

Congress's Contempt Power and the Enforcement of Congressional Subpoenas: A Sketch

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Summary

Congress's contempt power is the means by which Congress responds to certain acts that in its view obstruct the legislative process. Contempt may be used either to coerce compliance, punish the contemnor, and/or to remove the obstruction. Although arguably any action that directly obstructs the effort of Congress to exercise its constitutional powers may constitute a contempt, in recent times the contempt power has most often been employed in response to noncompliance with a duly issued congressional subpoena—whether in the form of a refusal to appear before a committee for purposes of providing testimony or a refusal to produce requested documents.

Congress has three formal methods by which it can combat noncompliance with a duly issued subpoena. Each of these methods invokes the authority of a separate branch of government. First, the long dormant inherent contempt power permits Congress to rely on its own constitutional authority to detain and imprison a contemnor until the individual complies with congressional demands. Second, the criminal contempt statute permits Congress to certify a contempt citation to the executive branch for the criminal prosecution of the contemnor. Finally, Congress may rely on the judicial branch to enforce a congressional subpoena. Under this procedure, Congress may seek a civil judgment from a federal court declaring that the individual in question is legally obligated to comply with the congressional subpoena.

A number of obstacles face Congress in any attempt to enforce a subpoena issued against an executive branch official. Although the courts have reaffirmed Congress's constitutional authority to issue and enforce subpoenas, efforts to punish an executive branch official for noncompliance with a subpoena through criminal contempt will likely prove unavailing in many, if not most, circumstances. Where the official refuses to disclose information pursuant to the President's decision that such information is protected under executive privilege, past practice suggests that the Department of Justice (DOJ) will not pursue a prosecution for criminal contempt. In addition, although it appears that Congress may be able to enforce its subpoenas through a declaratory civil action, relying on this mechanism to enforce a subpoena directed at an executive official may prove an inadequate means of protecting congressional prerogatives due to the time required to achieve a final, enforceable ruling in the case. Although subject to practical limitations, Congress retains the ability to exercise its own constitutionally based authorities to enforce a subpoena through inherent contempt.

This report examines the source of Congress's contempt power, analyzes the procedures associated with inherent contempt, criminal contempt, and the civil enforcement of subpoenas, and discusses the obstacles that face Congress in enforcing a contempt action against an executive branch official. A more fully developed and detailed version of this report, complete with sources and references, can be found at CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by (name redacted) and (name redacted).

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Introduction

Congress's contempt power is the means by which Congress responds to certain acts that in its view obstruct the legislative process. Contempt may be used either to coerce compliance, punish the contemnor, and/or to remove the obstruction.¹ Although any action that directly obstructs the effort of Congress to exercise its constitutional powers may arguably constitute a contempt,² in recent decades the contempt power has most often been employed in response to the refusal of a witness to comply with a congressional subpoena—whether in the form of a refusal to provide testimony, or a refusal to produce requested documents.³

Congress has three formal methods by which it can combat noncompliance with a duly issued subpoena.⁴ Each of these methods invokes the authority of a separate branch of government. First, the long dormant inherent contempt power permits Congress to rely on its own constitutional authority to detain and imprison a contemnor until the individual complies with congressional demands.⁵ Because the contemnor is generally released once the terms of the subpoena are met, inherent contempt serves the purposes of encouraging compliance with a congressional directive. Second, the criminal contempt statute⁶ permits Congress to certify a contempt citation to the executive branch for the criminal prosecution of the contemnor.⁷ Criminal contempt serves as punishment for noncompliance with a congressional subpoena, but does not necessarily encourage subsequent acquiescence. Once convicted, the contemnor is not excused from criminal liability if he later chooses to comply with the subpoena. Finally, Congress may rely on the judicial branch to enforce a congressional subpoena.⁸ Under this procedure, Congress may seek a civil judgment from a federal court declaring that the individual in question is legally obligated to comply with the congressional subpoena. If the court finds that the party is legally obligated to comply, continued noncompliance may result in the party being held in contempt of court. Where the target of the subpoena is an executive branch official, civil

¹ See generally, RONALD L. GOLDFARB, *THE CONTEMPT POWER* (2d ed., Anchor Books 1971).

² Compare *Jurney v. MacCracken*, 294 U.S. 125 (destruction of documentary evidence which had been subpoenaed by a committee of Congress can constitute contempt) with *Marshall v. Gordon*, 243 U.S. 521 (1917) (publication by U.S. Attorney of letter critical of Congress could not constitute contempt because it did not directly obstruct the legislative process). The *Jurney* decision also upheld the use of the inherent contempt power to punish a past contempt, even where removal of the obstruction to the legislative process was no longer possible. See *Jurney*, 294 U.S. at 147-48, 150.

³ However, in two cases, defendants entered pleas of *nolo contendere* to the statutory offense of contempt, a misdemeanor, rather than stand trial for perjury, a felony. *United States v. Helms*, Cr. No. 77-650 (D.D.C. 1977); *United States v. Kleindienst*, Cr. No. 74-256 (D.D.C. 1974); see also *Prosecution of Contempt of Congress*, Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 2684 and H.R. 3456, 98th Cong., 1st Sess., 29 (1983) (prepared statement of Stanley Brand, former Counsel to the Clerk of the House). It should also be noted that a witness who refuses to testify before a committee, or who provides a committee with false or misleading testimony, can potentially be prosecuted under other criminal provisions, including 18 U.S.C. Section 1001 (false statements), 18 U.S.C. Section 1621 (perjury), and 18 U.S.C. Section 1505 (obstruction of committee proceedings). A detailed discussion of those offenses, however, is beyond the scope of this report. See generally, JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS*, 78 (1976).

⁴ With respect to subpoenas issued against the executive branch, Congress may utilize other powers, including the imposition of funding restrictions, to coerce compliance.

⁵ See *infra* "Inherent Contempt."

⁶ 2 U.S.C. §§192, 194.

