Congressional Research Service

Statement of Todd B. Tatelman
Legislative Attorney
Congressional Research Service

Before

The Committee on Oversight and Government Reform
United State House of Representatives

June 13, 2011

On

Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoena?

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

My name is Todd B. Tatelman, I am a Legislative Attorney in the American Law Division of the Congressional Research Service at the Library of Congress. I thank you for inviting CRS to testify today regarding Obstruction of Justice: Does the Justice Department Have to Respond to Lawfully Issued and Valid Congressional Subpoena? Specifically, the Committee has asked for a discussion of the constitutional authority given to Congress to conduct oversight of the Executive Branch.

Congress's power to conduct oversight and investigations, including oversight and investigations of the other branches of government, is extremely broad. Although there is no express language in the Constitution or a specific statute authorizing the conduct of congressional investigations, precedents from the British Parliament, the practices of colonial assemblies, state legislatures, and the early Congresses, as well as the opinions in several state court and U.S. Supreme Court decisions, have firmly established that such a power is essential to the legislative function and is properly implied from the vesting of all legislative powers in Congress.[1]

---

[1] *See, e.g.*, *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159-164 (1926); C.S. Potts, *Power of Legislative Bodies to Punish for* Contempt, 74 U. PA. L. REV. 695 (1926); Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 193-94 (1967).

In addition to a textual basis, congressional oversight has been argued to be a central function of representative government. According to Senators William S. Cohen and George J. Mitchell, oversight of the executive is designed "to allow a free people to drag realities out into the sunlight and demand a full accounting from those who are permitted to hold and exercise power."[2] Dragging "realities out" is how Congress shines the spotlight of public attention on many significant issues, allowing lawmakers and the American people to make informed judgments about executive activities and actions. As Woodrow Wilson articulated in *Congressional Government*, Congress's informing function "should be preferred even to its legislative [lawmaking] function." Wilson went on to explain:

> Unless Congress has and uses every means of acquainting itself with the acts and dispositions of the administrative agents of government, the country must be helpless to learn how it is being served; and unless Congress both scrutinizes these things and sifts them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important it should understand and direct.[3]

Early Congressional Precedent

Largely because its membership included many of the delegates who participated both at the Constitutional Convention in Philadelphia and at the various state ratifying conventions, the early Congresses arguably provide the best example of the institution's view of its own prerogatives. This is especially true with regard to Congress's ability to obtain information directly from the Executive Branch. In fact, the early Congresses did not hesitate to assert their prerogatives with respect to conducting oversight and investigations of the Executive. In 1792, the House of Representatives of the Second Congress initially considered a resolution calling for the President to conduct an inquiry into the causes of the military losses of Major General Arthur St. Clair.[4] The House rejected a purely presidential inquiry and instead adopted a resolution creating a select committee to investigate the incident.[5] The resolution adopted by the House authorized the committee to "call for such persons, papers, and records, as may be necessary to assist its inquiries."[6] Acting on its delegated authority, the select committee promptly called for documents from the Secretary of War.

The response of the Executive, specifically President Washington and his cabinet, which also contained a number of delegates to the Constitutional Convention and subsequent state ratifying conventions, is illustrative as well. Upon receipt of the select committee's request, President Washington convened his cabinet of advisors – Secretary of State Thomas Jefferson, Secretary of Treasury Alexander Hamilton, Secretary of War Henry Knox, and Attorney General Edmund Randolph – to determine what response, if any, was warranted. According to notes taken by Thomas Jefferson, Washington's cabinet was in agreement on the following principles:

> First that the House was an inquest, and therefore might institute inquires. Second, that they might call for papers generally. Third, that the Executive ought to communicate such papers as the public

---

[2] SENATORS WILLIAM S. COHEN AND GEORGE J. MITCHELL, MEN OF ZEAL, A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS, 305 (1988).

[3] WOODROW WILSON, CONGRESSIONAL GOVERNMENT, 303 (1885).

[4] 3 ANNALS OF CONG. 490 (1792).

[5] *Id.* at 494.

