Written Testimony of

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Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee, thank you for the opportunity to appear before you today to testify about the important topic of the enforcement of congressional subpoenas. Having had the honor and privilege of serving as House General Counsel from 2016-2019, I experienced first-hand some of the many obstacles, frustrations, and inordinate delays that Congress frequently encounters in attempting to obtain information from the Executive Branch pursuant to legitimate oversight requests. I commend the Subcommittee for holding this hearing to consider potential solutions to this difficult and recurring bipartisan problem.[1]

As you know, Congress's inherent constitutional authority to conduct oversight of the Executive Branch is broad and far-reaching, encompassing a wide array of fact-finding and evidence-gathering aimed at informing potential legislation; examinations of the manner in which the Executive Branch has or has not implemented congressional appropriations and directives; and investigations regarding potential misfeasance, malfeasance, or nonfeasance by Executive Branch officers and employees in the exercise of their official duties. Importantly, this legislative oversight power necessarily includes the authority to compel testimony and the production of information from the Executive Branch. While Congress has traditionally employed a variety of mechanisms to effectuate its oversight authority, in recent decades it has become evident that those mechanisms are increasingly inadequate to the task. In order for Congress to successfully perform its important oversight role, its enforcement authorities must be strengthened.

I will first provide an overview of Congress's constitutional authority to investigate. Second, I will outline the existing enforcement mechanisms available to Congress to compel compliance with its demands for information, and the various practical and structural limitations that serve to undermine the effectiveness of those mechanisms at present. Finally, I will discuss a number of proposals that could be adopted to enhance Congress's ability to conduct effective investigations of the Executive Branch and obtain the information it needs to fulfill its oversight and other legislative responsibilities effectively.

I. Congress's Power to Investigate

The Constitution confers upon the Senate and House of Representatives "[a]ll legislative Powers herein granted."[2] The authority of each legislative chamber to conduct oversight and investigations is an inherent attribute of that constitutional grant of legislative power.[3] That authority

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[1] The views stated in my written and oral testimony are my own, and do not necessarily reflect the views of my law firm or its clients.

[2] U.S. Const. art. I, § 1.

[3] McGrain v. Daugherty, 273 U.S. 135, 174–75 (1927) ("[T]he power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function…. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.").

necessarily includes the power to compel testimony and the production of documents through the issuance of subpoenas.[4]

Congress's investigative authority is sweeping in its ambit. As the Supreme Court has recognized, "the scope of [Congress's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[5] Thus, while Congress's exercise of its oversight authority must always be in furtherance of a legitimate legislative purpose,[6] the range of valid legislative purposes extends to "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[7]

Recipients of congressional subpoenas have an "unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation."[8] Unfortunately, however, that obligation is not always honored. As a practical matter, Congress's investigatory and subpoena powers are only as effective as Congress's ability to enforce them, and the experience of the past dozen years has cast substantial doubt on Congress's ability to achieve an acceptable degree of compliance by means of its existing authorities.

II. Existing Enforcement Mechanisms and their Limits

At present, Congress has three primary methods by which to achieve compliance or deter noncompliance with a subpoena—inherent contempt powers, criminal contempt powers, and the ability to file civil enforcement actions. For close to a century, however, Congress has not utilized its inherent contempt powers, and criminal contempt proceedings at the behest of Congress are simply unavailable in cases involving Executive Branch officials (and have become vanishingly rare with respect to private parties as well). As a result, congressional committees have increasingly been forced to resort to filing civil enforcement actions in federal district court in an effort to compel compliance by recalcitrant subpoena recipients. Those civil enforcement actions have generally proven to be unsatisfactory enforcement mechanisms, however, because the

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4 Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504-05 (1975) ("The issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking….").

5 *Id*. at 504 n.15; *see* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate[.]").

6 Trump v. Mazars USA, LLP., 140 S. Ct. 2019, 2031 (2019).

7 Watkins v. United States, 354 U.S. 178, 187 (1957); *see generally* Michael D. Bopp, Gustav W. Eyler, & Scott M. Richardson, *Trouble Ahead, Trouble Behind: Executive Branch Enforcement of Congressional Investigations*, 25 CORN. J. OF LAW & PUB. POLICY 453, 456 (2015).

