

# TROUBLE AHEAD, TROUBLE BEHIND: EXECUTIVE BRANCH ENFORCEMENT OF CONGRESSIONAL INVESTIGATIONS

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INTRODUCTION

When responding to a request from a congressional committee, a company’s counsel does not often consider immediately whether and how the response could trigger an Executive Branch enforcement action. But it has become increasingly necessary for those responding to congressional requests to consider not only how the requesting committee will view their response, but also how federal and state enforcement agencies will view it.

Congressional committees have an assortment of authorities for enforcing their investigative requests. Some of these authorities are informal, as when committee members inflict negative publicity on an entity from whom information is sought, or when they require individuals to sit for a deposition or transcribed interview. More formally, committees can hold individuals in contempt for impeding their investigations. It is rare, however, for Congress to use these enforcement authorities, and it has ceased using some altogether.

At the same time, the Executive Branch has acted aggressively in a number of recent cases to enforce compliance with congressional investigations. Using various statutory provisions, the Executive Branch has sought to punish individuals and corporations for allegedly misinforming Congress or failing to comply completely with congressional requests—even in situations where compliance was voluntary and Congress took no enforcement action.

This Article begins by reviewing Congress’s power to investigate and discussing the authorities available to Congress and the Executive Branch for enforcing congressional investigative prerogatives. The Article then explores how each branch’s use of its available enforcement authorities has changed over time, with the Executive Branch becoming more aggressive in bringing enforcement actions that emanate from con-

gressional investigations and Congress becoming increasingly reliant on that enforcement activity.

The Article next discusses the effect of this shift in enforcement activity and what it means for congressional investigations. Among other things, the Article notes how Executive Branch enforcement of congressional investigations raises certain practical and constitutional concerns that require individuals and corporations to approach such proceedings with increased caution. Now more than ever, the Article explains, Executive Branch actions complement congressional investigations or develop as a result of information elicited through them. The result is that individuals and corporations may face penalties and sanctions divorced from the political safeguards typically associated with congressional action.

The Article concludes with a series of practice pointers designed to address the real possibility that a congressional investigation could lead to an Executive Branch enforcement proceeding.

## I. CONGRESS'S POWER TO INVESTIGATE AND ENFORCE INVESTIGATIVE REQUESTS

Congress may use “two separate but closely related powers” to gather information: the power to investigate and the power to punish for contempt.<sup>1</sup> Through practice and by statute, Congress has developed various mechanisms for using these powers, each with a unique set of accompanying procedures and limitations.

### A. *Congress's Investigative Power*

Congress's power to investigate is “inherent”<sup>2</sup> in its authority “to enact and appropriate under the Constitution.”<sup>3</sup> Congress thus may investigate: (1) whenever it has a valid legislative purpose, defined broadly

<sup>1</sup> Michael A. Zuckerman, Note, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 45 (2009).

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957); see also MORTON ROSENBERG, THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 9 (2009); James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1122 (2007) [hereinafter Hamilton, *Congressional Investigations*].

<sup>3</sup> See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Indeed, because Congress's investigative power flows inherently from the Constitution itself, it can likely only be permanently limited or modified by constitutional amendment. See *In re Chapman*, 166 U.S. 661, 671–72 (1897) (“We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended . . . .”); see also *Myers v. United States*, 272 U.S. 52, 176 (1926) (invalidating statute signed by a prior President that restricted the President's inherent power under Article II to dismiss executive officers); *United States v. Klein*, 80 U.S. 128, 145, 147–48 (1872) (invalidating statute limiting President's constitutionally derived pardon power).

to include gathering information for purposes of legislating, overseeing governmental matters, or informing the public about the workings of government; and (2) when it is discharging an enumerated power, such as when a House resolves an election dispute.<sup>4</sup>

Congress gathers information through requests for information, by conducting interviews, and by hearing testimony.<sup>5</sup> Any congressional body or representative may issue a request for information, seeking documents or explanations from individuals or corporations.<sup>6</sup> Testimony, by contrast, must be heard at a hearing or taken via a deposition.<sup>7</sup> Hearings are generally held by committees and subcommittees pursuant to governing legislative rules, and they are held in open session unless the committee or subcommittee votes to close proceedings because of the sensitive nature of offered testimony.<sup>8</sup> Depositions are conducted by staff of the few committees authorized to take depositions,<sup>9</sup> thereby al-

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<sup>4</sup> See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975); *Reed v. Cnty. Comm'rs of Del. Cnty.*, 277 U.S. 376, 388 (1928); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

<sup>5</sup> See Michael D. Bopp & DeLisa Lay, *The Availability of Common Law Privileges for Witnesses in Congressional Investigations*, 35 HARV. J.L. & PUB. POL'Y 897, 900–01 (2012) [hereinafter Bopp & Lay, *The Availability of Common Law Privileges*].

<sup>6</sup> See *id.* at 902.

<sup>7</sup> See *id.* at 901. Congress can also take de facto testimony through a transcribed interview. In a transcribed interview, the witness is interviewed in a deposition-like format. Although the interview is transcribed by a court reporter, the witness is not under oath, and the formal rules of depositions do not apply (for example, counsel are often permitted to make speaking objections in transcribed interviews). Although the witness is not under oath, lying in a transcribed interview violates 18 U.S.C. § 1001. See *infra* Part II.A.1.

<sup>8</sup> See STANDING RULES OF THE SENATE, R. XXVI(5)(b), S. Doc. No. 113-18, 113th Cong., 1st Sess. 33 (2013) (authorizing the holding of closed hearings if testimony is being taken regarding (1) national security matters, (2) internal personnel matters, (3) matters that will result in criminal prosecution or an unwarranted invasion of privacy, (4) sensitive law enforcement matters, (5) trade secrets, or (6) other matters required by law to remain secret); see also RULES OF THE HOUSE OF REPRESENTATIVES, R. XI(2)(g)(2), 114th Cong. (Karen L. Haas ed., 2015) (substantially similar).

<sup>9</sup> In the 114th Congress, the House Committees on Oversight and Government Reform, Education and the Workforce, Energy and Commerce, Financial Services, Science, Space, and Technology, and Ways and Means have authorized deposition authority. See Michael Bopp et al., *The Power to Investigate: Table of Authorities of House and Senate Committees for the 114th Congress*, GIBSON DUNN ALERT (Oct. 20, 2015), <http://www.gibsondunn.com/publications/Documents/Power-to-Investigate—Table-of-Authorities—House-and-Senate-Committees-114th-Congress.pdf> [hereinafter M. Bopp, *The Power to Investigate*]. To exercise this authority, the Committee on Oversight and Government Reform may compel depositions by subpoena, but committee rules also require that at least one member be present for any deposition (unless waived by deponent). See 161 CONG. REC. H864, at R. 15 (daily ed. Feb. 9, 2015). Five Senate committees have Senate authorization to take depositions, including the Committee on Homeland Security and Governmental Affairs, the Permanent Subcommittee on Investigations, the Committee on Aging, the Committee on Indian Affairs, and the Intelligence Committee. See M. Bopp, *The Power to Investigate*, *supra* note 9. Notably, the rules of several of these committees state that a deposition notice is not compulsory unless accompanied by a subpoena. See, e.g., 161 CONG. REC. S413, S415, at R. 5K(1) (daily ed. Jan. 22, 2015); *Rules—Jurisdiction and Authority*, S. COMM. ON AGING R. VII.1,

lowing those committees to obtain testimony quickly and confidentially—and occasionally remotely—without holding hearings. Testimony offered at hearings is unsworn unless the relevant chairperson or committee decides otherwise; deposition testimony is always sworn.<sup>10</sup> Regardless of whether testimony is under oath, all witnesses have a right to legal counsel,<sup>11</sup> are entitled to invoke certain constitutional privileges, and are almost always permitted to invoke common law privileges.<sup>12</sup>

Congressional bodies and representatives usually seek voluntary compliance with information requests and calls to testify.<sup>13</sup> When voluntary requests prove ineffective, however, lawmakers may seek to compel compliance through issuance of a congressional subpoena.<sup>14</sup> No constitutional provision explicitly gives Congress the authority to issue sub-

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ing.senate.gov/about/rules (last visited Mar. 6, 2016). Moreover, arguably as a general proposition of common law, a subpoena is required to compel a non-party deponent to appear. *See, e.g.*, FED. R. CIV. P. 30(a)(1), 45(a)(1)(B). Other Senate committees—namely the Agriculture, Commerce, Foreign Relations, and Small Business and Entrepreneurship committees—authorize depositions in their rules, but it is not clear that such deposition authority is authorized by the Senate and thus enforceable. *See* M. Bopp, *The Power to Investigate*, *supra* note 9. In addition, at least nineteen special investigating committees have had deposition authority. *See* ROSENBERG, *supra* note 2, at 11 n.49. And the Senate or House may grant deposition authority to a standing committee for a particular investigation. *See, e.g.*, 155 CONG. REC. H6, H9 (daily ed. Jan. 6, 2009) (authorizing House Judiciary Committee under § 4(f)(2) to conduct staff depositions to investigate the firing of U.S. Attorneys).

<sup>10</sup> *See* Hamilton, *Congressional Investigations*, *supra* note 2, at 1157; *see also* 2 U.S.C. § 191 (2012) (authorizing congressional committees to administer oaths to witnesses).

<sup>11</sup> *See, e.g.*, RULES OF THE HOUSE OF REPRESENTATIVES, R. XI(2)(k)(3), 114th Cong. (Karen L. Haas ed., 2015) (“Witnesses at hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.”); RULES OF PROCEDURE FOR THE SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, R. 8, S. DOC. NO. 114-13, 114th Cong., 1st Sess. 12 (2015) (“Counsel retained by any witness and accompanying such witness shall be permitted to be present during the testimony of such witness at any public or executive hearing, and to advise such witness while he or she is testifying, of his or her legal rights . . . .”); *Rules—Jurisdiction and Authority*, *supra* note 9, at R. P. II.6 (“A witness’s counsel shall be permitted to be present during his testimony at any public or closed hearing or depositions or staff interview to advise such witness of his or her rights . . . .”); *see also* ROSENBERG, *supra* note 2, at 24.

<sup>12</sup> *See* *Watkins v. United States*, 354 U.S. 178, 188 (1957) (“The Bill of Rights is applicable to investigations as to all forms of government action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.”); *see also* Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 905–31.

<sup>13</sup> *See* Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 904–05. In the personal experience of the authors, there are exceptions to this rule, with certain committees, notably the Senate Permanent Subcommittee on Investigations, known for initially proceeding by subpoena as to the private sector.

<sup>14</sup> ROSENBERG, *supra* note 2, at 8 (citing *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)); Hamilton, *Congressional Investigations*, *supra* note 2, at 1124.

poenas, but the Supreme Court has recognized that the issuance of subpoenas is “a legitimate use by Congress of its power to investigate.”<sup>15</sup>

The subpoena power is vested in each House of Congress.<sup>16</sup> Senate Rule XXVI(1) and House Rule XI(2)(m)(1) specifically empower standing committees and subcommittees to issue subpoenas, and Senate or House resolutions may authorize special committees to do so as well.<sup>17</sup> Each House and committee have extensive discretion to establish rules governing the issuance of subpoenas. Some committees, for example, allow committee chairmen to issue subpoenas unilaterally, while others authorize the issuance of a subpoena only with the consent of the ranking member or a majority of committee members.<sup>18</sup> Rules governing committee practice and authorities are adopted at the beginning of each Congress and published in the Congressional Record.<sup>19</sup>

A congressional subpoena is subject to few legal challenges. The Supreme Court, in fact, has held that courts’ power to review congressional subpoenas is sharply limited by the Constitution’s Speech or Debate Clause,<sup>20</sup> explaining that the clause provides “an absolute bar to interference” with the compulsory process.<sup>21</sup> Thus, to contest a subpoena, a witness generally must first refuse to comply with it, risk being cited for contempt, and then raise any objections as a defense to prosecution.<sup>22</sup> In other words, unlike with Article II or III processes, there is

<sup>15</sup> See, e.g., *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975). The Supreme Court has justified the use of congressional subpoenas by explaining that:

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.

*McGrain*, 273 U.S. at 175; see also *Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976).

<sup>16</sup> ROSENBERG, *supra* note 2, at 8.

<sup>17</sup> *Id.*; LOUIS FISHER, CONG. RESEARCH SERV., RL31836, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER 7 (2003).

<sup>18</sup> See M. Bopp, *The Power to Investigate*, *supra* note 9 (detailing, among other things, the specific rules governing each committee’s subpoena authority). In addition, in the personal experience of the authors, before a congressional subpoena issues, it is reviewed by either the House General Counsel or Senate Legal Counsel. House Rule II.2(d)(1) also states that House committees may only issue subpoenas under the seal of the Clerk of the House. Congressional subpoenas are served by the U.S. Marshal’s office, committee staff, or the Senate or House Sergeants-at-Arms. See ROSENBERG, *supra* note 2, at 9.

<sup>19</sup> See RULES OF THE HOUSE OF REPRESENTATIVES, R. XI(2)(a)(2), 114th Cong. (Karen L. Haas ed., 2015); STANDING RULES OF THE SENATE, R. XXVI(5)(b), S. Doc. No. 113-18, 113th Cong., 1st Sess. 31 (2013).

<sup>20</sup> U.S. CONST. art. I, § 6, cl. 1; see ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., R42648, THE SPEECH OR DEBATE CLAUSE: CONSTITUTIONAL BACKGROUND AND RECENT DEVELOPMENTS 2 (2012).

<sup>21</sup> *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503, 515 (1975).

<sup>22</sup> ROSENBERG, *supra* note 2, at 9.

virtually no pre-enforcement review of a congressional subpoena.<sup>23</sup> Moreover, the only valid objections to the enforcement of a congressional subpoena are that it: (1) was not issued pursuant to a proper legislative purpose within the jurisdiction of the issuing body; (2) fails to comport with applicable legislative rules; or (3) infringes on the constitutional rights of the subpoenaed witness.<sup>24</sup> Even these objections, however, are read narrowly in Congress's favor, with courts requiring the enforcement of subpoenas unless there is "no reasonable possibility" that the sought information will prove relevant to the "general subject" of an investigation<sup>25</sup> for which Congress need not explicitly state an intended result.<sup>26</sup>

### B. Congress's Contempt Powers

When the target of a congressional investigation fails to comply with a subpoena or otherwise obstructs the investigation, lawmakers may seek to enforce their investigative authority by holding that person or corporation in contempt.<sup>27</sup> The issuance of a contempt citation may lead to a fine or imprisonment.<sup>28</sup> There are three forms of contempt available to Congress: inherent, criminal, and civil.<sup>29</sup>

#### 1. Inherent Contempt Power

Congress's inherent contempt power, like its investigative power, "is not specifically granted by the Constitution, but is considered necessary to investigate and legislate effectively."<sup>30</sup> The Supreme Court has recognized this power, reasoning that, without it, Congress would be

<sup>23</sup> See *infra* Part III.B.

<sup>24</sup> See *Watkins v. United States*, 354 U.S. 178, 187–204 (1957); see also *Shelton v. United States*, 327 F.2d 601, 606–07 (D.C. Cir. 1963) (finding a subpoena authorized by a subcommittee chairman invalid because the Senate resolution conferring subpoena power required action by the subcommittee as a whole); *United States v. Reinecke*, 524 F.2d 435 (D.C. Cir. 1975); *Liveright v. United States*, 347 F.2d 473, 476 (D.C. Cir. 1965).

<sup>25</sup> *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 20–21 (D.D.C. 1994) (stay pending appeal denied); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319 (1994) (quoting *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1997)); see also *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946).