⁷ See *infra* "Statutory Criminal Contempt."

⁸ See *infra* "Civil Enforcement of Subpoenas."

enforcement may be the only practical means by which Congress can effectively ensure compliance with its own subpoena.⁹

This report examines the source of Congress's contempt power, analyzes the procedures associated with inherent contempt, criminal contempt, and the civil enforcement of subpoenas, and discusses the obstacles that face Congress in enforcing a contempt action against an executive branch official. A more fully developed and detailed version of this report, complete with sources and references, can be found at CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by (name redacted) and (name redacted).

Congress's Power to Investigate

The power of Congress to punish for contempt is inextricably related to the power of Congress to investigate.¹⁰ Generally speaking, Congress's authority to investigate and obtain information, including but not limited to confidential information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.¹¹ The broad legislative authority to seek and enforce informational demands was unequivocally established in two Supreme Court rulings arising out of the 1920s Teapot Dome scandal.

In *McGrain v. Daugherty*, which arose out of the exercise of the Senate's inherent contempt power, the Supreme Court described the power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function."¹² The Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain that which is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that

⁹ See *infra* "Implementation of a Contempt Resolution or a Civil Enforcement Action Against an Executive Branch Official."

¹⁰ See generally Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 SO. CAL. L. REV. 189 (1967).

¹¹ See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas. Several Supreme Court decisions have confirmed that fact.").

¹² 273 U.S. 135, 174-75 (1927).

the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.¹³

In *Sinclair v. United States*,¹⁴ a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts ... and shall respectfully decline to answer any questions propounded by your committee."¹⁵ The Supreme Court upheld the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."¹⁶ The Court further explained that "[i]t may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."¹⁷

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress's investigative authority. For example, in *Eastland v. United States Servicemen's Fund*, the Court explained that "[t]he scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."¹⁸ In addition, the Court in *Watkins v. United States*, described the breadth of the power of inquiry. According to the Court, Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."¹⁹ The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, that Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, the Court stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."²⁰ "[T]he first Congresses" held "inquiries dealing with suspected corruption or mismanagement by government officials"²¹ and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the Executive Branch were unduly hampered."²² Accordingly, the Court now clearly recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."²³

¹³ *Id.*

¹⁴ 279 U.S. 263 (1929).

¹⁵ *Id.* at 290.

¹⁶ *Id.* at 295.

¹⁷ *Id.*

¹⁸ 421 U.S. 491, 504, n. 15 (1975) (quoting *Barenblatt*, 360 U.S. at 111).

¹⁹ 354 U.S. 178, 187 (1957).

²⁰ *Id.*

²¹ *Id.* at 182.

²² *Id.* at 194-95.

²³ *Id.* at 200 n. 33; see also *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (noting that Congress's role under the (continued...))

Inherent Contempt

Congress's inherent contempt power is not specifically granted by the Constitution, but is considered necessary to investigate and legislate effectively. The validity of the inherent contempt power was upheld in the early Supreme Court decision *Anderson v. Dunn*²⁴ and reiterated in *McGrain v. Daugherty*.²⁵ Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned or detained in the Capitol or perhaps elsewhere.²⁶ The purpose of the imprisonment or other sanction may be either punitive²⁷ or coercive.²⁸ Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least by the House, beyond the end of a session of the Congress) until he agrees to comply. One commentator has concluded that the procedure followed by the House in the contempt citation challenged in *Anderson* is typical of that employed in the inherent contempt cases:

These traditional methods may be explained by using as an illustration *Anderson v. Dunn*.... In 1818, a Member of the House of Representatives accused Anderson, a non-Member, of trying to bribe him.... The House adopted a resolution pursuant to which the Speaker ordered the Sergeant-at-Arms to arrest Anderson and bring him before the bar of the House (to answer the charge). When Anderson appeared, the Speaker informed him why he had been brought before the House and asked if he had any requests for assistance in answering the charge. Anderson stated his requests, and the House granted him counsel, compulsory process for defense witnesses, and a copy, of the accusatory letter. Anderson called his witnesses; the House heard and questioned them and him. It then passed a resolution finding him guilty of contempt and directing the Speaker to reprimand him and then to discharge him from custody. The pattern was thereby established of attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges, identification of the accuser, compulsory process, counsel, and a hearing; determination of guilt; imposition of penalty.²⁹

When a witness is cited for contempt under the inherent contempt process, prompt judicial review appears to be available by means of a petition for a writ of habeas corpus.³⁰ In such a habeas proceeding, the issues decided by the court might be limited to (a) whether the House or Senate

(...continued)

Independent Counsel Act "of receiving reports or other information and oversight of the independent counsel's activities ... [are] functions we have recognized as being incidental to the legislative function of Congress") (citing *McGrain*, 273 U.S. at 174.

²⁴ 19 U.S. (6 Wheat) 204 (1821).

²⁵ 273 U.S. 135 (1927).

²⁶ Given Congress's plenary power over the District of Columbia, the contemnor could potentially be detained or jailed in a D.C. Metropolitan Police Department facility. See Art. I §8 ("The Congress shall have Power ... To exercise exclusive legislation in all Cases whatsoever, over such District ... as may ... become the Seat of the Government of the United States.").

²⁷ *Jurney*, 294 U.S. at 147.

²⁸ *McGrain*, 273 U.S. at 161.

²⁹ Thomas L. Shriner Jr., *Legislative Contempt and Due Process: The Groppi Cases*, 46 IND. L. J. 480, 490-91 (1971).

³⁰ See *Marshall v. Gordon*, 243 U.S. 521 (1917); see also *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970); Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt*, 31 GEO. WASH. L. REV. 399, 400, n.3 (1962).

acted in a manner within its jurisdiction,³¹ and (b) whether the contempt proceedings complied with minimum due process standards.³² While Congress would not have to afford a contemnor the whole panoply of procedural rights available to a defendant in criminal proceedings, notice and an opportunity to be heard would have to be granted.³³ Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee's investigation) might be mandated by the due process clause in the case of inherent contempt proceedings.

