

**Testimony of Morton Rosenberg Before the
Special Committee on the Climate Crises on
The Investigative Authority of House Committees**

October 29, 2019

I. Introduction

My testimony will focus on the breadth and limitations of a House committee’s investigative authorities that may be relevant to such an inquiry together with two case studies that shed light on the potential for success in this endeavor.

My observations and conclusions are based on 35 years of hands-on experience as a senior level Specialist in American Public Law at the American Law Division of the Congressional Research Service in the areas congressional investigative oversight and related issues of separation of powers and constitutional and common law privileges, and my work as a legislative consultant in these areas since my retirement in 2008. In 2017 I published an examination of the investigative oversight process, “When Congress Comes Calling: A Study on the Principles, Practices and Pragmatics of Legislative Inquiry,” which may serve as a useful reference source.

II. The Breadth of the Investigatory Power

Congress possesses broad and encompassing powers to engage in oversight and to conduct investigations reaching all sources of information necessary to carry out its legislative functions. In the absence of a countervailing constitutional privilege or self-imposed restriction on its authority, Congress and its committees have virtually plenary power to compel production of information needed to discharge their legislative functions. This applies whether the information is sought from executive agencies, private persons, or organizations. Within certain constraints, the information so obtained may be made public.

These powers have been successfully exercised by both Houses of the Congress since the dawning days of the Republic and have been recognized in numerous Supreme Court rulings. The broad authority to seek information and enforce demands was unequivocally established in two Supreme Court decisions arising out of the 1920s Teapot Dome scandal. In *McGrain v Daugherty*,¹ which considered a Senate investigation of the Justice Department, the Court described the power of inquiry, with the accompanying power to enforce it, as “an essential and appropriate auxiliary to the legislative function.” The Court explained:

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, and where the legislative body does not possess the requisite information—which not infrequently is true—recourse must be had through others who do possess it. Experience has taught that the mere requests for such information are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.²

The Court also pointed out that the target of the Senate investigation, the Department of Justice (DOJ), like all other executive departments and agencies, is a creation of Congress and subject to its plenary legislative and oversight authority. Congress has clear authority to investigate whether and how agencies are carrying out their missions. It did not matter that the Senate’s authorizing resolution lacked an “avow[al] that legislative action was had in view” because, the Court said “the subject to be investigated was...[p]lainly [a] subject...on which legislation could be had” and such legislation “would be materially aided by the information which the investigation was calculated to elicit.”³ That was sufficient. Although “[a]n express avowal” of the Senate’s legislative objective “would have been better,” the Court admonished that “*the*

¹ 273 US 135 (1927).

² *Id.* at 174-75.

³ *Id.* at 176-77.

presumption should be indulged that [legislation] was the real object.⁴ This presumption has become the touchstone for all for all future unsuccessful judicial challenges to congressional exercises of its investigatory powers.⁵

Two years later, in *Sinclair v United States*,⁶ the Court reiterated and expanded on many of the propositions established by *McGrain*. In that case, Harry Sinclair, the president of an oil company, appealed his conviction of contempt of Congress for refusing to answer a Senate Committee’s questions regarding his company’s allegedly fraudulent lease on federal oil reserves at Teapot Dome in Wyoming. The Court, while acknowledging an individuals’ “right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their private and personal affairs,”⁷ nonetheless, it explained, that because “[i]t was a matter of concern to the United States,”... “the transaction purporting to lease to [Sinclair’s company] the lands within the reserve cannot be said to be merely or principally...personal.”⁸ The Court also dismissed the suggestion that the Senate was impermissibly conducting a criminal investigation. The Court explained that “It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may be of use in such suits.”⁹

⁴ Id. at 178 (emphasis supplied).

⁵ The most recent example is the expansive ruling of the Court of Appeals for the District of Columbia in *Trump v Mazars USA and Committee on Oversight and Reform of the U.S. House of Representatives*, No 19-5142 (October 11, 2019) rejecting the President’s attempt to block compliance with Committee document subpoenas to a private accounting firm for his tax records.(Mazars).