<sup>26</sup> See *In re Chapman*, 166 U.S. 661, 670 (1897) ("[I]t was certainly not necessary that the resolutions should declare in advance what the Senate mediated doing when the investigation was concluded."); *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (deeming sufficient statement requesting information "for such legislative and other action as the Senate may deem necessary and proper").

<sup>27</sup> ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 33 (2014).

<sup>28</sup> Zuckerman, *supra* note 1, at 54.

<sup>29</sup> Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 902.

<sup>30</sup> TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34114, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 4 (2014).

“exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it.”<sup>31</sup>

Congress’s inherent contempt power extends to prohibit two broad categories of acts: (1) unlawful interference with Congress or its members’ powers—including bribery, assault, or the delay of a session or a member; and (2) refusal to comply with lawful congressional process or commands.<sup>32</sup> As an “inherent” power, no statute or rule specifically articulates the limits of the power. Over time, however, Congress and the courts have recognized a set of applicable procedures.<sup>33</sup>

To exercise its inherent contempt authority, the House or Senate must first pass a resolution charging a person with contempt.<sup>34</sup> The resolution must state the allegations giving rise to the charge.<sup>35</sup> The resolution also will contain a clause directing that the resolution be served as a citation on the defendant, or a clause directing the presiding officer to issue a warrant to the Sergeant at Arms to attach the defendant to answer before the bar of the chamber.<sup>36</sup> The full House or Senate may then hold a complete trial for an accused individual, or they may direct a committee to conduct evidentiary proceedings and make recommendations for a verdict and punishment, with debate on these recommendations and disposition and punishment occurring at the bar of the full chamber.<sup>37</sup> Whether before the bar of a chamber or committee, an individual accused of contempt typically is entitled to hear the charges against him; have access to counsel, defense witnesses, and the evidence against him; and examine witnesses.<sup>38</sup>

If, after a trial, a chamber of Congress finds an individual guilty of contempt, that chamber may imprison the individual either to punish for contumacy or to coerce compliance with a lawful process or command.<sup>39</sup> Although there is no direct precedent on point, there is a strong argument that Congress has power to fine an individual to the same ends.<sup>40</sup> Congress may not, however, imprison a witness under its inherent contempt authority after expiration of the session in which the contempt oc-

<sup>31</sup> *Anderson v. Dunn*, 19 U.S. 204, 228 (1821); *see also McGrain*, 273 U.S. at 178.

<sup>32</sup> Zuckerman, *supra* note 1, at 52–53.

<sup>33</sup> *See, e.g., Jurney v. MacCracken*, 294 U.S. 125, 144, 147 (1935).

<sup>34</sup> *See* TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 11–18 (2014) [hereinafter CONGRESS’S CONTEMPT POWER].

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.*

<sup>38</sup> *See, e.g., Anderson v. Dunn*, 19 U.S. 204 (1821) (reviewing House procedures); *see also* Thomas L. Shriner Jr., Note, *Legislative Contempt and Due Process: The Groppi Cases*, 46 IND. L.J. 480, 491 (1971).

<sup>39</sup> ROSENBERG, *supra* note 2, at 15.

<sup>40</sup> CONGRESS’S CONTEMPT POWER, *supra* note 34, at 12.



curred.<sup>41</sup> Imprisoned individuals may challenge their confinement by filing a petition for a writ of habeas corpus or by suing the Sergeant-at-Arms who made the arrest for trespass, false imprisonment, or both.<sup>42</sup> A court reviewing such an objection is limited to determining whether Congress had jurisdiction and complied with due process requirements; it may not consider whether an arrest or conviction for contempt is based in fact.<sup>43</sup>

## 2. Criminal Contempt Power

To augment its inherent contempt authority, Congress enacted a statutory criminal contempt procedure in 1857.<sup>44</sup> Congress decided to supplement—not supplant—its inherent contempt power because it felt that power was, in most cases, too cumbersome, ineffective, and infrequently used (only fourteen contempt actions were initiated before enactment of the criminal contempt statute).<sup>45</sup> Congress recognized that the political and procedural difficulties associated with its inherent contempt power, coupled with the limitation on punishment beyond a congressional adjournment date, often made use of that power impractical.<sup>46</sup>

Codified today at 2 U.S.C. §§ 192 and 194, the criminal contempt statute provides in part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question perti-

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<sup>41</sup> Hamilton, *Congressional Investigations*, *supra* note 2, at 1132–33.

<sup>42</sup> See *Marshall v. Gordon*, 243 U.S. 521 (1917); see also *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970); Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399, 400 n.3 (1962).

<sup>43</sup> In *Jurney v. MacCracken*, for example, a lawyer arrested for contempt of the Senate sought release pursuant to a writ of habeas corpus. See 294 U.S. 125, 144, 147 (1935). The lawyer was accused of allowing a client to remove from his office and destroy certain files that had been subpoenaed by a special committee of the Senate. The lawyer did not deny that he had allowed his client to remove and destroy the files, but he argued that the Senate lacked authority to arrest him simply “with a view to punishing him,” as he had eventually produced every requested “paper of every kind and description in his possession.” *Id.* The Supreme Court rejected this argument. *Id.* It held that Congress’s “power to punish a private citizen for a past and completed act” was well established so long as that act was “of a nature to obstruct the performance of the duties of the Legislature.” *Id.* at 148. The Senate thereafter found the lawyer guilty and sentenced him to ten days imprisonment. See 78 CONG. REC. 2468, 2495–97 (daily ed. Feb. 14, 1934); see also *Groppi v. Leslie*, 404 U.S. 496 (1972); *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1881).

<sup>44</sup> See *In re Chapman*, 166 U.S. 661 (1897); CONGRESS’S CONTEMPT POWER, *supra* note 34, at 6.

<sup>45</sup> CONGRESS’S CONTEMPT POWER, *supra* note 34, at 18.

<sup>46</sup> See *id.*

ment to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.<sup>47</sup>

A “person” thus may be punished under the statute for “willfully” failing to produce documents or refusing to answer “pertinent” questions in response to a congressional “summons.”<sup>48</sup>

The statute does not define “person,” but, unless otherwise stated or suggested by context, the term elsewhere in the United States Code refers to both organizations and individuals. The statute also does not define “pertinent” or “summons.” Courts have interpreted “pertinent” questions to include those that are “within [a] committee’s scope of inquiry” as “authorized” by governing legislative rules.<sup>49</sup> For example, in *United States v. Watkins*, the Supreme Court held that an individual could not be convicted under Section 192 for refusing to answer questions about the political beliefs of persons unaffiliated with organized labor as part of a House subcommittee hearing focused only on labor union activities.<sup>50</sup> As for the term “summoned,” in the event that a witness simply refuses to appear, it could arguably apply to congressional requests for voluntary compliance with an investigation, but, as a textual matter, it does not appear that the term encompasses more than an investigative demand backed by a subpoena. To the extent the witness appears, but then refuses to testify on at least some point, the Supreme Court has stated: “Section 102 [referring to 2 U.S.C. § 192] plainly extends to a case where a person voluntarily appears as a witness without being summoned as well as to the case of one required to attend.”<sup>51</sup>

Importantly, while Congress initiates an action under the criminal contempt statute, the Executive Branch prosecutes it.<sup>52</sup> This is the most

<sup>47</sup> 2 U.S.C. §§ 192, 194 (2012).

<sup>48</sup> See ROSENBERG, *supra* note 2, at 10–11.

<sup>49</sup> *Sacher v. United States*, 356 U.S. 576, 577 (1958) (“Inasmuch as petitioner’s refusal to answer related to questions not clearly pertinent to the subject on which the two-member subcommittee conducting the hearing had been authorized to take testimony, the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing are wanting.”); see also *United States v. Bryan*, 339 U.S. 323, 330 (1950); Comment, *Contempt of Congress and “Pertinency”: A Standard of Culpability*, 11 STAN. L. REV. 164 (1958).

<sup>50</sup> *United States v. Watkins*, 354 U.S. 178, 213–14 (1957).

<sup>51</sup> *Sinclair v. United States*, 279 U.S. 263, 291 (1929), *overruled by* *United States v. Gaudin*, 515 U.S. 506 (1995); see also CONGRESS’S CONTEMPT POWER, *supra* note 34, at 53 (noting that “the law applies whether the individual is subpoenaed or appears voluntarily and then refuses to testify”) (citing *Sinclair*, 279 U.S. 263).

<sup>52</sup> See 2 U.S.C. § 194. Section 194 specifically provides: “Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned

critical difference from Congress's inherent contempt authority, and it is the factor that makes the statute at once both significantly more effective and subject to political vagaries. Rather than requiring either House or a committee to issue a contempt charge and hold a burdensome trial, the statute requires a House of Congress merely to approve a contempt citation sent up by a committee.<sup>53</sup> If Congress is not in session, the presiding officer of the House or Senate may approve the citation.<sup>54</sup> The contempt citation is then certified by the President of the Senate or the Speaker of the House, after which, according to the statute, it becomes the "duty" of the appropriate U.S. Attorney "to bring the matter before the grand jury for its action."<sup>55</sup>

This procedure affords Congress a more efficient path to enforce its investigative demands, but it also surrenders a substantial amount of control over contempt proceedings to the Executive. Indeed, U.S. Attorneys occasionally have refused to enforce contempt citations referred by Congress—most notably in the case of Congress seeking to compel an Executive Branch official to comply with a subpoena.<sup>56</sup>

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refuses to answer any question pertinent to the subject under inquiry . . . and the fact of such failure or failures is reported to either House . . . it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

<sup>53</sup> *Id.*; see also *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966); *Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940); 4 LEWIS DESCHLER, *DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES* ch. 15, §§ 17–22 (1977); *DOLAN ET AL.*, *supra* note 27, at 33–34.

<sup>54</sup> 2 U.S.C. § 194; *DOLAN ET AL.*, *supra* note 27, at 33–34.

<sup>55</sup> *DOLAN ET AL.*, *supra* note 27, at 34.

<sup>56</sup> In *Comm. on the Judiciary v. Miers*, for instance, then-Attorney General Michael Mukasey ordered the U.S. Attorney for the District of Columbia not to act on the contempt citations referred by the House of Representatives against executive officials Joshua Bolten and Harriet Miers. See 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008); see also Timothy T. Mastrogiacono, Note, *Showdown in the Rose Garden: Congressional Contempt, Executive Privilege, and the Role of the Courts*, 99 GEO. L.J. 163, 164 (2010). In his order, Attorney General Mukasey emphasized the "longstanding position" of the Department of Justice that, at least when the witness cited for contempt is an Executive Branch official asserting the claim of executive privilege, the Executive is under no obligation to prosecute the witness. See Letter from Michael B. Mukasey, Attorney Gen., to Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008). Indeed, the Department of Justice has gone so far as to opine that setting aside executive privilege, the statute *itself* does not impose a mandatory duty. Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 118–24 (1984). The Department has justified this position primarily on the basis of its recognized "absolute discretion" over prosecutions, *United States v. Nixon*, 418 U.S. 683, 693 (1974), and on its related concern that reading the statute to confer a duty on the Executive to bring a prosecution requested by Congress would undermine the constitutional separation of powers. See Letter from James M. Cole, Deputy Attorney Gen., to John A. Boehner, Speaker of the House of Representatives (June 28, 2012) (refusing to present to a grand jury contempt allegations certified by the House against Attorney General Eric Holder). In any event, even if a U.S. Attorney were required by the statute to

Because the statute is punitive and not coercive, if a person is found guilty of violating the criminal contempt statute, he or she may not purge his or her guilt by complying with Congress's demands.<sup>57</sup> Additionally, he or she may remain imprisoned beyond the end of the session of the Congress that he or she disobeyed.<sup>58</sup> In these ways, the statute can offer the possibility of harsher punishment than that available under Congress's inherent contempt authority.

### 3. Civil Contempt Power

In addition to its criminal contempt powers, each House of Congress also may seek civil contempt sanctions against uncooperative persons. The Senate's civil contempt power is codified at 2 U.S.C. §§ 288b(b) and 288d; the House's authority to seek civil contempt sanctions can potentially be inferred from its other powers. In any civil contempt action initiated by Congress, the congressional chamber petitions a federal court to order a person to comply with a congressional request.<sup>59</sup> Assuming a court issues such an order, a non-compliant person may be found in contempt of court, rather than in contempt of Congress.<sup>60</sup>

Sections 288b(b) and 288d specifically authorize the Senate to seek enforcement of certain legislative subpoenas in a U.S. District Court.<sup>61</sup> The sections provide that the Senate—pursuant to certain procedures—may order by resolution its Office of Legal Counsel to bring a civil action “to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or a subcommittee of the Senate.”<sup>62</sup> Notably, however, the related jurisdictional statute, 28 U.S.C. § 1365, contains the following proviso:

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present evidence of contempt to a grand jury, he or she would still “retain considerable power to prevent a contempt prosecution from going forward.” Hamilton, *Congressional Investigations*, *supra* note 2, at 1135. Namely, the U.S. Attorney could present evidence and argument to persuade the grand jury not to indict the witness, refuse to sign a returned indictment, enter a *nolle prosequi*, or offer no evidence at trial. *See id.*; *see also* DOLAN ET AL., *supra* note 27, at 34; CONGRESS'S CONTEMPT POWER, *supra* note 34, at 21.

<sup>57</sup> CONGRESS'S CONTEMPT POWER, *supra* note 34, at 21.

<sup>58</sup> *See, e.g.*, United States v. Costello, 198 F.2d 200, 202 (2d Cir. 1952); United States v. Tobin, 195 F. Supp. 588, 617 (D.D.C. 1961); *see also* CONGRESS'S CONTEMPT POWER, *supra* note 34, at 4, 8; DOLAN ET AL., *supra* note 27, at 33–34.

<sup>59</sup> CONGRESS'S CONTEMPT POWER, *supra* note 34, at 23.

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

<sup>61</sup> 2 U.S.C. §§ 288b(b), 288d (2012); Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 903.

<sup>62</sup> 2 U.S.C. § 288d. The statute specifically sets forth the following procedural rules that must be followed before the Senate may consider a resolution to seek enforcement of a subpoena. First, the rules require a resolution seeking enforcement of a subpoena to be reported to the full Senate by a majority of the committee issuing the subpoena or the committee of which a subcommittee issued the subpoena. Second, the rules require the filed report to contain a statement of (a) the procedure followed in issuing the subpoena, (b) the extent to which the

This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, 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, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the Executive Branch of the Federal Government.

This proviso was based in part on the opinion of Assistant Attorney General Antonin Scalia that a statute authorizing a civil action against an official claiming executive privilege would be unconstitutional.<sup>63</sup>

By contrast, the House—which does not have a civil contempt statute—may arguably pursue a civil contempt action by passing a resolution creating a special investigatory panel with the power to seek judicial orders or by granting the power to seek such orders to a standing committee.<sup>64</sup> The full House must adopt a resolution finding the individual in contempt and authorizing a committee or the House General Counsel to file suit against a noncompliant witness in federal court.<sup>65</sup> Arguably, the Senate retains the same discretion to act outside of the jurisdiction provided by 2 U.S.C. §§ 288b(b) and 288d.

When either House of Congress petitions a federal court to enforce a subpoena, the court is limited in its review of the subpoena. Indeed, even if the court determines that a subpoena “does not meet applicable legal standards for enforcement,” the most it can do is refuse to issue an order instructing compliance.<sup>66</sup> If a court orders compliance, a non-compliant witness may be tried in summary proceedings for contempt of court, with sanctions available to enforce compliance.<sup>67</sup>

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party subpoenaed complied with the subpoena, (c) any objections or privileges raised by the subpoenaed party, and (d) the comparative effectiveness of bringing a civil action as opposed to certifying a criminal action for contempt of Congress or initiating a contempt proceeding under the Senate’s inherent contempt authority. 2 U.S.C. § 288d; *see also* CONGRESS’S CONTEMPT POWER, *supra* note 34, at 24 (citing S. REP. NO. 95-170, 95th Cong., 1st Sess. 89 (1977)).