[6] *Id.*

> good would permit and ought to refuse those that the disclosure of which would injure the public: consequently were to exercise discretion. Fourth, that neither the committee nor the House had a right to call on the head of a department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. … It was agreed in this case that there was not a paper, which might not be properly produced.[7]

As a result of these deliberations, Secretary of War Knox was instructed to and delivered copies of the requested papers to the House.[8]

The St. Clair example establishes a strong precedent for congressional access to executive materials. Based on its actions, Congress clearly did not believe that its power of inquiry stopped at the President's door. Similarly, the President accepted Congress's legitimate authority to call for papers. The St. Clair precedent also establishes that, while there exists some discretion on the part of the President, the ability to withhold extends only to those documents that "would injure the public." Thus, as at least one separation of powers scholar has noted, "Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal illegal or improper activities."[9]

State Legislature Precedent

Further support for the power of legislatures, specifically Congress, to conduct oversight and investigations can be derived from the practices of both the colonial assemblies, which were well known to the drafters of the Constitution, as well as the oversight activities of various state legislatures after ratification.

According to one scholar, the early colonial assemblies "very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention."[10] For example, in 1722, the Massachusetts legislature asserted the right to summon the heads of colonial forces to determine their responsibility for the failure to carry out operations ordered during a previous session of the legislature.[11] Another example occurred in Pennsylvania, in 1770, when a standing committee of the Pennsylvania Assembly – charged with auditing and settling the accounts of the treasury and collectors of public revenues, and imbued with the "full Power and Authority to send for Persons, Papers, and Records … " – ordered that the assessors and collectors of Lancaster County appear before them and bring their books and papers for the preceding 10 years.[12]

In addition to state legislative precedent, state court decisions have on several occasions directly addressed the question of the power of legislative bodies to receive evidence, call witnesses, and generally acquire knowledge and information from the sources of its choosing.[13] Two prominent

---

[7] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, VOL. 1, 304 (Albert Ellery Bergh eds) (1903).

[8] *See* CONGRESS INVESTIGATES: A DOCUMENTARY HISTORY 1792-1974, VOL. 1, 10 (Arthur M. Schlesinger, Jr. & Roger Burns eds. 1975).

[9] LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE, 11 (2004).

[10] C.S. Potts, *Power of Legislative Bodies to Punish for* Contempt, 74 U. PA. L. REV. 695, 708 (1926).

[11] *See id.* (citing VOTES OF THE ASSEMBLY, VOL. III, 498-503).

[12] *See id.* at 709. (citing VOTES OF THE ASSEMBLY, VOL. VI, 66-102, 199, 224).

[13] *See, e.g.*, *Sullivan v. Hill*, 73 W.Va. 49, 53 (1913); *State v. Frear*, 138 Wis. 173 (1909); *Ex parte Parker*, 74 S.C. 466, 470 (continued...)

examples are worth specific mention. First, in 1859, the Supreme Judicial Court of Massachusetts decided *Burnham v. Morrissey*,[14] in which the court held that the Massachusetts House of Representatives has the power to compel witnesses to testify before the House or one of its committees and that the refusal of a witness, duly summoned to appear, to attend or testify is in contempt of that authority and may be arrested and brought before the House. The court specifically stated that:

> [t]he house of representatives has many duties to perform, which necessarily require it to receive evidence, and examine witnesses. … It has often occasion to acquire a certain knowledge of facts, in order to the proper performance of the legislative duties. We therefore think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees.[15]

In 1885, the Court of Appeals for the State of New York decided *Keeler v. McDonald*,[16] in which the court reversed a lower court decision granting a writ of *habeas corpus* to William McDonald. Mr. McDonald had been found in contempt by the New York State Senate and was being held in the Albany County jail.[17] In reversing the lower court's granting of the writ, the Court of Appeals directly addressed the legislature's right to obtain information, holding that:

> [t]he power of obtaining information for the purpose of framing laws to meet supposed or apprehended evils is one which has, from time immemorial, been deemed necessary, and has been exercised by legislative bodies. …
>
> It is difficult to conceive of any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensible to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required; ….[18]

Supreme Court Precedent

In addition to the strong precedents established by the early Congresses and various state legislatures, the Supreme Court has firmly established Congress's investigative and oversight prerogatives. The broad legislative authority to seek and enforce informational demands was unequivocally established in two Supreme Court rulings arising out of the 1920's Teapot Dome scandal.

The seminal case establishing Congress's power of inquiry is *McGrain v. Daugherty*,[19] which arose out of the exercise of the Senate's inherent contempt power. The Senate had authorized a select committee to investigate the alleged failure of the Attorney General, Harry M. Daugherty, to prosecute violations of the

(...continued)

(1906); *Lowe v. Summers*, 69 Mo. App. 637, 649-50 (1897); *Keeler v. McDonald*, 99 N.Y. 463 (1885); *Burnham v. Morrissey*, 80 Mass. 226 (1859); *Falvey v. Massing*, 7 Wis. 630, 635-38 (1858).

