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Stopping Obstruction with Inherent Contempt

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Oversight is one of Congress's fundamental roles. In *Watkins v. United States*, the Supreme Court concluded, "the power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."¹ The Congressional Research Service further defines oversight as, "making sure that laws work and are being administered in an effective, efficient, and economical manner."² Proper oversight prevents corruption and promotes accountability. It pushes the federal government to deliver for those it serves. In practice, Congress conducts oversight in a number of ways, including through documents requests and subpoenas and by conducting hearings, transcribed interviews, and depositions.

However, the Trump Administration has obstructed Congressional oversight requests at a level never before seen.³ President Trump encapsulated his Administration's approach in April 2019, when he stated, "We're fighting all the subpoenas."⁴ Regardless of who holds the office of the President however, Congressional oversight remains an important tool to ensure the integrity of the federal government. As the role of oversight has been deeply compromised by the Trump administration's repeated and deliberate obstruction, reinstating the inherent contempt power can be used to restore Congress's ability to conduct oversight.

¹ *Watkins v. United States*, 354 US 178, 187 (1957). See also *Eastland v. United States Servicemen's Fund* 421 U.S. 491, 504, n. 15 (1975) ("scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir.) ("A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad.")

² "Congressional Oversight Manual," Congressional Research Service, January 16, 2020, <https://fas.org/sqp/crs/misc/RI30240.pdf>.

³ See e.g. "Trump's obstruction of Congressional Oversight has been unprecedented — now we're suing the Administration for stonewalling our investigation," American Oversight, September 19, 2019, <https://www.americanoversight.org/trumps-obstruction-of-congressional-oversight-has-been-unprecedented-now-were-suing-the-administration-for-stonewalling-our-investigation> and "Donald Trump's Obstruction of Congressional Oversight," American Oversight, July 31, 2020 <https://www.americanoversight.org/investigation/donald-trumps-obstruction-of-congressional-oversight>.

⁴ Jordyn Phelps, " 'We're fighting all the subpoenas': Trump on battle with House Democrats," ABC News, April 24, 2019, <https://abcnews.go.com/Politics/fighting-subpoenas-trump-battle-democrats/story?id=62600497>.

While not expressly authorized by statute or the constitution, courts have ruled the inherent contempt power implicit is to Congress's constitutional authority and it would allow either the House and Senate to unilaterally detain or fine individuals that are obstructing its duties and which it finds in contempt.⁵ At current, because Congress cannot effectively enforce executive branch compliance with its requests, the Trump Administration has been able to ignore many of Congress's oversight requests. This congressional impotence has renewed interest in Congress's inherent contempt power. Although inherent contempt has not been used since the 1930s, there is a great deal of historical precedent supporting its use, and it has the potential to restore Congress's ability to conduct its historical oversight role.

The Trump Administration's lack of cooperation with Congressional oversight requests is at historic levels

The oversight power of Congress is both broad and far-ranging and the Supreme Court has repeatedly supported the exercise of this power. *Eastland v. United States Servicemen's Fund* states that Congress's "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." The major limiting factor on the oversight power of Congress is whether such requests advance a "valid legislative purpose."⁶

Despite this broad grant of authority to conduct oversight, the Trump Administration has repeatedly spurned Congressional investigators. Most notably, the second article of impeachment against Donald Trump charged obstruction of Congress.⁷ The House Judiciary Committee's impeachment report detailed how "the White House and other agencies refused to produce a single document in response to Congressional subpoenas" and "President Trump also attempted to muzzle witnesses, threatening to damage their careers if they agreed to testify, and even attacked one witness during her live testimony before Congress."⁸ It described President Trump's obstruction as "categorical, indiscriminate, and without precedent in American history."⁹ While this was the most high-profile example of the Administration's lack of cooperation with legitimate oversight requests, it certainly was not a one-time occurrence.

An analysis from October 2019 indicated that the Trump Administration refused to comply with 82 requests from House Committees, including 42 subpoenas.¹⁰ Given

⁵ Congressional Subpoenas: Enforcing Executive Branch Compliance, Congressional Research Service, March 27, 2019, <https://fas.org/sgp/crs/misc/R45653.pdf>.

⁶ *Trump v. Mazars USA*, No. 19-715 (U.S. Jul. 9, 2020).

⁷ Impeachment of Donald J. Trump President of the United States, Report of the Committee of the Judiciary, December 13, 2019, <https://docs.house.gov/billsthisweek/20191216/CRPT-116hrpt346.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Cobb, Adrienne. Stonewalled: The numbers behind the Trump administration's refusal to cooperate. Forensic News. October 28, 2019.

that this analysis was based on public information, the actual number of Congressional requests that the Trump Administration has ignored is likely far higher as Congressional Committees often do not publicize their oversight requests. Other prominent examples highlighted by Speaker Pelosi¹¹ include:

- The unwillingness of DOJ and HHS to respond to Congressional requests regarding their attempts to get the Affordable Care Act struck down in court.
- The Secretary of HHS's refusal to testify before Congress regarding the child separation policy.
- The White House's refusal to allow Stephen Miller to testify before Congress regarding the Administration's immigration policy.
- The DOJ's refusal to comply with a subpoena for testimony regarding the 2020 Census.

