

R E S O L U T I O N
RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND
HOWARD SHELANSKI, ADMINISTRATOR, OFFICE OF INFORMATION AND
REGULATORY AFFAIRS,
IN CONTEMPT OF CONGRESS FOR REFUSAL TO
COMPLY WITH A SUBPOENA DULY ISSUED BY THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

R E P O R T
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the U.S. House of Representatives for citing Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, for contempt of Congress pursuant to this report is as follows:

Resolved, That Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, shall be found in contempt of Congress for failure to comply with a congressional subpoena.

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, to produce documents to the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Shelanski be proceeded against in the manner and form provided by law.

Resolved, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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I. Executive Summary

Office of Information and Regulatory Affairs (OIRA) Administrator Howard Shelanski failed to comply with a subpoena issued by the Committee on Oversight and Government Reform relating to the promulgation of the “Waters of the United States” (WOTUS) rule.¹ The documents and communications covered by the subpoena are central to the Committee’s investigation of the controversial WOTUS rulemaking process. WOTUS expanded the Clean Water Act’s purview and raised enforcement concerns, as well as state sovereignty considerations. In March 2016, the U.S. Court of Appeals for the Sixth Circuit announced it will consider the legality of WOTUS, and left in place a nationwide stay against enacting the rule.

Mr. Shelanski’s unwillingness and inability to work in good faith to comply with the subpoena interfered with the Committee’s investigation. Mr. Shelanski and his staff are withholding key documents from the Committee—the volume of which is unknown except to OIRA, because Mr. Shelanski and his staff refused to provide basic information about the universe of responsive documents.

Having exhausted all available options for obtaining compliance, the Chairman of the Committee on Oversight and Government Reform recommends that the House of Representatives find Howard Shelanski in contempt for his failure to comply with the subpoena issued to him.

II. Authority and Purpose

An important corollary to the powers expressly granted to Congress by the Constitution is the responsibility to perform rigorous oversight of the Executive Branch. The U.S. Supreme Court has recognized this congressional power and responsibility on numerous occasions. For example, in *McGrain v. Daugherty*, the Court held:

[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, and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.”²

Further, in *Watkins v. United States*, Chief Justice Earl Warren wrote for the majority: “The power of Congress to conduct investigations is inherent in the legislative process. That power is broad.”³

¹ Definition of Waters of the United States Under the Clean Water Act, 80 Fed. Reg. 37054 (Jun. 29, 2015).

² *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

³ *Watkins v. United States*, 354 U.S. 178, 1887 (1957).

The Legislative Reorganization Act of 1946,⁴ which directed House and Senate Committees to “exercise continuous watchfulness” over Executive Branch programs under their jurisdiction, and the Legislative Reorganization Act of 1970,⁵ which authorized committees to “review and study, on a continuing basis, the application, administration, and execution” of laws, codified the powers of Congress.

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the U.S. Constitution.⁶ House Rule X grants to the Committee broad jurisdiction over federal “[g]overnment management” and reform, including the “[o]verall economy, efficiency, and management of government operations and activities,” the “[f]ederal civil service,” and “[r]eorganizations in the executive branch of the Government.”⁷ House Rule X further grants the Committee particularly broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”⁸ The rules direct the Committee to make available “the findings and recommendations of the committee . . . to any other standing committee having jurisdiction over the matter involved.”⁹

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.”¹⁰ The rule further provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.¹¹ The subpoena discussed in this report was issued pursuant to this authority.

The Committee’s investigation into the promulgation of the WOTUS rule is being undertaken pursuant to the authority delegated to the Committee under House Rule X. Deficiencies in the rule – which was reviewed by OIRA – raised questions about how the administration developed and issued it. Documents obtained by the Committee to date show the administration did not comply with relevant statutory and legal authorities during the rule’s development and promulgation. The oversight and legislative purposes of the investigation are (1) to understand how and why the administration’s rulemaking process was deeply flawed, and (2) to determine whether Congress should amend the Clean Water Act or take other legislative action to address the various problems that have been exposed by the WOTUS rulemaking process and related legal challenges.

⁴ Pub. L. 79-601, House Rule XI(q)(2), 60 Stat. 828 (Aug. 2, 1946).

⁵ Pub. L. 91-510, 84 Stat. 1140 (Oct. 26, 1970).

⁶ U.S. CONST., art I. § 5, clause 2.

⁷ House Rule X, clause (1)(n).

⁸ House Rule X, clause (4)(c)(2).

⁹ *Id.*

¹⁰ House Rule XI, clause (2)(m)(1)(B).

¹¹ House Rule XI, clause (2)(m)(3)(A)(1).

III. Background

Supreme Court decisions in 2001 and 2006 concluded that the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers had adopted an unduly broad interpretation of the scope of their authority under the Clean Water Act (CWA). The WOTUS rule represented the administration's effort to address the attendant uncertainty related to the EPA's authority under the CWA. The WOTUS rulemaking process, however, was deeply flawed – so much so that the Sixth Circuit enacted a nationwide stay on the rule. The Committee's investigation of the rulemaking process started in early 2015.

A. The WOTUS Timeline

In 1972, Congress passed the CWA to control the pollution of the nation's waters.¹² At the time, the phrase "waters of the United States," as it pertained to federal legislation, was understood to mean interstate waters that were actually navigable. In June 2006, the Supreme Court restricted the EPA's authority under the CWA via a decision in *Rapanos v. United States*.¹³ In the deciding opinion, Justice Anthony Kennedy limited the EPA's jurisdiction to where a land feature has a "significant nexus" to downstream navigable water.¹⁴

In December 2008, the EPA issued a memorandum clarifying its authority.¹⁵ In May 2011, the EPA drafted a guidance document that asserted its jurisdiction pursuant to the *Rapanos* decision.¹⁶ This draft memorandum formed the basis for the final WOTUS rule. In April 2014, the EPA published the proposed rule in the Federal Register and opened the public comment period.¹⁷

The WOTUS rule was promulgated on June 29, 2015.¹⁸ The EPA claimed the purpose of the rule was to "clarify" the definition of the phrase "waters of the United States" under the CWA.¹⁹ The WOTUS rule was scheduled to become effective on August 28, 2015.²⁰ On August 27, 2015, however, in an action brought on behalf of thirteen states, a federal district judge in North Dakota granted an injunction against the EPA finding, in part, that because the

¹² The "Clean Water Act" was originally billed as the Federal Water Pollution Control Act Amendments of 1972. See W. Henry Graddy, IV, *Let Us Hope for Smart Fish: A Clean Water Act Practitioner's Search for Ratchet Down*, 10 J. Nat. Resources & Env'tl. L. 161, 162 (1995).

