

Understanding and Confronting the Current Executive Challenges to Effective Congressional Investigative Oversight

By Morton Rosenberg

1. Defining the Problem: Over the last decade the Executive has successfully obstructed Congress's investigative oversight capabilities. Contrary to the long recognized legal and practical understanding that Congress, acting as a body or through its committees, has the virtually absolute constitutional power, and responsibility, to make and enforce information access demands to the executive branch it deems necessary to accomplish its legislative duties, and its establishment of rules, tools and support mechanisms to identify, analyze and effectively utilize such sought after information, the Justice Department has executed a thus far uncontested strategy of compelling committees to seek judicial assistance in order get compliance with their document and testimonial subpoenas by civil court legal proceedings. It has done this by declaring that Congress's resort to its historic self-protective mechanisms of criminal and inherent proceedings are unconstitutional. The demonstrable consequence of this stratagem has been the crippling of the legislature's information gathering authority and thereby undermining its core, constitutionally-mandated legislative function. Litigation takes time and risks aberrant judicial rulings, both of which have occurred.

The uncertainty of whether committees can impose timely, meaningful consequences for delays or outright refusals with legitimate information demands has fostered an environment of agency slow-walking and encouraged the assertion of dilatory, non-constitutional privileges. The failure to challenge such a blatant Executive usurpation reflects an abnegation of institutional integrity and will. While Congress cannot expressly abdicate its core constitutional responsibilities, by inaction or acquiescence it can be effectively ceded elsewhere. That would be intolerable.

2. Congress's Right of Access to Executive Information: The constitutional basis of Congress's virtually plenary oversight and Investigative powers is irrefutable. The Supreme Court has consistently recognized that to perform its

core constitutional authorities, Congress can and must acquire information from the President and the departments and agencies of the Executive Branch. An inquiring committee need only show that the information sought is within the broad subject matter of its jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern in order to present an enforceable information demand. The structure of our scheme of checks and balances rests on the principle that Congress has the right to know everything that the executive is doing, including all policy choices and all successes and failures in the implementation of those policies. The Supreme Court has made it clear that Article I presupposes Congress's access to such information so it can responsibly exercise its obligation to make laws requiring or limiting executive conduct, to fund the programs of which it approves, to deny funds to those policies it disapproves, and to pursue investigations of executive behaviors that raise concerns. It has stated that without knowledge of the policy choices and activities of the Executive Branch, which are often unavailable unless provided by the Executive, Congress cannot perform those duties the Framers envisioned. In support of that understanding, the High Court and lower Federal courts have approved practices and processes Congress has adopted for the conduct of its oversight and investigative inquiries that do not accord witnesses with the entire of the panoply of procedural rights enjoyed by witnesses in adjudicatory proceedings, as well as institutional self-protective mechanisms, such as punitive inherent and statutory criminal contempt proceedings, all of which are intended to encourage and support the necessary expeditious gathering of information for legislative purposes from officials and private parties. The Supreme Court's seminal 1927 ruling in *McGrain v. Daugherty*, which set the broad parameters of contemporary congressional oversight, made it clear it applied to the most sensitive activities of any agency, including the Justice Department.

3. Remedial Actions Available to Congress: Despite the High Court's consistent recognition of the breadth of Congress's authority to access information about executive activities, the enduring lesson of successful past congressional oversight inquiries is that committees must establish their

credibility with the White House and the executive departments and agencies they wish to oversee early, often and consistently, and in a manner evoking respect, if not fear. Thus, although standing and special committees have been vested with a formidable array of rules and tools to support their powers of inquiry and have developed over time an efficacious, nuanced staged investigatory process, one that proceeds from one level of persuasion or pressure to the next to achieve a mutually acceptable basis of accommodation with the executive, it has been absolutely critical to the success of such endeavors that there be a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. In the past that threat has been the possibility of a citation of an official for criminal contempt of Congress or a trial at the bar of a House --so-called inherent contempt-- either of which could result in imprisonment and/or monetary fines.

Inherent contempt was utilized in the earliest days of the Republic and was recognized by the Supreme Court as a constitutionally valid and essential institutional self-protective mechanism in 1821 and several times thereafter. Indeed, the landmark *McGrain* ruling in 1927 arose from an inherent contempt proceeding. In 1857 Congress added a statutory contempt process as a supplement to the inherent contempt mechanism, making it clear that both were designed to cover the obstructive activities of executive branch officials. Inherent contempt was successfully utilized until 1935 when it was displaced in favor of criminal contempt because it took too much floor time.

In 1975, oversight committees, resting on 150 years of historical practice and judicial recognition of the inherent constitutional authority to protect itself from nonmember assaults on its prerogatives, revived the prevailing threat that a refusal to comply with a congressional information gathering subpoena could result in a citation for criminal contempt of Congress with potential jail time and fines. There is little doubt that such threats were effective until at least 2002. In particular, between 1975 and 1998 there were 10 votes to hold cabinet level officials in contempt at the subcommittee, full committee and House floor levels. All resulted in complete or substantial compliance with the information demands at issue without the need to proceed to trial. It can be said that the

threat those instances established was so credible that until 2002 even the mention of a subpoena was often sufficient enough to move an agency to an accommodation.

Thus far neither House has acted to challenge the legal substantiality of the Justice Department's tactic and the apparent acceptance of that stance that it cannot use its contempt powers has essentially mooted what were once credible threats to agency officials and has spurred agency reluctance to timely compliance. There is little incentive to do so now that agencies understand that their refusals will require committees to seek court enforcement of their, which they know they are wont to do.

There are certainly viable options that the House can consider. It could create a mechanism on the model of the now-expired Independent Counsel which eliminates the problems raised by the original by imposing limits on the length, cost and scope of the expired version. But that would require passage of a law which is unlikely to be signed by any president.

A second option would be to promulgate under the House's rule making authority a more "seemly" inherent contempt process, one that does not embrace arrest, detention or incarceration but establishes a speedy process with due process protections that results in hefty fines for the convicted contemnor and appropriations consequences for the agency. A model for such a rule is attached.

A third option, which would not be preclusive of a revised inherent contempt proceeding, would be a legal challenge contesting the validity of DOJ's assertion that a criminal contempt assertion is violative of the president's duty to "take care that the laws are faithfully executed" and his constitutional status as the executive branch's chief law enforcer. But, to the contrary, it may be argued that since the Supreme Court has ruled in an analogous situation that district court judges who have found a person in contempt of court are permitted to appoint a nongovernmental attorney to prosecute the alleged contemnor as a legitimate institutional protective mechanism, such judicial appointments may appropriately be sought in situations where the institutional integrity of the

legislature is involved. Subsequently, the Supreme Court in *Morrison v. Olson* cited that ruling approvingly in upholding the authority of a court to appoint independent counsels and also ruled that prosecutorial discretion was not a core presidential power. A substantial argument can now be made that the only ground available to the Justice Department when faced with a House criminal contempt citation, which is a constitutionally-based congressional self-protective right analogous to what a court can do, is that it would present a conflict of interest situation and that in light of DOJ's rules with respect to such conflicts a court could be asked to order DOJ to appoint a special counsel pursuant to its own rules. It may be noted that the Supreme Court has ruled that inherent and criminal contempt can be conducted simultaneously or in seriatim without raising double jeopardy questions.