



15. *Concluding Observations: the Constitution and Oversight of the Administrative Bureaucracy*

President Woodrow Wilson, describing the role of Congress in 1885, insisted that: “Quite as important as legislation is vigilant oversight of administration.”¹ Wilson further noted the importance of oversight in promoting government transparency, and cited the necessity of “the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in the broad daylight of discussion.”²

Wilson went on to exhort: “It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents....The informing functions of Congress should be preferred even to its legislative function.”³

If Wilson was observing Congress today he would be deeply disappointed, if not aghast. Congress has become mired in a state of legislative dysfunction, often meekly acquiescent to the executive’s negation of its core investigative powers, and complicit in the degradation of internal congressional capacity to legislate effectively and conduct meaningful oversight. There has been a palpable loss of a sense of institution that in the past served to inspire actions to protect Congress’s core constitutional prerogatives.

This study has attempted to introduce the reader to the current complexities of the legislative oversight process and the rules, tools, and folkways by which it operates. It has sought to demonstrate—through discussions of law, practices, and history—that effective oversight can assure not only that Congress has the capability to inform itself and the public how well or badly government is performing its public duties, but also that performing such oversight is key to Congress maintaining and vindicating its co-equal role in our constitutional scheme. It has shown that over the course of our nation’s political history, dating from the earliest years of the Republic, Congress has established a constitutionally-based foundation of mechanisms and practices for oversight that affords it virtually unlimited access to information from the executive necessary to perform its legislative responsibilities.

Indeed, the Supreme Court and lower federal courts have recognized Congress’s prerogative to obtain documents and testimony from any executive branch entity through a host of rulings, including:

- that subpoenas may be enforced through inherent, criminal and or civil court enforcement processes;
- that a presidential claim of qualified privilege does not cloak an executive branch official with absolute immunity from responding to a committee subpoena;
- that a court may not entertain a request to quash a subpoena during the course of an on-going committee inquiry;

1. Woodrow Wilson, CONGRESSIONAL GOVERNMENT 195 (1885).

2. *Id.* at 227.

3. *Id.* at 303.

- that committees have absolute control over the conduct of hearings, including the initial discretionary determination whether to accept presidential or common law claims of privilege; and
- that committees may intercede in ongoing agency decisionmaking proceedings—such as notice and comment rulemakings, ratemakings, informal decisionmaking, formal adjudications, and agency investigations—when pursuing legitimate oversight concerns in a manner that does not force agency consideration of factors that Congress did not intend to make relevant, or intrude, in an adjudicatory proceeding, directly on the considerations of the ultimate decisionmaker on the merits of the issue involved.

In addition, the House has established a practice, dating back 140 years and to which the Justice Department has acquiesced, requiring a member or committee in receipt of a DOJ subpoena for documents and/or testimony to report that service to the House general counsel, so that she can make an initial determination whether any of the information sought falls within the protections of the Speech or Debate Clause. The Senate follows a similar practice. More recently, the court of Appeals for the District of Columbia has held the Speech or Debate Clause does not allow the executive to execute a search warrant for documents in a member's congressional office without allowing the member and/or the House general counsel the opportunity to make the initial determination as to which documents may be subject to speech or debate immunity. This practice and ruling underscores the Speech or Debate Clause's design to protect Congress's role in the separation of powers by "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary."⁴

In the past, Congress has reacted to executive challenges by timely, appropriate internal reorganizations, remedial legislation, and decisive political and legal actions. For example, in the 1970's, the accumulated problems with executive domestic and foreign intelligence secrecy, aggrandizement and maladministration in the Viet Nam war, presidential impoundment tactics, and Watergate and the Nixon impeachment proceedings, laid bare the need for an expanded legislative ability to gain access to and properly utilize vital sources of information. The result was passage of legislation in the mid and late 1970's that created, adequately funded, and staffed new legislative support agencies and expanded the authorities and missions of existing ones; established offices of inspectors general in major agencies to enable on the spot policing of inefficiency, waste, fraud and abuse; and put in place a scheme that would allow the court to appoint independent counsels to investigate and prosecute any unlawful actions of high level executive officials. Internal reforms in that same period included the decentralization and disbursal of full committee authority over legislation and oversight to well-staffed subcommittees and their chairs, and the establishment of offices of legal counsel in the House and Senate to advise, and where necessary formally represent, members and committees.