¹³ See *Rapanos v. United States*, 547 U.S. 715 (2006).

¹⁴ *Id.* at 742.

¹⁵ See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, Dec. 2, 2008, https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

¹⁶ Draft Guidance on Identifying Waters Protected by the Clean Water Act 3 (May 2, 2011), noticed 76 Fed. Reg. 24479 (May 2, 2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-05-02/html/2011-10565.htm>.

¹⁷ Definition of "Waters of the United States" Under the Clean Water Act, 70 Fed. Reg. 22188 (April 21, 2014), [https://yosemite.epa.gov/sab/sabproduct.nsf/36a1ca3f683ae57a85256ce9006a32d0/2EFFD460CE002B6785257CBB006752DE/\\$File/Waters+of+the+US_proposed_rule_4_21_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/36a1ca3f683ae57a85256ce9006a32d0/2EFFD460CE002B6785257CBB006752DE/$File/Waters+of+the+US_proposed_rule_4_21_14.pdf).

¹⁸ Clean Water Rule: Definition of "Waters of the United States," 80 FR 37054 (June 29, 2015).

¹⁹ *Id.*

²⁰ *Id.*

WOTUS rule purports to exert authority over bodies of water that bear no significant nexus to navigable waters, the rule likely “violates the congressional grant of authority to the EPA.”²¹

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay against the enforcement of the WOTUS rule.²² The court questioned whether the rule’s distance limitations made sense in light of the *Rapanos* decision, and noted that the rulemaking process was “facially suspect.”²³ The court’s opinion stated:

[W]e conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims. Petitioners first claim that the Rule’s treatment of tributaries, ‘adjacent waters,’ and waters having a ‘significant nexus’ to navigable waters is at odds with the Supreme Court’s ruling in *Rapanos*, where the Court vacated the Sixth Circuit’s upholding of wetlands regulation by the Army Corps of Engineers. Even assuming, for present purposes, as the parties do, that Justice Kennedy’s opinion in *Rapanos* represents the best instruction on the permissible parameters of ‘waters of the United States’ as used in the Clean Water Act, it is far from clear that the new Rule’s distance limitations are harmonious with the instruction.

Moreover, the rulemaking process by which the distance limitations were adopted is facially suspect. Petitioners contend the proposed rule that was published, on which interested persons were invited to comment, did not include any proposed distance limitations in its use of terms like ‘adjacent waters’ and ‘significant nexus.’ Consequently, petitioners contend, the Final Rule cannot be considered a ‘logical outgrowth’ of the rule proposed, as required to satisfy the notice-and-comment requirements of the APA, 5 U.S.C. § 553. . . . As a further consequence of this defect, petitioners contend, the record compiled by respondents is devoid of specific scientific support for the distance limitations that were included in the Final Rule. They contend the Rule is therefore not the product of reasoned decision-making and is vulnerable to attack as impermissibly ‘arbitrary or capricious’ under the APA, 5 U.S.C. § 706(2).²⁴

The Sixth Circuit noted that the rule had already been stayed in thirteen states, and ordered the stay to remain in place stating: “[T]he sheer breadth of the ripple effects caused by the Rule’s definitional changes counsels strongly in favor of maintaining the status quo for the time being.”²⁵

²¹ *North Dakota v. U.S. EPA*, No. 3:15-CV-59, 2015 WL 5060744, at *5 (D.N.D. Aug. 27, 2015).

²² See *In re Environmental Protection Agency and Department of Defense Final Rule; “Clean Water Rule: Definition of Waters of the United States,”* Nos. 15-3799, et al., (6th Cir. Oct. 9, 2015), <http://www.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf>.

²³ *Id.* at 4.

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 6.

B. The Committee's Investigation

On March 3, 2015, the Committee requested all documents and communications relating to OIRA's review of the WOTUS rulemaking at a joint Government Operations and Health Care, Benefits, and Administrative Rules Subcommittee Hearing, entitled "Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking." At the hearing, Mr. Shelanski testified: "I will not send to the Committee documents that were part of the deliberative process where the proposed rule was under review."²⁶

Indeed, Mr. Shelanski made this statement despite committing in writing that it was his "priority . . . to increase the predictability of the regulatory process by improving the timeliness and transparency of OIRA's key functions."²⁷ Mr. Shelanski continued to refuse to voluntarily produce documents related to the rulemaking process throughout March and April of 2015.²⁸ In fact, OIRA did not produce any documents at all during this time. On May 12, 2015, the Committee sent a letter to Mr. Shelanski once again requesting all documents and communications pertaining to OIRA's review of the WOTUS rulemaking.²⁹ The letter requested a response no later than May 25, 2015.³⁰

The Office of Management and Budget (OMB) managed OIRA's response to the Committee's request for documents and information. OMB failed to produce any documents until June 4, 2015,³¹ and even then, the production consisted almost entirely of publicly-available documents.³² For the next several weeks, OMB repeatedly stated the Committee's request was overly broad, but refused to provide details about the search for responsive documents, or make any commitments with respect to whether responsive documents would be produced at all.³³

²⁶ *Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. On Oversight and Gov't Reform*, 114th Cong., at 37 (Mar. 3, 2015) (question and answer with Hon. Mark Meadows) [hereinafter Mar. 3, 2015 Hearing].

²⁷ *Id.*

²⁸ After the Committee's March 3, 2015 hearing, Subcommittee Chairman Mark Meadows and Committee staff engaged in a series of emails and telephone calls with Administrator Shelanski and Office of Management and Budget staff, Allie Neill and Jessica Menter, reiterating the request for documentation, culminating in OMB sharing OIRA's public disclosure policy in an April 6, 2015 email from Jessica Menter, OMB, to H. Comm. on Oversight & Gov't Reform staff (10:51 A.M.), with no further information or commitment to answer the Committee's request.

²⁹ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. On Oversight & Gov't Reform & Hon. Mark Meadows, Chairman, Subcomm. on Gov't Operations, to Hon. Howard Shelanski, Administrator, Office of Info. and Reg. Affairs. (May 12, 2015) [hereinafter May 12, 2015 Letter].

³⁰ *Id.*

³¹ Letter from Hon. Howard Shelanski, Administrator, Office of Info. and Reg. Affairs. (June 4, 2015).

³² Ninety-nine percent, or 846 of 853 total pages, of the June 4, 2015 production were publicly available online at the time of production, including two copies of the proposed rule and meeting records.

