



**Testimony of David Janovsky
Project On Government Oversight
for the House Select Committee on the Modernization of Congress
on Article One: Strengthening Congressional Oversight Capacity
November 4, 2021**

Thank you for the opportunity to submit testimony to the House Select Committee on the Modernization of Congress. I am David Janovsky, program manager and analyst at The Constitution Project at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

My testimony focuses on how to improve Congress's ability to oversee the executive branch, particularly by improving compliance with congressional subpoenas.¹ Today, I will discuss two reforms the Select Committee is particularly well suited to lead: first, reviving and modernizing Congress's inherent contempt powers, and second, creating an entity to counterbalance the Justice Department's Office of Legal Counsel (OLC), one that can articulate a robust view of congressional legal prerogatives.

Background

Congress has the constitutional authority and responsibility to conduct investigations to support its legislative duties. One of the most important subjects of this investigative power is the executive branch. Without robust oversight, Congress cannot identify shortcomings in the faithful execution of the laws it has passed.

The need for Congress to assert its authority and legislative prerogatives, including by compelling testimony and evidence, is clear. But for decades, presidential administrations have steadily escalated their opposition to congressional oversight. Relying heavily on increasingly aggressive legal theories advanced by the Justice Department's Office of Legal Counsel, the executive branch has erroneously argued that many of Congress's oversight tools violate the Constitution.

¹ This testimony does not address enforcement of congressional subpoenas against private individuals. Congress has broad investigative powers in that context as well, but that power must be balanced against individual rights, including those afforded by the First and Fourth Amendments.

For example, the executive branch claims that presidential advisers enjoy absolute immunity from compelled testimony, even after their employment ends.² It tends to broadly define executive privilege,³ and it takes the position that the Justice Department does not have to — and indeed, will not — prosecute executive branch officials who have claimed executive privilege if they are referred by Congress for criminal contempt charges.⁴ The office has also claimed that Members of Congress don't have the authority to request information on government programs or activities unless they chair a committee or subcommittee, or either chamber of Congress has passed a resolution authorizing such investigation or inquiry.⁵

This executive branch overreach is not a partisan phenomenon. Both Democratic and Republican administrations, dating back at least to Richard Nixon, have endorsed and advanced this campaign, regardless of which party is in the White House or the majority in Congress.

Notable instances of executive obstruction in recent memory include the George W. Bush administration's efforts to block the investigation into the firing of U.S. attorneys; the Obama administration's refusal to release documents related to Operation Fast and Furious that resulted in Attorney General Eric Holder being held in contempt; and former Trump White House counsel Don McGahn's flat refusal to testify in connection with the special counsel investigation. Regardless of one's views on any of these investigations, they all represent instances in which Congress was deprived of timely access to information it viewed as essential to its oversight responsibilities.

The executive branch's escalation has far outpaced Congress's ability to enforce its subpoenas, and the tools it currently possesses are simply inadequate. The Justice Department's refusal to pursue criminal contempt charges against executive officials has led committees to file civil suits against intransigent officials, but this is not a sustainable solution. Three of the highest profile of these cases ended in settlements, but they took years to resolve while the Justice Department raised a series of absolutist, procedural objections designed to keep Congress out of the

² Testimonial Immunity Before Congress of the Former Counsel to the President, 43 Op. O.L.C. ___ (2019), <https://www.justice.gov/olc/opinion/file/1215066/download>; Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. ___ (2014), <https://www.justice.gov/file/30896/download>; Memorandum from William H. Rehnquist, Assistant Attorney General, to John Ehrlichman, Assistant to the President, regarding Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff," February 5, 1971, <https://1wh5e1460wv1xmab2umuziv-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/Rehnquist-1971-memorandum-.pdf>.

³ See, for example, Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious, 36 Op. O.L.C. 1 (2012), <https://www.justice.gov/file/20591/download>; Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys, 31 Op. O.L.C. ___ (2007), <https://www.justice.gov/file/451161/download>. For a countervailing view based on historical practice and caselaw, see Mort Rosenberg, *The Constitution Project, When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, 2nd ed. (2017), 70-83, <https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf>.

⁴ Prosecutorial Discretion Regarding Citations for Contempt of Congress, 38 Op. O.L.C. 1 (2014) <https://www.justice.gov/olc/file/2014-06-16-pros-disc-contempt-cong/download>; Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress, 32 Op. O.L.C. 65 (2008), <https://www.justice.gov/opinion/file/832851/download>.

⁵ Memorandum from Curtis E. Gannon, Acting Attorney General, about "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch," May 1, 2017, <https://www.justice.gov/olc/file/1085571/download>.

courtroom entirely.⁶ While most lower courts have ruled in Congress’s favor in these cases, the lack of controlling opinions from appellate courts ensures future litigation will be similarly protracted. Civil enforcement is a poor vehicle to vindicate Congress’s rights. In time-sensitive investigations, it takes far too long to be useful, often outlasting any given Congress, and it puts Congress’s prerogatives at the mercy of the judicial branch.⁷

It is true that Congress can, and has, used its other powers, like appropriations and confirmations, to incentivize compliance.⁸ However, not all committees have access to these tools. And more fundamentally, a system in which Congress has the choice of either gumming up the workings of government to carry out its constitutional investigative responsibilities or resigning itself to neglecting those responsibilities — with all the waste, fraud, and abuse of power that a government operating without oversight would entail — can’t be what the framers of the Constitution intended.