⁶ 279 U.S. 263 (1929).

⁷ Id at 292.

⁸ Id. at 294.

⁹ Id at 295. See also *Hutcheson v. United States*, 369 U.S. 599 (1962). The case involved a contempt of Congress prosecution of a union president for refusal to answer questions of a Senate committee tasked with investigating whether criminal practices or activities were occurring in the field of labor-management relations that would require remedial legislation. The union official refused to answer questions respecting the alleged use of union funds to bribe a state prosecutor. If the allegations were well founded it would have been the basis for a state prosecution. The Court affirmed the contempt conviction. What mattered to the Court was that the committee’s investigation into the details of the defendant’s illegal conduct “would have supported remedial federal legislation

In future rulings the High Court and federal appellate courts would hold that properly based inquiries would overcome First Amendment claims¹⁰, and have deemed congressional investigative proceedings the “legislative equivalent of a grand jury.”¹¹ Witnesses’ rights at an investigatory hearing are at the sufferance of the committee. Thus, there is no right to cross-examine adverse witnesses, or to discovery of materials utilized by a committee as a basis for questions.¹² The Supreme Court has commented that “only infrequently have witnesses...[in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding.”¹³ Moreover courts have consistently denied that neither agencies nor private parties can deny committee access to proprietary, trade secret, privacy or other sensitive information in their possession unless a statute expressly denies such congressional access.¹⁴ Also, long-standing congressional practice and case law has established that a committee may determine, on a discretionary, case-by-case basis, whether to accept common law privileges such as the attorney-client, work product and deliberative process privileges. It may deny a witness’s request to invoke such privileges if the committee concludes it needs the information sought to accomplish its legislative functions.¹⁵ Finally, while the

for the future.” *Id.* at 617. The Court observed that “a congressional committee...engaged in a legitimate legislative investigation need not grind to a halt whenever...crime or wrongdoing is disclosed.” *Id.* at 618.

¹⁰See, e.g., *Barenblatt v United States*, 360 U.S. 109 (1959). There the Court considered the case of a teacher convicted of criminal contempt for refusing, when testifying before a congressional committee, to answer questions about his “past or present membership in the Communist Party.” *Id.* at 126. The Court noted that he had been “sufficiently apprised of the topic under inquiry” by “other sources of information” such as the Subcommittee “Chairman’s statement as to why he had been called” to testify and the questions posed by the Subcommittee to previous witnesses. *Id.* at 124-25. Then, addressing the “precise constitutional issue—whether the Subcommittee’s “inquiry transgressed the provisions of the First Amendment”—the Court explained that although “Congress may not constitutionally require an individual to disclose his... private affairs except in relation to” “a valid legislative purpose,” such a purpose was present in that case. *Id.* at 127. Congress’s “wide power to legislate in the field of Communist activity... and to conduct appropriate investigations in aid thereof is hardly deatable” and “[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.” *Id.* at 127, 132. Thus, given the governmental interests... at stake,” the Court concluded that “the First Amendment [had] not been offended” and affirmed the defendant’s conviction. *Id.* at 134. See also discussion in *When Congress Comes Calling* at 59-61.

¹¹ See, *Senate Select Committee on Ethics v Packwood*, 845 F. Supp. 17, 21 (D.D.C.1994), *stay pending appeal denied*, 510 U.S. 1319 (1994).

¹² *United States v. Fort*, 443 F. 2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

¹³ *Hannah v Larch*, 363 U.S. 420, 445 (1960).

¹⁴ See generally, *When Congress Comes Calling*, at 83-86.

¹⁵ *Id.* at 65-73.