³³ In a telephone call with OMB staff on June 18, 2015, Committee staff made clear the June 4, 2015 production was not fully responsive to the Committee's request. OMB staff explained they were unable to provide all of the documents due to the timeline provided to respond to the Committee's May 12, 2015 letter, and agreed to update the Committee by June 22, 2015 with a date by which the remainder of requested materials would be produced (email from H. Comm. on Oversight & Gov't Reform staff to OMB staff (June 18, 2015 4:10 P.M.)). On June 22, 2015, OMB responded "we would like to better understand the documents the Committee is requesting so that we may better prioritize our limited staff resources." Email from OMB staff to H. Comm. on Oversight & Gov't Reform staff (June 22, 2015, 4:34 P.M.). Committee staff responded the same day, "Per our letter, the Committee's priority is all of OIRA's documents and communications relating to its review of the rule. If the documents produced are exhaustive of all records or communications within OIRA's control or possession related to the rule, that would be

After OMB was unable to answer basic questions about its search and review of documents to date, Committee staff requested to speak with more knowledgeable staff. OMB also did not allow the Committee to speak with the staff directly involved in the review.³⁴

Mr. Shelanski and OMB staff were unwilling to engage in the accommodations process, or even provide the most basic information about the universe of responsive documents.³⁵ As a result, Chairman Chaffetz was forced to issue a subpoena to advance the investigation. On July 14, 2015, the Committee issued a subpoena for documents related to the “Waters of the United States” rule. The subpoena is narrowly tailored and concise. It compels:

All documents and communications referring or relating to the Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) rule defining the scope of waters protected under the Clean Water Act.³⁶

IV. Mr. Shelanski Failed to Produce Documents Responsive to the Subpoena

It has been nearly a year since Mr. Sheklanski received the subpoena, and longer than that since the Committee first requested the documents and communications covered by the subpoena. Mr. Shelanski has failed to comply, and an unknown number of responsive documents are being withheld. Further, Mr. Shelanski and his staff testified at Committee hearings about their intentions, specifically, that he does not plan to comply with the legal obligation imposed by the Committee’s subpoena.

helpful to know. Please let us know when you plan to respond in full to the Committee’s request.” Email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (June 22, 2015, 5:30 P.M.). The Committee received no response until June 29, 2015 when Committee staff called OMB staff to discuss the possibility of a forthcoming subpoena. In a June 30, 2015 follow-up call, OMB staff indicated another production was forthcoming, but refused to commit to producing all responsive documents, and did not provide any information regarding the breadth of the review or a date by which the Committee could expect to receive all responsive documents. *See also* email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (July 1, 2015, 11:01 A.M.) outlining details of June 30 call.

³⁴ In the June 30, 2015 call with OMB staff and again in the July 1, 2015 follow-up email, Committee staff asked to speak directly with the staff at OIRA conducting the review to gain greater insight into basic information about the review, including a general estimate of the universe of documents, custodians identified, custodians searched to date, length of time necessary to conduct the remainder of the review, and the types of records searched. Email between H. Comm. on Oversight & Gov’t Reform staff and OMB staff (July 1, 2015, 11:01 A.M.).

³⁵ In a July 1, 2015 response to the Committee’s concerns that no information was provided about OMB’s search and review efforts, OMB promised a “productive” conversation with their Office of General Counsel. Email from OMB staff to H. Comm. on Oversight & Gov’t Reform staff (July 1, 2015, 5:06 P.M.). Committee staff requested to speak with someone on July 2, 2015 to answer basic questions about the process, absent a commitment that OIRA would produce everything requested; OMB did not respond. Email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (July 2, 2015, 8:45 A.M.). Despite sending a list of questions for OMB’s Office of General Counsel in advance of the July 7 call for basic search and review information, the Office of General Counsel was unable to furnish answers to any of the questions. *See* email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (July 6, 2015, 11:29 A.M.) and email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (July 7, 2015, 4:47 P.M.). Instead, on July 2, 2015, OMB issued another production of 90 pages, including 19 blank pages and 59 duplicate pages.

³⁶ H. Comm. on Oversight & Gov. Reform, Subpoena to Hon. Howard Shelanski, Administrator, Office of Info. And Regulatory Affairs (July 14, 2015).

A. March 3, 2015 Government Operations Subcommittee Hearing

The Committee first requested documents related to the WOTUS rulemaking from Mr. Shelanski on March 3, 2015, at a joint Subcommittee hearing titled “Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking.”³⁷ Mr. Shelanski was the only witness. During the hearing, members of the Committee requested documentation regarding the review of the WOTUS rulemaking. Mr. Shelanski initially claimed all of the documentation was publicly available. He testified:

Mr. DesJarlais: Can you provide this Committee with documentation relating to OIRA’s oversight of this rule, including the rule’s designation as significant and certification under the Regulatory Flexibility Act?

Mr. Shelanski: So all of the documentation related to a rule is actually on our website and through the website RegInfo.gov. So when a rule comes in, it becomes public that it is with OIRA; its designation at that point similarly becomes public. So when the final rule comes in, that will be publicly visible, both the timing of the arrival and the designation that it receives.³⁸

Later in the hearing, Mr. Shelanski explained to Government Operations Subcommittee Chairman Mark Meadows that OIRA views requests from Congress the same as requests from the general public. Mr. Shelanski also made clear he considered the discussions about the rule at OIRA part of the deliberative process and would not be making those available to Congress. He testified:

Mr. Meadows: Let me ask a clarifying point before I recognize the ranking member, because your testimony right now says that all those documents and all of that as it relates to your review of that is online. I don’t believe that that is correct; and that is what the gentleman was asking. So maybe your answer didn’t match his question.

Mr. Shelanski: No, what I meant to say is the fact that a rule is with us under review and the designation –

³⁷ Mar. 3, 2015 Hearing (statement of Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs).

³⁸ *Id.* (statement of Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs).

Mr. Meadows: So what about in the interim process? You have been involved in the interim process with the Waters of the U.S., have you not?

Mr. Shelanski: Right.

Mr. Meadows: So where is that documentation?

Mr. Shelanski: So what we do at the end of a review process is the agency, and the EPA does this, makes available both the rule as it came in and the rule as changed after it finished the review process.

Mr. Meadows: I will wait to my line of questioning. That doesn't answer the question, because when you have the initial rule and the final rule, there is a whole lot of the story that happens in between that we are not privy to your involvement there. Where is that documentation? Where is the transparency, I guess?

Mr. Shelanski: So there is a deliberative process that is undertaken, discussions not just between OIRA and the agency, but there is an interagency review process in which agencies are –

Mr. Meadows: Right. We are well aware of that. I guess what I am saying is his question was specifically with regards to the information, the audit trail, so to speak, of your involvement. Where are those documents?

Mr. Shelanski: There is not a set of documents.

Mr. Meadows: So you don't document it.

Mr. Shelanski: No, we do not.

Mr. Meadows: You just get involved and have verbal conversations?

