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IN FOCUS

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Contempt Actions in the 118th Congress

During the 118th Congress, the House of Representatives and the Senate both undertook actions related to contempt of Congress. The Senate referred a witness to the Department of Justice (DOJ) for contempt of Congress and instituted a civil action seeking to compel his testimony. The House voted to refer one executive branch officer to DOJ for criminal contempt, and various House committees passed resolutions recommending that the House vote on contempt actions for three individuals; the full House took up none of the actions.

On September 19, 2024, the Senate Health, Education, Labor, and Pensions Committee (Senate HELP) approved a pair of resolutions directing Senate Legal Counsel to bring a civil action to enforce a subpoena for Ralph de la Torre, then the chief executive officer of Steward Health Care, and directing the President of the Senate to refer him to DOJ for prosecution under 2 U.S.C. §§ 192 and 194.

On September 24, 2024, the House Foreign Affairs Committee (HFAC) approved a resolution recommending that the House hold then-Secretary of State Antony Blinken in contempt and that the Speaker refer him for prosecution under §§ 192 and 194. The full House never voted to make this referral. The House Oversight and Accountability Committee, as well as the House Judiciary Committee, approved reports recommending contempt for Hunter Biden, although the full chamber never acted on these reports, either. Likewise, the House Judiciary Committee published a report recommending referral of Mark Zwonitzer, an author, to DOJ for contempt, but the House never voted on it. In one case, the House did vote to make a criminal contempt referral, on the Oversight and Judiciary Committees' recommendation, for then-Attorney General Merrick Garland. DOJ declined to prosecute upon that referral.

This In Focus provides an overview of civil enforcement of congressional subpoenas and criminal contempt of Congress. It then summarizes the last actions in each chamber—against de la Torre and Blinken—and details what the next steps in each case in the 119th Congress might be. The House, in adopting its rules for the 119th Congress, specifically authorized the reissuance of subpoenas to Garland and to two individuals involved in the investigation of Hunter Biden. This In Focus does not address Congress's inherent contempt power.

Contempt of Congress and Subpoena Enforcement

Congress has implied constitutional authority to conduct investigations connected to a "valid legislative purpose." Either chamber may issue subpoenas for testimony or documents and other materials. Willfully failing to comply with a subpoena issued by Congress is criminalized by 2 U.S.C. § 192. The U.S. Court of Appeals for the D.C. Circuit has interpreted "willful" to mean "deliberate" and "intentional," without requiring evidence of bad faith. A second statute, 2 U.S.C. § 194, establishes procedures for referring alleged violations of § 192 to DOJ for prosecution. Section 194 does not expressly require a full chamber to approve a referral to DOJ, but each chamber typically does so as a matter of longstanding congressional practice. At least one judicial decision has recognized a full-chamber vote as necessary for referral.

Congressional referrals to DOJ reflect separation of powers principles. Because Congress is not a "law enforcement or trial agency," it must rely on the executive to prosecute those that violate the contempt of Congress statutes. Further reflecting this separation of powers, a criminal referral from Congress does not *require* DOJ to initiate a prosecution. Criminal prosecution may not ultimately result in compliance with the subpoena, as prosecution serves primarily to punish an individual and provide future deterrence. Accordingly, each chamber may also seek to enforce its subpoenas in federal court through civil lawsuits to compel an individual to comply and share the demanded information. A chamber that votes to hold an individual in contempt may both make a criminal referral and direct its legal counsel to file a civil lawsuit in federal court seeking to enforce a subpoena.

The U.S. District Court for the District of Columbia (D.C. district court) has jurisdiction to hear civil suits initiated by the Senate under 28 U.S.C. § 1365 (this statutory authority does not extend to actions to enforce a subpoena issued to executive branch officials acting in their official capacity and asserting a "governmental privilege"). Further, 2 U.S.C. § 288b authorizes Senate Legal Counsel to "bring a civil action to enforce a subpoena of the Senate or a committee or subcommittee of the Senate . . . only when directed to do so by the adoption of a resolution by the Senate," thus requiring full Senate approval prior to the initiation of a civil action to enforce a subpoena. House committees have no corresponding statutory authority for civil enforcement, but the D.C. district court has recognized that the House may authorize a committee to file a civil claim to enforce a subpoena on behalf of the body—a process used on various occasions.

De la Torre Subpoena

Senate HELP issued a subpoena to Ralph de la Torre on July 25, 2024. De la Torre's counsel responded, seeking a postponement of his testimony on the basis that his company, Steward Health Care, was engaged in bankruptcy proceedings and claiming that Senate HELP had made "predeterminations of [de la Torre's] alleged criminal

misconduct" in a "veiled attempt to sidestep [his] constitutional rights]." The chairman and ranking minority member overruled these objections.

