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Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure

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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, to 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 non-compliance 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 non-compliance 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 non-compliance 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 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. 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 the contempt power, reviews the historical development of the early case law, outlines the statutory and common law basis for Congress's contempt power, and analyzes the procedures associated with inherent contempt, criminal contempt, and the civil enforcement of subpoenas. The report also includes a detailed discussion of two recent information access disputes that led to the approval of contempt citations in the House against then-White House Chief of Staff Joshua Bolten and former White House Counsel Harriet Miers, as well as Attorney General Eric Holder. Finally, the report discusses both non-constitutional and constitutionally based limitations on the contempt power.

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Introduction

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Congress has three formal methods by which it can combat non-compliance 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 non-compliance 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 non-compliance 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. §1001 (false statements), 18 U.S.C. §1621 (perjury), and 18 U.S.C. §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) [hereinafter *Hamilton*].

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 “Inherent Contempt” *infra*.

⁶ 2 U.S.C. §§192, 194.

⁷ See “Statutory Criminal Contempt” *infra*.

⁸ See “Civil Enforcement of Subpoenas” *infra*.

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 the contempt power; reviews the historical development of the early case law; discusses noteworthy contempt proceedings; outlines the statutory, common law, and constitutional limitations on the contempt power, and analyzes the procedures associated with inherent contempt, criminal contempt, and the civil enforcement of congressional subpoenas.

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 1920's Teapot Dome scandal.

In *McGrain v. Daugherty*,¹² 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." 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 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

⁹ See "Enforcement of a Criminal or Inherent Contempt Resolution Against an Executive Branch Official" *infra*.

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

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. July 31, 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).

¹³ *Id.*

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 legislative 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

The inherent contempt power is not specified in a statute or constitutional provision, but has been deemed implicit in the Constitution’s grant to Congress of all legislative powers. In an inherent

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 v. United States*, 360 U.S. 109, 111 (1960)).

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

contempt proceeding, the offender is tried at the bar of the House or Senate and can be held in custody until such time as the contemnor provides the testimony or documents sought, or until the end of the session. Inherent contempt was most often used as a means of coercion, not punishment. A statutory criminal contempt provision was first enacted by Congress in 1857, in part because of the inadequacies of proceedings under the inherent power. In cases of criminal contempt, the offender is cited by the subcommittee, the committee, and the full House or Senate, with subsequent indictment by a grand jury and prosecution by the U.S. Attorney. Criminal contempt, unlike inherent contempt, is intended as a means of punishing the contemnor for non-compliance rather than to obtain the information sought. A statutory civil enforcement procedure, applicable only to the Senate, was enacted in 1978. Under that procedure, a witness, who refuses to testify before a Senate committee or provide documents sought by the committee can, after being served with a court order, be held in contempt of court and incarcerated until he agrees to testify. Moreover, the House and Senate have authorized standing or special committees to seek civil enforcement of subpoenas.²⁴

Early History of Congressional Contempt

While the contempt power was exercised both by the English Parliament²⁵ and by the American colonial assemblies,²⁶ Congress's first assertion of its contempt authority occurred in 1795, shortly after the ratification of the Constitution. At the time, three Members of the House of Representatives reported that they had been offered what they interpreted to be a bribe by men named Robert Randall and Charles Whitney.²⁷ The House of Representatives interpreted these allegations as sufficient evidence of an attempt to corrupt its proceedings and reported a resolution ordering their arrest and detention by the Sergeant-at-Arms, pending further action by the House.²⁸ The matter was then referred to a special Committee on Privileges which reported out a resolution recommending that formal proceedings be instituted against Messrs. Randall and Whitney at the bar of the House.²⁹ In addition, the resolution provided that the accused be questioned by written interrogatories submitted by the Speaker of the House with both the

²⁴ See, e.g., S.Res. 60 & S.Res. 194, 93d Cong., (1973) (Senate Select Committees on Watergate); H.Res. 60, 97th Cong., (1981) (ABSCAM); H.Res. 12, 100th Cong. (1987) (House Iran–Contra); S.Res. 23, 100th Cong. (1987) (Senate Iran–Contra); H.Res. 463, 105th Cong., (1998) (Select Committee on National Security Commercial Concerns); see also H.Res. 1420, 94th Cong. 2d Sess. (1976) (authorizing the chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *United States v. American Telephone & Telegraph*, 419 F. Supp. 454 (D.D.C. 1976)); H.Res. 899, 121 CONG. REC. 918-19 (1975) (authorizing the chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *Ashland Oil Inc., v. FTC*, 409 F. Supp. 297, 307 (D.D.C. 1976)); H.Res. 980, 110th Cong. (2008) (authorizing the chairman of the House Committee on the Judiciary to initiate judicial proceedings affirming the authority of a congressional subpoena.); H.Res. 706, 112th Cong. (2012) (authorizing the chairman of the House Oversight and Government Reform Committee to initiate judicial proceedings affirmed the authority of a congressional subpoena issued to Attorney General Eric Holder).

²⁵ MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, 141-42 (17th ed . 1964).

²⁶ MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1971); see also CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945-1957 (1959) [hereinafter Beck].

²⁷ 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §1599 (1907) [hereinafter Hinds' Precedents]. According to the records, Messrs. Randall and Whitney allegedly offered three Members emoluments and money in exchange for the passage of a law granting Randall and his associates some 18-20 million acres of land bordering Lake Erie. See *id.*

²⁸ *Id.*

²⁹ *Id.* at §1600.

questions and the answers entered into the House minutes.³⁰ The resolution also provided that individual Members could submit written questions to the accused.³¹

Upon adopting the resolution and after considerable debate, the House determined that the following procedures be adhered to: First, the complaining Members were to submit a written signed information to the accused and for publication in the House Journal. In addition, the accused were to be provided counsel, the right to call witnesses on their behalf, the right to cross-examination of the complaining Members through written questions submitted to the Speaker, and adequate time to prepare a defense.³² A proceeding was held at the bar of the House, and on January 4, 1796, the House, by a vote of 78-17, adopted a resolution finding Mr. Randall guilty of “a contempt to, and a breach of the privileges of, this House by attempting to corrupt the integrity of its Members in the manner laid to his charge.”³³ The House ordered Mr. Randall to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House.³⁴ Mr. Randall was detained until January 13, 1796, when he was discharged by House resolution. Mr. Whitney, on the other hand, was absolved of any wrongdoing as the House determined that his actions were against a “member-elect,” and had taken place “away from the seat of government.”³⁵

Of additional significance is the fact that the records indicate that almost no question was raised with respect to the power of Congress to punish a non-Member for contempt. According to one commentator, who noted that many of the Members of the early Congress were also members of the Constitutional Convention and, thus, fully aware of the legislative practices of the time, it was “substantially agreed that the grant of the legislative power to Congress carried with it by implication the power to punish for contempt.”³⁶

Four years later, the Senate exercised its contempt power against William Duane, who, as editor of the *Aurora* newspaper, was charged with the publication of a libelous article concerning the Senate and one of its committees. Mr. Duane was ordered by Senate resolution to appear before the bar of the Senate and “make any proper defense for his conduct in publishing the aforesaid false, defamatory, scandalous, and malicious assertions and pretended information.”³⁷ At his initial appearance before the Senate, Mr. Duane requested, and was granted, the assistance of counsel and ordered to appear again two days later.³⁸ Instead of appearing before the Senate as ordered, Mr. Duane submitted a letter indicating he did not believe he could receive a fair trial before the Senate.³⁹ Mr. Duane was subsequently held in contempt of the Senate for his failure to appear, not for his alleged libelous and defamatory publications.⁴⁰ As a result, he was held in the

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at §§1601-1602. The proceedings appear to have been delayed from December 30, 1795 to January 4, 1796, at the request of Randall and his counsel. *Id.*

³³ 2 Hinds' Precedents, *supra* note 27, at §1603.

³⁴ *Id.*

³⁵ *Id.*

³⁶ C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PENN. L. REV. 691, 720 (1926).

³⁷ 2 Hinds' Precedents, *supra* note 27, at §1604.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* The Senate voted 16-11 to hold Mr. Duane in contempt. *Id.*

custody of the Senate for several weeks before the Senate, by resolution, instructed that he be released and tried by the courts.⁴¹

The Senate's contempt of Mr. Duane generated considerably more debate concerning Congress's contempt authority. A majority of Senators argued that the Senate's contempt power was an inherent right of legislative bodies, derived not specifically from the Constitution, but rather from "the principle of self-preservation, which results to every public body from necessity and from the nature of the case."⁴² Moreover, Senators supportive of this position argued that their reasoning was firmly supported by English and colonial practices, as well as the practice of the state legislatures. Finally, the majority asserted that if Congress did not possess a contempt power it would be vulnerable to the disruption of its proceedings by outside intruders.⁴³

While the Senate's exercise of its contempt power was not without precedent, many Senators disputed these claims, arguing that all powers sought to be exercised by Congress must be specifically derived from the Constitution; that because the contempt power is not among the enumerated powers given to Congress, the power is reserved to the states and the people. In addition, the minority argued that Congress, unlike the English Parliament or state legislatures, was intentionally not granted the plenary powers of sovereignty by the Constitution and, thus, could not claim any inherent right to self-preservation.⁴⁴ As an alternative, the minority proposed that Congress, which has the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers"⁴⁵ had sufficient authority to enact a statute that would protect the integrity of its proceedings.⁴⁶ Moreover, the minority argued that disruptions of congressional proceedings would continue to be subject to the criminal laws.⁴⁷

After Mr. Duane's contempt by the Senate, it appeared that the subject of the Congress's inherent contempt power was settled. The authority, however, was not used again for another 12 years. In 1812, the House issued a contempt resolution against Mr. Nathaniel Rounsavell, who had refused to answer a select committee's questions concerning which Representative had given him information regarding secret sessions.⁴⁸ However, before Mr. Rounsavell was brought before the bar of the House a Member admitted his indiscretion and the matter was not pursued.⁴⁹ Congress's inherent contempt power was not used again until 1818, where it eventually made its way to the Supreme Court for adjudication.

Anderson v. Dunn

In 1821, the Supreme Court was faced with interpreting the scope of Congress's contempt power.⁵⁰ The case arose when Representative Louis Williams of North Carolina introduced a

⁴¹ *Id.* The records indicate that Mr. Duane was held in contempt of the Senate on March 27, 1800, and released by resolution adopted on May 14, 1800, the last day of the session, by a vote of 13-4. *Id.*

⁴² *Senate Proceedings*, 6th Cong. 1799-1801 86 (March 5, 1800); *see also* Constitution, Jefferson's Manual, and the Rules of the House of Representatives, H.R. Doc. 108-241, 108th Cong., 2d Sess., §§297-299 (2005) [hereinafter Jefferson's Manual].

⁴³ *See* Jefferson's Manual, *supra* note 42, at §§297-299.

⁴⁴ *Id.* at §298

⁴⁵ U.S. CONST. Art. 1, §8, cl.18.

⁴⁶ Jefferson's Manual, *supra* note 42, at §298.

⁴⁷ *See id.*

⁴⁸ *See* Beck, *supra* note 26, at 192.

⁴⁹ *Id.*

⁵⁰ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

letter before the House from a John Anderson, which Representative Williams interpreted as an attempt to bribe him.⁵¹ Following its 1795 precedent, the House adopted a resolution ordering the Sergeant-at-Arms to arrest Mr. Anderson and bring him before the bar of the House. Upon Mr. Anderson's arrest, however, a debate erupted on the floor of the House as the motion for referral to the Committee on Privileges to adopt procedures was considered. Several Members objected to the House's assertion of an inherent contempt power. They argued, as the minority Senators had in Mr. Duane's contempt, that neither the Constitution nor the general laws afforded the Congress such an inherent power to punish for actions that occurred elsewhere.⁵² Relying on the 1795 precedent and examples from the British Parliament and state legislatures, the Committee was formed and it adopted a resolution requiring Mr. Anderson to be brought before the bar of the House for questioning by the Speaker.⁵³ At his appearance, Mr. Anderson, like Mr. Randall and Mr. Whitney before him, was afforded counsel and permitted to present the testimony of eleven witnesses. Ultimately, Mr. Anderson was found in contempt of Congress and was ordered to be reprimanded by the Speaker for the "outrage he committed" and discharged into the custody of the Sergeant-at-Arms.⁵⁴

Mr. Anderson subsequently filed suit against Mr. Thomas Dunn, the Sergeant-at-Arms of the House, alleging assault, battery, and false imprisonment. Mr. Dunn responded by asserting that he was carrying out the lawful orders of the House of Representatives. The Supreme Court heard the case in February of 1821 and concluded that the Congress possessed the inherent authority to punish for contempt and dismissed the charges against Mr. Dunn.⁵⁵ The Court noted that while the Constitution does not explicitly grant either House of Congress the authority to punish for contempt, except in situations involving its own Members, such a power is necessary for Congress to protect itself. The Court asserted that if the House of Representatives did not possess the power of contempt it would "be exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it."⁵⁶

The Court's decision in *Anderson* does not define the specific actions that would constitute contempt; rather, it adopted a deferential posture, noting that "it is only necessary to observe that there is nothing on the facts of the record from which it can appear on what evidence the warrant was issued and we do not presume that the House of Representatives would have issued it without fully establishing the facts charged on the individual."⁵⁷

The *Anderson* decision indicates that Congress's contempt power is centered on those actions committed in its presence that obstruct its deliberative proceedings. The Court noted that Congress could supplement this power to punish for contempt committed in its presence by enacting a statute, which would prohibit "all other insults which there is any necessity for providing."⁵⁸

⁵¹ See 2 Hinds' Precedents, *supra* note 27, at §1606. The letter offered Representative Williams \$500 as "part pay for extra trouble" with respect to furthering the claims of Mr. Anderson with respect to the River Raisin. *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Anderson*, 19 U.S. (6 Wheat.) 204.

⁵⁶ *Id.* at 228.

⁵⁷ *Id.* at 234.

⁵⁸ *Id.* at 228.

The Court in *Anderson* also endorsed the existing parliamentary practice that the contemnor could not be held beyond the end of the legislative session.⁵⁹ According to the Court, “[s]ince the existence of the power that imprisons is indispensable to its continuance, and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.”⁶⁰

Since *Anderson* was decided there has been an unresolved question as to whether this rule would apply with equal force to a contempt by the Senate, since it is considered a “continuing body.”⁶¹ The Senate, it appears, has only addressed this issue once, in 1871, regarding the contempt of two recalcitrant witnesses, Z.L. White and H.J. Ramsdell.⁶² During these contempt proceedings, the Senate found itself near the end of a session and the question arose as to whether the Senate’s acquiescence to the *Anderson* rule would provide adequate punishment. After vigorous debate, the Senate instructed the Sergeant-at-Arms to release the prisoners immediately upon the final adjournment of the Congress.⁶³ The House, however, has imprisoned a contemnor for a period that extended beyond the adjournment of a Congress. Patrick Wood was sentenced by the House to a three-month term in jail for assaulting Representative Charles H. Porter.⁶⁴ Although there is no doubt that Mr. Woods’s period of incarceration extended beyond the date of adjournment, it was not challenged and, therefore, there is no judicial opinion addressing the issue.

Kilbourn v. Thompson

In 1876, the House established a select committee to investigate the collapse of Jay Cooke & Company, a real estate pool in which the United States had suffered losses as a creditor.⁶⁵ The committee was, by resolution, given the power to subpoena both persons and records pursuant to its investigation. Acting under its authority, the committee issued a *subpoena duces tecum* to one

⁵⁹ See 2 Hinds’ Precedents, *supra* note 27, at §1604 (noting that Mr. Duane, who had been held in contempt by the Senate, was released from custody on the last day of the legislative session).

⁶⁰ *Anderson*, 19 U.S. (6 Wheat.) at 231.

⁶¹ Unlike the House, whose entire membership stands for election every two years, only one-third of the Senate is elected each Congress.

⁶² Moreland, *supra* note 10, at 199, n. 31.

⁶³ *Id.*

⁶⁴ See 2 Hinds’ Precedents, *supra* note 27, at §§1628-629.

⁶⁵ See 2 Hinds’ Precedents, *supra* note 27, at §1609. It should also be noted that the Speaker also reported Mr. Kilbourn’s contempt to the District Attorney for the District of Columbia pursuant to the 1857 criminal contempt statute. According to records, the District Attorney presented the case to a grand jury and received an indictment for five counts of contempt. The District Attorney requested the Mr. Kilbourn be turned over to his custody for trial. The House, however, after considerable debate, adopted a resolution instructing the Sergeant-at-Arms not to release Mr. Kilbourn. See 4 CONG. REC. 2483-2500, 2513-2532 (April 15-16 1876). Although the Supreme Court later indicated, in the case of *In re Chapman*, 166 U.S. 661, 672 (1897), that the double jeopardy clause of the Constitution would not prohibit a criminal prosecution of a witness for contempt of Congress after he had been tried at the bar of the House under the inherent contempt power, subsequent developments in the interpretation of the double jeopardy clause suggest that this aspect of the *Chapman* decision is no longer good law. See *Grafton v. United States*, 206 U.S. 333 (1907); *Waller v. Florida*, 397 U.S. 387 (1970); *Columbo v. New York*, 405 U.S. 9 (1972). However, it appears that where the sanction imposed pursuant to the inherent contempt power is intended to be purely coercive and not punitive, a subsequent criminal prosecution would be permissible since the double jeopardy clause bars only dual criminal prosecutions. See S.Rept. 95-170, 95th Cong., 1st Sess., 89 (1977) (stating that “[o]nce a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. §192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem.”); see also Hearings Before the Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess., 798-800 (1977).

Hallet Kilbourn, the manager of the real estate pool. When Mr. Kilbourn refused to produce certain papers or answer questions before the committee he was arrested and tried under the House's inherent contempt power. The House adjudged Mr. Kilbourn in contempt and ordered him detained by the Sergeant-at-Arms until he purged himself of contempt by releasing the requested documents and answering the committee's questions.⁶⁶

Mr. Kilbourn filed a suit against the Speaker, the members of the committee, and the Sergeant-at-Arms for false arrest. The lower court held in favor of the defendant dismissing the suit. Mr. Kilbourn appealed, and the Supreme Court reversed, holding that Congress did not have a general power to punish for contempt.⁶⁷ While the Court appeared to recognize that Congress possessed an inherent contempt power, it declined to follow *Anderson v. Dunn's* expansive view of Congress's authority. Moreover, the Court rejected any reliance on the English and colonial precedents establishing the source and extent of Congress's contempt power. The Court stated that

[w]e are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.⁶⁸

The Court held that the investigation into the real estate pool was not undertaken by the committee pursuant to one of Congress's constitutional responsibilities, but rather was an attempt to pry into the personal finances of private individuals, a subject that could not conceivably result in the enactment of valid legislation. According to the Court, because Congress was acting beyond its constitutional responsibilities, Mr. Kilbourn was not legally required to answer the questions asked of him. In short, the Court held 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, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."⁶⁹

In addition, the Court indicated that the investigation violated the doctrine of separation of powers because judicial bankruptcy proceedings were pending relating to the collapse of the real estate pool and, therefore, it might be improper for Congress to conduct an investigation that could interfere with the judicial proceedings.⁷⁰ The Court specifically challenged Congress's assertion that there were no other viable remedies available to the government to retrieve the lost funds.⁷¹ Thus, the Court concluded that

the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of

⁶⁶ See 2 Hinds' Precedents, *supra* note 27, at §1609.

⁶⁷ Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1881).

⁶⁸ *Id.* at 189.

⁶⁹ *Id.*

⁷⁰ 273 U.S. 135 (1927).

⁷¹ *Id.* at 194 (questioning "[h]ow could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?").

the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.⁷²

Finally, in *dicta*, the Court indicated that the contempt power might be upheld where Congress was acting pursuant to certain specific constitutional prerogatives, such as disciplining its Members, judging their elections, or conducting impeachment proceedings.

Although the precedential value of *Kilbourn* has been significantly limited by subsequent case law, the case continues to be cited for the proposition that the House has no power to probe into private affairs, such as the personal finances of an individual, on which legislation could not be enacted. The doubts raised by *Kilbourn* about the scope of Congress's contempt power have essentially been removed by later cases sanctioning the use of the power in investigations conducted pursuant to Congress's authority to discipline its Members,⁷³ to judge the elections of its Members,⁷⁴ and, most importantly, to probe the business and conduct of individuals to the extent that the matters are subject to congressional regulation.⁷⁵ For example, in *McGrain v. Daugherty*, which involved a Senate investigation into the claimed failure of the Attorney General to prosecute certain antitrust violations, a subpoena was issued to the brother of the Attorney General, Mallie Daugherty, the president of an Ohio bank. When Daugherty refused to comply, the Senate exercised its inherent contempt power and ordered its Sergeant-at-Arms to take him into custody. The grant of a writ of habeas corpus was appealed to the Supreme Court. The Court's opinion in the case considered the investigatory and contempt powers of Congress to be implicit in the grant of legislative power.⁷⁶ The Court distinguished *Kilbourn*, which was an investigation into purely personal affairs, from the instant case, which was a probe of the operation of the Department of Justice (DOJ). According to the Court, the subject was plainly "one on which legislation could be had and would be materially aided by information the investigation was calculated to elicit."⁷⁷ The Court in *McGrain* was willing to presume that the investigation had been undertaken to assist the committee in its legislative efforts.⁷⁸

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 in *Anderson v. Dunn* and reiterated in *McGrain v. Daugherty*. 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.⁷⁹ The purpose of the imprisonment or other sanction

⁷² *Id.* at 196.

⁷³ *In Re Chapman*, 166 U.S. 661 (1897).

⁷⁴ *Barry v. United States ex rel Cunningham*, 279 U.S. 597 (1929).

⁷⁵ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

⁷⁶ *Id.*

⁷⁷ *Id.* at 177.

⁷⁸ *Id.* at 177-178; *see also* *ICC v. Brimson*, 154 U.S. 447 (1894). It has been said that *McGrain* "very clearly removed the doubt [that had existed after *Kilbourn v. Thompson*] as to whether Congress could force testimony in aid of legislation." Moreland, *supra* note 10, at 222. Although *McGrain* and *Sinclair v. United States*, 279 U.S. 263 (1929), involved inquiries into the activities of private individuals, there was a connection to property owned by the United States and, therefore, it could not be said that purely personal affairs were the subjects of the investigations.

⁷⁹ 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* U.S. CONST. 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 (continued...)")

may be either punitive⁸⁰ or coercive.⁸¹ 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 that was at issue in *Anderson v. Dunn* 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.⁸²

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.⁸³ In such a habeas proceeding, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction,⁸⁴ and (b) whether the contempt proceedings complied with minimum due process standards.⁸⁵ 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.⁸⁶ 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.⁸⁷

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 authority

(...continued)

Government of the United States.”).

⁸⁰ *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935).

⁸¹ *McGrain v. Daugherty*, 273 U.S. at 161.

⁸² Thomas L. Shriner, Jr., *Legislative Contempt and Due Process: The Groppi Cases*, 46 IND. L. J. 480, 491 (1971) [hereinafter Shriner].

⁸³ 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) [hereinafter Sky].

⁸⁴ *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935); see also *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880); *Ex Parte Nugent*, 18 F. 471 (D.D.C. 1848).

⁸⁵ *Groppi v. Leslie*, 404 U.S. 496 (1972).

⁸⁶ *Id.*

⁸⁷ For a discussion of these statutory limitations on the contempt power see *infra* at notes 279-351 and accompanying text.

that courts have to inherently impose fines for contemptuous behavior,⁸⁸ it appears possible to argue that Congress, in its exercise of a similar inherent function could impose fines as opposed to incarceration. Additional support for this argument appears to be contained in *dicta* from the 1821 Supreme Court decision in *Anderson v. Dunn*. 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.⁸⁹

Finally, 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....”⁹⁰ 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 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, compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

There are also certain limitations on 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.⁹¹ Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.⁹² Because of these drawbacks, the inherent contempt process has not been used by either body since 1935.⁹³ 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—

⁸⁸ 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).

⁸⁹ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821) (emphasis added).

⁹⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881) (emphasis added).

⁹¹ *Watkins v. United States*, 354 U.S. 178, 207, n.45 (1957); *Anderson*, 19 U.S. (6 Wheat.) at 231.

⁹² 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) [hereinafter Lee].

⁹³ 4 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, ch. 15, §17, 139 n.7 (1977) [hereinafter Deschler's Precedents]; see also Lee, *supra* note 92, at 255.

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,⁹⁴ 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.⁹⁵

Inherent Contempt Proceedings by Committees of Congress

As has been indicated, although the majority of the inherent contempt actions by both the House and the Senate were conducted via trial at the bar of the full body, there is historical evidence to support the notion that this is not the exclusive procedure by which such proceeding can occur. This history, when combined with a 1992 Supreme Court decision addressing the power of Congress to make its own rules for the conduct of impeachment trials,⁹⁶ strongly suggests that the inherent contempt process can be supported and facilitated by the conduct of evidentiary proceedings and the development of recommendations at the committee level.

Actually, the consideration of the use of committees to develop the more intricate details of an inquiry into charges of contempt of Congress date back to the very first inherent contempt proceedings of Messrs. Randall and Whitney in 1795. As discussed above, in these cases the House appointed a Committee on Privileges to report a mode of procedure. The Committee reported the following resolution, which was adopted by the full House of Representatives:

Resolved, That the said Robert Randall and Charles Whitney be brought to the bar of the House and interrogated by the Speaker touching the information given against them, on written interrogatories, which with the answers thereto shall be entered into the minutes of the House. And that every question proposed by a Member be reduced to writing and a motion made that the same be put by the Speaker. That, after such interrogatories are answered, *if the House deem it necessary to make any further inquiry on the subject, the same be conducted by a committee to be appointed for that purpose.*⁹⁷

According to the *Annals of Congress*, the Committee's language sparked a debate concerning the proper procedures to be used, including a discussion regarding whether the use of such a select committee was proper.⁹⁸ At least one Representative "was convinced that the select committee was alone competent to taking and arranging the evidence for the decision of the House."⁹⁹ While others noted that "the investigation of facts is constantly performed by select committees. ... [The committee's] report is not to be final, it is to be submitted to the House for final decision."¹⁰⁰ It was recommended that, "the subject should be remanded to a committee, which would save a good deal of time."¹⁰¹ Other Members, however, objected to the use of a select committee to hear

⁹⁴ See Beck, *supra* note 26, at 4; ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS 289 (1928) [hereinafter Eberling].

⁹⁵ For example, in 1865, the House appointed a select committee to inquiry 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.

⁹⁶ See *United States v. Nixon*, 506 U.S. 224 (1992).

⁹⁷ See 2 Hinds' Precedents, *supra* note 27, at §1599 (emphasis added).

⁹⁸ See 5 ANNALS OF CONG. 188 (1792).