Although many of the inherent contempt precedents have involved incarceration of the contemnor, there may be an argument for the imposition of monetary fines as an alternative. Such a fine would potentially have the advantage of avoiding a court proceeding on habeas corpus grounds, as the contemnor would never be jailed or detained. Drawing on the analogous inherent authority that courts have to impose fines for contemptuous behavior,³⁴ it appears possible to argue that Congress, in its exercise of a similar inherent function, could impose fines as opposed to incarceration. Support for this argument appears to be contained in *dicta* from the 1821 Supreme Court decision in *Anderson*. The Court questioned the "extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self preservation" and responded with the following:

Analogy, and the nature of the case, furnish the answer—"the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought *to extend to other inflictions*. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious.³⁵

Moreover, in *Kilbourn v. Thompson*, the Court suggested that in certain cases where the Congress had authority to investigate, it may compel testimony in the same manner and by use of the same means as a court of justice in like cases. Specifically, the Court noted that "[w]hether the power of punishment in either House *by fine or imprisonment* goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire...."³⁶ While the language of these cases and the analogous power possessed by courts seem to suggest the possibility of levying a fine as punishment for contempt of Congress, we are not aware of, and could not locate, any precedent for Congress imposing a fine in the contempt or any other context.

In comparison with the other types of contempt proceedings, inherent contempt has the distinction of not requiring the cooperation or assistance of either the executive or judicial branches. The House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt. Furthermore, although the contemnor can seek judicial review by means of a petition for a writ of habeas corpus, the scope of such review may be relatively limited,

³¹ *Jurney*, 294 U.S. at 147; *see also* *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880); *Ex Parte Nugent*, 18 F. 471 (D.D.C. 1848).

³² *Groppi v. Leslie*, 404 U.S. 496 (1972).

³³ *Id.*

³⁴ *See, e.g.,* *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding a \$700,000 fine against a labor union as punishment for disobedience of a preliminary injunction preventing it from continuing a worker strike and approving the imposition of a \$2.8 million fine if the union did not end the strike within five days).

³⁵ *Anderson*, 19 U.S. (6 Wheat.) at 230-31 (1821) (emphasis added).

³⁶ *Kilbourn*, 103 U.S. at 190 (emphasis added).

compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

There are, however, certain limitations of the inherent contempt process. Although the contemnor can be incarcerated until he agrees to comply with the subpoena, imprisonment may not extend beyond the end of the current session of Congress.³⁷ Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload, which would be interrupted by a trial at the bar.³⁸ Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.³⁹ Proceedings under the inherent contempt power might be facilitated, however, if the initial fact-finding and examination of witnesses were to be held before a special committee—which could be directed to submit findings and recommendations to the full body—with only the final decision as to guilt being made by the full House or Senate. Although generally the proceedings in inherent contempt cases appear to have been conducted at the bar of the house of Congress involved,⁴⁰ in at least a few instances proceedings were conducted initially or primarily before a committee, but with the final decision as to whether to hold the person in contempt being made by the full body.⁴¹

Statutory Criminal Contempt

Between 1795 and 1857, 14 inherent contempt actions were initiated by the House and Senate, 8 of which can be considered successful in that the contemnor was meted out punishment, agreed to testify, or produced documents. Such inherent contempt proceedings, however, involved a trial at the bar of the chamber concerned and, therefore, were seen by some as time-consuming, cumbersome, and in some instances ineffective—because punishment could not be extended beyond a house’s adjournment date.⁴² In 1857, a statutory criminal contempt procedure was enacted,⁴³ largely as a result of a particular proceeding brought in the House of Representatives that year. The statute provides for judicial trial of the contemnor by a United States Attorney rather than a trial at the bar of the House or Senate. It is clear from the floor debates and the subsequent practice of both houses that the legislation was intended as an *alternative* to the inherent contempt procedure, not as a substitute for it. A criminal contempt referral was made in the case of John W. Wolcott in 1858, but in the ensuing two decades after its enactment most

³⁷ *Watkins*, 354 U.S. at 207, n.45; *Anderson*, 19 U.S. (6 Wheat.) at 231.

³⁸ See S.Rept. 95-170, 95th Cong., 1st Sess., 97 (1977); see also Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 255 n. 71 (1978).

³⁹ 4 DESCHLER’S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, §17, 139 n.7 (1977) (hereinafter Deschler’s Precedents).

⁴⁰ See CARL BECK, *CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1957* 4 (1959) (hereinafter Beck); ERNEST J. EBERLING, *CONGRESSIONAL INVESTIGATIONS* 289 (1928) (hereinafter Eberling).

⁴¹ For example, in 1865, the House appointed a select committee to inquire into an alleged breach of privilege committed by Mr. A.P. Field for assaulting a Member of the House. 72 CONG. GLOBE, 38th Cong., 2d Sess., 371 (1865). After taking testimony, the committee recommended, and the House adopted, a resolution directing the Speaker to reprimand Field at the bar of the House. *Id.* at 971, 974.

⁴² See Eberling, *supra* note 40, at 302-16.

⁴³ Act of January 24, 1857, c. 19 §3, 11 Stat. 156 (1857) (codified as amended at 2 U.S.C. §§192, 194 (2000)). The constitutionality of the statute was upheld by the Supreme Court in 1897. See *In re Chapman*, 166 U.S. 661 (1897).

contempt proceedings continued to be handled at the bar of the house, rather than by the criminal contempt method, apparently because Members felt that they would not be able to obtain the desired information from the witness after the criminal proceedings had been instituted.⁴⁴ With only minor amendments, those statutory provisions are codified today as 2 U.S.C. Sections 192 and 194.