The effect of the reforms was immediate. Aggressive, successful committee oversight actions produced supporting precedents that underlined the efficacy, importance, and availability of a credible threat of severe consequences for an official's failure to comply with valid compulsory demands for information. Between 1975 and 1998 there were 10 votes to hold cabinet-level officials in contempt of Congress. All resulted in complete or substantial compliance with the information demands in question before the necessity of a criminal trial. During this period, often the very threat of a contempt vote was sufficient to elicit compliance.

However, as the administrative bureaucracy has burgeoned since 1980—in response to Congress's vast expansion of its domestic and foreign responsibilities—presidents have increasingly vied for control over the execution of these expansive legislative goals and the executive branch has increasingly resisted compliance with committee information access demands. The Justice Department has taken the legal stance that neither house of Congress has the constitutional authority to enforce subpoena demands against executive officials through criminal or inherent contempt proceedings, even if there is no claim of presidential privilege. A congressional committee's only recourse, according to DOJ, is the filing of a civil enforcement action in federal district court. Congress's experience with this option since 2007 has not been good; the two investigations that have become the subject of litigation have been stymied to the point that ultimate resolution, even if successful for the committee, is untimely and essentially irrelevant. The latest such litigation has currently consumed over six years of investigative and court proceedings with an appellate court review still in the offing.

4. *Gravel v. United States*, 408 U.S. 606, 617, 624-25 (1972).

The consequences of DOJ's tactic, however, go beyond delay in a particular inquiry. The uncertainty over whether a congressional committee can effectively enforce its informational demands has inspired growing agency resistance, even when a committee's request is accompanied by a subpoena. The *Fast and Furious* court's ruling that it would recognize claims of common law deliberative process privilege has provided additional incentive, albeit resting on a dubious legal basis, for slow walking. One frustrated committee has issued the empty threat of an impeachment proceeding, which certainly would be unavailing. Delaying confirmations or passing targeted agency appropriation cuts are difficult to accomplish in a timely fashion, and if noncompliance is widespread funding cuts may be seen as counterproductive.

In the face of this grave external challenge to its core oversight power, Congress has proven its own worst enemy. Since 1995, the House has cut committee staff by a third, reduced legislative support staff at GAO by a third, flat-lined funding at CRS, and abolished the Office of Technology Assessment. Today, GAO and CRS operate with about 80% of their 1979 professional personnel capacity. In 2011 the House cut its total operating budget by 20% across-the-board. During this period, policy leadership, including control of the initiation of sensitive investigative inquiries, has been centralized in the leadership of both houses (there has been a 53% increase in the size of House leadership support staffs since 1995), and term limits of six years have been imposed on committee chairs. These organizational and budget changes have had a profound impact on committee and support agency structure and performance. An increased turnover of committee staff as a result of low pay and the departures of term limited chairs has caused a gap in experience and expertise that, in turn, has resulted in greater reliance on the assistance of outside lobbyists and special interest organizations for information analysis and policy development ideas. Most committees in each house ignore staffing models with career paths that favor tenure and internal structures that reward specialization, experience, and training.

Concurrently, centralized leadership in the selection of legislative priorities and the resultant diminution of the importance of committees in policy development has dampened member interest and enthusiasm for the drudgery of committee work, particularly oversight. Deliberative committee meetings are now rare and conference committees to iron out differences in legislative texts are almost non-existent. The former powers of House committees and subcommittees created incentives for members to concentrate on committee work and hope for advancement to senior positions through established, institutional roles. With seniority now one of only many qualifications, and chairmanships left to the party leadership's discretion, members must remain loyal to party leadership if they are to advance or accomplish their goals. Thus, parties, with their inherent focus on politics, have replaced the former House focus on policymaking.⁵

A consequence, highly evident today, is that internal legislative processes generally are not geared to policy development and passage of considered public interest legislation, but rather to expending time and effort on symbolic messaging actions designed to garner media and public attention to political issues. The top down leadership scheme has failed to draw in rank-and-file members, who often have single interest concerns. Minority party congresspersons and their leadership increasingly feel and behave like dispossessed outsiders who need to oppose whatever the powers that be present. And there are no rewards or punishments available to bring them in line. The result is stasis and dysfunction and almost no inclination at any level to protect institutional prerogatives against growing executive challenges.