Solutions

Reinvigorating congressional oversight requires a multipronged approach. First, Congress must develop concrete enforcement procedures that allow it to sidestep roadblocks the executive and judicial branches have created. Second, Congress must work to restore the balance of powers between itself and the executive branch.

Inherent Contempt

Congress has the authority to enforce its subpoenas without the involvement of the executive or judicial branches. The “inherent contempt” power is well-established in historical practice and Supreme Court precedent. In the past, the House or Senate sergeants-at-arms have actually arrested and imprisoned people who have been held in contempt of Congress.⁹ However, Congress has not used this power in modern times, and the process should be updated to meet current needs.

⁶ David Johnston, “Top Bush Aides to Testify in Attorneys’ Firings,” *New York Times*, March 4, 2009, <https://www.nytimes.com/2009/03/05/us/politics/05rove.html>; Josh Gerstein, “Subpoena fight over operation Fast and Furious documents finally settled,” *Politico*, May 9, 2019, <https://www.politico.com/story/2019/05/09/fast-and-furious-documents-holder-1313120>; Ann Marimow, “Biden administration, House Democrats reach agreement in Donald McGahn subpoena lawsuit,” *Washington Post*, May 11, 2021, https://www.washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebdc5a0f65_story.html; David Janovsky, “Congress May Be on Its Own,” Project On Government Oversight, September 3, 2020, <https://www.pogo.org/analysis/2020/09/congress-may-be-on-its-own/>.

⁷ The Supreme Court has recently shown signs that it prioritizes executive branch interests over those of Congress. David Janovsky and Sarah Turberville, “Congress Needs to Reclaim Its Time From the Courts,” Project On Government Oversight, November 18, 2020, <https://www.pogo.org/analysis/2020/11/congress-needs-to-reclaim-its-time-from-the-courts/>.

⁸ Courtney Bubl , “Republican Senator Holds Up Nominations While Awaiting IG Firing Explanations,” *Government Executive*, June 5, 2020, <https://www.govexec.com/oversight/2020/06/republican-senator-holds-nominations-while-awaiting-ig-firing-explanations/165963/>; Rosenberg, *When Congress Comes Calling*, 308 [see note 3].

⁹ Rosenberg, *When Congress Comes Calling*, 24-25 [see note 3].

A modern inherent contempt procedure could be implemented through House (or Senate) rules, and this is an area where the Select Committee’s leadership could be invaluable. POGO has endorsed a two-part proposal developed by Good Government Now and their senior fellow Mort Rosenberg, who is also a congressional scholar at POGO who worked for decades at the Congressional Research Service. That proposal is cited below and attached to this testimony.¹⁰

When executive branch officials defy subpoenas, the proposal calls for the creation of bipartisan select committees to determine if contempt charges are warranted and refer those charges to the full House. An accused official would have the opportunity to mount a defense prior to the House vote. Should they be convicted, the general counsel would be empowered to collect fines from them until the contempt is resolved.

The proposal would also create processes for prosecuting contempt should fines prove insufficient. It would provide for a criminal contempt vote in the House, followed by a vote to appoint a private attorney to prosecute the case on behalf of the House in federal court. Again, this process would allow the accused official to present a defense, as in any court procedure.

This proposal would overcome the Justice Department’s obstructionist refusal to prosecute contempt citations against executive branch officials, and it would result in a process where Congress, not the courts, would be the primary driver in the effort to enforce its subpoenas.

A Congressional Office of Legal Counsel

The framers envisioned a government of separate but interdependent powers in which ambition would check ambition. But the terms of the legal debate between Congress and the executive branch are skewed toward the latter. There has been a bipartisan commitment by presidents to advance the institutional power of the executive branch, an advancement often facilitated by the Office of Legal Counsel (OLC). Even though Congress has equally — or even more — valid institutional interests, it does not have an advocate that consistently advances those interests.

That’s why POGO joins a number of experts in endorsing the creation of a congressional office that could play a role comparable to that of the Office of Legal Counsel by articulating Congress’s legal positions outside the context of litigation.¹¹

¹⁰ “Inherent Contempt Fines Rule,” Good Government Now, <https://goodgovernmentnow.org/modified-inherent-contempt-enforcement-rule/>.

¹¹ See, for example, Emily Berman, “Weaponizing the Office of Legal Counsel,” *Boston College Law Review*, vol. 62, no. 2 (2021), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3938&context=bclr>; Oona Hathaway, “National Security Lawyering in the Post-War Era: Can Law Constrain Power?” *UCLA Law Review*, vol. 68, no. 2 (2021), <https://ssrn.com/abstract=3530588>; *Article One: Restoring Capacity and Equipping Congress to Better Serve the American People: Hearing Before the House Select Committee on the Modernization of Congress*, 116th Cong. (January 14, 2020) (statement of Elise Bean, Co-director, Levin Center at Wayne Law), <https://www.congress.gov/116/meeting/house/110374/witnesses/HHRG-116-MH00-Bio-BeanE-20200114.pdf>; Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 169-171.