Under 2 U.S.C. Section 192, a person who has been “summoned as a witness” by either house or a committee thereof to testify or to produce documents and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to \$100,000 and imprisonment for up to one year. 2 U.S.C. Section 194 establishes the procedure to be followed by the House or Senate if it chooses to refer a recalcitrant witness to the courts for criminal prosecution rather than try him at the bar of the House or Senate. Under the procedure outlined in Section 194,⁴⁵

the following steps precede judicial proceedings under [the statute]: (1) approval by committee;⁴⁶ (2) calling up and reading the committee report on the floor; (3) either (if Congress is in session) House approval of a resolution authorizing the Speaker to certify the report to the U.S. Attorney for prosecution, or (if Congress is not in session) an independent determination by the Speaker to certify the report;⁴⁷ [and] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.⁴⁸

The criminal contempt statute and corresponding procedure are punitive in nature. It is used when the House or Senate wants to punish a recalcitrant witness and, by doing so, deter others from similar contumacious conduct.⁴⁹ The criminal sanction is not coercive because the witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or Senate. Consequently, once a witness has been voted in contempt, he lacks an incentive for cooperating with the committee. However, although the courts have rejected arguments that defendants had purged themselves,⁵⁰ in a few instances the House has certified to the U.S. Attorney that further proceedings

⁴⁴ Beck, *supra* note 40 at 191-214. In the appendix to Beck’s study, he provides a comprehensive list of persons from 1793-1943 who were held in contempt of Congress, and the circumstances surrounding their cases. A review of Beck’s chronology indicates that from 1857-1934 Congress relied on its inherent contempt power almost exclusively, despite the availability of the criminal statute. *See id.* Moreover, Beck’s detailed history indicates that in at least 28 instances, witnesses who were either threatened with, or actually charged with, contempt of Congress purged their citations by either testifying or providing documents to the inquiring congressional committees. *See id.*

⁴⁵ The language of Section 194 does not provide a complete picture of the process. For a more detailed explanation of the workings of the procedure, reference should be made to the actual practice in the House and Senate. *See* 4 Deschler’s Precedents, *supra* note 39, at §§17-22.

⁴⁶ In case of a defiance of a subcommittee subpoena, subcommittee approval of the contempt citation precedes committee action on the matter.

⁴⁷ *See Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966).

⁴⁸ 4 Deschler’s Precedents, *supra* note 39, at p. 141. While the quoted description is from the compilation of House precedents, the same procedure is employed in the Senate, but with the President of the Senate performing the functions that are the responsibility of the Speaker in cases of contempt of the House.

⁴⁹ *See, e.g., S.Rept. 95-170*, 95th Cong., 1st Sess., 97 (1977).

⁵⁰ *United States v. Costello*, 198 F.2d 200 (2d Cir. 1952), *cert. denied*, 344 U.S. 874 (1952); *United States v. Brewster*, 154 F. Supp. 126 (D.D.C. 1957), *rev’d on other grounds*, 255 F.2d 899 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 842 (1958). However, the defendant’s sentence may be suspended where he complies with the committee’s demand following his conviction. *See United States v. Tobin*, 195 F. Supp. 588, 617 (D.D.C. 1961).

concerning contempts were not necessary where compliance with subpoenas occurred after contempt citations had been voted but before referral of the cases to grand juries.⁵¹

Under the statute, after a contempt has been certified by the President of the Senate or the Speaker, it is the “duty” of the U.S. Attorney “to bring the matter before the grand jury for its action.”⁵² It remains unclear whether the “duty” of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary. The case law that is most relevant to the question provides conflicting guidance. In *Ex parte Frankfeld*,⁵³ the District Court for the District of Columbia granted petitions for writs of habeas corpus sought by two witnesses before the House Committee on Un-American Activities. The witnesses were charged with violating 2 U.S.C. Section 192, and were being held on a warrant based on the affidavit of a committee staff member.⁵⁴ The court ordered the witnesses released since the procedure, described as “mandatory” by the court,⁵⁵ had not been followed. The court, in *dicta*, not central to the holding of the case, observed that Congress prescribed that

when a committee such as this was confronted with an obdurate witness, a willful witness, perhaps, the committee would report the fact to the House, if it be a House committee, or to the Senate, if it be a Senate committee, and that the Speaker of the House or the President of the Senate should then certify the facts to the district attorney.

It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and *it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.*⁵⁶

Similarly, in *United States v. United States House of Representatives*,⁵⁷ a case that involved the applicability of the Section 192 contempt procedure to an executive branch official, the same district court observed, again in *dicta*, that after the contempt citation is delivered to the U.S. Attorney, he “is then required to bring the matter before the grand jury.”⁵⁸

Conversely, in *Wilson v. United States*,⁵⁹ the U.S. Court of Appeals for the District of Columbia Circuit concluded, based in part on the legislative history of the contempt statute and congressional practice under the law, that the “duty” of the Speaker when certifying contempt

⁵¹ See 4 Deschler's Precedents, *supra* note 39, ch. 15, 521 (witness before the House Committee on Un-American Activities voluntarily purged himself of his contempt); see also H.Res. 180, 98th Cong. (resolution stating that prosecution of Anne Gorsuch Burford, Administrator of the Environmental Protection Agency, was not required following implementation of an agreement granting the House access to documents which had been withheld under a claim of executive privilege).

⁵² 2 U.S.C. §194 (2000).

⁵³ 32 F.Supp 915 (D.D.C. 1940).

⁵⁴ *Id.* at 916.

⁵⁵ *Id.*

⁵⁶ *Id.* (emphasis added).

⁵⁷ *United States v. United States House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

⁵⁸ *But see* *Ansara v. Eastland*, 442 F.2d 751, 754, n.6 (D.C. Cir. 1971) (suggesting that “the Executive Branch ... may decide not to present ... [a contempt citation] to the grand jury ...”). The court in *Ansara* did not expressly consider the nature of the prosecutor's duty under 2 U.S.C. Section 194, nor did it provide any basis for its statement to the effect that the prosecutor may exercise discretion in determining whether to seek an indictment.