The threat of an overreaching, unrestrained executive is an ever-present, built-in reality of our separated but balanced plan of government. Vigilance through continuous and aggressive oversight is indispensable. The current failure to meet executive challenges to Congress's core prerogatives is an abdication of its constitutional responsibility.

Congressional investigations can, have, and should continue to serve the public interest. Throughout our nation's history, congressional investigations have led to major reforms that have benefited taxpayers, improved public health, safety, and the environment, and safeguarded individual liberties from governmental abuse. Benchmark probes of the last six decades have included:

5. See generally CHARLES TIEFER, *THE POLARIZED CONGRESS: THE POST-TRADITIONAL PROCEDURE OF ITS CURRENT STRUGGLES* (2016) (lucidly describing how the centralization of policymaking control in congressional leadership has resulted in the diminution the relevance of the roles of committees in the lawmaking process.)

- the 1940s Truman Committee investigation that disclosed waste and abuse in the national defense program, which spurred subsequent important procurement reforms;
- the investigation of the drug industry led by Senator Estes Kefauver in the 1960s, which led to enactment of major amendments to the Food, Drug, and Cosmetic Act by imposing new safeguards over the manufacture, testing, inspection, certification, and withdrawal of drugs;
- House and Senate investigations during the 1960s and 1970s concerning the environment, which led to enactment of the Clean Air Act, Clean Water Act, and various hazardous waste laws;
- the exposure by the Church Committee in the 1970s of decades of inappropriate domestic and foreign intelligence activities by the CIA and the FBI, which produced reforms in congressional oversight over the intelligence community and the enactment of such landmark legislation as the Foreign Intelligence Surveillance Act and the establishment of the Foreign Intelligence Surveillance Court;
- in the 1980s, investigations of the generic drug and blood industries by Representative John Dingell's Oversight and Investigations Subcommittee, which led to major reforms in those industries;
- in 2002, following the exposure of the Enron and Worldcom accounting scandals and the revelation by the Senate and House Banking Committee investigations of serious weaknesses in industry self-regulatory reporting requirements for certain publicly held companies, Congress enacted the Sarbanes–Oxley Act of 2002, which established an independent board to oversee the audit of public companies subject to the securities laws;
- in 2010, the final report of the Senate Permanent Subcommittee on Investigations on its two-year inquiry into the causes and effects of the 2008 financial crisis spurred passage of the Dodd–Frank financial remedial legislation; and
- in December 2014, the release of the executive summary of the Senate Select Committee on Intelligence's 6,700 page report examining the CIA's former detention and interrogation program—the longest oversight report in Senate history, culminating more than five years of investigation—which resulted in bipartisan legislation the following year to strengthen the prohibition against torture.

Those investigations and many others came at a price that included the investment in time, resources, and energy of committee chairs and staff, which could have been expended on more politically beneficial legislative activities. Often, high profile inquiries have inspired personal attacks on committee chairs and staff as well as on the committees themselves. The Senate's investigation of the Teapot Dome scandal in the 1920s, now revered by most as the modern era's model of a responsible exercise of Congress's investigative powers for its exposure of government corruption and self-dealing, was reviled by the press and academics at the time. Leading New York newspapers called the Senate investigators "scandal mongers," "assassins of character," and "mudgunners." The eminent legal scholar Dean John H. Wigmore wrote of the "sensational debauch of investigation—poking into the garbage cans and dragging the sewers of political intrigue."⁶

