



## The Case for Direct Appointment by the House of Outside Counsel to Prosecute Citations of Criminal Contempt of Executive Branch Officials Morton Rosenberg and William J. Murphy

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### Abstract

*Since 2006 the House of Representatives has inexplicably acquiesced in a Justice Department strategy that has successfully obstructed the ability of committees to enforce subpoena demands for documents and testimony relevant to the exercise of their legitimate, constitutionally-based legislative responsibilities. This obstructive scheme has escalated steadily over the last thirteen years and apparently reached its apogee with the President's actualization of his blanket threat to ignore any congressional investigative oversight demands he disfavors. This strategy rests solely upon opinions of the Department's Office of Legal Counsel (OLC) that deny the constitutional authority of either House of Congress to invoke the historically recognized coercive and punitive enforcement processes of inherent and criminal contempt against Executive Branch officials who have been instructed by the President to claim executive privilege in response to congressional information gathering demands. These OLC opinions, however, are faulty and, in most respects, present deliberately false and misleading fabrications of constitutional law, history and practice. They erroneously assert: (1) that a U.S. Attorney is not required to refer a criminal contempt citation to a grand jury as a function of prosecutorial discretion, implying that civil litigation is the sole route for congressional subpoena enforcement; (2) that the 1857 criminal contempt of Congress legislation enacted to support congressional subpoena enforcement was never intended to apply to executive branch officials; (3) that the Executive is vested with exclusive discretion to determine whether to prosecute violations of law which prohibits the Legislative and Judicial Branches from directly interfering with that discretionary authority; and (4) that the very threat of criminal contempt against an agency official would be unconstitutional because it would unduly chill the President's ability to effectively protect presumptively privileged executive deliberations. The failure to challenge these extraordinary OLC assumptions and the multi-decade campaign of executive branch subversion of legislative authority they have supported has deprived Congress access to its two historically most effective mechanisms for subpoena enforcement, inherent and criminal contempt. That has resulted in the loss of any credible threat of meaningful personal punishment for subpoena noncompliance, and forced committees to seek judicial assistance in dilatory civil enforcement actions that risk aberrant judicial decisions to gain compliance with their enforcement demands. The further consequence of this obstructive tactic has been the fostering of an almost universal environment of agency slow-walking, or blatant noncompliance, crippling the House's information gathering authority, thereby undermining its constitutionally mandated legislative function.*

*The House of Representatives should challenge this obstructive executive branch stratagem with the powerful combination of heavy personal fines for subpoena non-compliance imposed through a modified inherent contempt process coupled with the authority of direct appointment by the Speaker of outside counsel to prosecute criminal contempts should the coercive monetary penalties prove insufficient. This integrated enforcement process can be established through the exercise of the House's internal rulemaking authority either by amending House rules or the adoption of a House resolution. A close examination of over two centuries of legislative actions and judicial endorsements leads to the indubitable conclusion that each House of Congress is vested with inviolable inherent institutional self-protective powers that may not be intruded upon or obstructed by actions of the Executive or Judicial branches nor abandoned by either House, and is not subject to the presidential pardon authority. It is a "core" power emanating from British parliamentary, colonial and early post-revolutionary state usage that was adopted and put into practice by the first Congresses in recognition of its necessity as a vital adjunct to the accomplishment of its legislative responsibilities. Broad Supreme Court approval of the inherent contempt process was quickly forthcoming and soon complemented by the addition of a supplemental criminal contempt alternative that has also received High Court validation. Over the years, the combination of the threats of inherent and criminal contempt proved demonstrably effective in eliciting compliance with information demands from nonmembers, including Executive Branch officials.*

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*This article will focus on the validity of the second element of this proposal, the direct appointment of prosecuting attorneys by either House of Congress to vindicate the necessary, indispensable exercise of legitimate legislative authorities and responsibilities. Two hundred years of constitutional recognition and practice give it an indisputable place as one of the key elements of our Founders scheme of separated powers, a quintessential example of constitutional originalism. We will examine four critical historical reference points that totally undermine and refute the current obstructive stance of the Executive Branch that attempts to preempt Congress’s core constitutional authority and responsibility to inform itself to effectively accomplish its legislative mission and fully supports the remedial policy recommendations presented herein including: (1) the foundation era from 1789 to 1857, (2) the period surrounding the Department of Justice Act of 1870, (3) the Tea Pot Dome scandal of the mid-1920s, and (4) the Reagan Administration attack on oversight authority. We conclude that the current, and likely continued, uncertainty of the House’s information gathering authorities demands a constitutional confrontation. It must act with urgency to reclaim its fundamental institutional prerogatives, restore effective oversight, and neutralize the illegitimate Justice Department policies and practices intended to prevent it from employing its historically recognized, essential and demonstrably successful contempt enforcement powers.*

## Table of Contents

I. Introduction: Understanding the Urgent Need to Confront the Current Executive Challenge to Effective Congressional Oversight and How to Do It .....	3
II. Foundation Period Understandings and Early Precedents (1789-1857) .....	11
1. <i>Congress Asserts Control Over Executive Conduct of Federal Law Enforcement and Provides a Minimal Role for the Office of Attorney General</i> .....	11
2. <i>Congress’s Early and Definitive Assertion of Its Investigative Authority and the Power to Enforce Its Information Demands Against Executive Officials</i> .....	15
3. <i>The Early Recognition of Inherent and Criminal Contempt as Constitutionally Indispensable Institutional Self-Protective Processes</i> .....	17
4. <i>Congress’s Understandings in Establishing a Criminal Enforcement Procedure in 1857</i> .....	19
III. Establishing a Department of Justice (1861-1870) .....	25
1. <i>The Stymie of Congress’s Initial Attempt to Centralize Federal Law Enforcement</i> .....	25
2. <i>The Inexorable Road to the 1870 Reform Act: History and Context Reflect Congress’s Continuation of Its Consistent Actions to Protect Its Constitutional Prerogatives and to Limit Presidential Control of the Law Enforcement Process</i> .....	27
3. <i>The New Department of Justice: Expectations and Realities</i> .....	29
IV. The Lessons of the Teapot Dome Inquiry .....	31
V. Understanding the Origins of the Current Constitutional Impasse Over Congressional Subpoena Enforcement: The Reagan Administration’s Quest for Presidential Hegemony Over the Administrative Bureaucracy .....	33
1. <i>The Position of the Justice Department on the Use of Inherent and/or Criminal Contempt of Congress Against Executive Branch Officials: The Immediate Origins of the Olson and Cooper Memoranda</i> .....	34
2. <i>The Supreme Court Has Thus Far Rejected the Concept of a Unitary Executive</i> .....	40
3. <i>The Aftermath of Morrison</i> .....	43
VI. Conclusion .....	44

## I. Introduction: Understanding the Urgent Need to Confront the Current Executive Challenge to Effective Congressional Oversight and How to Do It

Any serious doubts as to whether Congress is facing a constitutional crisis have been removed by the President's actualization of his blanket threat to challenge and obstruct any and all committee subpoena demands for testimony and documents relevant to legislative oversight concerns that he disfavors. This extraordinary recalcitrance rests on a strategy developed by the Justice Department's Office of Legal Counsel (OLC) that denies the constitutional authority of either House of Congress to enforce the long recognized legal and practical understanding that, acting as a body or through its committees, it has the virtually absolute power, and responsibility, to make and enforce information access demands to the Executive Branch it deems necessary to accomplish its legislative duties. It can do so by means of the invocation of the institutional self-protective mechanisms of inherent and criminal contempt that require no statutory authority, which have been deemed constitutionally indispensable by numerous Supreme Court and appellate court rulings, that have been effectively utilized for over two centuries, and which are not subject to presidential pardon authority.

Inexplicably, since 2006, the House has, without challenge, acquiesced in that stratagem and has been compelled to seek subpoena enforcement assistance from the courts by filing civil enforcement suits. The demonstrable consequence of this response has been the crippling of the legislature's information gathering authority, thereby undermining its core, constitutionally-mandated legislative oversight function. Such litigation takes time, places the burden of proof of justification for its actions on the committee, and is subject to the risk of aberrant judicial rulings. A recent such suit, the Fast and Furious litigation involving the cover up of an unlawful federal agency gun-running scheme, lasted over seven and a half years from the commencement of the investigation, through a litigation process that resulted in questionable legal recognition of privileges heretofore rejected by congressional practice, and an appeal, before an ultimate unsatisfactory settlement was reached.

These delays and court rulings have encouraged widespread agency slow walking and outright refusals to honor committee information and testimonial requests, including demands accompanied by subpoenas. Agency officials understood there would be no effective contempt actions by thwarted committees. And that was before the current presidential blanket threat of noncompliance.<sup>1</sup>

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<sup>1</sup> The initial House forays seeking subpoena compliance, *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) and *House Committee on Oversight and Government Reform v. Holder/Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016) (Fast & Furious) and their consequences for effective oversight are related in Morton Rosenberg, "When Congress Comes Calling: A Study of the Principles, Practices and Pragmatics of Legislative Inquiry, 29-31

In a Washington Post Op-Ed<sup>2</sup>, Rep. Jamie Raskin, who sits on the House Judiciary Committee and has a recognized academic background in constitutional law and the separation of powers, insightfully explains that the common reference to the Congress, the Executive and the Judiciary as “co-equal” constitutional branches is a misnomer and misleading. They are, rather, coordinate institutions, with different powers and functions: “[Congress] is the exclusive lawmaking branch of our national government and the preeminent part of it. We set the policy agenda, we write the laws, and we can impeach judges and executives who commit high crimes misdemeanors against our institutions. As James Madison observed in the Federalist Papers, ‘In republican government, the legislative branch necessarily predominates.’ Congress is first among equals.” Raskin concedes that “As presidential power has grown, congressional power has been eroded through a combination of legislative branch passivity and executive branch power grabs.” He pointed to the Judiciary Committee’s recent vote to hold Attorney General William Barr and Commerce Secretary Wilbur Ross in contempt of Congress for their refusals to supply subpoenaed documents related to attempts to add a citizenship question to the 2020 census survey as a sign of the “forward motion and energy [that] must be provided by Congress.... For government to work as the Constitution’s framers intended, lawmakers must assert our proper role. And that means we must lead.”

Unfortunately, despite growing attention to the constitutional imbalance between the executive and legislative branches, Congress, as of yet, has avoided mention of the 800-pound gorilla that is in the room. Few have broached the critical question that has arisen whether congressional committees presently have the legal authority to effectively enforce testimonial or documentary subpoenas against executive officials, or even the will to ensure that it will take the necessary and readily available measures that will make it effective. Instead we have been hearing demands for revival of the long abandoned draconian version of inherent contempt that involves arrest, detention, a floor trial and possible jail time for executive officials; a contempt process that results in unlimited increasing fines until compliance; an expedited civil court enforcement requirement for subpoena enforcement cases; or an immediate resort to the impeachment process.

On July 17, 2019 the House, by a vote of 230-198, passed a resolution finding Barr and Ross in criminal contempt of Congress and authorizing the Speaker to refer the citation to the United States Attorney for the District of Columbia for mandatory submission to a grand jury as is required by law. The Speaker transmitted the referral to the U.S. Attorney on July 23. On July 24 Deputy Attorney General Jeffrey Rosen advised the Speaker that there would be no grand jury referral based on “[the] Department of Justice’s long-standing position that... we will not

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(The Constitution Project 2017) (When Congress Comes Calling) and Morton Rosenberg, Reasserting Congress’ Investigative Authority, R Street Policy Study No. 103 (R Street Institute, Washington, D.C. July 2017).

<sup>2</sup> Jamie Raskin, Congress Isn’t Just a Co-Equal Branch. We’re First Among Equals, Wash. Post, May 10, 2019.

prosecute an official for contempt of Congress for declining to provide information subject to a presidential assertion of executive privilege.” The authority cited for the refusal consisted solely of past Office of Legal Counsel (OLC) opinions and the acquiescent diversion of the House from directly challenging constitutional validity of denying similar criminal referrals in 2008 and 2012 by acceding to a misguided exclusive reliance on seeking compliance through civil enforcement suits.

Initial public commentary respecting the criminal contempt citation was that this would be simply a prelude to further House recourse to the time consuming and demonstrably ineffectual civil litigation process. This foresight proved accurate. On November 26, 2019, the House Government Oversight and Reform Committee filed a civil enforcement action against Barr and Ross.<sup>3</sup> It need not, and should not, have been so. The time is ripe for a serious, meaningful constitutional challenge by the House to the Executive’s unconstitutional obstructive stance. This challenge should include the powerful combination of heavy personal fines for subpoena non-compliance imposed through a modified inherent contempt process coupled with direct appointment of outside counsel to prosecute criminal contempts integrated into a single, unified enforcement process. Congress could, of course, also employ either of these options separately and independently. The second element in this formula, the direct appointment of prosecuting attorneys by Congress to vindicate the necessary, indispensable exercise of legitimate legislative authorities and responsibilities, is the focus of this article. Two hundred years of constitutional recognition and practice give it an indisputable place as one of the key elements of our Founders scheme of separated powers, a quintessential example of These two enforcement actions could, of course, also be employed

During the 35-year tenure of Morton Rosenberg as a senior counsel in the Congressional Research Service’s American Law Division (ALD) the most common question presented to him by members and staff was “Have we ever done this before?” and, if so, “How and when did we do it?” followed. Rosenberg’s research experience over the years taught him that there was virtually nothing new under the congressional sun and that the relative weight of past precedents was often determinative of their current legislative value. He found that implicit legislative intent regarding the division or allocation of power amongst the branches may be reflected not only in the structure and purpose of legislation but in conduct and attendant understandings over time that are reflected in historical practice. Just as historical practice has played a role in constitutional interpretation, courses of conduct and understandings over time

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<sup>3</sup> Committee on Oversight and Government Reform U.S House of Representatives v. William P Barr and Wilbur Ross, Case 1:19-cv-03557 (D.D.C. filed 11/26/2019).

help answer statutory interpretation questions about the scope and necessity of congressional powers.<sup>4</sup>

With particular regard to his areas of special interest—separation of powers and investigative oversight—Rosenberg found that the enduring lesson of the numerous past successful 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 invoking respect, if not fear. Standing 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 to the next to achieve a mutually acceptable basis of accommodation with the executive. But what has been absolutely critical to the success of such endeavors is that there has been a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. The desired goal of interbranch comity in resolving contested congressional investigative information demands has seldom, if ever, been achieved without such leverage, even in the best of times. The current historic state of political dysfunction puts such comity out of reasonable expectation.

The history of successful congressional utilization of its self-protective contempt powers dates back to the early founding years of the republic.<sup>5</sup> The initial inherent contempt

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<sup>4</sup> The Supreme Court has consistently relied on and referred to historical practices to support the integrity of constitutionally-based congressional prerogatives and authorities. See, e.g., *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 935-36 (2017) (After detailing the history of congressional actions dating from 1795 limiting presidential evasions of the Appointments Clause by means of indefinite temporary appointments, the Court agreed that a then current denial of the applicability of the Vacancies Act of 1868 to executive departments and agencies by DOJ had resulted “[b]y 1998, [in] approximately 20 percent of PAS offices in executive agencies were occupied by ‘temporary designees’, most of whom had served the 120 day limitation period without presidential submissions of nominations.... Perceiving a threat to the Senate’s advice and consent power... Congress acted again. In 1998, it replaced the Vacancies Act with the FVRA.” The Court rendered an expansive construction of the new legislative limitations on presidential temporary designations to avoid further evasions); see also *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2559-60 (2014) (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon the historical practice.”)(rejecting a presidential assertion of authority to determine when the Senate is in recess); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in proper interpretation of constitutional provisions.”); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1988) (stating that the decisions of the First Congress afford “contemporaneous and weighty evidence” of the meaning of the Constitution); and most recently, *Department of Commerce v. New York*, 588 US. \_\_\_, No. 18-966 (June 27, 2019) concluding, after describing the historical exercise of Congress’s broad authority of its census responsibility that allowed for more than simply counting the population: “That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that ‘has been open, widespread, and unchallenged since the early days of the Republic. *NLRB v. Noel Canning*, 573 US. 513, 572 (2014) (Scalia J., concurring in judgement); see also *Wisconsin*, 517 U.S. at 21{noting ‘importance of historical practice’ in consensus practice context)” (majority slip opinion at pp. 12-13).