[14] 80 Mass. 226 (1859).

[15] *Id.* at 239.

[16] 99 N.Y. 463 (1885).

[17] *Id.* at 472.

[18] *Id.* at 481-82.

[19] 273 U.S. 135, 174-75 (1927).

Sherman Antitrust Act and the Clayton Act against various monopolies.[20] During the course of the select committee's investigation, who issued a subpoena to Mally S. Daugherty, brother of the Attorney General and president of Midland National Bank of Washington Court House, Ohio, directing him to appear and testify before the committee as well as to bring specifically requested documents for the committee's review.[21] Mr. Daugherty refused to appear and produce the subpoenaed materials. As a result, a warrant was issued directing the Sergeant-at-Arms that Mr. Daugherty be arrested and brought before the bar of the Senate.[22] Upon his arrest in Cincinnati, Mr. Daugherty sought and obtained a writ of *habeas corpus* from the district court directing his release.[23] On appeal, the Supreme Court, in reversing the district court and quashing the writ, described Congress's power of inquiry, with the accompanying process 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 itself possess the requisite information–which not infrequently is true–recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry–with enforcing process–was regarded and employed as a necessary and appropriate attribute of the power to legislate–indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[24]

Two years later, in *Sinclair v. United States*,[25] a different witness at the congressional hearings investigating Teapot Dome refused to provide answers to committee questions, and was prosecuted for contempt of Congress. The witness, Harry F. Sinclair, had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts ... and shall respectfully decline to answer any questions propounded by your committee."[26] The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[27] The Court further explained that:

> [i]t may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to

[20] *Id.* at 151.

[21] *Id.* at 152.

[22] *Id.* at 153-54.

[23] *Id.* at 154.

[24] *Id.* at 174-75.

[25] 279 U.S. 263 (1929).

[26] *Id.* at 290.

[27] *Id.* at 295.

> require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.[28]

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress's investigative authority. For example, the Court, in *Watkins v. United States*, described the breadth of the power of inquiry. According to the Court, Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[29] The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, that Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, the Court stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[30] "[T]he first Congresses," held "inquiries dealing with suspected corruption or mismanagement by government officials"[31] and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."[32] Accordingly, the Court now clearly recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[33] Additionally, in *Eastland v. United States Servicemen's Fund*,[34] the Court explained that "[t]he scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[35]

Other Judicial Precedent

While it is true that each of the above referenced Supreme Court cases involved actions against non-executive branch officials, the Supreme Court has never made a distinction between Congress's power to investigate the Executive and Congress's authority with respect to private citizens. Largely due to the political nature of congressional investigations of the Executive Branch and the reluctance of the judiciary to interfere in political questions, the case law involving executive branch officials is limited and has not reached the Supreme Court. That said, the judicial precedent that does exist is arguably favorable to congressional prerogatives.

A prominent example occurred in June of 1976, during a Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce investigation into allegations of improper domestic intelligence gathering, foreign intelligence gathering, and the wiretapping of telephone

---

[28] *Id.*

[29] 354 U.S. 178, 187 (1957).

[30] *Id.*

[31] *Id.* at 182.

[32] *Id.* at 194-95

[33] *Id.* at 200 n. 33; *see also Morrison v. Olson*, 487 U.S. 654, 694 (1988) (noting that Congress's role under the Independent Counsel Act "of receiving reports or other information and oversight of the independent counsel's activities ... [are] functions we have recognized as being incidental to the legislative function of Congress") (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

[34] 421 U.S. 491 (1975).

[35] *Id.* at 504, n. 15 (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1960)).

communications without a warrant. Pursuant to its authority under the House Rules, subpoenas were issued to the American Telephone and Telegraph Company (AT&T) by the subcommittee seeking copies of "all national security request letters sent to AT&T and its subsidiaries by the [Federal Bureau of Investigation] FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated."[36] Before AT&T could comply with the request, the Department of Justice (DOJ) and the subcommittee's Chairman, Representative John Moss, entered into negotiations seeking to reach an alternative agreement which would prevent AT&T from having to turn over all of its records.[37] When these negotiations broke down, the DOJ sought an injunction prohibiting AT&T from complying with the subcommittee's subpoenas. According to the court, the DOJ based its claim on the "the damage to the national interest from the centralization and possible disclosure outside of Congress, of information identifying the targets of all foreign intelligence surveillance since 1969."[38] The District Court for the District of Columbia applied a balancing test between the competing Executive and Legislative Branch authorities with respect to the issues presented. That court concluded that the alternative offered by the President met most of the subcommittee's needs. The court, however, deferred to the "final determination" of the President that execution of the subpoena "would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States" and issued the injunction.[39]