Mr. Shelanski: There is a lot of verbal conversation, there is a lot of discussion, and then there is a written pass-back, back and forth that goes on between the agencies.

Mr. Meadows: All right, so let's say the emails. Where are those emails? Can you provide those specifically with regards to that particular, your analysis and your interrogatory with them? Can you provide that to the committee?

Mr. Shelanski: We do not make public –

Mr. Meadows: We are not public. You want to make that to us?

Mr. Shelanski: With all respect, sir, with respect to the rulemaking process, we do not divulge parts of the deliberative process outside the office.

Mr. Meadows: But you are not part of the deliberative process; you are part of the analysis, according to the statute.

Mr. Shelanski: But what you are asking for is the deliberative process that we engage in.³⁹

On May 12, 2015, the Committee sent a letter to Mr. Shelanski reiterating its request for information related to the rulemaking. Specifically, the letter stated:

We reiterate our request for documents and information to assist the Committee's oversight of OIRA and the development of the proposed regulation. Please provide all documents and communications referring or relating to the proposed regulations as soon as possible, but no later than 5:00 p.m. on May 25, 2015. This request includes, but is not limited to, the time period prior to the proposed rule's submission for review under Executive Order 12866.⁴⁰

The Committee's letter stated it "will consider the use of compulsory process to obtain these documents if you continue to refuse to produce them voluntarily."⁴¹

B. July 14, 2015 Subpoena

Due to Mr. Shelanski's failure to voluntarily comply with the Committee's request, a subpoena was served on July 14, 2015. The subpoena covers one category of documents:

³⁹ *Id.*

⁴⁰ May 12, 2015 Letter.

⁴¹ *Id.*

All documents and communications referring or relating to the Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) rule defining the scope of waters protected under the Clean Water Act.⁴²

Over the course of three months after the subpoena was issued, Mr. Shelanski and his staff failed to make a meaningful production of responsive documents, or even to make a good faith effort to engage in the accommodations process.⁴³ In an effort to better understand the difficulties OIRA was having in gathering responsive documents and otherwise fully complying with the subpoena, the Committee sent a letter to Mr. Shelanski on October 28, 2015. The letter requested interviews with the custodians of responsive documents that OIRA previously identified to the Committee, and asked for basic information related to the document production process. Specifically, the letter requested:

1. A list of the custodians of responsive documents;
2. The total number of documents identified as potentially responsive to date;
3. The total number of documents reviewed by the Office of Management and Budget (OMB);
4. The total number of documents sent to the White House for review;
5. The total number of documents withheld by OMB, in whole or in part;
6. The reasons why each document or portion of a document has been withheld, including a description of any redactions applied to the document, and whether OMB, the White House, or another federal agency applied the redactions; and
7. An estimated date by which OMB's production of unredacted, responsive documents to the Committee will be complete.⁴⁴

⁴² H. Comm. on Oversight & Gov. Reform, Subpoena to Hon. Howard Shelanski, Administrator, Office of Info. And Regulatory Affairs (July 14, 2015).

⁴³ The Committee received a production on July 22, 2015 that OMB promised to produce before issuance of the subpoena. Email from OMB staff to H. Comm. on Oversight & Gov't Reform staff (July 10, 2015, 4:05 P.M.). OMB staff asserted "We anticipate being able to make OMB's next production to you by the 22nd." OMB made the production in response to the Committee's request to discuss specific information regarding the search and review process. Email from H. Comm. on Oversight & Gov't Reform staff to OMB staff (July 7, 2015, 4:47 P.M.). OMB did not produce that information, made no commitment to future productions, and did not produce any subsequent documentation to the Committee until December 10, 2015.

⁴⁴ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs (Oct. 28, 2015).

The Committee requested a response by November 11, 2015. Mr. Shelanski never responded. In fact, OIRA repeatedly refused to provide even the most basic information about OIRA’s search for responsive documents.⁴⁵

C. The January 7, 2016 Committee Hearing

In an effort to better understand why OIRA had not provided documents in response to the subpoena, the Committee held a hearing on January 7, 2016. Ms. Tamara Fucile, Associate Director of Legislative Affairs for the Office of Management and Budget, testified.⁴⁶ Her invitation to testify made clear she was expected to answer questions related to OIRA’s response to the Committee. Specifically, it stated:

The hearing will specifically address the agency’s response to the Committee’s March 3, 2015, request and subsequent July 14, 2015, subpoena for documents pertaining to the Office of Information and Regulatory Affairs’ review of the Waters of the United States rulemaking.⁴⁷

When asked, however, she was unable to provide basic information about OIRA’s production. She could not confirm the names or the number of custodians whose emails were searched. Rep. Cynthia Lummis asked: “How many custodians have you identified?” Ms. Fucile responded: “I don’t have that information. I’d have to take that back.”⁴⁸

Nor could Ms. Fucile provide an estimate of the number of potentially responsive documents identified by OIRA to date or confirm OIRA would provide all documents responsive to the subpoena. In fact, Ms. Fucile refused to commit to providing the Committee all of the documents responsive to the subpoena. She testified:

Mr. Chaffetz: Are you committed to providing all of those documents?

Ms. Fucile: We are committed to providing the committee the information that it needs. We are –

Mr. Chaffetz: Well, we determine what we need, so the question is, are you going to provide all the documents?

Ms. Fucile: We’re – we certainly –

⁴⁵ See Section V, *infra*.

⁴⁶ *Document Production Status Update: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Jan. 7, 2016) (statement of Ms. Tamara Fucile, Assoc. Dir. for Leg. Affairs, Office of Info. and Regulatory Affairs) [hereinafter Jan. 7, 2016 Hearing]

⁴⁷ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to Ms. Tamara Fucile, Assoc. Dir. for Leg. Affairs, Office of Info. and Regulatory Affairs (Dec. 18, 2015).

⁴⁸ Jan. 7, 2016 Hearing.

Mr. Chaffetz: That isn't a simple yes. You can't say yes to that?

Ms. Fucile: We're committed to getting the committee the information it requested. We certainly are committed to going through all of those documents. There is a process that is a longstanding practice between this administration, other administrations to make sure that the documents are relevant, to make sure that the documents adhere to privacy concerns. All the information we've given you so far has been complete without redactions. We're committed to continuing this process.

Mr. Chaffetz: I want to know if you're committed to giving us all the documents, yes or no?

Ms. Fucile: We are committed to getting you the information that you need and producing documents and continuing to produce documents and to working with you on that.

Mr. Chaffetz: Why can't you just say yes or no? Are you going to give us all the documents we asked for, yes or no?

Ms. Fucile: Part of the problem is I personally don't know what the universe of all the documents is. I – we are committed to getting you the documents.