⁵⁹ 369 F.2d 198 (D.C. Cir. 1966).

citations to the U.S. Attorney during adjournments is a discretionary, not a mandatory, one.⁶⁰ The court reasoned that despite its mandatory language, the statute had been implemented in a manner that made clear Congress's view that, when it is in session, a committee's contempt resolution can be referred to the U.S. Attorney only after approval by the parent body. When Congress is not in session, review of a committee's contempt citation is provided by the Speaker or President of the Senate, rather than by the full House or Senate.⁶¹ This review of a committee's contempt citation, according to the court, may be inherently discretionary in nature.⁶² In *Wilson*, the defendants' convictions were reversed because the Speaker had certified the contempt citations without exercising his discretion.⁶³ From this holding it may be possible to argue that because the statute uses similar language when discussing the Speaker's "duty" and the "duty" of the U.S. Attorney, that the U.S. Attorney's function is discretionary as well, and not mandatory as other courts have concluded.

Nevertheless, it should be noted that the courts have generally afforded U.S. Attorneys broad prosecutorial discretion, even where a statute uses mandatory language.⁶⁴

Civil Enforcement of Subpoenas

Where the use of inherent or criminal contempt is unavailable or unwarranted, Congress may appeal to the authority of the judicial branch in an effort to enforce a congressional subpoena. Civil enforcement entails a single house or committee of Congress filing suit in federal district court seeking a declaration that the individual in question is legally obligated to comply with the congressional subpoena.⁶⁵ If the court finds that such an obligation exists and issues an order to that effect, continued noncompliance may result in contempt of court—as opposed to contempt of Congress.⁶⁶ Although the Senate has existing statutory authority to pursue such an action, there is

⁶⁰ *Id.* at 201-03.

⁶¹ *Id.* at 203-04.

⁶² *See id.*

⁶³ *Id.* at 205.

⁶⁴ *See* Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868); *see also* United States v. Nixon, 418 U.S. 683, 694 (1974); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 376 (2d Cir. 1973); *Moses v. Kennedy*, 219 F. Supp. 762, 765 (D.D.C. 1963), *aff'd sub. nom.*, *Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). Prosecutorial discretion was the principal basis of the decision of the U.S. Attorney not to present to the grand jury the contempt citations of Environmental Protection Agency Administrator Anne Gorsuch Burford in 1982, former White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten in 2008, and Attorney General Eric Holder in 2012. *See* Letter from U.S. Attorney Stanley Harris to Speaker Thomas P. O'Neill, December 27, 1982, *reprinted in*, H.Rept. 98-323, 98th Cong., 1st Sess., 48-49 (1983); Letter from Attorney General Michael B. Mukasey to Speaker of the House Nancy Pelosi, February 29, 2008; Letter from Deputy Attorney General James M. Cole to Speaker of the House John Boehner, June 28, 2012. Of course, as a practical matter, even if the U.S. Attorney is required to refer a contempt under 2 U.S.C. Sections 192, 194 to the grand jury, there is no apparent requirement that the U.S. Attorney concur in the prosecution of any subsequent indictment. *See* FED. R. CRIM. PRO. 7(c); *see also* United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

⁶⁵ *See, e.g.*, 2 U.S.C. §288d ("When directed ... the counsel shall bring a civil action ... to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate.").

⁶⁶ As the statute makes clear, a party refusing to obey the court's order will be in contempt of the court, not of Congress itself. 28 U.S.C. §1364(b).

no corresponding provision applicable to the House.⁶⁷ However, the House has previously pursued civil enforcement pursuant to an authorizing resolution.⁶⁸

Civil Enforcement in the Senate

As an alternative to both the inherent contempt power of each house and the criminal contempt statutes,⁶⁹ in 1978 Congress enacted a civil enforcement procedure,⁷⁰ which is applicable only to the Senate.⁷¹ The statute gives the U.S. District Court for the District of Columbia jurisdiction over a civil action to enforce, secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or subcommittee. Generally such a suit will be brought by the Senate Legal Counsel, on behalf of the Senate or a Senate committee or subcommittee.⁷²

Pursuant to the statute, the Senate may “ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court.”⁷³ It is solely within the discretion of the Senate whether or not to use such a two-step enforcement process.⁷⁴

Regardless of whether the Senate seeks the enforcement of, or a declaratory judgment concerning a subpoena, the court will first review the subpoena’s validity.⁷⁵ Because of the limited scope of the jurisdictional statute and the Speech or Debate Clause immunity for actions taken as part of congressional investigations,⁷⁶ “when the court is petitioned solely to enforce a congressional subpoena, the court’s jurisdiction is limited to the matter Congress brings before it, that is

⁶⁷ 2 U.S.C. §§288b(b), 288d, and 1365.

⁶⁸ See *infra* “Civil Enforcement in the House of Representatives.”

⁶⁹ The inadequacies of the inherent and criminal contempt procedures have been recognized by the Congress itself, the courts, and by students of the subject. See, e.g., *Representation of Congress and Congressional Interests In Court*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 94th Cong, 2d Sess., 556-68 (1976); Fort, 443 F.2d at 677-78; *Tobin v. United States*, 306 F.2d 270, 275-76 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Sky, *supra* note 30.

⁷⁰ Ethics in Government Act of 1978, P.L. 95-521, §§703, 705, 92 Stat. 1877-80 (1978) (codified as amended at 2 U.S.C. §§288b(b) 288d, and 28 U.S.C. §1365 (2000)).

⁷¹ The conference report accompanying the legislation which established the procedure explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H.Rept. 95-1756, 95th Cong., 2d Sess., 80 (1978).