⁹⁹ See *id.* (statement of Rep. Baldwin).

¹⁰⁰ *Id.* at 189 (statement of Rep. W. Smith).

¹⁰¹ *Id.* at 190 (statement of Rep. W. Smith).

evidence of this magnitude on the grounds that it would be “highly improper for the witness to be sworn by a select committee, and that committee to send for the Members and have them sworn and examined in that private way. However troublesome and difficult, the House must meet all the questions and decide them on this floor.”¹⁰²

Ultimately, it appears that none of the proceedings in this case was conducted before a select committee. That said, Congress’s interpretation of its own powers and prerogatives is significant. It is clear that during the very first exercise of Congress’s power of inherent contempt, the House allowed for the possibility that at least some of the proceedings could occur before a committee, rather than at the bar of the House.

This early precedent was finally invoked in 1836, when after the assault of reporter Robert Codd by reporter Henry Wheeler on the House floor, the House committed the examination of a contempt and breach of privilege to a select committee. The House adopted the following resolution empowering the committee to conduct a contempt investigation:

Resolved, That a select committee be forthwith appointed, whose duty it shall be forthwith to inquiry into an assault committed within the Hall of the House of Representatives this morning, while this House was in session and for and on account of which two persons are now in custody of the Sergeant-at-Arms; and said committee are to make their report to this House; and that said committee be authorized to administer oaths and to cause the attendance of witnesses.¹⁰³

The Committee’s report noted that Mr. Wheeler admitted his offense and included a recommendation that the punishment not be vindictive.¹⁰⁴ The report also contained three resolutions that were considered by the full House. The first found Mr. Wheeler guilty of contempt and breach of the privileges of the House, and was adopted. The second, which was amended on the floor prior to adoption, excluded Mr. Wheeler from the floor of the House for the remainder of the session. Finally, the third resolution, which called for Mr. Wheeler to be taken into custody for the remainder of the session, was also amended on the floor prior to adoption to simply discharge Mr. Wheeler from custody.¹⁰⁵

Another example of the use of select committee to hear a contempt trial occurred in 1865, when it was alleged that Mr. A.P. Field assaulted Congressman William Kelley. Similar to the contempt proceedings of Mr. Wheeler, the House adopted the following resolution authorizing a select committee to conduct an examination of the charges:

Be it Resolved, That a select committee of five members be appointed by the Speaker to inquire into the said alleged breach of privilege; that the said committee have power to send for persons and papers, and to examine witnesses; and that the committee report as soon as possible all the facts and circumstances of the affair, and what order, if any, it is proper for this House to take for the vindication of its privilege, and right, and duty of free legislation and judgment.¹⁰⁶

During the debate on the resolution it was observed that proceeding in this manner would avoid a trial by the full House, which, in the words of one Member, “would consume a great amount of

¹⁰² *Id.* at 188 (statement of Rep. Hillhouse).

¹⁰³ 2 Hinds’ Precedents, *supra* note 27, at §1630.

¹⁰⁴ *See id.*; *see also* H.Rept. 792, 24th Cong. 1st Sess. (1836).

¹⁰⁵ H.Rept. 792, 24th Cong. 1st Sess. (1836); *see also* Groppi v. Leslie, 404 U.S. 496, 501 n.4 (1972) (citing the Wheeler committee procedure as an example of procedures followed by Congress in contempt cases).

¹⁰⁶ CONG. GLOBE, 38th Cong., 2nd Sess., 371 (1865).

the public time which there is a pressing need to apply to the business of the Government, it is better that the course should be adopted which is contemplated by the resolution....¹⁰⁷

The select committee, in its report to the full House, noted that it had heard the testimony of several witnesses concerning the incident, including the voluntary statement of Mr. Field.¹⁰⁸ Also according to the Committee, Mr. Field was present for each of the witnesses and, in fact, several of them were heard from at his request. Moreover, all of the witnesses were subject to examination or cross-examination by Mr. Field.¹⁰⁹ At the committee's recommendation, a resolution directing the Speaker to issue a warrant for Mr. Field's arrest by the Sergeant-at-Arms for the purpose of bringing him before the Speaker for a reprimand was adopted.¹¹⁰ It does not appear that Mr. Field or his counsel was permitted to be present during the House's consideration of the committee's report, nor does it appear that he was afforded an opportunity to address the House prior to his formal reprimand. In fact, during the course of the reprimand, the Speaker expressly referred to Mr. Field having "*been tried before a committee of their members, and ordered to be reprimanded at the bar of the House by their Presiding Officer,*"¹¹¹ which may be interpreted as indicating that the committee's proceedings were deemed to be sufficient in the eyes of the House.

Nixon v. United States

Although there is ample historical evidence of the presumed propriety of contempt proceedings before committees of Congress, there has been no judicial ruling directly confirming the Congress's interpretation of its own contempt powers. In 1993, however, the Supreme Court decided *Nixon v. United States*,¹¹² which, while not a contempt case, involved an analogous delegation of authority by the Senate to a select committee for the purposes of hearing evidence regarding the impeachment of two federal judges. Specifically, the impeached judges challenged the Senate's procedure under Rule XI of the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," which provides:

That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, *shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine*, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before the committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having received and taken before the Senate, but nothing herein shall prevent the Senate

¹⁰⁷ *Id.* (statement of Rep. Thayer).

¹⁰⁸ *Id.* at 971.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 972-74.

¹¹¹ *Id.* at 991 (emphasis added).

¹¹² 506 U.S. 224 (1993).

from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.¹¹³

Judge Nixon argued that the use of a select committee to hear the evidence and witness testimony of his impeachment violated the Senate's constitutional duty to "try" all impeachments. According to Judge Nixon, anything short of a trial before the full Senate was unconstitutional and, therefore, required reversal and a reinstatement of his judicial salary. The Court held the issue to be a non-justiciable political question. Chief Justice Rehnquist, writing for the Court, based this conclusion upon the fact that the impeachment proceedings were textually committed in the Constitution to the Legislative Branch. In addition, the Court found the "lack of finality and the difficulty in fashioning relief counsel[led] against justiciability."¹¹⁴ According to the majority, to open "the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'"¹¹⁵ The Court found that the word "try" in the Impeachment Clause did not "provide an identifiable textual limit on the authority which is committed to the Senate."¹¹⁶ Justice Souter's concurring opinion noted that "[i]t seems fair to conclude that the [Impeachment] Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to 'try' impeachments."¹¹⁷

The Court's affirmation of the Senate's procedures with respect to the appointment of select committees for impeachment trials, clearly indicates that the use of committees for contempt proceedings—whether they be standing legislative committees, or select committees created by resolution for a specific purpose—is a permissible exercise of each House's Article I, Section 5 rulemaking power. As such, it would appear that one of the suggested reasons for the apparent abandonment of the use of Congress's inherent contempt power, namely, that it became too cumbersome and time consuming to try contemptuous behavior on the floor of the body, is no longer compelling. The ability to utilize the committee structure for trials, evidentiary hearings, and other procedural determinations appears to be supported not only by the historical records of previous contempt proceedings, but also by the Court's decision in *Nixon*.

While the Court in *Nixon* addressed the permissibility of using select committees in impeachment trials, it says nothing about the rights or privileges that would be required to be afforded to the accused. Similarly, in any contempt proceedings before a congressional committee, the question of rights and privileges remains one that has not yet been directly addressed by the courts. According to the Supreme Court in *Groppi v. Leslie*,

[t]he past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him.¹¹⁸

¹¹³ *Id.* at 227, n. 1 (emphasis added).

¹¹⁴ *Id.* at 263.

¹¹⁵ *Id.* (quoting *United States v. Nixon*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

¹¹⁶ *Id.* at 238.

¹¹⁷ *Id.* at 253 (Souter, J., concurring).

¹¹⁸ See *Groppi v. Leslie*, 404 U.S. 496, 500-01 (1972) (citing *Jurney v. MacCracken*, 294 U.S. 125, 143-144 (1935); *Kilbourn v. Thompson*, 103 U.S. 168, 173-174 (1880); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 209-211 (1821); *Marshall v. Gordon*, 243 U.S. 521, 532 (1917)).

The Court also suggested that “the length and nature of the [right to be heard] would traditionally be left largely to the legislative body....”¹¹⁹ This deference to Congress in establishing its own rules and procedures is consistent with the more recent decision in *Nixon*. Thus, it would appear that while there is no definitive answer to the question of what rights the committee hearing a contempt proceeding would be required to afford,¹²⁰ so long as the minimum protections of notice and opportunity to be heard are provided, the courts, it seems, will not interfere with Congress’s decisions regarding proper procedure.

Congressional precedent would also appear to be a useful guide to the question of what process is due. A review of early exercises of inherent contempt, discussed above, indicates that the following procedures have been established: attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges; identification of the accuser; compulsory process; provision of counsel; a hearing; determination of guilt; and imposition of a penalty. According to one commentator, “[t]his traditional procedure was followed by both houses of Congress until they abandoned it for a more convenient statutory device.”¹²¹ Since these procedures appear to be in excess of what the Court instructed was required in *Groppi*, it would seem reasonable to conclude that any inherent contempt proceeding that conforms with these traditions would likely satisfy judicial review.

Statutory Criminal Contempt

Between 1795 and 1857, 14 inherent contempt actions were initiated by the House and Senate, eight of which can be considered successful in that the contemnor was meted out punishment, agreed to testify or produce 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.¹²² In 1857, a statutory criminal contempt procedure was enacted,¹²³ 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 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.¹²⁴ With

¹¹⁹ *Groppi*, 404 U.S. at 503.

¹²⁰ While the Supreme Court in *Groppi* limited its holding to requiring only notice and the opportunity to be heard, the lower court in the same case suggested that the following rights were also necessary: representation by counsel; the ability to compel the attendance of witnesses; an opportunity to confront any accusers; and the right to present a defense to the charges. See *Groppi v. Leslie*, 311 F. Supp. 772, 774 (W.D. Wisc. 1970), *rev’d*, 436 F.2d 326 (7th Cir. 1970), *rev’d*, 404 U.S. 496 (1972).

¹²¹ Shriner, *supra* note 82, at 491.

¹²² See Eberling, *supra* note 94, at 302-16.

¹²³ Act of January 24, 1857, c. 19 §3, 11 Stat. 156 (1857) (codified as amended at 2 U.S.C. §§192, 194 (2012)). The constitutionality of the statute was upheld by the Supreme Court in 1897. See *In re Chapman*, 166 U.S. 661 (1897).

¹²⁴ Beck, *supra* note 26, 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 (continued...)

only minor amendments, those statutory provisions are codified today as 2 U.S.C. §§192 and 194, which state the following:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$100,000] nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.¹²⁵

Whenever a witness summoned as mentioned in Section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.¹²⁶

The legislative debate over the criminal contempt statute reveals that it was prompted by the obstruction of a House select committee's investigation into allegations of misconduct that had been made against several Members of the House of Representatives. According to reports, the investigation was hindered by the refusal of a newspaper reporter, James W. Simonton, to provide answers to certain questions posed by the committee.¹²⁷ The select committee responded by reporting a resolution citing Mr. Simonton for contempt, as well as introducing a bill¹²⁸ that was intended "to more effectually ... enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony."¹²⁹ It appears that there were no printed House or Senate committee reports on the measure, though it was considered in the House by the select committee and in the Senate by the Judiciary Committee.¹³⁰

According to the legislative debate records and commentators, there was opposition to the bill on several fronts. Some Members proposed an amendment expressly codifying Congress's contempt power for failure to comply with requests for documents or testimony, thereby resurrecting the

(...continued)

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.*

¹²⁵ 2 U.S.C. §192 (2012). As a result of congressional classification of offenses, the penalty for contempt of Congress is a Class A misdemeanor; thus, the \$1,000 maximum fine under §192 has been increased to \$100,000. *See* 18 U.S.C. §§3559, 3571 (2012).

¹²⁶ 2 U.S.C. §194 (2012).

¹²⁷ *See* Eberling, *supra* note 94, at 302-04.

¹²⁸ H.R. 757, 34th Cong., 3d Sess. (1857).

¹²⁹ 42 CONG. GLOBE. 34th Cong., 3d Sess., 403-04 (1857) (discussing H.R. 757).

¹³⁰ *See id.* at 425-26.

view that Congress did not possess any inherent power to punish for contempt.¹³¹ Others argued that Congress's inherent contempt powers rendered the proposed bill unnecessary.¹³² Still other Members opposed the bill on the grounds that it violated the Fourth and Fifth Amendments of the Constitution, because it sanctioned unreasonable searches and seizures, compelled persons to incriminate themselves, and violated the prohibition on persons being punished twice for the same offense (double jeopardy).¹³³

In response to arguments that such a statute was unnecessary given Congress's inherent authority to hold individuals in contempt, supporters made clear that the proposed bill was not intended in any way to diminish Congress's inherent contempt authority.¹³⁴ Rather, supporters of the bill saw it as designed to give Congress "additional authority, and to impose additional penalties on a witness who fails to appear before an investigating committee of either House, or who, appearing, fails to answer any question."¹³⁵ The main concern of proponents seems to have been Congress's ability to impose adequate punishments for contempts that occur near the end of a session, especially in the House, where the prevailing view was that the Court's opinion in *Anderson v. Dunn*¹³⁶ prohibited terms of incarceration that extended beyond the adjournment of a session.¹³⁷ With respect to the arguments surrounding the Fourth and Fifth Amendments, supporters asserted that the bill provided the protection of the judiciary, via a judicial trial, for the potential contumacious witnesses. Moreover, supporters argued that the bill removed such witnesses "from the passions and excitement of the Hall—where partisans may frequently, in political questions, carry into the measures of punishment their party hostilities."¹³⁸

The bill was ultimately passed by both the House¹³⁹ and the Senate.¹⁴⁰ According to one commentator, the bill was adopted for three reasons:

[F]irst, to increase the power of either House of Congress to punish for contempt in cases of contumacy of witnesses, ... second, to compel criminating testimony. A third reason, although undoubtedly a minor one, was that the effect of the enactment of this legislation would be to remove the trial of cases of contempt of either House of Congress from their respective bars to the courts, where passion and partisanship would not influence the decision against the prisoner and where he would have a trial by jury and all the other constitutional safeguards of court proceedings.¹⁴¹

¹³¹ See Eberling, *supra* note 94, at 309.

¹³² *Id.* at 311.

¹³³ *Id.* at 309.

¹³⁴ 42 CONG. GLOBE, 34th Cong., 3d Sess., 404 (1857) (statement of Mr. Orr) (providing that "Some gentlemen say that the very fact of presenting this bill is an admission that the House has no power upon this subject, and that it negatives the resolution which we have already adopted, that is, to take [Mr.] Simonton into custody and bring him before the House to answer for his contempt. No such thing. The power of this House I believe is conceded by all....")

¹³⁵ Eberling, *supra* note 94, at 306; see also 42 CONG. GLOBE, 34th Cong., 3d Sess., 405 (1857) (statement of Mr. Orr).

¹³⁶ See *supra* notes 50-64 and accompanying text.

¹³⁷ 42 CONG. GLOBE, 34th Cong., 3d Sess., 404 (1857) (statement of Mr. Orr) (stating "[s]uppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of this House by corrupt means of any description; then the power of this House extends only to those two days. Is that an adequate punishment? Ought we not then, to pass a law which will make the authority of the House respected;....").

¹³⁸ Eberling, *supra* note 94, at 313 (citing 42 CONG. GLOBE, 34th Cong. 3d Sess., 427 (1857) (statement of Mr. Davis)).

¹³⁹ 42 CONG. GLOBE, 34th Cong., 3d Sess., 433 (1857).

¹⁴⁰ *Id.* at 445.

¹⁴¹ Eberling, *supra* note 94, at 316.

Under 2 U.S.C. §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. §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 194,¹⁴² “the following steps precede judicial proceedings under [the statute]: (1) approval by committee;¹⁴³ (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;¹⁴⁴ [and] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.”¹⁴⁵

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, to deter others from similar contumacious conduct.¹⁴⁶ 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,¹⁴⁷ in a few instances the House has certified to the U.S. Attorney that further proceedings 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.¹⁴⁸

Under the statute, after a contempt has been certified by the President of the Senate or the Speaker, it is the “duty” of the United States Attorney “to bring the matter before the grand jury for its action.”¹⁴⁹ 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*,¹⁵⁰ the District Court for the District of Columbia granted petitions for writs of habeas corpus sought by two witnesses before

¹⁴² The language of §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 93, at §§17-22.

¹⁴³ In case of a defiance of a subcommittee subpoena, subcommittee approval of the contempt citation precedes committee action on the matter.

¹⁴⁴ See *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966).

¹⁴⁵ 4 Deschler’s Precedents, *supra* note 93, at 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.

¹⁴⁶ See, e.g., S.Rept. 95-170, 95th Cong., 1st Sess., 97 (1977).

¹⁴⁷ *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).

¹⁴⁸ See 4 Deschler’s Precedents, *supra* note 93, at 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).

¹⁴⁹ 2 U.S.C. §194 (2012).

¹⁵⁰ 32 F. Supp. 915 (D.D.C. 1940).

the House Committee on Un-American Activities. The witnesses were charged with violating 2 U.S.C. §192, and were being held on a warrant based on the affidavit of a committee staff member.¹⁵¹ The court ordered the witnesses released since the procedure, described as “mandatory” by the court,¹⁵² 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.*¹⁵³

Similarly, in *United States v. United States House of Representatives*,¹⁵⁴ 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.”¹⁵⁵

Conversely, in *Wilson v. United States*,¹⁵⁶ the United States 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 citations to the United States Attorney during adjournments is a discretionary, not a mandatory, one.¹⁵⁷ 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.¹⁵⁸ This review of a committee’s contempt citation, according to the court, may be inherently discretionary in nature, whereas the prosecutor is simply carrying out Congress’s directions in seeking a grand jury indictment.¹⁵⁹ In *Wilson*, the defendants’ convictions were reversed because the Speaker had certified the contempt citations without exercising his discretion.¹⁶⁰ 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.

¹⁵¹ *Id.* at 916.

¹⁵² *Id.*

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *United States v. United States House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

¹⁵⁵ *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. §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.

¹⁵⁶ 369 F.2d 198 (D.C. Cir. 1966).

¹⁵⁷ *Id.* at 201-03.

¹⁵⁸ *Id.* at 203-04.

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 205.

Alternatively, despite the similarity in the statutory language, there is an argument that the functions of the Speaker and the President of the Senate are so different in nature under the statutory scheme from those of the U.S. Attorney that to conclude that the function of the prosecutor was intended to be discretionary simply because that is the interpretation given to the function of the presiding officers is contrary to the understanding and intent of the 1857 Congress that drafted the language.¹⁶¹ Nevertheless, it should be noted that the courts have generally afforded U.S. Attorneys broad prosecutorial discretion, even where a statute uses mandatory language.¹⁶² Prosecutorial discretion was the principal basis of the U.S. Attorney's decision not to present the grand jury with 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 Joshua Bolten in 2008, and Attorney General Eric Holder in 2012.¹⁶³

Finally, while upholding the validity of 2 U.S.C. §§192 and 194, the courts have recognized that they are criminal provisions and have reversed convictions for contempt where limitations dictated by the language of the statute itself or the Constitution have been exceeded.¹⁶⁴

Civil Enforcement of Subpoenas

Where the use of inherent or criminal contempt is unavailable or unwarranted, Congress may invoke 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.¹⁶⁵ If the court finds that such an obligation exists and issues an order to that effect, continued non-compliance may result in contempt of court—as opposed to contempt of Congress.¹⁶⁶ Although the Senate has existing statutory authority to pursue such an action,

¹⁶¹ See *id.* at 201-02.

¹⁶² 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).

¹⁶³ See *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that Was Voted by the Full House of Representatives against the Then-Administrator of the Environmental Protection Agency, Anne Gorsuch Burford*, Hearing before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess., 30 (1983) [hereinafter *Burford Contempt Prosecution Hearing*]. The U.S. Attorney also suggested that it would have been inappropriate for him to institute a criminal suit against Burford while a related civil action brought by the Justice Department against the House was pending). 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 United States Attorney is required to refer a contempt under 2 U.S.C. §§192, 194 to the grand jury, there is no apparent requirement that the United States 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).

¹⁶⁴ See *infra* notes 279-325 and accompanying text.

¹⁶⁵ See, e.g., 2 U.S.C. §288d (2012) (“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.”).

¹⁶⁶ 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. See 28 U.S.C. §1365(b).

there is no corresponding provision applicable to the House.¹⁶⁷ However, the House has previously pursued civil enforcement pursuant to an authorizing resolution.¹⁶⁸

Civil Enforcement in the Senate

As an alternative to both the inherent contempt power of each House and the criminal contempt statutes,¹⁶⁹ in 1978 Congress enacted a civil enforcement procedure,¹⁷⁰ which is applicable only to the Senate.¹⁷¹ 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.¹⁷²

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.”¹⁷³ It is solely within the discretion of the Senate whether or not to use such a two-step enforcement process.¹⁷⁴

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.¹⁷⁵ 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. Because of the limited scope of the jurisdictional statute and because of Speech or Debate Clause immunity for congressional investigations,¹⁷⁶ “[w]hen 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 whether or not to aid

¹⁶⁷ 2 U.S.C. §§288b(b), 288d, 1365.

¹⁶⁸ See “The Bolten and Miers Contempt: *Committee on the Judiciary v. Miers infra*.”

¹⁶⁹ The inadequacies of the inherent and criminal contempt procedures had 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); *United States v. Fort*, 443 F.2d 670, 677-78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971); *Tobin v. United States*, 306 F.2d 270, 275-76 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Sky, *supra* note 83.

¹⁷⁰ 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 (2012)).

¹⁷¹ 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).

¹⁷² 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) (2012). See 28 U.S.C. §1365(d) (2012). 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) (2012).

¹⁷³ S.Rept. 95-170, 95th Cong., 1st Sess., 89 (1977).

¹⁷⁴ *Id.* at 90.

¹⁷⁵ *Id.* at 4.

¹⁷⁶ See U.S. CONST. art. 1, §6, cl. 3.

Congress in enforcing the subpoena or order.”¹⁷⁷ If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court,¹⁷⁸ with sanctions being imposed to coerce their compliance.¹⁷⁹

Without affecting the right of the Senate to institute criminal contempt proceedings or to try an individual for contempt at the bar of the Senate,¹⁸⁰ this procedure gives the Senate the option of a civil action to enforce a subpoena.¹⁸¹ Civil enforcement might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Unlike criminal contempt, in a civil enforcement, sanctions (imprisonment and/or a fine) can be imposed until the subpoenaed party agrees to comply thereby creating an incentive for compliance; namely, the termination of punishment.¹⁸²

In addition, the civil enforcement process is arguably more expeditious than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant’s constitutional rights. The civil enforcement procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional

¹⁷⁷ S.Rept. 95-170, 95th Cong., 1st Sess., 94 (1977).

¹⁷⁸ *See id.* at 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.

¹⁷⁹ 28 U.S.C. §1365(b) (2012).

¹⁸⁰ Not only do the inherent and criminal contempt procedures remain available as an alternative to the civil enforcement mechanism, but the legislative history indicates that the civil and criminal statutes could both be employed in the same case. “Once a committee investigation has terminated, a criminal contempt of Congress citation under 2 U.S.C. §192 might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem.” S.Rept. 95-170, 95th Cong., 1st Sess., 95 (citations omitted); *see also* Hearings Before the Senate Committee on Governmental Affairs on S. 555, 95th Cong., 1st Sess., 798-800 (1977) [hereinafter *Civil Contempt Hearing*].

¹⁸¹ For a more detailed analysis of the civil enforcement procedure and a comparison with the other options available to the Senate when faced with a contempt, *See* S.Rept. 95-170, 95th Cong., 1st Sess., 16-21, 40-41, 88-97 (1977); *see also* 123 CONG. REC. 20,956-21,019 (June 27, 1977).

¹⁸² The act specifies that “an action, contempt proceeding, or sanction.... shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee ... certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.” 28 U.S.C. §1365(b) (2012). In the first case brought under the new procedure, the witness unsuccessfully argued that the possibility of “indefinite incarceration” violated the due process and equal protection provisions of the Constitution, and allowed for cruel and unusual punishment. Application of the U.S. Senate Permanent Subcommittee on Investigations, 655 F.2d 1232 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981).

procedures, or an inability to comply with the subpoena)¹⁸³ without risking a criminal prosecution.

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.¹⁸⁴ Enacted as part of the Ethics in Government Act of 1978, early drafts of the civil enforcement statute did not include an exception for federal government officers and employees acting within the scope of their duties. It appears that the section was drafted primarily in response to the District Court's dismissal, for lack of jurisdiction, of an Ervin Committee's request for a declaratory judgment regarding the lawfulness of its subpoena of President Nixon's tape recordings.¹⁸⁵ Thus, one of the purposes of the statute was to expressly confer jurisdiction upon courts to determine the validity of congressional requests for information.

During the course of the debates regarding this legislation, the executive branch strongly opposed conferring jurisdiction upon the federal courts to decide such sensitive issues between Congress and the executive branch. Testifying before a subcommittee of the Senate Committee on Governmental Operations, then-Assistant Attorney General Antonin Scalia argued that weighing the legislature's need for information against the executive's need for confidentiality is "the very type of 'political question' from which ... the courts [should] abstain."¹⁸⁶ In response, Congress amended the proposed legislation excluding from its scope federal officers and employees acting in their official capacity. However, as noted in a report from the House Judiciary Committee in 1988, the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms.¹⁸⁷

Since the civil enforcement statute's enactment in 1979, it appears that the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least six times.¹⁸⁸ Notably, it appears that none of these civil enforcement actions has been brought against executive branch officials. Nevertheless, the Senate has successfully enforced its subpoena authority with respect to non-governmental officials. Most recently, on March 17, 2016, the Senate passed a resolution authorizing civil enforcement of a subpoena

¹⁸³ S.Rept. 95-170, 95th Cong., 1st Sess., 93.

¹⁸⁴ 28 U.S.C. §1365(a) (2012). 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

¹⁸⁵ *See* Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

¹⁸⁶ *Executive Privilege-Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess., 117 (1975).

¹⁸⁷ *Clarifying the Investigatory Powers of the United States Congress*, H.Rept. 100-1040, 100th Cong. 2d Sess., 2 (1988).