Mr. Chaffetz: When?

Ms. Fucile: We are – have increased our production and response rate. I expect that will continue –

Mr. Chaffetz: Well, you had enough information that you actually produced a rule, so why can't you provide those underlying documents to Congress?

Ms. Fucile: The – as the Congresswoman pointed out, this rule is under litigation. That increases the amount of work that needs to go done – be done in terms of producing documents. We are committed. We – I expect that we will be able to

continue to produce documents, that we will be able to produce documents this month – or next month by – in short order, you know, and we’re committed to work with your staff on that.

Mr. Chaffetz: When is it reasonable to give us the – what date? I am looking for a date.

Ms. Fucile: I can’t give you a date certain because the breadth of the subpoena is so broad, but I can commit that within the next month we will produce more documents.

Mr. Chaffetz: Wow. This is what we are up against.⁴⁹

D. March 15, 2016 Government Operations Subcommittee Hearing

To further understand OIRA’s involvement in the rulemaking process, the Committee’s Government Operations Subcommittee held a hearing on March 15, 2016 titled “Accountability and Transparency Reform at the Office of Information and Regulatory Affairs.” Mr. Shelanski appeared as a witness at the hearing.⁵⁰

When he was questioned directly about the obligation to comply with the subpoena, Mr. Shelanski responded: “I believe it is my duty to turn over all documentation to our General Counsel’s Office and our Legislative Affairs Office that is currently engaged in the process of producing documents and witnesses for you.”⁵¹ After additional questions, Mr. Shelanski made clear, “I am not personally involved.”⁵²

As the head of OIRA, Mr. Shelanski is solely responsible for responding to the subpoena. The subpoena names Mr. Shelanski as the recipient.

E. April 19, 2016 Committee Hearing

The Committee held a second document production hearing on April 19, 2016, and Mr. Shelanski was invited to explain why he had not complied with the Committee’s subpoena. Specifically, Mr. Shelanski was asked to testify on:

⁴⁹ *Id.*

⁵⁰ *Accountability and Transparency at the Office of Information and Regulatory Affairs: Hearing Before the H. Subcomm. on Gov’t Operations*, 114th Cong. (Mar. 15, 2016) (statement of Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs). [hereinafter Mar. 15, 2016 Hearing]

⁵¹ *Id.*

⁵² *Id.*

OIRA's lack of responsiveness regarding the Committee's request for information about the OIRA's review of the Waters of the United States rulemaking though the Committee's March 3, 2015, hearing; May 12, 2015, letter; July 14, 2015, subpoena for documents; and October 28, 2015, letter requesting transcribed interviews and information about OIRA's effort to respond to the subpoena.⁵³

Mr. Shelanski was also asked to "be prepared to answer questions posed by Members, such as questions relating to the search and review efforts to comply with the Committee's subpoena, including the information requests posed in the October 28, 2015, letter."⁵⁴ During the hearing, Mr. Shelanski was not prepared to answer questions on topics the Committee explicitly asked him to be prepared. Mr. Shelanski was also unwilling to commit to fully complying with the subpoena. He testified:

Mr. Chaffetz: Mr. Shelanski, I want to start with you. On March 3, 2015, our colleague here, Mr. Meadows of North Carolina, asked you some questions regarding the Waters of the United States and made a request for documents. Correct?

Mr. Shelanski: I believe that is correct, yes.

Mr. Chaffetz: May 12, 2015, the committee issued you a letter requesting information regarding the Waters of the United States. Correct?

Mr. Shelanski: I believe that is correct, yes.

Mr. Chaffetz: On July 14, 2015, I issued a subpoena from this Committee to you and the Office of Information and Regulatory Affairs. Correct?

Mr. Shelanski: Yes, sir.

Mr. Chaffetz: You received that subpoena. Correct?

Mr. Shelanski: Yes, sir.

Mr. Chaffetz: Did you understand the subpoena?

Mr. Shelanski: Yes, sir.

Mr. Chaffetz: Was there any ambiguity about the subpoena?

⁵³ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs (Mar. 18, 2016).

⁵⁴ *Id.*

Mr. Shelanski: It was a very broad subpoena, but I understood the subpoena.

Mr. Chaffetz: The subpoena right here, one sentence essentially in terms of the schedule: all documents and communications referring or relating to the Environmental Protection Agency and the U.S. Department of Army rule defining the scope of the waters protected under the Clean Water Act.

Is there anything that you didn't understand about that?

Mr. Shelanski: No, sir.

Mr. Chaffetz: What percentage of the documents in your agency have been provided to this committee?

Mr. Shelanski: I don't know what the exact percentage is, in part because the subpoena goes back 9 years to June of 2006, and so I don't know what the full volume of documents ultimately would be. I do know that we have turned over a large number of documents, documents that we have prioritized the review of pursuant to counsel from your staff.

Mr. Chaffetz: Why should we settle for anything less than 100 percent?

Mr. Shelanski: We agree that you should receive the information that you need for your oversight review, and that is why we have continued to review and work through our documents as quickly as we can in response to your request.

Mr. Chaffetz: Do you believe we should get 100 percent of the documents?

Mr. Shelanski: I believe you should get all of the documents that are responsive to your request.⁵⁵

Mr. Shelanski professed to understand his obligation to comply with the subpoena, yet refused to acknowledge the Committee is entitled to receive all responsive documents. Instead of complying, or even engaging in the accommodations process, Mr. Shelanski

⁵⁵ *Document Production Status Update Part II: Hearing before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Apr. 19, 2016) (statement of Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs).

continued to insist on withholding certain responsive documents he determined are not of interest to the Committee. Mr. Shelanski's testimony – that the Committee should “receive the information that you need for your oversight review” – creates the appearance that Mr. Shelanski has substituted his judgment for the Committee's as it pertains to the documents and information that are relevant to the Committee's investigation.

F. Mr. Shelanski has failed to Produce Subpoenaed Documents

In response to the Committee's subpoena, Mr. Shelanski failed to provide even a meaningful subset of responsive documents. To date, OIRA has made twelve limited productions to the Committee, the majority of which were produced from a search of only six months of the nine-year rulemaking process. Of the 18,896 pages produced to date, over 78 percent (or 14,770 pages) of those are duplicates, including 52 identical copies of the rule itself and ten copies of the rule's economic analysis. In fact, in its largest production to date of 8,570 pages on May 23, 2016, only 50 pages were unique documents that had not previously been produced or otherwise duplicated.⁵⁶

A review of the documents Mr. Shelanski produced shows a number of responsive and relevant documents exist, and continue to be withheld from the Committee, including:

- Feedback from Department of Agriculture senior policy staff regarding the interpretative rule;⁵⁷
- Communications between OIRA staff and staff from the Small Business Administration (SBA) regarding comments on WOTUS rule;⁵⁸
- Scanned emails with input from the former OIRA Administrator and current Deputy Administrator;⁵⁹
- Emails from Mike Fitzgerald;⁶⁰
- Jim Laity comments on December 6, 2013, regarding the draft rule;⁶¹

⁵⁶ Committee analysis of OIRA document productions.