⁷² Although the Senate or the committee may be represented by any attorney designated by the Senate, in most cases such an action will be brought by the Senate Legal Counsel after an authorizing resolution has been adopted by the Senate. 2 U.S.C. §288b(b); see 28 U.S.C. §1364(d). A resolution directing the Senate Legal Counsel to bring an action to enforce a committee or subcommittee subpoena must be reported by a majority of the members voting, a majority being present, of the full committee. The report filed by the committee must contain a statement of (a) the procedure employed in issuing the subpoena; (b) any privileges or objections raised by the recipient of the subpoena; (c) the extent to which the party has already complied with the subpoena; and (d) the comparative effectiveness of the criminal and civil statutory contempt procedures and a trial at the bar of the Senate. 2 U.S.C. §288(c).

⁷³ S.Rept. 95-170, 95th Cong., 1st Sess., 89 (1977).

⁷⁴ *Id.* at 90.

⁷⁵ *Id.* at 4.

⁷⁶ See U.S. CONST. Art. 1, §6, cl. 3. For more information about the Speech or Debate Clause, see CRS Report R42648, *The Speech or Debate Clause: Constitutional Background and Recent Developments*, by (name redacted) and (name redacted).

whether or not to aid Congress in enforcing the subpoena.”⁷⁷ Even if the court finds that the subpoena “does not meet applicable legal standards for enforcement,” it does not have jurisdiction to enjoin the congressional proceeding. The court can only refuse to issue an order instructing compliance with the subpoena. However, if the court does order compliance with the subpoena and the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court,⁷⁸ with sanctions being imposed to coerce his compliance.⁷⁹

Civil enforcement, however, has limitations. Most notable is that the statute granting jurisdiction to the courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to an officer or employee of the federal government acting in their official capacity.⁸⁰

Civil Enforcement in the House of Representatives

While the House of Representatives cannot pursue actions under the Senate’s civil enforcement statute discussed above, past precedent suggests that the House may authorize a committee to seek a civil enforcement action to force compliance with a subpoena.⁸¹ The 2008 dispute over the refusal of former White House Counsel Harriet Miers to testify in connection to a House Judiciary Committee investigation into the resignations of nine U.S. Attorneys represented the

⁷⁷ S.Rept. 95-170, 95th Cong., 1st Sess., 94 (1977).

⁷⁸ See S.Rept. 95-170, 95th Cong., 1st Sess., 41, 92. It is also worth noting that the Senate has in place a standing order, adopted in 1928, that appears to provide the authority, independent of the civil enforcement statute, for a committee to seek a court order to enforce its subpoenas. The standing order states that

Resolved, That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law. Such suit may be brought and prosecuted to final determination irrespective of whether or not the Senate is in session at the time the suit is brought or thereafter. The committee may be represented in the suit either by such attorneys as it may designate or by such officers of the Department of Justice as the Attorney General may designate upon the request of the committee. No expenditures shall be made in connection with any such suit in excess of the amount of funds available to the said committee. As used in this resolution, the term “committee” means any standing or special committee of the Senate, or any duly authorized subcommittee thereof, or the Senate members of any joint committee.

See S. Jour. 572, 70-1, May 28, 1928. It is unclear what effect, if any, the passage of the civil enforcement procedure in 1978 has had on this Standing Order. The Standing Order appears to have never been invoked and, therefore, its validity remains an open question.

⁷⁹ 28 U.S.C. §1364(b).

⁸⁰ 28 U.S.C. §1364(a). The statutory exception was explained in the Senate’s Report as follows:

This jurisdictional statute applies to a subpoena directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal Government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the executive branch. (See S. 2170, “The Congressional Right to Information Act”). This exception in the statute is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government. However, if the federal courts do not now have this authority, this statute does not confer it.

S.Rept. 95-170, 95th Cong., 1st Sess., 91-92.

⁸¹ 558 F. Supp. 2d 53 (D.D.C. 2008).

first congressional attempt to seek civil enforcement of a subpoena in federal court authorized solely by resolution of a single house. Prior to this case, a number of threshold questions, including whether the federal courts would have jurisdiction over such a claim, remained unresolved. However, following the federal district court decision in *Committee on the Judiciary v. Miers*, it appears that the current statutory basis is sufficient to establish jurisdiction for a civil action of the type contemplated if the representative of the congressional committee is specifically authorized by a house of Congress to act.

In 2012, the House again authorized a congressional committee to pursue a civil action in federal court to enforce a subpoena issued to an executive branch official. On June 28, 2012, in addition to holding Attorney General Eric Holder in contempt of Congress for his failure to comply fully with subpoenas issued pursuant to the House Oversight and Government Reform Committee investigation of Operation Fast and Furious, the House also approved a resolution authorizing the committee to initiate a civil lawsuit on behalf of the committee to enforce the outstanding subpoenas.⁸² The lawsuit, which seeks a declaratory judgment directing the Attorney General to comply with the committee subpoenas, was filed on August 13, 2012.⁸³ On September 30, 2013, the court issued its opinion rejecting the Department of Justice's (DOJ's) motion to dismiss based on jurisdictional and justiciability arguments.⁸⁴ The court largely adopted the reasoning laid out in *Miers*, in a detailed discussion that addressed federal court jurisdiction, standing, causes of action, and separation-of-powers concerns. Since that decision, the court has denied motions for summary judgment from both parties and ordered the DOJ to provide the court with a list of documents withheld that describes why each document is privileged and protected from disclosure.⁸⁵ The court has yet to reach the merits of the executive privilege question.

Following *Miers* and *Holder*, it appears that all that is legally required for House committees, the House General Counsel, or a House-retained private counsel to seek civil enforcement of subpoenas or other orders is that authorization be granted by resolution of the full House.⁸⁶ Absent such authorization, it appears that the courts will not entertain civil motions of any kind on behalf of Congress or its committees.⁸⁷ While some may still argue that a measure passed by both houses and signed by the President conferring jurisdiction is required, it appears that—at least with respect to claims filed in the U.S. District Court for the District of Columbia—if an authorizing resolution by the House can be obtained, there is a likelihood that the court will find no legal impediment to seeking civil enforcement of subpoenas or other committee orders.⁸⁸

⁸² See H.Res. 711, 112th Cong. (2012) (holding Attorney General Holder in contempt of Congress); H.Res. 706, 112th Cong. (2012) (authorizing Chairman Issa to initiate judicial proceeding to enforce the committee subpoena).