8 Watkins, 354 U.S. at 187–88.

Department of Justice's litigating tactics, existing areas of legal uncertainty, and the discretionary scheduling decisions of federal judges can lead to inordinate delays and unduly limited relief, effectively defeating Congress's oversight efforts. In this context as in many others, justice delayed is justice denied.

A. Inherent Contempt.

By virtue of its constitutional grant of the federal legislative power, Congress possesses the inherent authority to find recalcitrant witnesses (among others) in contempt of Congress and to impose appropriate sanctions. While not explicitly outlined in the Constitution, the Supreme Court has recognized the existence and legitimacy of this power, explaining that without it, Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, [might] mediate against it."[9]

In practice, however, Congress's inherent contempt power has been of no practical utility in the modern era. First, the Senate, the House, and the courts have understandably imposed procedural requirements to constrain and guide the exercise of this power. Traditionally, for example, it has been understood that the relevant legislative chamber must first adopt a resolution setting forth the allegations of misconduct and formally charging the defendant with contempt; the resolution must be served on the defendant, or the Sergeant at Arms must take the defendant into custody to answer the charges at the bar of the chamber; and a trial or evidentiary hearing must be held allowing for access to counsel, defense witnesses, submission of evidence, and witness examination.[10] If the House or Senate finds the defendant guilty, the defendant may be imprisoned during that term of Congress, either to coerce compliance or as punishment for the contempt.[11]

Given the many procedural requirements, among other difficulties, this process has been "described as 'unseemly,' cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar."[12] Moreover, incarceration by Congress is simply not realistic or practicable in the twenty-first century. Congress has no jail where it could imprison individuals held in contempt, the political costs of imprisoning recalcitrant witnesses are widely viewed as unacceptably high, and the obvious practical and structural difficulties inherent in asking the Sergeant at Arms to arrest

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9 Anderson v. Dunn, 19 U.S. 204, 228 (1821); *see also* Marshall v. Gordon, 243 U.S. 521, 542 (1917) ("The right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed.")

10 *See*, *e.g., Bopp et al.*, 25 CORN. J. OF LAW & PUB. POLICY 453, 460 (2015); TODD GARVEY AND ALISSA M. DOLAN, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 10-11 (2017).

11 *Id.* at 11.

12 *Id.* at 12 (citing S. Rep. No. 95-170, 95th Cong., 1st Sess. 97 (1977)).

and imprison a federal official are daunting, to say the least.[13] As a result, Congress has not used this power since 1934.[14]

B. Criminal Contempt

In recognition of the practical difficulties posed by use of the inherent contempt power to enforce compliance with congressional subpoenas, in 1857 Congress enacted a statutory criminal contempt procedure as an additional mechanism for vindicating its interests in conducting legislative investigations. Under the criminal contempt statute, any person who "willfully" refuses to comply with a committee subpoena for testimony or documents "shall be deemed guilty of a misdemeanor," punishable by a substantial fine or imprisonment up to one year.[15] Moreover, the statute sets forth a mechanism whereby a congressional committee can submit a statement of facts regarding a witness's contempt to the President of the Senate or the Speaker of the House, who must then certify the witness's contempt to "the appropriate United States attorney, *whose duty it shall be* to bring the matter before the grand jury for its action."[16]

By its express terms, this statute provides Congress with a powerful tool to compel compliance with its legitimate subpoenas. In reality, however, and particularly in recent decades, the usefulness of this mechanism has been limited at best, because Congress depends on the Executive Branch for enforcement. Notwithstanding the mandatory language of the statute, which specifies that the U.S. Attorney "shall" prosecute a recalcitrant witness upon certification by Congress, the Executive Branch has taken the position that it retains the discretion not to prosecute, and in particular that it has no obligation to prosecute federal officials for alleged contempt when they assert executive privilege, because the power to prosecute is exclusively vested in the Executive Branch under Article II of the Constitution.[17] Thus, specifically in the context of Executive Branch resistance to congressional oversight requests, the criminal contempt statute is effectively useless, and other enforcement mechanisms are necessary.