Supreme Court has recognized the president's constitutionally based privilege to protect the confidentiality of documents and other information that reflects presidential decision making and deliberations, that privilege is qualified. Recent appellate court rulings have held that Congress and other appropriate investigative entities may overcome the privilege by a sufficient showing of need and the inability to obtain the information elsewhere.¹⁶ In short, a committee having established its prescribed area of legislative jurisdiction, its authority to issue subpoenas, the pertinence of the matter under inquiry to its area of authority, together with its presumed legislative purpose, has an encompassing investigative range.¹⁷

III. The Waxman Model

During his sixteen years (1994-2007, 2011-2015) as the ranking minority member of the House Oversight and Government Reform Committee, Rep. Henry Waxman employed a variety of non-official, non-compulsory approaches to access and disseminate information to support of his oversight objectives. He sent out literally thousands of information requests to the White House, agency officials and targeted private sector individuals or entities on matters of legislative concern which he publicized through the media whether they were answered or not. His fundamental precept for successful oversight was public engagement in order to foster public attention to his concerns. He also saw that this served as an enticement for whistleblowers and he was careful to provide them with confidentiality protection and a tip-line for communications. He maintained an experienced, dedicated, and long serving staff. He created a Special Investigative Division(SID) that interviewed whistleblowers , studied obscure government data bases and did undercover work. SID produced over 1000 reports on a range of issues that laid the groundwork for landmark legislation and revelations of fraud, abuse of power and maladministration. SID inquiries included such matters as the high cost of drugs in comparison to prices in Canada which ultimately led legislation to create a Medicare prescription drug benefit; classroom overcrowding; nursing home abuses; the involuntary

¹⁶ Id.at 39-46

¹⁷ Id. at 15-18.

incarceration of mentally ill youths; online file sharing programs that bombarded children with pornography; government secrecy; pre-Iraq war claims about weapon of mass destruction; waste, fraud and abuse in private no-bid and limited competition procurement contracts worth over \$1 trillion; vast overcharges for goods and services for Iraq by Halliburton Corporation; and steroid use in professional sports, among many others.

His backbench work was most notable in his exposure of the long held secret knowledge of the tobacco industry of the deadly effects nicotine.¹⁸ His broad objectives were to establish a public record regarding the health effects of tobacco use and the addictiveness of nicotine and to secure passage of laws that would reduce smoking and thereby improve public health. In the course of his inquiry four questions were prominent: Did the tobacco industry know that nicotine was addictive? Did it manipulate the nicotine levels to enhance addictiveness"? Did it knowingly suppress information regarding addictiveness or health risks? And did it market its product to children? Over time all were answered in the affirmative. Important turning points came before 1995, when he was chair of a subcommittee and enticed executives from seven tobacco companies voluntarily testify publically to their purported lack any knowledge of any dangers from nicotine consumption. At that time Waxman's subcommittee had received internal documents purloined by a whistleblower paralegal of law firm representing a tobacco company that demonstrated its long time knowledge of the ill effects of nicotine and its efforts for decades to cover-up the its dire health effects from its customers and the public of its health hazards. The company brought a civil action to retrieve the documents from Waxman who had wisely not held a press conference or otherwise publically exposed the documents in order to maintain his constitutional Speech or Debate protection. A court of appeals ruled that since neither Waxman nor

¹⁸ The general details of the breadth and success of Waxman's backbench oversight is described in *When Congress Comes Calling* at 100-102. An insightful essay focusing on Waxman's tobacco investigation specially prepared by Michael Stern for that study, "Henry Waxman and the Tobacco Industry: A Case Study in Congressional Oversight", appears at 313-317 (Stern).

his subcommittee staff were involved in the illegal activity it could use the evidence in an investigatory hearing.¹⁹

The successes during his period of chairmanship and the manner in which he achieved them provided continued momentum during his time as ranking minority member. His SID studies provided important information for the national press and whistle blowers continued to reach out to him. The clearinghouse function he developed as a source of revelatory negative information about tobacco industry activities was continued. At one point, the revelation of internal industry documents conceding the long-known ill effects of nicotine so shifted the momentum against tobacco companies that suits by State attorneys general and private plaintiffs against the companies proliferated so ominously that it impelled the industry to offer a settlement deal that would have insulated the companies from further liability. Waxman, now a ranking minority member, thought the deal inadequate and led the formation of a “shadow committee” called the Advisory Committee on Tobacco Policy on Public Health co-chaired by former prominent and respected government health officials who were anti-smoking advocates. After holding public hearings the panel found the proposed agreement “unacceptable” and detailed a stronger plan to address the problem. The committee’s conclusion caused the White House to distance itself from the original settlement and the Senate to consider stronger ameliorative legislation. Incremental measures followed and it was not until 2009 that the Family Smoking and Tobacco Smoking Control Act was passed into law, under Waxman’s aegis, giving the Food and Drug Administration the authority to regulate tobacco products and to ensure that tobacco is not advertised or sold to children.²⁰