⁵⁷ Email from Gregory Peck, EPA, to Jim Laity, OIRA (Dec. 31, 2013, 03:11 P.M. EST) (“I’d like to wait just a little longer on the Interpretive Rule so we can get feedback from USDA senior policy staff.”).

⁵⁸ Email from Jim Laity, OIRA, to Gregory Peck, EPA (Nov. 27, 2013, 12:49 A.M. EST) (“I will offer SBA the opportunity to make comments (we might have some too) and try to convince them this is a good way forward.”).

⁵⁹ Email from Gregory Peck, EPA, to Jim Laity, OIRA (Nov. 26, 2013, 1:15 P.M. EST) (“Here’s the scanned e-mails I mentioned that includes input from Cass and Dom.”).

⁶⁰ Email from Gregory Peck, EPA, to Jim Laity, OIRA (Nov. 26, 2013, 11:01 A.M. EST) (“Here’s a set of emails starting with Mike Fitzgerald. I’ll find a couple more.”).

⁶¹ Email from Jim Laity, OIRA, to Craig Schmauder, Army (Dec. 6, 2013, 07:01 P.M. EST) (OMB-000823) (“Craig, Thought I sent u my comments just now but I’m not seeing them in my send box. Unfortunately, I’ve left the office. Did u receive.”); *See also*, email from Craig Schmauder, Army, to Jim Laity, OIRA (Dec. 6, 2014, 07:06 P.M. EST) (OMB-000823) (“Yes I received them.”).

- Feedback from Department of Justice officials regarding the draft rule, which caused revisions to the rule by the EPA;⁶²
- Feedback from Department of Agriculture and Department of Interior officials regarding the draft rule;⁶³
- Comments by Army Corps officials on the rule received by Jim Laity on February 21, 2014;⁶⁴ and
- An attachment to an email containing a comment letter from the SBA’s Office of Advocacy related to the rule.⁶⁵

These documents are clearly responsive to the subpoena. There is no ambiguity. They are required for the Committee’s investigation, along with all other responsive documents.

V. Obstruction through Custodian Selection

Mr. Shelanski and his staff also obstructed the Committee’s investigation by excluding key custodians of responsive documents from OIRA’s search process. Despite numerous requests, OIRA failed to identify five key custodians who were involved in reviewing the rule. The Committee only learned of these individuals during transcribed interviews with OIRA staff, more than one year after the Committee’s initial request for information from the agency.⁶⁶

In June 2015, the agency’s woefully inadequate document productions caused the Committee to request basic information about the custodians whose emails OIRA planned to search. No substantive information about the Committee’s request was provided to the Committee.⁶⁷ On October 28, 2015, the Committee again requested the information.⁶⁸ Again, no information was provided. The Committee requested the information once more

⁶² Email from Gregory Peck, EPA, to Jim Laity, OIRA (Feb. 11, 2014, 11:49 A.M. EST) (OMB-000860) (“We’re making edits now based on DOJ comments and revisions to upload ditches and the “other waters” options.”).

⁶³ Email from Jim Laity, OIRA, to Gregory Peck, EPA (Feb. 11, 2014 11:53 A.M. EST) (OMB-000860) (“Still waiting for the USDA and DOI comments. I hope to get both today.”).

⁶⁴ Email from Jim Laity, OIRA, to Gregory Peck, EPA, and Craig Schmauder, Army (Feb. 26, 2014, 07:59 P.M. EST) (OMB-000877) (“In the interest of time, I have not reviewed the Corps comment that I received Friday. Ideally I would do this, but I know you need it asap.”); *see also, id.*, “Attachments: WOTUS 2-18-14 compare jl.docx.”

⁶⁵ Email from Kia Dennis, Office of Advocacy, SBA, to Vlad Dorjets, OIRA (Apr. 20, 2015, 08:15 A.M. EST) (OMB-005080) (“We reiterate everything that we’ve stated previously and I have attached our public comment to this e-mail.”).

⁶⁶ H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of James Laity, Tr. at 18 (Mar. 8, 2016); H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Dominic Mancini, Tr. at 39 (Apr. 15, 2016).

⁶⁷ Email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (July 7, 2015, 4:47 P.M.).

⁶⁸ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform, to Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs (Oct. 28, 2015).

during a hearing on January 7, 2016, but got no answers.⁶⁹ Committee staff met with OMB staff on January 29, 2016 to better understand the delay in providing documents and to seek specific information about the process of collecting, reviewing, and producing documents.⁷⁰ During the meeting, OMB staff informed the Committee they had limited the review for responsive documents to the period from September 17, 2013 to March 24, 2014. Agency staff further advised they were only searching the documents of four custodians, including Howard Shelanski, Dominic Mancini, Andrei Greenawalt, and James Laity. The OMB staff was unable to confirm the search for responsive documents from this very limited period for those four custodians was complete – more than six months after the subpoena was issued. OMB staff was also unwilling to identify the volume of documents identified by the agency during its search.

The Committee soon learned, however, the four custodians whose emails were being searched were not the only OIRA officials who worked on WOTUS. During transcribed witness interviews, Committee investigators identified several other key OIRA officials who were involved in reviewing WOTUS. On February 16, 2016, Committee staff identified two new custodians with primary responsibility for reviewing the rule – Vlad Dorjets and Stuart Levenbach – and asked why OIRA had not previously disclosed the roles of these two witnesses.⁷¹ Mr. Shelanski’s staff did not provide an explanation as to why they excluded these key witnesses from the search for responsive records.

On February 17, 2016, OMB staff confirmed they would begin searching for Mr. Dorjets and Mr. Levenbach’s records “with a focus on September 17, 2013 to March 24, 2014,” but again refused to provide basic information about the ongoing effort to produce documents from the time period for the four custodians who had been previously identified.⁷²

In subsequent transcribed interviews, the Committee obtained the names of additional OIRA officials who worked on the WOTUS rulemaking, but were excluded from the agency’s search for responsive documents. On March 8, 2016, Committee staff learned about Courtney Higgins, a desk officer who was responsible reviewing the rule.⁷³ On April 15, 2016, Committee staff learned about Amanda Thomas, the senior economic analyst who reviewed the rule.⁷⁴ On April 26, 2016, OIRA produced documents that identified yet another key witness involved in the rulemaking: Katie Johnson.⁷⁵ Despite being responsive to the subpoena, it is unlikely OIRA would have produced documents and communications from these custodians if the Committee had not identified and requested them during the investigation.