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13 *See*, *e.g.*, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 91 (D.D.C. 2008) (explaining that imprisoning an executive branch official would "exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis")

14 GARVEY & DOLAN, *supra* n.10, at 12; *see* Jurney v. MacCracken, 294 U.S. 125 (1935).

15 2 U.S.C. § 192.

16 2 U.S.C. § 194 (emphasis added).

17 *See*, *e.g.*, Letter from Karl R. Thompson, Acting Ass't Attorney Gen., Office of Legal Counsel, Dep't of Justice, to Ronald C. Machen, Jr., U.S. Attorney for D.C. (June 16, 2014); Letter from James M. Cole, Deputy Att'y Gen., to Hon. Charles E. Grassley, Ranking Minority Member, Comm. on the Judiciary, U.S. Senate at 1 (July 16, 2010) ("the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege") (quoting *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984)); TODD GARVEY, CONG. RSCH. SERV., RL45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 20 (2021).

C. Civil Enforcement Actions

A third mechanism available to the House[18] and Senate[19] to enforce subpoena matters is to initiate a civil enforcement action in federal court. When a recalcitrant witness refuses to comply with a subpoena, the relevant chamber may authorize a committee, typically via a resolution or standing rule, to file suit in federal district court seeking an order requiring the recalcitrant witness to comply with the subpoena. If the court then orders compliance and the witness fails to obey, the witness can be found in contempt of court and subjected to appropriate sanctions to coerce compliance. While this enforcement mechanism has had greater success in recent years than the contempt mechanisms discussed above, the House's experience with civil enforcement actions over the past dozen years has revealed substantial inadequacies that severely limit this mechanism's effectiveness in most circumstances.

First, civil enforcement actions have tended to result in substantial delays and prolonged litigation spanning different Congresses and even different presidential Administrations. By far the most egregious example of inordinate litigation delays occurred in the Fast and Furious investigation. There, the House Committee on Oversight and Government Reform issued a subpoena to the Attorney General for documents related to allegations of Executive Branch misconduct arising out of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' use of so-called "gunwalking" tactics in an undercover sting operation known as Operation Fast and Furious. After the Executive Branch asserted executive privilege (after many months of stonewalling), the Committee filed a civil enforcement action in August 2012. Amazingly, the district court did not even order production of *unprivileged* documents until August 2014, *two years* after the lawsuit had been filed,[20] and it did not resolve any of the Executive Branch's specific (and meritless) privilege objections until January 2016, nearly *three and a half years* after the litigation had commenced.[21] By the time the case was finally resolved in the district court, a presidential election and *two* congressional elections had intervened, and legitimate congressional efforts to obtain highly relevant information had been effectively stifled. As one committee report correctly observed, "[a]n enforcement tool requiring three and a half years simply to get a district court order is unacceptable."[22]

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18 While it is generally understood that either house of Congress may bring a civil enforcement action, *see infra* n.40, the Department of Justice has consistently argued otherwise, and Congress's ability to bring civil enforcement actions against the Executive Branch has been called into question by a now-vacated panel decision of the D.C. Circuit. *See* Comm. on Judiciary of U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

19 2 U.S.C. § 288d; 28 U.S.C. § 1365.

20 Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, ECF No. 81 (D.D.C. Aug. 20, 2014) (Amy Berman Jackson, J.).

21 Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016) (Amy Berman Jackson, J.).