<sup>63</sup> *See* CONGRESS’S CONTEMPT POWER, *supra* note 34, at 26.

<sup>64</sup> ROSENBERG, *supra* note 2, at 17–18; *see also* Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 903.

<sup>65</sup> *See* ROSENBERG, *supra* note 2, at 17–18; *see also* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C.), *stay granted*, 542 F.3d 909 (D.C. Cir. 2008).

<sup>66</sup> CONGRESS’S CONTEMPT POWER, *supra* note 34, at 26.

<sup>67</sup> Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 903; *see also* DOLAN ET AL., *supra* note 27, at 34.

### C. Congress's Use of Its Contempt Powers

Despite the various contempt powers available to it, Congress rarely uses its authority to enforce investigative demands. In fact, Congress has almost entirely restricted application of its contempt powers to high-ranking Executive Branch officials, and it virtually never follows through on threats to hold a private individual or corporation in contempt. Notably, Congress has not invoked its inherent contempt power since 1934.<sup>68</sup> Moreover, Congress has not sought criminal or civil contempt sanctions against a non-government entity since 1986 and 1995, respectively.<sup>69</sup>

It is not surprising that Congress has not used its inherent contempt authority in eighty years, as that authority has long been recognized as cumbersome and inefficient. However, that Congress rarely uses its statutory contempt powers is a relatively new development. As recently as the 1980s, Congress resolved to seek contempt sanctions against more than ten non-Executive Branch individuals.<sup>70</sup> Before then, the frequency of contempt resolutions issued to non-government persons was even greater.<sup>71</sup>

The wane in Congress's use of its contempt powers does not mean, of course, that contempt is no longer a readily available enforcement tool.<sup>72</sup> It is. Moreover, even when a formal contempt resolution is not issued, its threat and preliminary consideration alone can be an unpleasant and damaging experience for the target of a committee's attention.<sup>73</sup> Nonetheless, the decreased issuance of contempt resolutions is notable.

The decline in congressional contempt resolutions is not likely due to an increase in compliance with congressional demands; as one commenter has noted, "[l]ying to Congress is one of Washington's more

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<sup>68</sup> See *Jurney v. MacCracken*, 294 U.S. 125, 127, 144 (1935); United Press, *Senate Glee-ful, Cracks Down on Ex-Hoover Aide: MacCracken's Trial on Contempt Charge Is Resumed After 'Prisoner' Loses in Every Attempt to Evade Arrest*, PITTSBURG PRESS, Feb. 13, 1934, at 1, 6; see also Hamilton, *Congressional Investigations*, *supra* note 2, at 1133.

<sup>69</sup> See H.R. Res. 384, 99th Cong. (1986); 132 CONG. REC. 3028 (1986) (recording votes on criminal contempt resolutions against real estate investor Ralph Bernstein and attorney Joseph Bernstein for their refusal to answer questions regarding the embezzlement of funds in a closed hearing before the House Subcommittee on Asian and Pacific Affairs); S. Res. 199, 104th Cong. (1995); 141 CONG. REC. 37,761 (1995) (recording votes on civil contempt resolution against William H. Kennedy, III for refusing to comply with subpoena issued by the Special Committee to Investigate Whitewater Development Corporation). Note that former Internal Revenue Service ("IRS") official Lois Lerner had retired before she was voted in contempt by the House of Representatives in May 2014, making her a private citizen at the time. See *infra* Part III.A.1.

<sup>70</sup> CONGRESS'S CONTEMPT POWER, *supra* note 34, at 67–78.

<sup>71</sup> See CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945–1957, at 217–40 (1959).

<sup>72</sup> See Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 904.

<sup>73</sup> See *id.* at 904–05.

[e]nduring [t]raditions.”<sup>74</sup> It is also not the result of a decrease in congressional desire for full compliance with investigations. To be sure, the procedures and political capital necessary for passing a contempt resolution are significant, and the public’s attention span for investigations may be shorter than in years past, but these difficulties are no greater than those facing other legislative actions. Moreover, the decrease in contempt sanctions is wholly disproportionate to the relative increase in congressional investigations.<sup>75</sup> Since the 1980s, Congress has seen an increase in the use of staff depositions<sup>76</sup> and electronic discovery, which have allowed it to gather more information than ever before. Thus, there is no obvious change in Congress’s dealings that explains its markedly decreased use of its contempt powers.

Instead, a likely explanation for Congress’s diminished use of its contempt powers is that the Executive Branch has now become an active enforcer of congressional investigative demands. As discussed below, the Executive Branch has sought, in a variety of contexts and using several criminal laws, to punish individuals and corporations for allegedly misinforming Congress or inadequately responding to congressional requests. The Executive Branch occasionally acts in concert with congressional actions, but, more often than not, it acts to enforce Congress’s demands as it sees fit. This executive action affects the compliance calculus both for Congress and persons in receipt of congressional requests, and by raising the stakes of noncompliance, it reduces the need for Congress to enforce its own demands.

## II. EXECUTIVE BRANCH ENFORCEMENT OF CONGRESSIONAL INVESTIGATIONS

There has always been a certain measure of coordination between congressional investigations and Executive Branch actions. Topics of congressional inquiry often overlap with topics of interest to the Executive, with both branches seeking to identify, reform, or punish bad actors and inefficiencies. However, recent efforts of the Executive Branch to coordinate with, and enforce, congressional investigations are unprecedented. Recognizing congressional inquiries as an expedient vehicle for gathering information relevant to its own investigations, the Executive Branch is now regularly using criminal laws to punish incomplete and untruthful responses to Congress.

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<sup>74</sup> P.J. Meitl, *The Perjury Paradox: The Amazing Under-Enforcement of the Laws Regarding Lying to Congress*, 25 QUINNIPIAC L. REV. 547, 547 (2007).

<sup>75</sup> Indeed, based on the authors’ count, in the 110th Congress alone, there were 486 congressional investigations.

<sup>76</sup> See Hamilton, *Congressional Investigations*, *supra* note 2, at 1153.

### A. *Relevant Criminal Laws*

The Executive Branch may use a number of criminal laws to seek punishment for inadequate compliance with congressional requests. These laws not only collectively cover a broader range of conduct than the conduct punishable under Congress's contempt powers, but they also offer more severe punishments. More importantly, none of these laws require congressional input or acquiescence; the Executive Branch may pursue prosecutions under them irrespective of Congress's views.

#### 1. 18 U.S.C. § 1001

Section 1001 of Title 18 of the U.S. Code is often a cornerstone of Executive Branch efforts to enforce congressional investigations. The Section prohibits, among other things, the obstruction of justice by false statements made knowingly and willfully in any "administrative matter" or "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate."<sup>77</sup> Congress specifically drafted this language to ensure the criminality of false statements made "within [its] jurisdiction."<sup>78</sup>

Notably, the legislative history of Section 1001 emphasizes that the statute's application to statements made to members or staff in connection with investigations "conducted pursuant to the authority" of Congress is meant to limit its application to "duly authorized investigative matters."<sup>79</sup> As a result, "unsworn statements made to or before Congress and which are not furnished pursuant [to] a duly authorized investigation" are exempted from the statute's reach.<sup>80</sup> The legislative history

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<sup>77</sup> 18 U.S.C. § 1001(c) (2012); *see also* United States v. Boffil-Rivera, 607 F.3d 736, 740 (11th Cir. 2010) (outlining the elements needed to convict a defendant under § 1001); United States v. Geisen, 612 F.3d 471, 489 (6th Cir. 2010) (also outlining the elements needed to convict a defendant under § 1001).

<sup>78</sup> 18 U.S.C. § 1001(c). An original version of § 1001 applied only to matters of "any department or agency of the United States." *See* United States v. Bramblett, 348 U.S. 503, 504 (1955). After the Supreme Court ruled that this language did not apply to the Judiciary, *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (holding that a federal court is "neither a 'department' nor an 'agency' within the meaning of § 1001"), various lower courts and commenters concluded that it similarly did not apply to the Legislative Branch. *See, e.g.*, United States v. Dean, 55 F.3d 640, 658–59 (D.C. Cir. 1995) (holding that the applicability of § 1001 is limited to the Executive Branch). However, Congress amended § 1001 in 1996 to clarify that the statute did apply to false statements made to Congress. *See* United States v. Pickett, 353 F.3d 62, 65 (D.C. Cir. 2004) (discussing the effect of the 1996 amendments).

<sup>79</sup> H.R. REP. NO. 104-680, at 5 (1996). "Administrative matters" refers to, among other things, financial disclosures submitted by members of Congress and allows the Executive Branch to prosecute members who have "ghost employee schemes, knowingly submit false vouchers, and purchase personal goods and services with taxpayer dollars." *Id.*

<sup>80</sup> *Id.* at 8; *see also id.* at 5 ("A criminal statute should not be broadly formulated . . . . Rather, certainty must be based on a specifically-tailored statute that criminalizes only what is intended to be a crime.").



also makes clear that a “duly authorized investigation” is one initiated “through a formal action of a House or Senate committee, or the whole House or Senate.”<sup>81</sup> Thus, “an inquiry conducted by a Member of Congress or the staff of such Member . . . is not a ‘duly authorized investigation’ for purposes of section 1001.”<sup>82</sup> But so long as a statement is made in connection with a “duly authorized investigation”—including to an individual Member or staff acting in furtherance of that investigation—it is subject to the statute’s terms; it does not matter whether the statement is made pursuant to a subpoena, whether it is sworn, or whether it is transcribed.<sup>83</sup> In addition, Section 1001—like all the criminal laws available for the independent use of the Executive—covers false statements regardless of whether those statements pertained to questions that were “pertinent” to the subject under investigation.<sup>84</sup> The statute therefore applies more broadly than Congress’s criminal contempt powers.<sup>85</sup>

However, a recent change in the government’s interpretation of Section 1001 could potentially limit the Executive’s ability to use this statute to enforce compliance with congressional investigations. The federal courts of appeal have long been split as to whether Section 1001’s “knowingly and willfully”<sup>86</sup> language requires the government to prove that the defendant deliberately made false statements and simply knew the statements to be false, or that the defendant also knew that making such statements was unlawful.<sup>87</sup> Until the spring of 2014, the Depart-

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<sup>81</sup> *Id.* at 9. The House report goes on to clarify that “an employee in a Member’s office who contacts an executive branch employee [for] information about a particular matter of interest to the Member is not engaged in a ‘duly authorized investigation.’ Neither is the inquiry which is made by a . . . committee employee at the direction of the Chairman of the Committee, even when the inquiry pertains to a matter within such committee’s jurisdiction, a ‘duly authorized investigation’ for purposes of section 1001.” *Id.* at 9–10.

<sup>82</sup> *Id.* at 9. Of course, under many committees’ rules, the Chairman alone can authorize an investigation. *See, e.g.*, 161 CONG. REC. H862, H864, at R. 12 (daily ed. Feb. 9, 2015).

<sup>83</sup> *See, e.g.*, Indictment at 10, *United States v. Clemens*, 793 F. Supp. 2d 236 (D.D.C. 2009) (No. 10-cr-223) (accusing Roger Clemens of lying to a committee staff member during sworn testimony related to a committee investigation into the use of performance-enhancing drugs by professional athletes); *see also United States v. Poindexter*, 951 F.2d 369, 388 (D.C. Cir. 1991) (holding that there is no exception to prosecution under § 1001, even when the legislative proceeding lacks “formal trappings” such as oaths and verbatim transcripts).

<sup>84</sup> Note, however, that a false statement must be “material” for the government to succeed in a prosecution under § 1001. *See, e.g.*, *United States v. Ballistrea*, 101 F.3d 827, 834–35 (2d Cir. 1996).

<sup>85</sup> *See supra* Part I.B.2; *see also* Comment, *Contempt of Congress and “Pertinency”*: A Standard of Culpability, 11 STAN. L. REV. 164, 170–71 (1958).

<sup>86</sup> 18 U.S.C. § 1001 (2012).

<sup>87</sup> *See* Brief for the United States in Opposition at 11 n.3, *Natale v. United States*, No. 13-744 (Mar. 14, 2014). The majority view, adopted by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits, is that the government must only prove that the defendant deliberately made statements with knowledge that they were false. *See United States v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007); *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006); *United States v. Daughtry*, 48 F.3d 829, 831–32 (4th Cir. 1995), *vacated on other grounds*,

ment of Justice maintained that the government need only prove that a defendant had knowledge of the falseness of his statements.<sup>88</sup> In a series of recent briefs in opposition to certiorari, however, the Solicitor General announced that “it is now the view of the United States that the ‘willfully’ element of [Section] 1001 . . . requires proof that the defendant made a false statement with knowledge that his conduct was unlawful.”<sup>89</sup> This shift in the government’s position may have little effect on the prosecution of deliberate falsity in congressional investigations so long as investigators communicate to interview subjects that deliberate lying is illegal—and in the authors’ experience, seasoned investigators do just that. But such a change in interviewing practices will at least make congressional investigations and Section 1001 less of a trap for the unwary.

## 2. 18 U.S.C. § 1505

Another key criminal statute, 18 U.S.C. § 1505, is available to the Executive Branch for punishing non-compliance with congressional investigations. Prohibiting the “obstruction of proceedings before . . . committees,” Section 1505 applies whenever a defendant “corruptly” attempts to influence, obstruct, or impede a “due and proper” congressional investigation of which he is aware.<sup>90</sup> Any response that “affirmatively [misleads] and obstruct[s] Congressional inquir[ies]”<sup>91</sup>

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516 U.S. 984 (1995), *reinstated in relevant part*, 91 F.3d 675 (4th Cir. 1996); *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992), *cert. denied*, 506 U.S. 878 (1992); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *Walker v. United States*, 192 F.2d 47, 49–50 (10th Cir. 1951). The Third Circuit, by contrast, requires proof that the defendant had “knowledge of the general unlawfulness of the conduct at issue,” *United States v. Starnes*, 583 F.3d 196, 211–12 (3d Cir. 2009), and the Second Circuit seems to have taken the same position. *See United States v. Whab*, 355 F.3d 155, 162 (2d Cir. 2004), *cert. denied*, 541 U.S. 1004 (2004); *United States v. Bakhtiari*, 913 F.2d 1053, 1060 n.1 (1990), *cert. denied*, 499 U.S. 924 (1991); *see also United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (same).

<sup>88</sup> *See* Nick Krawitz & Margaret Netisham, *False Statements and False Claims*, 50 AM. CRIM. L. REV. 953, 961–62 (2013).

<sup>89</sup> Brief for the United States in Opposition at 12, *Natale v. United States*, No. 13-744 (Mar. 14, 2014); *see also* Brief for the United States in Opposition at 11–15, *Ajoku v. United States*, 134 S. Ct. 1872 (2014) (No. 13-7264); Brief for the United States in Opposition at 7–11, *Russell v. United States*, 134 S. Ct. 1872 (2014) (No. 13-7357).

<sup>90</sup> 18 U.S.C. § 1505. The statute specifically provides, in part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper . . . exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—Shall be fined under this title, imprisoned not more than 5 years . . . or both.

*See also United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006); *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991) (citing *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984); *United States v. Laurins*, 857 F.2d 529, 536–37 (9th Cir. 1988)); *United States v. Perraud*, 672 F. Supp. 2d 1328, 1346 (S.D. Fla. 2009).