On appeal, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) first dismissed several prudential concerns. Specifically, the court considered the doctrines of mootness, political question, and standing, determining that none of them prevented the court from reaching the merits of the injunction.[40] Next, the court very carefully addressed the claims of absolute rights asserted by both the Congress and the Executive Branch. Relying on both *Eastland v. United States Servicemen's Fund*,[41] as well as *McGrain v. Daugherty*,[42] the court stated that the "Congressional power to investigate and acquire information by subpoena is on a firm constitutional basis."[43] Moreover, the court concluded that while generally congressional subpoena power cannot be interfered with by the courts, the "*Eastland* immunity is not absolute in the context of a conflicting constitutional interest asserted by a coordinate branch of government."[44] Turning to the Executive Branch's claims of absolute control over national security information, the court noted that Supreme Court precedent does "not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers."[45] Given the sensitivity of the constitutional balancing that the court was faced with, combined with the fact that the parties had nearly reached an out-of-court settlement, the court expressly declined to rule on the merits of the injunction. Rather, it remanded the case to the district court to modify the injunction to exclude information for which no claim

---

[36] *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976) [hereinafter AT&T I].

[37] *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the Subcommittee are explained by the court, and, therefore, will not be recounted here. *See id.* at 386-88.

[38] *Id.* at 388.

[39] *United States v. AT&T & Moss*, 419 F.Supp. 454, 458-461 (D.D.C.1976).

[40] *See AT&T I*, 551 F.2d at 390-91.

[41] 421 U.S. 491 (1975).

[42] 273 U.S. 135 (1927).

[43] *AT&T I*, 551 F.2d at 393.

[44] *Id.* at 392 (citing *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

[45] *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) & *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948)).

of national security had been made.[46] Moreover, the court directed the parties to continue negotiations and report to the district court on their progress.[47]

After continued negotiations, which focused primarily on access to un-redacted DOJ memoranda, the parties reached an impasse and found themselves back before the D.C. Circuit.[48] Like its previous decision, the court, rather than ruling on the merits of the constitutional conflict, attempted to fashion a compromise resolution that would force the parties back to the negotiating table, or at least allow the district court to play a role in mediating the dispute. It allowed the DOJ to limit the sample size of the unedited memoranda and prohibited the committee staff from removing its notes from the FBI's possession.[49] In a situation where inaccuracy or deception was alleged by the subcommittee, the materials were to be forwarded to the district court for *in camera* review and any remedial action the court found necessary.[50] In addition, while the Attorney General was afforded the right to employ a substitution procedure for the most sensitive documents, the substitutions would have to be approved by the district court based on a showing of "the accuracy and fairness of the edited memorandum, and the extraordinary sensitivity of the contents of the original memorandum to the national security."[51]

In the end, the court in *AT&T* never ruled on the merits of the dispute and never resolved the constitutional conflict between the branches. At most, *AT&T* stands for the proposition that neither claims of executive control over national security documents, nor congressional assertions of access are absolute. Instead, both claims are qualified and, therefore, subject to potential judicial review, but only after every attempt to resolve the differences between the branches themselves has been exhausted. In addition, *AT&T* provides support for the proposition that third-party subpoenas – such as ones to telecommunications companies – can be challenged in federal court and are not subject to the constitutional protection provided by the Speech or Debate Clause.

In the most recent conflict between the Congress and Executive Branch to make its way before the courts, *Committee on the Judiciary, U.S. House of Representatives v. Miers*,[52] the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law ("the Committee") filed a civil lawsuit against the White House in an attempt to enforce its prerogatives. After an extensive investigation into the resignations of nine United States Attorneys involving numerous witness interviews and several congressional hearings, the Committee ultimately sought information relating to the resignations directly from the White House.[53] After several attempts to obtain the information informally, the Committee issued and served subpoenas on Ms. Harriet Miers, the former White House Counsel and Mr. Joshua

---

[46] *Id.* at 395 (stating that "[w]e direct the District Court to modify the injunction to exclude request letters pertaining to taps classified by the FBI as domestic, since there was no contention by the Executive, nor finding by the District Court, of undue risk to the national security from transmission of these letters to the Subcommittee.").