22 H.R. Rep. No. 114-848, at 401.

Other civil enforcement actions have proceeded in the federal district courts without similarly egregious delays. But even when federal district judges are prepared to act expeditiously, the necessarily time-consuming nature of the civil litigation process and the often slow pace of appellate review render the litigation mechanism a less-than-satisfactory means of vindicating Congress's need for the prompt submission of information in response to oversight requests. In 2007, for example, the House Judiciary Committee issued subpoenas for the testimony of the former White House Counsel and Chief of Staff regarding the firings of nine United States attorneys. The Executive Branch categorically refused to comply, and the Committee filed suit in March 2008. The district court acted with commendable diligence, resolving the case in favor of the Committee in July 2008.[23] Thereafter, however, the Executive Branch appealed, and the D.C. Circuit, while granting the Executive Branch a stay pending appeal, *declined* to expedite the appeal, thereby frustrating the Committee's obvious and compelling interest in a speedy resolution of the dispute. Ultimately, the D.C. Circuit never resolved the case, because a presidential election intervened, and the new administration was able to settle the dispute. The former White House Counsel did not testify until March 2009, after the administration in which she had served was no longer in office.[24]

A similar pattern unfolded during the Trump Administration, when subpoena disputes intensified but litigation delays continued to frustrate congressional efforts to obtain information within a reasonable period of time. The House's experience in these disputes serves only to confirm the lesson that, for the Executive Branch, litigation delays can be as effective as a favorable court decision in resisting congressional investigations.

Perhaps the best known example involves the *Mazars* and *Deutsche Bank* cases, which arose out of several subpoenas to third parties for private financial records of then-President Trump. The subpoenas were issued by the Committee on Financial Services, the Committee on Intelligence, and the Committee on Oversight and Reform. Rather than comply with these subpoenas, then-President Trump challenged them in federal court. Although the district courts in both cases proceeded with admirable promptness in deciding the cases in the first instance,[25] the subsequent process of judicial consideration, involving direct appeal to the courts of appeals, review by the Supreme Court, and further proceedings on remand, resulted in protracted delays. The *Mazars* and *Deutsche Bank* subpoenas were issued in April 2019, and the Supreme Court issued its decision in July 2020, but the cases remain pending with no final decision,[26] and in the meantime a presidential election has occurred and a new administration has taken office.

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[23] Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (John D. Bates, J.).

[24] David Johnston, *Top Bush Aides to Testify in Attorney's Firings*, N.Y. TIMES (Mar. 4, 2009), https://www.nytimes.com/2009/03/05/us/politics/05rove.html.

[25] Trump v. Committee on Oversight & Reform, 380 F. Supp. 3d 76 (D.D.C. 2019) (Amit P. Mehta, J.), aff'd sub nom., Trump v. Mazars USA LLP, 940 F.3d 710 (D.C. Cir. 2019), vacated, 140 S. Ct. 2019 (2020); Trump v. Deutsche Bank, AG, 2019 WL 2204898 (S.D.N.Y. May 22, 2019) (Edgardo Ramos, J.), aff'd in part, 943 F.3d 627 (2d Cir. 2019), vacated, 140 S. Ct. 2019 (2020).

[26] Trump v. Committee on Oversight & Reform, No. 19-cv-01136 (D.D.C.); Trump v. Deutsche Bank,

[Footnote continued on next page]

The same is true of the remaining two subpoena cases that arose in 2019. In the *McGahn* case, the House Judiciary Committee issued a subpoena to former White House Counsel Donald McGahn in April 2019. The Executive Branch took the position that McGahn was absolutely immune from compelled testimony, and the Committee filed suit in August 2019 to compel enforcement. The district court promptly ruled in favor of the Committee in November 2019,[27] but a panel of the D.C. Circuit reversed, and the case has been pending on appeal (with multiple twists and turns) ever since. Ultimately, it appears that the dispute may finally have been resolved, not by the courts but by a settlement reached after the new administration took office. Finally, *Committee on Ways and Means v. U.S. Treasury*, which involves a subpoena issued to Treasury Secretary Mnuchin and Internal Revenue Service Commissioner Charles Rettig for six years of President Trump's tax returns, was stayed pending resolution of the various overlapping legal issues raised in the *McGahn* appeal, and the parties are now apparently engaged in settlement negotiations.[28]

It is striking that not one of the six lawsuits discussed above resulted in the House obtaining any relief before at least one congressional and presidential election intervened. Given the typically short timeframes on which congressional investigations usually operate, these lengthy litigation delays are a serious obstacle to effective oversight, and serve only to encourage the Executive Branch to engage in vigorous resistance at every step of the process. As a practical matter, the limited victories that Congress has been able to obtain through litigation have proven to be largely hollow, with access to meaningful information generally delayed for years, if achieved at all. Reforms are needed if Congress is to regain its ability to conduct effective oversight of the Executive Branch in the face of stubborn resistance.