¹⁸⁸ *See* S. Res. 502, 96th Cong. (1980); S. Res. 293, 98th Cong. (1984); S. Res. 162, 101st Cong. (1989); S. Res. 153, 103rd Cong. (1993); S. Res. 199, 104th Cong. (1995); S. Res. 377, 114th Cong. (2016).

against Carl Ferrer, the Chief Executive Officer of backpage.com, a website for classified advertisements.¹⁸⁹ The Senate, in conjunction with an investigation into sex trafficking on the Internet, had sought the production of documents concerning the company's advertisements for commercial sex services.¹⁹⁰ On August 5, 2016, the U.S. District Court for the District of Columbia rejected Mr. Ferrer's arguments that the subpoena violated his First Amendment rights, and the court granted the Senate's application for enforcement of the subpoena.¹⁹¹ Thus, although used infrequently, the Senate's statutory authority to seek civil enforcement of a subpoena has remained a powerful tool of its investigatory functions.

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 and the decision of the U.S. District Court for the District of Columbia in *Committee on the Judiciary v. Miers* suggest that the House may authorize a committee to seek a civil enforcement action to force compliance with a subpoena.¹⁹² Prior to *Miers*—which represented the first congressional attempt to seek civil enforcement of a subpoena in federal court authorized solely by resolution of a single house—a number of threshold questions, including whether the federal courts would have jurisdiction over such a claim, remained unresolved.

The jurisdiction of the federal district courts, where a civil action for enforcement of a congressional subpoena would be brought, is derived from both Article III of the Constitution and federal statute. Article III states, in relevant part, that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States....”¹⁹³ The Supreme Court has interpreted the language “arising under” broadly, essentially permitting federal jurisdiction to be found whenever federal law “is a potentially important ingredient of a case.”¹⁹⁴ Conversely, the federal question jurisdiction statute, first enacted in 1875,¹⁹⁵ while containing almost identical language to Article III, has been interpreted by the Court to be much narrower in scope. As the Court explained in *Verlinden B.V. v. Central Bank of Nigeria*,

Although the language of 1331 parallels that of the “Arising Under” Clause of Art. III, this Court never has held that statutory “arising under” jurisdiction is identical to Art. III “arising under” jurisdiction. Quite the contrary is true ... [T]he many limitations which have been placed on jurisdiction under 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts ... Art. III “arising under” jurisdiction is broader than federal-question jurisdiction under 1331....¹⁹⁶

¹⁸⁹ S. Res. 377, 114th Cong. (2016).

¹⁹⁰ S. Rep. No. 114-214 (2016).

¹⁹¹ Senate Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125 (D.D.C. 2016). On August 9, 2016, Mr. Ferrer appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Senate Permanent Subcomm. v. Ferrer, No. 16-5232 (D.C. Cir. filed Aug. 11, 2016). The D.C. Circuit heard oral argument in Mr. Ferrer's appeal on March 3, 2017. *Id.*

¹⁹² 558 F. Supp. 2d 53 (D.D.C. 2008).

¹⁹³ U.S. CONST. art. III, §2, cl. 1.

¹⁹⁴ See ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 264 (3d Ed. 1999) (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

¹⁹⁵ See Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. §1331 (stating that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”)).

¹⁹⁶ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983) (internal quotation marks and citations (continued...))

The fact that the statutory jurisdiction provided by Congress is narrower than the Constitution's grant of judicial power may give rise to an argument that the statutory grant of jurisdiction cannot be used by the House should it merely adopt a resolution authorizing a subpoena enforcement proceeding to be brought in court. Following this argument to its conclusion might suggest that both houses of Congress must pass a law, signed by the President, which authorizes a civil enforcement action to be brought in federal district court because a mere one-house resolution will not suffice to provide such jurisdiction. However, the limited precedent from the Supreme Court and other federal courts, especially the federal district court decision in *Committee on the Judiciary v. Miers*, may be read to suggest that the current statutory basis is sufficient to establish jurisdiction for a civil action of the type contemplated here if the representative of the congressional committee is specifically authorized by a house of Congress to act.

In 1928, the Supreme Court decided *Reed v. The County Commissioners of Delaware County, Pennsylvania*,¹⁹⁷ which involved a special committee of the United States Senate charged, by Senate resolution, with investigating the means used to influence the nomination of candidates for the Senate.¹⁹⁸ The special committee was authorized to “require by subpoena or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.”¹⁹⁹ During the course of its investigation into the disputed election of William B. Wilson of Pennsylvania to the Senate, the committee sought to obtain the “boxes, ballots, and other things used in connection with the election.”²⁰⁰ The County Commissioners, who were the legal custodians of said materials, refused to provide them to the committee, thus necessitating the lawsuit. The Supreme Court, after affirming the powers of the Senate to “obtain evidence related to matter committed to it by the Constitution”²⁰¹ and having “passed laws calculated to facilitate such investigations,”²⁰² nevertheless held that it was without jurisdiction to decide the case. The Senate had relied on the resolution's phrase “such other acts as may be necessary” to justify its authority to bring such a suit. According to the Court, however, that phrase “may not be taken to include everything that under any circumstances might be covered by its words.”²⁰³ As a result, the Court held that “the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not ‘authorized by law to sue.’”²⁰⁴ The Court in *Reed* made no mention of the jurisdictional statute that existed at the time. Rather, the Court appears to have relied on the fact that the Senate did not specifically authorize the committee to sue; therefore, absent particular language granting the power to sue in court, there can be no basis for judicial jurisdiction over such a suit.²⁰⁵ Read in this manner, *Reed* appears to suggest that had the Senate resolution specifically mentioned the power to sue, the Court may have accepted jurisdiction and decided the case on its merits. Such a reading of *Reed* is supported

(...continued)

omitted).

¹⁹⁷ 277 U.S. 376 (1928).

¹⁹⁸ *Id.* at 378 (citing S. Res. 195, 69th Cong., 1st Sess. (1926)).

¹⁹⁹ *Id.* at 378-79.

²⁰⁰ *Id.* at 387.

²⁰¹ *Id.* at 388 (citing *McGrain v. Daugherty*, 273 U.S. 135, 160-174 (1927)).

²⁰² *Id.* (citing R.S. §§101-104, (codified as amended at 2 U.S.C. §§192, 194 (2012))).

²⁰³ *Id.* at 389.

²⁰⁴ *Id.*

²⁰⁵ It appears that the Court's decision in *Reed* prompted the Senate to adopt its Standing Order.

by a recent district court ruling involving the question of whether Congress authorized judicial enforcement of Member demands for information from executive branch agencies.

In *Waxman v. Thompson*, a 2006 opinion of the District Court for the Central District of California,²⁰⁶ the plaintiffs, all minority members of the House Government Reform Committee, sought a court order pursuant to 5 U.S.C. §§2954 and 7211—often times referred to as the “rule of seven”—granting them access to Department of Health and Human Services records related to the anticipated costs of the Medicare Prescription Drug Implementation and Modernization Act of 2003.²⁰⁷ The court, in dismissing the case for lack of jurisdiction, addressed the argument made by the plaintiffs that 5 U.S.C. §2954, which requires that “[a]n Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof ... shall submit any information requested of it relating to any matter within the jurisdiction of the committee,”²⁰⁸ implicitly delegated to Members the right to sue to enforce their informational demands.²⁰⁹ The court, in rejecting this argument, relied on the Supreme Court’s holding in *Reed v. County Commissioners*.²¹⁰ Specifically, the court noted that *Reed*’s holding “put Congress on notice that it was necessary to make authorization to sue to enforce investigatory demands explicit if it wished to ensure that such power existed.”²¹¹ According to the court, like the Senate resolution at issue in *Reed*, because §2954 is silent with respect to civil enforcement it stands to reason that the Congress never intended to provide the Members with the power to seek civil judicial orders to enforce their document demands. According to the court in *Waxman*, the holdings of *Reed*, *Senate Select Committee* and *United States v. AT&T*²¹²—a case involving the intervention by a House committee chairman into a lawsuit by the DOJ, which was attempting to enjoin compliance with a committee subpoena by AT&T—suggest that “legislative branch suits to enforce requests for information from the executive branch are justiciable if authorized by one or both Houses of Congress.”²¹³

The argument that a mere one-house resolution is not sufficient to provide jurisdiction chiefly derives its support from the ruling in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,²¹⁴ a 1973 decision by the U.S. District Court for the District of Columbia. In *Senate Select Committee*, the court held that there was no jurisdictional statute available that authorizes the court to hear and decide the merits of the Committee’s request for a declaratory judgment, mandatory injunction, and writ of mandamus arising from President Nixon’s refusal to produce tape recordings and other documents sought by the Committee pursuant to a *subpoena duces tecum*.²¹⁵ In reaching its conclusion, the court addressed several potential bases for jurisdiction: 28 U.S.C. §1345, United States as a Plaintiff; 28 U.S.C. §1361, Action to Compel an Officer of the United States to Perform His Duty; 5 U.S.C. §§701-706, the Administrative

²⁰⁶ *Waxman v. Thompson*, No. 04-3467, slip op. (C.D. Cal. July 24, 2006).

²⁰⁷ *Id.* at 2.

²⁰⁸ 5 U.S.C. §2954 (2012) (emphasis added).

²⁰⁹ *Waxman*, No. 04-3467, slip op. at 21.

²¹⁰ *Id.* at 21, n. 42.

²¹¹ *Id.*

²¹² 567 F.2d 121 (D.C. Cir. 1977).

²¹³ *Waxman v. Thompson*, No. 04-3467, slip op. at 29 (C.D. Cal. July 24, 2006) (emphasis added).

²¹⁴ 366 F. Supp. 51 (D.D.C. 1973).

²¹⁵ *Id.* at 61.

Procedure Act; and, of particular relevance here, 28 U.S.C. §1331, the federal question jurisdiction statute.²¹⁶

Focusing on 28 U.S.C. §1331, the court noted that the statute at the time contained a minimum “amount in controversy” requirement of “\$10,000 exclusive of interest and costs.”²¹⁷ The court stated that “[t]he satisfaction of a minimum amount-in-controversy is not a technicality; *it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.*”²¹⁸ Because the Select Committee could not establish a theory under which the amount in controversy requirement was satisfied, the court dismissed the case for lack of subject matter jurisdiction.²¹⁹

The 2008 district court opinion in *Committee on the Judiciary v. Miers* made clear that the lack of subject matter jurisdiction in *Senate Select Committee* was based solely on the jurisdictional amount in controversy—which has since been repealed—²²⁰ and not on any larger limit on the reach of federal question jurisdiction.²²¹ In *Miers*, the House Judiciary Committee was authorized, by resolution, to pursue civil enforcement of subpoenas issued against former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten.²²² The *Miers* court, without significant discussion, succinctly stated that although the district court in *Senate Select Committee* had dismissed the claim for failure to satisfy the amount in controversy requirement, “that requirement no longer exists and there is no other impediment to invoking §1331 subject matter jurisdiction.”²²³ The court expressly held that because the subpoena power at issue in the suit “derives implicitly from Article I of the Constitution, this case arises under the Constitution for purposes of §1331” and, therefore, qualifies for federal question jurisdiction.²²⁴

In the summer of 2012, the House again authorized a congressional committee to pursue a civil action in federal court to enforce a subpoena in connection with the approval of a contempt citation against an executive branch official.²²⁵ 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 Chairman Darrell Issa to initiate a civil lawsuit on behalf of the Committee to enforce the outstanding subpoenas.²²⁶

²¹⁶ *Id.* at 55-61.

²¹⁷ 28 U.S.C. §1331 (1970).

²¹⁸ Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. at 59 (citing *Holt v. Indiana Mfg. Co.*, 176 U.S. 68 (1900); *United States v. Sayward*, 160 U.S. 493 (1895)) (emphasis in original).

²¹⁹ *Id.* at 61 (stating that “[e]ach of plaintiffs’ assertions ... regarding the amount-in-controversy are legally inadequate, and finding no possible valuation of the matter which satisfies the \$10,000 minimum, the Court cannot assert jurisdiction by virtue of §1331.”).

²²⁰ See P.L. 96-486 §2(a), 94 Stat. 2369 (1980).

²²¹ *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 64 (D.D.C. 2008) (“Both sides concede, and the Court agrees, that 28 U.S.C. §1331 provides subject matter jurisdiction over this lawsuit.”).

²²² For a detailed discussion of the *Miers* litigation, see “The Bolten and Miers Contempt: *Committee on the Judiciary v. Miers*” *infra*.

²²³ *Miers*, 558 F. Supp. 2d at 65.

²²⁴ *Id.* at 64. The court also determined that the committee had standing to bring the claim and that the Constitution provided an implied cause of action necessary to authorize the suit. *Id.* at 66-99 (“It is the Constitution, and not any independent cause of action, that supplies the basis for Congress’s right to invoke the [Declaratory Judgment Act] here.”).

²²⁵ See “The Holder Contempt” *infra*.

²²⁶ 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).

The lawsuit, which seeks a declaratory judgment directing the Attorney General to comply with the Committee subpoenas, was filed on August 13, 2012.²²⁷ On September 30, 2013, the court issued its opinion rejecting the DOJ's motion to dismiss based on jurisdictional and justiciability arguments.²²⁸ The court largely adopted the reasoning laid out in *Miers*, in a detailed discussion that addressed the doctrine of separation of powers, federal court jurisdiction, standing, and causes of action. It determined that the court had jurisdiction to hear the case under 28 U.S.C. §1331 and that the Committee, having been authorized to represent the interests of the full House, had standing to sue.²²⁹ The court has yet to issue its opinion on the merits of the case.

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.²³⁰ Absent such authorization, it appears that the courts will not entertain civil motions of any kind on behalf of Congress or its committees. 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.²³¹

Special Investigative Committees

There have been numerous examples of the House, by resolution, affording special investigatory committees authority not ordinarily available to its standing committees. Such special panels have often been vested with staff deposition authority, and given the particular circumstances, special panels have also been vested with the authority to obtain tax information, as well as the authority to seek international assistance in information gathering efforts abroad.²³² In addition, several special panels have been specifically granted the authority to seek judicial orders and participate in judicial proceedings.²³³

²²⁷ Complaint, Committee on Oversight and Government Reform v. Holder, No. 1:12-cv-1332 (D.D.C. August 13, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/08/Complaint-08-13-12-1.pdf>.

²²⁸ 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.

²²⁹ For a detailed discussion of the *Holder* litigation, see “The Holder Contempt” *infra*.

²³⁰ 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.

²³¹ Relatedly, the Department of Justice has, on numerous occasions, including most recently in 1996, suggested 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. Off. Legal Counsel, 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. Off. Legal Counsel, 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.”).

²³² See *supra* note 24.

²³³ *Id.*

For example, in 1987, the House authorized the creation of a select committee to investigate the covert arms transactions with Iran (Iran-Contra). As part of this resolution, the House provided the following authorization:

(3) The select committee is authorized ... to require by subpoena or otherwise the attendance and testimony of such witnesses ... as it deems necessary, including all intelligence materials however classified, White House materials, ... and to obtain evidence in other appropriate countries with the cooperation of their governments. ... (8) The select committee shall be authorized to respond to any judicial or other process, or to make *any applications to court*, upon consultation with the Speaker consistent with [House] rule L.²³⁴

The combination of broad subpoena authority that expressly encompassed the White House, and the ability to make “any applications to court,” arguably suggests that the House contemplated the possibility that a civil suit seeking enforcement of a subpoena against a White House official was possible. By virtue of the resolution’s language, it appears reasonable to conclude that the House decided to leave the decision in the hands of the select committee, consistent with House Rule L (now House Rule VIII governing subpoenas).²³⁵ It may be noted, then, that while the House select committee did not attempt to seek judicial enforcement of any of its subpoenas, the authorization resolution did not preclude the possibility.

Among the more prominent attempts at utilizing the authority to make applications in court granted by a house of Congress to a select committee occurred during the investigation into the Iran-Contra affair. In 1987, the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition issued an order requiring that former Major Richard V. Secord execute a consent directive authorizing the release of his offshore bank records and accounts to the committee.²³⁶ When Mr. Secord refused to sign the consent directive, the committee sought to obtain a court order directing him to comply.²³⁷ While the committee did not prevail in the Secord litigation, the matter was not disposed of on jurisdictional grounds. Specifically, the district court noted its jurisdiction pursuant to 28 U.S.C. §1364, as Mr. Secord was a private citizen. Moreover, there is no mention or indication of any challenge to the committee’s ability to seek such an order. Rather, the case was decided on Fifth Amendment grounds, with the court holding that there was a testimonial aspect to requiring the signing of the consent directive.²³⁸ Thus, the court concluded that the committee’s order was a violation of Mr. Secord’s Fifth Amendment right against self-incrimination.²³⁹

Committee Intervention in Subpoena Related Litigation

Although, as indicated, prior to the Miers dispute there have been no previous attempts by a House of Congress to seek civil enforcement of subpoenas in federal court authorized solely by

²³⁴ See H.Res. 12, 100th Cong., 1st Sess., §§3, 8 (1987) (emphasis added).

²³⁵ This resolution was initially added to the House Rules as Rule L by the 97th Congress. See H.Res. 5, 97th Cong. (1981). The 106th Congress re-codified the rules and this provision became House Rule VIII, which is where it remains today as amended. See H.Res. 5, 106th Cong. (1999).

²³⁶ Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord, 664 F. Supp. 562, 563 (D.D.C. 1987).

²³⁷ *Id.*

²³⁸ *Id.* at 564-65.

²³⁹ *Id.* at 566. The ruling was not appealed because of the time strictures imposed on the House and Senate Select Committee’s inquiry. It may be noted that in 1988 the Supreme Court adopted the Senate’s argument in a different case, holding that such a directive is not testimonial in nature. See *Doe v. United States*, 487 U.S. 201 (1988).

resolution of a single House,²⁴⁰ there have been situations that appear to be closely analogous. On several occasions the House of Representatives has authorized, via House Resolution, the intervention by counsel representing a House Committee into civil litigation involving congressional subpoenas.

In June of 1976, subpoenas were issued to the American Telephone and Telegraph Company (AT&T) by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The Subcommittee was seeking copies of “all national security request letters sent to AT&T and its subsidiaries by the FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated.”²⁴¹ Before AT&T could comply with the request, the DOJ and the Subcommittee’s chairman, Representative John Moss, entered into negotiations seeking to reach an alternate agreement which would prevent AT&T from having to turn over all its records.²⁴² When these negotiations broke down, the DOJ sought an injunction in the District Court for the District of Columbia prohibiting AT&T from complying with the Subcommittee’s subpoenas.

The House of Representatives responded to the litigation by authorizing Representative Moss to intervene in the suit on behalf of the Committee on Interstate and Foreign Commerce and the House of Representatives.²⁴³ Specifically, the authorization for intervention was accomplished by House Resolution, which provided that Chairman Moss was to represent the Committee and the full House “to secure information relating to the privacy of telephone communications now in the possession of [AT&T] for the use of the Committee and the full House.”²⁴⁴ In addition, the resolution authorized Chairman Moss to hire a special counsel, use not more than \$50,000 from the contingent fund of the Committee to cover expenses, and to report to the full House on matters related as soon as practicable.²⁴⁵ The resolution was adopted by the House by a vote of 180-108 on August 26, 1976.²⁴⁶

Chairman Moss’s intervention into the proceedings was noted by the district court, and does not appear to have been contested by either AT&T or the DOJ.²⁴⁷ Chairman Moss remained an intervener pursuant to the House Resolution through the district court proceeding and two appeals to the Court of Appeals for the District of Columbia Circuit until an agreement was reached with respect to the disclosure of the documents sought.

A second intervention authorization, involving litigation between Ashland Oil and the Federal Trade Commission (FTC), also occurred in 1976. This case arose when Ashland Oil sought to enjoin the FTC from transferring its information to the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce at the request of

²⁴⁰ The litigation filed during the 110th Congress by the House Judiciary Committee represents the first such attempt at civil enforcement. *See infra* notes 405-416 and accompanying text.

²⁴¹ *United States v. American Telephone & Telegraph*, 551 F.2d 384, 385 (D.C. Cir. 1976).

²⁴² *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the Subcommittee are explained by the court, *see id.* at 386-88, and, therefore, will not be recounted here.

²⁴³ *See* H.Res. 1420, 94th Cong. 2d Sess. (1976); *see also* H.Rept. 94-1422, 94th Cong. 2d Sess. (1976).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See* 122 CONG. REC. 27,865-866 (August 26, 1976).

²⁴⁷ *See United States v. American Telephone & Telegraph*, 419 F. Supp. 454, 458 (stating that “[t]he effect of any injunction entered by this Court enjoining the release of materials by AT&T to the Subcommittee would have the same effect as if this Court were to quash the Subcommittee’s subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.”).

Subcommittee Chairman Moss. When Ashland Oil obtained a temporary restraining order, the subcommittee promptly authorized a subpoena for the documents and Chairman Moss filed a resolution for authorization from the House to allow him to intervene with special counsel in the suit that Ashland Oil had filed seeking to enjoin the FTC from transferring the documents to the subcommittee.²⁴⁸ The district court granted Chairman Moss's motion to intervene and ultimately refused to grant the injunction.²⁴⁹ The Court of Appeals affirmed on the grounds that "no substantial showing was made that the materials in the possession of the FTC will necessarily be 'made public' if turned over to Congress."²⁵⁰

While *AT&T* and *Ashland Oil* represent affirmative authorizations for intervention by a house of Congress, *In Re Beef Industry Antitrust Litigation*,²⁵¹ provides an example of what may occur should a house of Congress not provide express authorization to be represented in court. In *In Re Beef*, the chairmen of two subcommittees of the House of Representatives²⁵² sought to intervene in a pending antitrust dispute for the purpose of obtaining access to documents subpoenaed by subcommittees from a party to the litigation. The subpoenaed documents had been obtained through litigation discovery and were thus subject to a standing court protective order. The district court refused to modify its protective order allowing the party to comply with the subpoena.²⁵³ The subcommittee chairmen appealed to the United States Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit entertained a motion to dismiss by one of the plaintiffs on the grounds that the chairmen had not obtained authorization from the full House of Representatives before filing their initial motion before the district court. The plaintiffs relied on what was then Rule XI, cl. 2(m)(2)(B) of the Rules of the House of Representatives, which provided that "[c]ompliance with any subpoena [sic] issued by a committee or subcommittee ... may be enforced only as authorized or directed by the House."²⁵⁴ The committee chairmen responded by arguing that the rule was not applicable as they were not seeking to enforce their subpoenas, but rather were seeking a modification of the district court's protective order.²⁵⁵ Therefore, according to the chairmen, they did not require authorization from the full House of Representatives to appear in court.²⁵⁶

The Fifth Circuit rejected the chairmen's arguments, noting specifically that the House Rules "require[] House authorization not only for direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation and, of course, to appeal from a court decision, particularly when the purpose is, as here, to obtain the effectuation

²⁴⁸ See generally *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976); see also H.Res. 899, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 41,707 (1976).

²⁴⁹ *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 301 (D.D.C. 1976).

²⁵⁰ *Ashland Oil*, 548 F.2d at 979.

²⁵¹ 589 F.2d 786 (5th Cir. 1979).

²⁵² The Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business. See *id.* at 788.

²⁵³ See *In re Beef Industry Antitrust Litigation*, 457 F. Supp. 210, 212 (C.D. Tex. 1978) (stating that "the persons whom the Subcommittees have subpoenaed would not have possession of the subpoenaed documents but for the discovery rules of the Federal Courts. Congress by subpoenaing these documents is interfering with the processes of a Federal Court in an individual case.").

²⁵⁴ *In Re Beef*, 589 F.2d at 789.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

of a subpoena.²⁵⁷ The court also extensively relied on the *Ashland Oil* precedent noting that similar to this case, the chairman in *Ashland Oil* was not seeking to enforce a subpoena, rather merely attempting to prevent an injunction from being issued.²⁵⁸ The failure of the chairmen to obtain an authorization resolution from the full House in this case necessitated the dismissal of their appeal without any decision on the merits.²⁵⁹

Enforcement of a Criminal or Inherent Contempt Resolution 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 branch official,²⁶⁰ 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 procedures²⁶¹ 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. §§192, 194.²⁶² This view is most fully articulated in two opinions by the DOJ's Office of Legal Counsel (OLC) from the mid-1980s,²⁶³ and further evidenced by actions taken by the DOJ in the Burford, Miers, and Holder disputes, discussed below.²⁶⁴ 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.

²⁵⁷ *Id.* at 790-91.

²⁵⁸ *Id.* at 790.

²⁵⁹ *Id.* at 791.

²⁶⁰ 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.

²⁶¹ 2 U.S.C. §§192, 194.

²⁶² *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.”).

²⁶³ See Olson Memo, *supra* note 256; Cooper Memo, *supra* note 256.

²⁶⁴ 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.

The Burford Contempt

The DOJ's early legal analyses were prompted by the outcome of an investigation by two House committees into the Environmental Protection Agency's (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund). Subpoenas were issued by both committees seeking documents contained in the EPA's litigation files.²⁶⁵ At the direction of President Reagan, EPA Administrator Burford claimed executive privilege over the documents and refused to disclose them to the committees on the grounds that they were "enforcement sensitive."²⁶⁶ A subcommittee, and ultimately the full House Committee on Public Works and Transportation, approved a criminal contempt of Congress citation and forwarded it to the full House for its consideration.²⁶⁷ On December 16, 1982, the full House of Representatives voted, 259-105, to adopt the contempt citation.²⁶⁸ Before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit seeking to enjoin the transmission of the citation and to have the House's action declared unconstitutional as an intrusion into the President's authority to withhold such information from the Congress. According to the DOJ, the House's action imposed an "unwarranted burden on executive privilege" and "interferes with the executive's ability to carry out the laws."²⁶⁹

The District Court for the District of Columbia dismissed the DOJ's suit on the grounds that judicial intervention in executive-legislative disputes "should be delayed until all possibilities for settlement have been exhausted."²⁷⁰ In addition, the court noted that ultimate judicial resolution of the validity of the President's claim of executive privilege could only occur during the course of the trial for contempt of Congress.²⁷¹ The DOJ did not appeal the court's ruling, opting instead to resume negotiations, which resulted in full disclosure and release of all the subpoenaed documents to the Congress.²⁷² Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury for its consideration on the grounds that, notwithstanding the mandatory language of the criminal contempt statute,²⁷³ he had discretion with respect to whether to make the presentation. The issue was never resolved because the ultimate settlement agreement included a withdrawal of the House's contempt citation.

In its initial 1984 opinion, OLC revisited the statutory, legal, and constitutional issues that were not judicially resolved by the Superfund dispute. The opinion concluded that, as a function of prosecutorial discretion, a U.S. Attorney is not required to refer a contempt citation to a grand

²⁶⁵ See generally Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, for Withholding Subpoenaed Documents Relating to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.Rept. 97-968, 97th Cong. (1982) [hereinafter Gorsuch Contempt Report].

²⁶⁶ *Id.* at 42-43.

²⁶⁷ *Id.* at 57, 70.

²⁶⁸ 128 CONG. REC. 31,776 (1982).

²⁶⁹ See generally *United States v. United States House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

²⁷⁰ *Id.* at 152.