<sup>91</sup> *United States v. North*, 708 F. Supp. 385, 386 n.3 (D.D.C. 1988).

therefore potentially violates the statute, even if the information was not provided pursuant to a subpoena.<sup>92</sup> Indeed, attempts to influence or obstruct congressional investigations are punishable under Section 1505 “even when they occur prior to formal committee authorization.”<sup>93</sup>

Like the limitation on the application of 18 U.S.C. § 1001 to investigations “conducted pursuant to the authority”<sup>94</sup> of Congress, the “due and proper” language of Section 1505 limits its application to actions affecting the “legitimate exercise of investigative authority by a congressional committee in an area within the committee’s purview.”<sup>95</sup> Such exercises include those that have not received formal committee authorization, but they do not include independent inquiries by individual members or staff.<sup>96</sup> Another limitation on the application of Section 1505 is the requirement that interfering or obstructing action be taken “corruptly.” “As used in Section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”<sup>97</sup> Even with these limitations, however, Section 1505 encompasses a broad swath of conduct affecting everything from formal hearings to “preliminary and informal inquiries.”<sup>98</sup>

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<sup>92</sup> See *id.*; *United States v. Presser*, 292 F.2d 171, 174 (6th Cir. 1961), *aff’d*, 371 U.S. 71 (1962) (“[T]he existence of a valid subpoena is not vital to the charge of obstruction of justice.”).

<sup>93</sup> *United States v. Mitchell*, 877 F.2d 294, 301 (4th Cir. 1989).

<sup>94</sup> 18 U.S.C. § 1001(c)(2).

<sup>95</sup> *Mitchell*, 877 F.2d at 300.

<sup>96</sup> See *id.* Although it is an open question whether 18 U.S.C. § 1505 could apply to an individual member’s investigation, the text of the statute strongly suggests it does not. 18 U.S.C. § 1505 (criminalizing “the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress”); see also *United States v. Rainey*, 757 F.3d 234, 241–47 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015) (suggesting the same). Note also that in 2014, the Fifth Circuit “interpret[ed] the statutory class of ‘any committee of either House[.]’ . . . to include congressional subcommittees.” *Rainey*, 757 F.3d at 236.

<sup>97</sup> 18 U.S.C. § 1515(b); see also *Mitchell*, 877 F.2d at 299 (quoting *United States v. Griffin*, 589 F.2d 200, 206–07 (5th Cir. 1979)) (broadly interpreting “corruptly” to encompass a “variety of corrupt methods . . . limited only by the imagination of the criminally inclined”); *United States v. Laurins*, 857 F.2d 529, 536–37 (9th Cir. 1988) (concluding that defendant acted corruptly where he acted “with the purpose of obstructing justice”).

<sup>98</sup> See *United States v. Cisneros*, 26 F. Supp. 2d 24, 39 (D.D.C. 1998) (quoting *United States v. Poindexter*, 725 F. Supp. 13, 21 (D.D.C. 1989)); *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1980) (“‘[P]roceeding’ is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency.”). For example applications of § 1505, see *United States v. Browning*, 630 F.2d 694, 700–01 (10th Cir. 1980) (encouraging a business partner to give misleading answers to questions from the U.S. Customs Service); *Fruchtman*, 421 F.2d at 1021 (altering invoices after learning of an FTC investigation); *United States v. Sprecher*, 783 F. Supp. 133, 163 (S.D.N.Y. 1992) (making false statements to the Securities and Exchange Commission during an SEC investigation).

Conduct that violates Section 1505 need not be otherwise illegal so long as it is done with “the requisite corrupt intent to improperly influence the investigation”; in other words, “the means [a] defendant employ[s] in bringing to bear his influence” are inconsequential.<sup>99</sup> “Even a literally true statement may not be a complete defense to obstruction” under Section 1505.<sup>100</sup>

### 3. 18 U.S.C. §§ 1512 and 1519

The Executive Branch may also seek to enforce compliance with congressional proceedings through statutes prohibiting the obstruction of justice by deception under 18 U.S.C. § 1512(b), or by destruction of evidence under 18 U.S.C. §§ 1512(c) and 1519.

A violation of Section 1512(b) occurs when a person knowingly engages in misleading or corrupt persuasion with the intent to prevent testimony or physical evidence from being truthfully presented at a congressional proceeding.<sup>101</sup> Courts have determined that the statute does not require specific intent to mislead or deceive Congress; rather, the intent element is satisfied if the false or misleading information is merely likely to be transferred to Congress.<sup>102</sup>

Relatedly, a violation of Section 1512(c) occurs when a person “corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.”<sup>103</sup> An “official proceeding” includes “a proceeding before Congress,” defined broadly to allow punishment of nearly any intentional destruction of evidence related to a trial or hearing.<sup>104</sup>

Destruction of evidence also is punishable under 18 U.S.C. § 1519. Known as the post-Enron “anti-shredding” provision, Section 1519 was enacted as part of the Sarbanes-Oxley Act to broaden the scope of activi-

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<sup>99</sup> *Mitchell*, 877 F.2d at 299. The *Mitchell* court went on to clarify, “any endeavor, including the promised exploitation of a special relationship with the chair of [an] investigating committee, when done with the requisite intent to corruptly influence a congressional investigation, violates § 1505.” *Id.*

<sup>100</sup> *United States v. Safavian*, 528 F.3d 957, 968 (D.C. Cir. 2008).

<sup>101</sup> 18 U.S.C. § 1512(b); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., RL34304, OBSTRUCTION OF CONGRESS: A BRIEF OVERVIEW OF FEDERAL LAW RELATING TO INTERFERENCE WITH CONGRESSIONAL ACTIVITIES 40 (2010).

<sup>102</sup> *United States v. Veal*, 153 F.3d 1233, 1251–52 (11th Cir. 1998) (for a violation of § 1512(b), the “possibility or likelihood that . . . false or misleading information” would be transferred to federal authorities is all that is required to satisfy the statute’s intent element) (emphasis in original); *see, e.g.*, *United States v. Carson*, 560 F.3d 566, 580–81 (6th Cir. 2009).

<sup>103</sup> 18 U.S.C. § 1512(c).

<sup>104</sup> 18 U.S.C. § 1515(a)(1); *see also* DOYLE, *supra* note 101, at 9–14, 1 n.5, 9 n.56.

ties that had been previously outlawed by § 1512(c).<sup>105</sup> In particular, the statute outlaws the obstruction of “investigations” by destruction of evidence.<sup>106</sup> There is some question whether the statute applies to congressional investigations,<sup>107</sup> but the legislative history suggests that it does.<sup>108</sup>

#### 4. 18 U.S.C. §§ 1621 and 1622

Additional provisions available to enforce congressional investigations are the statutes that criminalize perjury and subornation of perjury, 18 U.S.C. §§ 1621 and 1622, respectively. Section 1621 penalizes individuals who willfully give false testimony under oath on a material matter.<sup>109</sup> Courts have not precisely defined the “willful” requirement of the statute, but the Supreme Court has indicated that it means “deliberate.”<sup>110</sup> An important limitation on the application of Section 1621 is the “two witness” rule,<sup>111</sup> which provides that the uncorroborated testimony of a single witness is not sufficient to sustain a federal perjury charge.<sup>112</sup>

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<sup>105</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 802 (2002); see also Albert D. Spalding, Jr. & Mary Ashby Morrison, *Criminal Liability for Document Shredding After Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 650–51 (2006).

<sup>106</sup> See DOYLE, *supra* note 101, at 13. The text of the statute provides that anyone who knowingly “alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . of any matter within the jurisdiction of any department or agency of the United States,” can be punished by fine or imprisonment. 18 U.S.C. § 1519.

<sup>107</sup> The language, “any department or agency of the United States,” is nearly identical to the original language in 18 U.S.C. § 1001 that Congress was forced to amend in 1996 to clarify its application to congressional proceedings. See *supra* note 78 and accompanying text. As a result, some commenters have suggested that Congress’s use of the language in its 2002 adoption of § 1519—four years after its amendment of § 1001—may indicate that Congress was seeking to limit the statute’s application to Executive Branch investigations. See Spalding & Morrison, *supra* note 105, at 650–51; see also DOYLE, *supra* note 101, at 40–41.

<sup>108</sup> The Senate report accompanying § 1519 states that it is “meant to do away with the distinctions . . . between court proceedings, investigations, regulatory or administrative proceedings . . . and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which . . . are within the jurisdiction of any federal agency are covered by this statute.” S. REP. NO. 107-146, at 15 (2002).

<sup>109</sup> See *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. Dean*, 55 F.3d 640, 659 (D.C. Cir. 1995); see also MORTON ROSENBERG, CONG. RESEARCH SERV., RL7-5700, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 12–13 (1995).

<sup>110</sup> See *United States v. Norris*, 300 U.S. 564, 574 (1937) (“Deliberate material falsification under oath constitutes the crime of perjury . . .”); see also DOYLE, *supra* note 101, at 46.

<sup>111</sup> See *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *Stein v. United States*, 337 F.2d 14, 18 (9th Cir. 1964).

<sup>112</sup> See *Weiler v. United States*, 323 U.S. 606, 609–10 (1945). To meet the requirements of the two witness rule, corroborative evidence must “(1) . . . if true, substantiate[ ] the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; [and] (2) . . . the corroborative evidence [must be] trustworthy.” *Id.*; see also *Stewart*, 433 F.3d at 316 (quoting *Weiler*, 323 U.S. at 610).

By contrast, Section 1622 criminalizes the subornation of perjury and is not subject to the “two witness” rule.<sup>113</sup> Subornation of perjury occurs when an individual “procures another to commit perjury.”<sup>114</sup>

#### 5. 18 U.S.C. § 371

The last criminal provision frequently used by the Executive Branch to punish non-compliance with congressional investigations is the general conspiracy statute codified at 18 U.S.C. § 371. Section 371 applies when “two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose,” and at least one of these individuals does “any act to effect the object of the conspiracy.”<sup>115</sup> The fraud covered by § 371 includes “impairing, obstructing or defeating the lawful function of any department of government,” which courts have read as encompassing congressional investigations.<sup>116</sup>

#### B. Executive Branch Enforcement Proceedings

Efforts by the Executive Branch to enforce congressional investigations using the above-described laws have evolved significantly. Until 1980, the Executive Branch primarily concerned itself with congressional investigations in one area: the prosecution of those who stood in contempt of inquiries by the House Un-American Activities Committee or the Senate Permanent Subcommittee on Investigations into communist activities.<sup>117</sup> The only other notable convictions related to congressional proceedings involved instances of congressmen submitting false payroll reports and certain labor officers’ obstruction of congressional investigations.<sup>118</sup> After 1980, the Executive Branch stepped up its activity, but it

<sup>113</sup> *Stein*, 337 F.2d at 20; *see also* *Catrino v. United States*, 176 F.2d 884, 888 (9th Cir. 1949).

<sup>114</sup> 18 U.S.C. § 1622 (2012).

<sup>115</sup> 18 U.S.C. § 371.

<sup>116</sup> *United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995) (quoting *Tanner v. United States*, 483 U.S. 107, 128 (1987)); *see also* *United States v. Poindexter*, 725 F. Supp. 13, 18 (D.D.C. 1989) (“[T]he Court concludes that Count One charges but a single conspiracy to defeat congressional inquiries into the defendants’ Iran-contra activities by a variety of means, as necessary to conceal the conspirators’ activities, and that this is a permissible and not multiplicitous method of charging a conspiracy.”).

<sup>117</sup> A number of commentators have noted that the FBI and its director J. Edgar Hoover coordinated activities and congressional hearings into suspected communist activities with the House Un-American Activities Committee. *See* Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 130–32 (2005); Frank Wilkinson, *Revisiting the “McCarthy Era”: Looking at Wilkinson v. United States in Light of Wilkinson v. Federal Bureau of Investigation*, 33 LOY. L.A. L. REV. 681, 684–88 (2000).

<sup>118</sup> *See, e.g.*, *United States v. Bramblett*, 348 U.S. 503 (1955) (affirming conviction of Representative Ernest Bramblett for lying about his misuse of official funds); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980) (affirming conviction and sentence of Representative Charles Diggs, Jr. for falsifying records to disclose his misuse

still directed most of its efforts toward the prosecution of government officials who had misled Congress. For example, there were prosecutions under 18 U.S.C. §§ 1001, 1505, and 1621 of various individuals for lying to Congress about the Iran-Contra Affair<sup>119</sup> and of Assistant EPA Director Rita Lavelle for submitting false documents and testimony to Congress about improper Superfund payments.<sup>120</sup> In each of these cases, the Executive Branch pursued convictions despite no parallel congressional contempt proceedings.

In contrast to this measured enforcement history, the Executive Branch has recently initiated a much broader array of prosecutions to punish non-compliance with congressional investigations. More than ever, these prosecutions target private individuals and corporations, and the Executive Branch regularly pursues them without congressional direction or active support. In addition, the Executive's aims seem not merely limited to encouraging compliance with congressional demands, but also appear designed to compel the production of information that the Executive wants for its own investigations.

### 1. Executive Branch Actions Punishing Obstruction of Congressional Investigations

One prominent example of the recent enforcement trend is the prosecution of baseball star Roger Clemens. Clemens voluntarily testified under oath at a hearing and in depositions held by the House Committee on Oversight and Government Reform to investigate the usage of performance-enhancing drugs in professional baseball.<sup>121</sup> Committee Chairman Henry Waxman and Ranking Member Tom Davis later ac-

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of official funds); *Stein v. United States*, 337 F.2d 14 (9th Cir. 1964) (affirming conviction of Teamsters affiliate for subornation of perjury in Senate committee investigation); *United States v. Presser*, 292 F.2d 171 (6th Cir. 1961), *aff'd*, 371 U.S. 71 (1962) (affirming conviction for obstruction of justice under 18 U.S.C. § 1505 for destroying evidence related to Jimmy Hoffa sought by congressional subpoena).

<sup>119</sup> See, e.g., Indictment at \*6, *United States v. Weinberger*, 1992 U.S. Dist. Lexis 16537 (D.D.C. Oct. 30, 1992) (No. 92-416) (indicting Secretary of Defense Caspar Weinberger for violations of 18 U.S.C. §§ 1621, 1505, and 1001 for falsely denying knowledge of the Iran-Contra Affair); *Poindexter*, 725 F. Supp. 13 (reviewing reversed conviction of National Security Advisor John Poindexter under 18 U.S.C. §§ 1621, 1505, and 1001); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *withdrawn and superseded in part*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam) (reviewing convictions of Oliver North, National Security Council advisor, under 18 U.S.C. §§ 1621, 1505, and 1001). Of course, these proceedings represented a bit of an anomaly in that as a technical matter, the Executive power was being exercised by the Independent Counsel—not the Administration. See, e.g., *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (en banc) (Silberman, J., concurring in the denial of rehearing en banc).

<sup>120</sup> See *United States v. Lavelle*, 751 F.2d 1266 (D.C. Cir. 1985), *abrogated by Huddleston v. United States*, 485 U.S. 681 (1988).

<sup>121</sup> See Memorandum from Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform, to Democratic Members of the H. Comm. on Oversight & Gov't Reform (Feb. 27, 2008) (on file with the H. Comm. on Oversight & Gov't Reform).

cused Clemens of lying during his testimony.<sup>122</sup> Rather than attempting to cite him for contempt of Congress, however, Chairman Waxman and Representative Davis simply referred Clemens for prosecution by the Department of Justice.<sup>123</sup> Following this referral, the Department of Justice charged Clemens under 18 U.S.C. §§ 1001, 1505, and 1621 for allegedly making “false and misleading” sworn statements to Congress.<sup>124</sup> Clemens fought these charges and prevailed—eventually being cleared of all wrongdoing.<sup>125</sup> But throughout his prosecution, Clemens was forced to respond both to the legal arguments of prosecutors and to the commentary of congressmen, who were able to criticize Clemens without shouldering the burdens or political risk associated with contempt proceedings.