Other examples include the DOJ's unwillingness to allow the Assistant Attorney General and Bureau of Prisons Director to testify before the House Judiciary Committee because, in the DOJ's view, during a previous hearing "Committee Members chose instead to use their allotted time to air grievances."¹²

The Trump Administration has used a number of legal justifications to justify its lack of cooperation with Congressional oversight requests. The Department of Justice legal counsel has, despite precedent to the contrary¹³, offered the following legal opinions:

- 1) Individual members of Congress, including ranking members, do not have the authority to conduct oversight.¹⁴
- 2) The immunity of the President's immediate advisers from compelled congressional testimony on matters related to their official responsibilities applies to the White House Counsel.¹⁵

<https://forensicnews.net/2019/10/28/stonewalled-the-numbers-behind-the-trump-administrations-refusal-to-cooperate/>

¹¹ "Trump Administration Obstruction: Unprecedented, Unwarranted, Unconstitutional," Press Release from Speaker of the House Nancy Pelosi,

<https://www.politico.com/f/?id=0000016a-72b0-dca8-alf-7fb813f60001>.

¹² Letter from Stephen E. Boyd, Assistant Attorney General to Chairman Nadler, September 21, 2020.

<https://int.nyt.com/data/documenttools/doj-letter/ceade3b0830c34b/full.pdf>

¹³ Co-Equal Guide to Congressional Oversight Precedent,

<https://www.co-equal.org/guide-to-congressional-oversight> and Levin Center Key Issues,

<http://oversightcases.org/key-issues/>.

¹⁴ "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch," Department of Justice Office of Legal Counsel, May 1, 2017,

<https://www.justice.gov/olc/file/966326/download>.

¹⁵ "Testimonial Immunity Before Congress of the Former Counsel to the President," Department of Justice Office of Legal Counsel, May 20, 2019,

https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-20-test-immun-fmr-whc-2_1.pdf.

- 3) Congress may not constitutionally prohibit agency counsel from accompanying agency employees called to testify about matters that potentially involve information protected by executive privilege.¹⁶
- 4) The Department of the Treasury is prohibited from complying with a request by the Chairman of the House Ways and Means Committee for the President's tax returns.¹⁷
- 5) The Assistant to the President and Senior Counselor to the President is absolutely immune from compelled congressional testimony in her capacity as a senior adviser to the President.¹⁸
- 6) Congressional committees participating in an impeachment inquiry may not validly compel executive branch witnesses to testify about matters that potentially involve information protected by executive privilege without the assistance of agency counsel.¹⁹
- 7) The President may direct the Secretary of Commerce not to publish a confidential report to the President under section 232 of the Trade Expansion Act of 1962, notwithstanding a recently enacted statute requiring publication within 30 days, because the report falls within the scope of executive privilege and its disclosure would risk impairing ongoing diplomatic efforts to address a national-security threat.²⁰

More broadly, in addition to questioning Congress's legitimate legislative purpose, the Trump Administration has relied on three main privileges as their justification for their lack of compliance with Congressional oversight requests.

The first privilege is the deliberative process privilege, which "may protect from disclosure executive branch documents and communications that are predecisional, meaning they are created prior to reaching the agency's final decision, and deliberative, meaning they relate to the thought process of executive officials and are not purely factual."²¹ While courts have recognized some form of this privilege, it

¹⁶ "Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees," Department of Justice Office of Legal Counsel, May 23, 2019, <https://www.justice.gov/sites/default/files/opinions/attachments/2019/11/04/2019-05-23-agency-counsel-2.pdf>.

¹⁷ "Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)," Department of Justice Office of Legal Counsel, June 13, 2019, <https://www.justice.gov/olc/file/1173756/download>.

¹⁸ "Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President," Department of Justice Office of Legal Counsel, June 12, 2019, <https://www.justice.gov/olc/file/1183271/download>.

¹⁹ "Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context," Department of Justice Office of Legal Counsel, November 1, 2019, <https://www.justice.gov/olc/file/1214996/download>.

²⁰ "Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security," Department of Justice Office of Legal Counsel, January 17, 2020, <https://www.justice.gov/olc/opinion/file/1236426/download>.