III. Possible Mechanisms for Enhancing Oversight Effectiveness

As shown above, Congress's existing authorities are inadequate to the task of enforcing legitimate congressional subpoenas against recalcitrant Executive Branch officials in a timely manner. As one House Select Committee aptly summarized the current reality, "[a]ll three enforcement mechanisms—inherent powers, criminal charges and civil enforcement—have questionable usefulness today and are largely dependent upon other branches of government agreeing with or pursuing the cause and remedy. The administration's obstruction of congressional oversight is the inevitable and predictable result."[29]

[Footnote continued from previous page]
AG, No. 1:19-cv-03826 (S.D.N.Y.).

27 Committee on Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019) (Ketanji Brown Jackson, J.), appeal pending (No. 19-5331).

28 Comm. on Ways and Means, U.S. House of Representatives v. U.S. Dep't of the Treasury, No. 1:19-cv-01974 (D.D.C.).

29 H.R. Rep. No. 114-848, at 401 (2016).

A number of proposals for attempting to remedy this problem have been made over the years, and several of them have the potential to meaningfully enhance Congress's oversight powers. Some of these proposals are discussed below.

A. Enhancing the Efficacy of the Contempt Power

As discussed above, procedural and structural inefficiencies render the existing contempt avenues largely ineffectual as mechanisms for ensuring compliance with congressional subpoenas. The political costs, public-relations optics, and practical obstacles to arresting, trying, and imprisoning recalcitrant witnesses pursuant to the inherent contempt power have made it a dead letter for more than 80 years, and the Department of Justice's consistent refusal to pursue criminal contempt charges against federal officials renders the criminal contempt process effectively toothless.

Commentators have proposed a variety of potential remedies aimed at reinvigorating the contempt power and transforming it once again into an effective tool for bolstering congressional oversight efforts. One proposal would entail the imposition of monetary fines on persons found guilty of inherent contempt; the rationale for this approach is that fines would be a more politically and practically feasible alternative to the traditional but somewhat jarring penalty of imprisonment.[30] For example, Congress could pass a statute imposing a range or graduated schedule of monetary penalties for government officials found to have engaged in willful contempt of Congress pursuant to the inherent contempt mechanism, with the penalties designed to incentivize compliance with lawful subpoenas and/or punish those who continue to resist compliance. Such a provision could provide for judicial imposition and enforcement of such fines (with carefully framed mandatory provisions aimed at guiding and constraining judicial discretion in order to ensure an effective fines regime), or it could provide for the automatic imposition of specified fines on federal officials found in contempt, with collection to be enforced through mandatory salary deductions.

To avoid potential due process objections, such a regime would of course need to include appropriate procedural protections for individuals charged with contempt, to ensure that the House's or Senate's inherent contempt determination would not be subject to legitimate challenge in the courts. As discussed above, the procedural protections deemed appropriate in the inherent contempt context have typically included fair notice of and an opportunity to respond to the contempt charges, the right to be represented by counsel, and the like.[31] As the Supreme Court explained in a legislative contempt case decided in 1972, "we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'"[32] At the same time, however, "the panoply of

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30 *See e.g.*, Morton Rosenberg, WHEN CONGRESS COMES CALLING 24-25 (2017).

31 GARVEY & DOLAN, *supra* n.10, at 11; Mort Rosenberg, *Reasserting Congress' Investigative Authority* 2 n.6 (R Street 2017).