IV. The Lessons of the *Miers* and Fast and Furious Investigations and their Fallout

Waxman’s efforts respecting the effective regulation of deadly nicotine exposure spanned much of his 30 year congressional career. One lesson that be

¹⁹ See *Williamson Tobacco Corp. v. Williams*, 62 F. 3d 408 (D.C. Cir. 1995) and Stern at 314-316.

²⁰ See *When Congress Comes Calling* at 101 and Stern at 317.

drawn from his experience is that successful oversight can require extensive time. Waxman had spent more than a decade on the tobacco inquiry before he began to make real progress in the early 1990's. Developing both expertise and information on a subject can pay dividends. Similarly learning the techniques of oversight is not something that happens overnight. Waxman's experience demonstrates that Members of Congress can conduct successful oversight without issuing subpoenas or even holding formal hearings. The question that should be addressed is whether the dynamic of investigative oversight prevalent during Waxman's era exists any longer today.

Since 2006 the Executive has successfully obstructed Congress's investigative oversight capabilities that I have described above. The Department of Justice (DOJ), on the basis of opinions issued by its Office of Legal Counsel (OLC), has instituted and executed a thus far congressionally uncontested strategy of compelling House committees to seek judicial assistance in order to gain compliance with their document and testimonial subpoenas by civil court proceedings. It has done this by declaring that Congress's resort to its historic, constitutionally recognized institutional self-protective mechanisms of inherent and criminal contempt proceedings are unconstitutional because they usurp the President's core power to exercise prosecutorial discretion and his duty to ensure that the laws are "faithfully executed." The demonstrable consequence of this stratagem has been the crippling of the legislature's information gathering authority and thereby undermining its core, constitutionally mandated legislative function. It has done this by shifting the burden historically placed on a recalcitrant executive official or private person or party to defend against a charge of contempt of Congress through either inherent or criminal on a responsible committee that must now must seek judicial assistance to obtain compliance. Such litigation takes time and risks aberrant judicial rulings, both of which have occurred.

The initial foray precipitated by this tactic occurred after a House committee investigation the firing of nine United States Attorneys in 2006 indicated that the removals were for political reasons and were dictated by White House officials. Subpoenas were issued to White House Counsel Harriet

Miers and Chief Staff Joshua Bolton for testimony and documents. President Bush asserted executive privilege and ordered them to not even appear before the Committee claiming his assertion of privilege gave them absolute immunity. A criminal contempt citation was voted by the House together with a resolution authorizing a civil contempt enforcement suit in anticipation of a DOJ refusal to present the citation to a grand jury. In 2008, after a trial the district court affirmed the authority of the House alone to authorize the suit, rejected out of hand the notion that the president's claim of privilege vested any sort of immunity, denied the government's claim that the case involved a political question and was not reviewable by a court, and directed them to appear before the Committee.²¹ An appeal was filed but before it could be heard a new administration took control and negotiated a settlement that did little to resolve the withholding issues. The Speaker did refuse the President Obama's request that court's opinion be vacated. The *Miers* inquiry and litigation extended for two years.

