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DOJ's brief on Fast and Furious: marginalizing committee investigations

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After the House held Attorney General Eric Holder Jr. in contempt on June 28, it filed a civil suit in federal district court on August 13. The purpose is to enforce a subpoena issued by the Committee on Oversight and Government Reform, which requested documents for its investigation of "Operation Fast and Furious." The House complaint charges obstruction by the Justice Department and a need to understand why it provided false information to Congress in a letter of February 4, 2011. Senator Charles Grassley (R-Iowa) had written to the acting director of the Bureau of Alcohol, Tobacco, and Firearms (ATF), asking whether the agency had allowed assault weapons to leave the United States and reach drug cartels in Mexico. The department told Grassley his allegations were "false." Ten months later, the department retracted the letter and admitted that its response to Grassley contained "inaccuracies." ATF had allowed approximately 2,000 guns to flow from the United States into Mexico.

On October 15, the Justice Department filed a memorandum in district court requesting that it dismiss the House action. DOJ's brief contemplates a remarkably reduced role for committee investigations. In doing so, it relies heavily on *Raines v. Byrd* (1997), which involved the effort of one lawmaker—Senator Robert C. Byrd (D-W. Va.)—to challenge a statute that gave the president a line-item veto. The Supreme Court properly rejected lawsuits by members of Congress who vote on the losing side. Raines has no application to the constitutional authority of Congress to conduct oversight by depending on committees and subcommittees to discharge that legislative duty.

Undercutting committee authority

According to DOJ's brief, the "Founders intended Congress to use the tools provided in the Constitution—rather than the federal courts—to obtain documents that Congress believes necessary to engage in oversight of the Executive Branch." Of course legislative oversight is not "provided in the Constitution," nor are committee subpoenas, the contempt power or even executive privilege. A legislative tool that is found in the Constitution is the power of the purse. Under the reasoning of the brief, a House committee seeking agency documents would have to work with the House and the Senate to add punitive language to an appropriations bill and have it enacted into law, perhaps by having to override a presidential veto.

Recourse to the full statutory process is reinforced throughout the brief, which warns about the difficulty of congressional demands from "its myriad committees." DOJ prefers not to honor oversight by committees but to insist on the full legislative process and statutory controls. The brief identifies several congressional remedies. "It can tie up nominations" (available to the Senate but not the House), it "can legislate change within the Department of Justice" and "slash the budget in the area of concern"—again requiring statutory action. DOJ admits that the House "can hold—and has held—the Attorney General in contempt." First, the contempt power is not expressly provided in the Constitution. Second, the administration attempted to nullify the Holder contempt action by not following a statute that requires the U.S. attorney in the District of Columbia to take a contempt action to grand jury.

DOJ suggests that Congress "can bring its case to the people through the electoral process" and can "make its case to the public." It is unclear what those actions would be and why they would be effective in gaining access to agency documents. The brief lists other congressional powers that might be used: withhold funds, "override vetoes," "decline to enact legislation, refuse to act on nominations, and adjourn." How would any of those actions help a committee obtain documents for oversight purposes, particularly in a timely manner?

The brief claims that the House Oversight Committee rejected "the full panoply of tools Congress has used throughout two centuries of inter-Branch give-and-take." In fact, the committee used the subpoena and contempt powers. DOJ asks the district court not to augment legislative powers "when Congress has chosen not to exercise them." With Fast and Furious, House Oversight chose to exercise the powers of oversight, subpoenas, hearings and contempt. Oversight was also conducted by the House and Senate Judiciary Committees.

As to the February 4 letter, the brief states that the department "sought to provide a thorough and accurate response in a tight timeframe." It is true that the department decided to issue the letter within a matter of days. After the department retracted the letter, it gave Congress 1,364 emails explaining how the letter was drafted. The emails make it clear that Main Justice chose to rely on self-serving statements from the ATF office in Phoenix rather than ask Grassley what documentation he possessed about gun-running. Instead of trying to provide a thorough and accurate response, the overriding motivation was to discredit Grassley and his allegations. The department argued it was appropriate to rely on Phoenix because it was "in a position to know." It was also in a position to dissemble and deceive, which it proceeded to do. Rather than rely exclusively on Phoenix supervisors and the U.S. attorney's office in Phoenix, Main Justice should have obtained information from ATF agents. They had accurate information about gun-running, as the department later admitted.

The brief emphasizes the importance of negotiation and accommodation between the two branches as the best method of settling information disputes: "The prudential bases for refusing jurisdiction are especially strong here, where substantial accommodation was continuing and has continued, and where Congress's legitimate informational interests have been largely

satisfied." Instead of joint negotiation and mutual accommodation, the brief appears to offer a one-sided and conclusive determination. The department advises the court that "the accommodation process was continuing and has continued after the filing of this suit" and the department "remains open to further accommodation." Given the tone, substance, and analysis of this brief, there is little reason for the House to expect additional accommodation from the administration.

Louis Fisher is scholar in residence at the Constitution Project. He served four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library. His books include The Politics of Executive Privilege (2004) and a recently completely treatise, The Law of the Executive Branch: Presidential Power, to be published by Oxford University Press.

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