⁸³ Complaint, Committee on Oversight and Government Reform v. Holder, No. 1:12-cv-1332 (D.D.C. August 13, 2012), available at <http://images.politico.com/global/2012/08/housevholdercomp.pdf>.

⁸⁴ Comm. on Oversight and Gov't Reform, U.S. House of Representatives v. Holder, 2013 U.S. Dist. LEXIS 140994 (D.D.C. 2013) available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1332-52.

⁸⁵ For a discussion of the district court's order and its relevance to the distinctions drawn in *Espy* between the deliberative process privilege and the presidential communications privilege, see CRS Report WSLG1109, *Three Parties, Two Cases, One Set of Documents; Not a Fast and Furious Resolution*, by (name redacted) and (name redacted).

⁸⁶ Although *Miers* was the first judicial opinion discussing the merits of federal court jurisdiction over a civil suit to enforce a subpoena, it should be noted that its precedential value is limited to that which is traditionally accorded a district court decision.

⁸⁷ The absence of a House Resolution may also raise questions about whether the plaintiffs have standing to sue. For more information, see CRS Report R42454, *Congressional Participation in Article III Courts: Standing to Sue*, by (name redacted) and (name redacted).

⁸⁸ Relatedly, the Department of Justice (DOJ) has, on numerous occasions, including most recently in 1996, suggested (continued...)

Implementation of a Contempt Resolution or a Civil Enforcement Action Against an Executive Branch Official

Although the DOJ appears to have acknowledged that properly authorized procedures for seeking civil enforcement provide the preferred method of enforcing a subpoena directed against an executive official,⁸⁹ the executive branch has consistently taken the position that Congress cannot, as a matter of statutory or constitutional law, invoke either its inherent contempt authority or the criminal contempt of Congress procedures⁹⁰ against an executive branch official acting on instructions by the President to assert executive privilege in response to a congressional subpoena. Under such circumstances, the Attorney General has previously directed the U.S. Attorney to refrain from pursuing a criminal contempt prosecution under 2 U.S.C. Sections 192, 194.⁹¹ This view is most fully articulated in two opinions by the DOJ's Office of Legal Counsel (OLC) from the mid-1980s,⁹² and further evidenced by actions taken by the DOJ in the contempt proceedings against Environmental Protection Agency Administrator Anne Gorsuch Burford, former White House Counsel Harriet Miers, White House Chief of Staff Josh Bolten, and Attorney General Eric Holder.⁹³ In each case the House approved a contempt citation against the

(...continued)

that committees of Congress resolve inter-branch disputes involving the enforcement of subpoenas by civil proceeding in federal court. *See, e.g.,* H.Rept. 104-598, 104th Cong., 2d Sess., 63 (1996) (additional views of Hon. William F. Clinger Jr.) (stating that "I am astonished at hearing this recommendation by a Democrat President when the contemnor is a Democrat after knowing that the concept of a civil remedy has been so resoundingly rejected by previous Democrat Congresses when the contemnor was a Republican."); 10 Op. O.L.C., 68, 87-89 (1986) (suggesting that "the courts may be willing to entertain a civil suit brought by the House to avoid any question about the possible applicability of the criminal contempt provisions of [2 U.S.C.] §§192 and 194."); 8 Op. O.L.C., 101, 139, n.40 (1984) (stating that "[t]he use of criminal contempt is especially inappropriate ... because Congress has the clearly available alternative of civil enforcement proceedings.").

⁸⁹ *See Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101 (1984) (hereinafter Olson Memo) ("Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena."); *see also Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68 (1986) (hereinafter Cooper Memo) ("although the civil enforcement route has not been tried by the House, it would appear to be viable option."); *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 76 (D.D.C. July 31, 2008) ("OLC rather emphatically concluded that a civil action would be the least controversial way for Congress to vindicate its investigative authority."). The DOJ may, however, continue to argue that the federal courts lack jurisdiction to hear a civil enforcement case when the suit is authorized solely by a House resolution.

⁹⁰ 2 U.S.C. §§192, 194.

⁹¹ *Miers*, 558 F. Supp. 2d at 64 ("The Attorney General then directed the U.S. Attorney not to proceed against Ms. Miers and Mr. Bolten.").

⁹² *See* Olson Memo, *supra* note 89; Cooper Memo, *supra* note 89.

⁹³ *See, e.g.,* Memorandum for the Counsel to the President, Fred F. Fielding, from Stephen G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Immunity of Former Counsel to the President from Compelled Congressional Testimony*, July 10, 2007; Letter to George T. Manning, Counsel for Ms. Harriet Miers, from Fred F. Fielding, Counsel to the President, July 10, 2007 (directing Ms. Miers not to appear before the House Judiciary Committee in response to a subpoena); Letter to House Judiciary Committee Chairman John Conyers Jr. from George T. Manning, Counsel for Ms. Harriet Miers, July 17, 2007 (explaining legal basis for Ms. Miers's refusal to appear); Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012 (alerting the Speaker that President Obama asserted executive privilege over a subset of subpoenaed documents).

official and forwarded the citation on to the U.S. Attorney, only to see the DOJ decline to bring a prosecution for criminal contempt.⁹⁴ As a result, when an executive branch official is invoking executive privilege at the behest of the President, the criminal contempt provision may prove ineffective, forcing Congress to rely on other avenues to enforce subpoenas, including civil enforcement through the federal courts.