[47] *Id.*

[48] *See United States v. AT&T*, 567 F.2d 121, 124-25 (D.C. Cir. 1977) (detailing the extensive negotiations between the DOJ and the Subcommittee since the court last heard from the parties).

[49] *Id.* at 131-32.

[50] *Id.*

[51] *Id.* at 132.

[52] 558 F.Supp.2d 53 (D.D.C. 2008).

[53] *See generally*, H.Rept. 110-423 (2007), *available at*, http://judiciary.house.gov/Media/PDFS/ContemptReport071105.pdf; *see also* H. Jud. Comm. Mot. Summ. J. at 11 (copy on file with authors).

Bolten, the White House Chief of Staff and custodian of White House records.[54] Ms. Miers's subpoena was for both documents and testimony about her role, if any, in the resignations; while Mr. Bolten's subpoena was only for White House records and documents related to the resignations. When the information was not provided to the Committee by the White House, the Committee sought a declaratory judgment in federal district court.

In holding that the Congress has standing to bring a civil suit for the purpose of enforcing its subpoenas, the District Court for the District of Columbia affirmed Congress's power of inquiry and its ability to issue subpoenas. Specifically, the court stated that "'[j]ust as the power to issue subpoenas is a necessary part of the Executive Branch's authority to execute federal laws' so too is Congress's need to enforce its subpoenas a necessary part of its power of inquiry."[55] The court went on to state that "there can be no question that Congress has a right – derived from its Article I legislative function – to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas."[56]

As discussed above, the cases involving disputes between Congress and the Executive rely heavily on the rationale articulated by the Supreme Court in *McGrain*, *Sinclair*, *Watkins*, and *Eastland*. More importantly, the courts have not distinguished Congress's power of inquiry based on the target. Phrased another way, those courts that have reviewed Congress's power of inquiry against the Executive have found it to be equally as plenary and powerful as when it is used against private persons or entities.

Authority of Congressional Committees

Oversight and investigative authority is implied from Article I of the Constitution and lies with the House of Representatives and Senate. The House and Senate in turn have delegated this authority to various entities, the most relevant of which are the standing committees of each chamber Committees of Congress have only the power to inquire into matters within the scope of the authority delegated to it by its parent body. Once having established its jurisdiction, authority, and the pertinence of the matter under inquiry to its area of authority, however, a committee's investigative purview is substantial and wide-ranging.

Committee Jurisdiction

Establishing committee jurisdiction is the foundation for any attempt to obtain information and documents from the Executive Branch. A claim of lawful jurisdiction, however, does not automatically entitle the committee to access whatever documents and information it may seek. Rather, an appropriate claim of jurisdiction authorizes the committee to inquire and request information. The specifics of such access may still be subject to prudential, political, and constitutionally based privileges asserted by the targets of the inquiry.

A congressional committee is a creation of its parent house and, therefore, has only the power to inquire into matters within the scope of the authority that has been delegated to it by that body.[57] Thus, the

---

[54] H. Jud. Comm. Mot. Summ. J. at 12.

[55] *Miers*, 558 F.Supp.2d at 75 (internal citation omitted).

[56] *Id.* at 84.

[57] *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *see also Watkins v. United States*, 354 U.S. at 198.

enabling chamber rule or resolution that gives the committee life is also the charter that defines the grant and limitations of the committee's power. In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself, and then, if necessary, to the usual sources of legislative history such as floor debate, legislative reports, and prior committee practice and interpretation.

Rule X of the House Rules and Rule XXV of the Senate Rules deal respectively with the organization of the standing committees and establish their jurisdiction.[58] Jurisdictional authority for "special" investigations may be given to a standing committee, a joint committee of both houses, or a special subcommittee of a standing committee, among other vehicles. Given the specificity with which the House and Senate rules now confer jurisdiction on their standing committees, as well as the care with which most authorizing resolutions for special and/or select committees have been drafted in recent years, sufficient models exist to avoid a successful judicial challenge by a witness that his noncompliance was justified by a committee's overstepping its delegated scope of authority.