During the House Energy and Commerce Oversight and Investigations Subcommittee's 1992–94 investigation of mismanagement in the Environmental Crimes Section (ECS) of the Department of Justice,⁷ the subcommittee, its chair, John Dingell, and its staff came under relentless criticism from the media, public interest organizations, a former attorney general, the American Bar Association (ABA), and the Justice Department. Editorials personally attacked "General Dingell" and the subcommittee staff, describing them as "interrogators," "Dingell's wolves," and "Torquemadas-in-training." The former attorney general questioned the constitutionality of the subcommittee's demands for the testimony of subordinate employees and the probes into open and closed cases, and criticized the department for ultimately allowing the interviews and producing the documents. The Criminal Justice Section of the ABA recommended to its House of Delegates that it adopt a report that proposed severely restricting congressional oversight of prosecutorial agencies and

6. Recounted in JOHN C. GRABOW, *CONGRESSIONAL INVESTIGATIONS, LAW AND PRACTICES* 15 (1988).

7. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, H. COMM. ON ENERGY AND COMMERCE, 103RD CONG., *DAMAGING DISARRAY: ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM* (Comm. Print 1994). See also Deborah Jacobson, *1992–1994 Investigation of the Justice Department's Environmental Crimes Program*, Part II *infra*.

encouraged the executive branch to resist demands for testimony and documents.⁸ Nonetheless, the investigation was ultimately highly successful. The inquiry uncovered severe strains in the relationship between the U.S. attorneys' offices and the ECS, which had been exacerbated by a three-year campaign by DOJ Headquarters to centralize its control over environmental prosecutions in Washington, D.C. In the end, the attorney general ordered the return of prosecutorial discretion to the local U.S. attorneys' offices and reversed efforts toward centralized control.⁹

As has been emphasized throughout this study, investigative oversight is very hard, sometimes dirty, and often unrewarding in the ways that are today so important for a legislator's political survival. It is, however, critical. Congress's recent quiescence in the face of very serious challenges to its core constitutional prerogatives is dangerous, and the prospect of its continuance is disquieting. The longer Congress stands silent on the sidelines, the more difficult it becomes to reclaim its powers. The legislative prerogatives are, of course, retrievable but only with great effort. Not only must Congress revive the respect for the powers of the institution, but the infrastructure of oversight also has to be rebuilt, starting with enforcement of the subpoena power and revitalizing committee capacity to properly assess and utilize the information for legislative purposes.

A. Congressional Options for Restoring Its Subpoena Enforcement Authority and Its Ability to Effectively Assess and Utilize Vital Information for Legislative Purposes

1. Criminal Contempt

As described in this study, the now-settled three options for enforcing subpoenas are all difficult and problematic. Criminal contempt has worked in the past, probably because the executive official who has been the target has been unwilling to be subjected to a criminal prosecution in order to make a constitutional point for the president. From a congressional standpoint, however, it is time-consuming and resource draining, even if there is eventual capitulation because the likelihood of success in court is high. However, the Justice Department's current stance on the constitutionality of criminal contempt prosecutions against executive officials removes the leverage that the threat of citation posed. Consideration might be given to establishment of a mechanism based on the model of the now-expired Independent Counsel Act. This would allow the appointment of a special advocate by a panel of the U.S. Court of Appeals for the District of Columbia Circuit to prosecute contempt of Congress whenever the executive blocks a U.S. attorney from presenting a citation to a grand jury.¹⁰ During the Teapot Dome investigation, the independent counsel successfully brought several such contempt prosecutions on behalf of the Senate.¹¹ However, the likelihood of a president signing such legislation is slim.

But the criminal contempt process cannot be dismissed out of hand as subject to some aspect of prosecutorial discretion. Supreme Court rulings since 1821 have concluded that each house has the inherent constitutional authority to protect itself and to punish for contempt those who attempt to obstruct its legislative process, or else it would "be exposed to every indignity and interruption, that rudeness, or even conspiracy, may mediate against it."¹² The 1857 criminal contempt legislation was enacted in light of the same self-protective authority because of the Supreme Court's limitation on punishment by imprisonment to the end of a legislative session. It is to be recalled that there was no Justice Department in 1857 (it was not established until 1870) and United States attorneys were contract employees of the executive. They were simply viewed as the vehicle for either house to obtain judicial assistance to vindicate a House's integrity. That situation and rationale did not change with the creation of DOJ.¹³ Thus, the similar, well recognized self-

8. *Id.* at 41-56.