<sup>5</sup> See Carl Beck, *Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957*, Appendix A, *Synopsis of Contempt Citations 1787-1943* (1957) (Beck); Todd Garvey,

proceeding was brought in 1795 and in 1821 a unanimous Supreme Court in *Anderson v. Dunn*<sup>6</sup> recognized its constitutional validity and indispensability as a means for protecting the institutional integrity of the legislative process. Between 1795 and 1857 14 inherent contempt actions were initiated by the House and Senate, eight of which can be considered successful in that the contemnor was meted out punishment and agreed to testify or produce documents.<sup>7</sup>

The *Anderson* ruling, however, had one limitation: its coercive penalties could not extend beyond the House's adjournment date of the session in which the contempt occurred. That limitation, combined with the requirement of a trial at the bar of the House, which often was time consuming and cumbersome, in some instances made the penalty of incarceration ineffective because it was imposed so close to the end of a session. As a consequence, in 1857 Congress established a criminal contempt process as an alternative whereby a referral of a citation of criminal contempt could be made to the United States District Attorney for the District of Columbia who was mandated to present the citation to a grand jury.

The inherent contempt process, however, continued to be the preferred method of enforcement in most instances until 1934, likely both because the now unlimited threat of a criminal prosecution was an intimidating reality and that conviction would not necessarily assure that the information sought would be forthcoming since compliance at that point would not affect the penalty. Between 1857 and 1934, there were at least 28 instances in which witnesses who were either threatened with, or were actually charged with, inherent contempt of Congress, purged their citations by either testifying or providing documents to the inquiring congressional committees.<sup>8</sup> At least two such proceedings were instituted against executive branch officials.<sup>9</sup> Perhaps the most significant inherent contempt proceeding conducted during this period resulted in the Supreme Court's landmark 1927 ruling in *McGrain v. Daugherty*<sup>10</sup> which established the contemporary constitutional legitimacy and breadth of Congress's investigative authority. It was followed shortly by its ruling in *Sinclair v. United States*<sup>11</sup>, upholding the Senate's exercise of its criminal contempt authority.<sup>12</sup>

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Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure, CRS Report, RL34097, May 12, 2017 (CRS on Contempt).

<sup>6</sup> 19 U.S. (6 Wheat.) 204 (1821) (*Anderson*).

<sup>7</sup> Beck, *supra* note 5.

<sup>8</sup> *Id.*, Beck

<sup>9</sup> Josh Chafetz, *Congress's Constitution, 176-79* (2017) (Chafetz).

<sup>10</sup> 273 U.S. 135 (1927) (*McGrain*).

<sup>11</sup> 279 U.S. 263 (1929).

<sup>12</sup> It has been long understood by the courts that "the historical background of congressional investigating committees is sufficient to support the premise that Congress was only implementing a conceded power when it enacted the [1857] statute providing punishment for contempt of such committees. The statute only serves to supplement the contempt power implied to the Houses of Congress, the enforcement of which, prior to the enactment of the statute, involved a procedure which was cumbersome and troublesome. Its objective was to

Inherent contempt ceased to be employed by Congress after 1935 as the modern congressional work load increased. The associated trials at the bar of either House consumed too much time and *habeas corpus* suits that invariably accompanied the arrests and detentions delayed the process still further. Congress turned exclusively to the criminal contempt alternative which relieved it of that burden and which has proven to be invaluable as a counter weight to the Executive's aggressive attempts to restore its purported "lost" authority to resist congressional information demands after Watergate. As is more fully detailed below<sup>13</sup>, structural reforms by Congress in the early 1970's facilitated access to, and more effective utilization of, executive branch information. These included decentralization of full committee chairman control of legislative and oversight goals and the establishment of subcommittees with authority to engage in investigative oversight, which dramatically enhanced the legislature's leverage to obtain information necessary for informed actions.<sup>14</sup>

As a result, between 1975 and 1998 there were ten instances of votes of criminal contempt by House subcommittees, full committees, or the full House against cabinet-level officials that resulted in compliance before criminal trials occurred.<sup>15</sup> One of the author's, Morton Rosenberg was directly involved in many of those proceedings. Essentially, the common factor in each one was the reluctance of the accused contemnors to subject themselves to a criminal prosecution for the sake of establishing a principle of constitutional law, policy or common law privilege for the president. The tale of EPA Administrator Anne Gorsuch Burford's contempt experience, presented below, is both a clear illustration of the effectiveness of the leverage that serious consequences for executive obstruction of congressional prerogatives provides and puts into proper perspective the beginnings of the current deliberate Executive design to establish a presidential hegemony over the administrative bureaucracy, the so-called notion of the unitary executive.

Rosenberg's innumerable experiences over the years working with committees at all stages of the oversight process also demonstrated to him the acute awareness of both committee and subcommittee chairs and target senior executive branch officials of the power

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facilitate the gathering of information deemed pertinent to the purpose of an investigating committee." *Fields v. United States*, 164 F. 2d 97, 100 (D.C. Cir. 1947), *cert denied*, 332 U.S. 851 (1948). See also, *In re Chapman*, 166 U.S. 661, 671-72 (1891); *McGrain*, 273 U.S. at 171-73; *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935) ("The [1857] statute was enacted...because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.... The purpose of the statute was merely to supplement the power of contempt by providing additional punishment." (Jurney)

<sup>13</sup> *Infra*, pp. 34-36.

<sup>14</sup> These also included the tripling of the appropriation for the Congressional Research Service, enhancement of the oversight and investigative authority of the General Accounting Office (now the Government Accountability Office), the creation of the Office of Technology Assessment, the establishment of offices of inspectors general in a dozen agencies, and the creation of the first permanent committees on intelligence in the House and Senate.

<sup>15</sup> *When Congress Comes Calling* at 26-27.

of the accumulating criminal contempt precedents. The threat of a subpoena, or the actual issuance of one, was often sufficient to bring agency officials to the table to seek accommodations leading to full or substantial compliance. Chairs with reputations for no nonsense, like the legendary John Dingell, often simply got results from a clear, detailed demand letter. Called “Dingell-grams,” they were often treated as the equivalent of a subpoena. Similarly, the credible threat of a committee contempt vote often brought compliance.

Rosenberg took part in what we believe was one of the last such successes. That involved a 2001-02 investigation of a decades long abuse of the FBI’s informants program at its Boston Regional Office by the House Government Reform Committee chaired by Rep. Dan Burton. During that period, FBI handlers knowingly allowed mob informants to commit numerous murders in return for information about a rival Boston mafia organization. Burton’s object was to determine when and who in the FBI and DOJ administrative hierarchy knew and condoned this practice. Subpoenas seeking critical internal prosecutorial and declination documents were issued but were denied by DOJ. Burton persisted and ultimately President Bush issued a broad claim of executive privilege. After contentious hearings on the constitutional substantiality of the claims it became clear that a bipartisan majority of the committee was ready to vote the Attorney General in contempt. At that threat, the presidential privilege claims were withdrawn and most of the withheld documents were supplied.<sup>16</sup>

Our sense is that the appropriate and necessary response to the current situation is for the House to initiate a revival of the historic institutional self-protection mechanisms in a manner and form that reflects current political sensitivities but retains and combines the demonstrated effectiveness of threats of inherent and criminal contempt in one process that can be established by the exercise of the House’s internal rulemaking authority.

Briefly, our proposal<sup>17</sup> would eliminate inherent contempt’s historic reliance on arrest, detention and possible incarceration after conviction at a trial conducted on the House floor, now seen by some as draconian and unseemly. It would substitute a speedier internal institutional process that leads to a floor trial that reflects due process concerns, provides safety steps to avoid abusive use of the process, and relies on hefty, incrementally increasing monetary fines as its coercive incentive. After 10 days, the fines are capped. If it is then

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<sup>16</sup> For a comprehensive review of the inquiry see Alissa M. Dolan, “The House Committee on Government Reform Investigation of the FBI’s Use of Confidential Informants”, in *When Congress Comes Calling* at 265-273.

<sup>17</sup> Inherent Contempt Fines Rule. Washington, DC. Good Government Now.

<https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>. For the full text of the proposed rule, see Morton Rosenberg, “Inherent Contempt Fines Procedure Rule with Independent Criminal Prosecution Provision.” Washington, DC: Good Government Now. <https://goodgovernmentnow.org/wp-content/uploads/2019/03/House-Rule-on-Inherent-Contempt-Process-Rosenberg-Rule-v6.pdf>.

determined that compliance is still being withheld, this finding may be reported to the Speaker with a recommendation that a resolution of criminal contempt be entertained by the House against the contemnor and that on passage of such a resolution a second floor vote is to be taken to authorize the Speaker to appoint private counsel to prosecute the criminal contempt citation.

As has been indicated, DOJ's Office of Legal Counsel has opined that Congress cannot, as a matter of statutory or constitutional law, invoke either its inherent contempt authority or the statutory criminal contempt of Congress procedures against an executive branch official instructed by the President to claim executive privilege in response to a congressional subpoena.<sup>18</sup> It asserts that, as a function of prosecutorial discretion, a U. S. Attorney is not required to refer a criminal contempt citation to a grand jury or otherwise prosecute an executive official who is carrying out the President's direction to assert executive privilege.<sup>19</sup> It further avers that the legislative history of the 1857 criminal contempt statute enacted to support enforcement of congressional subpoenas for documents and testimony was not intended to apply to executive officials and that "[t]he Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial or Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals."<sup>20</sup> The opinion concludes that the very threat of criminal contempt against an agency official would be unconstitutional because it would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations.<sup>21</sup>

The 1984 and 1986 OLC opinions are faulty and, in most aspects, present deliberately false and misleading fabrications and omissions of constitutional law, history and practice. In the following pages, we will describe four historical reference points that totally undermine and refute the current obstructive stance of the Executive that attempts to preempt Congress's core constitutional authority and responsibility to inform itself in order to effectively accomplish its legislative mission. It is doing this by denying the existence of the self-protective powers the Framers of our constitutional scheme anticipated would be needed to avert just such usurpations.

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<sup>18</sup> See, Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. Off. Legal Counsel 101 (1984) (Olson Memo); see also, Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. Off. Legal Counsel 68 (1986) (Cooper Memo).

<sup>19</sup> Olson Memo at 102,114-15, 118-28

<sup>20</sup> Olson Memo at 129-34.

<sup>21</sup> Olson Memo at 102, 135-142. The Olson Memo briefly asserts that its rationale encompasses the inherent contempt process as well. The Cooper Memo makes this point at greater length.

We will first examine the foundation period of our constitutional history for the understandings of the Framers that informed their decisions respecting the division of powers between the branches of government called for by the Constitution; the actions of the first Congresses that reflect those understandings; and the manner in which the courts responded to challenges to the actual practices of the legislature during the period between 1789 and 1857.

Next, we will describe the circumstances and the historical context of the creation of the Department of Justice in 1870. In the midst of the many legal and political crises emanating from the Civil War, which included the problems of a surge of post-war litigation, Reconstruction, and the impeachment proceeding of President Johnson. At the same time the Congress also had to deal with the recognition that the nation's decentralized federal law enforcement system was not only chaotic and ineffective but corrupt as well and needed to be addressed as part of the government's effort to re-stabilize the Nation. The solution presented by the Department of Justice Act of 1870 demonstrates the continued intent and design of the Congress, initiated in 1789, to maintain its control of the process of federal law enforcement and to limit presidential influence in this area.

Following will be a discussion of the lessons learned from the investigation of the Teapot Dome scandal of the mid-1920s. That inquiry marked the full revival of Congress's oversight and investigative authorities amidst confused and often bitter political and public perception of circumstances that in many ways mirror the current turmoil in that it involved allegations of widespread corruption in government agencies, including the Justice Department, that ultimately reached into the White House. The resulting landmark Supreme Court rulings reiterated the continued recognition of the necessity, legitimacy and efficacy of both inherent and criminal contempt as mechanisms of institutional self-protection. The obvious conflict of interest of the Justice Department at that time led to the appointment of private counsel to assist in the Senate committee's investigation. The litigation it spawned saw the successful defense of the Senate's inherent and criminal contempt authority.

Finally, we conclude with a review of the political and legal circumstances that led to the Reagan Administration's initial attack on the constitutionality of the House's exercise of its inherent criminal contempt authority against officials which, in turn, led to the Supreme Court's 1988 ruling in *Morrison v. Olson*<sup>22</sup> that held, among other significant rulings supportive of Congress's authority over the structure and actions of the administrative bureaucracy, that prosecutorial discretion is not a core presidential power.

## **II. Foundation Period Understandings and Early Precedents (1789-1857)**

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<sup>22</sup> 487 U.S. 654 (1988) (Morrison).

## **1. Congress Asserts Control Over Executive Conduct of Federal Law Enforcement and Provides a Minimal Role for the Office of Attorney General**

The First Congress in 1789 was faced with the formidable task of creating the structure of an operative government and assigning the responsibilities for control of governmental actions in and between the Constitution’s legislative, executive and judicial branches. Its approach to questions of control, in the view of one commentator, “was remarkably subtle and pragmatic.”<sup>23</sup> An examination of the key offices established in 1789 --the Secretaries of Foreign Affairs, War, Treasury, Attorney General and District Attorneys—reveals the priorities and concerns of these early legislators, many of whom had participated in the drafting of the Constitution and were also familiar with state legislative and administrative practices. Those decisions and their aftermath shine a bright light on the question at hand: the nature, scope and constitutional necessity of the legislature’s self-protective powers.

With respect to the establishment of the Departments of Foreign Affairs (soon to become State) and War, Congress demonstrated a clear purpose of assuring a significant measure of presidential control and in limiting legislative interference with the exercise of Executive powers. Congress made no effort to dictate the internal structure of these departments and explicitly provided that the President had the power to appoint the secretaries heading them, subject to advice and consent of the Senate; to control their administrative actions; and to remove them at his will. The Secretary of Foreign Affairs, for example, was to “perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States” and to “conduct the business of the...department in such manner as the President of the United States shall from time to time order or instruct.” The enabling enactment provided virtually no internal structure. The legislative language structuring the War Department was essentially identical.<sup>24</sup> These provisions of effective day-to-day executive control evidences congressional sensitivity to the Constitution’s explicit vestment in the President of significant, though not exclusive, authority in the areas of national defense and foreign affairs.<sup>25</sup>

In contrast, in the establishing legislation for the Treasury Department, Congress explicitly created and defined the responsibility of the Secretary as well as that of a Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary. There was no explicit supervisory role for the President other than provisions recognizing his authority to appoint and remove the Secretary. Close congressional control was the theme. The Secretary was directed

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<sup>23</sup> Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 *Duke L.J.* 561,563 (Bloch). See also Peter M. Shane, *Prosecutors at the Periphery*, 94 *Chi.-Kent L. Rev.* 241, 255-56 (2019) (Shane).

<sup>24</sup> *Id.*, Bloch at 572-75; Shane at 256.

