JEB HENSARLING, TX, CHAIRMAN

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

MAXINE WATERS, CA, RANKING MEMBER

June 17, 2015

The Honorable Janet Yellen
Chair
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. NW
Washington, D.C. 20551

Mr. Mark Bialek
Inspector General
Board of Governors of the Federal Reserve System and
Bureau of Consumer Financial Protection
20th Street and Constitution Ave. NW
Washington, D.C. 20551

Dear Chair Yellen and Mr. Bialek:

This is in response to your respective letters in which you both refuse to comply with the Committee's repeated requests for records relating to the leak of confidential Federal Open Market Committee (FOMC) information in 2012.[1] The Board of Governors of the Federal Reserve System (Fed), pursuant to the request of the Fed's Office of Inspector General (OIG), has refused to comply with a duly authorized and issued Congressional subpoena.[2] The OIG has also not complied with multiple requests from the Committee for these records, most recently citing executive privilege as its basis for non-compliance.[3] As set forth more fully below, the OIG has no cognizable legal grounds for refusing to produce the requested

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[1] Letter from the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (June 4, 2015); Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015).

[2] Subpoena by Authority of the House of Representatives of the Congress of the United States of America, to the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System (May 21, 2015).

[3] *See* Letter from the Hon. Sean Duffy, Chairman, Subcmte. on Oversight & Investigations, H. Comm. on Fin. Serv., to Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Feb. 5, 2015); Letters from the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv., to Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Mar. 13, 2015; Apr. 30, 2015); Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015) (citing executive privilege: "The OIG's concerns regarding the disclosure of ongoing criminal investigative information to Congress *are consistent with the law of executive privilege*, as described in the DOJ Office of Legal Counsel (OLC) opinion . . . ." (emphasis added)).

records, and the Fed's refusal to comply with the Committee's subpoena constitutes the willful obstruction of this Committee's lawful investigation.[4]

The Committee remains very concerned about the leak of confidential FOMC information and the inadequate investigations by the Fed and the OIG that followed. The leak disclosed market-moving information to a private party regarding confidential FOMC deliberations, i.e., the Fed's plan to purchase hundreds of billions of dollars' worth of securities.[5] It should be self-evident that a leak of such confidential FOMC information is unacceptable and must be promptly and vigorously investigated both by relevant law enforcement authorities and congressional committees of jurisdiction.

Unfortunately, the Fed conducted what can most charitably be described as an inadequate internal investigation, failing to make a referral even to its own inspector general. And although the OIG began its own investigation, it concluded it a short time later without identifying the source of the leak. The media have reported that the Fed's investigation was not conducted in accordance with its own internal policy at the time, and that the Fed subsequently changed this policy to afford itself more discretion over investigations into leaks of FOMC information and to avoid referrals to the OIG.[6] Perhaps more troubling than these deficient investigations and the Fed's failure to safeguard confidential information is that both the Fed and the OIG chose not to promptly advise Congress and the American people what had occurred, what they found, and what, if anything, was being done to ensure that such a leak never occurred again.

This history of failure has left the Committee with little confidence in the Fed and the OIG either to identify the source of the leak or to determine how a breach occurred and prevent its recurrence. Because such matters directly implicate the Committee's jurisdiction under clause 1(h) of Rule X of the House of Representatives, the Committee launched its own investigation into both the leak and the mismanagement of the response. Now that the Department of Justice (DOJ) has recently become involved, the Committee is hopeful that DOJ will thoroughly investigate such matters as are within its purview. That investigation, however, is not a substitute for the Committee's own inquiry, which serves legislative interests under Article I of the Constitution rather than law enforcement

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[4] 2 U.S.C. §§192, 194.

[5] *See, e.g.*, Craig Torres, *Fed Leak Handed Traders Profitable Tip, Prompted Secret Inquiry*, Bloomberg, Dec. 1, 2014, http://www.bloomberg.com/news/articles/2014-12-01/fed-leak-handed-traders-profitable-tip-prompted-secret-inquiry.

[6] *See* Binyamin Appelbaum, *Fed Deflects Outside Aid to Investigate Data Leaks*, N.Y. Times, June 4, 2015, http://nyti.ms/1Qv4K8k; Pedro Da Costa, *Yellen: Fed Was Advised Against Fully Complying With Subpoena on Leak Probe*, Wall St. J., June 5, 2015, http://www.wsj.com/articles/yellen-fed-advised-against-fully-complying-with-subpoena-on-leak-probe-1433523063.

interests under Article II. The Committee therefore remains committed to fulfilling its oversight responsibilities to investigate the mishandling of your respective investigations.