9. This move toward centralization came at the same time that control over nearly every other area of criminal prosecution was being decentralized. These conflicts were found to have affected field office morale and undermined the effectiveness of enforcement efforts. By the time the probe ended, the investigation had spurred important changes in DOJ's environmental criminal enforcement program. In addition to ordering a return of prosecutorial discretion to the local U.S. attorneys' offices, the department also established an entirely new management team to head the ECS. *Id.* at 1, 64.

10. Rep. Brad Miller introduced such legislation in the 111th Congress. See H.R. 277, 111th Cong., 1st Sess. (2009). It would have provided for appointment of an independent counsel by the Chief Judge of the U.S. district court for the district in which the certification was made if the attorney general or the U.S. attorney refuses to prosecute or if no indictment has been returned within 30 days after date of receipt of a House or Senate certification of a contempt citation. No House action was taken on the bill.

11. GRABOW, JOHN C., CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 29-30 (1988).

12. *Anderson v. Dunn*, 19 U.S. 204 (1821).

13. The legislative history of the 1857 criminal contempt enactment makes it abundantly clear that Congress intended to make its criminal strictures applicable to uncooperative executive branch officials. See Todd Garvey, *The Webster and Ingersoll Investigations*, at Part II *infra*.

protective contempt authority of the federal courts provides an apt analogy.

In *Young v. ex rel. Louis Vuitton et Fils*¹⁴ the Supreme Court recognized that courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their authority. The next year, in its landmark ruling in *Morrison v. Olson*,¹⁵ upholding the validity of the independent counsel legislation, the court cited *Young* as authority for court appointment of a prosecutor where there is no “incongruity between the functions normally performed by the courts and the performance of their duty to appoint.” The court noted that “Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive is called upon to investigate its own high ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch.” The *Morrison* court also made it clear that prosecutorial discretion was not a core presidential power.

A strong argument can be made that the notion put forth by DOJ that it is raising an applicable claim of presidential privilege is misplaced. The only defense it could properly raise is that it would face a conflict of interest if it is asked to represent the House by presenting a contempt citation to a grand jury against one of its clients. However, DOJ’s own rules provide the solution to such conflict problems: appointment of a private counsel as prosecutor or designation of a DOJ counsel who is made independent. A judicial challenge to the next DOJ refusal to present a criminal contempt, asking the court to order DOJ to appoint a special prosecutor in accordance with its own rules, would be a credible option.

2. Inherent Contempt

The historic inherent contempt power risks creating a political spectacle since it involves the arrest and detention of the accused, a trial on the floor of the House or Senate chamber, and possible incarceration if the person is found guilty. It also may involve a lawsuit in court, since the initial arrest and detention are typically quickly challenged in court through a *habeas corpus* petition. As a result, Congress has since 1935 avoided using this power, turning instead to its criminal contempt option. But Congress may wish to consider this tool more seriously because it does provide the means to obtain the desired testimony or documents more quickly. Congress could establish, by internal house rules, procedures and practices that avoid “unseemly” initial detentions and ultimate incarcerations, provide an expeditious due process proceeding, and impose stiff monetary penalties in place of incarceration

For example, preliminary to the holding of a trial in the House or Senate chamber, a special committee could conduct evidentiary proceedings at which the person cited or his or her attorney could appear and present witnesses and arguments. The special committee would then report its findings and recommendations to the floor. The person cited for contempt could again appear in person prior to the vote to acquit or convict and present his defense. Such preliminary committee considerations were not uncommon in early inherent contempt proceedings and an analogous pre-trial process for Senate impeachments has been held constitutional by the Supreme Court.¹⁶ In addition, House and Senate rules could provide that upon conviction, the sole penalty that could be imposed would be a fine, which would automatically trigger a point of order reducing the official’s pay. In such a process, the entire matter would be carried out within Congress. Without detention or incarceration, *habeas* is unavailable, and thus there would be no separate court proceedings. Under such revised procedures, inherent contempt might then be viewed as a politically palatable, “congressionally friendly,” fair, and expeditious enforcement mechanism that would make recalcitrant executive officials think twice before resisting.