²⁷¹ *Id.* (stating that "[c]onstitutional claims and other objections to congressional investigations may be raised as defenses in a criminal prosecution").

²⁷² See LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE*, 126-130 (Carolina Academic Press., 2004) [hereinafter Fisher].

²⁷³ 2 U.S.C. §194 (1982) (stating that "[the Speaker of the House or President of the Senate] shall so certify, ... to the appropriate United States attorney, whose duty it *shall* be to bring the matter before the grand jury for its action.") (emphasis added).

jury or otherwise to prosecute an executive branch official who is carrying out the President's direction to assert executive privilege.²⁷⁴ Next, the OLC opinion determined that a review of the legislative history of the 1857 enactment of the criminal contempt statute and its subsequent implementation demonstrates that Congress did not intend the statute to apply to executive officials who carry out a presidential directive to assert executive privilege.²⁷⁵ Finally, as a matter of constitutional law, the opinion concludes that simply the threat of criminal contempt would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations.²⁷⁶ According to the OLC opinion,

The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.²⁷⁷

The 1984 opinion focuses almost exclusively on the criminal contempt statute, as that was the authority invoked by Congress in the Superfund dispute. In a brief footnote, however, the opinion contains a discussion of Congress's inherent contempt power, summarily concluding that the same rationale that makes the criminal contempt statute inapplicable and unconstitutional as applied to executive branch officials apply to the inherent contempt authority:

We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well.²⁷⁸

The 1986 OLC opinion reiterates the 1984 reasoning adding the observation that the power had not been used since 1935 (at that time over 50 years), and that "it seems unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official who claimed executive privilege."²⁷⁹ The 1986 OLC opinion also suggests that then current Supreme Court opinions indicated that it was "more wary of Congress exercising judicial authority" and,

²⁷⁴ See Olson Memo, *supra* note 254, at 102, 114-15, 118-28.

²⁷⁵ *Id.* at 129-134 (stating that "[t]he Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

²⁷⁶ See *id.* at 102, 135-142.

²⁷⁷ *Id.* at 102.

²⁷⁸ *Id.* at 140, n. 42 (internal citation omitted).

²⁷⁹ Cooper Memo, *supra* note 256, at 86.

therefore, might revisit the question of the continued constitutional validity of the inherent contempt power.²⁸⁰

Factual, legal, and constitutional aspects of these OLC opinions are open to question and potentially limitations. For example, with respect to the argument that a U.S. Attorney cannot be statutorily required to submit a contempt citation to a grand jury, despite the plain language of the law, such a statement appears to be analogous to a grant of so-called “pocket immunity” by the President to anyone who asserts executive privilege on his behalf.²⁸¹ The courts have concluded that the government, or in this case the President, may informally grant immunity from prosecution, which is in the nature of a contract and, therefore, its effect is strongly influenced by contract law principles.²⁸² Moreover, principles of due process require that the government adhere to the terms of any immunity agreement it makes.²⁸³ It appears that a President has implicitly immunized executive branch officials from violations of congressional enactments at least once—in 1996, during a dispute over the constitutionality of a statute that made it a requirement for all public printing to be done by the Government Printing Office.²⁸⁴ At the time, the DOJ, in an opinion from OLC, argued that the requirement was unconstitutional on its face, directed the executive branch departments not to comply with the statute as passed by Congress, and noted that executive branch officials who are involved in making decisions that violate the statute face little to no litigation risk, including, it appears, no risk of prosecution under the Anti-Deficiency Act,²⁸⁵ for which the DOJ is solely responsible.²⁸⁶ Such a claim of immunization in the contempt context, whether express or implicit, would raise significant constitutional questions. While it is true that the President can immunize persons from criminal prosecution, it does not appear that he has authority to immunize a witness from a congressional inherent contempt proceeding. Arguably, an inherent contempt proceeding takes place wholly outside the criminal code, is not subject to executive execution of the laws and prosecutorial discretion, and thus, appears completely beyond the reach of the executive branch. Furthermore, as previously indicated, inherent contempt, unlike criminal contempt, is not intended to punish, but rather to coerce compliance with a congressional directive.²⁸⁷ Thus, a finding of inherent contempt against an executive branch official does not appear to be subject to the President’s Pardon power²⁸⁸—as an

²⁸⁰ *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 962-66 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Levett*, 328 U.S. 303, 317 (1940)). It is important to note that the 1984 OLC opinion pre-dates the Supreme Court’s decisions in *Morrison v. Olson*, 487 U.S. 654 (1988) and *Mistretta v. United States*, 488 U.S. 361 (1989), both of which appear to undercut portions of the OLC’s reasoning.

²⁸¹ *See, e.g.*, *United States v. Hogan*, 862 F.2d 386, 388 (1st Cir. 1988); *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986); *United States v. Harvey*, 791 F.2d 294, 300-01 (4th Cir. 1986); *United States v. Irvine*, 756 F.2d 708, 710-11 (9th Cir. 1985).

²⁸² *Id.*

²⁸³ *See Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled”); *United States v. (Jerry) Harvey*, 869 F.2d 1439, 1443-44 (11th Cir. 1989); *Innes v. Dalsheim*, 864 F.2d 974, 978 (2d Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); *In re Arnett*, 804 F.2d 1200, 1202-03 (11th Cir. 1986).

²⁸⁴ *See* Legislative Branch Appropriations Act of 1993, P.L. 102-392 §207(a), 106 Stat. 1703, 1719 (1992) (codified at 44 U.S.C. §501 note); *see also* Legislative Branch Appropriations Act of 1995, P.L. 103-283 §207(2), 108 Stat. 1423, 1440 (1994) (amending Section 207(a) of the 1993 Act).

²⁸⁵ *See* 31 U.S.C. §1341 (2012).

²⁸⁶ *See* Memorandum for Emily C. Hewitt, General Counsel, GSA, *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, May 31, 1996.

²⁸⁷ *See supra* “Inherent Contempt.”

²⁸⁸ U.S. CONST. art. II, §2 (stating that the President “shall have the Power to grant Reprieves and Pardons for Offenses (continued...)”).

inherent contempt arguably is not an “offense against the United States,” but rather is an offense against a house of Congress. Likewise, it appears that the same arguments would be applicable to a potential civil enforcement by Congress.

The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch official is not supported by the historical record. The floor debates leading to the enactment of the statute make it clear that the legislation was intended as an alternative to, not a substitute for, the inherent contempt authority. This understanding has been reflected in numerous Supreme Court opinions upholding the use of the criminal contempt statute.²⁸⁹ A close review of the floor debate indicates that Representative H. Marshall expressly pointed out that the broad language of the bill “proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people.”²⁹⁰

Moreover, language from the floor debate indicates that Congress was aware of the effect that this language would have on the ability of persons to claim privileges before Congress. Specifically, the sponsor of the bill, Representative Orr, was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege,²⁹¹ to support an investigation such as one that probed “the propriety of a secret service fund to be used upon the discretion of the executive department,”²⁹² or to support inquiries about “diplomatic matters.”²⁹³ Representative Orr responded that the House has and would continue to follow the practice of the British Parliament, which “does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the common law of Parliament.”²⁹⁴ Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege in the statute was overwhelmingly defeated.²⁹⁵

With respect to the secret service fund, Representative Orr explained:

this House has already exercised the power and authority of forcing a disclosure as to what disposition had been made for the secret-service fund. And it is right and proper that it should be so. Under our Government—under our system of laws—under our Constitution—I should protest against the use of any money by an executive authority, where the House had not the right to know how every dollar had been expended, and for what purpose.²⁹⁶

(...continued)

Against the United States.”).

²⁸⁹ See, e.g., *Journey v. McCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *In re Chapman*, 166 U.S. 661 (1897).

²⁹⁰ 42 CONG. GLOBE 429 (1857).

²⁹¹ *Id.* at 431 (statement of Rep. Dunn) (asking that “if the committee considered, and if they did so consider, what is their judgment in reference to the effect of this bill upon communications by the universal law regarded as privileged, to attorneys and counselors at law? Are they required to divulge things communicated to them in confidence, and for wise and high purposes of public purpose by their clients?”).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* (statement of Rep. Orr).

²⁹⁵ *Id.* at 441-43.

²⁹⁶ *Id.* at 431.

Representative Orr's reference was to a contentious investigation in 1846, regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund used by the President for clandestine foreign operations. The charges led the committee to issue subpoenas to former Presidents John Quincy Adams and John Tyler. President Polk sent the House a list of the amounts in the contingent fund for the relevant period, which was prior to his term, but refused to furnish documentation of the uses that had been made of the expenditures on the grounds that a sitting President should not publically reveal the confidences of his predecessors.²⁹⁷ President Polk's refusal to provide the information was mooted by the actions of the two investigatory committees established by the House. Former President Tyler testified²⁹⁸ and former President Adams filed a deposition²⁹⁹ detailing the uses of the fund during their Administrations. In addition, President Polk's Secretary of State, James Buchanan, was subpoenaed and testified.³⁰⁰ Ultimately, Mr. Webster was found innocent of any wrongdoing. From these references, it appears that the House was, in 1857, sensitive to and cognizant of its oversight and investigative prerogatives vis-à-vis the executive branch. It therefore appears arguable that in the context of the debate, the contempt statute was not intended to preclude the House's ability to engage in oversight of the executive branch.

Finally, it should be noted that past practice suggests that Congress clearly claims the authority to utilize the criminal contempt statute to cite executive branch officials for contempt. Since 1980, Congress has cited a number of executive branch officials or former executive branch officials for contempt of Congress. The House of Representatives has approved contempt citations for two former officials (former EPA Assistant Administrator Rita M. Lavelle and former White House Counsel Harriet Miers), and three sitting³⁰¹ officials (EPA Administrator Anne Gorsuch Burford, White House Chief of Staff Joshua Bolten, and Attorney General Eric Holder). Additionally, committees and subcommittees of the House of Representatives have also voted contempt citations against Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982); Attorney General William French Smith (1983); White House Counsel John M. Quinn (1996); Attorney General Janet Reno (1998); and former White House Advisor Karl Rove (2008).³⁰² Senate committees and subcommittees have voted contempt citations against William French Smith (1984); Joshua Bolten (2007); and White House Advisor Karl Rove (2007). (For a summary of House and Senate action on contempt resolutions see **Appendix**.)

The Bolten and Miers Contempt: *Committee on the Judiciary v. Miers*

The DOJ's position on the use of criminal contempt against an executive branch official invoking executive privilege was put into practical effect during a dispute over an investigation into the resignations of nine United States Attorneys by the House Judiciary Committee and its

²⁹⁷ See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 949 (4th ed. 2007) (citing 16 CONG. GLOBE 698 (April 20, 1846)).

²⁹⁸ *Id.* (citing H.Rept. 684, 29th Cong., 1st Sess., 8-11 (1846)).

²⁹⁹ *Id.* (citing H.Rept. 686, 29th Cong., 1st Sess., 22-25 (1846)).

³⁰⁰ *Id.* (citing H.Rept. 686, 29th Cong., 1st Sess., 4-7 (1846)).

³⁰¹ These officials held office at the time of the contempt citation.

³⁰² Notably, House committees have also approved contempt citations against Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); and Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978).

Subcommittee on Commercial and Administrative Law (“the Committee”).³⁰³ This investigation resulted in the first legal confrontation over Congress’s contempt authority since the early 1980s and the first civil lawsuit filed by a house of Congress in an attempt to affirm its information gathering prerogatives. The actions and approach taken by both branches throughout the dispute; the Attorney General’s unwillingness to prosecute a former presidential advisor for contempt of Congress; and the resulting district court decision remain uniquely informative in delineating the ability of Congress to issue and effectively enforce its own subpoenas against executive branch officials.

After an extensive investigation into whether political motives and White House involvement had prompted the requested resignations of the U.S. Attorneys—including numerous informal communications and requests for information, witness interviews, and several congressional hearings—the Committee ultimately sought information relating to the resignations directly from a number of President Bush’s closest White House legal advisors.³⁰⁴ Following several months of unfruitful negotiations and a number of attempts to obtain the information sought voluntarily,³⁰⁵ on March 21, 2007, the Committee authorized subpoenas for Ms. Harriet Miers, the former White House Counsel and Mr. Joshua Bolten, the White House Chief of Staff and custodian of White House records.³⁰⁶ The Miers subpoena was for both documents and testimony relating to her role, if any, in the resignations, while the Bolten subpoena was only for White House records and documents related to the resignations.³⁰⁷ In an effort to obtain a negotiated solution, Chairman Conyers did not issue the authorized subpoenas until June 13, 2007.³⁰⁸

In response to the Committee’s action, the White House, via its Counsel Fred F. Fielding, notified the Committee that it did not intend to comply with the Bolten subpoena on the grounds of executive privilege. With respect to the subpoena directed to Ms. Miers, who had been living in Texas since her resignation as White House Counsel in January 2007, Mr. Fielding first sent a letter to Miers’s private attorney containing notice of the President’s assertion of executive privilege over information related to the investigation, and suggested that Ms. Miers refrain from producing any documents pursuant to her subpoena.³⁰⁹ Several days later, Mr. Fielding sent a second letter to Miers’s attorney indicating that she was “not to provide ... testimony” pursuant to the subpoena on the grounds that any such testimony would also be covered by the President’s assertion of executive privilege.³¹⁰ Subsequently, Miers’s attorney notified the Committee that, as a result of the President’s claim of executive privilege, Ms. Miers would not appear at the scheduled hearing.³¹¹

³⁰³ For additional information on the U.S. Attorneys dispute *see* H.Rept. 110-423, 110th Cong. (2007).

³⁰⁴ *Id.*; Plaintiff’s Motion for Summary Judgment at 11 *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (copy on file with authors).

³⁰⁵ Following the initial request by the Committee for testimony and documents, Counsel to the President Fred Fielding responded with an offer to make certain officials and documents available, but only with respect to external White House communications, and only under the condition that any testimony be taken in private, “without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas.” Letter from Fred Fielding, Counsel to the President to John Conyers, Chairman, House Committee on the Judiciary, et. al. (March 20, 2007); *Miers*, 558 F. Supp. 2d at 59-60.

³⁰⁶ *Miers*, 558 F. Supp. 2d at 60.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 61.

³⁰⁹ *See* Plaintiff’s Motion for Summary Judgment at 12 *Miers*, 558 F. Supp. 2d 53.

³¹⁰ *Id.*

³¹¹ *Id.*

Although negotiations between the Committee and the White House continued in an attempt to reach a compromise over the disclosure of documents and the requested testimony, by July 25, 2007, the sides had apparently reached an impasse, and the Committee voted to recommend that Ms. Miers and Mr. Bolten be cited for contempt of Congress for failure to comply with the duly issued subpoenas.³¹² The resolutions were forwarded to the House of Representatives, which voted to cite Ms. Miers and Mr. Bolten for contempt of Congress on February 14, 2008.³¹³ The House approved Resolution 979, which directed the Speaker to forward the contempt citation to the U.S. Attorney for the District of Columbia for action against Ms. Miers and Mr. Bolten; and Resolution 980, which expressly authorized Chairman Conyers to initiate a civil lawsuit in federal court to enforce the subpoenas in the event that the Department of Justice did not pursue the criminal contempt actions.³¹⁴

On February 28, 2008, pursuant to 2 U.S.C. §194, the Speaker of the House certified the report to the U.S. Attorney for the District of Columbia for presentation to the grand jury.³¹⁵ The next day, however, the Attorney General sent a letter to the Speaker, stating that the Department of Justice would “not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.”³¹⁶ Consistent with the positions asserted in the previously discussed OLC opinions, it appeared that the DOJ would not proceed with the prosecution of a White House official for criminal contempt of Congress where that official had invoked executive privilege at the behest of the President. With any criminal contempt prosecution under 2 U.S.C. §§192 and 194 unavailable, on March 10, 2008, pursuant to the resolution adopted by the House of Representatives, the Committee filed a civil suit in the U.S. District Court for the District of Columbia “seek[ing] [a] declaratory judgment[]” and other “appropriate relief, including injunctive relief” to enforce the Committee’s subpoenas.³¹⁷ It is important to note that the case filed by the Committee was limited only to whether Miers and Bolten could be forced to comply with the issued subpoenas, not whether the House had the authority to hold either of the officials in contempt of Congress.³¹⁸

In *Committee on the Judiciary v. Miers*, the Bush Administration adopted the position that senior presidential advisors, like Ms. Miers,³¹⁹ were absolutely immune from compelled testimony before Congress when asserting executive privilege at the direction of the President.³²⁰ As such, Ms. Miers could not be required to present herself before the Committee.³²¹ The Administration’s absolute immunity argument rested primarily on the assertion that a senior presidential advisor, as

³¹² See H.Rept. 110-423, 60 (2007).

³¹³ See H.Res. 979, H.Res. 980, H.Res. 982, 110th Cong. (2008).

³¹⁴ The House actually passed H.Res. 982, which incorporated the terms of H.Res. 979 and H.Res. 980.

³¹⁵ See Plaintiff’s Motion for Summary Judgment at 13 *Miers*, 558 F. Supp. 2d 53.

³¹⁶ *Id.* at 13-14.

³¹⁷ *Id.*

³¹⁸ *Miers*, 558 F. Supp. 2d at 55 (“The Committee ... asks the Court to declare that ... Miers must comply with a subpoena and appear before the Committee to testify ... and that current White House Chief of Staff Joshua Bolten must produce a privilege log in response to a congressional subpoena.”).

³¹⁹ The Administration did not claim that absolute immunity extended to a congressional subpoenas for documents, as opposed to a subpoenas for testimony. However, the Administration did argue that the individual documents responsive to Mr. Bolten’s subpoena were protected by executive privilege. *Id.* at 99.

³²⁰ *Id.* at 99-100.

³²¹ Although the case dealt only with the enforceability of the Committee’s subpoenas, if the Committee did not have the authority to compel Ms. Miers to appear, non-compliance with the Committee’s subpoena would not appear to have been grounds for a contempt citation.

the President's "alter ego," should be accorded the same constitutional immunities enjoyed by the President, just as congressional aides were accorded the same protections as Members of Congress under the Speech or Debate Clause.³²² Therefore, if the President were absolutely immune from compelled testimony before Congress, which the Administration argued he surely was, so should that immunity extend to his closest presidential advisors, including his White House Counsel.³²³

The opinion issued by the U.S. District Court for the District of Columbia on July 31, 2008, rejected the Administration's position, noting that "the asserted absolute immunity claim here is entirely unsupported by existing case law."³²⁴ In addition, the court reaffirmed Congress's "essential," constitutionally based power to issue and enforce subpoenas.³²⁵ Although upholding Congress's "right" to information, and acknowledging that that right "derived from its Article I legislative function," the district court made no explicit comment about Congress's authority to punish executive branch officials through contempt.³²⁶ Nor did the court reach the question of whether the U.S. Attorney could decline to refer a duly certified criminal contempt citation to a grand jury under 2 U.S.C. §194.

In dismissing the Administration's absolute immunity argument, the district court held that past precedent suggested that presidential advisors could not be regarded as the "alter ego" of the President for immunity purposes. The Supreme Court had previously rejected the alter ego analogy in the case of *Harlow v. Fitzgerald*.³²⁷ There, the Court held that executive officers were not entitled to the same absolute immunity in a civil suit arising from official conduct as enjoyed by legislators, judges, prosecutors, and the President. As opposed to the relationship between congressional aides and Members of Congress,³²⁸ the President and his advisors were considered "analytically distinct."³²⁹ These advisors were, therefore, only entitled to qualified immunity in the performance of their official duties. In light of the Supreme Court's reasoning in *Harlow* that presidential advisors were not entitled to alter ego status for immunity purposes, the *Miers* court concluded that there was "nothing left to the Executive's primary argument ..."³³⁰

The district court continued, however, and noted that even if presidential advisors were entitled to the same immunity as the President, it was not clear that the President himself would enjoy

³²² *Miers*, 558 F. Supp. 2d at 100 ("Because senior White House advisers 'have no operational authority over government agencies ... [t]heir sole function is to advise and assist the President in the exercise of his duties.' Therefore, they must be regarded as the President's 'alter ego.'") (citations omitted).

³²³ *Id.* ("Accordingly, forcing close presidential advisors to testify before Congress would be tantamount to compelling the President himself to do so, a plainly untenable result in the Executive's view.")

³²⁴ *Id.* at 99 ("The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.")

³²⁵ *Id.* at 75 (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)).

³²⁶ *Id.* at 84 ("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.")

³²⁷ 457 U.S. 800 (1982).

³²⁸ The Supreme Court has held that the liability protections of the Speech or Debate Clause extend beyond Members to include their personal staff. *Doe v. McMillan*, 412 U.S. 306 (1973).

³²⁹ *Miers*, 558 F. Supp. 2d at 106.

³³⁰ *Id.* at 101.

absolutely immune from compelled congressional testimony.³³¹ Although reaching no decision on whether Congress could subpoena a sitting President for testimony, the court noted that the Supreme Court's opinions in *U.S. v. Nixon* and *Clinton v. Jones* could be interpreted as recognizing that the President was not absolutely immune from compulsory process generally. In the *Nixon* case, President Nixon was only entitled to a presumptive privilege over the White House tapes in question—a privilege that could be overcome by a sufficient showing of need by the grand jury.³³² Additionally, in the *Clinton* case, the Supreme Court held that President Clinton was not immune from a civil suit arising from unofficial conduct not occurring during his Presidency, and, therefore, could be required to comply with compulsory process in the suit.³³³ Like the judiciary's essential need for access to information in *Nixon* and *Clinton*, the district court reasoned that a congressional subpoena likewise involved “core functions of a co-equal branch of the federal government.”³³⁴

Although the district court opinion in *Miers* may be characterized as a vindication of congressional oversight prerogatives, or at least a limitation on the scope of executive privilege in the face of a congressional investigation, the opinion also made clear that Congress's authority to compel testimony from executive branch officials was not unlimited. Indeed, the court noted two important restrictions. First, the court specifically held that, although not enjoying absolute immunity from congressionally compelled testimony, Ms. Miers was still free to assert executive privilege “in response to any specific questions posed by the Committee.”³³⁵ Thus, Ms. Miers could still assert the protections of executive privilege during her testimony depending on the substance of any individual question posed by a Member of the Committee. Second, the court suggested that Congress may lack authority to compel testimony where such testimony related to national security, foreign affairs, or another “particularly sensitive function” of the executive branch.³³⁶ Without further explanation, the district court repeatedly noted that absolute immunity may inhere to presidential advisors where “national security or foreign affairs form the basis for the Executive's assertion of privilege.”³³⁷

The Administration appealed the district court decision and asked the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to stay the district court order pending an expedited final decision by that court. On September 16, 2008 the D.C. Circuit granted the stay, but denied the Administration's request for an expedited schedule.³³⁸ The appeals court had concluded that “even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch ... before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.”³³⁹ As noted previously, the authority underlying a House subpoena or contempt citation

³³¹ *Id.* at 102-03. (“Significantly, although the Supreme Court has established that the President is absolutely immune from civil suits arising out of his official actions, even the President may not be absolutely immune from compulsory process more generally ... the President may only be entitled to a presumptive, rather than an absolute, privilege here.”).

³³² *United States v. Nixon*, 418 U.S. 683 (1974).

³³³ *Clinton v. Jones*, 520 U.S. 681 (1997).

³³⁴ *Miers*, 558 F. Supp. 2d at 103. *But see* Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (describing a select committee's need for the Nixon White house tapes as “merely cumulative.”).

³³⁵ *Miers*, 558 F. Supp. 2d at 105.

³³⁶ *Id.* at 101, 106.

³³⁷ *Id.* at 106.

³³⁸ *Committee on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008) [hereinafter *Miers II*].

³³⁹ *Id.* at 911.

has traditionally been considered to expire at the termination of the Congress in which it was authorized.³⁴⁰ Accordingly, because the Committee's subpoenas were likely to expire before the dispute could be resolved, the court saw no reason to expedite the case.³⁴¹

On January 13, 2009—with the *Miers* case still on appeal before the D.C. Circuit, the 110th Congress having reached its conclusion, and all presidential records set to transfer into the custody of the Archivist of the United States³⁴² at the end of President Bush's second term on January 20th—the district court issued a second order to preserve the availability of documents covered by the Committee subpoenas.³⁴³ The order required the Administration to make copies of all materials responsive to the subpoenas for storage at the White House until the conclusion of the litigation.

In March of 2009, after the arrival of a newly elected Congress and presidential administration, the parties reached a settlement in which some, but not all, of the requested documents would be provided to the Committee. In addition, Ms. Miers would be permitted to testify, under oath, in a closed, but transcribed hearing.³⁴⁴ Accordingly, the D.C. Circuit dismissed *Miers* on October 14, 2009, pursuant to a motion for voluntary dismissal.³⁴⁵ Thus the *Miers* litigation ended, more than a year and a half after the Committee first filed its suit to enforce the subpoenas. Ultimately, however, the Committee was able to gain access to much of the information it had been seeking.³⁴⁶

The Holder Contempt

In the summer of 2012, the DOJ again refused to pursue a contempt prosecution against an executive branch official when the President had invoked executive privilege as the basis for non-compliance with a congressional subpoena. The dispute arose out of a subpoena issued by the House Oversight and Government Reform Committee seeking disclosure of internal DOJ documents detailing the department's response to the Committee's investigation into Operation Fast and Furious.

In early 2011, the Committee on Oversight and Government Reform began investigating the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), a DOJ sub-agency, regarding Operation Fast and Furious—an ATF operation based in the Phoenix, Arizona field office.³⁴⁷ The investigations were principally triggered by ATF whistleblowers who had alleged that suspected straw purchasers were allowed to amass large quantities of firearms as part of long-term gun trafficking investigations.³⁴⁸ As a consequence, some of these firearms were allegedly “walked,”

³⁴⁰ See *supra* note 60 and accompanying text.

³⁴¹ The concurring opinion appeared to disagree with the majority on this point, arguing that “the successor Congress can assert the prior Committee's investigatory interest . . .” *Committee on the Judiciary v. Miers*, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, Judge, concurring) (citing *United States v. AT&T Co.*, 567 F.2d 121 (D.C. Cir. 1977)).

³⁴² Presidential Records Act, 44 U.S.C. §§2201-2207.

³⁴³ *Committee on the Judiciary v. Miers*, 2009 U.S. Dist. LEXIS 2326 (D.D.C. 2009).

³⁴⁴ David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES, March 4, 2009. The settlement also permitted Karl Rove to testify under the same conditions.

³⁴⁵ *Committee on the Judiciary v. Miers*, 2009 U.S. App. LEXIS 29374 (D.C. Cir. 2009).

³⁴⁶ The testimony and documents are available at http://judiciary.house.gov/issues/issues_WHInterviews.html: http://judiciary.house.gov/issues/issues_WHInterviews.html.