<sup>25</sup> U.S. Const. Art. II, sec. 2.

to discharge a series of functions enumerated in the statute and to “make report, and give information to either branch of the legislature, in person or in writing, (as may be required)....” For many years, the Treasury Secretary recommended tax policy directly to Congress and transmitted department budget estimates with virtually no presidential involvement. These provisions reflected colonial experiences that anticipated that Congress would be protective of the public purse. The Constitution had settled the fiscal primacy of the Congress in Article I, Section 9, cl. 2 providing that “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>26</sup> The detailing of Treasury’s direct responsibilities to Congress was meant to assure that.

With respect to matters of law enforcement, however, the First Congress took a wholly different tack, one reflecting a clear intent to maintain a significant degree of legislative control in that area at the expense, if it was so disposed, of a greatly limited presidential authority. At the very least, these initial congressional actions and their consistent legislative follow-ups over the first two centuries of our Republic’s experience belies any substantial claim that prosecutorial discretion is a core presidential power and, further, denies any ability of the Executive, or the Judiciary, to diminish or nullify Congress’s inherent institutional self-protective powers, or for either House of the Congress to abandon or divest itself of that authority.

Section 35 of the Judiciary Act of 1789<sup>27</sup> created the office of Attorney General “whose duty it shall be to prosecute and conduct all suits in the Supreme Court which the United States shall be concerned, and give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as by law shall be provided.” It also established a corps of district attorneys, one for each for each judicial district, “whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as compensation for his services such fees as shall be taxed therefore in the respective courts before which the suits or prosecutions shall be.”

With respect to federal law enforcement, there was no congressional consideration of a

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<sup>26</sup> Bloch, *supra* note 23, 576-77. See also, Leonard D White, *The Federalists: A Study in Administrative History*, 323 (1948); and Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Authority*, 63 B.U. L. Rev.59, 72, 86-87 (1983) (suggesting that the difference in congressional treatment of the Secretaries of War and Foreign Affairs and the Treasury Secretary indicated a “contemporary appreciation of the difference between departments intended to be subordinate to presidential control in the performance of ‘political’ functions of diplomacy and war, and the department not intended as a ‘political’ arm, but which was expected to instead to follow the direction of law.”

<sup>27</sup> An Act to Establish the Judicial Courts of the United States, ch. 20, sec.35, 1 Stat.73, 92-93 (1789).

“Department of Law.” The Attorney General was left devoid of direct authority respecting executive litigation. He was expressly vested with responsibility limited solely to representing the legal interests of the United States in actions in the Supreme Court and to providing legal advice requested by the President or heads of departments. It was a part-time position with low pay, no staff, no perquisites such as allotments for pencils, paper, or record keeping, and the incumbent had to provide his own office. But the Attorney General could continue with the private practice of law, an incentive which most incumbents took optimal advantage of until 1853.<sup>28</sup>

Further, the three sentences of section 35 devoted to establishing the office did not specify who would appoint the Attorney General, who would control him or to whom he would report (other than responding to queries from the President or department heads), or about his removability, omissions that seem striking after the intense debates about these issues respecting the Secretaries of Foreign Affairs, War and Treasury. Arguably, this reflects both less concern about the President’s need to control the Attorney General and raises a presumption that he would take orders from Congress. Indeed, until 1818 it was customary for Congress to directly seek, and receive, advice from the Attorney General. In any event, the President asserted his constitutional ability to nominate officers for Senate approval to install the first Attorney General, a practice that went unchallenged.

Of more substantive constitutional interest for this discussion, the 1789 legislation gave neither the President nor the Attorney General the express authority to appoint, supervise or direct district attorneys, even though Congress gave district attorneys full prosecutorial authority on behalf of the United States. As was the case with the absence of statutory authority regarding appointment of the Attorney General, the President assumed that the power to appoint district attorneys derived from his authority to designate inferior officers for Senate approval.<sup>29</sup> But otherwise the Judiciary Act rendered the new district attorneys virtually

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<sup>28</sup> Homer Cummings & Carl McFarland, *Federal Justice Chapters in the History of Justice and the Federal Executive*, 90, 154 (1937) (Cummings & McFarland); Bloch *supra* n. 23 at 567-68; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 *Stanford L. Rev.* 121, 128-135 (2014) (Shugerman).

<sup>29</sup> It is significant to note that prior to 1986 it was the long-standing understanding that the Attorney General had no authority to appoint a U.S. District Attorney in the event of a vacancy in the office and that a district court had the sole discretion to make an interim appointment pending Senate confirmation of a successor. See Act of March 3, 1863, ch. 93, sec. 2, 12 Stat. 768; see also, *United States v. Solomon*, 216 F. Supp. 835, 836 (S.D. N.Y. 1963) and *United States v. Gantt*, 194 F. 3d 987, 998 (9<sup>th</sup> Cir. 1999). In 1986 Congress authorized the Attorney General to appoint a U.S. District Attorney for a district in which the office has been vacant for 120 days. If that period expired without the confirmation of a successor, the chief judge of that district was authorized to appoint an interim to serve until a proper appointment was consummated. The provision was held constitutional in *U.S. v. Hilario*, 218 F. 3d 19 (1<sup>st</sup> Cir. 2000). In March 2006 Congress enacted the Patriot Act Reauthorization which contained an apparently little noticed provision that eliminated the interim judicial appointment authority and allowed the Attorney General, after the expiration of the initial 120-day period, to appoint interim U.S. District Attorneys for an

autonomous. They were financially independent of the central government and were paid on a fee-per- case basis, a practice that continued until 1896. Otherwise they were also free to take on clients for other legal matters, an entitlement they enjoyed until 1953.<sup>30</sup>

Over the next 80 years the Attorney General exercised no control over district attorneys. Rather, Congress employed an ad hoc practice of, first, delegating supervisory and directory authority over district attorneys to departments and agencies, such as Treasury, State, Interior, and the Post Office, respecting the conduct of their respective legal interests, and then, in later years, by increasingly allowing departments and agencies to hire their own legal staff and also to retain paid outside counsel over whom they had direct control.<sup>31</sup> This situation prevailed despite numerous entreaties to Congress by incumbent attorneys general supported by presidents. It started in 1792 with an effort by President Washington and his first attorney general, Edmund Randolph, that attempted to convince Congress of the need to create a law department with proper administrative support to oversee and provide legal coordination of the legal positions of the new government. Then, and thereafter, the legislature consistently rejected any proposal that would lead to centralization of law enforcement responsibilities in the executive.<sup>32</sup> Indeed, the first instance of an apparent congressional agreement to vest some direct supervisory authority over district attorneys in the Attorney General in 1861 was overturned by legislation passed four days later exempting the Treasury Department from the Attorney General's exclusive control, an action that caused considerable confusion amongst the district attorneys as to whom they had to report and obey until the passage of the Justice Department legislation in 1870.<sup>33</sup>

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indefinite period. This was soon perceived as an effective means of bypassing the Senate confirmation process and became the object of a firestorm of protest with the revelations of a congressional investigation that nine U.S. Attorneys had been fired for political reasons at the instigation White House officials. The new provision was quickly repealed by the passage of the United States Attorney Independence Act of 2007 which restored the judiciary's interim appointment authority. See, Laurie L. Levenson, Live and Learn: Depoliticizing the Interim Appointments of U.S. Attorneys, 31 Seattle Univ. L. Rev. 297,311- 26 (2008). It is arguably continued evidence of the early congressional inclination to limit executive control of key aspects of the federal law enforcement process.

<sup>30</sup> Shane, *supra* n. 23 at 258 n.65.

<sup>31</sup> See Shugerman, *supra* n. 28 at 131-35, 140; Cummings & McFarland, *supra*, n. 28 at 219-222; Bloch, *supra* n.23 at 585-89-

<sup>32</sup> Cummings and McFarland, *supra* n. 28 at 142-160; Harold J. Krent, Executive Control Over Criminal Enforcement: Some Lessons from History, 38 Amer. U. L. Rev. 275, 286-90 (1989) (describing the repeated failed attempts to consolidate legal representation of the government under the Attorney General); Griffin B. Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L. Rev. 1049, 1051 (1978)(suggesting that an important factor in denying repeated requests for centralized law enforcement control "was fear of a strong Attorney General"); James S. Easby-Smith, The Department of Justice; Its History and Functions, 25 (1904) (cataloging the repeated entreaties of presidents and attorneys general to expand the staff, resources and supervisory authority of attorneys general over district attorneys); Shane, *supra* n. 23 at 258-59.

<sup>33</sup> Shugerman, *supra* n. 28 at 134; Cummings & McFarland, *supra* n.28 at 219.

## **2. Congress's Early and Definitive Assertion of Its Investigative Authority and the Power to Enforce Its Information Demands Against Executive Officials**

Throughout our constitutional history it has been almost uniformly agreed by the Supreme Court, lower federal courts, commentators, and by the words and actions of the Congress itself, that the early adoption and exercise of legislative oversight and investigative authority, which was accompanied by inviolable institutional self-protective mechanisms, was directly influenced and guided by the experiences of the British Parliament in its establishment of the concept of a breach of privilege of the House of Commons punishable by contempt proceedings against the Crown. The legislatures of the American colonies and states carried on the British model of using breach of privilege and contempt proceedings as a means of controlling their colonial governors and other royal officials. In their post-revolution constitutions, a number of states specifically provided for such investigative and contempt powers. Other early state constitutions said nothing about a contempt power but were interpreted as implicitly containing such a power. The Continental Congress of course had no independent executive to deal with but was familiar with contempt procedures which it used against private citizens.<sup>34</sup>

Congress has never doubted its authority to investigate in order to inform itself of the facts essential for the appropriate exercise of its legislative authority in the public interest and its necessity as a means to maintain the integrity of the institution itself from obstructions that would undermine the accomplishment of its constitutionally mandated mission and responsibilities. It was also well understood that in order for the investigative means to be effective there had to be an element of coercion. As the Supreme Court has noted, "This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition and authorized the committee to send for necessary persons, papers and records," emphasizing that James Madison and four House

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<sup>34</sup> For a detailed history of the pre-constitutional development and usage of institutional protective contempt practices by the House of Commons and colonial and state legislatures, see Chafetz, *supra* n. 9 at 152-192. See also Cummings & McFarland, *supra* n. 28 at 8-14; C.S. Potts, Powers of Legislative Agencies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926) (reviewing colonial and early state precedents) (Potts); James Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 169 (1926) ("Legislative power in 1789 already possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and papers....") (Landis). The only instance of departure from the recognition of the British Parliament's practices as an influence on our Congress's adoption of such self-protective mechanisms is the aberrant Supreme Court ruling in *Kilbourn v. Thompson*, 103 U.S. 168 (1881). The recognition of the strong influence of the British Parliament's institutional self-protective practices was fully restored in the Court's opinion in *McGrain*, which also negated *Kilbourn's* limitations on each house's subpoena enforcement authority. 273 U.S. at 161, 170-71 ("In actual practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislature before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most state legislatures.")

colleagues who supported the inquiry resolution played an important part in the constitutional convention five years before.<sup>35</sup> From that time on investigative inquiries by the House and Senate concerning the conduct of executive branch officials, including presidents, continued with increasing frequency. It was the consistent practice for the authorizing resolutions of inquiry to include the power for the issuance of subpoenas for documents and testimony. The threat of a subpoena, or its actual issuance, usually affected an accommodation.<sup>36</sup>

### ***3. The Early Recognition of Inherent and Criminal Contempt as Constitutionally Indispensable Institutional Self-Protective Processes***

While the authority to punish nonmembers has no explicit textual basis in the federal constitution, Article I, section 5 allows that “Each House may determine the Rules of its Proceedings” and in 1795 the House conducted its initial inherent contempt proceeding without challenge and in accordance with rules adopted for the occasion that became the procedural model for such future actions. In 1821, the Supreme Court in *Anderson v. Dunn* rejected a challenge to the House’s exercise of the inherent contempt power in a broad and decisive manner. It analogized it to the power of judicial courts which “are universally acknowledged to be vested, by their very creation, with power with power to impose silence, respect and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers, from the approach and insults of pollution.” The Court emphasized that these self-protective powers need no statutory authorization and are “indispensable to powers in their public functionaries, without which that safety cannot be guarded.” It concluded that if the same authority is denied to the House it would lead “to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”<sup>37</sup>

The *Anderson* Court also made it clear that the then current existence of legislation allowing judicial imposition of penalties for contemptuous actions did not displace the constitutional necessity of such inherent authority: “It is true, the Courts of Justice of the United States are vested, by express statutory provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such occur, to which such statute

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<sup>35</sup> *McGrain*, 273 U.S.at 161.

<sup>36</sup> See, John W Gilligan, Congressional Investigations, 41 J. Crim. L. & Criminology 618,620-22(1950-1951)(detailing numerous executive branch inquiries conducted by congressional committees between 1792 and 1860 that involved the actions of presidents and senior level officials such as the Secretary of the Treasury, the governor of the Missouri territory, General Andrew Jackson respecting his Florida campaigns, John Calhoun as Secretary of War, Daniel Webster as Secretary of State, and the managements of the Smithsonian Institute and the National Bank, among others)(Gilligan).

<sup>37</sup> *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204. 227-28 (1821).

provision may not extend; on the contrary, it is a legitimate assertion of this right, as incident to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.”<sup>38</sup> The *Anderson* Court however placed one limitation on the House’s power: any penalty for incarceration could not be enforced beyond the session in which contempt occurred.

It is interesting, and significant, to note that, in order to protect its position in that initial legal challenge to its authority to institute such inherent contempt proceedings, the House passed a resolution directing the Speaker “to employ such counsel, as he may think proper, to defend the suit brought by Anderson against the said Thomas Dunn, and the expenses be defrayed out of the contingent fund of the House.”<sup>39</sup> The Speaker retained the incumbent Attorney General, William Wirt, who defended the arresting legislative officer and successfully convinced the Supreme Court that the House had the inherent power to find a nonmember in contempt of Congress. As previously indicated, under the Judiciary Act of 1789 Witt had limited statutory responsibilities as Attorney General and could take on cases as a private attorney to supplement his income. He was paid \$500 for his efforts.<sup>40</sup> He was apparently the first such congressional appointee and thus presents early evidence of the recognition that the conduct of inherent or criminal contempt proceedings by the judiciary or legislature by employing private counsel are not exercises of federal executive prosecutorial power but rather are independent, indispensable inherent institutional mechanisms designed solely for vindication of the judicial and legislative functions.

The leading constitutional scholars of the period agreed that although the Constitution’s text was silent on the houses’ power to hold nonmembers in contempt, sound structural and historical reasoning dictated that such a power must exist. In 1826 James Kent opined that this power “was founded on the principle of self-preservation.”<sup>41</sup> Similarly, Joseph Story observed that that each houses’ “power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior, or disobedience to those rules.”<sup>42</sup> He found it

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<sup>38</sup> *Id.* The Supreme Court in *Young v. U.S. ex rel. Louis Vuitton et. Fils*, 481 U.S 787 (1987) and *Morrison v. Olson*, 487 U.S. 654 (1988), and the Ninth Circuit in *United States v. Arpaio*, 906 F.3d 800 (9<sup>th</sup> Cir. 2018), discussed below, have acknowledged and adopted the *Anderson* Court’s understandings of the nature and scope of judicial inherent authority. See generally, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa Rev. 735, 766-75, 784-87, 829-31, 833-43, 847-49, 857-67 (2001), presenting a comprehensive discussion and analysis of the law, history, practice and constitutionally recognized indispensability of the judicial inherent authority. (Pushaw)

<sup>39</sup> 33 Annals of Congress at 433-34 (1818), discussed in Bloch, *supra* note 23 at 628 note 214.

<sup>40</sup> 2 American State Papers, Miscellaneous 932 (statement of sums paid to Attorney General Wirt, beyond his salary, for services not required of him by law).

<sup>41</sup> 1 James Kent, *Commentaries on American Law* 221 (New York Hasted 1826).