32 Groppi v. Leslie, 404 U.S. 496, 502 (1972).

procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings."[33]

A related proposal that could be adopted as an alternative to or in conjunction with the imposition of monetary fines would be the enactment of annual appropriations riders forbidding the use of appropriated funds to pay the salary of any federal officer or employee found to be in contempt of Congress.[34] Such a prohibition could be effective for a specified period of time, or until the contemnor has complied with Congress's lawful demand for information (subject to constitutional limitations). Congress has adopted analogous appropriations riders in other contexts. For example, Section 713 of the Consolidated Appropriations Act of 2020 provides that "[n]o part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who … prohibits or prevents … any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress" on official matters.[35] A similar rider could easily be fashioned to preclude salary payments to congressionally adjudicated contemnors. And to ensure implementation of this approach during each appropriations cycle, the House "change its rules to allow a point of order against any appropriations measure, including conference reports, and continuing resolutions, that would fund the salary of a Federal official held in contempt of Congress."[36]

Properly implemented, neither a salary-freezing mechanism nor a monetary penalty structure would constitute an impermissible bill of attainder. Such measures would not be drafted to target particular identified individuals, but would instead operate generally (like any criminal statute), with their penalties or prohibitions being triggered only by separate findings of contempt pursuant to each legislative chamber's well-recognized inherent power to make such findings in accordance with due process.[37]

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33 *Id*. at 501.

34 *See e.g.*, H.R. Rep. No. 114-848, at 402 (2016).

35 Consolidated Appropriations Act, 2020, Pub. L. No. 116-93 § 713, 133 Stat. 2487 (2020).

36 H.R. Rep. No. 114-848, at 401 (2016).

37 The Supreme Court has defined bills of attainder as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Lovett, 328 U.S. 303, 315 (1946). The imposition of penalties based on a finding of contempt pursuant to Congress's constitutional inherent contempt procedures would not be an impermissible bill of attainder, as evidenced by the fact that the Supreme Court has consistently upheld Congress's power to impose punishment on the basis of such findings. *See supra* n.9.

B. Enhancing the Efficacy of the Civil Enforcement Mechanism

1. Expediting Judicial Proceedings

In recognition of the fact that the time-consuming nature of civil enforcement has proven to be the largest single obstacle to its effectiveness, proposals to enhance the civil enforcement process have typically focused on mechanisms for expediting judicial consideration and resolution of such cases.[38] In 2017, the House of Representatives passed H.R. 4010, a bill aimed at resolving several of the problems posed by current civil enforcement procedures, specifically including the problem of delay.[39] The bill would have ameliorated that problem in several ways.

First, by making clear that the House and its committees may bring civil enforcement actions to enforce congressional subpoenas, the bill would have eliminated one of the Department of Justice's delaying tactics, namely, its traditional (but meritless) argument that the House lacks a cause of action and therefore cannot pursue civil enforcement litigation.[40]

Second, the bill would have imposed on all levels of the federal court system the "duty … to advance on the docket and to expedite to the greatest possible extent the disposition of any such action and appeal."[41] In addition, the bill would have given the committee initiating the lawsuit the option of requesting that the case be heard by a three-judge court with direct appeal to the Supreme Court, thereby eliminating an entire layer of appellate review with its attendant delays.[42]

Subsequent proposed bills have included additional enhancements that would also help further the goal of securing expedited judicial consideration of subpoena enforcement actions. For ex-

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38 *See e.g.*, H.R. Rep. No. 114-848, at 402 (2016) (proposing mechanisms for expedited resolution, and explaining that "[a]n investigation delayed by years of legal deliberations does not allow Congress to make timely legislative decisions.").