³⁴⁷ For a detailed discussion of Operation Fast and Furious, see CRS Report RL32842, *Gun Control Legislation*, by William J. Krouse. The Senate and House Judiciary Committees also initiated contemporaneous investigations.

³⁴⁸ James V. Grimaldi and Sari Horwitz, *ATF Probe Strategy is Questioned*, WASH. POST, February 2, 2011, at A4.

or trafficked to gunrunners and other criminals in Mexico.³⁴⁹ In December 2010, two of these firearms were reportedly found at the scene of a shootout near the U.S.-Mexico border where U.S. Border Patrol Agent Brian Terry had been killed.³⁵⁰ Following public reports of the operation and Agent Terry's death, Attorney General Eric Holder instructed the DOJ Office of the Inspector General to review ATF's gun trafficking investigations.³⁵¹

On February 4, 2011, Assistant Attorney General for Legislative Affairs Ronald Weich sent a letter to Congress denying that ATF had either sanctioned or knew of the sale of weapons to straw purchasers who then transported the guns into Mexico.³⁵² In March 2011, Representative Darrell Issa, Chairman of the Oversight and Government Reform Committee, requested additional documents and information about the operation from then-Acting ATF Director Kenneth E. Melson. DOJ acknowledged the request but, according to the Committee, "did not provide any documents or information to the Committee by the March 30, 2011 deadline."³⁵³ The following day, the Committee subpoenaed the documents from both DOJ and ATF.³⁵⁴ Over the next year, the Committee held several hearings regarding Operation Fast and Furious and also heard direct testimony from Attorney General Holder.³⁵⁵ On October 12, 2011, after DOJ informed the committee that it had produced all the documents it was willing to provide, the Committee issued a second subpoena to the Attorney General requesting all departmental communications and documents "referring or related to Operation Fast and Furious."

Notably, at a November 8, 2011 Senate Judiciary Committee hearing, Attorney General Holder conceded that the February 4, 2011 letter—disclaiming ATF knowledge of "gun walking"—contained "inaccurate" information about the depth of knowledge DOJ officials had regarding ATF's "gun walking" methods.³⁵⁶ The next month, DOJ formally withdrew the February 4 letter and acknowledged that Operation Fast and Furious was "fundamentally flawed."³⁵⁷ The letter was accompanied by nearly 1,400 pages of pre-February 4 documents and communications that addressed how inaccurate information had been included in the February 4 letter.³⁵⁸

³⁴⁹ *Id.*

³⁵⁰ John Solomon, David Heath, and Gordon Witkin, "ATF Let Hundreds of U.S. Weapons Fall into Hands of Suspected Mexican Gun Runners: Whistleblower Says Agents Strongly Objected to Risky Strategy," *Center for Public Integrity*, available at <http://www.iwatchnews.org/2011/03/03/2095/atf-let-hundreds-us-weapons-fall-hands-suspected-mexican-gunrunners>.

³⁵¹ Pete Yost, *Justice IG to Look into Anti-Gun Efforts on Border*, ASSOCIATED PRESS ONLINE, March 4, 2011.

³⁵² Letter from Assistant Attorney General Ronald Weich to Ranking Member Charles Grassley, February 4, 2011, available at <http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf>.

³⁵³ Report of the Committee on Oversight and Government Reform U.S. House of Representatives, "Report Recommending that the House of Representatives Find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Committee on Oversight and Government Reform, June 20, 2012, p. 4 [hereinafter Contempt Committee Report].

³⁵⁴ Press Release, "Chairman Issa Subpoenas ATF for 'Project Gunrunner' Documents," April 1, 2011.

³⁵⁵ The Committee hearings included: June 13, 2011: "Obstruction of Justice: Does the Justice Department Have to Respond to a Lawfully Issued and Valid Congressional Subpoena?"; June 15, 2011: "Operation Fast and Furious: Reckless Decisions, Tragic Outcomes"; July 26, 2011: "Operation Fast and Furious: The Other Side of the Border"; February 2, 2012: "Fast and Furious: Management Failures at the Department of Justice" (Attorney General Holder testified); June 20, 2012: "Full Committee Business Meeting" (voting on citation to hold Attorney General Holder in contempt).

³⁵⁶ Jerry Jarkon, *Holder Amends Remarks on Gun Sting: Attorney General Heard of 'Fast and Furious' Earlier Than He First Said*, WASH. POST, November 9, 2011, at A2.

³⁵⁷ Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley, December 2, 2011, available at <http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf>.

³⁵⁸ *Id.*

This disclosure deviated from DOJ's general position that congressional requests "seeking information about the Executive Branch's deliberations ... implicate significant confidentiality interests grounded in the separation of powers under the U.S. Constitution."³⁵⁹ As such, DOJ maintained that it made "extraordinary accommodations"³⁶⁰ in responding to requests about the drafting of the February 4 letter. Furthermore, it stated:

The Department has substantially complied with the outstanding subpoenas. The documents responsive to the remaining subpoena items pertain to sensitive law enforcement activities, including ongoing criminal investigations and prosecutions, or were generated by Department officials in the course of responding to congressional investigations or media inquiries about this matter that are generally not appropriate for disclosure.³⁶¹

However, the Committee maintained that despite its flexibility and being "unfailingly patient,"³⁶² the DOJ had "refused to produce certain documents"³⁶³ and had "fought this committee's investigation every step of the way."³⁶⁴ During a Committee hearing, Chairman Issa remarked that the Attorney General had specifically "refused to cooperate, offering to provide subpoenaed documents only if the committee agrees in advance to close the investigation. No investigator would ever agree to that."³⁶⁵ As a result, Chairman Issa publicly threatened a contempt vote if the Attorney General's refusal to comply with the subpoena continued. As negotiations between the Attorney General and Chairman Issa continued, the Chairman reportedly narrowed the scope of the documents that would need to be produced in order to avoid a contempt vote to only those documents created after February 4, 2011—the date in which DOJ provided Congress with admittedly inaccurate information about Operation Fast and Furious—and which related to the Department's response to various congressional inquiries.³⁶⁶ The Attorney General maintained that he could not provide the Committee with the requested documents.

In light of the Committee's continued dissatisfaction with DOJ's refusal to comply fully with the subpoenas, Chairman Issa scheduled a vote to hold Attorney General Holder in contempt of Congress. Although the Attorney General and Chairman Issa met the night before the scheduled vote, they were unable to reach an acceptable accommodation with regard to document disclosure. On the morning of the vote, President Obama formally invoked executive privilege "over the relevant post-February 4, 2011, documents."³⁶⁷ In defending this assertion, DOJ noted that:

the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging

³⁵⁹ *Id.*

³⁶⁰ Letter from Deputy Attorney General James Cole to Chairman Darrell Issa, June 20, 2012, available at <http://oversight.house.gov/wp-content/uploads/2012/08/June-20-2012-Letter-from-Deputy-Attorney-General-Cole-to-Rep.-Darrell-Issa-with-attachment.pdf> [hereinafter June 20 Cole Letter].

³⁶¹ *Id.*

³⁶² Contempt Committee Report, *supra* note 349, at 22.

³⁶³ *Id.* at 4.

³⁶⁴ Congressional Quarterly Hearing Transcript: "House Oversight and Government Reform Committee Holds Markup on a Contempt of Congress Citation for U.S. Attorney General Holder," available at <http://www.cq.com/doc/congressionaltranscripts-4110610> [hereinafter Hearing Transcript].

³⁶⁵ *Id.*

³⁶⁶ Contempt Committee Report, *supra* note 349, at 38.

³⁶⁷ June 20 Cole Letter, *supra* note 356, at 1.

consequences ... it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these co-equal branches of the Government.³⁶⁸

In its contempt citation, the Oversight and Government Reform Committee rejected the President's assertion of executive privilege, calling it "transparently invalid" due to the timing and blanket application of the privilege to all withheld documents.³⁶⁹ The Committee voted 23 to 17 to hold Attorney General Holder in contempt of Congress.³⁷⁰

The contempt citation was reported to the full House, and on June 28, 2012, two important resolutions were passed. The first, H.Res. 711, constituted the formal criminal contempt citation and was approved by a vote of 255-67.³⁷¹ The resolution found the Attorney General in contempt of Congress for his failure to comply with a congressional subpoena and directed the Speaker, pursuant to 2 U.S.C. §194, to certify the contempt citation to the U.S. Attorney for the District of Columbia for prosecution. The second resolution, H.Res. 706, authorized Chairman Issa to initiate a judicial proceeding on behalf of the Committee "to seek declaratory judgments affirming the duty of Eric H. Holder Jr....to comply with any subpoena...issued to him by the Committee as part of its investigation into [Operation Fast and Furious]."³⁷² H.Res. 706 was approved by a vote of 258-95.³⁷³ As in the Miers and Bolten contempt proceedings, the House voted to hold an executive branch official in criminal contempt of Congress, while preserving the option to seek enforcement of the Committee subpoenas through a civil action in federal court.

Consistent with DOJ's legal position and the precedent set in the Burford, Miers, and Bolten contempt actions, Deputy Attorney General James Cole informed Speaker Boehner on the same day that the contempt was approved that "the [DOJ] has determined that the Attorney General's response to the subpoena issued by the Committee on Oversight and Government Reform does not constitute a crime, and therefore the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General."³⁷⁴

Although the criminal prosecution of the Attorney General for contempt of Congress appears to be foreclosed for passage of time, H.Res. 706 permitted the Committee to ask a federal district court to compel the Attorney General to comply with the Committee subpoena. The Committee filed this civil enforcement action in the U.S. District Court for the District of Columbia on August 13, 2012.³⁷⁵

³⁶⁸ *Id.* at 4.

³⁶⁹ Contempt Committee Report, *supra* note 349, at 42 (as stated in Representative Gowdy's amendment, approved by a 23 to 17 vote).

³⁷⁰ Ed O'Keefe and Sari Horwitz, *Fast and Furious: House Committee Votes 23-17 to Hold Attorney General Eric Holder in Contempt of Congress*, WASH. POST, June 20, 2011, available at http://www.washingtonpost.com/blogs/2chambers/post/live-fast-and-furious-hearing-to-discuss-contempt-of-congress-charge-against-eric-holder/2012/06/20/gJQAzQKHqV_blog.html.

³⁷¹ See H.Res. 711 (roll call vote available at <http://cq.com/doc/floorvote-236138000>).

³⁷² H.Res. 706, 112th Cong. (2012).

³⁷³ *Id.* (roll call vote available at <http://cq.com/doc/floorvote-236141000>).

³⁷⁴ Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House, June 28, 2012 available at <http://oversight.house.gov/wp-content/uploads/2012/08/June-28-2012-Cole-to-Boehner.pdf>.

³⁷⁵ Complaint, Committee on Oversight and Government Reform v. Holder, No. 1:12-cv-1332 (D.D.C. August 13, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/08/Complaint-08-13-12-1.pdf>.

On September 30, 2013, the district court issued its first opinion in the case, rejecting the DOJ's motion to dismiss the civil enforcement suit on jurisdictional and justiciability grounds.³⁷⁶ The court's opinion echoed that of the District Court for the D.C. Circuit in *Miers*, and addressed arguments for dismissal based on separation-of-powers concerns, the court's jurisdiction to hear the case, and the plaintiff's standing to bring suit. The DOJ did not argue that the facts in this case were distinguishable from those in *Miers*; it "simply urges the Court to come to a different conclusion."³⁷⁷

First, the court considered the DOJ's argument that the "separation of powers enshrined in the Constitution [would be violated] if this Court were to undertake to resolve a dispute between the other two branches" and that resolution of such conflicts should be left to the political branches themselves.³⁷⁸ The court disagreed, strongly rejecting any notion that the judiciary did not have the authority to resolve the dispute or that by injecting itself into an interbranch conflict the court would in some way threaten the separation of powers.³⁷⁹ It noted that subpoenas are routinely enforced by the courts; federal courts have long-standing involvement in evaluating executive privilege claims; and the question presented was not a "political question"³⁸⁰ simply because the parties are the political branches of government. Indeed, the court found just the opposite, holding that to not hear the claim would "do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint."³⁸¹

Next, the court considered the DOJ's argument that the court lacked subject matter jurisdiction under 28 U.S.C. §1365. Section 1365 gives the U.S. District Court for the District of Columbia jurisdiction to enforce subpoenas issued by the Senate but is silent as to subpoenas issued by the House.³⁸² The court rejected the DOJ's argument that the statute's silence on House subpoenas eliminated the court's jurisdiction, finding it improper to "draw inferences from the *absence* of a precisely drawn, detailed statute."³⁸³ The court agreed with the *Miers* opinion and held that subject matter jurisdiction is rooted in the federal question jurisdiction statute.³⁸⁴ Because the House's subpoena power derives from its Article I legislative powers,³⁸⁵ the case satisfies that statute's requirements as a "civil action[] arising under the Constitution."³⁸⁶ Therefore, the court had jurisdiction to hear the case despite the lack of an applicable, specific jurisdictional statute.

The court also rejected the DOJ's argument that the Committee did not have standing to bring the suit to enforce their subpoena.³⁸⁷ The court ruled that the Committee had standing, in part, because it has suffered a concrete and particular injury to its ability to gather information

³⁷⁶ 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.

³⁷⁷ *Id.* at *25.

³⁷⁸ *Id.* at *30.

³⁷⁹ *Id.* at *21-45.

³⁸⁰ *Id.* at *22. See *Baker v. Carr*, 369 U.S. 186 (1962).

³⁸¹ *Holder*, 2013 U.S. Dist. LEXIS 140994 at *28.

³⁸² Additionally, the statute exempts certain subpoenas issued by the Senate to executive branch officials. 28 U.S.C. §1365.

³⁸³ *Holder*, 2013 U.S. Dist. LEXIS 140994 at *49.

³⁸⁴ See 28 U.S.C. §1331.

³⁸⁵ See *supra* "Congress's Power to Investigate."

³⁸⁶ 28 U.S.C. §1331. See *Holder*, 2013 U.S. Dist. LEXIS 140994 at *49-52.

³⁸⁷ For a detail discussion of congressional standing, see CRS Report R42454, *Congressional Participation in Article III Courts: Standing to Sue*, by Todd Garvey.

pursuant to its constitutional duties.³⁸⁸ The court pointed to applicable D.C. Circuit precedent stating that “[i]t is clear that the House as a whole has standing to assert its investigatory power ...”³⁸⁹ Furthermore, the court noted that “this case presents the sort of question[s],” including the applicability of privileges and subpoena enforcement, “that the courts are traditionally called upon to resolve.”³⁹⁰

Finally, the court briefly considered the DOJ’s contention that the Committee could not rely solely upon the Declaratory Judgment Act to provide a cause of action. The court concluded that since “the Constitution is the source of the right allegedly violated,”³⁹¹ the Committee did not need to identify another source in order to seek declaratory relief—establishing “an actual, ripe controversy” that satisfies subject matter jurisdiction is sufficient.³⁹² Finally, the court declined to dismiss the case on prudential grounds, communicating its skepticism that dismissing the case would facilitate a resolution and noting that continued court involvement did not prevent the parties from reaching an acceptable compromise on their own.³⁹³

Following the court’s decision, the Committee filed a motion for summary judgment on the grounds that the DOJ could not invoke executive privilege in response to a congressional subpoena because the records requested did not involve actual communications with the President.³⁹⁴ Simultaneously, the DOJ moved for summary judgment on the basis that all the records requested were protected by the deliberative process element of executive privilege.³⁹⁵

On August 20, 2014, following a hearing, the district court denied both motions.³⁹⁶ The court ruled that the DOJ, as an executive branch agency, could invoke the deliberative process privilege in response to a congressional subpoena.³⁹⁷ The court, however, rejected the DOJ’s “blanket assertion of the privilege over all records generated after a particular date,” without any showing that each of those records was subject to the privilege.³⁹⁸ The court thus directed the DOJ to

³⁸⁸ *Holder*, 2013 U.S. Dist. LEXIS 140994 at *55-57.

³⁸⁹ *United States v. Amer. Telephone & Telegraph Co.*, 551 F.2d 384, 392 (D.C. Cir. 1976).

³⁹⁰ *Holder*, 2013 U.S. Dist. LEXIS 140994 at *58-59.

³⁹¹ *Holder*, 2013 U.S. Dist. LEXIS 140994 at *62 (citing *Miers*, 558 F. Supp. 2d at 81).

³⁹² *Id.* at *60.

³⁹³ *Id.* at *65-70.

³⁹⁴ *Comm. on Oversight and Gov’t Reform, United States House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016).

³⁹⁵ *Id.* Deliberative process privilege is a form of executive privilege, and “it allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In re Sealed case (“Espy”)*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). In order for the privilege to apply, the material withheld must be both deliberative and predecisional. *Id.* Therefore, the privilege “does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.” *Id.* The deliberative process privilege is a “qualified privilege” that must be weighed with the government’s need for the evidence. *Id.* at 737-38. The other form of executive privilege, which is less frequently invoked, is the presidential communications privilege. *Id.* at 738; *see also United States v. Nixon*, 418 U.S. 638 (1974).

³⁹⁶ *Comm. on Oversight and Gov’t Reform, United States House of Representatives v. Lynch*, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016).

³⁹⁷ *Id.*

³⁹⁸ *Id.*

provide a list of all the records that were being withheld on deliberative process privilege grounds.³⁹⁹

The DOJ subsequently produced a list of materials being withheld, which consisted of internal DOJ communications about how to respond to media and congressional inquiries about Operation Fast and Furious.⁴⁰⁰ The DOJ's list also included other documents that it sought to withhold on separate grounds, such as law enforcement material, privacy information, and other sensitive material.⁴⁰¹ The DOJ additionally listed several other documents for which it provided no reason for withholding from Congress.⁴⁰² On January 16, 2015, after the DOJ had produced its list, the Committee moved to compel the production of each record that was withheld.⁴⁰³

On January 19, 2016, in a published decision, the district court granted, in part, and denied, in part, the Committee's motion to compel the production of documents.⁴⁰⁴ The court rejected the Committee's argument that the deliberative process privilege only covered documents that contained deliberations concerning the formulation of policy.⁴⁰⁵ Citing to prior precedent that applied the deliberative process privilege to discussions regarding operational matters and public relations efforts, the court determined that the privilege equally extended to internal deliberations about how to respond to press and congressional inquiries into Operation Fast and Furious.⁴⁰⁶

The court observed, however, that the deliberative process privilege was a qualified privilege subject to being weighed against the public interest that would be served by the disclosure of the protected documents.⁴⁰⁷ The court determined that, because the substance of the DOJ's internal deliberations had already been publicly disclosed pursuant to an Inspector General investigation, any "incremental harm" that would be caused by providing these documents was outweighed by Congress's "unchallenged need for the material."⁴⁰⁸ The court thus held that the DOJ had to produce the documents otherwise subject to the deliberative process privilege.⁴⁰⁹

Further, the court ruled that the agency was required to provide documents for which it had offered no justification for invoking a privilege.⁴¹⁰ The court, however, declined to order the production of documents that were withheld for reasons other than deliberative process privilege, such as attorney work product, personal privacy information, and law enforcement sensitive material, because the legitimacy of those privileges was not an issue before the court, and the parties were better suited to resolve those questions through negotiations instead.⁴¹¹ Therefore, the court only ordered the DOJ to produce the "segregable portions" of these records.⁴¹²

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 108, 110.

⁴⁰¹ *Id.* at 108.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 104, 108.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 110-12.

⁴⁰⁶ *Id.* at 111-12.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 114.

⁴⁰⁹ *Id.* at 115.

⁴¹⁰ *Id.* at 115-16.

⁴¹¹ *Id.* at 119-21.

⁴¹² *Id.* at 121.

On April 18, 2016, the Committee appealed the district court's decision to the D.C. Circuit.⁴¹³ On January 19, 2017, the appeals court granted the parties' request to hold the case in abeyance pending a potential settlement with the Trump Administration.⁴¹⁴ Ultimately, should the court reach the merits of the case, its decision may further clarify the scope of Congress's subpoena power and the degree to which executive privilege may be invoked to shield a document from disclosure.

The Lerner Contempt

The most recent case where Congress attempted to enforce a subpoena against an executive branch official occurred in 2014. Previously, in 2012, the House Committee on Oversight and Government Reform (Committee) had received reports that the Internal Revenue Service (IRS) improperly targeted conservative political groups applying for tax-exempt status by scrutinizing their applications for additional information, such as the identity of applicant donors, and delaying their applications.⁴¹⁵ In 2013, Lois G. Lerner, who was serving as the IRS's Director of Exempt Organizations at the time, publicly acknowledged that the agency had inappropriately targeted conservative groups.⁴¹⁶

In response, the Committee commenced an investigation of the IRS's targeting program, which included conducting interviews with IRS officials and obtaining testimony and documents related to the program.⁴¹⁷ The Committee, in particular, considered Ms. Lerner's testimony critical because, as the Director of the Exempt Organizations division, "[s]he was at the epicenter of the targeting program."⁴¹⁸ The Committee hoped that Ms. Lerner would answer "important outstanding questions" about why the IRS targeted conservative organizations.⁴¹⁹

On May 14, 2013, the Committee sent a letter to Ms. Lerner asking her to testify at a May 22, 2013 hearing about the IRS's handling of applications for tax-exempt status.⁴²⁰ Ms. Lerner, through counsel, confirmed her attendance at the hearing, but indicated that she would invoke her Fifth Amendment privilege against self-incrimination instead of answering questions.⁴²¹ Subsequently, on May 20, 2013, the Committee issued a subpoena to compel Ms. Lerner's testimony.⁴²² Ms. Lerner, through counsel, again invoked her Fifth Amendment right not to answer any questions.⁴²³ In response, Committee Chairman Darrell Issa advised Ms. Lerner that the subpoena remained in effect, and that her attendance at the hearing was expected because she was "uniquely qualified" to testify about the IRS's actions.⁴²⁴

⁴¹³ Comm. on Oversight and Gov't Reform, *United States House of Representatives v. Sessions*, No. 16-5078 (D.C. Cir. filed April 18, 2016).

⁴¹⁴ *Id.*

⁴¹⁵ 160 CONG. REC. H3482, 3483 (daily ed. May 7, 2014).

⁴¹⁶ *Id.* at H3483-84.

⁴¹⁷ *Id.* at H3484.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

On May 22, 2013, Ms. Lerner appeared before the Committee.⁴²⁵ In an opening statement, she denied any wrongdoing or unlawful activity as the Director of Exempt Organizations at IRS, but maintained that she would assert her Fifth Amendment privilege not to testify or answer any questions relating to the Committee's investigation.⁴²⁶ Following the hearing, on June 28, 2013, the Committee, by a 22-17 vote, approved a resolution finding that Ms. Lerner had waived her Fifth Amendment privilege by making a voluntary opening statement and denying her involvement in unlawful activity.⁴²⁷ Thus, on February 25, 2014, Chairman Issa advised Ms. Lerner's counsel by letter that she was expected to comply with the subpoena and present testimony before the Committee at a reconvened hearing on March 5, 2014.⁴²⁸

Ms. Lerner appeared before the Committee on March 5, 2014.⁴²⁹ At the beginning of the hearing, Chairman Issa advised Ms. Lerner that, because the Committee had determined that she waived her Fifth Amendment privilege, it reserved the option of recommending a contempt resolution against her if she refused to answer any questions.⁴³⁰ Nevertheless, Ms. Lerner continued to invoke her Fifth Amendment privilege.⁴³¹ Several weeks later, on April 10, 2014, the Committee, by a 21-12 vote, approved a contempt resolution against Ms. Lerner for her refusal to comply with the subpoena.⁴³²

On May 7, 2014, the House voted 231-187 to adopt the Committee's resolution, and directed the Speaker, pursuant to 2 U.S.C. §§ 192 and 194, to certify the contempt citation to the U.S. Attorney for the District of Columbia for prosecution.⁴³³ Notably, the House did not pursue the option to enforce the Committee's subpoena through civil action in federal court, as it had done in the Miers, Bolten, and Holder contempt proceedings. Therefore, unlike those cases, there is no court decision in the Lerner contempt case.

On March 31, 2015, the United States Attorney for the District of Columbia, Ronald C. Machen Jr., advised House Speaker John Boehner that he would not pursue criminal prosecution of Ms. Lerner based on the contempt resolution passed by the House.⁴³⁴ In his letter, Mr. Machen determined that, although Ms. Lerner had refused to answer questions from the Committee despite being properly notified that her Fifth Amendment claim had been rejected, and being given a reasonable opportunity to respond to the Committee's questions, her failure to provide testimony did not warrant a criminal contempt prosecution.⁴³⁵ Mr. Machen reasoned that Ms. Lerner did not waive her Fifth Amendment privilege by making an opening statement during the original May 22, 2013 hearing "because she made only general claims of innocence," and did not provide any substantive testimony.⁴³⁶ As a result, he concluded, "the Fifth Amendment to the

⁴²⁵ *Id.*

⁴²⁶ *Id.* at H3484-85.

⁴²⁷ *Id.* at H3485.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at H3485-86.

⁴³² *Id.* at H3487, 3902.

⁴³³ H.R. Res. 574, 113th Cong. (2014); 160 Cong. Rec. at H3902

⁴³⁴ Letter from Ronald C. Machen Jr., United States Attorney, U.S. Department of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

⁴³⁵ *Id.*

⁴³⁶ *Id.*

Constitution would provide Ms. Lerner with an absolute defense should she be prosecuted under Section 192 for her refusal to testify.⁴³⁷

The Lerner case marked yet another occasion where the DOJ declined to pursue prosecution based on a criminal contempt resolution passed by Congress. Although, in the Burford, Miers, Bolten, and Holder cases, the DOJ cited to executive privilege as a reason for not pursuing criminal contempt charges, the Lerner case stands as an example of the DOJ citing to the Fifth Amendment privilege as grounds for its decision. However, regardless of the basis for the DOJ's decision not to prosecute, the outcome of these cases underscores the challenge Congress may potentially face in successfully enforcing a criminal contempt resolution.

Practical Limitations of Congressional Reliance on Criminal Contempt or the Civil Enforcement of Subpoenas

The lessons to be gleaned from information access disputes between congressional committees and the executive branch, including the interbranch quarrels over documents and testimony relating to Operation Fast and Furious, the U.S. Attorney resignations, and the Superfund litigation, 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,⁴³⁸ efforts to punish an executive branch official for non-compliance with a subpoena through criminal contempt will likely prove unavailing in many, if not most circumstances. Where the President directs or endorses the non-compliance of the official, such as 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 DOJ will not pursue a prosecution for criminal contempt.⁴³⁹ The U.S. Attorney would likely rely on prosecutorial discretion as grounds for not forwarding the contempt citation to the grand jury pursuant to 2 U.S.C. §194.⁴⁴⁰ 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 so as to avoid establishing a precedent for Congress's authority to use the criminal contempt statute to punish an executive branch officer.⁴⁴¹

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.⁴⁴² This shortcoming was apparent in the

⁴³⁷ *Id.*

⁴³⁸ Such subpoenas are still subject to valid claims of executive privilege and other constitutional limitations. *See* "Constitutional Limitations" *infra*.