The 2014 controversy surrounding former Internal Revenue Service (IRS) official Lois Lerner may suggest that the executive branch has broadened its position on the use of criminal contempt against an executive official. In that case, the House held Ms. Lerner in contempt, passing a criminal contempt citation after she refused to provide testimony relating to her role in the allegations that the IRS targeted politically active conservative groups for increased scrutiny in assessing applications for tax exempt status.⁹⁵ Appearing before the House Committee on Oversight and Government Reform, Lerner invoked the Fifth Amendment privilege against self-incrimination as the basis for her refusal to testify. The committee rejected her assertion, concluding that she had waived her Fifth Amendment privilege by voluntarily making an opening statement in which she declared her innocence.⁹⁶ Although the House approved the contempt citation, the DOJ has remained silent and has taken no action to pursue a criminal case against Lerner.

As noted, the DOJ's past refusals to prosecute for contempt of Congress have involved situations in which the executive branch official refused to comply with a subpoena on the grounds that the documents or testimony sought were protected by executive privilege. Unlike these past controversies, the dispute surrounding Ms. Lerner did not involve executive privilege or *institutional* interests in the confidentiality of executive branch communications. Rather, Lerner's justification for noncompliance with the committee subpoena relates to her *personal* constitutional privilege against self-incrimination under the Fifth Amendment.⁹⁷ As such, the DOJ's exercise of prosecutorial discretion in apparently declining to pursue a criminal contempt of Congress charge against executive branch officials would appear to extend beyond those situations in which the official is asserting executive privilege.

The lessons to be gleaned from the Burford, Miers, Holder, and Lerner disputes appear to be twofold. First, Congress faces a number of obstacles in any attempt to enforce a subpoena issued against an executive branch official through the criminal contempt statute. Although the courts have reaffirmed Congress's constitutional authority to issue and enforce subpoenas,⁹⁸ efforts to punish an executive branch official for noncompliance with a subpoena through criminal contempt will likely prove unavailing in many, if not most circumstances. Where the President directs or endorses the noncompliance of the official, such as where the official refuses to disclose information pursuant to the President's decision to assert executive privilege, past practice suggests that the DOJ will not pursue a prosecution for criminal contempt. The U.S. Attorney would likely rely on prosecutorial discretion as grounds for not forwarding the contempt

⁹⁴ These contempt actions are discussed in greater detail in CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by (name redacted) and (name redacted).

⁹⁵ H.Res. 574, 113th Cong. (2014).

⁹⁶ For details on the Lerner contempt, see H.Rept. 113-415 (2014).

⁹⁷ See CRS Report WSLG883, *Prosecutorial Discretion and the Lerner Contempt*, by (name redacted) and (name redacted).

⁹⁸ Such subpoenas are still subject to valid claims of executive privilege and other constitutional imitations.

citation to the grand jury pursuant to 2 U.S.C. Section 194.⁹⁹ In other scenarios, however, where the conduct of the executive branch official giving rise to the contempt citation was not endorsed by the President, for example where an official disregards a congressional subpoena to protect personal rather than institutional interests, the criminal contempt provision may remain an effective avenue for punishing executive officials. Even in these situations, however, the executive branch may choose not to prosecute the official, either because the executive branch views the contempt citation as without merit or to avoid establishing a precedent for Congress's authority to use the criminal contempt statute to punish an executive branch officer.¹⁰⁰

Second, although it appears that Congress may be able to enforce its own subpoenas through a declaratory civil action, relying on this mechanism to enforce a subpoena directed at an executive official may prove an inadequate means of protecting congressional prerogatives due to the time required to achieve a final, enforceable ruling in the case.¹⁰¹ This shortcoming was apparent in the *Miers* case, where the committee received a favorable decision from the district court, but was unable to enforce that decision prior to the expiration of the 110th Congress and the conclusion of the Bush Administration.¹⁰² Given the precedential importance of any civil action to enforce a congressional subpoena, the resulting litigation would likely include a protracted appeals process. The *Miers* litigation, which never reached a decision on the merits by the D.C. Circuit, was dismissed at the request of the parties after approximately 19 months.¹⁰³ Although the committee gained access to much of the information the Bush Administration had refused to disclose, the change in administrations and the passage of time could be said to have diminished the committee's ability to utilize the provided information to engage in effective oversight.

In light of these practical realities, in many situations Congress likely will not be able to rely on the executive branch to effectively enforce subpoenas directed at executive branch officials, nor will reliance on the civil enforcement of subpoenas through the judicial branch always result in a prompt resolution of the dispute. Although subject to practical limitations, Congress retains the ability to exercise its own constitutionally based authorities to enforce a subpoena through inherent contempt.¹⁰⁴

⁹⁹ See *supra* pages 8-9.

¹⁰⁰ The OLC opinions previously discussed only challenged the application of the criminal contempt statute in cases in which the executive branch official in question has asserted a claim of executive privilege. See Olson Memo, *supra* note 89.

¹⁰¹ It should also be repeated that the Senate civil enforcement statute, by its own terms, is inapplicable in the case of a subpoena issued to an officer or employee of the federal government acting in their official capacity. 28 U.S.C. §1364(a).

¹⁰² At least one commentator has suggested that reliance on the courts to enforce congressional subpoenas has diminished Congress's constitutional standing. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 741 (2012) ("It seems literally unimaginable to the [*Miers*] court that the executive branch might resist a court order as readily as it would resist an order from the House. And the House, in choosing to invoke the court's authority rather than its own, played right into this perception. It reinforced the idea that the judiciary is the domain of reasoned, principled judgments that must be respected, while congressional action in defense of its powers is 'unseemly.'").

¹⁰³ However, if a lawsuit were brought early in a Congress, the reviewing court was willing to expedite the case, and discretionary appeals were denied civil enforcement of a subpoena could be achieved promptly.

¹⁰⁴ The district court in *Miers* warned against the risks of employing inherent contempt. 558 F. Supp. 2d, at 78 ("Exercise of Congress's inherent contempt power through arrest and confinement of a senior executive official would provoke an unseemly constitutional confrontation that should be avoided."). In addition, even where either contempt or civil enforcement proceedings prove unavailing, Congress may utilize other powers, including, for example, the imposition of funding restrictions, to effectuate compliance by executive branch officials.

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