The Fast and Furious investigate emanated from concerns of Senator Chuck Grassley of what appeared to him to be an unlawful gun running operation being conducted by DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Grassley was assured by senior DOJ officials in early 2011 that no such ATF operation existed. Grassley persisted and found evidence contrary to what DOJ was asserting. He was in the minority in the Senate and prevailed upon the chair of the House Committee on Oversight and Government Reform, a friend, to commence an inquiry which revealed that the DOJ had lied about the existence of the gun-running operation. That resulted in a further House investigation that caused the issuance of a subpoena to the Attorney General Holder that was ignored and led to a criminal contempt of Congress citation by the full House. DOJ again refused to present the citation to a grand jury on the basis of the Office of Legal Counsel (OLC) opinion that it would be unconstitutional for Congress to direct a criminal prosecution against an executive official when the president claims executive privilege and that the House's only recourse is a civil enforcement litigation. The House did that. The

²¹ *House Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

result was seven and half years of investigative and litigation process that has inspired almost uniform agency slow walking and total refusals to comply as result of court rulings that unaccountably recognized the deliberative privilege had a “constitutional dimension” of privilege that could be invoked²² as well as the reinforcement of the understanding of executive that there was no immediate personal threat for non-compliance. The case was appealed and negotiations for settlement commenced. No one really cared about the many thousand documents still in question. House and DOJ agreed on some further access but each side was anxious to be rid of the judge’s opinions agreed ask her vacation of those rulings. The judge refused. To complete the settlement the attorneys for both sides entered into a “gentlemans agreement” that neither side would invoke the rulings in her opinions against the other in future cases. With that understanding the judge signed off on the settlement early January 2019.

However, most recently any serious doubts as to whether Congress is facing a constitutional quandary, if not a crisis, have been erased by the president’s actualization of his blanket threat to challenge any and all committee subpoena demands for documents and testimony relevant to legislative oversight concerns he disfavors even if they have nothing to do with impeachment. My study of over 200 years of Supreme Court rulings and congressional practice indicates that each House of Congress has constitutionally based and Supreme Court recognized inherent institutional self-protective powers that allow it to conduct in-house trials that would result in imprisonment and fines or to have the Speaker directly appoint a private counsel to prosecute a criminal contempt of Congress citation. Either action can be effected by passage of a simple House resolution. They can be used in tandem, serially or individually. The strongest argument for such actions, apart from their legality and their likely coercive incentive, is that they are not subject to a presidential pardon which is limited to “Offenses against the United States.” The Supreme Court has consistently agreed that such institutional self-

²² Committee on Oversight and Government Reform, U.S. House of Representatives v. Lynch, No 12-1332 (ABJ)D.D.C. Jn. 19, 2016).

protective actions are vindications of institutional integrity and are legislative actions that are not part of the criminal laws of the United States.

The most remarkable aspect of this current situation is that the House has lamely acquiesced in this tactic despite a long history that taught that what has been absolutely critical to the success of investigative oversight efforts: there has to be a credible threat of meaningful consequences for refusals to provide committees necessary information in a timely manner. The desired goal of interbranch comity in resolving contested investigative information demands has seldom, if ever, been achieved without such leverage, even in the best of times. The current historic state of political dysfunction puts such comity out of reasonable expectation. No one seems to recall that in the revival of effective oversight after Watergate that the House, between 1975 and 2008 voted ten times at the subcommittee, full committee and House floor levels to hold cabinet level officials in criminal contempt and each time full or substantial compliance before a trial was forthcoming. The threat of potential prosecution fostered 100's of accommodations during that period. The experience of Anne Gorsuch Burford in 1983 dissuaded most officials from being martyrs for the sake of protecting presidential privilege or policy interests. Indeed, it was the Burford fiasco in which DOJ first attempted challenge the Houses criminal contempt authority but was rejected by a district court. The Supreme Court has expressly indicated that the House cannot abandon its self-protective prerogative nor can the Judiciary or Executive branches undermine it. Retrieval is therefore solely in its own hands.

V. Conclusion

doubt that doubt that the evidence transmitted and the remedial suggestions that will accompany or be implicated by the evidence will unequivocally be on "a subject which legislation can be had" and that such legislation can be materially aided by the information the investigation was calculated to elicit. The recent *Mazars* ruling and rationale is supportive of congressional inquiries that encompass information held by private entities or individuals or government officials that is pertinent to public concerns, is on "a

subject which legislation can be had” and that such legislation can be materially aided by the information the investigation was calculated to elicit.