Another example of the changing role of the Justice Department in examining congressional and company interactions is the recent prosecution of BP PLC related to a letter concerning the Deepwater Horizon oil spill. Congressman Edward Markey wrote a letter to the company and asked it to voluntarily provide information regarding the amount of oil leaking from the Deepwater Horizon rig.<sup>126</sup> BP provided a letter containing a leakage estimate.<sup>127</sup> Congressman Markey did not seek to initiate any further action—whether by subpoena or use of contempt power—relating to the letter. In the course of its own investigation into the Deepwater Horizon accident, however, the Department of Justice became aware of leakage estimates higher than those submitted to Congressman Markey. The Justice Department used this information as the basis of criminal charges under 18 U.S.C. § 1505, alleging that a BP executive had obstructed Congress.<sup>128</sup> Indeed, the Department made these charges a focal point of its prosecutorial scheme.<sup>129</sup> BP ultimately

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<sup>122</sup> See *id.* at 1.

<sup>123</sup> See *id.*

<sup>124</sup> Indictment at 12–14, *United States v. Clemens*, No. 10-CR-223 (D.D.C. May 15, 2009).

<sup>125</sup> See Del Quentin Wilber & Ann E. Marimow, *Roger Clemens Acquitted of All Charges*, WASH. POST (June 18, 2012), [https://www.washingtonpost.com/local/crime/roger-clemens-trial-verdict-reached/2012/06/18/gJQAQxvzIV\\_story.html](https://www.washingtonpost.com/local/crime/roger-clemens-trial-verdict-reached/2012/06/18/gJQAQxvzIV_story.html).

<sup>126</sup> See *United States v. Rainey*, 946 F. Supp. 2d 518, 522, 524–25, 531–32 (E.D. La. 2013), *vacated and remanded*, 757 F.3d 234 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015).

<sup>127</sup> See *id.* at 522.

<sup>128</sup> Information for Seaman’s Manslaughter, Clean Water Act, Migratory Bird Treaty Act and Obstruction of Congress at 24, *United States v. BP Exploration & Prod., Inc.*, No. 2:12-CR-292 (E.D. La. Nov. 15, 2012), ECF No. 1; see also Indictment at 8–11, *United States v. Rainey*, No. 2:12-CR-291 (E.D. La. Nov. 14, 2012), ECF No. 1.

<sup>129</sup> *BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident*, U.S. DEP’T OF JUSTICE (Nov. 15, 2012), <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>; Lanny A. Breuer,



reached a plea agreement with the government.<sup>130</sup> The BP executive alleged to have obstructed Congress was tried and acquitted.<sup>131</sup>

Relatedly, highly visible congressional hearings into Toyota's response to sudden-acceleration "sticky pedal" issues laid the groundwork for subsequent Executive action. In 2010, Toyota produced more than 75,000 documents to the House Committee on Energy and Commerce and the House Committee on Oversight and Government Reform in response to information requests.<sup>132</sup> Toyota's senior executives also testified at numerous hearings.<sup>133</sup> Around the same time, the Department of

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Deputy Attorney Gen., Dep't of Justice, Speech at the BP Press Conference (Nov. 15, 2012), <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121115.html>.

<sup>130</sup> See *BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident*, U.S. DEP'T OF JUSTICE (Jan. 29, 2013), <http://www.justice.gov/opa/pr/2013/January/13-ag-123.html>.

<sup>131</sup> See Order, *United States v. Rainey*, No. 12-cr-291 (E.D. La. June 5, 2015), ECF No. 504. The acquitted BP executive, David Rainey, had submitted BP's leakage estimate. The Department of Justice charged Rainey with one count of obstructing Congress under 18 U.S.C. § 1505 and one count of making false statements under 18 U.S.C. § 1001. See Second Superseding Indictment, *United States v. Rainey*, No. 12-cr-291 (E.D. La. Sept. 19, 2014), ECF No. 179. In preparing his defense, Rainey served subpoenas seeking congressional documents and the testimony of three members of Congress and six congressional staffers. See Order Authorizing Subpoenas, *United States v. Rainey*, No. 12-cr-291 (E.D. La. Dec. 11, 2014), ECF No. 264. Through the U.S. House of Representative's Office of General Counsel, the subpoena recipients moved to quash the subpoenas under the Constitution's Speech or Debate clause. See Motion To Quash, *United States v. Rainey*, No. 12-cr-291 (E.D. La. May 8, 2015), ECF No. 419. The General Counsel's Office explained that the subpoena recipients had made voluntary document productions to Rainey and would voluntarily testify as prosecution witnesses, but it argued that the Speech or Debate Clause's privilege against compelled testimony and document production was "absolute." *Id.* at 16; see also *id.* at 8–17. The trial court agreed with the House General Counsel's Office that the privilege was absolute, but disagreed that the subpoena recipients' voluntary productions and testimony were sufficient to accommodate Rainey's Fifth and Sixth Amendment rights. Thus, the court simultaneously granted the motion to quash and dismissed the obstruction of Congress charge. See Order, *United States v. Rainey*, No. 12-cr-291 (E.D. La. June 1, 2015), ECF No. 494. A jury then acquitted Rainey of making false statements. See Order, *United States v. Rainey*, No. 12-cr-291 (E.D. La. June 5, 2015), ECF No. 504. Notably, the speech or debate privilege issues that arose in *Rainey* would not have arisen in a congressional contempt proceeding. They also likely would not have arisen in the context of an Executive Branch prosecution on a criminal referral from Congress. When Congress initiates the prosecution with a referral, they presumably do so with the understanding that speech or debate will be waived to ensure the prosecution can go forward. See S. Res. 66, 106th Cong. (1999).

<sup>132</sup> David Ingram, *Toyota Executives Head to Capitol Hill to Testify on Public Safety Record; Toyota Executives to Testify on Public Safety Record*, NAT'L L.J., Feb. 23, 2010.

<sup>133</sup> See, e.g., *Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Commerce*, 111th Cong. 86–134 (2010) (testimony of James E Lentz, President & Chief Operating Officer, Toyota Motor Sales, U.S.A., Inc.); *Toyota Gas Pedals: Is the Public At Risk?: H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (testimony of Akio Toyoda, President & Chief Executive Officer, Toyota Motor Corporation, and Yoshimi Inaba, President & Chief Executive Officer, Toyota Motor North America, Inc.); *Update on Toyota and NHTSA's Response to the Problem of Sudden Unintended Acceleration: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Commerce*,

Justice convened a grand jury to probe the sudden-acceleration issue.<sup>134</sup> The Justice Department entered into negotiations with Toyota, and in March 2014, Toyota accepted a deferred-prosecution agreement, in which the company consented to the filing of a criminal information charging Toyota with a single count of wire fraud under 18 U.S.C. § 1343 and agreed to pay a financial penalty of \$1.2 billion.<sup>135</sup>

The Executive Branch's increased role in enforcing congressional investigations is also apparent in other matters. For instance, by 2011, the Department of Justice had convicted or negotiated guilty pleas for three individuals under 18 U.S.C. §§ 1001 and 1505 for voluntarily offering false or misleading testimony during an investigation by the Senate Committee on Indian Affairs into improper interactions between lobbyists and staff of the General Services Administration.<sup>136</sup> The Committee deferred entirely to the Executive with respect to these prosecutions, taking no separate action to hold the individuals in contempt of Congress.<sup>137</sup> Similarly, Congress deferred to the Executive Branch to punish individuals who allegedly lied to or obstructed the Senate Permanent Subcommittee on Investigations (PSI) or the Senate Governmental Affairs Committee in matters related to the Enron scandal,<sup>138</sup> health-care operations,<sup>139</sup> and an investigation into illegal federal campaign contribu-

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111th Cong. 52–73 (2010) (testimony of James E. Lentz, President & Chief Operating Officer, Toyota Motor Sales, U.S.A., Inc.).

<sup>134</sup> See Peter J. Henning, *Toyota's Latest Legal Headache: Federal Subpoenas*, N.Y. TIMES (Feb. 23, 2010), <http://dealbook.nytimes.com/2010/02/23/toyotas-growing-legal-problems>.

<sup>135</sup> See generally *Deferred Prosecution Agreement at 1*, United States v. Toyota Motor Corp., 2014 WL 1043909 (S.D.N.Y. Mar. 19, 2014); see *id.* Statement of Facts at 12, *Toyota Motor Corp.*, 2014 WL 1043909.

<sup>136</sup> See United States v. Safavian, 644 F. Supp. 2d 1 (D.D.C. 2009), *aff'd*, 649 F.3d 688 (D.C. Cir. 2011) (affirming denial of defendant's motions opposing conviction under 18 U.S.C. § 1001 for lying to the Committee on Indian Affairs); Plea Agreement at 1, 7, United States v. Federici, No. 07-145 (D.D.C. June 6, 2007) (entering guilty plea under 18 U.S.C. § 1505 for obstructing Congress); Plea Agreement, United States v. Griles, No. 07-79 (D.D.C. Mar. 23, 2007) (same).

<sup>137</sup> Senator John McCain, who served as chairman of the committee, threatened to hold Italia Federici, President of the Council of Republicans for Environmental Advocacy, in contempt during a hearing at which she refused to answer questions and was generally combative, but he never sought a committee vote to enforce his threat. See *Tribal Lobbying Matters: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 9 (2005).

<sup>138</sup> See United States v. Boyle, No. 4:03-CR-363 (S.D. Tex. 2005) (convicting defendant under 18 U.S.C. §§ 371 and 1001 for making a false statement and conspiring to falsify records during interview with Senate PSI staff).

<sup>139</sup> See, e.g., United States v. Weissman, 22 F. Supp. 2d 187 (S.D.N.Y. 1998), *aff'd*, 195 F.3d 96 (2d Cir. 1999) (convicting an individual of obstructing Congress under 18 U.S.C. § 1505 for personally altering documents produced in response to a subcommittee subpoena, and for causing another not to produce certain unaltered documents).

tions.<sup>140</sup> In each of these matters, the Executive Branch was left to give force to Congress's investigative demands.<sup>141</sup>

## 2. Executive Branch Use of Congressional Investigation Findings

As the Executive Branch has become more involved in enforcing congressional investigations, it also has begun to more regularly use the findings of those investigations for its own initiatives. In fact, it is not uncommon for individuals and corporations to be investigated by Congress and then prosecuted or sued by federal or state enforcement agencies.

In 2012, for example, the Department of Justice used the findings of a report by the Senate PSI as the basis to further its own investigation into HSBC Bank.<sup>142</sup> That investigation, which largely adopted PSI's conclusions, alleged instances of money laundering and sanctions violations and eventually resulted in a deferred prosecution agreement under which the bank forfeited more than \$1.2 billion to the government.<sup>143</sup> A

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<sup>140</sup> See generally *United States v. Trie*, 21 F. Supp. 2d 7, 14 (D.D.C. 1998) (noting charges under, among other statutes, 18 U.S.C. §§ 371 and 1505 for "instruct[ing] a witness to alter, destroy or conceal documents responsive to a subpoena" issued in the course of a Senate committee's investigation); *Indictment, United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998), <http://edition.cnn.com/ALLPOLITICS/1998/02/05/trie.indictment>; see also DOYLE, *supra* note 101, at 16–18.

<sup>141</sup> Of course, not all referrals lead to prosecution. For example, Chairman Carl Levin of the Senate PSI recommended that the Department of Justice investigate certain financial institutions for obstruction under 18 U.S.C. § 1505 on the basis that they misled Congress. But the Department found insufficient evidence to prosecute. See Jason Ryan, *DOJ Will Not Prosecute Goldman Sachs in Financial Crisis Probe*, ABC NEWS (Aug. 9, 2012), <http://abcnews.go.com/blogs/politics/2012/08/doj-will-not-prosecute-goldman-sachs-in-financial-crisis-probe>. Likewise, following revelations regarding Martha Stewart's insider trading, the House Committee on Energy and Commerce requested that the DOJ investigate and prosecute her under 18 U.S.C. § 1001 for allegedly submitting false information to the Committee, but the DOJ opted not to act. See Letter from W.J. Tauzin et al., Chairman, H. Comm. on Energy & Commerce, to John Ashcroft, Attorney Gen., U.S. Dep't of Justice (Sept. 10, 2002), <http://fl1.findlaw.com/news.findlaw.com/wp/docs/mstewart/encmrc91002dojltr.pdf>.

<sup>142</sup> See Kevin McCoy, *HSBC Will Pay \$1.9 Billion for Money Laundering*, USA TODAY (Dec. 11, 2012), <http://www.usatoday.com/story/money/business/2012/12/11/hsbc-laundering-probe/1760351> (stating that the facts that emerged as a result of the DOJ settlement "echoed findings of a July report by the Senate Permanent Subcommittee on Investigations"); Ben Protes and Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES (Dec. 10, 2012), <http://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering> ("HSBC was thrust into the spotlight in July after a Congressional committee outlined how the bank, between 2001 and 2010, 'exposed the U.S. financial system to money laundering and terrorist financing risks.' The Permanent Subcommittee on Investigations held a subsequent hearing at which the bank's compliance chief resigned amid mounting concerns that senior bank officials were complicit in the illegal activity.").

<sup>143</sup> See *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, U.S.

similar scenario unfolded with the telephone company Inc21. Following an investigation by the Senate Committee on Commerce, Science, and Transportation, the company was identified in a Majority staff report as having engaged in questionable billing practices.<sup>144</sup> The Department of Justice subsequently brought criminal charges and secured guilty pleas against two of the company's senior executives for illegal billing schemes.<sup>145</sup> The Executive Branch also followed an almost year-long investigation by the House Committee on Energy and Commerce into the federal loans requested and received by Solyndra, a clean energy company,<sup>146</sup> with its own investigation into the company for possible fraud violations.<sup>147</sup> And, more recently, federal agencies and state executive agencies have pursued investigations and enforcement actions against various for-profit colleges and universities using findings from an investigation into for-profit schools by the Majority staff of the Senate Committee on Health, Education, Labor, and Pensions (HELP).<sup>148</sup>

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DEP'T OF JUSTICE (Dec. 11, 2012), <http://www.justice.gov/opa/pr/2012/December/12-crim-1478.html>.

<sup>144</sup> See generally MAJORITY STAFF OF THE OFFICE OF OVERSIGHT & INVESTIGATIONS, S. COMM. ON COMMERCE, SCIENCE & TRANSPORTATION, 111TH CONG., UNAUTHORIZED CHARGES ON TELEPHONE BILLS 4–5 (Comm. Print 2011).

<sup>145</sup> See *San Francisco Brothers Plead Guilty to Charges Stemming from Fraudulent Billing Scheme*, U.S. ATTORNEY'S OFFICE, N.D. CAL. (Dec. 12, 2012), [https://www.justice.gov/archive/usao/can/news/2012/2012\\_12\\_12\\_lins.guiltyplea.press.html](https://www.justice.gov/archive/usao/can/news/2012/2012_12_12_lins.guiltyplea.press.html).

<sup>146</sup> MAJORITY STAFF OF H. COMM. ON ENERGY & COMMERCE, 112TH CONG., THE SOLYNDRA FAILURE 6, 8 (Comm. Print 2012).