⁴³⁹ Although criminal contempt citations were forwarded to the U.S. Attorney for the District of Columbia in the Burford, Miers, and Holder disputes, no prosecutions were ever brought.

⁴⁴⁰ *See supra* notes 149-164 and accompanying text.

⁴⁴¹ 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 256.

⁴⁴² It should also be repeated that the Senate civil enforcement statute, by its own terms, is inapplicable in the case of a (continued...)

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.⁴⁴³ 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.⁴⁴⁴ 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. Whereas it may be possible for a federal district court to reach a decision on the Holder subpoena prior to the expiration of the 112th Congress, it is highly unlikely that the expected appeals process will be completed by that point. Thus, a new authorization will likely be required for the Committee to continue the litigation into the 113th Congress.⁴⁴⁵

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 authority to enforce a subpoena through inherent contempt.⁴⁴⁶

Non-Constitutional Limitations

Authorization and Jurisdiction

Although the courts have upheld the authority of Congress to investigate and to cite a witness for contempt, they have also established limits, rooted both in the language of the criminal contempt

(...continued)

subpoena issued to an officer or employee of the federal government acting in their official capacity. 28 U.S.C. §1365(a).

⁴⁴³ 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 that the judiciary is the domain of reasoned, principled judgments that must be respected, while congressional action in defense of its powers is 'unseemly.'").

⁴⁴⁴ However, if a lawsuit were brought early in a Congress, a reviewing court was willing to expedite the case, and discretionary appeals were denied, civil enforcement of a subpoena could be achieved promptly.

⁴⁴⁵ See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) at 231 ("Since the existence of the power that imprisons is indispensable to its continuance, and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."); *Committee on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) ("Even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch ... before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.").

⁴⁴⁶ The district court in *Miers* highlighted the risks of inherent contempt. *Miers*, 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 coerce compliance by executive branch officials.

statute and in the Constitution, on the investigatory and contempt powers. Recognizing that 2 U.S.C. §192 is a criminal statute, the courts have accorded defendants the same safeguards as defendants in other criminal proceedings.⁴⁴⁷

The criminal contempt statute is applicable to contempts committed by a person “summoned as a witness by *the authority of either House of Congress ...*”⁴⁴⁸ The statute applies regardless of whether a subpoena has been issued by a committee or by the full House or Senate.⁴⁴⁹ Although the statute specifically makes the contempt sanction applicable to a witness who has been “summoned,” the law applies whether the individual is subpoenaed or appears voluntarily and then refuses to testify.⁴⁵⁰

A contempt conviction will not be upheld if the committee’s investigation has not been clearly authorized by the full House or Senate.⁴⁵¹ The investigation, and the questions posed, must be within the scope of the committee’s jurisdiction.⁴⁵² A committee cannot issue a subpoena for a subject outside the scope of its jurisdiction. Authorization from the parent body may take the form of a statute,⁴⁵³ a resolution,⁴⁵⁴ or a standing rule of the House or Senate.⁴⁵⁵ In the case of a subcommittee investigation, the subject matter must fall within the scope of authority granted to the subcommittee by the full committee.⁴⁵⁶ Investigations may be conducted, and subpoenas issued, pursuant to a committee’s legislative or oversight jurisdiction.⁴⁵⁷

⁴⁴⁷ *Russell v. United States*, 369 U.S. 749 (1962); *see also* *Sinclair v. United States*, 279 U.S. 263 (1929). While most of the case law in this section of the report involves decisions under the statutory criminal contempt procedure, many of the holdings would be applicable to exercises of the civil enforcement statute and the inherent contempt power. *See* S.Rept. 95-170, 95th Cong., 1st Sess., 41, 94.

⁴⁴⁸ 2 U.S.C. §192 (2012) (emphasis added).

⁴⁴⁹ *McGrain v. Daugherty*, 273 U.S. 135 (1927); *see also* *Sinclair v. United States*, 279 U.S. 263, 296 (1929).

⁴⁵⁰ *Sinclair*, 279 U.S. at 296.

⁴⁵¹ *United States v. Rumely*, 343 U.S. 41 (1953); *Tobin v. United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962); *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

⁴⁵² *See* *United States v. Rumely*, 343 U.S. 41 (1953); *see also* *United States v. Patterson*, 206 F.2d 433 (D.C. Cir. 1953).

⁴⁵³ 26 U.S.C. §8021, 8022 (2012) (Joint Committee on Taxation).

⁴⁵⁴ Resolutions are generally used to establish select or special committees and to delineate their authority and jurisdiction. *See* 4 Deschler’s Precedents, *supra* note 93, ch. 17, 56; *see also e.g.*, S.Res. 23, 100th Cong. (Iran-Contra); S.Res. 495, 96th Cong. (Billy Carter/Libya).

⁴⁵⁵ This mode is the most common today. Both the House and the Senate authorize standing committees to make investigations within their jurisdiction, and permit such committees and their subcommittees to issue subpoenas. *See* Rules of the House of Representatives, Comm. Print, 113th Cong., 1st Sess., Rule XI, cl. 1(b), 2(m) (2013); Standing Rules of the Senate, S. Doc. No. 113-18, 113th Cong., 1st Sess., Rule XXVI, cl. 1 (2013).

⁴⁵⁶ *Gojack v. United States*, 384 U.S. 702, 706 (1966). The case involved a rule of the former House Committee on Un-American Activities, which stated that “no major investigations shall be initiated without the approval of a majority of the committee.” The court reversed the contempt conviction in *Gojack* because the subcommittee’s investigation, which resulted in the contempt citation, had not been approved by the committee as its rules required.

Despite the provision of Senate Rule XXVI, cl.1, authorizing subcommittee subpoenas, the rules of at least one committee expressly prohibit subcommittee subpoenas (Committee on Small Business, Rule 3(c)), while another committee requires approval by the full committee of any subcommittee subpoenas (Committee on Labor and Human Resources, Rule 17).

⁴⁵⁷ A leading study of Senate committee jurisdiction noted that “oversight jurisdiction necessarily flows from specific legislative enactments, but it also emanates from broader and more vaguely defined jurisdiction which committees may exercise in particular subject matter areas.” *First Staff Report to the Temporary Select Committee to Study the Senate Committee System*, 94th Cong., 2d Sess., 104 (1976); *see also* *United States v. Kamin*, 136 F. Supp. 791, 801 (D. Mass. 1956) (providing a judicial application of oversight jurisdiction in the investigatory context).

In construing the scope of a committee's authorizing rule or resolution, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports, and past committee practice. As explained by the Court in *Barenblatt v. United States*,⁴⁵⁸ “[j]ust as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.”⁴⁵⁹ It appears that the clear articulation of committee jurisdiction in both the House and Senate rules combined with the express authorization of special committees by resolution has effectively eliminated the use of jurisdiction as a defense to contempt proceedings.

Legislative Purpose

A committee's investigation must have a legislative purpose or be conducted pursuant to some other constitutional power of the Congress, such as the authority of each House to discipline its own Members, judge the returns of the their elections, and to conduct impeachment proceedings.⁴⁶⁰ Although the early case of *Kilbourn v. Thompson*⁴⁶¹ held that the investigation in that case was an improper probe into the private affairs of individuals, the courts today generally will presume that there is a legislative purpose for an investigation, and the House or Senate rule or resolution authorizing the investigation does not have to specifically state the committee's legislative purpose.⁴⁶² In *In re Chapman*,⁴⁶³ the Court upheld the validity of a resolution authorizing an inquiry into charges of corruption against certain Senators despite the fact that it was silent as to what might be done when the investigation was completed. The Court stated:

The questions were undoubtedly pertinent to the subject matter of the inquiry. The resolutions directed the committee to inquire “whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.” What the Senate might or might not do upon the facts when ascertained, we cannot say nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers.

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion, if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.

⁴⁵⁸ 360 U.S. 109, 117 (1959).

⁴⁵⁹ See *Watkins v. United States*, 354 U.S. 178, 209-215 (1957).

⁴⁶⁰ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927); see also *In Re Chapman*, 166 U.S. 661 (1897).

⁴⁶¹ 103 U.S. 168 (1881).

⁴⁶² *McGrain*, 273 U.S. 135; see also *Townsend v. United States*, 95 F.2d 352 (D.C. Cir. 1938); LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER, 7 (Comm. Print 1976) [hereinafter *Leading Cases*]. For a different assessment of recent case law concerning the requirement of a legislative purpose see Moreland, *supra* note 10, at 232.

⁴⁶³ 166 U.S. 661, 669 (1897).

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.⁴⁶⁴

In *McGrain v. Daugherty*,⁴⁶⁵ the original resolution that authorized the Senate investigation into the Teapot Dome Affair made no mention of a legislative purpose. A subsequent resolution for the attachment of a contumacious witness declared that his testimony was sought for the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” The Court found that the investigation was ordered for a legitimate object. It wrote:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. ***

The second resolution—the one directing the witness be attached—declares that this testimony is sought with the purpose of obtaining “information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.” This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of “other action” if deemed “necessary or proper” is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and is rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.⁴⁶⁶

Moreover, when the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of the Congress exceeds its power when it seeks information in such areas.⁴⁶⁷ In the past, the types of legislative activity which have justified the exercise of the power to investigate have included the primary functions of legislating and appropriating,⁴⁶⁸ the function of deciding whether or not legislation is appropriate;⁴⁶⁹ oversight of the administration of the laws by the executive branch;⁴⁷⁰ and the essential congressional function of informing itself in matters of national concern.⁴⁷¹ In addition, Congress’s power to investigate such diverse matters as foreign and domestic subversive activities,⁴⁷² labor union corruption,⁴⁷³

⁴⁶⁴ *In re Chapman*, 166 U.S. at 699.

⁴⁶⁵ 273 U.S. 135 (1927).

⁴⁶⁶ *Id.* at 179-180.

⁴⁶⁷ *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

⁴⁶⁸ *Barenblatt v. United States*, 360 U.S. 109 (1959).

⁴⁶⁹ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

⁴⁷⁰ *McGrain*, 273 U.S. at 295.

⁴⁷¹ *United States v. Rumely*, 345 U.S. 4, 43-45 (1953); *see also Watkins*, 354 U.S. at 200 n. 3.

⁴⁷² *See, e.g., Barenblatt*, 360 U.S. 109; *Watkins v. United States*, 354 U.S. 178 (1957); *McPhaul v. United States*, 364 U.S. 372 (1960).

⁴⁷³ *Hutcheson v. United States*, 369 U.S. 599 (1962).

and organizations that violate the civil rights of others⁴⁷⁴—have all been upheld by the Supreme Court.⁴⁷⁵

Despite the Court's broad interpretation of legislative purpose, Congress's authority is not unlimited. Courts have held that a committee lacks legislative purpose if it appears to be conducting a legislative trial rather than an investigation to assist in performing its legislative function.⁴⁷⁶ Furthermore, although "there is no congressional power to expose for the sake of exposure,"⁴⁷⁷ "so long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."⁴⁷⁸

Pertinency

Two different issues of pertinency arise in regard to a contempt prosecution.⁴⁷⁹ First, a witness's refusal to answer questions or provide subpoenaed documents will be punished as a contempt only if the questions posed (or documents requested) by the committee are, in the language of the statute, "pertinent to the question under inquiry."⁴⁸⁰ In determining general questions of the pertinency of inquiries, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.⁴⁸¹ Given the breadth of congressional investigations, the courts have long recognized that pertinency in the legislative context is broader than in the judicial context, which relies primarily on the law of evidence's standard of relevance. For example, the D.C. Circuit has stated that

A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. ... A judicial inquiry relates to a case, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry which generally is very broad.⁴⁸²

The second pertinency issue concerns the Fifth Amendment's Due Process Clause. According to the Supreme Court in *Deutch v. United States*, the pertinency of a "committee's inquiry must be brought home to the witness at the time the questions are put to him."⁴⁸³ The Court in *Watkins* stated that

⁴⁷⁴ *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

⁴⁷⁵ For an indication of the likely breadth of Congress's power to investigate, see *supra* note 10-24 and accompanying text.

⁴⁷⁶ See *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956); *United States v. Cross*, 170 F. Supp. 303 (D.D.C. 1959).

⁴⁷⁷ *Watkins*, 354 U.S. at 200. However, Chief Justice Warren, writing for the majority, made it clear that he was not referring to the "power of the Congress to inquire into and publicize corruption, mal-administration or inefficiency in agencies of the Government." *Id.*

⁴⁷⁸ *Barenblatt*, 360 U.S. at 132.

⁴⁷⁹ *Deutch v. United States*, 367 U.S. 456, 467-68 (1961).

⁴⁸⁰ 2 U.S.C. §192 (2012); see also *Barenblatt*, 360 U.S. at 123; *Watkins*, 354 U.S. at 208.

⁴⁸¹ *Sinclair v. United States*, 279 U.S. 263, 279 (1929); *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 287, 305 (D.D.C. 1976).

⁴⁸² *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938), *cert. denied*, 303 U.S. 664 (1938) (internal citation omitted) (emphasis in original).

⁴⁸³ *Deutch*, 367 U.S. at 467-68.

[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.⁴⁸⁴

In addition, according to commentators, a witness is entitled “to understand the specific aspect of the committee’s jurisdiction under its authorizing resolution [or House or Senate rule] to which the question relates.”⁴⁸⁵ Finally, it appears that the committee must specifically rule on a pertinency objection and, if the objection is overruled, inform the witness of that fact before again directing him to answer the question.

The Court has also observed that a witness might resort to several sources in determining the subject matter of an investigation. These include, but are likely not limited to: (a) the House or Senate resolution authorizing the committee inquiry; (b) the committee’s resolution authorizing the subcommittee investigation; (c) the introductory statement of the chairman or other committee Members; (d) the nature of the proceedings; and (e) the chairman’s response to a witness’s objections on the grounds of lack of pertinency.⁴⁸⁶

Willfulness

A conviction for statutory criminal contempt cannot be sustained unless the failure to appear before the committee, to produce documents, or to respond to questions is a willful, intentional act.⁴⁸⁷ However, an evil motive does not have to be established.⁴⁸⁸ Because of the willfulness requirement, and to satisfy constitutional due process standards, when a witness objects to a question or otherwise refuses to answer, the chairman or presiding member should rule on any objection and, if the objection is overruled, the witness should be clearly directed to answer.⁴⁸⁹ It has been observed that “there is no talismanic formula which [a] committee must use in directing [a] witness to answer,” but he should be clearly informed “and not left to the risk of guessing upon pain of criminal penalties, whether the grounds for his objection to answering [are] accepted or rejected,” and “if they are rejected, he should be given another chance to answer.”⁴⁹⁰ The procedure to be followed in responding to a witness’s objections to questions has been described as follows:

If a witness refuses to answer a question, the committee must ascertain the grounds relied upon by the witness. It must clearly rule on the witness’s objection, and if it overrules the witness’s objection and requires the witness to answer, it must instruct the witness that his continued refusal to answer will make him liable to prosecution for contempt of Congress. By failing adequately to apprise the witness that an answer is required

⁴⁸⁴ *Watkins*, 354 U.S. at 214-15.

⁴⁸⁵ See Hamilton, *supra* note 3, at 241.

⁴⁸⁶ *Watkins*, 354 U.S. at 209-14.

⁴⁸⁷ *Quinn v. United States*, 349 U.S. 155, 165 (1955); see also *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1948), *cert. denied*, 333 U.S. 838 (1948); *Deutch v. United States*, 235 F.2d 853 (D.C. Cir. 1956), *rev’d on other grounds*, 367 U.S. 456 (1961).

⁴⁸⁸ See generally Moreland, *supra* note 10, at 239-42.

⁴⁸⁹ See, e.g., *Deutch v. United States*, 367 U.S. 456 (1961); *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Bart v. United States*, 349 U.S. 219 (1955); *Braden v. United States*, 272 F.2d 653, 661 (5th Cir. 1959), *aff’d*, 365 U.S. 961 (1961).

⁴⁹⁰ *Quinn v. United States*, 203 F.2d 30, 33 (D.C. Cir. 1952), *aff’d*, 349 U.S. 155 (1955).

notwithstanding his objection the element of deliberateness necessary for conviction for contempt under 2 U.S.C. §192 is lacking, and such a conviction cannot stand.⁴⁹¹

Other Procedural Requirements

A contempt conviction can be reversed on other non-constitutional grounds. The cases make clear that committees must closely follow their own rules and the rules of their parent body in authorizing subpoenas⁴⁹² and conducting investigations and hearings.⁴⁹³ It appears that a witness can be convicted of criminal contempt,⁴⁹⁴ but not of perjury, where a quorum of the committee was not present.⁴⁹⁵

Attorney-Client Privilege

In practice, the exercise of committee discretion whether to accept a claim of attorney-client privilege has turned on a “weighing [of] the legislative need for disclosure against any possible resulting injury.”⁴⁹⁶ More particularly, the process of committee resolution of claims of attorney-client privilege has traditionally been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight of the application, administration, and execution of laws that fall within their jurisdiction,⁴⁹⁷ against any possible injury to the witness. In the particular circumstances of any situation, a committee may consider and evaluate the strength of a claimant’s assertion in light of the pertinency of the documents or information sought to the subject of the investigation, the practical unavailability of the documents or information from any other source, the possible unavailability of the privilege to the claimant if it were to be raised in a judicial forum, and the committee’s assessment of the cooperation of the witness in the matter, among other considerations. A valid claim of attorney-client privilege, free of any taint of waiver, exception or other mitigating circumstance, would merit substantial weight. Any serious doubt, however, as to the validity of the asserted claim would diminish its compelling character.⁴⁹⁸ Moreover, the

⁴⁹¹ See Leading Cases, *supra* note 416, at 69.

⁴⁹² *Shelton v. United States*, 327 F.2d 601 (D.C. Cir. 1963); see also *Liveright v. United States*, 347 F.2d 473 (D.C. Cir. 1965).

⁴⁹³ *Yellin v. United States*, 374 U.S. 109 (1963); *Gojack v. United States*, 384 U.S. 702 (1966).

⁴⁹⁴ *United States v. Bryan*, 339 U.S. 323 (1950).

⁴⁹⁵ The Court held in *Christoffel v. United States*, 338 U.S. 84 (1949), that a quorum of the committee must be present at the time that the perjurious testimony is given. It is not sufficient that a quorum is present at the start of the hearing. The difference in regard to the quorum requirement between the contempt statute (2 U.S.C. §192) and the perjury statute (18 U.S.C. §1621) is the provision in the latter that the statement must have been made before a “competent tribunal,” and a quorum has been considered necessary for the tribunal to be competent. The Court in *Christoffel* recognized the constitutional power of each House to determine the rules of its proceedings and pursuant to this power, the Senate has authorized its committees to adopt rules under which one member of a committee can constitute a quorum for the receipt of sworn testimony. See Senate Rule XXVI, cl. 7(a)(2). The House allows committees to adopt rules providing for receipt of testimony by as few as two members. See House Rule XI, cl. 2(h).

⁴⁹⁶ Hearings, “International Uranium Cartel,” Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Vol. 1, 123 (1977).

⁴⁹⁷ See 2 U.S.C. §190d (2012).

⁴⁹⁸ See, e.g., *Contempt of Congress Against Franklin L. Haney*, H.Rept. 105-792, 105th Cong., 2d Sess., 11-15 (1998); *Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)*, H.Rept. 104-598, 104th Cong., 2d Sess., 40-54 (1996); *Refusal of William H. Kennedy, III, To Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S.Rept. 104-191, 104th Cong. 1st Sess., 9-19 (1995); *Proceedings Against Ralph Bernstein and Joseph Bernstein*, H.Rept. 99-462, 99th Cong. 2d Sess., 13, 14 (1986); *Hearings, International Uranium Control, before the* (continued...)

conclusion that recognition of non-constitutionally based privileges, such as attorney-client privilege, is a matter of congressional discretion is consistent with both traditional British parliamentary and the Congress's historical practice.⁴⁹⁹

Although there is limited case law with respect to attorney-client privilege claims before congressional committees,⁵⁰⁰ appellate court rulings on the privilege in cases involving other investigative contexts (e.g., grand jury) have raised questions as to whether executive branch officials may claim attorney-client, work product, or deliberative process privileges in the face of investigative demands.⁵⁰¹ These rulings may lead to additional arguments in support of the long-standing congressional practice.

The legal basis for Congress's practice in this area is based upon its inherent constitutional prerogative to investigate which has been long recognized by the Supreme Court as extremely broad and encompassing, and which is at its peak when the subject is fraud, abuse, or maladministration within a government department.⁵⁰² The attorney-client privilege is, on the other hand, not a constitutionally based privilege, rather it is a judge-made exception to the normal principle of full disclosure in the adversary process which is to be narrowly construed and has been confined to the judicial forum.⁵⁰³

While no court has recognized the inapplicability of the attorney-client privilege in congressional proceedings in a decision directly addressing the issue,⁵⁰⁴ an opinion issued by the Legal Ethics

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Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., 60, 123 (1977).

⁴⁹⁹ See CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, pp. 43-55 (April 7, 1995; available upon request); see also, Glenn A. Beard, *Congress v. the Attorney-Client Privilege: A "Full and Frank Discussion,"* 35 AMER. CRIM. L. REV. 119, 122-127 (1997) ("[C]ongressional witnesses are not legally entitled to the protection of the attorney-client privilege, and investigating committees therefore have discretionary authority to respect or overrule such claims as they see fit."); Thomas Millett, *The Applicability of Evidentiary Privileges for Confidential Communications Before Congress*, 21 JOHN MARSHALL L. REV. 309 (1988).

⁵⁰⁰ See *In the Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States.>").

⁵⁰¹ *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub. nom.*, Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (rejecting claims by the First Lady of attorney-client and work-product privilege with respect to notes taken by White House Counsel Office attorneys); *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998) (holding that a White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (deciding that the deliberative process privilege is a common law agency privilege which can be overcome by a showing of need by an investigating body); *In re: A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002) (holding that the attorney-client privilege is not applicable to communications between state government counsel and state office holder); *But see In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (upholding a claim of attorney-client privilege with respect to communications between a former chief legal counsel to the governor of Connecticut who was under grand jury investigation.) It is worth noting that the Second Circuit recognized its apparent conflict with the afore-cited cases, however, the ruling is arguably distinguishable on its facts. See Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, 75 FORDHAM L. REV. 75 (2006).

⁵⁰² *McGrain v. Daugherty*, 272 U.S. 135, 177 (1926); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).

⁵⁰³ *Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991).

⁵⁰⁴ The Supreme Court has recognized that "only infrequently have witnesses ... [in congressional hearings] been afforded the procedural rights normally associated with an adjudicative proceeding." *Hannah v. Larche*, 363 U.S. 420, (continued...)

Committee of the District of Columbia Bar in February 1999, clearly acknowledges the long-standing congressional practice.⁵⁰⁵ The occasion for the ruling arose as a result of an investigation of a Subcommittee of the House Commerce Committee into the circumstances surrounding the planned relocation of the Federal Communications Commission to the Portals office complex.⁵⁰⁶ During the course of the inquiry, the Subcommittee sought certain documents from the Portals developer, Mr. Franklin L. Haney. Mr. Haney's refusal to comply resulted in subpoenas for those documents to him and the law firm representing him during the relocation efforts. Both Mr. Haney and the law firm asserted attorney-client privilege in their continued refusal to comply. In addition, the law firm sought an opinion from the D.C. Bar's Ethics Committee as to its obligations in the face of the subpoena and a possible contempt citation. The Bar Committee notified the firm that the question was novel and that no advice could be given until the matter was considered in a plenary session of the Committee.⁵⁰⁷ The firm continued its refusal to comply until the Subcommittee cited it for contempt, at which time the firm proposed to turn over the documents if the contempt citation was withdrawn. The Subcommittee agreed to the proposal.⁵⁰⁸

Subsequently, on February 16, 1999, the D.C. Bar's Ethics Committee issued an opinion vindicating the action taken by the firm. The Ethics Committee, interpreting D.C. Bar Rule of Professional conduct 1.6(d)(2)(A),⁵⁰⁹ held that an attorney faced with a congressional subpoena that would reveal client confidences or secrets

has a professional responsibility to seek to quash or limit the subpoena on all available, legitimate grounds to protect confidential documents and client secrets. If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of "required by law" as that phrase is used in D.C. Rule of Professional conduct 1.6(d)(2)(A).

The D.C. Bar opinion urges attorneys to press every appropriate objection to the subpoena until no further avenues of appeal are available, and even suggests that clients might be advised to retain other counsel to institute a third-party action to enjoin compliance,⁵¹⁰ but allows the

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425 (1960); *see also* *United States v. Fort*, 443 F. 2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (rejecting the contention that the constitutional right to cross-examine witnesses applied to a congressional investigation); In the *Matter of Provident Life and Accident Co.*, E.D. Tenn., S.D., CIV-1-90-219, June 13, 1990 (noting that the court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States.").

⁵⁰⁵ Opinion No. 288, *Compliance With Subpoena from Congressional Committee to Produce Lawyers' Files Containing Client Confidences or Secrets*, Legal Ethics Committee, District of Columbia Bar, February 16, 1999. [hereinafter D.C. Ethics Committee Opinion].

⁵⁰⁶ *See* H.Rept. 105-792, 105th Cong., 1st Sess., 1-6, 7-8, 15-16 (1997).

⁵⁰⁷ *See Meeting on Portal Investigation (Authorization of Subpoenas; Receipt of Subpoenaed Documents and Consideration of Objections); and Contempt of Congress Proceedings Against Franklin L. Haney*, H. Comm. On Commerce, 105th Cong., 2d Sess., 48-50 (1998).

⁵⁰⁸ *Id.* at 101-105.

⁵⁰⁹ Under Rule 1.6(d)(2)(A) a lawyer may reveal client confidences or secrets only when expressly permitted by the D.C. Bar rules or when "required by law or court order."

⁵¹⁰ A direct suit to enjoin a committee from enforcing a subpoena has been foreclosed by the Supreme Court's decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), but that ruling does not appear to foreclose (continued...)

attorney to relent at the earliest point when he is put in legal jeopardy. The opinion represents the first, and thus far the only, bar in the nation to directly and definitively address the merits of the issue.

In the end, of course, it is the congressional committee alone that determines whether to accept a claim of attorney-client privilege.