²¹ "Congressional Oversight Manual," Congressional Research Service, January 16, 2020, <https://fas.org/sgp/crs/misc/RL30240.pdf>.

does not apply to entire documents, it has also been found to “to be qualified, not absolute” and “can be overcome by an adequate showing of need.”²²

The second privilege is attorney-client privilege, which most notably is a common law privilege applicable in a judicial setting and not recognized by Congress. In practice however, Congress has exercised its discretion, “weighing the legislative need for disclosure against any possible resulting injury.”²³

The final privilege is executive privilege. The Supreme Court recognized the existence of this privilege in *United States v. Nixon*, but the privilege applies only within the Executive Office of the President and the White House, and is not absolute and can be overcome by the showing of appropriate need.²⁴ While all of these privileges do have some basis in the law, none are meant to serve as blanket objections or used to the extent that they have by the Trump Administration.

Problems with current oversight enforcement mechanisms

Currently, the primary means by which Congress seeks compliance with its subpoenas is via the courts. Normally, when Congress sends an oversight request to the executive branch, both sides attempt to work through an accommodation process where objections are raised and addressed. If this is done successfully, then the documents or testimony are produced. During the Trump Administration, this process has often broken down and forced Congressional committees to issue subpoenas in an attempt to compel compliance. Congress can - and often has - held executive branch officials in criminal contempt over refusals to comply with Congressional subpoenas. But in practice, because the executive branch is responsible for enforcing criminal contempt citations, this course of action often does not lead to the desired compliance. It is often the threat of subpoena or being held in criminal contempt that potentially compels compliance, as opposed to the act itself.

Instead, Congress is forced to turn to the courts to compel the executive branch to comply with its subpoenas. The problem with such an approach is that it can be

²² Id. See *also* Fast and Furious Case: Comm. on Oversight & Gov't Reform, United States House of Representatives v. Sessions, Opinion at 22, 344 F. Supp. 3d 1 (D.D.C. 2018) (“During the course of this litigation pitting two branches of the United States government against one another, the Court determined ... that the executive branch could invoke the deliberative process prong of the executive privilege to shield records from production to the legislature; that the privilege could not be asserted on a blanket basis, though, but only on a document-by-document basis; that the privilege covered internal deliberations concerning communications with Congress or the media; and that the privilege was not absolute and could be waived or overcome by a showing of need.”)

²³ “Congressional Oversight Manual,” Congressional Research Service, January 16, 2020, <https://fas.org/sgp/crs/misc/RL30240.pdf>.

²⁴ “Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments,” Congressional Research Service, December 15, 2014 <https://crsreports.congress.gov/product/pdf/R/R42670>.

quite lengthy and can take years before reaching a final legal judgement. Often this means litigating a case all the way to the Supreme Court. For instance, *Trump v. Mazars*, which stemmed from an April 2019 subpoena, was not ultimately decided by the Supreme Court until July 2020. Similarly, there has yet to be a final legal disposition in the House's attempt to subpoena the testimony of former White House Counsel Don McGahn, where a subpoena was also issued in April 2019.

Most concerning, however, is the growing number of conservative judges who have begun to take the legal position that such disputes between Congress and the executive branch should be considered "political questions" where it is not appropriate for the courts to become involved.²⁵ Were this legal doctrine to be adopted, it would render Congress's ability to conduct oversight as meaningless, as under current practice Congress has limited other tools to compel compliance. While the Trump's administration's disregard for congressional oversight is historic and unprecedented, it has exposed weaknesses in Congress's ability to conduct oversight that could once again be exploited by future administrations seeking to avoid Congressional scrutiny.

History of Inherent Contempt

One such option Congress could choose to pursue in order to reestablish its oversight authority, is to reinstate its inherent contempt power.²⁶ While Congress has not used this authority since the 1930s, its ability to do so was upheld by the Supreme Court in *McGrain v. Daugherty* and *Anderson v. Dunn*.²⁷ Under the historical practice of this power, the House or Senate Sergeant-at-Arms would be empowered to imprison or detain the individual held in inherent contempt.²⁸ The purpose of such imprisonment would be to compel the individual's compliance with a valid Congressional request.²⁹

As the Supreme Court has often compared Congress's contempt power to that of the courts, it would similarly follow that, like the courts, Congress has the ability to use inherent contempt to impose fines to force compliance with its requests.³⁰

²⁵ See e.g. Matt Ford, "The Supreme Court Eyes an Escape Hatch From Trump's Corruption," *The New Republic*, April 28, 2020. <https://newrepublic.com/article/157485/supreme-court-trump-corruption>.

²⁶ The Department of Justice's Office of Legal Counsel stated both in 1984 and 1986 that it was their position that the use of inherent contempt is unconstitutional.

²⁷ Notably, however the Senate did successfully use the threat of inherent contempt to ensure compliance from the Nixon White House with the Watergate investigation. See e.g. Jonathan C. Rose, "House Democrats Are Ignoring This Key Lesson of Watergate," *the Atlantic*, September 23, 2019, <https://www.theatlantic.com/ideas/archive/2019/09/how-to-break-trumps-stonewall/598450/>.