<sup>147</sup> See, e.g., Seth Stern & Jim Snyder, *FBI Said to Be Probing Solyndra for Possible Account Fraud*, BLOOMBERG (Sept. 29, 2011), <http://www.bloomberg.com/news/2011-09-29/fbi-said-to-be-probing-solyndra-for-possible-accounting-fraud.html>; Jim McElhatton, *Grand Jury Begins Probe of Solyndra*, WASH. TIMES (Dec. 13, 2011), <http://www.washingtontimes.com/news/2011/dec/13/grand-jury-begins-probe-of-bankrupt-solyndra>. Another prominent example of an Executive Branch prosecution building on a congressional investigation is the conviction of Jeffrey Skilling, who was investigated in depth by two congressional committees, for crimes associated with the Enron scandal. See Hamilton, *Congressional Investigations*, *supra* note 2, at 1172. Also, the Food and Drug Administration commenced a criminal investigation against a Massachusetts company after an investigation by the House Committee on Energy and Commerce determined that the company may have caused a meningitis outbreak. See *Feds Open Criminal Inquiry into Firm Linked to Deadly Meningitis Outbreak*, CNN (Oct. 23, 2012), <http://www.cnn.com/2012/10/23/health/massachusetts-outbreak-criminal-investigation>; *The Fungal Meningitis Outbreak: Could It Have Been Prevented? Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Commerce*, 112th Cong. (2012).

<sup>148</sup> See generally *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 U.S. Dist. LEXIS 28254 (S.D. Ind. Mar. 6, 2015); *Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc.*, No. 1:14-cv-07194 (N.D. Ill. Sept. 16, 2014); *United States v. ITT Educ. Servs., Inc.*, No. 1:07-cv-0867-TWP-MJD, 2012 WL 266943 (S.D. Ind. 2012); *Commonwealth v. Corinthian Colls., Inc.*, No. 14-1093 (Mass. Super. Ct. Apr. 3, 2014); MAJORITY STAFF OF S. COMM. ON HEALTH, EDUCATION, LABOR AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (Comm. Print 2012).

The Executive Branch also regularly uses congressional findings to advance civil suits.<sup>149</sup> In one action, the Justice Department joined a False Claims Act suit against a large government contractor after a series of investigations—including House and Senate committee investigations—revealed that the contractor may have failed to complete security background checks before seeking payment from the government.<sup>150</sup>

In all of these actions, the Executive Branch was able to gather a significant portion of relevant evidence without ever issuing a warrant or subpoena. Relying on documents and testimony offered to Congress—often in an entirely different atmosphere and under an entirely different set of rules than would apply to its own investigative proceedings<sup>151</sup>—the Executive Branch was able to build cases that it might otherwise have not pursued.

As discussed below, the result of increased Executive Branch involvement in enforcing congressional investigations is that individuals and corporations subject to congressional investigation must now weigh, and react to the possibility of a related Executive Branch investigation. The current environment also warrants consideration from a constitutional perspective, with special attention given to how the Executive Branch's recent actions may be affecting the balance of power between the governmental branches.

### III. THE CONSEQUENCES OF INCREASED EXECUTIVE BRANCH ENFORCEMENT OF CONGRESSIONAL INVESTIGATIONS

The increasing willingness of the Executive Branch to prosecute activity that Congress could—but is unlikely to—punish under its contempt powers, coupled with a rise in Executive Branch investigations that parallel or build on congressional inquiries represents a significant development in the practice and effect of congressional investigations. This development manifests itself in three related arenas.

*First*, from a constitutional perspective, the increased involvement of the Executive Branch in the enforcement of congressional investigations harkens a shift of power to the Executive Branch. If Congress becomes accustomed to relying on the Executive Branch to enforce

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<sup>149</sup> See, e.g., Hamilton, *Congressional Investigations*, *supra* note 2, at 1171. In addition to Executive Branch proceedings, plaintiffs' lawyers have been known to initiate civil suits or administrative proceedings based on a congressional investigation, hearing, or both. *Id.* at 1171–72.

<sup>150</sup> See Tom Hamburger & Debbi Wilgoren, *Justice Department Says USIS Submitted 665,000 Incomplete Background Checks*, WASH. POST (Jan. 23, 2014), [https://www.washingtonpost.com/world/national-security/justice-department-joins-lawsuit-against-isis-over-background-checks/2014/01/23/db16e244-8432-11e3-8099-9181471f7aaf\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-joins-lawsuit-against-isis-over-background-checks/2014/01/23/db16e244-8432-11e3-8099-9181471f7aaf_story.html).

<sup>151</sup> See Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 905–06; *infra* Part III.B.

compliance with its investigative demands, Congress may compromise its ability to effectively gather information. This is particularly true with respect to issues on which congressional and executive interests diverge. The more reliant Congress is on Executive Branch enforcement of its investigative prerogatives, the more likely it is that the Executive will prevail when inter-branch conflicts arise regarding congressional information requests.

*Second*, the entire point of separation of powers—at its core—is to protect individual liberty.<sup>152</sup> When the Executive usurps congressional investigative power, the affront to the separation of powers necessarily will affect the liberty of individuals against government intrusion. Under our constitutional structure, the Executive is limited in gathering information (through safeguards that narrow and restrict the scope and issuance of warrants and subpoenas), but it has a relatively straightforward unilateral process for prosecuting or suing individuals, which involves the expenditure of little to no political capital. By contrast, Congress has few limits on its information-gathering ability, but it traditionally has found it difficult to take unilateral action against a non-compliant individual or corporation—collective action problems are not conducive to swift and zealous enforcement of the law.<sup>153</sup> And virtually any act by Congress to enforce its authority requires the expenditure of considerable political capital. Thus, by utilizing Congress's broad information-gathering ability to bolster its prosecutorial and litigation authority, the Executive may be able to circumvent some of the safeguards designed to protect individual liberty.

*Third*, the new enforcement paradigm for congressional investigations also raises significant concerns for persons targeted by such investigations. Individuals and corporations must now be especially cognizant of the risk that any non-disclosure, misstatement, or act of non-compliance could result in prosecution by the Executive Branch—regardless of Congress's view on, or interest in, the matter. Individuals and corporations also must view congressional investigations as potential precursors to, or information-gathering initiatives for, investigations of the Executive. They must assume that information provided to Congress may work its way into an Executive Branch investigation. This is particularly true given the differing privilege and confidentiality rules that apply in congressional investigations. The risk is heightened in high-profile mat-

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<sup>152</sup> See *NLRB v. Canning*, 134 S. Ct. 2550, 2559–60 (2014) (providing case examples that emphasize the interplay between individual liberty and separation of powers). See generally *THE FEDERALIST* Nos. 47, 51 (James Madison).

<sup>153</sup> Cf. *Canning*, 134 S. Ct. at 2605–06 (Scalia, J., concurring) (noting Congress's collective action challenges); *THE FEDERALIST* No. 70 (Alexander Hamilton) (discussing the unitary executive and the need for an energetic executive).

ters or those in which there is—or is likely to be—parallel investigatory action by the Executive.

### A. *A Shift of Power from Congress to the Executive Branch*

It used to be axiomatic that in disputes with private citizens—and, more pointedly, in disputes with the Executive Branch—Congress had substantial power, but used that power sparingly, relying instead on the *in terrorem* effects of its power.<sup>154</sup> That dynamic seems to have changed. Congress now uses its power less frequently, which diminishes the effects of that power.

#### 1. A Case Study in the Shift of Power

A contrast in cases provides the best example here: witness the power of Congress in the case of William P. MacCracken, Jr. compared to Congress's reliance on the Executive Branch in the recent scandal involving Lois Lerner.

*MacCracken.* In the mid-1930s, Senator Hugo Black led a hard-charging investigation into “all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail.”<sup>155</sup> The investigation targeted William P. MacCracken, Jr., a Washington lawyer<sup>156</sup> who had previously served as Assistant Secretary of Commerce for Aeronautics in the late 1920s.<sup>157</sup> On January 31, 1934, Black's Senate committee served MacCracken with a subpoena *duces tecum*, demanding that he personally appear before the committee “instanter, at 12:30 p.m.” and produce all documents in his possession relevant to “air-mail and ocean-mail contracts.”<sup>158</sup> The subpoena provided no explanation for the extraordinary return date and made no accommodation for the attorney-client privilege or work-product doctrine, despite the fact that the committee subpoenaed MacCracken precisely because he was the attorney for Senator Black's corporate targets.

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<sup>154</sup> An example of the *in terrorem* effects of the fear of Congress's power to compel and place in contempt is the conflict that occurred between Senator James O. Eastland, Chairman of the Senate Judiciary Committee, and the American Bar Association (ABA) over William H. Rehnquist's nomination to be an Associate Justice of the Supreme Court of the United States. Senator Eastland had learned that an ABA committee “was not going to give Rehnquist a favorable recommendation” for the Court on what Senator Eastland believed were blatant political grounds. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 195 (2005). Senator Eastland informed the ABA that if they did not give a favorable rating to Rehnquist, he would subpoena every member of the committee and compel them to justify their vote under oath. *Id.* The ABA committee voted to find Rehnquist highly qualified. *Id.*

<sup>155</sup> *Journey v. MacCracken*, 294 U.S. 125, 145 (1935).

<sup>156</sup> *Id.* at 135–45.

<sup>157</sup> *William P. MacCracken Papers, ca. 1920s–1940s*, EAST CAROLINA UNIV., <http://digital.lib.ecu.edu/special/ead/findingaids/0811/#histnote> (last visited Mar. 9, 2016).

<sup>158</sup> *MacCracken v. Journey*, 72 F.2d 560, 561 (D.C. Cir. 1934), *rev'd*, 294 U.S. 125 (1935).

MacCracken made return as demanded and stated that he was ready to produce all responsive documents in his possession except for papers covered by privilege.<sup>159</sup> Chairman Black then asked MacCracken if he would seek waivers from his clients, which MacCracken readily agreed to do.<sup>160</sup> Over the next two days, MacCracken produced documents pertaining to clients from whom he had received a privilege waiver,<sup>161</sup> but he declined to produce documents from four clients who had not yet waived their privilege.<sup>162</sup> MacCracken admitted in further testimony that he had allowed a client's representative to remove some relevant files from his office,<sup>163</sup> and that his partner had allowed another client's representative to remove and attempt to destroy personal records that were "unrelated to matters under investigation by the Committee."<sup>164</sup>

Following MacCracken's testimony, the committee overruled any existing claims of privilege, and the full Senate passed a resolution for the Sergeant-at-Arms "to take MacCracken into custody before the bar of the Senate."<sup>165</sup> The resolution sought to compel the testimony and production of outstanding documents necessary for the committee to perform its legislative function.<sup>166</sup> MacCracken promptly obtained the final waivers from his clients "and made available to the committee . . . all papers in his possession relating to air mail contracts."<sup>167</sup>

On February 5, the Senate passed a resolution directing MacCracken to appear before the Senate and show cause for why he ought not be held in contempt for "the destruction and removal of certain papers, files, and memorandums" from his files.<sup>168</sup> MacCracken, believing all relevant documents in his possession had already been turned over to the committee, and that the committee lacked the constitutional authority to punish him for his role in the removal and destruction of documents, refused to appear before the Senate.<sup>169</sup> On February 9, upon MacCracken's failure to appear, the Senate immediately passed a resolution directing the Vice President to issue a warrant for MacCracken's arrest.<sup>170</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

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

<sup>163</sup> *Jurney*, 294 U.S. at 146.

<sup>164</sup> *Id.* Postal inspectors reconstructed the papers for the committee. *Id.* at 147 n.3.

<sup>165</sup> *Id.* at 146-47 & 146 n.2; *MacCracken*, 72 F.2d at 561.

<sup>166</sup> *MacCracken*, 72 F.2d at 562.

<sup>167</sup> *Id.*

<sup>168</sup> *Jurney*, 294 U.S. at 143-44; *MacCracken*, 72 F.2d at 563. The resolution also directed the client representatives to show cause for why they should not also be held in contempt. *Jurney*, 294 U.S. at 143-44; *MacCracken*, 72 F.2d at 563.

<sup>169</sup> *Jurney*, 294 U.S. at 143-44; *MacCracken*, 72 F.2d at 563-64.

<sup>170</sup> *MacCracken*, 72 F.2d at 563. Time Magazine vividly recounts the Senate's reaction. *Bar of the Senate*, TIME, Feb. 19, 1934 (internal citation omitted).



MacCracken was subsequently tried before the Senate on February 14 in an inherent contempt proceeding. Rejecting a proposal to refer a contempt citation to the Executive Branch pursuant to 2 U.S.C. § 192, the Senate proceeded to find MacCracken in contempt, sentencing him to ten days' imprisonment.<sup>171</sup> MacCracken challenged the Senate's authority to punitively punish him for obstruction, but the Supreme Court upheld the Senate's actions as an appropriate invocation of its inherent contempt power.<sup>172</sup>

*Lois Lerner.* Lois Lerner, a former Director of the IRS Exempt Organizations (EO) division, was at the center of the IRS targeting scandal in which the IRS used inappropriate, politically based criteria to target conservative groups.<sup>173</sup> Although the record suggests that Lerner committed contempts more egregious than those punished in MacCracken's case, the House of Representatives, in keeping with the current trend of deferring enforcement to the Executive Branch, referred the matter to the Department of Justice.

Specifically, on May 14, 2013, the House Oversight and Government Reform Committee (HOGGR) Chairman Darrell Issa requested that Lerner testify at a May 22, 2013 hearing regarding the IRS targeting.<sup>174</sup> Determining that Lerner's testimony was "critical to the Committee's investigation," Issa placed Lerner under subpoena on May 20, 2013.<sup>175</sup> That same day, Lerner's counsel informed HOGGR that she would invoke her Fifth Amendment rights at the hearing and requested to be excused.<sup>176</sup> Chairman Issa denied this request, noting that Lerner might decide at the hearing to waive her privilege.<sup>177</sup>

Lerner appeared at the hearing and voluntarily gave an opening statement that contained specific denials of wrongdoing relative to the IRS investigation.<sup>178</sup> The hearing was recessed to determine whether this voluntary statement constituted a waiver of Lerner's Fifth Amendment right not to incriminate herself.<sup>179</sup> On June 28, 2013, HOGGR met in business session and after debate approved a resolution finding Lerner

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<sup>171</sup> 78 CONG. REC. 2468, 2495–97 (1934).

<sup>172</sup> *Jurney*, 294 U.S. at 147–52.

<sup>173</sup> H. COMM. ON OVERSIGHT & GOV'T REFORM, LOIS LERNER'S INVOLVEMENT IN THE IRS TARGETING OF TAX-EXEMPT ORGANIZATIONS 3 (2014). *See generally* H. COMM. ON OVERSIGHT & GOV'T REFORM, RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND LOIS G. LERNER, FORMER DIRECTOR, EXEMPT ORGANIZATIONS, INTERNAL REVENUE SERVICE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM [hereinafter HOGGR REPORT].

<sup>174</sup> HOGGR REPORT, *supra* note 173, at 8.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 8–9.

<sup>177</sup> *Id.* at 9.

<sup>178</sup> *Id.* at 10–11.

<sup>179</sup> *Id.*

had waived her Fifth Amendment rights in making a voluntary statement.<sup>180</sup> The hearing was reconvened on March 5, 2014.<sup>181</sup> Prior to this hearing, Lerner had retired, and was accordingly before HOCR as a private citizen previously employed by the Government—the same position MacCracken stood in. In spite of warnings by Chairman Issa that Lerner could be held in contempt for refusing to answer questions because her privilege claim had been overruled, Lerner again declined to answer any questions.<sup>182</sup> Subsequent to this hearing, Lerner’s lawyer “convened a press conference at which he apparently revealed that [Lerner] had sat for an interview with Department of Justice prosecutors and [Treasury Inspector General for Tax Administration] staff within the past six months.”<sup>183</sup> This interview was neither under oath nor under any grant of immunity.<sup>184</sup> These revelations seemed to undermine Lerner’s invocation of the Fifth Amendment.