<sup>42</sup> 2 Joseph Story, *Commentaries on the Constitution of the United States*, sec. 835 at 298 (Boston, Hilliard, Gray 1833).

“remarkable” that the Constitution did not explicitly mention a power to punish nonmembers, “yet is obvious that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions.”<sup>43</sup> Story concluded that in America, as in Britain, “the legislative body was the proper and exclusive forum to decide when the contempt existed, and when there was a breach of its privileges; and, that the power to punish followed as a necessary incident to the power to take cognizance of the offence.”<sup>44</sup>

In 1848, the Circuit Court for the District of Columbia in *Ex parte Nugent*<sup>45</sup> denied a *habeas corpus* petition respecting a Senate warrant for commitment in the course of an inherent contempt proceeding resulting from unauthorized disclosures of matters from secret Senate sessions. The appellate court’s opinion reflected the continued judicial understanding of the influence of British parliamentary history on our own scheme for the maintenance of legislative integrity as well as the message of the *Anderson* ruling declaring the constitutional indispensability of each house’s self-protective prerogatives.<sup>46</sup>

#### **4. Congress’s Understandings in Establishing a Criminal Enforcement Procedure in 1857**

By 1857 the breadth and complexity of congressional responsibilities had grown commensurate with the public demands presented for legislative attention to the economic, social and political expansion of the nation. The well-established investigative powers of House and Senate committees were increasingly being utilized for information gathering purposes from nonmembers, including executive branch officials at senior levels. However, the inherent contempt process upheld by the Supreme Court in *Anderson v. Dunn* to facilitate such legislative oversight was proving to be cumbersome and inefficient as a consequence of the floor time needed for trials, even for trivial matters; the inevitable delays of *habeas corpus* claims; and the limitation imposed by the *Anderson* Court’s ruling that a punishment of incarceration could not be continued after the punishing body adjourns the session in which the contempt occurred. The potential ability of a contemnor to “run out the clock” often cancelled the intended coercive effects of “shame” for being cited for contempt and the possible imprisonment to induce voluntary compliance.

Congress’s solution was simple and direct: it passed legislation that supplemented, but did not displace, the existing inherent institutional self-protective process by providing for an alternative procedure that could lead to enhanced penalties for refusals to comply with

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<sup>43</sup> *Id.* sec. 842 at 305.

<sup>44</sup> *Id.* sec. 844 at 308.

<sup>45</sup> 18 Fed. Cases 471, No. 10,375 (C.C.D.C. 1848).

<sup>46</sup> Subsequent Supreme Court rulings have continued to maintain the absolute authority of the House to be the sole judge of its findings of contempt subject only to limited judicial review respecting jurisdictional and due process matters. See, e. g., *Marshall v. Gordon*, 243 U.S. 521 (1917) and *Jurney v. McCracken*, 294 U.S. 125 (1935).

documentary and testimonial subpoena demands. It permitted either chamber to certify to the district attorney for the District of Columbia that an individual had committed contempt and mandated that the citation be presented by the district attorney to a grand jury for possible indictment and trial which could lead to imprisonment and fines.<sup>47</sup> It was enacted on the basis of then current uncontested understandings of constitutional law, history and practice relating to congressional oversight and investigative prerogatives.

As has been detailed above, both Houses of Congress early assumed they had inherited the British parliamentary prerogative of institutional self-protection. The first exercise of inherent contempt authority was by the House in 1795 and was unchallenged. In 1821 the Supreme Court upheld the constitutionality of the procedure for use by both houses of Congress in *Anderson v. Dunn*. The Court supported its ruling by analogizing it to the long-recognized exercise of the judiciary's indispensable, constitutionally-based inherent institutional self-protective authority, which needed no statutory basis for its legitimacy. The breadth of the *Anderson* ruling was reiterated in District of Columbia Circuit's opinion in *Ex parte Nugent* in 1848.

Also of particular significance for the legislators in 1857 was the First Congress's handling of law enforcement authority in the new constitutional scheme. There was no consideration of an executive law department, and consistent legislative rejections of executive proposals for such a centralization assured there would be none until 1870. The Attorney General was a low paid, ill-supported executive functionary limited to giving legal advice to the president and department heads and arguing cases of interest to the United States before the Supreme Court. He had no supervisory direction or control whatsoever over the litigation work of the corps of district attorneys created by the Judiciary Act of 1789. Their duties under the Act "shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden." District attorneys were autonomous functionaries. They were paid on a fee-per-case basis and otherwise were free to engage in the private practice of law. It was the practice of the Congress for many years to either specifically designate officials in various departments to assign its legal work to district attorneys, or to allow hiring of staff attorneys, or to permit the retention of paid private counsel. In short, it was the Congress alone that dictated the manner and method of executive law enforcement for the first 80 years of the Republic.

Thus it is no surprise that there was no question of a constitutional anomaly in vesting enforcement of the supplemental criminal contempt penalty in a district attorney. The freedom

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<sup>47</sup> 11 Stat. 155 (1857).

given attorneys general and district attorneys to take on private legal employment assignments arguably anticipated the legislature's likely need for outside legal support for protection of its institutional interests and prerogatives. It certainly did not preclude it. In any event, it was the early understanding of the Congress that the invocation of its presumed inherent institutional protective mechanism was an act of vindication of the autonomy of its constitutional functions which could result in incarceration and/or monetary penalties for a contemnor and could be subjected to legal challenge. When the challenge to that presumption arose in 1818 the Speaker of the House had no hesitancy in retaining Attorney General Wirt in his private capacity to defend the House's action. He argued successfully that the self-protective power of judicial courts was an inherent constitutional authority that required no statutory authorization and thereby was an implicit recognition of the applicability of the same privilege for the houses of Congress. Wirt's appointment was a direct precedent for the 1857 Act's assignment of and direction to the District Attorney for the District of Columbia to bring prosecutions for citations of criminal contempt of Congress.

The constitutionality of the 1857 statute was upheld by the Supreme Court in 1897 in *In re Chapman*<sup>48</sup> which recognized its need in light of "[t]he history of congressional investigations [that] demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose facts deemed essential to taking definitive action.... It was an act necessary and proper for carrying into execution the powers vested in In Congress and each House thereof." The Court rejected the argument that an issue of double jeopardy could be raised by the existence of both an inherent and criminal proceeding. In this regard the Court also observed "that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt to which the power of either House properly extended; but because, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved, and the statute is not open to objection on that account."<sup>49</sup> Subsequent Supreme Court and appellate court rulings have emphasized that the 1857 statute was only intended to serve to complement the conceded inherent power that had proved cumbersome in application and often insufficient in accomplishing its intended coercive effect in that the penalty of imprisonment was limited to the duration of the session. "The purpose of the statute was to merely supplement the power of contempt by providing additional punishment."<sup>50</sup>

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<sup>48</sup> 166 U.S. 661 (1897).

<sup>49</sup> 166 U.S. at 671-72.

<sup>50</sup> *McGrain*, 273 U.S. at 171-73; *Jurney v. MacCracken*, 294 U.S. 125, 151 (1935); *Fields v. United States*, 164 F. 2d 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

The Supreme Court’s 1987 ruling in *Young v. ex rel. Louis Vuitton et Fils*<sup>51</sup> directly addressed and affirmed the constitutional authority of judicial courts to appoint private counsel to assist in the criminal enforcement of the exercise their inherent contempt power. The Court held that “it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint private counsel to prosecute the contempt.” It explained that ordinary prosecutions are exercises of executive power but that prosecutions for criminal contempt of court are different. Such prosecutions are vindications of the judicial power, and the use of private counsel as special prosecutors “reflects the longstanding acknowledgement that the initiation of contempt proceedings to punish disobedience to court orders is part of the judicial function.”<sup>52</sup> The Court warned that “if the Judiciary were completely dependent on the Executive Branch to address affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution.”<sup>53</sup> That ruling, as did its ruling in *Anderson*, analogously supports such an appointment authority in each House of Congress.<sup>54</sup>

In sum, the history of the enforcement actions by means of inherent contempt proceedings by both houses of the Congress in the Founding years and the generation thereafter, and the judicial support for their constitutionality, provide no basis for any argument denying that it was these prevalent understandings of the legislature that lead to and supported its adoption of the criminal contempt procedure in 1857. Congress was aware of the breadth of its oversight and investigative powers and its constitutionally recognized ability to enforce information demands by means of the unilateral exercise of inherent institutional self-protective contempt proceedings analogous to those of vested in judicial courts. It had also made it clear that it would be in control of the most significant aspects of executive law enforcement. There would be no centralized law department; the Attorney General would be a part-time official with responsibility for Supreme Court arguments and advising the president and department heads when asked, but otherwise was without substantive authority over any aspect of law enforcement ; and district attorneys would be essentially autonomous functionaries paid on a fee-per-case basis who could continue private practice but would receive law enforcement assignments from department officials specifically designated by congressional enactments.

The assignment of the District Attorney for the District of Columbia in the 1857 legislation to prosecute citations of criminal contempt of Congress was just that: an effective

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<sup>51</sup> 481 U.S. 787 (1987).

<sup>52</sup> 481 U.S. at 787.

<sup>53</sup> *Id.* at 801.

<sup>54</sup> The *Young* ruling was cited approvingly in the Supreme Court’s ruling in *Morrison v. Olson* and most recently was applied by the Ninth Circuit in *United States v. Arpaio*, 906 F. 3d 800 (2018).

congressional endorsement of the hiring of a private counsel to vindicate the legislative information gathering prerogative, in the manner of the appointment of Attorney General Wirt in 1818.

The OLC opinions of 1984 and 1986, so heavily relied upon by DOJ in its current defense of its obstructive scheme to undermine legislative subpoena enforcement, never acknowledge this relevant, and determinative, law and history that led to the 1857 legislation. Rather, DOJ's continued resistance rests upon the bald assertions that the legislative history of the 1857 statute fails to indicate that it was to be applicable to executive branch officials and that the inherent contempt process had never been utilized against an executive official. Neither claim is supportable.

A close review of the 1857 floor debate indicates that Rep. H. Marshall expressly points out that the broad language of the bill “proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a representative of the people.” More to the point, Rep. Orr, the sponsor of the bill, specifically stated that “this House has already exercised the power and authority of forcing disclosure [from executive officials] as to what disposition has been made for the secret-service fund. And it is right and proper it should be so. Under Government-under our system of laws-under our Constitution-I should protest against the use of money by an executive authority, where the House had not right to know how every dollar has been expended, and for what purpose.”<sup>55</sup>

Rep. Orr had reference to two contentious, related investigations conducted by two select committees in 1846 regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund available to the President for clandestine operations necessary for the effective conduct of foreign affairs, and counter-charges that his accuser, Rep. Charles Ingersoll, had improperly received statutorily designated confidential information that formed the basis of his accusations from the State Department. The ensuing investigations received testimony from present and former high level executive officials, generally pursuant to subpoenas, that included former presidents John Tyler and John Quincy Adams, sitting Secretary of State John Buchanan, and an interrogatory from sitting President Polk. The testimony received focused on the past practice of presidents of placing control of expenditures from the secret fund in the hands of the Secretary of State and of the State Department practices for securing information. It resulted in the exoneration of Webster.<sup>56</sup>

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<sup>55</sup> 42 Cong. Globe 431 (1857).

<sup>56</sup> For a thorough examination and analysis of the Webster-Ingersoll investigation see Todd Garvey, *The Webster and Ingersoll Investigations*, in *When Congress Comes Calling* at 287-92. A dozen prior investigations of senior level executive officials could have additionally been cited. See ft. 36, *supra*, and accompanying text.

The 1857 floor debate is also pertinent to the Executive's current persistent claims of an expanding notion of presidential executive privilege that would encompass common law privileges normally unavailable before Congress. Specifically, Rep. Orr was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege, in probes like the Webster inquiry which touched on "diplomatic" matters.<sup>57</sup> Rep. James Orr responded that the House had and would continue to follow the practice of the British Parliament, which "does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the law of the Parliament."<sup>58</sup> Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege was overwhelmingly defeated.<sup>59</sup>

With respect to the OLC assertion that inherent contempt process has never been utilized against a federal official, in fact there have been two such instances.<sup>60</sup> The first occurred in 1879 as a result of allegations received by the House Committee on Expenditures from the State Department that George F. Seward, then Minister to China, had misappropriated a large sum of money from the consulate. When Seward returned from China he was subpoenaed for ledger books and his testimony. He refused to comply and asserted his Fifth Amendment rights, which was rejected. At the request of the Committee the House ordered that he be arrested and brought to the bar of the House. There he argued that he should not be forced to incriminate himself while there was an ongoing impeachment proceeding against him. Articles of impeachment were reported out by the committee but were never acted upon by the Judiciary Committee.

The second instance of an arrest occurred in 1916 of the United States Attorney for the Southern District of New York, H. Snowden Marshall, who had been investigating Rep. Frank Buchanan for Sherman Act violations. Buchanan had accused Marshall of committing high crimes and misdemeanors. Two weeks later a grand jury convened by Marshall indicted Marshall under the Sherman Act. Buchanan then introduced a House resolution to investigate Marshall which was adopted. Marshall then instigated a newspaper article accusing the investigating committee of trying to frustrate the grand jury inquiry. He then admitted his role in publishing the article in a letter to the subcommittee that was personally highly offensive. The committee then adopted a resolution declaring the letter "defamatory and insulting" which brought the House into "pubic contempt" and was guilty of violating "the privileges of the House, its honor and its dignity." The sergeant-at-arms was sent to New York to arrest and bring him to the bar of the House. Marshall's *habeas* petition was denied by Judge Learned

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<sup>57</sup> 42 Cong. Globe 431.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 441-43.

<sup>60</sup> See Chafetz, *supra* n.9.

Hand but was reversed by the Supreme Court in *Marshall v. Gordon*.<sup>61</sup> It is clear, however, that the Court had no doubt that the House had the “power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given” in the Constitution, but since all that was involved in the case were dignity offenses “not intrinsic to the right of the House to preserve the means of discharging its legislative duties” the citation was inappropriate in those circumstances.<sup>62</sup> The Court appeared to have no doubt that the House could arrest and hold a federal prosecutor for actions which were appropriately within the scope intended to be protected by Congress’s contempt authority.

### **III. Establishing a Department of Justice (1861-1870)**

By 1861 sufficient evidence had accumulated to convince the Congress that the uncoordinated dispersal of executive law enforcement authority was failing to meet the need to assure that its legislative responses to growing public demands for economic, social and political attention would be fulfilled. The advent of the Civil War and its aftermath buttressed those concerns and ultimately lead to passage of legislation centralizing federal law enforcement in 1870 by the creation of the Department of Justice headed by the here-to-for powerless Attorney General. However, a close examination of the historical, legal and practical context of the DOJ Act indicates that the consistent predilection of the Congress since 1789 to limit executive control of law enforcement was clearly maintained. Neither the notion of a “core” presidential discretionary authority with respect to criminal prosecutions or a relaxation of congressional power to control executive litigation finds support in the legislative history or text of the Act.

#### **1. The Stymie of Congress’s Initial Attempt to Centralize Federal Law Enforcement**

As has been discussed, Congress’s first assignment of departmental prosecutorial supervisory duties over district attorneys was in 1797 to Treasury’s Comptroller authorizing the directing of suits over revenue and debts. Over time Congress shifted such authority to different Treasury departmental officials and until 1870 it had either sole or primary supervision over district attorneys. In 1849 Congress established the Interior Department, a catchall agency that loosely shared district attorney supervision with Treasury. It has been suggested that one of the reasons for the consistent refusal to adopt a proposal for a centralized law department is that Treasury officials resisted any changes that would reduce its personnel and power.<sup>63</sup> This perception was further evidenced by the sabotage of the first successful effort to effect law enforcement centralization.