Work Product Immunity and Other Common Law Testimonial Privileges

Common law rules of evidence as well as statutory enactments recognize a testimonial privilege for witnesses in a judicial proceeding so that they need not reveal confidential communications between doctor and patient, husband and wife, or clergyman and parishioner.⁵¹¹ Although there is no court case directly on point, it appears that, like the privilege between attorney and client, congressional committees are not legally required to allow a witness to decline to testify on the basis of other similar testimonial privileges.⁵¹² It should be noted, however, that the courts have denied claims by the White House Counsel's office of attorney work product immunity in the face of grand jury subpoenas that have been grounded on the assertion that the materials sought were prepared in anticipation of possible congressional hearings.⁵¹³ In addition, court decisions indicate that various rules of procedure generally applicable to judicial proceedings, such as the right to cross-examine and call other witnesses, need not be accorded to a witness in a congressional hearing.⁵¹⁴ The basis for these determinations is rooted in Congress's Article I Section 5 rulemaking powers,⁵¹⁵ under which each House is the exclusive determiner of the rules of its own proceedings. This rulemaking authority, as well as general separation-of-powers considerations, suggests that Congress and its committees are not obliged to abide by rules established by the courts to govern their own proceedings.⁵¹⁶

Though congressional committees may not be legally obligated to recognize the privilege for confidential communications, they may do so at their discretion. Historical precedent suggests that committees often have recognized such privileges.⁵¹⁷ The decision as to whether or not to

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an action against a "third party," such as the client's attorney, to test the validity of the subpoena or the power of a committee to refuse to recognize the privilege. *See, e.g.,* United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a subpoena to provide telephone records that might compromise national security matters).

⁵¹¹ *See generally* 8 Wigmore, EVIDENCE §2285 (McNaughton ed. 1961); *see also* FED. R. EVID. 501. For an analysis of the attorney client privilege *see supra* notes 331-344 and accompanying text.

⁵¹² *Compare Attorney-Client Privilege: Memoranda Opinions of the American Law Division, Library of Congress, Comm. Print of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Cong., 1st Sess., 926 (1983) [hereinafter Attorney-Client Privilege Comm. Print]; see also, Moreland, supra note 10, at 265-67.*

⁵¹³ *See e.g.,* In re Grand Jury Subpoena Duces Tecum, 112 F.3d 907, 924-25 (8th Cir. 1997); In re Grand Jury Proceedings, 5 F. Supp. 2d 21, 39 (D.D.C. 1998).

⁵¹⁴ United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970) (citing Hannah v. Larche, 363 U.S. 420 (1960)), *cert. denied*, 403 U.S. 932 (1971),

⁵¹⁵ U.S. CONST. art. I, §5, cl. 2

⁵¹⁶ *See generally* Telford Taylor, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 227-28 (1974).

⁵¹⁷ *See* Hamilton, *supra* note 3, at 244; *see also* S.Rept. 2, 84th Cong., 1st Sess. (1955). Hamilton notes that John Dean, the former counsel to the President, testified before the Senate Watergate Committee after Nixon had "waived any attorney-client privilege he might have had because of their relationship." Hamilton, *supra* note 3, at 244.

allow such claims of privilege turns on a “weighing [of] the legislative need for disclosure against any possible resulting injury.”⁵¹⁸

Constitutional Limitations

The Supreme Court has observed that “Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights.”⁵¹⁹ There are constitutional limits not only on Congress’s legislative powers, but also on its investigative powers.

First Amendment

Although the First Amendment, by its terms, is expressly applicable only to legislation that abridges freedom of speech, press, or assembly, the Court has held that the amendment also restricts Congress in conducting investigations.⁵²⁰ In the leading case involving the application of First Amendment rights in a congressional investigation, *Barenblatt v. United States*,⁵²¹ the Court held that “where First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” Thus, unlike the Fifth Amendment privilege against self-incrimination, the First Amendment does not give a witness an absolute right to refuse to respond to congressional demands for information.⁵²²

The Court has held that in balancing the personal interest in privacy against the congressional need for information, “the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.”⁵²³ To protect the rights of witnesses, in cases involving the First Amendment, the courts have emphasized the requirements discussed above concerning authorization for the investigation, delegation of power to investigate to the committee involved, and the existence of a legislative purpose.⁵²⁴

⁵¹⁸ Attorney-Client Privilege Comm. Print, *supra* note 466, at 27 (citing *Hearings on an International Uranium Cartel before the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., 60, 123 (1977)).

⁵¹⁹ *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Not all of the provisions of the Bill of Rights are applicable to congressional hearings. For example, the Sixth Amendment right of a criminal defendant to cross-examine witnesses and to call witnesses on his behalf has been held not applicable to a congressional hearing. *See United States v. Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

⁵²⁰ *Watkins v. United States*, 354 U.S. 178, 197 (1957).

⁵²¹ 360 U.S. 109, 126 (1959).

⁵²² *Id.*

⁵²³ *Watkins*, 354 U.S. at 198. A balancing test was also used in *Branzburg v. Hayes*, which involved the issue of the claimed privilege of newsmen not to respond to demands of a grand jury for information. *See Branzburg v. Hayes*, 408 U.S. 665 (1972). In its 5-4 decision, the Court concluded that the need of the grand jury for the information outweighed First Amendment considerations, but there are indications in the opinion that “the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose,” and that “a State’s interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights.” *Branzburg*, 408 U.S. at 699-700; *see also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (applying the compelling interest test in a legislative investigation).

⁵²⁴ *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins*, 354 U.S. 178; *United States v. Rumely*, 345 U.S. 41 (1953); *see also* 4 Deschler’s Precedents, *supra* note 93, ch. 15, §10, n. 15 and accompanying text.

While the Court has recognized the application of the First Amendment to congressional investigations, and although the amendment has frequently been asserted by witnesses as grounds for not complying with congressional demands for information, the Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.⁵²⁵ However, the Court has narrowly construed the scope of a committee's authority so as to avoid reaching a First Amendment issue.⁵²⁶ In addition, the Court has ruled in favor of a witness who invoked his First Amendment rights in response to questioning by a state legislative committee.⁵²⁷

In a 1976 investigation of the unauthorized publication in the press of the report of the House Select Committee on Intelligence, the Committee on Standards of Official Conduct subpoenaed four news media representatives, including Daniel Schorr.⁵²⁸ The Standards of Official Conduct Committee concluded that Mr. Schorr had obtained a copy of the Select Committee's report and had made it available for publication. Although the ethics committee found that "Mr. Schorr's role in publishing the report was a defiant act in disregard of the expressed will of the House of Representatives to preclude publication of highly classified national security information," it declined to cite him for contempt for his refusal to disclose his source.⁵²⁹ The desire to avoid a clash over First Amendment rights apparently was a major factor in the committee's decision on the contempt matter.⁵³⁰

In another First Amendment dispute, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, in the course of its probe of allegations that deceptive editing practices were employed in the production of the television news documentary program *The Selling of the Pentagon*, subpoenaed Frank Stanton, the president of CBS, directing him to deliver to the subcommittee the "outtakes" relating to the program.⁵³¹ When, on First Amendment grounds, Stanton declined to provide the subpoenaed materials, the subcommittee unanimously voted a contempt citation, and the full committee by a vote of 25-13 recommended

⁵²⁵ Leading Cases, *supra* note 416, at 42; Hamilton, *supra* note 3, at 234. Although it was not in the criminal contempt context, one court of appeals has upheld a witness's First Amendment claim. In *Stamler v. Willis*, the Seventh Circuit Court of Appeals ordered to trial a witness's suit for declaratory relief against the House Un-American Activities Committee in which it was alleged that the committee's authorizing resolution had a "chilling effect" on plaintiff's First Amendment rights. See *Stamler v. Willis*, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970). In other cases for declaratory and injunctive relief brought against committees on First Amendment grounds, relief has been denied although the courts indicated that relief could be granted if the circumstances were more compelling. See, e.g., *Sanders v. McClellan*, 463 F.2d 894 (D.C. Cir. 1972); *Davis v. Chord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971). However, in *Eastland v. United States Servicemen's Fund*, the Supreme Court held that the Constitution's Speech or Debate Clause (Art. I, Section 6, cl. 1) generally bars suits challenging the validity of congressional subpoenas on First Amendment or other grounds. Thus, a witness generally cannot raise his constitutional defenses until a subsequent criminal prosecution for contempt unless, in the case of a Senate committee, the statutory civil enforcement procedure is employed. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); see also *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

⁵²⁶ *United States v. Rumely*, 345 U.S. 41 (1953).

⁵²⁷ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963). In the majority opinion, Justice Goldberg observed that "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition [is] that the State convincingly show a substantial relation [or nexus] between the information sought and a subject of overriding and compelling state interest. *Id.* at 546.

⁵²⁸ H.Rept. 94-1754, 94th Cong. 2d Sess., 6 (1976).

⁵²⁹ *Id.* at 42-43.

⁵³⁰ *Id.* at 47-48 (additional views of Representatives Spence, Teague, Hutchinson, and Flynt).

⁵³¹ The outtakes were portions of the CBS film clips that were not actually broadcast. The subcommittee wanted to compare the outtakes with the tape of the broadcast to determine if improper editing techniques had been used.

to the House that Stanton be held in contempt.⁵³² After extensive debate, the House failed to adopt the committee report, voting instead to recommit the matter to the committee.⁵³³ During the debate, several Members expressed concern that approval of the contempt citation would have a “chilling effect” on the press and would unconstitutionally involve the government in the regulation of the press.⁵³⁴

In a more recent case, Carl Ferrer, the Chief Executive Officer of Backpage.com, an online website for classified ads, refused on First Amendment grounds to comply with a subpoena issued by the Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs.⁵³⁵ The Subcommittee had requested documents concerning Backpage.com’s screening practices against Internet sex trafficking.⁵³⁶ Following Mr. Ferrer’s refusal to provide the requested documents, the Senate sued to enforce the subpoena in the U.S. District Court for the District of Columbia.⁵³⁷ Before the court, Mr. Ferrer argued that the subpoena violated the First Amendment because it constituted an abuse of the investigative process; it was part of a “sustained, coordinated, and targeted campaign” to punish protected speech; and it was an “overly broad and unduly burdensome” measure that produced a chilling effect on speech.⁵³⁸

The district court rejected Mr. Ferrer’s arguments.⁵³⁹ The court determined that Mr. Ferrer “[did] not possess an absolute right to be free from government investigation when there are valid justifications for the inquiry,” and that he failed to show, beyond conclusory allegations, that the subpoena intruded into his First Amendment rights.⁵⁴⁰ In this respect, the court concluded that enforcement of the subpoena did not directly regulate the content of any protected speech because it only requested information on Backpage.com’s efforts to screen out sex trafficking from commercial advertisements on its website.⁵⁴¹ Under these circumstances, the court explained, merely searching for the requested documents had no “impermissible chilling effect” on protected speech.⁵⁴² The court noted, moreover, that “[u]nderstanding the magnitude of Internet sex trafficking and how to stop it substantially outweigh[ed] Mr. Ferrer’s undefined interests.”⁵⁴³ The court thus determined that the subpoena served a valid legislative purpose that did not simply seek to punish Backpage.com.⁵⁴⁴ Finally, the court stated that, while producing documents in response to the subpoena entailed some burden, “[t]here is nothing unusual, unreasonable, or overly broad about requiring a party to search for all responsive documents on a specific subject or topic,” particularly where the requested information is relevant to a stated legislative

⁵³² H.Rept. 92-349, 92d Cong., 1st Sess. (1971). The legal argument of CBS was based in part on the claim that Congress could not constitutionally legislate on the subject of editing techniques and, therefore, the subcommittee lacked a valid legislative purpose for the investigation. *Id.* at 9.

⁵³³ *See* 117 CONG. REC. 23922-926, 24603-59, 24720-53 (1971).

⁵³⁴ *Id.* at 24731-732.

⁵³⁵ S. Rep. No. 114-214 (2016).

⁵³⁶ *Id.*

⁵³⁷ S. Res. 377, 114th Cong. (2016).

⁵³⁸ *Ferrer*, 199 F. Supp. 3d at 138.

⁵³⁹ *Id.* at 138-44.

⁵⁴⁰ *Id.* at 139-43.

⁵⁴¹ *Id.* at 141-43.

⁵⁴² *Id.* at 141.

⁵⁴³ *Id.* at 143.

⁵⁴⁴ *Id.*

purpose.⁵⁴⁵ Accordingly, the court granted the Subcommittee's application to enforce the subpoena *duces tecum*.⁵⁴⁶

Although the First Amendment may limit the manner in which Congress may exercise its investigatory authority, this limitation is not absolute. The courts will likely balance a person's right to protected speech against Congress's inherent constitutional authority to obtain information relevant to an investigation. And when Congress uses its investigatory function to advance a valid governmental interest, a person's private interests may be outweighed by the public interest in securing that information.

Fourth Amendment

Several opinions of the Supreme Court indicate that the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable to congressional committees; however, there has not been an opinion directly addressing the issue.⁵⁴⁷ It appears that there must be a legitimate legislative or oversight-related basis for the issuance of a congressional subpoena.⁵⁴⁸ The Fourth Amendment protects a congressional witness against a subpoena which is unreasonably broad or burdensome.⁵⁴⁹ The Court has outlined the standard to be used in judging the reasonableness of a congressional subpoena:

Petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment.... 'Adequacy or excess in the breath of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry'.... The subcommittee's inquiry here was a relatively broad one ... and the permissible scope of materials that could reasonably be sought was necessarily equally broad. It was not reasonable to suppose that the subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only 'specify ... with reasonable particularity, the subjects to which the documents ... relate.... 'The call of the subpoena for 'all records, correspondence and memoranda' of the Civil Rights Congress relating to the specified subject describes them 'with all of the particularity the nature of the inquiry and the [subcommittee's] situation would permit.... 'The description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them adequately.⁵⁵⁰

If a witness has a legal objection to a subpoena *duces tecum* or is for some reason unable to comply with a demand for documents, he must give the grounds for his non-compliance upon the return of the subpoena. As the D.C. Circuit stated:

⁵⁴⁵ *Id.* at 143-44.

⁵⁴⁶ *Id.* at 145. Mr. Ferrer appealed the district court's decision to the D.C. Circuit Court of Appeals, and that case is currently pending adjudication. See Senate Permanent Subcomm. v. Ferrer, No. 16-5232 (D.C. Cir. filed Aug. 11, 2016).

⁵⁴⁷ *Watkins v. United States*, 354 U.S. 178, 188 (1957); see also *McPhaul v. United States*, 364 U.S. 372 (1960).

⁵⁴⁸ A congressional subpoena may not be used in a mere "fishing expedition." See *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) (quoting *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) (stating that "[i]t is contrary to the first principles of justice to allow a search through all the records, relevant or irrelevant, in the hope that something will turn up.")); see also *United States v. Groves*, 188 F. Supp. 314 (W.D. Pa. 1937) (dicta). But see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975) (recognizing that an investigation may lead "up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.").

⁵⁴⁹ *McPhaul v. United States*, 364 U.S. 372 (1960); see also *Shelton v. United States*, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

⁵⁵⁰ *McPhaul*, 364 U.S. at 832.

If [the witness] felt he could refuse compliance because he considered the subpoena so broad as to constitute an unreasonable search and seizure within the prohibition of the fourth amendment, then to avoid contempt for complete noncompliance he was under [an] obligation to inform the subcommittee of his position. The subcommittee would then have had the choice of adhering to the subpoena as formulated or of meeting the objection in light of any pertinent representations made by [the witness].⁵⁵¹

Similarly, if a subpoenaed party is in doubt as to what records are required by a subpoena or believes that it calls for documents not related to the investigation, he must inform the committee. Where a witness is unable to produce documents he will not be held in contempt “unless he is responsible for their unavailability ... or is impeding justice by not explaining what happened to them.”⁵⁵²

The application of the exclusionary rule to congressional committee investigation is in some doubt and appears to depend on the precise facts of the situation. It seems that documents which were unlawfully seized at the direction of a congressional investigating committee may not be admitted into evidence in a subsequent unrelated criminal prosecution because of the command of the exclusionary rule.⁵⁵³ In the absence of a Supreme Court ruling, it remains unclear whether the exclusionary rule bars the admission into evidence in a contempt prosecution of a congressional subpoena which was issued on the basis of documents obtained by the committee following their unlawful seizure by another investigating body (such as a state prosecutor).⁵⁵⁴

Fifth Amendment Privilege Against Self-Incrimination

Despite the provision’s express application to “criminal case[s]” the Supreme Court has indicated that the privilege against self-incrimination afforded by the Fifth Amendment to be available to a witness appearing before a congressional committee.⁵⁵⁵ The privilege is personal in nature,⁵⁵⁶ and

⁵⁵¹ *Shelton*, 404 F.2d at 1299-1300; see also *Leading Cases*, *supra* note 416, at 49.

⁵⁵² *McPhaul*, 364 U.S. at 382.

⁵⁵³ *Nelson v. United States*, 208 F.2d 505 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 827 (1953).

⁵⁵⁴ In *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972), the court of appeals reversed contempt convictions where the subcommittee subpoenas were based on information “derived by the subcommittee through a previous unconstitutional search and seizure by [state] officials and the subcommittee’s own investigator.” The decision of the court of appeals in the contempt case was rendered in December, 1972. In a civil case brought by the criminal defendants, Alan and Margaret McSurely, against Senator McClellan and the subcommittee staff for alleged violations of their constitutional rights by the transportation and use of the seized documents, the federal district court in June, 1973, denied the motion of the defendants for summary judgment. While the appeal from the decision of the district court in the civil case was pending before the court of appeals, the Supreme Court held, in *Calandra v. United States*, 414 U.S. 338 (1974), that a grand jury is not precluded by the Fourth Amendment’s exclusionary rule from questioning a witness on the basis of evidence that had been illegally seized. A divided court of appeals subsequently held in *McSurely v. McClellan*, 521 F.2d 1024, 1047 (D.C. Cir. 1975), that under *Calandra* “a congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure.”

The decision of the three-judge panel in the civil case was vacated and on rehearing by the full District of Columbia Circuit, five judges were of the view that *Calandra* was applicable to the legislative sphere and another five judges found it unnecessary to decide whether *Calandra* applies to committees but indicated that, even if it does not apply to the legislative branch, the exclusionary rule may restrict a committee’s use of unlawfully seized documents if it does not make mere “derivative use” of them but commits an independent fourth amendment violation in obtaining them. *McSurely v. McClellan*, 553 F.2d 1277, 1293-94, 1317-25 (D.C. Cir. 1976) (en banc). The Supreme Court granted certiorari in the case, 434 U.S. 888 (1977), but subsequently dismissed certiorari as improvidently granted, with no explanation for this disposition of the case. See *McAdams v. McSurely*, 438 U.S. 189 (1978). Jury verdicts were eventually returned against the Senate defendants, but were reversed in part on appeal. See *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985).

⁵⁵⁵ See U.S. CONST. amend. V; *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (continued...)

may not be invoked on behalf of a corporation,⁵⁵⁷ small partnership,⁵⁵⁸ labor union,⁵⁵⁹ or other “artificial” organizations.⁵⁶⁰ The privilege protects a witness against being compelled to testify but generally not against a subpoena for existing documentary evidence.⁵⁶¹ However, where compliance with a subpoena *duces tecum* would constitute implicit testimonial authentication of the documents produced, the privilege may apply.⁵⁶²

There is no required verbal formula for invoking the privilege; nor does there appear to be necessary a warning by the committee.⁵⁶³ A committee should recognize any reasonable indication, such as “the fifth amendment,” that the witness is asserting his privilege.⁵⁶⁴ Where a committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or is claiming some other basis for declining to answer, the committee should direct the witness to specify his privilege or objection.⁵⁶⁵

The committee can review the assertion of the privilege by a witness to determine its validity, but the witness is not required to articulate the precise hazard that he fears. In regard to the assertion of the privilege in judicial proceedings, the Supreme Court has advised:

To sustain the privilege, it need only be evident, from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.... To reject a claim, it should be ‘perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers cannot possibly have a tendency’ to incriminate.⁵⁶⁶

The basis for asserting the privilege was elaborated upon in a lower court decision:

The privilege may only be asserted when there is reasonable apprehension on the part of the witness that his answer would furnish some evidence upon which he could be

(...continued)

(1955). The application of a waiver that occurs as a result of a witness having provided prior testimony on the same matters as to which the privilege is later asserted—sometimes known as “testimonial waiver”—may depend on various factors including: whether the witness was compelled to testify; whether the prior testimony occurred in the same or different proceeding; and whether the prior testimony was incriminating. *See, e.g.,* Mitchell v. United States, 526 U.S. 314 (1999); Brown v. United States, 356 U.S. 148 (1958); Rogers v. United States, 340 U.S. 367 (1951); McCarthy v. Arndstein, 262 U.S. 355 (1923); Presser v. United States, 284 F.2d 233 (D.C. Cir 1960).

⁵⁵⁶ *See* McPhaul v. United States, 364 U.S. 372 (1960); *see also* McCormick, EVIDENCE §120 (Cleary ed. 1984) [hereinafter McCormick].

⁵⁵⁷ Hale v. Henkel, 201 U.S. 43 (1906).

⁵⁵⁸ Bellis v. United States, 417 U.S. 85 (1974).

⁵⁵⁹ *See* United States v. White, 322 U.S. 694 (1944).

⁵⁶⁰ Bellis, 417 U.S. at 90; *see also* Rogers v. United States, 340 U.S. 367 (1951) (Communist Party).

⁵⁶¹ Fisher v. United States, 425 U.S. 391, 409 (1976); Andresen v. Maryland, 427 U.S. 463 (1976). The cases concerned business records and there may be some protection available in the case of a subpoena for personal papers. *See* McCormick, *supra* note 498, at §§126, 127.

⁵⁶² United States v. Coe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976). *see also* Curcio v. United States, 354 U.S. 118 (1957); McCormick, *supra* note 498, at §126.

⁵⁶³ Although there is no case law on point, it seems unlikely that *Miranda* warnings are required. That requirement flows from judicial concern as to the validity of confessions evoked in an environment of a police station, isolated from public scrutiny, with the possible threat of physical and prosecutorial jeopardy; an environment clearly distinguishable from a congressional context. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

⁵⁶⁴ Quinn v. United States, 349 U.S. 155 (1955).

⁵⁶⁵ Emspak v. United States, 349 U.S. 190 (1955); *see also* Leading Cases, *supra* note 416, at 63.

⁵⁶⁶ Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

convicted of a criminal offense ... or which would reveal sources from which evidence could be obtained that would lead to such conviction or to prosecution thereforeOnce it has become apparent that the answers to a question would expose a witness to the danger of conviction or prosecution, wider latitude is permitted the witness in refusing to answer other questions.⁵⁶⁷

The privilege against self-incrimination may be waived by declining to assert it, specifically disclaiming it, or testifying on the same matters as to which the privilege is later asserted. However, because of the importance of the privilege, a court will not construe an ambiguous statement of a witness before a committee as a waiver.⁵⁶⁸

Where a witness asserts the privilege, the full House or the committee conducting the investigation may seek a court order which (a) directs the witness to testify and (b) grants him immunity against the use of his testimony, or other evidence derived from his testimony, in a subsequent criminal prosecution.⁵⁶⁹ The immunity that is granted is “use” immunity, not “transactional” immunity. Neither the immunized testimony that the witness gives, nor evidence derived therefrom, may be used against him in a subsequent criminal prosecution, except one for perjury or contempt relating to his testimony. However, he may be convicted of the crime (the “transaction”) on the basis of other evidence.⁵⁷⁰

The application for the judicial immunity order must be approved by a majority of the House or Senate or by a two-thirds vote of the full committee seeking the order.⁵⁷¹ The Attorney General must be notified at least ten days prior to the request for the order, and he can request a delay of twenty days in issuing the order.⁵⁷² Although the order to testify may be issued before the witness’s appearance,⁵⁷³ it does not become legally effective until the witness has been asked the question, invoked his privilege, and been presented with the court order.⁵⁷⁴ The role of the court in issuing the order has been held to be ministerial and, thus, if the procedural requirements under the immunity statute have been met, the court may not refuse to issue the order or impose conditions on the grant of immunity.⁵⁷⁵

⁵⁶⁷ *United States v. Jaffee*, 98 F. Supp. 191, 193-94 (D.D.C. 1951); *see also* *Simpson v. United States*, 241 F.2d 222 (9th Cir. 1957) (finding the privilege inapplicable to questions seeking basic identifying information, such as the witness’s name and address).

⁵⁶⁸ *Emspak*, 349 U.S. 190; *see also* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁵⁶⁹ 18 U.S.C. §§6002, 6005 (2012).

⁵⁷⁰ The constitutionality of granting a witness only use immunity rather than transactional immunity, was upheld in *Kastigar v. United States*, 406 U.S. 441 (1972). In *United States v. Romano*, 583 F.2d 1 (1st Cir. 1978), the defendant appealed from his conviction of several offenses on the ground, *inter alia*, that the prosecution’s evidence had been derived, in part, from immunized testimony that he had given before a Senate subcommittee. Although the conviction was affirmed, the case illustrates the difficulty that the prosecutor may have in establishing that its evidence was not “tainted,” but rather was derived from independent sources, especially in a case where there was some cooperation in the investigation between a committee and the Justice Department prior to the grant of immunity to testify before the committee. *See Kastigar*, 406 U.S. at 461-621.

⁵⁷¹ 18 U.S.C. §6005(a) (2012).

⁵⁷² However, the Justice Department may waive the notice requirement. *Application of the Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232, 1236 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1084 (1981).

⁵⁷³ *Application of the Senate Permanent Subcommittee on Investigations*, 655 F.2d at 1257.

⁵⁷⁴ *See In re McElreath*, 248 F.2d 612 (D.C. Cir. 1957) (en banc).

⁵⁷⁵ *Application of the U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973). In *dicta*, however, the court referred to the legislative history of the statutory procedure, which suggests that although a court lacks power to review the advisability of granting immunity, a court may consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee’s inquiry. *See id.* at 1278-79.