⁶⁹ Jan. 7, 2015 hearing (statement of Ms. Tamara Fucile, Assoc. Dir. for Leg. Affairs, Office of Info. and Regulatory Affairs).

⁷⁰ Email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (Jan. 8, 2016, 4:19 P.M.).

⁷¹ Email from H. Comm. on Oversight & Gov’t Reform staff to OMB staff (Feb. 16, 2016, 10:24 A.M.).

⁷² Email from OMB staff to H. Comm. on Oversight & Gov’t Reform staff (Feb. 17, 2016, 6:12 P.M.).

⁷³ Laity, Tr. at 18.

⁷⁴ Mancini, Tr. at 39.

⁷⁵ Letter from Ms. Tamara Fucile, Assoc. Dir. of Leg. Affairs, Office of Mgmt. & Budget, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform (Apr. 7, 2016).

VI. Mr. Shelanski Refused to Engage in the Accommodations Process

Mr. Shelanski's staff repeatedly stated compliance with the Committee's subpoena is a burden on OIRA's resources because of the breadth of the responsive documents.⁷⁶ This is in spite of the fact Mr. Shelanski and other OIRA officials reported turning over all of their documents to the Committee's request.⁷⁷ In an effort to prioritize the documents it needs, the Committee asked for details about the volume of records returned by the OIRA's search.

Mr. Shelanski and his staff have persistently refused to identify the number of responsive documents, or how the search was conducted. This position short-circuited the accommodations process. OIRA cannot simultaneously insist the subpoena is overly broad and yet refuse to disclose, or even estimate, how many documents it covers. Taking these contradictory positions creates the appearance that OIRA never conducted a good faith search for responsive documents in the first place.

VII. Historical Perspectives on Contempt

Contempt proceedings in Congress date back over 215 years. These proceedings provide Congress a valuable mechanism for adjudicating its interests. Congressional history is replete with examples of the pursuit of contempt proceedings by House committees when faced with strident resistance to their constitutional authority to exercise investigative power.

A. Historical Use of the Contempt Authority

Congress first exercised its contempt authority in 1795 when three Members of the House charged two businessmen, Robert Randall and Charles Whitney, with offering bribes in exchange for the passage of legislation granting Randall and his business partners several million acres bordering Lake Erie.⁷⁸ This first contempt proceeding began with a resolution by the House deeming the allegations were adequate "evidence of an attempt to corrupt," and the House

⁷⁶ E.g. Email from OIRA staff to H. Comm. on Oversight & Gov't Reform staff (Feb. 6, 2016, 2:46 P.M.) ("As you know, we are a small agency and the search and review of documents is a time-consuming one.")

⁷⁷ Mr. Shelanski made clear during a hearing: "A hundred percent of my documents are turned over." Mar. 15, 2016 Hearing (Statement of Howard Shelanski). Mr. Dominic Mancini also testified all his documents were collected, stating "I have produced what counsel has asked me to produce that was consistent with the request... to be clear, I have produced what I was asked to produce." Mancini, Tr. at 169. Other OIRA officials claimed not to have a clear memory of responding to the Committee's request, but explained compliance with such a request was not a heavy lift. Mr. Vlad Dorjets explained "If I did, it would have taken a couple – it would have been a very quick search, and I would have continued doing what I was doing before, and carried on my day." H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Vlad Dorjets, Tr. at 177 (May 10, 2016). And Mr. James Laity testified it was his process to search for documents as they were requested of him: "I don't remember – we've had various requests, FOIA requests and other requests, for documents about this rulemaking in the past, and I don't remember much about - those things happen so much they go in and out... I would search if I received such a request. If they were documents in my custody, basically documents that I either wrote or received and that were recent enough that they hadn't been deleted from our system." Laity, Tr. at 170-71.

⁷⁸ Todd Garvey & Alissa M. Dolan, Congressional Research Service, *Congress's Contempt Power: Law, History, Practice, & Procedure* (Apr. 15, 2008) (RL34097) [hereinafter CRS Contempt Report].

reported a corresponding resolution that was referred to a special committee.⁷⁹ The special committee reported a resolution recommending formal proceedings against Randall and Whitney “at the bar of the House.”⁸⁰

The House adopted the committee resolution which laid out the procedure for the contempt proceeding. Interrogatories were exchanged, testimony was received, Randall and Whitney were provided counsel, and at the conclusion, on January 4, 1796, the House voted 78-17 to adopt a resolution finding Randall guilty of contempt.⁸¹ As punishment Randall was “ordered [] to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House.”⁸² Randall was detained until January 13, 1796, when the House passed a resolution discharging him.⁸³ In contrast, Whitney “was absolved of any wrongdoing,” since his actions were against a “member-elect” and occurred “away from the seat of government.”⁸⁴

Congressional records demonstrate no question or hesitation regarding whether Congress possesses the power to hold individuals in contempt.⁸⁵ Moreover, there was no question that Congress could punish a non-Member for contempt.⁸⁶ Since the first contempt proceeding, numerous congressional committees have pursued contempt against obstinate administration officials, as well as private citizens who failed to cooperate with congressional investigations.⁸⁷ Since the first proceeding against Randall and Whitney, House committees, whether standing or select, have served as the vehicle used to lay the foundation for contempt proceedings in the House.⁸⁸

On August 3, 1983, the House passed a privileged resolution citing Environmental Protection Agency Administrator Anne Gorsuch Burford with contempt of Congress for failing to produce documents to a House subcommittee pursuant to a subpoena.⁸⁹ This was the first occasion the House cited a cabinet-level executive branch member for contempt of Congress.⁹⁰ A subsequent agreement between the House and the Administrator, as well as prosecutorial discretion, was the base for not enforcing the contempt citation against Burford.⁹¹

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; quoting Asher C. Hinds, *Precedents of the House of Representatives*, Sec. 1603 (1907).

⁸⁵ *Id.*

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 14.

⁸⁹ *Id.*

⁹⁰ Wm. Holmes Brown et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, 450 (2011).

⁹¹ *Id.* at 20, 22.