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<sup>61</sup> 243 U.S. 521 (1917).

<sup>62</sup> 243 U.S. at 541, 545-46.

<sup>63</sup> Shugerman, *supra* n. 28 at 134.

In 1861, shortly after the attack on Fort Sumter, the necessity for change to meet anticipated wartime needs for coordinated executive legal actions resulted in the passage of legislation granting the Attorney General exclusive supervision over district attorneys:

That the Attorney-General of the United States be, and he is hereby, charged with the general superintendence and direction of the attorneys and marshals of all the districts in superintendence the United States and the Territories as to the manner of discharging their respective duties; and the said district-attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and the state and condition of their respective offices in such time and manner as the Attorney-General may direct.<sup>64</sup>

The legislation also allowed district attorneys and other departments to hire outside counsel.<sup>65</sup>

Four days later, Congress passed a second statute providing that district attorneys were still under the command of the Treasury Department as well<sup>66</sup>, a change attributable to the influence of the Treasury Department.<sup>67</sup> As a consequence, district attorneys were unsure as to whether they were supposed to report to the Attorney General, the Solicitor of the Treasury, or the Secretary of the Interior. In addition, the heads of other departments continued to give directions to the district attorneys and also were permitted to maintain and expand their own law offices and to hire their own outside special counsel.<sup>68</sup>

In 1863, Congress further insulated district attorneys from central executive control by vesting authority to temporarily fill vacant district attorney positions in the district court judges:

In case of a vacancy in the office of marshal or district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer.<sup>69</sup>

The authority of courts to appoint district attorneys (now U.S. Attorneys) in cases of vacancy remains a part of federal law today, further evidencing another aspect of Congress's historic

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<sup>64</sup> Act of Aug. 2, 1861, ch. 37, sec. 1, 12 Stat. 285, 285.

<sup>65</sup> *Id.* Secs. 2-3, 12 Stat. 285, 285-86.

<sup>66</sup> Act of August 6, 1861, ch. 37, 12 Stat. 327.

<sup>67</sup> Shugerman, *supra* n.28 at 131-34.

<sup>68</sup> Cummings & McFarland, *supra* n.28 at 219.

<sup>69</sup> Act of Mar. 3, 1863, ch. 93, sec. 2. 12 Stat. 768, 768.

concern with maintaining a significant measure control over executive law enforcement and limiting presidential influence.<sup>70</sup>

The 1861 vestment of more supervisory authority by the Attorney General over district attorneys did little to remedy the problem of lack of coordination of law enforcement. Indeed, it exacerbated it. The Attorney General was not given a “department” or staff to assist in such supervision; the 1861 legislation encouraged the hiring of more staff attorneys as well as outside counsel; Congress created new law officer positions in several departments; it gave the State Department its own solicitor’s office; and it still left district attorneys without clarity as to whom to report.<sup>71</sup>

## ***2. The Inexorable Road to the 1870 Reform Act: History and Context Reflect Congress’s Continuation of Its Consistent Actions to Protect Its Constitutional Prerogatives and to Limit Presidential Control of the Law Enforcement Process***

The afore-described pragmatic distinctions the First Congress made in 1789 respecting the varying degrees of control it would maintain or delegate over the initial departments and offices it created were followed in 1795 with clear assertions of legislative institutional prerogatives that may not be obstructed by the President that obtain to this day: both House’s inherent powers of self-protection and the Senate’s exclusive confirmation authority. The former is reflected in the initial successful exercise by the House that year of its inherent contempt authority, the latter by the passage of legislation prohibiting the president from temporarily filling a vacant executive advice and consent position without Senate confirmation for longer than six months.<sup>72</sup> Both those prerogatives came to play, directly and indirectly, in the run-up to and passage of the 1870 DOJ Act.

Actions by presidents during and after the Civil War which were perceived by Congress to interfere with its confirmation prerogatives were promptly dealt with. As has been indicated, in 1863 the use of interim presidential appointments to vacant district attorney positions by the president was denied by legislation vesting such authority in district court judges alone.<sup>73</sup> That same year the Congress responded to President Lincoln’s recess appointments of hundreds of military officers that were in violation of statutory authorization.<sup>74</sup> The legislation prohibited the payment of money from the Treasury “to any person acting or presuming to act as an officer, civil, military or naval, as salary in any office, which office is not authorized by some

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<sup>70</sup> 28 U.S.C. sec. 546 (d) (2012). See also footnote 29, *supra*, for a review Congress’s brief and failed attempt in 2006 to vest unlimited authority in the Attorney General to fill vacant district attorney until a presidential nomination is made and confirmed.

<sup>71</sup> Cummings & McFarland, *supra* n. 28 at 218 -22; Shugerman *supra* n. 28 at 134-35, 140.

<sup>72</sup> Act of Feb. 13, 1795, ch. 21, 1 Stat.415.

<sup>73</sup> See footnote 69 and accompanying text.

<sup>74</sup> See, 33 Cong. Globe 564-65 (1863).

previously existing law, unless where such office shall subsequently be sanctioned by law.” It also provided that “nor shall any money be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is required by law to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate.”<sup>75</sup> Those provisions were attached as a rider to the fiscal year 1864 Army Appropriations Act and were the precursor of current statutory provisions.<sup>76</sup>

In 1867 Congress famously responded to President Johnson’s efforts to purge President Lincoln’s cabinet holdovers and other Senate confirmed officials and to undermine the Reconstruction undertaking with the passage of the Tenure of Office Act.<sup>77</sup> The purpose of the legislation was to shield Lincoln appointees from removal without Senate consent. The Act restricted the power of the President to suspend any advice and consent officer while the Senate was not in session unless it was for misconduct, crime or could be shown the official incapable or disqualified to hold office. (At that time, Congress sat during a relatively small portion of the year.) Such removals were to be reported to the Senate for review and if the Senate did not concur, the removed officer could resume his duties. Also, the President could make recess appointments only if the vacancy occurred by death or resignation. If the recess appointee’s nomination was not thereafter confirmed in the next session of the Senate, the office “shall remain in abeyance.” Criminal penalties and salary cut-offs were also provided for violations of the Act. In 1868 impeachment proceedings against President Johnson were commenced for alleged violation of the Act by his suspension of Secretary of War Stanton and his refusal to reinstate him when the Senate rejected his removal. The impeachment trial resulted in an acquittal.

In 1869, after the election of President Grant, the Act was amended and modified.<sup>78</sup> The revised Act gave the President more control over cabinet officials but continued to block his power to fire district attorneys and other principal officers. The Act was ultimately repealed in 1887.<sup>79</sup>

The passage of the Vacancies Act of 1868<sup>80</sup> presents another important instance of Congress’s consistent diligence to identify and cabin broad presidential assertions of

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<sup>75</sup> 12 Stat. 642, 646 (1863).

<sup>76</sup> The salary bar for recess appointees to offices that had been vacated while the Senate was in session remained intact until amended in 1940 to provide exceptions to the flat prohibition. See 5 U.S.C. 56.

<sup>77</sup> Act of Mar. 2, 1867, ch. 154, 14 Stat. 430.

<sup>78</sup> Act of Apr. 5, 1869, 16 Stat. 6 (1869). Similar limits on the President’s removal power were struck down as unconstitutional in *Myers v. United States*, 272 U.S. 52 (1926).

<sup>79</sup> Act of Mar. 3, 1887.

<sup>80</sup> Act of July 23, 1868, ch. 227, 15 Stat 168.

administrative control of sensitive high level executive positions.<sup>81</sup> At issue was the opportunity being afforded the president by the six-month period then allowed for a temporary designee to an advice and consent position to act before the submission of a nomination for Senate consideration. Senator Trumbull, the principal Senate sponsor of the legislation, made it clear that “the intention of the bill was to limit the time within which the President might supply a vacancy.... As the law now stands, he is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the Committee to be an unreasonable length of time, and hence have limited it by this bill to ten days.” Senator Trumbull also made it clear that the Act could be used to fill a vacancy only once for the prescribed period by another officer detailed by the President.<sup>82</sup> The bill was meant to be the exclusive means for temporary appointments and applied only to cabinet officers and the heads of bureaus appointed by the President with the Senate’s consent. It provided only for presidential designation of a federal official who would serve for ten days.<sup>83</sup> As will be seen shortly, the Vacancy Act’s limitation on the presidential option respecting a vacancy in the Attorney General’s position would be further narrowed.

### **3. The New Department of Justice: Expectations and Realities**

In 1870 Congress directly confronted the problem that the practice of spreading law officers throughout the departments that they had allowed to develop had undermined their independence and undercut their power to restrain executive action. These lawyers had been handpicked by the department heads and became “yes-men” for the legal answers that the department heads wanted to hear. The opinions from these departmental law officers and from outside counsel were “designed to strengthen the resolution” of the department heads for their preferred course, to “sanction” their actions, even though “there was no authority in any law” for those actions.<sup>84</sup> In addition, congressmen described “outside counsel” as “departmental favorites,” hired by executive officers at their own discretion, thereby creating even deeper problems of sycophancy, cronyism, and lawlessness.<sup>85</sup> It was expected that with

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<sup>81</sup> Issues raised by presidential attempts to evade the limitations of the 1868 Act and successor enactments were a principal area of attention for author Mort Rosenberg during his entire 35-year tenure at CRS. He was closely engaged with Senate and House committees in the development and passage of the Federal Vacancies Reform Act of 1998 (FVRA) through testimony and reports, which included a comprehensive detailing of the legal history of vacancy acts from 1795 to 1998. See Morton Rosenberg, *Validity of Designation of Bill Lann Lee As Acting Assistant Attorney General for Civil Rights* (CRS Report January 14, 1998) (Rosenberg on Vacancies). That report and other of Rosenberg’s written understandings of the past history of vacancy acts and the legislative history of the FVRA were cited by the Supreme Court in *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017) which is the only instance it has addressed issues in this area.

<sup>82</sup> 39 Cong. Globe 1163-64. The time limit was increased to 30 days in 1891 and to 120 days in 1988. Rosenberg on Vacancies, *supra* n. 81 at 6-7.

<sup>83</sup> *Id.*

<sup>84</sup> Cong. Globe, 41<sup>st</sup> Cong., 2d Sess. 3036 (1870) (statement of Rep. Thomas Jenkes).

<sup>85</sup> *Id.* at 3039 (statement of Rep. William Lawrence); *id.* at 4490 (statement of Sen. Thomas Bayard).

his new authority over government legal officers, the Attorney General’s opinions would become more authoritative within the executive branch, to be “followed by all the officers of the Government until [they were] reversed by the decision of some competent court.”<sup>86</sup> Executive officers—even the President—would no longer be able to find legal “shelter” from the law officers for their questionable actions.<sup>87</sup> “The reformers’ vision was to increase professional independence by increasing bureaucratic accountability to the Attorney General, not to the President. Instead of cementing presidential power over government lawyers and merging law and politics, the DOJ Act was itself a structural reform aiming to protect professional independence and separate law from politics.”<sup>88</sup> Thus the DOJ Act barred other departments from employing their own attorneys and prohibited the new Justice Department from paying attorney’s fees to anyone other than district attorneys.<sup>89</sup>

The hope for professionalism and nonpartisan legal pronouncements was realized for many years, particularly with regard to the DOJ Act’s limitation on the president’s authority to designate an official from outside DOJ in the event of vacancy in the office of Attorney General. Following its creation in 1870, numerous Attorneys General issued opinions consistently concluding that under the 1868 Vacancies Act that the President must comply strictly with the Act’s demanding, pre-emptive requirements, regardless of whether such compliance imposed practical difficulties. Seven Attorney General opinions from five different presidential administrations held that once the statutory limitation had expired, no one could exercise the duties and powers of the vacant office. The offices involved included the Secretary of the Navy, two Treasury Secretaries, a Postmaster General, a Treasury Department Auditor, and a Secretary of State.<sup>90</sup> A district court commented in 1990 that “These opinions show that the Attorney General and other senior government officials have, for the last 100 years, interpreted the Vacancies Act giving the President authority to make interim appointments only when the express conditions of the Act satisfied...[and] show that Congress has been on notice for more than a century that the Vacancies Act is generally and strictly and narrowly interpreted. If Congress intended the Act to serve a more general purpose—to allow the

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<sup>86</sup> *Id.* at 3036 (statement of Thomas Jenkes).

<sup>87</sup> *Id.*

<sup>88</sup> Shugerman, *supra* n. 28 at 125-26. The legislative history of the Act “offered stories of rampant factional battles and cronyism in the various departments, especially the Treasury Department. The Treasury Department was a gold mine for patronage: it had a combination of many offices, access to money and taxation, and lots of power. The stories of corruption were particularly relevant to the founding of the DOJ because the Treasury Department had command over U.S. Attorneys, and the Treasury Department’s legendary spoils framed the debate and heightened the urgency of reform. The office of the Attorney General was squeaky clean and professional, particularly when contrasted with Treasury” *Id.* at 150-51.

<sup>89</sup> District attorneys were put under the direct supervision of the Attorney General but the fee system, described as “by far the greatest evil which beset the administration of federal justice in the nineteenth century,” continued until 1896. See Cummings & McFarland, *supra* n. 28 at 493-95.

<sup>90</sup> See Rosenberg on Vacancies, *supra* n. 81 at 7-8.

President to fill any vacancy, however created—as the government contends, Congress has had ample opportunity to amend the statute to give effect to that intent.”<sup>91</sup>

More recently DOJ has argued that the Vacancies Act was not intended to apply to the office of Attorney General. However, a clear indication that Congress was aware of the Act is to be found in Section 2 of the DOJ Act which created the office of Solicitor General “who, in the case of vacancy in the Office of Attorney General, or in his absence or disability, shall have the power to exercise the duties of that office”, a provision that was understood to prevent the President from utilizing his authority under Vacancies Act to designate some other officer outside the Department to be its acting head. A brief review of the administrative history of the conduct of the legal business of the government that led to the 1870 Act demonstrates with clarity its singular purpose of preventing the President from installing legal officials from other agencies with possible incompatible interests as the temporary head of DOJ. In any event, four years later, Congress, in its adoption of Revised Statutes, made the sole change in the 1868 statute which appears in Section 179: “In any of the cases mentioned in the two preceding sections [allowing first assistants to temporarily fill vacancies], *except the death, resignation, absence or sickness of the Attorney General*, the President may, in his discretion, authorize and direct the head of any other or any other officer in either department whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed, or the sickness or absence shall cease.” (emphasis supplied).<sup>92</sup>

#### **IV. The Lessons of the Teapot Dome Inquiry**

Teapot Dome is a historic term that is synonymous with the notion of government corruption as well as a model for the conduct of effective congressional investigative oversight. It commenced with rumors that members of the Harding Administration had leased a rich naval oil reserve in Wyoming to private interests in return for bribes. The Senate investigations and resultant civil and criminal proceedings spanned over six years touching high level officials in executive departments, including the Justice Department, and even reaching the White House. It also reached members of both political parties and fostered vituperative verbal assaults on the Senate investigating committee. The eminent legal scholar Dean John Henry Wigmore commented:

The senatorial debauch of investigations... poking into political garbage cans and dragging sewers of political intrigue...filled the winter...with a stench which has not yet passed away. Instead of employing the constitutional, manly, fair procedure of

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<sup>91</sup> *Olympic Fed. Sav. & Loan v. Office of Thrift Supervision*, 732 F. Supp. 1183,1197-980, *appeal dismissed as moot*, 903 F. 2d 837 (D.C. Cir. 1990).