39 H.R. 4010, 115th Cong. (2017).

40 See H.R. 4010, § 2(a) (proposed 28 U.S.C. § 1365a(a)), 115th Cong. (2017). As noted above, the assertion that the House lacks a cause of action was responsible for some of the delay in the McGahn matter, and as a result of the settlement of that matter it will not be resolved by the D.C. Circuit in the near term. Of course, the Department of Justice's position on this issue has been rejected by multiple district court decisions, which correctly recognize that the House's constitutional right to compel compliance with its subpoenas necessarily carries with it the ability to vindicate that right in court. *See* Committee on Judiciary v. McGahn, 415 F. Supp. 3d 148, 193-95 (D.D.C. 2019); Committee on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1, 22-24 (D.D.C. 2013); Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53, 78-94 (D.D.C. 2008). Unfortunately, the now-vacated panel decision in the McGahn case (which reached the opposite conclusion) will undoubtedly encourage the Department of Justice to continue advancing this argument, so it can be expected to cause delay in future cases unless precluded by statute.

41 H.R. 4010, § 2(a) (proposed 28 U.S.C. § 1365a(a)(2)), 115th Cong. (2017).

42 *Id*. § 2(a) (proposed 28 U.S.C. § 1365a(a)(3)).

ample, one proposal would add statutory language authorizing appellate courts to issue interlocutory relief as necessary to compel prompt judicial action when a district court fails to proceed expeditiously, and directing the federal courts to prescribed rules of procedure "to ensure the expeditious treatment" of subpoena enforcement actions.[43]

One additional matter that would be worthy of legislative attention in this regard is the potential enactment of statutory language mandating expedited district court and appellate consideration of actions brought to quash, modify, or enjoin enforcement of congressional subpoenas. Most such actions are barred by the Speech or Debate Clause,[44] but as illustrated by the *Mazars* case, courts have entertained actions to enjoin third-party recipients of congressional subpoenas from complying with demands for production of documents belonging to the plaintiff, and such cases have sometimes failed to proceed at an appropriately expedited pace. A statutory obligation to expedite such cases to the greatest extent feasible at all levels of the federal judicial system would presumably help alleviate this problem.

2. Streamlining Privilege Disputes

House Bill 4010 also included language requiring subpoena recipients to provide timely privilege logs detailing any claims of privilege or be deemed to have waived such privilege claims.[45] Requiring a privilege log—a list describing any documents withheld and the corresponding protective privilege—would substantially accelerate the subpoena enforcement process by mandating that the Executive Branch specify its claims of privilege at the beginning of the process. In the Fast and Furious investigation, for instance, the Executive Branch refused to assert even a blanket claim of executive privilege until faced with contempt proceedings, and failed to provide a detailed privilege log until finally ordered to do so after years of litigation, tactics that resulted in substantial delay.

Additionally, Congress could enact legislation making clear that each chamber or committee has discretion to decline to recognize common law privileges when asserted by the Executive Branch. Limiting the available privileges in the context of particularly compelling investigations could expedite the oversight process by minimizing the number of privilege disputes to be litigated.

C. Wielding the Appropriations Power to Enhance Oversight

Separate and apart from proposals to enhance the effectiveness of the contempt and civil enforcement mechanisms, the effectiveness of the House's oversight investigations could also be enhanced through more aggressive deployment of the appropriations power in a manner targeted at recalcitrant federal agencies. Many mechanisms for achieving this goal could be devised, but one potential approach would be to modify the House's Rules to empower standing committee

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43 H.R. 8335, § 3(a) (proposed 28 U.S.C. § 1365a(b)(2) & (e)), 116th Cong. (2020).

44 Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 507 (1975).

45 H.R. 4010, §§ 2(a) & 3(a) (proposed 28 U.S.C. § 1365a(c) & Rev. Stat. § 105).

chairs whose legitimate oversight requests have been stonewalled by particular Executive Branch agencies to certify those agencies' noncompliance to the Appropriations Committee, which would then be obligated to imposed mandated percentage reductions in funding for the relevant agency or an appropriate element thereof (such as its senior leadership units), in the next annual appropriation bill. To ensure compliance, language could be also be added to Rule XXI.9 stating that it shall not be in order for the House to consider on the floor any bill, joint resolution, amendment, or conference report appropriating funds in a manner inconsistent with the foregoing percentage reductions, unless the certifying committee confirms that the recalcitrant agency has resolved its subpoena compliance issues.

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Thank you for the opportunity to testify regarding this important subject.