

Good Government Now

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Summary of Proposed Rule on Information Requests and Subpoenas

The proposed rule establishes orderly and efficient processes for administration of congressional information requests and subpoenas, resolution of executive branch objections and assertions of privilege, and imposition of sanctions on executive branch recalcitrance that make management of these issues easier for committee chairs and members. Key features of the rule, authored by former House senior legal counsel Michael L. Stern, include:

- 1) **Deadlines** - Establishes a consistent institutional policy on deadlines for executive branch responses to congressional information requests
- 2) **Written Objections** - Requires executive branch officials to assert all objections to information requests, subpoenas, compliance orders and assertions of privilege in writing and in a timely manner
- 3) **Negotiation** - Establishes an orderly, consistent, and effective system for early resolution of information disputes through *negotiation, primarily at the staff level*
- 4) **Subpoenas and Committee Rulings** - Provides a structured process for responding to subpoenas and for committees to rule on objections or assertions of privilege at the agency level
- 5) **Executive Privilege Accountability** - Requires assertions of executive privilege to be made by the president personally and in writing
- 6) **Enforcement Mechanisms** - for Disputes that Cannot be Resolved through Negotiation or Committee Ruling:
 - (a) **Civil enforcement action in federal court** - applies to disputes where there has been a clear procedural default by the executive and/or the president has declined to assert executive privilege
 - (b) **Congressional remedies** - can be used in addition or as an alternative to court enforcement. These include:
 - (i) **points of order against appropriations for the agencies, offices or sections** of executive officials responsible for withholding information from Congress.
 - (ii) **initiating impeachment inquiries** if the conduct of senior responsible executive branch officials warrants
 - (c) **All other statutory, constitutional or other remedies are preserved.**

Six Advantages of the Proposed Rule on Information Requests and Subpoenas

- 1) **Congressional Control of Calendar** - Forces the executive branch to act on congressionally-mandated timetables, not their own, thereby preventing federal officials from “slow walking” congressional information requests unaccountably.
- 2) **Imposes Political Accountability on Executive Branch** - Holds the president and executive

branch politically accountable for assertions of executive privilege and withholding information by requiring the president to take personal responsibility for these actions formally in writing.

- 3) **Discourages Delaying Tactics and Meritless Objections** - Discourages executive branch officials from using vague, specious or obstructive assertions of executive privilege or other objections to withhold information from congress or as delaying tactics by requiring federal officials to submit all such claims in writing and subjecting them to scrutiny in a disciplined, formal, consistent process.
- 4) **Reduces Asymmetric Burdens on Congressional Committees and Chairs** - Under current practice, executive agencies can take advantage of the unstructured nature of congressional information requests and subpoenas to impose on the limited time of committee chairs and members, while the same matter is dealt with well below the level of top agency leadership. This rule will ease the burden on committees and committee chairs to administer information requests and subpoenas by enabling them to employ regularized procedures rather than continually having to confront difficult contingencies with ad hoc remedies case by case.
- 5) **Uses Courts to Enhance Congressional Capacity without Sacrificing Institutional Interests** - courts are well positioned to enforce congressional subpoenas when there is no fundamental dispute over Congress's constitutional authority. However, in cases where the president has raised a constitutional privilege, Congress should not empower courts to become an arbiter between the political branches. In those cases Congress must depend on its own constitutional powers to defend its institutional prerogatives vis a vis the executive branch.
- 6) **Improves Efficiency** - Creates efficiencies in administrative processes that will reduce the time and effort necessary to accomplish oversight and investigative tasks as relevant organizational routines are developed and refined.