B. Modern Use of the Contempt Authority

Within the past fifteen years the Committee on Oversight and Government Reform has undertaken or prepared for contempt proceedings on multiple occasions. In 1998, Chairman Dan Burton held a vote recommending contempt for Attorney General Janet Reno based on her failure to comply with a subpoena issued in connection with the Committee's investigation into campaign finance law violations.⁹² On August 7, 1998, the Committee held Attorney General Reno in contempt by a vote of 24 to 18.⁹³

During the 110th Congress, Chairman Henry Waxman threatened and scheduled contempt proceedings against several administration officials.⁹⁴ Contempt reports were drafted against Attorney General Michael B. Mukasey, Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, and Susan E. Dudley, Administrator of OIRA. Business meetings to consider these drafts were scheduled.⁹⁵ Former Attorney General Mukasey's draft contempt report charged him with failing to produce documents in connection to the Committee's investigation of the release of classified information. According to their draft contempt reports, Administrators Johnson and Dudley failed to cooperate with the Committee's lengthy investigation into California's petition for a waiver to regulate greenhouse gas emissions from motor vehicles and the revision of the national ambient air quality standards for ozone.

In 2007, the House Judiciary Committee pursued contempt against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten.⁹⁶ On June 13, 2007, the Committee served subpoenas on Miers and Bolten.⁹⁷ After attempts at accommodations from both sides, the Committee determined that Miers and Bolten did not satisfactorily comply with the subpoenas. On July 25, 2007, the Committee voted, 22-17, to hold Miers and Bolten in contempt of Congress.⁹⁸

On February 14, 2008, the full House, with most Republicans abstaining, voted to hold Miers and Bolten in criminal contempt of Congress by a margin of 223-42.⁹⁹ One hundred seventy-three Members of Congress did not cast a vote either in favor or against the resolution.¹⁰⁰ This marked the first contempt vote by Congress with respect to the Executive Branch since the Reagan administration.¹⁰¹ The resolutions passed by the House allowed Congress to exercise all available remedies in the pursuit of contempt.¹⁰² The House Judiciary

⁹² David E. Rosenbaum, *Panel Votes to Charge Reno With Contempt of Congress*, N.Y. TIMES (Aug. 7, 1998).

⁹³ *Id.*

⁹⁴ Laurie Kellman, *Waxman Threatens Mukasey With Contempt Over Leak*, U.S.A. TODAY (July 8, 2008); Richard Simon, *White House Says No to Congress' EPA Subpoena*, L.A. TIMES (June 21, 2008).

⁹⁵ Press Release, Rep. Henry Waxman, *Chairman Waxman Warns Attorney General of Scheduled Contempt Vote* (July 8, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2067> (last visited Feb. 22, 2012); Press Release, Rep. Henry Waxman, *Chairman Waxman Schedules Contempt Vote* (June 13, 2008) <http://oversight-archive.waxman.house.gov/story.asp?ID=2012> (last visited Feb. 22, 2012).

⁹⁶ CRS Contempt Report at 54-55.

⁹⁷ *Id.*

⁹⁸ See H. Rept. 110-423, 60 (2007).

⁹⁹ See H. Res. 982, 110th Cong.

¹⁰⁰ *Id.*

¹⁰¹ Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES (Feb. 15, 2008).

¹⁰² CRS Contempt Report at 54-55.

Committee's action against Miers marked the first time that a former administration official had ever been held in contempt.¹⁰³

In 2012, the Committee initiated contempt proceedings against former Attorney General Eric Holder for refusing to comply with a subpoena for documents and communications related to the Fast and Furious gunwalking program.¹⁰⁴ President Obama eventually asserted executive privilege over a portion of the documents that Holder was withholding.¹⁰⁵ The Committee held Holder in contempt and on June 28, 2012,¹⁰⁶ seventeen House Democrats crossed party lines to rebuke President Obama's claim of executive privilege by supporting H.Res. 711.¹⁰⁷ The House then considered and passed H. Res. 706 authorizing a civil lawsuit to compel production of the required materials.¹⁰⁸ Twenty-one House Democrats crossed party lines in support of authorizing the civil litigation.

The resolution contained a criminal contempt citation, and it authorized a lawsuit for the purpose of compelling production of the Department's communications about how to respond to the congressional investigation of Fast and Furious, among other subpoenaed documents. In January 2016, U.S. District Court for the District of Columbia Judge Amy Berman Jackson ruled in favor of the Committee, and required the Department of Justice to produce the documents at the heart of the litigation.¹⁰⁹ Judge Jackson ruled that the Committee's need for the documents outweighed the Department's need to protect the Department from such limited harm. The lawsuit is ongoing.

In 2014, the Committee¹¹⁰ and subsequently the House¹¹¹ held IRS official Lois G. Lerner in contempt for refusing to comply with a testimonial subpoena relating to her role in the Internal Revenue Service's targeting scandal, where certain tax-exempt applicants were afforded extra scrutiny.¹¹²

¹⁰³ *Id.*

¹⁰⁴ H. Rept. 112-546 (2012).

¹⁰⁵ Letter from James Cole, Deputy U.S. Atty. Gen., to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (June 20, 2012).

¹⁰⁶ H. Comm. on Oversight & Gov't Reform, Resolution Recommending That the House of Representatives Find Eric H. Holder, Jr. Atty. Gen., U.S. Dept. of Justice, In Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Comm. on Oversight & Gov't Reform., 112th Cong. (2012) (H. Rept. 112-546).

¹⁰⁷ H. Res. 711, 112th Cong. (2012).

¹⁰⁸ H. Res. 706, 112th Cong. (2012).

¹⁰⁹ *Comm. On Oversight and Gov't Reform v. Lynch*, No. 12-1332 (ABJ), slip opinion at 32 (D.D.C. Jan. 19, 2016).

¹¹⁰ H. Comm. on Oversight & Gov't Reform, Resolution Recommending That the House of Representatives Find Lois G. Lerner, Former Director, Exempt Organizations, Internal Revenue Service, In Contempt of Congress for Refusal to Comply with a Subpoena Duly Issued by the Comm. on Oversight & Gov't Reform., 113th Cong. (2014) (H. Rept. 113-415).

¹¹¹ H. Res. 574, 113th Cong. (2014).

¹¹² See H. Comm. on Oversight & Gov't Reform, Staff Report: The Internal Revenue Services' Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress, 113th Cong. (Dec. 23, 2014).

VIII. Conclusion

Mr. Shelanski's actions impeded and caused meaningful delays to the Committee's ability to perform its Constitutional oversight duties. As Mr. Shelanski and his staff have willfully failed to comply with the Committee's subpoena, or even to demonstrate a modicum of good faith, it is necessary to enforce the subpoena.¹¹³

¹¹³ 2 U.S.C. §§ 192, 194 are the enforcement provisions for Congressional subpoenas. Section 192 states in pertinent part, "Every person who having summoned . . . to produce papers upon any matter under inquiry [by a standing House committee], willfully makes default . . . shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment Section 194 states it is "the duty of the . . . Speaker of the House . . . to certify . . . [the matter] to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action.