Senate HELP's subpoena stemmed from what it characterized as Steward's "negligence and mismanagement," resulting in "harm . . . caused to patients, health care workers, and the communities in which they live." The company filed for bankruptcy in 2024.

After de la Torre failed to appear for the hearing as noticed, the committee approved resolutions recommending that the Senate refer him to DOJ for prosecution and directing the Senate Legal Counsel to initiate a civil lawsuit seeking compliance in the D.C. district court. The full Senate thereafter voted unanimously to hold de la Torre in contempt. On September 30, 2024, de la Torre filed a lawsuit against Senate HELP in the D.C. district court, claiming the subpoena violated his constitutional right against self-incrimination. De la Torre, who resigned his position as CEO effective October 1, 2024, seeks declaratory relief and injunctive relief to prevent the committee from attempting to civilly enforce its subpoena.

Blinken Subpoena

HFAC's subpoena to Secretary Blinken arose from an initial request to the State Department at the beginning of the 118th Congress for documents and information regarding the withdrawal of U.S. forces from Afghanistan. HFAC subpoenaed the State Department on July 18, 2023, for documents pertaining to an internal review of the withdrawal. HFAC and the State Department reached an agreement in March 2024 to produce the documents, prompting HFAC's chairman to postpone a markup on a contempt resolution. On May 22, 2024, HFAC held a hearing on the withdrawal at which Secretary Blinken testified. HFAC published a report summarizing its findings on September 9, 2024.

HFAC issued another subpoena to Secretary Blinken on September 3, 2024, demanding his appearance at a September 19 hearing. HFAC appears to have issued a superseding subpoena on September 18, "as an accommodation to the Secretary's travel schedule." In a letter accompanying its September 3 subpoena, HFAC's chairman asserted that Secretary Blinken was asked to testify to address the report's findings. According to HFAC, the subpoena was issued "[i]n view of the Department's continued delay and unresponsiveness" to requests for a hearing date at which the Secretary would testify.

On September 22, 2024, the Secretary sent a letter to the chairman, expressing that he was "willing to testify" on a different date, owing to his attendance the week of the scheduled hearing at the United Nations General Assembly. The Secretary urged the chairman to "withdraw your subpoena, reconsider your planned contempt proceedings, and begin good faith engagement with the [State] Department to find an appropriate accommodation."

HFAC proceeded with a markup on September 24, 2024, of a resolution recommending contempt. HFAC approved the resolution by a vote of 26 to 25. The resolution directs that, in accordance with 2 U.S.C. §§ 192 and 194, the Speaker of the House certify to the U.S. Attorney HFAC's report finding the Secretary in contempt. The resolution does not otherwise appear to endorse civil enforcement of the subpoena in federal court. The Speaker stated he was "sure [the House] will" take such a vote, but the 118th Congress concluded with the House having taken no such action.

The Next Congress

The timing of these actions may raise questions regarding their status in the 119th Congress. A criminal referral approved prior to the start of a new Congress is unlikely to be affected legally due to the legislature's turnover. The matter, after being referred to the Executive, is within the Executive's purview. Thus, while a change in the Executive may affect DOJ's decision whether to prosecute, a change of Congress should not affect the preexisting referral.

When the House authorizes civil enforcement of its subpoenas, the House Office of General Counsel manages the litigation. The Office of General Counsel acts at the direction of the Speaker, who acts in consultation with the Bipartisan Legal Advisory Group (the Speaker and the majority and minority leaderships). Some case law suggests that House subpoenas expire upon the adjournment of each Congress. House Rule II, however, which the 119th Congress adopted, provides that litigation begun in one Congress continues in the next at the direction of the named plaintiff—i.e., the full House, the Speaker, a committee, or a committee chair. When the plaintiff wishes to continue litigation, recent practice has been to reissue outstanding subpoenas to avoid a court declaring the issue moot. The House also agreed to a separate order as part of the rules package for the 119th Congress to authorize the chairman of the Judiciary Committee, prior to adoption of that committee's own rules, to issue subpoenas to Garland and to two DOJ employees in connection with their investigation into Hunter Biden. The order also authorizes the chairman to continue the related actions authorized during the 118th Congress.

The Senate, on the other hand, is considered a continuing body whose business continues from Congress to Congress without interruption. Unlike the House, the Senate's rules are silent on the question of litigation authorized by the chamber. The statute granting the D.C. district court jurisdiction over Senate actions to enforce subpoenas in federal court, however, provides that "[a]n action, contempt proceeding, or sanction brought or imposed pursuant to this section shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee of the Senate which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment." Accordingly, it appears that civil litigation by a subsequent Senate may continue in the next Congress, if the body that authorized the subpoena certifies to the court that it remains interested in enforcing it.

Clay Wild, Legislative Attorney

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