3. Civil Contempt

Finally, civil contempt is not as speedy as advertised, as both the *Miers* and *Fast and Furious* litigations have amply demonstrated. It also presents the ever-present danger of an aberrational judicial ruling as occurred in *Fast and Furious*. In the past, the Justice Department has suggested that subpoena disputes be resolved in court because this would allow the department to defend an official in a potentially executive-friendly judicial forum. Congressional committees in the past, whether led by Democrats or Republicans, uniformly avoided DOJ offers for resolution through a civil enforcement

14. 481 U.S.787 (1987).

15. 487 U.S. 654 (1988).

16. See discussion in Chapter 3.

suit.¹⁷ Interestingly, when utilized by the House to enforce the subpoenas in the *Miers* and *Fast and Furious* cases, DOJ challenged the suit on a variety of “justiciability” grounds, but lost in each case its claim that the lawsuit was improperly brought because an authorization by one house is insufficient to vest jurisdiction in a district court. Ultimately, the *Miers* suit proved to be the only way for Congress to challenge the president’s claim of absolute immunity from congressional subpoenas for close presidential aides. The issue will undoubtedly be raised again by DOJ in the *Fast and Furious* appeal. In any event, civil contempt as an enforcement option will certainly be abandoned if the criminal and inherent contempt processes are restored.

Shoring up congressional enforcement mechanisms would help in making executive agencies and the White House more amenable to settling such disputes short of reliance on lengthy lawsuits with potentially uncertain outcomes. In most cases, it is the political process that is best able to forge compromises that address the needs of both political branches of government.¹⁸

B. Restoring the Centrality of the Roles of Committees and Subcommittees in Policy Development and Oversight and Their Ability to Assess and Evaluate Vital Legislative Information

Centralization in the party leadership of each house of control over legislative policy development and the initiation of sensitive investigative inquiries, accompanied by funding cuts for jurisdictional committees and the legislative branch support agencies that have traditionally assisted them, has served to undermine effective oversight and the depth and soundness of policy choices. Not only has there been a critical diminution in committee and support agency staffs’ expertise and institutional memory, but also a reduction in the incentive of members to engage in the increasingly unrewarding, time consuming effort that committee work requires.¹⁹

Resolution of this problem will not be easy or immediately forthcoming. It will require a fundamental change in the current climate of political dysfunction, which will entail a resurrection of a long dormant communal sense of institution that understands and respects the collective duties and responsibilities as members of a representative legislature in our scheme of separated powers. It will first require a successful challenge to the legal basis of executive refusals to obey compulsory processes for information. This in itself will call for an exercise of institutional will that of late has not been apparent. But, ultimately, there must be a congressional recognition that continued executive obstruction of its core legislative oversight and investigative prerogatives will become such an institutionally intolerable invasion of its place in our scheme of separated powers that a constitutional confrontation is necessary and unavoidable. Arguably, that time has already arrived.²⁰

17. The Justice Department on numerous past occasions has suggested, during contentious inquiries that raised possible executive privilege issues over subpoenaed documents and witnesses, that such disputes be resolved by civil enforcement proceedings in federal court. Until *Miers* such importunings were uniformly rejected. *See*, for example, H. R. REP. NO. 104-598, at 63 (1996) (additional views of Chairman William Clinger, Jr., stating that “I am astonished at hearing this recommendation by a Democratic President when the contemnor is a Democrat after knowing that the concept of a civil remedy has been so resoundingly rejected by previous Democrat Congresses when the contemnor was a Republican.”).