One of the most comprehensive analyses of this dynamic was published last year by Professor Emily Berman.¹² Stated simply, OLC gives the executive branch a significant advantage in oversight disputes because its legal opinions set the terms of the debate. It allows the targets of congressional investigations to point to a preexisting body of work that dismisses Congress's prerogatives and casts executive intransigence as a constitutional mandate, rather than a subversion of checks and balances.

Without the counterweight of a comparable source of work defending Congress's institutional interests, Members and staff are at a disadvantage. They may even take OLC's interpretations at face value, for lack of alternative resources. An example from a non-oversight context is illustrative. OLC asserted in 1974 that conflicts of interest laws don't — and in fact, couldn't — apply to the president and vice president.¹³ Congress then explicitly carved both positions out of legislation that created criminal penalties for violations of conflicts of interest rules governing the conduct of executive branch officials.¹⁴

Congress would need to decide where it would be most appropriate to house a congressional OLC equivalent. Ultimately, we believe the best solution is the one Congress identifies as the most suitable, and the Select Committee is well positioned to lead that effort. However, we will offer some general observations. As Berman notes, there are likely four places to house this office: within the House and Senate counsels' offices, the Government Accountability Office (GAO), the Congressional Research Service (CRS), or a new standalone office.¹⁵

The counsels' offices are relatively small and have a full workload with litigation responsibilities. In addition, part of the reason OLC enjoys a perception — however inaccurate — as a source of independent legal interpretation is its structural separation from the Justice Department's litigation components. A congressional equivalent would likely benefit from a similar separation.

The Government Accountability Office has the advantage of already providing legal interpretations on behalf of the legislative branch, and it has well-established procedures for carrying out that work.¹⁶ However, as Berman notes, its interpretive mandate is limited primarily to appropriations and spending issues.¹⁷ As a result, it may not have a particular advantage in taking on the work of a congressional OLC.

The Congressional Research Service does have subject-matter expertise, primarily in its American Law Division. However, in recent years public reporting and a hearing before the

¹² Berman, "Weaponizing the Office of Legal Counsel," 531-559 [see note 11].

¹³ Memorandum from Deputy Attorney General Laurence H. Silberman to Richard T. Burgess, Office of the President, about "Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution," August 28, 1974, <https://fas.org/irp/agency/doj/olc/082874.pdf>.

¹⁴ 18 U.S.C. § 202(c) (2020), [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:202%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:18%20section:202%20edition:prelim)).

¹⁵ Berman, "Weaponizing the Office of Legal Counsel," 562-566 [see note 11].

¹⁶ Government Accountability Office, Office of the General Counsel, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (September 2006), <https://www.gao.gov/products/gao-06-1064sp>.

¹⁷ Berman, "Weaponizing the Office of Legal Counsel," 563 [see note 11].

House Administration Committee have raised concerns that both the service and the division struggle with a culture that is reluctant to take firm stances on contentious issues and has trouble retaining experts.¹⁸ Those qualities would be essential to a congressional OLC, so if these issues within the service are not addressed, it may not be a suitable home for this new office either.

As a result, a standalone office may be preferable. But, however it is implemented, a congressional Office of Legal Counsel is an idea whose time has come.¹⁹

Conclusion

Currently, there are simply too many barriers to effective oversight of the executive branch. Most of these barriers are the result of a concerted effort by presidents and the Justice Department to undercut Congress's constitutional power to investigate. But Congress can push back. A modern inherent contempt procedure would give it the tools to enforce its subpoenas without delay and in the face of executive branch opposition. And an office to articulate and advocate for congressional legal prerogatives would put Congress on a more equal footing with the executive branch going forward. My colleagues at POGO and I look forward to helping the Select Committee take on these important reforms in any way we can. Thank you again for the opportunity to testify.

¹⁸ *Oversight of the Congressional Research Service: Hearing before the House Administration Committee*, 116th Cong. (June 20, 2019), <https://cha.house.gov/committee-activity/hearings/oversight-congressional-research-service>; Chris Marquette, "Public to get rare look inside the Congressional Research Service, with attrition, morale points of contention," *Roll Call*, June 19, 2019, <https://www.rollcall.com/2019/06/19/public-to-get-rare-look-inside-the-congressional-research-service-with-attrition-morale-points-of-contention/>.

¹⁹ Congress came close to establishing such an office in the 1970s, but the House and Senate were unable to come to an agreement. Berman, "Weaponizing the Office of Legal Counsel," 563 [see note 11]; The advantages of a congressional OLC would likely extend beyond the oversight context into areas like national security law. Hathaway, "National Security Lawyering in the Post-War Era: Can Law Constrain Power?" [see note 11].