<sup>92</sup> See Rosenberg on Vacancies, *supra* n. 81 at 14-16.

impeachment, the Senate flung self-respect and fairness to the winds. As a prosecutor, the Senate presented a spectacle [and] fell” in popular estimate to the level of professional searchers of the municipal dunghills...”<sup>93</sup>

The future Supreme Court member, Felix Frankfurter, responded:

Emboldened by the successful offensive against the pending investigation in Washington, various suggestions are afloat with a view to curbing future Walsh and Wheeler investigations. Professing, of course, that wrongdoing, impropriety and unwholesome standards in public life should be exposed, critics who have nothing to say for the astounding corruption and corrupting soil which have been brought to light, seek to divert attention and shackle the future by suggesting restrictions in the procedures of future congressional investigations. Not only do members of the bar thus propose to hamper a power which has been exercised since 1789, but even one of our financiers, who is a self-appointed mentor for all our national ills, urges curbs upon Congress drawn from his deep study of comparative parliamentary procedure.... The procedure of congressional investigation should remain as it is. No limitations should be imposed by congressional legislation or standing rules. The power of investigation should be left untrammelled, and the methods and forms of each investigation should be left for determination of Congress and its committees, as each situation arises. The safeguards against abuse and folly are to be looked for in the forces of responsibility which are operating within Congress, and are generated from without.<sup>94</sup>

For present purposes, understanding the adoption of past congressional investigative procedures that were adapted to the political and legal situation at hand is vital.<sup>95</sup> The Walsh investigation had reached a point in early 1924 that it appeared to have lost momentum and public interest. But then concrete evidence was revealed about a \$100,000 bribe of one of the governmental suspects. Since Attorney General Harry Daugherty was already a suspect because of his failure to institute any DOJ investigations of past oil lease revelations, and President Coolidge had declined to take any measures with him, Walsh developed a plan to propose a Senate resolution calling on Coolidge to annul the oil leases and appoint special counsel to

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<sup>93</sup> Wigmore, Legislative Power to Compel Testimonial Disclosure, 19 Ill. L. Rev. 452, 453 ((1925).

<sup>94</sup> Felix Frankfurter, Hands Off the Investigations, The New Republic May 21, 1924, reprinted in Volume IV, Congress Investigates: A Documented History, 1792-1974 at 116-20 (Congress Investigates). Other prominent constitutional scholars of that era also strongly supported congressional usage of its inherent self-protective powers. See, e.g., C.S. Potts, Powers of Legislative Agencies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926) and James Landis, Constitutional Limitations on the Power of Investigation, 40 Harv. L. Rev. 153 (1926).

<sup>95</sup> The following relation of the political and legal events of the inquiry are taken from the in depth documentations prepared by Hasia Diner, Teapot Dome 1924, in Congress Investigates, 3-24(Diner), and Leslie E Bennett, One Lesson from History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal Brookings Institution, 1999) (Bennett).

investigate and prosecute those involved. Coolidge, however, got word of the plan and quickly issued his own plan to appoint two special counsel to upstage Walsh and to protect his political credibility. At the same time, Daugherty issued a statement agreeing with the president's plan.

Within days Walsh introduced a *joint resolution* stating that the oil leases had been issued under circumstances indicating fraud and corruption and directed the president to institute lawsuits to recapture the lost assets and to punish the malefactors. The joint resolution was careful in two respects. The presidential authorization of appointments of two special counsels had to be approved by the Senate and the counsels were to have total control of all the civil and criminal litigation despite "anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding."

The Senate confirmation requirement came into play when it was discovered that Coolidge's first two nominees had conflicting oil interests and their nominations were withdrawn. The subsequent nominations of Atlee Pomerene and Owen Roberts were easily confirmed. Within a month of their confirmations the two counsels sought indictments of three accused. Shortly after their confirmation the Senate passed Senate Resolution 157 directing an investigation of Daugherty's failure to prosecute. When Daugherty finally resigned and his successor Harlan Stone became Attorney General, the committee agreed that Stone could retain the two counsels as special assistants to the Attorney General. Pomerene and Roberts brought numerous civil and criminal actions. Two civil trials and six criminal prosecutions against those involved in the fraudulent leasing of Teapot Dome and the Elk Hill reserves ensued which restored the naval reserves and put Sinclair in jail for contempt of Congress. The latter prosecution led to a major Supreme Court victory in *Sinclair v United States* establishing the institution's self-protective prerogative. Together with the High Court's ruling in *McGrain v. Daugherty*, Congress's oversight and investigative authority was irrefutably re-established and its inherent, inviolable self-protective powers were unquestionably recognized.

#### **V. Understanding the Origins of the Current Constitutional Impasse Over Congressional Subpoena Enforcement: The Reagan Administration's Quest for Presidential Hegemony Over the Administrative Bureaucracy**

As has been previously indicated, the formal articulation of the Executive's current position refusing legal recognition of congressional contempt citations issued pursuant to either the legislature's statutory criminal contempt or inherent contempt authorities appears in two opinions rendered by DOJ's Office of Legal Counsel (OLC) in 1984 and 1986.<sup>96</sup> Both have been cited as the basis for Executive non-compliance with the contempt citations in the *Miers* and

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<sup>96</sup> See, *Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101 (1984) (Olson Memo); and *Response to Congressional Requests for Information Made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68 (1986) (Cooper Memo).

Fast & Furious investigations and litigations.<sup>97</sup> But it has taken thirty years for the Executive to attempt to implement a strategic decision that on its face poses profound constitutional separation of powers implications. To fully and properly assess the legal substantiality of the stratagem, it is useful, and indeed necessary, to understand the immediate context that prompted the preparation of the OLC opinions as well as the intervening three decades of events that apparently impelled effectuation of the tactic.

### **1. The Immediate Origins of the Olson and Cooper Memoranda**

In 1970, in response to the growing perception and alarm over Executive actions, often taken in secret, and all reflective of a disdain for legislative authority and prerogatives in foreign and domestic affairs, Congress began taking counteractions to shore up its ability to know what the Executive is doing and to be able respond effectively and in a timely manner to protect its institutional integrity. The hard-earned lessons learned from the Viet Nam war, presidential impoundment tactics, as well as Watergate and the Nixon impeachment proceedings resulted in congressional measures that expanded its ability to gain access to sources of vital information and to assure its timely receipt. These actions included passage of the Legislative Reorganization Act of 1970<sup>98</sup>, the War Powers Resolution of 1973<sup>99</sup>, the Congressional Budget Act of 1974<sup>100</sup>, the Impoundment Control Act of 1974<sup>101</sup>, the Inspector General Act of 1978<sup>102</sup>,

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<sup>97</sup> See, e.g., Memorandum for the Counsel to the President, Fred F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Immunity of Former Counsel to the President from compelled Testimony*, July 10, 2007; Letter to George T. Manning, Counsel for Ms. Miers, from Fred F. Fielding, Counsel to the President, July 10, 2007 (directing Ms. Miers not to appear before the House Judiciary Committee in response to a subpoena); Letter to House Judiciary Committee Chairman John Conyers, Jr., from George T. Manning, counsel for Ms. Miers, July 17, 2007 (explaining legal basis for Ms. Miers refusal to appear); Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012.

<sup>98</sup> 84 Stat. 1156, 1168-71, 1181-85 (making express the duty of all standing committees to engage in oversight on a “continuing basis,” strengthening the program evaluation responsibilities of the General Accounting Office (GAO), tripling the personnel complement of the Congressional Research Service and directing the hiring of senior level experts in over 20 categories of legislative concern, strengthening its policy analysis role and expanding its other responsibilities to Congress, and increasing the number of permanent staff for standing committees, including a provision for minority staff hirings).

<sup>99</sup> Pub. L. 93-148, 87 Stat. 134 (1973) (requiring the prompt reporting to Congress of military actions taken by the President).

<sup>100</sup> 88 Stat. 302,325, 326,327-29 (further expanding committee oversight authority by permitting them to appraise and evaluate programs by themselves ‘or by contract, or [to] require a Government agency to do so and furnish a report thereon to the Congress;’ directing the Comptroller General of GAO to review and evaluate government agency programs and activities on his own initiative or by requests by committees or members and to establish a special office to carry out these responsibilities, and strengthening GAO’s role in acquiring fiscal, budgetary and program-related information; and establishing the Congressional Budget Office (CBO) which is authorized to “secure information, data, estimates, and statistics from the various departments, agencies, and establishments of the government to share with the newly established House and Senate budget committees).

<sup>101</sup> 2 U.S.C. 683 (limiting the ability of the President to refuse to obey statutory directions to spend appropriated funds).

<sup>102</sup> Pub. L. 95-452, *codified at* U.S.C. Appendix 3 (establishing offices of inspectors general in all cabinet and larger agencies to monitor the efficiency and propriety of their administrative actions by means of independent internal audits and investigations that may be reported to Congress).

and the Ethics in Government of 1978<sup>103</sup>.

Of particular interest here, however, are the historic internal institutional reforms of the committee system in the House installed at the beginning of the 94<sup>th</sup> Congress in 1975<sup>104</sup> which had the effect of abandoning the seniority system for committees, which had vested absolute control in full committee chairs, by decentralizing and disbursing committee authorities over legislation and oversight to subcommittees and their chairs. As a result, any committee with over 20 members is required to establish a separate committee solely devoted to oversight. Also significant was the 1977 appointment of the first House General Counsel by Speaker Thomas “Tip” O’Neill to represent institutional interests in court actions and to provide legal guidance to committees, members and the leadership. Remarkably, before that time the Justice Department frequently represented congressional interests in court proceedings, often to the legal detriment of Congress.<sup>105</sup>

The effect of the reforms was immediate, with aggressive committee actions producing important supporting precedents underlining the efficacy and institutional necessity of having available the credible threat of a contempt of Congress citation to support compliance with valid compulsory committee demands for information. Between 1975 and 1998 there were 10 votes to hold cabinet-level executive officials in contempt. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial.<sup>106</sup> During this period, and indeed until 2002, the very threat of a contempt vote was sufficient to elicit compliance.<sup>107</sup> Four refusals raised executive privilege claims, one asserted a “conditional” claim of constitutional privilege, and the remainder raised claims of statutory exemption or agency policy concerns. There is evidence in some of the cases that the contemnors were reluctant to risk a criminal prosecution to vindicate a presidential claim of privilege or policy, which led to settlements.<sup>108</sup> In addition, in 1976, the House, by resolution,

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<sup>103</sup> Pub. L. No. 95-521, 92 Stat.1824 (establishing the process of appointing an independent counsel to investigate and prosecute allegations of criminal conduct at the higher reaches of the executive bureaucracy).

<sup>104</sup> See H. Res. 988, 93d Cong., effective Jan. 3, 1975.

<sup>105</sup> For a discussion of the history legal representation for the House and Senate see Rebecca May Salokar, Legal Counsel to Congress Protecting Legal Interests, 20 Congress and the Presidency 133-136 (Autumn 1993) and Charles Tiefer, The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client, 61 Law & Contemporary Problems 47-60 (Spring 1988).

<sup>106</sup> Secretary of Commerce Rogers C.B. Morton (1975); Secretary of State Henry A. Kissinger (1975); Secretary of Health, Education and Welfare Joseph A. Califano (1978); Secretary of Energy Charles W. Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); Environmental Protection Agency Administrator Anne Gorsuch Burford (1982-83); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); and Attorney General Janet Reno (1998). The details of these instances may found in Louis Fisher, *The Politics of Executive Privilege*, 111-134 (2004)(Fisher)..

<sup>107</sup> See Alissa Dolan and Todd Garvey, *Congressional Investigations of the Department of Justice, 1920-2012: History Law and Practice*, CRS Report R42811, 32-33, 38-39 (Nov. 5, 2012), describing successful investigations of the Rocky Flats Environmental Crimes Plea Bargain and the investigation of the Misuse of Informants at the FBI’s Boston Regional Office.

<sup>108</sup> See, e.g., Anne M. Burford, *Are You Tough Enough?* 145-159 (McGraw Hill 1986) (quoting James Watt’s warning about his and Attorney General Smith’s contempt experience and Burford’s description of her despair at her treatment by the Justice department) (Burford).

twice authorized Rep. John Moss, chairman of the House Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, to intervene in pending litigation to ensure compliance with issued subpoenas. In both cases the courts accepted the congressional appearances.<sup>109</sup> Those precedents proved to be decisive for the courts in the *Miers* and *Fast and Furious* litigations in upholding the House's right to authorize *initiation* of civil enforcement proceedings by a House resolution. It may also be noted that Rep. Moss and his Subcommittee were also the motivating force behind the Rogers Morton and Califano contempt proceedings. It was into this almost exuberant atmosphere of successful exercises of congressional authority that President-elect Ronald Reagan warily but prepared stepped.

The advent of the Reagan administration in 1981 marked the beginning of a determined and carefully conceived legal and political effort to retrieve a perceived loss in strength of the presidency.<sup>110</sup> President Reagan campaigned for and sought to implement a broad deregulatory agenda. Implementing that goal required asserting control over administrative agencies. But by the end of 1982 it became readily apparent that this could not be accomplished through legislative means<sup>111</sup> and the administration turned to an aggressive administrative and litigation strategy. Fundamental to this scheme was the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the President or his delegate. In support of this end, the administration and its supporters articulated a constitutionally-based theory of a unitary executive, a conception that left no constitutional space for independent agencies—those protected from removal under a good cause standard—much less the new independent counsel statute. It is founded on the notion that that Article II's vesting of "executive power" in the President combined with the President's authority to "take Care that the Laws be faithfully executed", requires that the President have the power to supervise and control the implementation of federal law, and bars Congress from imposing restrictions on his power to fire executive officers at will. The new independent counsel law was seen as an especial intrusion on core presidential prerogatives since it imposed removal restrictions on an officer whose functions are paradigm exercises of executive power: criminal investigations and prosecution.<sup>112</sup>

On this basis, the administration began taking a variety of actions to make that idea an operative fact. These included centralizing control of agency rulemaking in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) by executive

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<sup>109</sup> See *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 301 (D.D.C. 1976) *aff'd* 548 F. 2d 977 (D.C. Cir. 1976) and *United States v. AT&T*, 551 F. 2d 384,392 (D.C. Cir.1976). See also Fisher, *supra* n.106 at 95-97 discussing *Ashland*.

<sup>110</sup> See Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 *Geo. Wash. L. Rev.*627 (1989)(Rosenberg Rise and Demise); Kevin Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake*, *Vanderbilt Law School Public Law and Theory, Working Paper Number 09-06*, 401-431 (Stack), accessible at [http://ssrn.com/abstract\\_id=1340124](http://ssrn.com/abstract_id=1340124); Peter I. Strauss, *Foreword: Overseer, or "The Decider?" The President in Administrative Law*, 75 *Geo. Wash. L Rev.* 696 (2007) (Strauss).

<sup>111</sup> Rosenberg Rise and Demise, *supra* n. 110 at 628 n. 2.