HOCR sought to hold Lerner in contempt under 2 U.S.C. § 192, rather than through an inherent contempt proceeding.<sup>185</sup> The full House accordingly held Lerner in contempt on May 7, 2014 by a vote of 231 to 187, and the Speaker certified the contempt citation to the United States Attorney for the District of Columbia.<sup>186</sup>

The result of the House referring Lerner—a former administration official at the epicenter of a scandal involving the administration—to the Executive Branch for prosecution, rather than exercising its inherent contempt power, was unsurprising: the Executive elected not to pursue contempt or criminal charges against Lerner.<sup>187</sup> Thus, because of the

<sup>180</sup> *Id.* at 12.

<sup>181</sup> *Id.* at 13–14.

<sup>182</sup> *Id.* at 13–16.

<sup>183</sup> *Id.* at 16–17.

<sup>184</sup> *Id.* at 17.

<sup>185</sup> *See id.* at 20; *see also* Russell Berman, *Will the House Arrest Lois Lerner?*, THE HILL (May 11, 2014), <http://www.thehill.com/homenews/house/205792-boehner-house-wont-arrest-lerner>.

<sup>186</sup> H.R. Res. 574, 113th Cong. (2014).

<sup>187</sup> *See* Letter from Ronald Machen, U.S. Attorney for the District of Columbia, to John Boehner, U.S. House Speaker (Mar. 31, 2015) (informing Speaker Boehner that the Department of Justice would not present Lois Lerner’s contempt citation to a federal grand jury); Letter from Peter J. Kadzik, Assistant Attorney General, to House Judiciary Committee (Oct. 23, 2015) (informing that the Department of Justice would not pursue criminal charges against Lerner). Indeed, the Department of Justice foreshadowed this result long before it announced its decisions. Responding to HOCR questioning on July 17, 2014, regarding whether 2 U.S.C. § 192, which states that it is the U.S. Attorney’s “duty . . . to bring the matter before the grand jury for its action,” imposes a mandatory duty on the U.S. Attorney to present the citation to the grand jury, Deputy Attorney General James Cole responded that the mandatory language in the statute was not so mandatory, noting that the Office of Legal Counsel had opined that there was discretion on whether to present a House-certified contempt citation to the grand jury. *Hearing Examining the Justice Department’s Response to the IRS Targeting Scandal, H. Subcomm. on Economic Growth, Job Creation and Regulatory Affairs of the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 42–43 (2014). The central questions of (1) whether the

House's reliance on the Executive to enforce its investigative demands, Lerner avoided any penalty for her obstructive stance.

## 2. Separation of Powers Concerns

The increasing role of the Executive Branch in congressional investigations also presents potential separation of powers concerns. The Founders divided the powers of the federal government into three branches in order to guard against any one branch becoming too powerful.<sup>188</sup> For Congress to be an effective branch of government, and an effective check on the other branches, it must be able to acquire information and make informed decisions on the subject matter of potential legislation.<sup>189</sup> In ceding investigative enforcement authority to the Executive Branch, Congress relinquishes a measure of control over its investigations and its ability to gather facts and data. The Executive Branch may decide whether to pursue enforcement actions or follow-up investigations based on its goals, not necessarily Congress's.<sup>190</sup> In addition, when the Executive Branch's priorities differ from Congress's, and those subpoenaed by Congress do not fear congressional threats of contempt or Executive Branch enforcement, Congress may struggle to obtain the information it seeks, as it may face less cooperative witnesses.<sup>191</sup>

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statute required the U.S. Attorney to present the citation to the grand jury, and (2) whether Congress could constitutionally impose such a duty, are open issues that can be argued either way. Compare *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Att'y Gen. 101 (1984), with CONGRESS'S CONTEMPT POWER, *supra* note 34, at 21–23 (noting the question is open). See also *United States v. Cox*, 342 F.2d 167, 184–85 (5th Cir. 1965) (en banc) (Brown, J., concurring) (holding that a U.S. Attorney can be compelled to prepare an indictment at the request of the grand jury); *id.* at 179 (Rives, J., concurring in part and dissenting in part) (same).

<sup>188</sup> See THE FEDERALIST NOS. 47, 51 (James Madison).

<sup>189</sup> See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504–05 (1975); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); Hamilton, *Congressional Investigations*, *supra* note 2.

<sup>190</sup> See, e.g., Zuckerman, *supra* note 1, at 43 (comparing *MacCracken* to recent referrals of contempt citations to the Justice Department and arguing that “Congress has become vulnerable to the discretion of federal prosecutors”); see also Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1086 (2009) (arguing “that Congress has been wrong, since the 1970s, in seeking judicial enforcement of contempt citations against Executive Branch officials, and that the courts have been wrong in finding such disputes justiciable” in part because “Congress’s abdication of this power aggrandizes the executive and judicial branches at Congress’s expense, upsetting the proper balance of the separation of powers”).

<sup>191</sup> See Zuckerman, *supra* note 1, at 64–65. Furthermore, Justice Scalia’s characterization of the majority’s reasoning in the recent *NLRB v. Canning* case as one relying on an “adverse possession theory of executive authority” indicates a risk that Congress takes in abdicating enforcement authority to the Executive Branch. 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring). In *Canning*, the majority opinion cites historical practice to resolve textual ambiguities about the President’s appointment authority under the Recess Appointments Clause. See *id.* at 2556–78. According to Justice Scalia, the majority “swe[pt] away the key textual limitations on the recess-appointment power” by invoking a theory that “Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient

### B. *Potential Dangers to Personal Liberties*

The Department of Justice and the rest of the Executive Branch are subject to a number of external restraints on their ability to gather information and conduct investigations. Congress, on the other hand, operates under a different set of rules, and is more easily able to collect information from individuals and organizations. Given the recent trends in congressional investigations, the targets of such inquiries must be aware that traditional protections of personal liberties normally available to them may not apply.

#### 1. Limits on Executive Branch Investigations

By its very nature, the Executive is granted the ability to act swiftly. But because there is so little restraint on its ability to take action, its investigative powers are limited by constitutional design. Take, for example, the principal investigative body of the Executive Branch, the Department of Justice. The most traditional tools used by the Justice Department in conducting investigations are searches and seizures and grand jury subpoenas. They are powerful weapons. But they are limited in their scope.

The Fourth Amendment acts as a powerful restraint on the federal government's search and seizure powers. Under normal circumstances, pre-enforcement review is required before a search and seizure is made: the Department of Justice must go before a neutral magistrate and demonstrate—under oath—that they have probable cause to believe that a federal crime has been, or will be, committed.<sup>192</sup> Because of the warrant requirement, the Department of Justice usually cannot deploy its broad power *ex ante* without the review of an impartial judge. Even in cases where a warrant is not required, the Executive Branch must demonstrate that its search or seizure fell within one of the judicially recognized exceptions to the Fourth Amendment's warrant requirement.<sup>193</sup> In addition, if the government conducts a search or seizure improperly, it may

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vigor, so the Court should not 'upset the compromises and working arrangements that the elected branches of Government themselves have reached.'" *Id.* at 2592. Given the greater ease with which the President may establish historical precedent in areas presenting separation of powers issues, according to Scalia, the "majority's methodology thus all but guarantees the continuing aggrandizement of the Executive Branch." *Id.* at 2606. Congress thus should be wary of the historical precedents that are being established with the growing role of the Executive Branch in congressional investigations, as such precedents could be used to further justify an expansion of executive power.

<sup>192</sup> U.S. CONST. amend. IV; *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (noting that "a [judicial] warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" (citation omitted)); *United States v. Leon*, 468 U.S. 897, 913–15 (1984).

<sup>193</sup> *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

not be able to use the evidence gathered at trial under the application of the Exclusionary Rule.<sup>194</sup>

The Department of Justice also enjoys significant investigative power through its ability to obtain grand jury subpoenas. But this power is limited because of the grand jury's structure and the right to challenge the validity of a grand jury subpoena *duces tecum* before it is enforced.<sup>195</sup>

Administrative subpoenas also are limited. While an agency can "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,"<sup>196</sup> its investigative power is cabined to avoid abusive investigations. Courts, for instance, will enforce an administrative subpoena only "if: (1) the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome."<sup>197</sup>

Under the statutory schemes authorizing almost all administrative subpoenas, moreover, the recipient of a subpoena may obtain pre-en-

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<sup>194</sup> See, e.g., *Leon*, 468 U.S. 897.

<sup>195</sup> Federal grand juries are composed of sixteen to twenty-three ordinary citizens from the judicial district in which the grand jury is summoned. See FED. R. CRIM. P. 6(a); 1 WRIGHT & LEIPOLD, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 4TH § 102 (2008). Furthermore, the grand jury's power to subpoena witnesses and documents is widely recognized as quite expansive. See FED. R. CRIM. P. 6(a); 1 WRIGHT & LEIPOLD, *supra* note 195, § 104. Even so, the grand jury "is a constitutional fixture in its own right," and it "belongs to no branch of the institutional government, [instead] serving as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992). But see 1 WRIGHT & LEIPOLD, *supra* note 195, § 104 (citing cases describing the central role of the prosecutor in grand jury investigations). The subject of a grand jury subpoena *duces tecum* may obtain pre-enforcement judicial review of the subpoena by moving to quash it under Rule 17 of the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 17(c)(2); 2 WRIGHT & LEIPOLD, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 4TH § 276 (2008).

<sup>196</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

<sup>197</sup> *Burlington N. R.R. v. Office of Inspector Gen.*, 983 F.2d 631, 638 (5th Cir. 1993). Accord *Morton Salt Co.*, 338 U.S. at 652; *Winters Ranch P'ship v. Viadero*, 123 F.3d 327, 329 (5th Cir. 1997). Under the relevance prong of this inquiry, information can only be subpoenaed if it is relevant to the specific function of the subpoenaing agency. For example, the Department of Defense Inspector General can only subpoena information relevant to the discharge of duties concerning that Department. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *United States v. Oncology Servs. Corp.*, 60 F.3d 1015, 1020 (3d Cir. 1995); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). The vast amount of public discourse beyond those confines is immune from this process. As to the undue burden inquiry, although the burden itself is on the recipient of the administrative subpoena, and reasonableness is assumed, courts will quash or modify subpoenas that clearly transgress reasonable limits. *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977) (en banc); *In re FTC Line of Bus. Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978). Courts will carefully review subpoenas to ensure that privilege is protected. See *United States v. Legal Servs.*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001). And they will, if necessary, enter appropriate protective orders to preserve the confidentiality of sensitive material. See, e.g., *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650-51 (5th Cir. 1999).

forcement review. In nearly all cases, an agency cannot enforce an administrative subpoena directly, but must first seek a federal court order to enforce the subpoena, and then if necessary, a finding of contempt from the federal court.<sup>198</sup>

In sum, the Executive Branch maintains powerful investigative tools, but it also must bear external checks on its ability to intrude into the affairs of private citizens, including pre-enforcement judicial review and the grand jury participation of ordinary citizens.

## 2. Broad Congressional Investigative Powers

In contrast with the Executive Branch, there are almost no pre-enforcement checks on the power of Congress to investigate via a compulsory process. As long as a congressional subpoena falls within the “legitimate legislative sphere” of Congress, federal courts will refuse to enjoin Members of Congress or committees from enforcing the subpoena.<sup>199</sup> As the Supreme Court has explained, “[t]he 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>200</sup> Given the dramatic expansion of congressional power in the twentieth century, the “legitimate legislative sphere” includes an enormous swath of activity.<sup>201</sup>

Unlike traditional investigative tools of the Executive Branch, there is no pre-enforcement external check on a congressional subpoena that is issued pursuant to a valid legislative purpose. Congressional subpoenas are not typically subject to preemptive challenges, but rather can only be challenged in defense to a civil enforcement action, defense to a criminal contempt prosecution, or on habeas in the case of confinement by order of a chamber of Congress. The Supreme Court was clear on this point in *Eastland v. United States Servicemen’s Fund*.<sup>202</sup>

There, the Court dismissed a lawsuit seeking to enjoin enforcement of a congressional subpoena and a declaration that the subpoena was invalid as barred by the Speech or Debate clause.<sup>203</sup> The Court began its analysis by noting that Speech or Debate is an absolute bar to any judi-

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<sup>198</sup> See, e.g., *Legal Servs.*, 249 F.3d at 1080; *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1143–44 (D.C. Cir. 1987).

<sup>199</sup> See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503–13 (1975).

<sup>200</sup> *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Eastland*, 421 U.S. at 504 n.15; see *supra* Part I.A.

<sup>201</sup> See CONGRESS’S CONTEMPT POWER, *supra* note 34, at 54–56; see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012) (describing Congress’s expansive authority).

<sup>202</sup> 421 U.S. 491.

<sup>203</sup> *Id.* at 496, 501.

cial interference with Members “acting within the ‘legitimate legislative sphere.’”<sup>204</sup> The Court then held that:

The issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking; without it our recognition that the act ‘of authorizing’ is protected would be meaningless. To hold that Members of Congress are protected for authorizing an investigation, but not for issuing a subpoena in exercise of that authorization, would be a contradiction denigrating the power granted to Congress in Art. I and would indirectly impair the deliberations of Congress.<sup>205</sup>

As a consequence, the Senate, its Members, and its staff were found to be immune to a lawsuit questioning the issuance of the subpoena and an action to enjoin the enforcement of the subpoena (or to have it declared unlawful) could not be maintained.<sup>206</sup>

Conversely, the Court explained that a congressional subpoena is reviewable in the context of enforcement actions because there, “[a]ny interference with congressional action had already occurred when the cases reached us, and Congress was seeking the aid of the Judiciary to enforce its will.”<sup>207</sup> So too review can occur through a habeas action because there, the Writ operates not against Congress or its Members, but upon the body of the petitioner to vindicate his rights.<sup>208</sup> While the subject of a congressional subpoena may raise a number of challenges to its enforcement after being cited for contempt,<sup>209</sup> the decision to not comply with a congressional subpoena and face possible imprisonment is a risky one.

The courts have broadly and repeatedly applied this principle.<sup>210</sup>

<sup>204</sup> *Id.* at 503 (internal citation omitted).

<sup>205</sup> *Id.* at 505.

<sup>206</sup> *Id.* at 492–93, 501, 507.

<sup>207</sup> *Id.* at 509 n.16.

<sup>208</sup> *See, e.g.,* *McGrain v. Daugherty*, 273 U.S. 135, 150, 177 (1927).

<sup>209</sup> *See* CONGRESS’S CONTEMPT POWER, *supra* note 34, at 62–68 (noting potential challenges on various constitutional grounds).