²⁸ "Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure," Congressional Research Service, May 12, 2017, <https://fas.org/sgp/crs/misc/RL34097.pdf>.

²⁹ In such a scenario the individual would continue to have access to their constitutional right to the writ of habeas corpus.

³⁰ Kia Rahnama, "What Congress Can Do When Trump Appointees Defy It," *the Atlantic*, May 20, 2019,

Congressman Lieu's Congressional Inherent Contempt Resolution

In response to the Trump Administration's lack of cooperation with Congressional oversight requests, Congressman Ted Lieu introduced the Congressional Inherent Contempt Resolution (H.Res. 1029) in June 2020, that would enable Congress to use the inherent contempt procedure to independently enforce its subpoenas.³¹ The legislation would require that government agencies and individuals subject to Congressional oversight either respond to any requests or file written objections within the time frame set out in the request. Any written objections would trigger a negotiation and accommodations process. If staff certifies to the chair of the committee that no such resolution could be achieved, or if there is no response or compliance to the request within the requisite timeframe, a subpoena could be issued.

To the extent that there are written objections, or if the President personally asserts a claim of executive privilege, the Committee may hold a hearing to consider the validity of these objections. Under this legislation, if the Committee overrules any such objections and noncompliance continues, the Committee is directed to meet to determine whether the noncompliance, "rises to the level of a breach of the constitutional privilege and duty of the House to be fully informed in order to properly perform its legislative responsibilities without undue obstruction and thereby warrants condemnation and punishment." If such a determination is made, the Committee would then report a privileged resolution of contempt.

Such a resolution would include the following:

1. a detailed history and nature of the controversy and attempts at accommodation,
2. the legal issues raised,
3. the legislative need for the information sought,
4. the legal and practical reasons for the determination that the objections were rejected, and
5. the recommended monetary penalties.

The resolution would then go to the full House of Representatives for consideration. Upon passage, the individual held in contempt would be assessed an initial penalty of no more than \$25,000 and total penalties of no more than \$100,000. The initial penalty can then be increased by no more than increments of no more \$25,000 after

<https://www.theatlantic.com/ideas/archive/2019/05/fining-william-barr-congresss-best-option/589798/>.

Moreover, in *Kilbourn v. Thompson* the Supreme Court additionally suggested that Congress has the ability to compel testimony in the same way a court does.

³¹ Congressional Inherent Contempt Resolution, H.Res. 1029, June 29, 2020, https://lieu.house.gov/sites/lieu.house.gov/files/LIEU_096_xml_0.pdf.

a waiting period of 20 days. This period must only be observed after the initial penalty. The House General Counsel is further authorized to file suit to freeze the assets of the individual held in contempt.³²

Congressman Lieu's resolution has been sponsored by 24 members of Congress³³ and endorsed by Good Government Now, Project on Government Oversight (POGO), Common Cause, Campaign For Accountability, and the Congressional Progressive Caucus. At an October 1 House Rules Committee hearing, Congressman Lieu called for this resolution to be included in the rules package for the 117th Congress.³⁴ Congressman Raskin, Chairman of the Rules Committee's Subcommittee on Expedited Procedures, also spoke in support of the resolution at the hearing, and it is amongst the potential changes to the rules for the 117th Congress being prioritized by the Congressional Progressive Caucus.

Conclusion

Since the beginning of the 116th Congress, the Trump Administration has obstructed Congress's ability to conduct oversight in a historic fashion. It has done so by invoking legal arguments that are not supported by current legal precedent. In the process, it has repeatedly demonstrated that in the absence of reform to the toothless enforcement mechanisms for oversight, the executive branch may simply refuse to engage in good faith with valid Congressional oversight requests, with little to no consequence.

As a result, while Congress has attempted to obtain the necessary information by other means, the Trump Administration has essentially succeeded in its attempts to be uncooperative with Congressional investigators. The use of inherent contempt is a means by which Congress can restore the balance of power that is supposed to exist between the legislative and executive branches, in order to conduct oversight in a manner consistent with past Congressional practice.

³² The legislation further provides that no other person can pay the monetary penalties on behalf of the individual held in contempt and that doing so would be regarded as obstruction of a House investigation.

³³ Reps. Neguse, Raskin, Dean, Cicilline, Demings, Swalwell, McNeerney, Wild, Connolly, Cohen, Huffman, Schakowsky, Lowenthal, Mucarsel-Powell, Vargas, Welch, Rush, Escobar, Phillips, Jackson Lee, Jayapal, Carson, Grijalva, and Roybal-Allard.

³⁴ <https://rules.house.gov/video/rules-committee-members-day-hearing>.