<sup>112</sup> Stack, *supra* n. 110 at 409-10.

order;<sup>113</sup>challenging the constitutionality of independent regulatory agencies; asserting the inability of Congress to vest discretionary authority in subordinate executive officials who are free from presidential supervision and control; refusing to implement congressional enactments it deemed unconstitutional; questioning the authority of Congress to vest the appointment of an executive officer with prosecutorial powers in the courts and to provide for removal of that officer only for cause; unsuccessfully firing inspectors general; successfully firing 12,000 air traffic controllers; and denying the authority of Congress to empower an agency to issue statutorily prescribed unilateral compliance orders to sister agencies found in violation of laws and regulations applicable to them or to resort to court action to force compliance with such orders.<sup>114</sup>

It should then come as no surprise that the Reagan Administration would take special umbrage to Congress's exercise of its criminal contempt power against its own cabinet rank officials. The first such citation, against Energy Secretary James Edwards by a House Government Operations Subcommittee, involved documents regarding contract negotiations between the department and a major oil company. Members were concerned the deal was going too fast, but the real conflict was between officials in the administration. The Energy Secretary wanted to sign the contract but wouldn't turn over the documents until it was consummated. On the morning of the scheduled full committee contempt vote the President avoided the potential conflict by siding with the Secretary. The contract was signed and the documents were delivered.<sup>115</sup>

The next citation, against Interior Secretary James Watt, was more contentious and saw the first invocation of executive privilege by President Reagan. At issue were 31 documents relating to a reciprocity provision in a statute involving Canada. Attorney General Smith argued that the documents should be withheld because the House Energy and Commerce Subcommittee wanted them for oversight and not legislative purposes; the documents would expose pre-decisional deliberative matters and would chill the candor of future deliberations; and the documents related solely to sensitive foreign affairs matters. After the Subcommittee rejected the claims and announced it would prepare a contempt citation all but seven of the documents had been turned over. When the refusals with respect to the remaining documents continued the Subcommittee voted him in contempt. When Watt continued to resist compliance, the full committee voted to hold him in contempt. At that time, a compromise was reached whereby Subcommittee members would be able to peruse the documents for four hours and take notes and agreed not to release information that might harm Canada.

The ranking minority member commented that there was nothing sensitive in the documents and that Watt would have turned over the materials had not the White House intervened.<sup>116</sup> This was confirmed by Watt himself in relating his reaction to being told by

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<sup>113</sup> See E.O. 12,291, 3 CFR 127 (1981) and E.O. 12,498, 3 CFR 323 (1985).

<sup>114</sup> See Rosenberg Rise and Demise, n. 110 at 629-30 and notes 5 through 9 detailing the almost uniform lack of litigation success.

<sup>115</sup> See Fisher, n. 106 at 123.

<sup>116</sup> *Id.* Fisher at 124-26.

White House Counsel Fred Fielding that when Attorney General Smith was cited for contempt the administration “didn’t want to create any embarrassment for the general, so we gave them the paperwork.” Watt said he responded: “*Fred Fielding!* You’re telling me that the Attorney General had a case similar to mine, and the principle for which you marched me to the end of the plank is not important enough for him to stand on and get abused like I’ve been abused?” When Fielding responded “That’s the way it goes, Jim,” Watt says he retorted: “You get me out within twenty-four hours or I’m going to the Congress personally and hand deliver those papers—because I will not be abused by the White House or the Department of Justice. If the principle is not strong enough for the Attorney General of the United States to fight for, I’m not going to let you guys use me any longer.”<sup>117</sup>

The White House and DOJ thought that they were better prepared for the next confrontation which evolved from an investigation by two House committees, the Oversight Subcommittee of the Public Works and Transportation Committee and the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee into the Environmental Protection Agency’s (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund). Initially, EPA voiced no objection to the requests seeking documents contained in its open litigation files regarding enforcement of the Superfund program “so long as the confidentiality of the information in the files was maintained.” Shortly thereafter the Reagan administration decided that Congress should not be able to see the documents in active litigation files. A presidential memorandum directed Gorsuch to refuse to turn over the documents, claiming that they represented “internal deliberative materials containing enforcement strategy and statements of the government’s positions of various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites” by the EPA or the Justice Department. Subpoenas were issued by both committees seeking the documents. In compliance with the President’s directive Gorsuch refused to comply on the ground they were “enforcement sensitive.”<sup>118</sup>

The Subcommittee, and ultimately the full House Committee on Public Works, approved a criminal contempt of Congress citation and forwarded it to the full House for consideration. On December 16, 1982, the House voted 259-105 to adopt the citation,<sup>119</sup> the first time in history a cabinet-level officer was ever so charged. But before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit seeking to enjoin the transmission of the citation and to have the House’s action declared unconstitutional as an intrusion into the president’s authority to withhold such information from Congress. According to DOJ, the House’s action imposed an “unwarranted burden on executive privilege” and “interferes with the executive’s

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<sup>117</sup> Burford, *supra*, n. 108 at 146-47.

<sup>118</sup> See generally, Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Related to the Comprehensive Response, Compensation and Liability Act of 1980, H.R. Rept. 97-968, 97<sup>th</sup> Cong., 7-9, 42-43 (1982) (hereinafter Gorsuch Contempt Report).

<sup>119</sup> 128 Cong. Rec. 31,776 (1982).

ability to carry out the laws.”<sup>120</sup>

The District Court for the District of Columbia dismissed the DOJ suit on the grounds that judicial intervention in executive-legislative disputes “should be delayed until all possibilities have been exhausted.”<sup>121</sup> In addition, the court noted that ultimate judicial resolution of the validity of the President’s claim of executive privilege “could only occur during the course of the trial for contempt of Congress.”<sup>122</sup> The court urged both parties to devote their energies to compromise and cooperation, not confrontation.<sup>123</sup> After the court’s ruling, DOJ chose not to appeal, in part due to Gorsuch’s reluctance to continue.<sup>124</sup> Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury for its consideration, despite a clear statutory direction to do so.<sup>125</sup> Following a brief period of negotiation with the Rep. Elliot Levitas, the Subcommittee chair of the Public Works and Transportation Committee, it was agreed that the documents would be released to the Subcommittee in stages, beginning first with briefings and redacted copies, and eventually ending with unredacted copies that could only be examined by committee members and up to two designated committee staffers.<sup>126</sup>

The Chairman of the House Energy and Commerce Committee, Rep. John Dingell, refused to accept the agreement between DOJ and the Public Works Committee given its limitations on access and time delays. After a threat to issue new subpoenas and pursue a further contempt citation, negotiations were resumed. The result was an agreement that all documents covered by the initial Energy and Commerce subpoena were to be delivered to the Subcommittee. There were to be no briefings and no multi-stage process of redacted documents leading to unredacted documents. The Subcommittee agreed to handle all “enforcement sensitive” documents in executive session, giving them confidential treatment. The Subcommittee, however, reserved for itself the right to release the documents or use them in public session, after providing “reasonable notice” to the EPA. If the EPA did not agree, the documents would not be released or used in public session unless the Chairman and Ranking Minority Member concurred. If they did not concur, the Subcommittee could vote on the release of the documents and their subsequent use in a public session. Staff access was to be decided by the Chairman and Ranking Minority Member. The agreement was signed by Chairman Dingell, Ranking Member Broyhill, and White House Counsel Fred Fielding.<sup>127</sup> The ultimate agreement is illustrative of the autonomy of jurisdictional committees in the House.

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<sup>120</sup> See generally, *United States v. U.S. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

<sup>121</sup> *Id.*, 556 F. Supp. at 152.

<sup>122</sup> *Id.*, stating that “[c]onstitutional claims and other objections to congressional investigations may be raised as defenses in a criminal prosecution.”

<sup>123</sup> *Id.*, at 153.

<sup>124</sup> Burford, *supra* n. 108 at 145-174.

<sup>125</sup> See 2 U.S.C. §§ 192 and 194 imposing a “duty” on the U.S. Attorney” to bring the matter before the grand jury for its action.”

<sup>126</sup> See Memorandum of Understanding Between the Committee on Public Works and Transportation and the Department of Justice, Concerning Documents Subpoenaed from the Environmental Protection Agency, February 18, 1983; see also H. Rept. No. 323, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18-20 (1983).

<sup>127</sup> See EPA Document Agreement, CQ Weekly Report, March 26, 1983.

The released documents provided evidence that raised allegations of perjury, conflict of interest, and political manipulation of the agency. As part of the final agreement the House withdrew its contempt citation of Gorsuch and she subsequently resigned along with 20 other top agency officials. One official, Rita Lavelle, the manager of the Superfund program, was found in contempt of Congress for defying a subpoena to testify and was tried and convicted of lying to Congress and received a prison sentence and fine.

## **2. The Supreme Court Has Thus Far Rejected the Concept of a Unitary Executive**

As indicated previously, the principal goal of the incoming Reagan administration in 1981 was the establishment, in law and practice, of an administrative regime in which the President has the ultimate power of supervision, direction and control of the entire executive bureaucracy, a true unitary executive. The greatest obstacle was Supreme Court rulings that recognized the authority of Congress to limit removal of presidentially appointed officials in independent regulatory agencies only for cause.<sup>128</sup> The task was finding the proper litigation vehicle for presentation to the High Court at the right time. White House and OLC legal strategists determined that the Independent Counsel statute was the one.

The leading supportive case, *Myers v. United States*<sup>129</sup>, in strong dicta indicated that the President must be able to remove at-will officials performing purely executive functions. However, eight years later the Court, in *Humphrey's Executor v. Federal Trade Commission*<sup>130</sup>, modified *Myers* to allow for cause removal protections for the commissioners but only because the Court found they performed “quasi-legislative” and “quasi-judicial” functions and not “purely executive” duties.<sup>131</sup> The removal restrictions on the independent counsel, who exercised prosecutorial duties, a quintessentially pure executive task, was seen as a vulnerable target. In addition, then recent Supreme Court separation of powers rulings indicated it was inclining toward strict construction of core structural constitutional provisions. In 1983 in *INS v. Chadha*<sup>132</sup> the Court held legislative vetoes unconstitutional because Congress may not control the execution of rules except through Article I procedures; and in *Bowsher v. Synar*<sup>133</sup> in 1986 it ruled that Congress may not delegate executive functions to an official, the Comptroller General, who is subject to congressional removal.

Indeed, they thought they had the perfect foil as a plaintiff, Theodore Olson, who was part of the team that developed the strategy. After the Gorsuch contempt was settled the House Judiciary Committee commenced a two-year inquiry about the role DOJ, and particularly

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<sup>128</sup> See, e.g., *Humphrey's Executor v. FTC*, 295 U.S.602 (1935). Constitutional challenges to the prosecutorial authorities of the SEC and FTC in the early 1980's were uniformly rebuffed by lower courts. See Rosenberg Rise and Demise, *supra* n. 110 at 629 n. 5.

<sup>129</sup> 272 U.S. 52 (1927).

<sup>130</sup> 295 U.S. 602 (1935).

<sup>131</sup> 295 U.S. at 628-29.

<sup>132</sup> 462 U.S. 919, 944-45.

<sup>133</sup> 478 U.S. 714, 736.

Olson, played during the controversy. It wanted to determine whether DOJ, not EPA, had made the decision to persuade the President to assert executive privilege; whether DOJ had directed the U.S. Attorney for the District of Columbia not to present the Gorsuch contempt citation to the grand jury for prosecution and had made the decision to sue the House ; and, generally, whether there was a conflict of interest in DOJ simultaneously advising the President, representing Gorsuch, investigating alleged executive wrongdoing, and enforcing the congressional criminal contempt statute. It was a contentious inquiry during which Olson was the central figure and target. The Committee issued its final report in December 1985.<sup>134</sup> Among other abuses cited by the Committee were the withholding of relevant documents until the Committee had independently learned of their existence, as well as the “false and misleading” testimony before the committee by the head [Olson] of the Department’s Office of Legal Counsel.” The report led to a request to Attorney General Meese seeking appointment of an independent counsel to investigate possible criminal conduct of Olson and others.

In the Spring of 1986 Meese referred Olson to be the subject of the investigation. It is not clear whether Olson was a willing subject but he played his role well. Independent Counsel Morrison issued a grand jury subpoena for his testimony and he refused to comply, challenging the constitutionality of the Ethics Act. The judicial high water mark was reached in 1988 with the split ruling of a panel of the District of Columbia Circuit Court of Appeals holding that the independent counsel provisions of the Ethics in Government Act were unconstitutional.<sup>135</sup> Although the principal basis for the panel’s decision rested upon its interpretation of the Appointments Clause,<sup>136</sup> the majority propounded as an alternate ground of decision the idea of the unitary executive. The appeals court decision represented the first judicial application of the unitary executive concept to the merits of a controversy and the initial recognition of a substantive content to the “take care” clause.<sup>137</sup> That is, for the first time a court acknowledged a constitutionally-based power in the President to direct the actions of subordinate executive officials contrary to the expressed intent of a congressional enactment.

However, any doubt raised by the appeals court ruling were emphatically allayed by the Supreme Court’s ruling *Morrison v. Olson*<sup>138</sup> upholding the appointment and removal provisions of the Independent Counsel Act. In an opinion remarkable for its breadth and near unanimity<sup>139</sup>, the High Court dealt directly and unequivocally with the notion of a unitary executive. Addressing the argument of dissenting Justice Scalia that “the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President,”<sup>140</sup> Chief Justice Rehnquist held that “[t]his rigid demarcation—a demarcation

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<sup>134</sup> EPA Withholding Report, H. Rept. 99-435 (1985).

<sup>135</sup> *In re Sealed Case*, 838 F.2d 476, *rev’d sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>136</sup> It found that the independent counsel was a superior office and thus had to be appointed by the President with Senate advice and consent.

<sup>137</sup> U.S. Const., art II, §3.

<sup>138</sup> 487 U.S. 654 (1988).

<sup>139</sup> The vote was 7-1 with Justice Scalia dissenting. Justice Kennedy had recused himself.

<sup>140</sup> 487 U.S. at 690 n.29

incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known or foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.”<sup>141</sup>

The Court dealt directly and boldly with the argument that an executive officer who is exercising “purely executive” functions must be subject to direct at-will removal by the President by simply discarding the *Humphrey’s Executor* precedent. The Court held that the validity of insulating an inferior officer from at-will removal by the President will no longer turn on whether such an officer is performing “purely executive” or “quasi-legislative,” or “quasi-judicial” functions.<sup>142</sup> The issue raised by a “good cause” removal limitation, the majority opinion explained, is whether it interferes with the President’s ability to perform his constitutional duty.<sup>143</sup> It is in that light that the function of the official in question must be analyzed. The Court noted that the independent counsel’s prosecutorial powers are executive in that they have been “typically” been performed by executive branch officials.<sup>144</sup> But, the Court held, the exercise of prosecutorial discretion is in no way “central” to the functioning of the executive branch.<sup>145</sup> In other words, it is not a core constitutional presidential prerogative. Further, since the independent counsel could be removed by the by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the “take care” clause.<sup>146</sup> Finally, the limited ability of the President to remove the independent counsel, through the Attorney General, was also seen as providing enough control in his hands to reject the argument that the scheme of the Ethics Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the executive from performing his functions.<sup>147</sup> Although the Court did not define with particularity what would constitute sufficient “cause” for removal, it did indicate that it would at least encompass misconduct in office.

In sum, then, *Morrison* appears to vitiate the essential supporting legal rationale of the unitary executive theory, *i.e.*, that the President must have absolute discretion to discharge at will subordinate officials whose functions include purely executive tasks. *Morrison* teaches that there are no rigid categories of officials who may or may not be removed at will, with the probable exception of the heads of the departments of State and Defense, but would include a more independent Attorney General.<sup>148</sup> The question that arises in such cases is whether for-cause insulation, together with other prescribed duties of the officer in question, impermissibly undermines executive powers or would disrupt the proper balance between the coordinate branches by preventing the executive from performing his assigned function. Resolution of such agency arrangement cases will be determined by the pragmatic, functional analysis approach

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 689--92

<sup>143</sup> *Id.* at 691

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 691-92

<sup>146</sup> *Id.* at 693

<sup>147</sup> *Id.* 692.