You have both advised that complying with the Committee's subpoena could compromise the integrity of the OIG's and/or DOJ's investigation—but it is the integrity of ***your*** previous investigations that is at issue here. Moreover, your legally baseless refusal to comply with the Committee's subpoena and records requests ***is*** compromising the integrity of this Committee's lawful investigation and oversight.

This Committee began its inquiry in February 2015, shortly after learning that confidential FOMC information had been leaked over two years prior and that both the Fed and the OIG had failed to find the source of the leak.[7] The Committee requested records related to those closed investigations.[8] The Fed failed to acknowledge or respond to the Committee's request until six weeks had passed, after repeated contact from the Committee.[9] The OIG responded on February 19, 2015, that it would not provide the requested records because "the records [the Committee] requested are in the process of being reviewed by the OIG, in coordination with the Board."[10] One month after the Committee began its investigation the OIG informed the Committee that there was now an open criminal investigation into the leak.[11] In a subsequent letter the OIG claimed it could not provide information about the new investigation to Congress due to DOJ policy regarding open criminal investigations.[12] Since then the Fed and the OIG have continually refused to comply with the Committee's requests for records. The OIG's active obstruction of the Committee's oversight efforts directly conflicts with one of Congress's principal purposes for creating Inspector Generals—to keep "Congress

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[7] *See* Torres, *supra* note 5.
[8] Letter from the Hon. Sean Duffy, Chairman, Subcmte. on Oversight & Investigations, H. Comm. on Fin. Serv., to Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Feb. 5, 2015); Letter from the Hon. Sean Duffy, Chairman, Subcmte. on Oversight & Investigations, H. Comm. on Fin. Serv., to the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System (Feb. 5, 2015).
[9] *See* Letter from the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv., to the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System (Mar. 13, 2015); Letter from the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (Mar. 23, 2015).
[10] Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Sean Duffy, Chairman, Subcmte. on Oversight & Investigations, H. Comm. on Fin. Serv. (Feb. 19, 2015).
[11] *See* Letter from the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv., to the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System (Mar. 13, 2015).
[12] Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (Mar. 27, 2015).

fully and currently informed about problems and deficiencies relating to the administration" of congressionally-created agencies.[13]

The timing of the recent criminal investigation into the leak is suspect. While the Committee is encouraged that DOJ is now investigating this matter, DOJ's involvement comes more than two years after the events in question—almost certainly making the investigation more difficult to conclude successfully. Moreover, both the Fed and the OIG had ample opportunity to provide the requested records to the Committee before the criminal investigation was reopened. Instead, following the Committee's requests for records relating to investigations that both the Fed and the OIG characterized as closed, the OIG suddenly "reopened" its case and, in concert with the Fed, advised the Committee that it would not comply with the Committee's requests due to an open criminal investigation.[14] This, of course, raises an important question: Other than this Committee's request for records, what new facts suddenly came to the OIG's attention that would warrant "reopening" a long-closed case? Based on the vigorous and coordinated obstruction to this Committee's oversight, one plausible scenario is that the OIG merely "reopened" the investigation to create a pretext for the Fed and the OIG to delay complying with this Committee's requests. That too is now the subject of the Committee's investigation.

This Committee has been clear in its position that it has an absolute right to the requested records.[15] Congress's investigative authority "is inherent in the power to make laws"[16] and is "as penetrating and far reaching as the potential power to enact and appropriate under the Constitution."[17] The Supreme Court has stated that this investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste,"[18] and authorizes Congress "to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[19] House and Senate committees have routinely obtained law enforcement materials regarding cases described by DOJ as "open" or "pending."[20] Despite the Committee's clear constitutional mandate and the