Legislative Purpose

While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[59] and cannot be used to expose for the sake of exposure alone. The Supreme Court in *Watkins* underlined these limitations stating that:

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[60]

A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of the Congress, such as the authority of each House to discipline its own Members, judge the returns of the their elections, and to conduct impeachment proceedings.[61] Although the 1927 Supreme Court decision in *Kilbourn v. Thompson*[62] held that the investigation in that case was an improper probe into the private affairs of individuals, the courts today generally will presume that there is a legislative purpose for an investigation, and the House or Senate rule or resolution authorizing the investigation does not have to specifically state the committee's legislative purpose.[63] In *In re Chapman*,[64]

---

[58] *See* RULES OF THE HOUSE OF REPRESENTATIVES FOR THE 112TH CONGRESS, Rule X, *available at*, http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf (2011); *see also* S. Doc. 107-1, *Senate Manual*, Rule XXV, 107th Cong. (2002).

[59] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

[60] *Watkins v. United States*, 354 U.S. at 187.

[61] *See, e.g., McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also In Re Chapman*, 166 U.S. 661 (1897).

[62] 103 U.S. 168 (1881).

[63] *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938); LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER, 7 (Comm. Print 1976). For a different assessment of recent case law concerning the requirement of a legislative purpose, *See* Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189, 232 (1967).

[64] 166 U.S. 661, 669 (1897).

the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

> The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire "whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate." What the Senate might or might not do upon the facts when ascertained, we cannot say nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.
>
> Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.
>
> We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.[65]

In *McGrain v. Daugherty*,[66] the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The Court found that the investigation was ordered for a legitimate object. It wrote:

> The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. ***
>
> The second resolution–the one directing the witness be attached–declares that this testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same

---

[65] *In re Chapman*, 166 U.S. at 699.

[66] 273 U.S. 135 (1927).

> resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.[67]

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of the Congress exceeds its power when it seeks information in such areas.[68] In the past, the types of legislative activity which have justified the exercise of the power to investigate have included the primary functions of legislating and appropriating;[69] the function of deciding whether or not legislation is appropriate;[70] oversight of the administration of the laws by the executive branch;[71] and the essential congressional function of informing itself in matters of national concern.[72] In addition, Congress's power to investigate such diverse matters as foreign and domestic subversive activities,[73] labor union corruption,[74] and organizations that violate the civil rights of others[75] have all been upheld by the Supreme Court.

Despite the Court's broad interpretation of legislative purpose, Congress's authority is not unlimited. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.[76] Furthermore, although "there is no congressional power to expose for the sake of exposure,"[77] "so 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."[78]

Conclusion

As demonstrated, there exists ample precedent, both legislative and judicial, for the assertion that Congress has the constitutional authority to conduct oversight of the Executive and enforce its demands for information. Specific investigations, however, may give rise to political and/or prudential concerns raised by the Executive, which Congress may find persuasive. In addition, there may be constitutionally based privileges, such as the privilege against self-incrimination or the presidential communications privilege, to which Congress must adhere, or overcome via a granting of immunity[79] or by a showing of

---

[67] *Id.* at 179-180.

[68] *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969).

[69] *Barenblatt v. United States*, 360 U.S. 109 (1959).

[70] *Quinn v. United States,* 349 U.S. 155, 161 (1955).

[71] *McGrain*, 273 U.S. at 295.

[72] *United States v. Rumely,* 345 U.S. 4, 43-45 (1953); *see also Watkins*, 354 U.S. at 200 n. 3.

[73] *See, e.g., Barrenblatt v. United States,* 360 U.S. 109 (1959); *Watkins v. United States,* 354 U.S. 178 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

[74] *Hutcheson v. United States*, 369 U.S. 599 (1962).

[75] *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[76] *See United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959); *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

[77] *Watkins v. United States*, 354 U.S. 178, 200 (1957). However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the "power of the Congress to inquire into and publicize corruption, mal-administration or inefficiency in agencies of the Government." *Id.*

[78] *Barenblatt*, 360 U.S. at 132.

[79] *See* 18 U.S.C. §§ 6002, 6005 (2006).

need and unavailability of the information elsewhere by an appropriate investigating authority.[80] The potential availability of these arguments, however, has no impact on the underlying constitutional authority vested in the Congress to conduct oversight and require that information, whether in the form of testimony, documents, or both.

[80] *See In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *see also Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

Todd B. Tatelman is a legislative attorney for the Congressional Research Service's American Law Division where he specializes and advises Members of Congress, Committees, and Staff in the areas of Congressional Laws and Procedure (specifically oversight and investigations), Constitutional Law, Administrative Law, Transportation Law, and International Trade Law. Todd is a 2003 *cum laude* graduate of the Catholic University of America's, Columbus School of Law in Washington, DC, and received his Bachelor of Arts degree in 2000 from Boston University.