18. In perhaps the first instance of a congressional committee directly and publically addressing the issue of restoration of the Congress’s contempt power, the final report of the Select Comm. on the Events Surrounding the 2012 Terrorist Attack on Benghazi, H.R. REP. NO. 114-848 (2016) made three recommendations, based upon investigatory experience of its inquiry: (1) House and Senate rules should be amended to provide for mandatory reductions in appropriations to the salaries of federal officials held in contempt of Congress; (2) the criminal contempt statute should be amended to require the appointment of a special counsel to handle criminal contempt proceedings upon the certification of a contempt citation against an executive branch official by the House or Senate; and (3) the enactment of expedited procedures for the civil enforcement of subpoenas. The first recommendation deals with suggested alterations of the inherent contempt process by means of changes in House rules that either allow a point of order against any appropriation measure that would fund the salary of a federal official held in contempt of Congress or that provides nearly automatic sanctions against officials held in contempt by including a triggering mechanism in an annual appropriations statute disallowing the use of any appropriation to pay the salary of a federal official held in contempt which would affect an immediate and automatic reduction in pay. The latter option would mirror Section 13 of the Financial Services and Government Appropriations Act of 2012, a rider that has been continued annually for many years.

19. *See* discussion in 2.

20. *See* Eric A. Posner & Adrian Vermuele, *Constitutional Showdowns*, 156 PA. L. REV. 991, 1041-42 (2008) (“[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, even properly discounted, imposes greater social costs than present conflict, a showdown in the current period would be socially beneficial.”).

Success in that effort must then be followed by the loosening of the reins of the current hierarchal control of committee policy development and oversight. This would be manifested by significant increases in funding for the hiring of committee personnel based on staffing models that establish career paths that favor tenure and internal structures that reward specialization, experience and training. Term limits for chairs should be abolished to avoid the inevitable staff turnover and the loss of expertise and institutional memory. A core cadre of committee personnel might be hired as committee staff rather than being attached to a particular member so as to minimize the impact of member or chair turnovers. Equally vital is sufficient funding for agencies like GAO and CRS to make them the resources of first and principal resort for technical and analytic assistance that is now being provided by lobbyists and special interest organizations. More powerful committees would attract and encourage more member loyalty. It would affirm one further Woodrow Wilson observation: “It is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in committee rooms is Congress at work.”



The shape and contours of the legislative oversight process are dictated or directly influenced by our constitutional scheme of separated powers. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the executive. The Framers of the Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. Indeed, the issue of honesty and integrity in government, and the prevention of public corruption, has been important since the formation of our government in the 18th century. This distrust motivated the structure of the federal government in the Constitution; that is, separating powers among three branches of government to avoid concentrations and abuses of power and facilitate “checks and balances” among the branches.

In practice, the powers of the two political branches are too incomplete for one to gain total control of the departments and agencies of the executive branch. Legislative oversight is the mechanism that attempts to assure that Congress’s will is carried out and that executive power does not overwhelm congressional prerogatives. A more complete and accurate picture, then, is not that of congressional dominance, or executive recalcitrance, but of a dynamic process of continuous sparring, confrontations, negotiations, and ultimate accommodation. Occasionally, there are monumental clashes. It is in those instances that congressional power has been refined and defined.

Our Constitution ensures that powers are divided among the branches of government no matter who controls the White House or the Congress. Thus, these issues of inter-branch conflict and cooperation will arise and they should be resolved without regard to which political party is in control. In recent years, we have faced a lengthy period of legislative passivity in the face of serious executive challenges. As a result, there is present in Congress a pervasive sense of loss of institutional regard, loyalty, and self-respect. It is evident that the availability of formidable investigative powers alone is insufficient without an accompanying oversight process that is continuous, consistent, and aggressive, that is conducted by experienced staff, and is overseen by chairpersons with no limits on tenure. Institutional memory must be maintained, and the sense of integrity and the need for preservation of institutional prerogatives must be cultivated once more. The executive branch and Congress must seek to work together as partners in a governmental enterprise. But Congress must never abdicate its oversight function that distinguishes its role in that partnership or even appear to do so. Its preeminence as the “First Branch” must be nurtured, sustained and protected in order to maintain the delicate constitutional equilibrium.