<sup>210</sup> *See, e.g.,* *McSurely v. McClellan*, 553 F.2d 1277, 1296–98 (D.C. Cir. 1976) (en banc) (indicating that the “Subcommittee’s issuance of subpoenas is privileged activity” under the Speech or Debate clause and cannot be questioned even though the basis for the search was an illegal search), *cert. granted*, 434 U.S. 888 (1977), *cert. dismissed as improvidently granted sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978); *Nelson v. United States*, 208 F.2d 505, 513 (D.C. Cir. 1953) (“Though a court can no more enjoin a congressional committee from making an unconstitutional search and seizure that it can enjoin Congress from passing an unconstitutional bill, a court does have the power and duty to deny legal effect to either in an action before it.”). That said, there is language in *Eastland* which suggests that the Speech or Debate Clause would not bar an action to invalidate a congressional subpoena if Congress were engaged in specific conduct that was not “essential to legislating,” and accordingly outside of the Speech or Debate Clause’s protection. This language further suggests that spe-

The only arguable judicially recognized exception to this principle is an application of the *Perlman* doctrine.<sup>211</sup>

Even if one decides to roll the dice and challenge a congressional subpoena as a defense in a criminal enforcement proceeding, the constitutional restrictions on congressional subpoenas are more limited than those on traditional Executive Branch investigatory tools. For example, while the Fourth Amendment's protections against overly broad subpoenas may apply to congressional subpoenas, this protection only bars a committee from issuing process that manifestly lacks in congruence and proportion to the inquiry under way. If the committee issuing a subpoena defines its legislative inquiry broadly enough, it appears unlikely that a court would declare the subpoena in violation of the Fourth Amendment.<sup>212</sup> Given the enormous range of valid legislative inquiry

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cific conduct which would fall within a class of conduct deemed "essential to legislating," could nonetheless be deemed not "essential to legislating" by virtue of its manifest illegality. *Eastland*, 421 U.S. at 508.

<sup>211</sup> In *Eastland*, the subpoena sought information from a third-party bank. Plaintiffs sought an injunction not only against the government defendants, but also against the bank to enjoin production. Because the bank was never served, that portion of the action was rendered moot. *Eastland*, 421 U.S. at 495 & n.4. However, Justice Marshall, writing for himself and Justices Brennan and Stewart, concurred in the judgment and took pains to suggest that because the Speech or Debate Clause was entirely personal to Congress and its members, a suit to enjoin a third party from the act of production would not be barred by Speech or Debate: "[T]he District Court properly entertained the action in order to provide a forum in which respondent could assert its constitutional objections to the subpoena, since a neutral third party could not be expected to resist the subpoena by placing itself in contempt." *Id.* at 514 (citing *Perlman v. United States*, 247 U.S. 7, 12 (1918)). In *United States v. AT&T*, the United States sued to enjoin AT&T from complying with a Senate subpoena seeking records of AT&T's participation in a government warrantless surveillance plan. 567 F.2d 121 (D.C. Cir. 1977). The United States asserted that the records subpoenaed implicated national security and were subject to valid claims of executive privilege. *Id.* The D.C. Circuit granted a pre-enforcement injunction against the enforcement of the congressional subpoenas, reasoning that "[t]he fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena." *Id.* at 129. Importantly, the court in *AT&T* endorsed only a limited exception to the general rule. *Id.* At its broadest, it tracks *Perlman* and allows a third party to bring a pre-enforcement action to allow it to assert a claim of constitutional right or privilege. *Id.* Read more narrowly, the decision is limited to its facts: the action was allowed in order to facilitate a claim of executive privilege. See *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983) (suggesting such a narrow reading).

<sup>212</sup> See *McPhaul v. United States*, 364 U.S. 372, 382 (1960) (noting a broad committee inquiry and stating that "the permissible scope of materials that could reasonably be sought was necessarily equally broad"); *Watkins v. United States*, 354 U.S. 178, 187-88 (1957) (noting that there "is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress"); *Shelton v. United States*, 404 F.2d 1292, 1300-01 (D.C. Cir. 1968); CONGRESS'S CONTEMPT POWER, *supra* note 34, at 64-65. Note also that an objection on the basis of overbreadth should be raised to the investigating committee to give it an opportunity to respond and possibly tailor its subpoena more precisely. *McPhaul*, 364 U.S. at 382; *Shelton*, 404 F.2d at 1299-1300; CONGRESS'S CONTEMPT POWER, *supra* note 34, at 65.



and the courts' reluctance to question an investigating committee's motives,<sup>213</sup> a Fourth Amendment overbreadth challenge does not seem to be a strong defense for a target of a congressional investigation.

### 3. The Growing Executive Branch Role in Congressional Investigations

Congress's broad investigative powers, when combined with the Executive Branch's growing role in congressional investigations, present potential concerns about the erosion of traditional safeguards that protect personal liberties.<sup>214</sup>

Recent investigations by the Department of Justice that rely upon the results of congressional inquiries portend the danger of an increasing reliance on Congress's wide-ranging powers to gather information. Clever investigators might be able to take facts and data gathered by a congressional committee and use that information to file civil or criminal charges that otherwise would have been impossible to file if they had only to rely on information-gathering tools subject to traditional restrictions on search warrants and grand jury subpoenas.<sup>215</sup> Thus, given the unique risks facing the targets of congressional investigations, one must tread carefully following receipt of a congressional subpoena.

#### C. *Practice Pointers for the Changing Congressional Enforcement Landscape*

In light of the foregoing developments, individuals and corporations should respond to congressional investigations—especially those conducted by committees or subcommittees with an investigative mandate—with appropriate care. While congressional investigations vary considerably and no single prescription works in all cases, in the following subsections we suggest approaches worthy of consideration in the context of many if not most congressional investigations.

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<sup>213</sup> See, e.g., *Watkins*, 354 U.S. at 200–01; *Shelton*, 404 F.2d at 1301.

<sup>214</sup> In a somewhat related context, a number of scholars have examined the dangers of Congress inserting itself into open criminal investigations. See, e.g., Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1591–93 (2002); Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1438, 1447 (2002). Todd Peterson has also argued that the Constitution's separation of powers "requires prosecutorial independence from both the lawmaking and the adjudicative functions," and that Congress cannot constitutionally require the Executive Branch to prosecute a criminal contempt citation. Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 612 (1991).

<sup>215</sup> A recent article has highlighted potentially similar threats posed to personal liberties by law enforcement entities utilizing the information-gathering powers of administrative agencies. Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77 (2013).

### 1. Seek Advice

Because a congressional investigation is a legal proceeding, it is advisable that individuals and corporations subject to such an investigation obtain counsel experienced in that field. That counsel should have ultimate responsibility for the response to any congressional inquiry, albeit in close consultation with government and media relations teams. And within a corporation, the response should be run through the general counsel's office. The rationale for this is simple: the key steps of a congressional investigation present a high risk of criminal or civil legal exposure (as opposed to merely media or political exposure). Lawyers are trained to review documents for privilege and produce them in response to subpoenas. Lawyers also defend depositions (or de facto depositions in the form of transcribed interviews), prepare witnesses to testify, and, if necessary, interject legal objections during testimony.

At the same time, lawyers should not formulate strategies for congressional investigations in isolation. The most successful strategies are created through the collaborative thinking of government affairs, media relations, and legal teams. Although a congressional investigation is a legal matter, it plays out under political rules. Accordingly, counsel must have the ability to seamlessly integrate traditional legal representation with an awareness of the political environment.

### 2. Employ Multi-Disciplinary Teams

The attorneys leading the response to a congressional investigation should include a multi-disciplinary team that can call on relevant subject matter experts. In light of the increased tendency of the Executive Branch to build on congressional probes, the response to any congressional inquiry should anticipate possible Executive Branch actions. For example, in an investigation involving alleged Medicare overcharges, any response must fully consider the possibility of a civil or criminal False Claims Act proceeding down the road. Given the specialization of this area of law, False Claims Act experts should be integrated onto the team so that the response can minimize downfield exposure by anticipating and proactively addressing likely Executive Branch moves.

### 3. Protect Privilege and Work Product

It is also critical in responding to a congressional investigation to preserve the attorney-client privilege and work product doctrine.

Congress takes the position that it does not have to recognize the attorney-client privilege and work product doctrine, and it does not al-

ways do so.<sup>216</sup> Moreover, to the extent the Executive Branch is building on a congressional investigation, it may seek to impose a privilege waiver. And Executive Branch attorneys would likely be able to do so before an Article III court with minimal countervailing political or public pressure. To take a famous example, Independent Counsel Kenneth Starr successfully sought to depose White House attorneys regarding their response to a HOCR investigation into the very same subject matter Starr was investigating.<sup>217</sup> Moreover, it is not difficult to foresee a prosecutor attempting to impose a privilege waiver not only to obtain the defense playbook, but also to render defense counsel a witness in order to conflict them out of any further representation.<sup>218</sup>

To protect against these sorts of scenarios, a congressional investigations response team should be led internally by the general counsel's office, and externally by counsel. Any third-party media or government relations consultants should work for, and at the direction of counsel, and should do so in accordance with the guidance that applicable case law provides on the preservation of privilege.<sup>219</sup>

With regard to preparing for congressional hearings, counsel should be present and knowledgeable of the attorney-client privilege. If any part of the preparation for a congressional hearing occurs without an attorney present (or without an attorney directing and supervising the preparation), that portion of the preparation may not be protected by either the attorney-client privilege or the work product doctrine and may be discoverable, be it by a congressional committee or by the Executive Branch. If an attorney is present and involved in a particular aspect of witness preparation, the presence of a third party during a communication between a lawyer and a client may destroy the attorney-client privilege, unless that third party is assisting the lawyer in providing legal advice.<sup>220</sup> In such a case, the preparation session may be discoverable in its entirety

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<sup>216</sup> Hamilton, *Congressional Investigations*, *supra* note 2, at 3; Timothy Noah, *Corporate Watchdog*, NEWSWEEK, Apr. 20, 1987, at 50; Rochelle L. Stanfield, *Big John's Preserve*, NAT'L J., May 16, 1987, at 126. To be sure, the refusal to recognize privilege was met with considerable backlash. It was a course of conduct that required the expenditure of considerable political capital.

<sup>217</sup> *In re Grand Jury Subpoena*, 112 F.3d 910, 924 (8th Cir. 1997).

<sup>218</sup> Cf. William E. White & Heather J. Pellegrino, *Disqualifying Counsel: A New SEC Enforcement Tactic?*, LAW360 (Aug. 17, 2010), <http://www.law360.com/articles/187839/disqualifying-counsel-a-new-sec-enforcement-tactic> (discussing comments by SEC personnel about potential conflicts of interest for counsel representing multiple clients participating in the SEC's "new SEC cooperation program" and an SEC motion in a case to "disqualify defense counsel" because "[o]ne law firm was acting as counsel to all four respondents").

<sup>219</sup> See generally Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5.

<sup>220</sup> Bopp & Lay, *The Availability of Common Law Privileges*, *supra* note 5, at 908–09. Of course, if an attorney controls the direction of an investigation undertaken for a legal purpose, it is presumptively privileged. See, e.g., *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).

unless the attorney's comments are protected by the work product doctrine. But the work product doctrine may not apply in a congressional investigation (and in any event it is not absolute), so preservation of the attorney-client privilege can be crucial.<sup>221</sup>

For example, the target of a congressional investigation would not want to produce a consultant's frank appraisal of hot documents; nor would a chief executive officer want documents showing an attorney's advice about how to answer certain questions be produced prior to the CEO's testimony. And imagine the company that is forced to disclose that counsel believes the conduct under investigation may have constituted a criminal or civil offense. Though few congressional committees may have the resources to create a record and legal argument to justify the imposition of a privilege waiver, in the end, that option may be available to them.

#### 4. E-Discovery

In today's digital world, congressional investigations increasingly involve a great deal of electronic discovery. Accordingly, any team responding to an inquiry involving documents should include electronic discovery experts. Moreover, careful attention must be paid to the fact that there are a number of ways in which electronic discovery before Congress is *sui generis*. Most notably, there are no rules regarding electronic discovery and Congress, although many committees provide "production instructions," which occasionally answer some of these questions (e.g., what media must be collected). Practitioners are left to guess at what duties arise when Congress places a client under a document request or a subpoena. For example, does a voluntary letter request trigger

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<sup>221</sup> The scant authority regarding whether the work product doctrine applies to materials prepared in anticipation of a congressional investigation is split on the critical question of whether a congressional investigation is an adversarial proceeding sufficient to render work created in "anticipation of litigation." The Restatement states that "'Litigation' . . . includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. h (AM. LAW INST. 2000). But as the Eighth Circuit noted in rejecting—albeit on other grounds—the argument by Hillary Clinton and the White House that materials prepared in anticipation of congressional hearings regarding Whitewater were covered by the work product doctrine, "[n]either the White House, Mrs. Clinton, nor the Restatement cites any authority for this proposition . . . and [the court] ha[s] discovered none." *In re Grand Jury Subpoena*, 112 F.3d 910, 924 (8th Cir. 1997). The few cases suggesting that a congressional investigation constitutes litigation do so in passing and with no analysis. See, e.g., *In re Trasyol Prods. Liability Litig.*, No. 08-1928-MDL, 2009 WL 2575659, at \*4 (S.D. Fla. Aug. 12, 2009); *United States v. Davis*, 131 F.R.D. 391, 405–06 (S.D.N.Y. 1990). Further, the proposition that the work product doctrine is not absolute is well established. See FED. R. CIV. P. 26(b)(3)(A) (noting that attorney work product may be discoverable if the party seeking the discovery "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means").

a preservation obligation? What level of forensic detail is required in collection? What types of media must be collected? What types of media can be excluded from collection based on burden? All of these questions lack a clear answer before Congress. But if one guesses wrong in answering one of these questions, he or she could end up charged either by Congress—or more likely by the Executive Branch—with contempt or violations of 18 U.S.C. §§ 1001 and 1505.

A good approach is to assume, until instructed otherwise, that the same rules for federal criminal and civil litigation in federal court apply to a congressional document request or subpoena. The Executive Branch (or Congress) would be hard pressed to prosecute someone who scrupulously adhered to the rules laid down by the very Article III judges presiding over the prosecution.

In line with this recommendation, the usual care should be taken to issue appropriate litigation holds, to conduct due diligence in document collection, and to preserve normal and appropriate mediums. This can be an intrusive and expensive process, but these concerns can often be ameliorated through negotiations with Congress to reduce the discovery burden. A detailed discovery plan drafted by experienced electronic discovery attorneys can often go a long way in getting Congress to reduce the discovery burden.

## 5. Write Carefully and Review Diligently

In the wake of recent Executive Branch prosecutions, individuals and companies subject to congressional investigations must use extreme care in responding to Congress—whether in writing or in oral testimony. Any statements of fact must be carefully drafted to ensure that they are accurate and will not be contradicted by a later document. And statements should account for accusations of misleading by omission. Counsel should carefully vet every written document and extensively prepare each witness with these points in mind.

As a corollary, if possible, extensive diligence should be exercised to ensure that statements will not be undermined by subsequent discovery. While it may be tempting to think that little preparation is required to withstand a five-minute cross-examination by a Member of Congress, that mentality can bear disastrous consequences.

To be sure, because Congress is a political entity, it is beholden to the news cycle, and it often demands information on a timeframe that does not allow thorough preparation. In such cases, it is prudent to lay a record that clearly reflects that the target is not prepared to respond because it is completing its internal diligence. If Congress nonetheless insists on a response or live testimony, that response or testimony should

be caveated to reflect the fact that it is being provided without the proper diligence and is subject to change.

#### CONCLUSION

Congressional investigations can pose challenges that extend beyond the confines of Congress, not only as a product of the subject matter under investigation, but also as a result of the way in which investigative targets respond to the inquiry. If a committee conducting an investigation believes that a witness has not responded forthrightly or has misled the committee, it could refer the matter to Executive Branch enforcement authorities. More daunting, however, is the possibility that the Department of Justice or another agency could prosecute a witness in a congressional investigation without a referral. That the Executive Branch seems to increasingly view congressional investigations as potential sources of charges to bring in high-profile prosecutions counsels caution. Subjects of congressional investigations thus should resist the long-held view that absent extraordinary circumstances, a congressional investigation is an exercise in governmental relations. It is not. It is a legal proceeding that plays out in a high-profile political setting and should be treated accordingly.