<sup>148</sup> Rosenberg Rise and Demise, *supra*, n. 110 at 695-702.

exemplified by *Nixon v. Administrator of General Services*.<sup>149</sup> Absent the issue aggrandizement, a court need only satisfy itself that the relative balance between the constitutional actors and the agencies has been maintained.<sup>150</sup>

The next year, in *Mistretta v. United States*,<sup>151</sup> the Court reiterated its holding in *Morrison* by rejecting, in an 8-1 ruling, the contention that Congress was without authority to locate an agency, the Sentencing Commission, with no judicial powers, but with authority to promulgate binding rules, in the judicial branch, determining that the separation of powers was not violated by structural arrangements that are either innovative or seemingly innovative.<sup>152</sup>

### **3. The Aftermath of Morrison**

Executive interpreters of *Morrison*, when commenting at all, have construed it narrowly. A well-known 1996 Office of Legal Counsel (OLC) memorandum on separation of powers highlighted the narrow range of officers to which it applied: inferior officers. OLC asserted that the ruling “had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation.”<sup>153</sup> In 2010, an opportunity to revisit *Morrison* arose in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>154</sup> That case addressed a situation in which the members of the Public Company Accounting Oversight Board (PCAOB) – who were statutorily provided with for cause protection from at-will removal by the President – were both appointed and directly overseen by an entity, the Securities and Exchange Commission (SEC), whose board members also enjoy statutory for cause protections from at-will removal by the President. The Court deemed the PCAOB members inferior officers and held that the “dual for-cause on the removal of [PCAOB] members contravened the Constitution’s separation of powers” and voided that provision alone. A close reading of the 5-4 opinion’s rationale, which favorably cited *Myers*, arguably would have sufficed to bring down the SEC’s for-cause removal protection as well.<sup>155</sup> Whether the Court was held back by the fact that PCAOB members were inferior officers or that one of the Justice’s was unwilling to go that far is matter for speculation.

Significantly, however, a recent litigation challenging the constitutionality of the for-cause removal protection accorded the Director of the Consumer Financial Protection Board, as well as other structural provisions that insulated the agency from both executive review of its implementation actions under its authorizing legislation and from congressional oversight by

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<sup>149</sup> 433 U.S. 425, 443 (1977).

<sup>150</sup> Anyone doubting this reading of the breadth of the majority opinion is invited to peruse Justice Scalia’s dissent at 487 U.S. at 697-727, and particularly 708-712.

<sup>151</sup> 488 U.S. 361 (1989).

<sup>152</sup> 488 U.S. at 385.

<sup>153</sup> The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 128 (May, 1996).

<sup>154</sup> 561 U.S. 477 (2010).

<sup>155</sup> See Neomi Rao, A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*, 79 Fordham L. Rev. 101 (2011).

means of appropriations review by allowing it receive the bulk of its funding needs directly from the Federal Reserve Board was heard by an *en banc* sitting of the Court of Appeals for the District of Columbia Circuit. The briefs and oral arguments in that case centered on the applicability of the *Free Enterprise Fund* ruling. Relying on *Morrison*, the appeals court upheld the independence aspects of the legislation in their collective entirety.<sup>156</sup> *Morrison* thus still maintains its relevance.

The set back of the *Morrison* ruling effected a subtle change in the tactics by the supporters of the unitary executive. Thus, much of the post-*Morrison* commentary has focused on the increasingly evident unilateral presidential actions that cross the line of supervision, coordination and oversight to operational direction and control. The emergence of what one scholar has called the “New Presidentialism,”<sup>157</sup> has become a profound influence in the unilateralist view of administrative and structural constitutional law. It is a combination of constitutional and practical argumentation that holds that most of the government’s regulatory enterprise represents the exercise of “executive power” which, under Article II, can legitimately take place only under the control and direction of the President and is coupled with the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of “coordination, technocratic efficiency, managerial rationality, and democratic legitimacy” because he alone is elected by the entire nation.<sup>158</sup> It is the incremental, stealth road to the unitary executive.

## VI. Conclusion

The foregoing review of the law, history and practice respecting Congress’s control of executive law enforcement authority and practices and its ability to protect its institutional information gathering prerogatives belies and rejects the mistaken, and unlawful, constitutional basis of the current successful tactic of the Justice Department that is designed to undermine effective legislative investigative oversight by forcing committees to seek enforcement of its subpoenas by means of civil litigation. The inevitable attendant excessive delays, and often

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<sup>156</sup> See *PHH v. CFPB*, 881 F. 3d 375 (D.C. Cir. 2018) (en banc). The District of Columbia Circuit's rationale and ruling was adopted by the 9th Circuit in *CFPB v. Seila Law LLC*, No.17-56324 (May 6. 2019). On October 18, 2019 the Supreme Court granted certiorari to review that ruling.

<sup>157</sup> Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J. of Law and Policy 227 (1988).

<sup>158</sup> For the proposition that the Constitution confers decisional authority on the President see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L. J. 541, 549-50 (1994); Christopher S. Yoo, Steven G. Calabresi, & Anthony Colangelo, The Unitary Executive in the Modern Era, 1945-2004, 90 Iowa L. Rev. 601, 730 (2005). For the proposition that the Constitution does not confer decisional authority but it should be presumed Congress intends it, given then the realities of modern administration, see, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2251 (2001) (Kagan); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2-3(1994). For the proposition that the President, unless directly authorized, is only an overseer, see, e.g., Peter L. Strauss, Foreword: Overseer, or “The Decider”? The President in Administrative Law, 75 Geo. Wash. L. Rev.696 (2007) (Strauss); Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 267 (2006) (Stack); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi-Kent L. Rev. 987, 987-89 (1997).

aberrant judicial rulings, has rendered the ultimate untimely availability of necessary information essentially useless. The result has been that the critical lines of constitutional authority in this vital area have become unclear and the uncertainty is having, and will continue to have, a paralyzing effect on congressional oversight. Until it is resolved it raises the specter of the concomitant danger of executive encroachment and aggrandizement and the destabilization of the Constitution's intended allocation of powers.

The Executive rests its obstructive conduct on the notion that prosecutorial discretion is a "core" constitutionally-based executive authority that prohibits either House of the Congress from requiring a United States Attorney to refer a criminal contempt citation of an executive official to a grand jury or to otherwise subject such an official to internal coercive legislative processes, if the official is carrying out a presidential direction to assert executive privilege. It is averred that the very threat of such actions would be unconstitutional because it would unduly chill the President's ability to effectively protect privileged executive branch deliberations.

But even a cursory examination of the pertinent law, history and practice leads to the indubitable conclusion that each House of Congress is vested with inviolable institutional self-protective authorities that cannot be intruded upon or obstructed by actions of the Executive or Judicial branches nor abandoned by either House of the legislature. It is a "core" authority that emanated from British parliamentary, colonial and early post-revolutionary state usage that was adopted and put in practice by the First Congresses in recognition of its necessity as a vital adjunct to accomplish its legislative responsibilities. Broad Supreme Court approval of the inherent contempt process was quickly forthcoming and soon was supplemented by the addition of a criminal contempt alternative that also received High Court validation. Over the years, the combination of the threats of inherent and criminal contempt proceedings has proved demonstrably effective in eliciting compliance with information demands from nonmembers, including Executive Branch officials. It can truly be said to be an example of a quintessential core constitutional authority.

The same claim cannot be made for the presidential assertion of an exclusive prerogative of prosecutorial discretion. As has been detailed, from the very outset of Congress's establishment of the executive bureaucracy it was made clear that executive law enforcement would be under strict legislative control. There would be no law department, the Attorney General would be virtually powerless with respect to supervision of executive law enforcement activities, and district attorneys were essentially autonomous functionaries who were paid on a fee-per-case basis, and could continue private law practice. Over the first 80 years of the Republic it was Congress that determined which agency officials could assign litigation duties to district attorneys and whether to allow departments to hire outside counsel. There was no centralized control by an executive official or the President. Indeed, Congress limited

presidential ability to fill vacancies in district attorney positions, assigning district court judges the power to make temporary appointments; and when the Department of Justice was created in 1870, Congress severely limited the ability of the President to temporarily fill a vacancy in the office of Attorney General.

These early congressional limitations led to an express rejection by the Supreme Court in its landmark 1988 ruling in *Morrison v. Olson* of the Government's assertion that prosecution was a core presidential authority:

There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.... Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminal at will by the President.<sup>159</sup>

The notion of "centrality" is addressed in the dissenting opinion of then-Judge Ruth Bader Ginsburg in the decision of the D.C. Circuit that the Supreme Court in *Morrison* reversed:

Appellants contend that the Act tampers with a "core" executive function—prosecution. Though it is indisputably an executive task, it is not obvious that prosecution is at the "core" of the executive branch's constitutionally-assigned functions, in the sense that the job must be kept, in any and all cases, under the president's wing and cover.

Core executive functions are described in Article II; they include, notably, the President's role as Commander-in-Chief of the Armed Forces, and his power to make treaties and to grant pardons. While the executive's powers, unlike those of the legislature, are not limited to those enumerated in the Constitution's text, it seems fair to assume that the powers specifically mentioned were of central concern to the framers. Prosecution was decentralized during the federalist period, and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. We cannot conclude that the framers, or the Congress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, *sans* exception, with the President and his men.<sup>160</sup>

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<sup>159</sup> *Morrison*, 487 U.S. at 691-92.

<sup>160</sup> *In re Sealed Case*, 838 F. 2d 476, 526-27 (D.C. Cir. 1988), *rev'd sub. nom. Morrison v. Olson*, 487 U.S. 654 (1988).

Professor Peter Shane, in agreeing with the Rehnquist and Ginsburg understanding of the concept of “centrality” and why it does not apply to prosecutorial discretion, carefully notes that Article II presumes and anticipates some sort of qualified presidential supervisory relationship with the administrative bureaucracy:

But criminal prosecution is not like the negotiation of treaties or the command of our armed forces—functions that Article II itself places in presidential hands. Criminal prosecution, like environmental protection or food safety regulation, is an administrative function for which the executive branch would have no role except insofar as Congress grants such a role through its statutory enactments. Indeed, the peripheral status of the prosecutor is especially clear precisely because, at the time of the Founding, prosecution would have been understood to have as much of a judicial as it does of an executive character. Against the actual historical background of prosecution, it is entirely faithful to original understanding to respect Congress’s authority to determine the scope of presidential policy control over criminal prosecutors.<sup>161</sup>

The current situation demands a constitutional confrontation. In 2008 Professors Eric Posner and Adam Vermuele posited the time when a “constitutional showdown” between the political branches is necessary:

[U]nder certain circumstances the active virtues, the embrace of clarifying conflict, should be preferred to the passive virtues, or the evasion of unnecessary conflict....As against the passive virtues, however, decisive constitutional conflicts and precedent-setting showdowns should actually be encouraged where the value of waiting for more information is low, where similar issues will frequently recur in future generations (so that the value of settling questions now is high), and where legal uncertainty will impose high cost in the future....Where aggregate future conflict, even properly discounted, imposes greater social costs than present conflict, a showdown in the current period would be beneficial.<sup>162</sup>

There can be little quarrel that such a time has been reached. The House of Representatives must act with urgency to reclaim its fundamental institutional prerogatives, restore effective oversight, and neutralize the illegitimate Justice Department policies and practices that are intended to prevent it from employing its historically recognized essential and demonstrably successful contempt enforcement powers. The vehicle should be the adoption of a unified enforcement procedure featuring heavy personal fines imposed through modified

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<sup>161</sup> Shane, *supra*, n. 23 at 264.

<sup>162</sup> Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. Pa. L. Rev. 991, 1041-42 (2008).

inherent contempt and appointment by the Speaker of private counsel to prosecute a contempt of Congress citation. As opposed to the problematic short term consequences of the current House resort to presidential impeachment, re-establishment of direct appointment power will have the long-term effect of effectively addressing the endemic, widespread obstructive reluctance of departments and agencies to comply with the most basic information requests about how they are exercising their administrative authorities and responsibilities. Even an unlikely successful removal of the current President will not staunch the now engrained administrative resistance to comply with legitimate, essential congressional information gathering requests. Recent history attests to that. New administrations are reluctant to abandon the successful tactics of their predecessors. But the history of the success of the combined incentives carrying the meaningful threats of inherent and criminal contempt proceedings demands their retrieval. Adoption of the suggested speedy, procedurally fair and safeguarded subpoena enforcement process that is not subject to presidential pardon authority<sup>163</sup> can be accomplished by passage of a simple House resolution.

The Justice Department will vigorously oppose the House challenge to executive branch obstruction which will reach the Supreme Court for resolution, probably with great dispatch. It would not appear to be wishful thinking that the High Court would be receptive to the House's

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<sup>163</sup> The President's pardon authority is limited to "Reprieves and Pardons for Offences against the United States." Article II, sec. 2. The case law respecting the exercise of the inherent institutional self-protective powers of the Judiciary and the two houses of Congress consistently reflect the understanding that such actions are vindications of judicial and legislative integrity and authority and reflect the exercise of the judicial and legislative functions. See, e.g., *Young v. U.S. ex rel. Vuitton et Fils*, 481 U.S. 787, 796 ("The ability to punish disobedience is regarded as essential to ensuring that the Judiciary has the means to vindicate its own authority without complete dependence on other Branches.... Courts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would only be advisory'") (*Young*). The 1857 legislation has long been recognized as simply providing a necessary supplement of more severe punishment intended to make the inherent contempt power of the Houses of Congress more effective. Its current iteration at 2 U.S.C. 192 and 194 is not part of the U.S. criminal code and was never so intended. See, e.g., *In re Chapman*, 166 U.S. 161, 671-72 ((1891); *McGrain*, 273 U.S. at 171-173; *Jurney*, 294 U.S. at 151 ("The 1857 statute was enacted ...because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses....The purpose of the statute was merely to supplement the power of contempt by providing additional punishment."); *Young*, 481 U.S. at 799-800 ("The fact that we have come to regard criminal contempt as 'a crime in the ordinary sense,'...does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the Executive Branch may engage. Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.... That criminal procedure protections are now required in such prosecutions should not obscure the fact that these proceedings are not intended to punish conduct prescribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings."). Of course, since the Supreme Court's 1821 ruling in *Anderson*, the purpose and breadth of the inherent self-protective authorities of the Judiciary and the Houses of Congress have been deemed analogous.

challenge. Rejection would require its overruling, modifying and /or distinguishing two centuries of Supreme Court precedents recognizing the imperative legislative and judicial need for inviolable self-protective mechanisms to ensure their institutional integrity to accomplish constitutionally mandated responsibilities and ignoring the beneficial institutional practices those rulings spawned. A successful challenge, on the other hand, will dramatically re-establish the historic dynamic between the legislative and executive branches that fostered accommodation between the branches. The past profound reluctance of targeted executive officials to subject themselves to the prospect of severe penalties (and the cost of litigation defense) for the sake of presidential privilege or political loyalty will be restored. Was that a cruel, unseemly regimen? We think not.

The need for untrammelled congressional access to government information is indisputable. In practice, it was Rosenberg's experience there was no limit for a reasonable accommodation even for the most sensitive disclosures. The ten votes of criminal contempt of cabinet level officials voted between 1975 and 1998 were fully or substantially successful because both sides determined that accommodation was the fairest and safest course. But those accumulated precedents fostered hundreds of settlements well before the specter of a contempt citation was imminent. We suspect that the passage of the 1857 legislation establishing a criminal contempt option had the same effect. After its passage, inherent contempt proceedings continued to be the predominant actual enforcement mechanism until 1935. The potential of a possible alternative criminal contempt citation was an effective incentive for accommodation. In sum, the threat of meaningful consequences for noncooperation is essential. If there is abuse of this congressional power the sole response, according to the Supreme Court, is at the ballot box.

The House should heed the warning and adjuration of Justice Kennedy that is applicable to its current circumstance:

That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less than those of other Congresses to follow.... Abdication of responsibility is not part of the constitutional design.<sup>164</sup>



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<sup>164</sup> *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy J., concurring in the Court's rejection of a congressional delegation of line item veto authority to the President).