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[13] Inspector General Act of 1978, as amended, 5 U.S.C. App §2(3).
[14] Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (Mar. 27, 2015).
[15] *See* Letter from the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv., to Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Apr. 30, 2015).
[16] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).
[17] *Barenblatt v. United States,* 360 U.S. 109, 111-12 (1959).
[18] *Watkins v. United States*, 354 U.S. 178, 187 (1957).
[19] *Id.* at 200 n.33.
[20] One particularly salient instance was in 2002, during an investigation before the House Committee on Government Reform into the misuse of informants by the Federal Bureau of Investigation (FBI). *See Investigation Into Allegations of Justice Department Misconduct In New England-Volume I, Hearings Before the H. Comm. on Government Reform*, 107th Cong. (May 3,

persuasive weight of historical evidence, the OIG has claimed that it "must decline" to provide the Committee with any of the requested records, apparently invoking executive privilege over an ongoing criminal investigation as its basis for refusal.[21] At the request of the OIG, the Fed has stated that it is withholding nearly every record the Committee has subpoenaed in reliance upon the OIG's invocation of

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December 13, 2001; Feb. 6, 2002). In that investigation DOJ provided deliberative prosecutorial documents to the Committee, including prosecutorial memoranda for open cases, testimony of FBI field agents and U.S. Attorneys, FBI investigative reports, summaries of FBI interviews, and memoranda and correspondence prepared during undercover operations, among other items. Alissa Dolan et. al., Cong. Research Serv., R42811, Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice 38-39 (2012). During that investigation White House Counsel Alberto Gonzales wrote to Chairman Burton of the Committee on Government Reform conceding that it was a "misimpression" that congressional committees could never have access to deliberative documents from a criminal investigation or prosecution, stating "[t]here is no such brightline policy, nor did we intend to articulate any such policy." Letter from Alberto R. Gonzales, Counsel to the President, to the Hon. Dan Burton, Chairman, H. Government Reform Comm. (Jan. 10, 2002), at 1. Other examples abound. In 1979, the Committees on the Judiciary and Interstate and Foreign Commerce investigated allegations that the Department of Energy and DOJ failed to prosecute alleged fraudulent fuel pricing in the oil industry; in executive session, the committees received testimony and evidence regarding open cases in which indictments were pending and criminal proceedings were in progress. *See* Dolan at 23. The committees also received access to declination memoranda and a DOJ staff attorney testified in open session concerning the reasons why DOJ did not proceed with a particular prosecution. *Id.* In the 1980s, when investigating the Environmental Protection Agency's (EPA) enforcement of the "Superfund" law, an Energy and Commerce subcommittee requested and received from DOJ documents relating to on-going enforcement actions, including memoranda of EPA and DOJ attorneys containing litigation and negotiation strategy, settlement positions, and other similar materials. *See id.* at 27. During approximately the same time period, a Senate Judiciary subcommittee obtained DOJ documents relating to two ongoing investigations of alleged false shipbuilding claims against the U.S. Navy. *See* Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 Notre Dame L. Rev. 1373, 1401 (2002). Finally, in 1997, the Senate Judiciary Committee obtained a memorandum suggesting that Attorney General Reno appoint an independent counsel to investigate allegations of campaign finance violations notwithstanding DOJ's initial objection that providing the memorandum would violate "longstanding DOJ policy prohibiting disclosure of deliberative material in open criminal cases to Congress and concerns about the chilling effect such disclosures would have on Department personnel in future investigations." Dolan at 37. Moreover, even DOJ's Office of Legal Counsel has opined that "[t]he policy of confidentiality does not necessarily extend to all material contained in investigative files" and that "there may be documents in even the open . . . files that do not implicate . . . constitutional or pragmatic problems" that may be provided to Congress. Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 267 (1984).

[21] "The OIG's concerns regarding the disclosure of ongoing criminal investigative information to Congress are consistent with the law of executive privilege, as described in the DOJ Office of Legal Counsel (OLC) opinion . . ."; *see* Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015), at 1.

executive privilege.[22] The OIG's position is without legal basis and the Fed is mistaken to rely upon it.

The OIG was created by the Inspector General Act of 1978, as amended (IG Act), which states that "nothing . . . in any . . . provision of this Act shall be construed to authorize or permit the withholding of information from Congress."[23] Remarkably, the OIG has advised the Committee that this is "irrelevant" and that it is relying upon an opinion by DOJ's Office of Legal Counsel (OLC Opinion) that the OIG can invoke executive privilege as a basis for impeding this Committee's investigation.[24] Even assuming, *arguendo*, that (1) the records sought by the Committee are by their character eligible for a claim of executive privilege[25] and (2) the OLC Opinion has any legal force, the opinion explicitly states that "executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President."[26] The policy of recent administrations, including the Obama Administration, is that the privilege can only be asserted by the President at the written request of the Attorney General.[27] The OIG itself advised the Committee that the OIG has confirmed with DOJ that the OLC Opinion remains in effect.[28] However, this Committee has not received any notification of a Presidential assertion of executive privilege, nor is it aware of any memo by the Attorney General requesting that it be asserted. Thus, because the President has not asserted executive privilege over the requested records, the OIG has no legal basis to interfere with the Committee's

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[22] *See* Letter from the Hon. Janet Yellen, Chair, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (June 4, 2015).
[23] Inspector General Act of 1978, as amended, 5 U.S.C. App § 5(e)(3).
[24] Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015) (citing Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations, 13 Op. O.L.C. 77 (1989) (hereinafter "OLC Opinion")).
[25] The Supreme Court in two cases has recognized a *limited* Executive privilege, rooted in the Constitution, for Presidential communications, which is not at issue here. Deliberative process privilege, which applies to law enforcement investigations, is "a common law privilege that is 'Executive,' not because it has any constitutional basis, but only in the sense that it is asserted by the Executive" and "is substantially weaker than the already limited Presidential communications privilege." This weaker common law privilege has no application to a congressional subpoena. *See* Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 19-21, *Comm. on Oversight and Gov't Reform, United States House of Representatives v. Eric H. Holder, Jr.*, No 12-01332 (D.D.C. 2013) (No. 61).
[26] OLC Opinion at 82 n.8.
[27] *See* Letter from Mary Kendal, Deputy Inspector General, U.S. Department of the Interior, to the Hon. Doc Hastings, Chairman, H. Comm. on Natural Resources (Mar. 19, 2014) (explaining the practice by recent administrations on asserting executive privilege); Letter from Eric Holder, Attorney General, to President Barack Obama (June 19, 2012) (requesting the President assert executive privilege over documents related to Operation Fast and Furious).
[28] Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015)

subpoena to the Fed, and the Fed is mistaken to refuse compliance with the subpoena based on the OIG's claim that it is acting "consistent with the law of executive privilege."[29]

However, even if the President attempted to assert executive privilege over the requested records, the privilege does not apply to investigations into government misconduct, such as this one.[30] Courts have found that "where there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.'"[31] Consistent with this limitation, past administrations have refrained from invoking executive privilege in matters involving unethical conduct.[32] The Committee is not aware that the Obama Administration has deviated from this established practice. Regardless, executive privilege is not a trump card to evade Congressional oversight. At best it is a qualified privilege and can be overcome by a sufficient showing of need.[33] Given the public facts of the FOMC leak, the requested records are critical to this Committee's ability to ascertain whether misconduct or mismanagement at the Federal Reserve and the OIG has occurred and is continuing to occur. Accordingly, because both the Fed and the OIG have failed to state any cognizable legal basis upon which to withhold the requested records from Congress, the Committee expects full and immediate compliance with its subpoena and investigative requests.

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[29] "The OIG's concerns regarding the disclosure of ongoing criminal investigative information to Congress are consistent with the law of executive privilege, as described in the DOJ Office of Legal Counsel (OLC) opinion . . ."; *see* Letter from Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System, to the Hon. Jeb Hensarling, Chairman, H. Comm. on Fin. Serv. (May 29, 2015), at 1.

[30] *In re Sealed Case (Espy)*, 121 F.3d 729, 745-46 (D.C. Cir. 1997).

[31] *Id.*

[32] Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 36 (1982) ("These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review."); *see also* Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 315 (1984) ("[T]he privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."); Memorandum for All Executive Department and Agency General Counsel's Re: Congressional Requests to Departments and Agencies Protected By Executive Privilege, September 28, 1994, at 1 ("In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.").

[33] *Espy*, 121 F.3d 729, 745; *accord* Todd Garvey et. al., Cong. Research Serv., R42670, Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments 1 (2012).

If you have any questions regarding this request, please contact Brett Sisto of the Committee staff at (202) 225-7502.

Sincerely,

JEB HENSARLING
Chairman

SEAN DUFFY
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Maxine Waters, Ranking Member
The Honorable Al Green, Ranking Member, Subcommittee on Oversight and Investigations