In practice, there have been two recent occasions that a person subject to a congressional subpoena invoked the Fifth Amendment privilege. As discussed in the preceding section regarding the enforcement of criminal contempt resolutions against executive branch officials, former IRS Director of Exempt Organizations Lois Lerner, in 2013, invoked her Fifth Amendment privilege in response to a subpoena requesting her testimony on the agency's policy of targeting conservative political groups.⁵⁷⁶ The House Committee on Oversight and Government Reform, which had issued the subpoena, determined that Ms. Lerner waived the privilege when she made an opening statement denying her involvement in any unlawful activity.⁵⁷⁷ Ultimately, after the House had voted to adopt the Committee's contempt resolution, the DOJ declined to pursue a criminal contempt charge against Ms. Lerner because, in the agency's view, the Fifth Amendment would have foreclosed a successful prosecution against her.⁵⁷⁸

Not long after the Lerner case, in 2015, the House Committee on Oversight and Government Reform investigated former Secretary of State Hillary Clinton's use of a private email server to conduct government business during her tenure at the State Department.⁵⁷⁹ The Committee requested the testimony of Bryan Pagliano, a former Senior Advisor in the Bureau of Information Resource Management at the State Department, who helped set up and maintain Secretary Clinton's private server.⁵⁸⁰ After Mr. Pagliano, through counsel, invoked his Fifth Amendment privilege, Committee Chairman Jason Chaffetz issued a subpoena compelling him to appear before the Committee on September 13, 2016.⁵⁸¹ Citing his Fifth Amendment privilege, Mr. Pagliano refused to testify before the Committee and did not appear at the hearing.⁵⁸² Chairman Chaffetz subsequently issued another subpoena compelling Mr. Pagliano's appearance on September 22, 2016.⁵⁸³ Mr. Pagliano again refused to appear at the hearing.⁵⁸⁴

On September 27, 2016, after finding that Mr. Pagliano "willfully failed to comply with a duly issued subpoena," the Committee voted 19-15 for a resolution recommending that the House find Mr. Pagliano in contempt of Congress.⁵⁸⁵ The members of the Committee who opposed the resolution argued that "no legitimate legislative purpose" would be served by forcing Mr. Pagliano to appear before the Committee and invoke his Fifth Amendment privilege, when he had previously asserted that right in separate investigations and there was no credible expectation that he would waive it before the Committee or that the Chairman would seek immunity for Mr. Pagliano.⁵⁸⁶ The House has not yet voted to adopt the resolution, but Chairman Chaffetz sent a letter to Attorney General Jeff Sessions on February 16, 2017, requesting the DOJ to "bring the

⁵⁷⁶ 160 CONG. REC. H3482, 3484-86 (daily ed. May 7, 2014).

⁵⁷⁷ *Id.* at H3485.

⁵⁷⁸ Letter from Ronald C. Machen Jr., United States Attorney, U.S. Department of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

⁵⁷⁹ H. Rep. No. 114-792 (2016).

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*; 162 CONG. REC. H5923 (daily ed. Sep. 27, 2016).

⁵⁸⁶ H. Rep. No. 114-792 (2016).

matter before a grand jury for its action or file an information charging Pagliano with violating” the criminal contempt provision.⁵⁸⁷

Finally, another recent case demonstrates how Congress’s immunity power could be used to eliminate a Fifth Amendment privilege to refuse to comply with a subpoena. Following the 2016 presidential election, Congress began to investigate allegations that Russia influenced the outcome of the election.⁵⁸⁸ On February 13, 2017, Michael Flynn, who was serving as President Trump’s national security advisor, resigned after revelations that he had failed to inform the Vice President and other White House officials that he had particular discussions with the Russian ambassador to the United States shortly after the election.⁵⁸⁹ In March 2017, Mr. Flynn reportedly offered to provide testimony to House and Senate investigators in exchange for immunity from prosecution.⁵⁹⁰ For the time being, Congress has not entered into an immunity deal with Mr. Flynn.⁵⁹¹ However, on May 10, 2017, the Senate Select Committee on Intelligence issued a subpoena requesting that Mr. Flynn provide documents related to the panel’s inquiry into alleged Russian meddling in the election.⁵⁹² If Congress decides to seek immunity, Mr. Flynn may be compelled to produce those documents and any requested testimony, and Mr. Flynn would not be able to invoke his Fifth Amendment privilege.⁵⁹³

Fifth Amendment Due Process Rights

The due process clause of the Fifth Amendment requires that “the pertinency of the interrogation to the topic under the ... committee’s inquiry must be brought home to the witness at the time the questions are put to him.”⁵⁹⁴ “Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.”⁵⁹⁵ Additionally, to satisfy both the

⁵⁸⁷ See Letter from Jason Chaffetz, Committee on Oversight and Government Reform, to Jeff B. Sessions, United States Attorney General, Department of Justice (Feb. 16, 2017), *available at* <https://oversight.house.gov/release/chaffetz-asks-justice-department-uphold-institutional-interests-congress>. This referral following a Committee vote is a marked departure from the Burford, Bolten, Miers, Holder, and Lerner cases, where the referral to the Department of Justice did not occur until after the full House had voted to adopt the committee’s contempt resolution.

⁵⁸⁸ See e.g., *Hearing on Russian Active Measures Investigation before H. Permanent Select Comm. on Intelligence*, 115th Cong. (2017) (statement of James Comey, Former Director, Federal Bureau of Investigation); *Hearing on Russian Interference in 2016 Election before S. Judiciary Subcomm. on Crime and Terrorism*, 115th Cong. (2017) (statement of James R. Clapper, Former Director, National Intelligence of the United States).

⁵⁸⁹ Maggie Haberman, Matthew Rosenberg, Matt Apuzzo, and Glenn Thrush, *Michael Flynn Resigns as National Security Adviser*, N.Y. TIMES, February 13 2017, <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.

⁵⁹⁰ Mark Mazzetti and Matthew Rosenberg, *Michael Flynn Offers to Testify Before Congress in Exchange for Immunity*, N.Y. TIMES, Mar. 30, 2017, <https://www.nytimes.com/2017/03/30/us/politics/michael-flynn-congress-immunity-russia.html>.

⁵⁹¹ *Id.*

⁵⁹² Karoun Demirjian, *Senate Intelligence Committee Subpoenas Documents from Flynn in Russian Probe*, WASH. POST, May 10, 2017, https://www.washingtonpost.com/powerpost/senate-intelligence-committee-subpoenas-documents-from-flynn-in-russia-probe/2017/05/10/d8153e8a-35d0-11e7-b4ee-434b6d506b37_story.html?utm_term=.4e17d71947af.

⁵⁹³ See *Kastigar*, 406 U.S. at 453, 462.

⁵⁹⁴ *Deutch v. United States*, 367 U.S. 456, 467-68 (1961). As the court explained in that case, there is a separate statutory requirement of pertinency.

⁵⁹⁵ *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

requirement of due process as well as the statutory requirement that a refusal to answer be “willful,” a witness should be informed of the committee’s ruling on any objections he raises or privileges which he asserts.⁵⁹⁶

⁵⁹⁶ *Deutch*, 367 U.S. at 467-68.

Appendix. Congressional Contempt Resolutions, 1980-Present

The tables below contain information on contempt resolutions in the House and Senate and civil enforcement resolutions in the Senate since 1980. The tables include contextual information such as the individuals or organizations charged, the recommending committee, resolution number, and roll call votes related to various actions. Summarized descriptions of the allegations and committee actions are derived from the identified House or Senate Report. CRS has attempted to make the table as comprehensive as possible; however, some relevant citations may not have been identified by CRS's searches.

Table A-1. Floor Votes on Contempt Resolutions in the House of Representatives, 1980-Present

| Name and Title | Recommending Committee and Report Excerpt | Resolution and Vote |
|---|---|---|
| <p>O. Robert Fordiani, District Representative for Congressman Charles H. Wilson</p> | <p>Standards of Official Conduct, H.Rept. 96-1078 (1980)</p> <p>On January 2, 1980, O. Robert Fordiani, having been summoned as a witness by the authority of the House Committee on Standards of Official Conduct pursuant to a subpoena of the said Committee, failed to appear to give testimony before said Committee, meeting in executive session for the purpose of receiving testimony, concerning possible violations of House Rule XLIII, of the Code of Official Conduct, by Representative Charles H. Wilson of California, pursuant to the authority of House Rule X, clause 4(e)(1)(B).</p> <p>Chairman Bennett found Fordiani's failure to appear contemptuous, and, thereafter, the Committee, a quorum being present, authorized its Chairman, the Honorable Charles E. Bennett, ayes 7, nays 0, to file this report and to offer a resolution directing the Speaker of the House to certify this report to the U.S. Attorney for the District of Columbia to the end that Fordiani be prosecuted for criminal contempt of Congress, pursuant to the provisions of title 2, United States Code, Sections 192 and 194.</p> | <p>H.Res. 743, 96th Cong. (1980)</p> <p>Agreed to by Voice Vote on July 21, 1980. See 126 Cong. Rec. 18,830-32 (1980)</p> |
| <p>Anne M. (Gorsuch) Burford, Administrator of the Environmental Protection Agency</p> | <p>Public Works and Transportation, H.Rept. 97-968 (1982)</p> <p>Last month, during an ongoing investigation by the Subcommittee on Investigations and Oversight into the functioning of the Superfund law in the face of recurring problems of contamination of the Nation's ground and surface water resources by illegally spilled or disposed hazardous wastes, the Subcommittee sought necessary information from the U.S. Environmental Protection Agency. Anne M. Gorsuch, Administrator, had responsibility for the administration of that law and was the custodian of the relevant documents.</p> <p>Administrator Gorsuch failed to cooperate, and the Subcommittee found it necessary to subpoena her to appear with the documents. Upon refusal to comply with the subpoena, the Subcommittee voted to hold the Administrator in contempt and referred the matter to the Committee on Public Works and Transportation.</p> | <p>H.Res. 632, 97th Cong. (1982)</p> <p>Agreed to in House by Yea-Nay Vote: 259 - 105 (Record Vote No: 472) on December 16, 1982. See 128 Cong. Rec. 31,746-76 (1982)</p> |

| Name and Title | Recommending Committee and Report Excerpt | Resolution and Vote |
|---|---|--|
| <p>Rita M. Lavelle, former Assistant Administrator for the Environmental Protection Agency</p> | <p>Energy and Commerce, H.Rept. 98-190 (1983)</p> <p>On April 26, 1983, the Committee unanimously adopted a resolution finding Ms. Lavelle in contempt of Congress for failing to appear and testify as called for by a subpoena authorized by the Subcommittee on Oversight and Investigations. As the senior official who was, until recently, in charge of the EPA's hazardous waste programs, Ms. Lavelle stands in a unique position to respond to the serious concerns of the Subcommittee—and of the Congress and the American people—about the agency's discharge of its duty to protect the public from hazardous wastes, to clean them up promptly, using the \$1.6 billion Superfund, and to secure reimbursement from those responsible.</p> | <p>H.Res. 200, 98th Cong. (1983)</p> <p>Resolution Agreed to in House by Yea-Nay Vote: 413 - 0 (Record Vote No: 127) on May 18, 1983. See 129 Cong. Rec. 12,717-25 (1983)</p> |
| <p>Anne M. (Gorsuch) Burford, Administrator of the Environmental Protection Agency</p> | <p>Public Works and Transportation (by referral), H.Rept. 98-323 (1982)</p> <p>The resolution of contempt adopted by the House of Representatives in the 97th Congress arose out of the issuance of a Subcommittee subpoena for Agency records in November 1982, necessitated by the EPA's refusal to make available to the Subcommittee pertinent and crucial information documenting how the Agency was carrying out its responsibilities under ... the so-called Superfund statute, which provides for the cleaning up of abandoned hazardous chemical waste dumps. The EPA Administrator's refusal to comply with the subpoena led ultimately to the House's citation of contempt.</p> <p>The Committee's reporting of House Resolution 180 reflects the fact that the Subcommittee on Investigations and Oversight now has that information ... and can now discharge its investigative duties and assist the Congress, through the oversight process, in carrying out its legislative responsibilities.</p> | <p>H.Res. 180, 98th Cong. (1983)</p> <p>Resolution Agreed to in House (Amended) by Voice Vote on August 3, 1983. See 129 Cong. Rec. 22,692-98 (1983)</p> |
| <p>Ralph Bernstein, real estate investor</p> <p>Joseph Bernstein, partner at Bernstein, Carter & Dayo</p> | <p>Foreign Affairs, H.Rept. 99-462 (1986)</p> <p>In closed hearings on December 11 and 12, 1985, the Subcommittee on Asian and Pacific Affairs questioned two witnesses, Ralph Bernstein, a nonlawyer who works extensively in real estate investment and his brother Joseph Bernstein, a lawyer who assists with that investment. The questions concerned investment work allegedly performed by them on behalf of President Ferdinand Marcos of the Philippines and his wife, Imelda Marcos. That Subcommittee was pursuing allegations of vast holdings by the Marcoses in the United States, part of a flight of capital from the Philippines that has been reportedly estimated at over \$10 billion in recent years.</p> <p>The two witnesses, alleged to be at the center of a web of dummy corporations shielding the Marcoses' holdings, firmly refused to answer the Subcommittee's questions about their investment work, or even to state whether they knew or had met the Marcoses. Their refusals to answer denied the Subcommittee information that was crucial to its investigation.</p> <p>Accordingly, the Subcommittee voted to report the contempts to the Committee, and the Committee voted to report to the House a contempt resolution for the Bernsteins.</p> | <p>H.Res. 384, 99th Cong. (1986)</p> <p>Resolution Agreed to in House to the First Resolving Clause by Yea-Nay Vote: 352 - 34 (Record Vote No: 34) and the Second Resolving Clause by Yea-Nay Vote: 345-50 (Record Vote No: 35) on February 27, 1986. See 132 Cong. Rec. 3,028-62 (1986)</p> |
| <p>Harriet Miers, former White House Counsel</p> <p>Joshua Bolten, White House Chief of Staff</p> | <p>Judiciary, H.Rept. 110-423 (2007)</p> <p>Beginning in March 2007, the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law have held a number of hearings on the U.S. Attorney terminations and related issues.</p> <p>On March 21, 2007, the Subcommittee on Commercial and Administrative Law authorized Chairman Conyers to issue subpoenas to J. Scott Jennings, Special Assistant to the President, Office of Political Affairs; William Kelley, Deputy White House Counsel; Harriet Miers, former White House Counsel; Karl Rove, Deputy Chief of Staff and Senior Advisor to the President; Joshua Bolten, White House Chief of Staff; and Fred Fielding, White House Counsel, to obtain testimony and documents. On June 13, 2007, Chairman Conyers and Senate Judiciary Committee Chairman Patrick Leahy issued subpoenas to Joshua Bolten,</p> | <p>H.Res. 979, 110th Cong. (2008)</p> <p>Pursuant to the provisions of H.Res. 982, H.Res. 979 and H. Res. 980 were considered passed by the House by recorded vote: 223 - 32, 1 Present (Roll no. 60) on February 14, 2008. 154 Cong.</p> |

| Name and Title | Recommending Committee and Report Excerpt | Resolution and Vote |
|---|---|--|
| | <p>White House Chief of Staff, or appropriate custodian, for relevant White House documents. On June 28, 2007, White House Counsel Fred Fielding wrote that the White House would refuse to produce any documents pursuant to the subpoena issued to Mr. Bolten based on executive privilege.</p> <p>Former White House Counsel Harriet Miers refused to comply with a subpoena requiring her appearance before the Subcommittee on July 12, 2007. Ms. Miers not only failed to provide testimony or documents, but she also failed even to appear for the hearing. Subcommittee Chair Sanchez proceeded to overrule Ms. Miers's claims of immunity and privilege and her ruling was sustained by Subcommittee members in a recorded vote of 7–5.</p> <p>The Subcommittee met on July 19, Subcommittee Chair Sanchez ruled against the privilege claims with respect to Mr. Bolten's refusal to produce any documents pursuant to the subpoena issued to him (as now reflected in the fourth count of the Resolution), and that ruling was upheld by a 7–3 vote.</p> | <p>Rec. 2,175-90 (2008)</p> |
| <p>Eric Holder, Attorney General</p> | <p>Oversight and Government Reform, H.Rept. 112-546 (2012)</p> <p>In February 2011, the Oversight and Government Reform Committee joined Senator Charles E. Grassley, Ranking Member of the Senate Committee on the Judiciary, in investigating Operation Fast and Furious, a program conducted by ATF. On March 16, 2011, Chairman Darrell Issa wrote to then-Acting ATF Director Kenneth E. Melson requesting documents and information regarding Fast and Furious. Responding for Melson and ATF, the DOJ did not provide any documents or information to the Committee by the March 30, 2011, deadline. The Committee issued a subpoena to Melson the next day. The DOJ produced zero pages of non-public documents pursuant to that subpoena until June 10, 2011, on the eve of the Committee's first Fast and Furious hearing.</p> <p>On October 11, 2011, the DOJ informed the Committee its document production pursuant to the March 31, 2011, subpoena was complete. The next day, the Committee issued a detailed subpoena to Attorney General Eric Holder for additional documents related to Fast and Furious.</p> <p>On June 20, 2012, the Committee on Oversight and Government Reform met in open session with a quorum present to consider a report of contempt against Eric H. Holder, Jr., the Attorney General of the United States, for failure to comply with a Congressional subpoena. The Committee approved the Report by a roll call vote of 23-17 and ordered the Report reported favorably to the House.</p> | <p>H. Res. 711, 112th Cong. (2012)</p> <p>Resolution agreed to in House by recorded vote: 255 - 67, 1 Present (Roll no. 441) on June 28, 2012. See 158 Cong. Rec. H4177-4417 (daily ed. June 28, 2012)</p> <p>H. Res. 706, 112th Cong. (2012)</p> <p>Resolution agreed to in House by Yea and Nay Vote: 258 - 95, 5 Present (Roll no. 442) on June 28, 2012. See 158 Cong. Rec. H4164-75 (daily ed. June 28, 2012)</p> |
| <p>Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service</p> | <p>Oversight and Government Reform, H. Rept. 113-415 (2014)</p> <p>Lois G. Lerner has refused to comply with a congressional subpoena for testimony before the Committee on Oversight and Government Reform relating to her role in the Internal Revenue Service's treatment of certain applicants for tax-exempt status. Her testimony is vital to the Committee's investigation into this matter.</p> <p>Ms. Lerner offered a voluntary statement in her appearance before the Committee. The Committee subsequently determined that she waived her Fifth Amendment privilege in making this statement, and it informed Ms. Lerner of its decision. Still, Ms. Lerner continued to refuse to testify before the Committee.</p> <p>Accordingly, the Chairman of the Oversight and Government Reform Committee recommends that the House find Ms. Lerner in contempt for her failure to comply with the subpoena issued to her.</p> | <p>H. Res. 574, 113th Cong. (2014)</p> <p>Resolution agreed to in House by recorded vote: 231 - 187 (Roll no. 203) on May 7, 2014. See 160 Cong. Rec. H3902-09, H3919-22 (daily ed. May 7, 2014).</p> |

Source: Information compiled from committee reports, hearings, the *Congressional Record* and news sources by CRS using LexisNexis, ProQuest Congressional, ProQuest Historical Newspapers, and the Legislative Information Service (LIS) databases.

Table A-2. Other Committee Actions on Contempt Resolutions in the House of Representatives, 1980-Present

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| Charles W. Duncan, Secretary of Energy | <p>Government Operations/Subcommittee on Environment, Energy, and Natural Resources, H.Rept. 96-1099 (1980)</p> <p>On April 8, the subcommittee requested in writing two categories of DOE documents related to the petroleum import fee: "(t)he final version or prior drafts of all memoranda, letters, studies, briefing papers or any other documents prepared" by members of the staffs of DOE's Economic Regulatory Administration and Office of Policy Evaluation relating to the import fee, and "(a)ny other documents pertaining to the role played by DOE in the President's decision to impose an import fee."</p> <p>Secretary Duncan and the Department produced some documents to the subcommittee for the first time on April 23, along with the letter of that date setting forth certain privilege claims.</p> <p>The subcommittee reiterated its rejection of the Administration's position regarding congressional access to these documents and voted unanimously to renew the subpoena.</p> <p>At the hearing of April 29, the subcommittee voted unanimously to hold Secretary Duncan in contempt for his sustained failure to produce the subpoenaed documents.</p> | The subcommittee Chairman recommended that the contempt of Congress be purged based on the subsequent production of documents. See H.Rept. 96-1099 at 29 |
| Nelson Bunker Hunt, silver trader W. Herbert Hunt, silver trader | <p>Government Operations/Subcommittee on Commerce, Consumer and Monetary Affairs, <i>Silver Prices and the Adequacy of Federal Actions in the Marketplace, 1979-80 Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the H. Comm. of Government Operations, 96th Cong. (1980)</i></p> <p>On April 22, the Commerce, Consumer and Monetary Affairs Subcommittee unanimously authorized the issuance of subpoenas directing Nelson Bunker Hunt and William Herbert Hunt to appear before the subcommittee in connection with its investigation into the adequacy of the Federal response to recent events in the silver and related financial markets. The subpoenas were authorized after Messrs. Hunt refused an April 7 written request to appear voluntarily before the subcommittee.</p> <p>Notwithstanding the command of the subpoenas, the Hunts failed to appear.</p> <p>At a meeting of the subcommittee on Tuesday, April 29, 1980, the subcommittee, by a vote of 6 ayes, 0 nays, voted to recommend that Messrs. Hunt be held in contempt of Congress for failure to appear on the return date of the subpoena.</p> | The Hunts requested an opportunity to appear and the subcommittee withdrew its contempt recommendation. See <i>Silver Prices</i> hearing, Letter from the Subcommittee Chairman, at 459 |
| Nicholas Gouletas, Chairman of American Invsco Corp. | <p>Government Operations/Subcommittee on Commerce, Consumer, and Monetary Affairs, 126 Cong. Rec. D1515 (daily ed. Dec. 1, 1980)</p> <p>The Subcommittee on Commerce, Consumer, and Monetary Affairs voted contempt citation against Nicholas Gouletas (American Invsco Corp.) for failure to produce documents required by committee subpoena.</p> <p><i>Condominium and Cooperative Conversion: The Federal Response Before a Subcomm. of the H. Comm. of Government Operations, Part 1, 97th Cong. (1980)</i></p> <p>The Subcommittee held hearings into the public policy consequences of the national condominium and cooperative conversation trend, including an examination of the manner in which Federal agency policies, practices, and procedures impact this trend. In order to test the effectiveness, efficiency, and effects of Federal programs and practices, the Subcommittee, among other things, studied the conversation activities of American Invsco and other corporations.</p> | The subcommittee and the full committee agreed to accept less material than was in the original subpoena. See <i>Condominium</i> hearing at 822 |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| <p>James B. Edwards, Secretary of Energy</p> | <p>Government Operations/Subcommittee on Environment, Energy, and Natural Resources, H.Rept. 97-994 (1982)</p> <p>In June of 1981, the Subcommittee began an investigation of the negotiation by the Department of Energy of two financial assistance packages under DPA [the Defense Production Act] for commercial-scale synthetic fuels plants. The inquiry was initiated after reports were received that the department was negotiating contracts with terms that were very favorable to the private companies. One of the contracts was with Union Oil Co., the nation's 15th largest oil company, and another was with TOSCO, which was in partnership with Exxon, the nation's largest oil company.</p> <p>DOE refused to give the Subcommittee any information about the contracts, claiming that while in negotiation they could not be discussed with Congress. On June 24, 1981, the Subcommittee voted to subpoena documents relating to the Union contract from the department.</p> <p>DOE provided information in six areas of the Union contract and also gave the Subcommittee staff additional briefings. However, because of his refusal to produce the requested documents, Secretary Edwards was held in contempt by the Subcommittee on July 23, 1981.</p> | <p>On July 29, Mr. Edwards signed the Union Oil contract and the documents were produced to the Subcommittee. H.Rept. 97-994 at 187</p> |
| <p>James G. Watt, Secretary of the Department of the Interior</p> | <p>Energy & Commerce/Subcommittee on Oversight and Investigations, H.Rept. 97-898 (1982)</p> <p>During an investigation into the functioning of the Mineral Lands Leasing Act, the Subcommittee sought information from the Department of the Interior. Secretary Watt was the custodian of relevant documents. When Secretary Watt failed to cooperate, the Subcommittee found it necessary to subpoena the documents. This led to an assertion of executive privilege on October 14, 1981 by the President and a further refusal to provide the requested material. In early February, the Subcommittee voted to hold Secretary Watt in contempt and referred the matter to the Committee on Energy and Commerce. On February 25th, the Committee passed a resolution to report the Secretary's refusal to comply with the Subcommittee's subpoena to the House with the recommendation that he be cited for contempt of the House of Representatives.</p> | <p>Report on contempt of Congress issued by committee.</p> <p>Documents were produced and the Committee did not press the resolution to cite the Secretary for contempt of the House.</p> |
| <p>John M. Quinn, White House Counsel David Watkins, former White House official Matthew Moore, former White House official</p> | <p>Government Reform and Oversight, H.Rept. 104-598 (1996)</p> <p>Since the controversial firings of the longtime White House Travel Office employees, the history of the investigations into what has become known as "Travelgate" has been one of a White House intent on keeping investigators at bay and relevant documents under wraps. While this Committee has succeeded in obtaining far more information and records than has any previous investigation into the Travel Office firings, the record is still incomplete because of the insistence of the President to withhold documents from the American public by taking the extraordinary step of invoking an undefined, vague, and ultimately ineffective protective assertion of executive privilege.</p> <p>The subpoenaed records were necessary for the Committee to resolve by direct factual evidence, fundamental factual questions relating to the actions, direction, knowledge, recommendations, or approval of actions by individuals in the White House, in responding to the allegations about the Travel Office employees as well as the subsequent investigations into the White House Travel Office matter.</p> <p>The issuance of subpoenas was not sufficient to ensure the production of all relevant records. Unfortunately, it is necessary to take the serious step of holding parties who fail to produce requested documents in contempt. Accordingly, the Committee voted to report to the House a contempt resolution for John M. Quinn, David Watkins, and Matthew Moore.</p> | <p>Report on contempt of Congress issued by committee.</p> <p>On May 30, 1996, the day on which the contempt resolution was scheduled for a vote on the floor of the House, the White House produced 1,000 documents to the committee. In the wake of this production, the committee postponed the contempt vote on the floor. See H.Rept. 104-874 at 47 (1997)</p> |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| <p>Janet Reno, Attorney General of the United States</p> | <p>Government Reform and Oversight, H.Rept. 105-728 (1998) On August 6, 1998, the Committee on Government Reform and Oversight, by a vote of 24 to 19, adopted the following report, including the following resolution, recommending to the House of Representatives that Attorney General Janet Reno be cited for contempt of Congress. The Committee has investigated allegations that the Justice Department failed adequately to investigate and prosecute a number of cases involving major Democratic National Committee fundraisers and donors. In July 1998, the Committee subpoenaed two memoranda prepared by the FBI Director, Louis Freeh, and the lead attorney for the Justice Department Campaign Finance Task Force, Charles La Bella. The Committee has a need to review these documents as part of its oversight of the Justice Department's campaign finance investigation. Chairman Burton issued a subpoena for these two memoranda. However, the Attorney General failed to comply with that subpoena. Therefore, the Committee voted to approve the contempt of Congress report by a vote of 24 to 19.</p> | <p>Report on contempt of Congress issued by committee. Contempt report not taken up on the floor before the end of the 105th Congress. See H.Rept. 106-1027 at 129 (2000)</p> |
| <p>Franklin L. Haney, Franklin L. Haney Company, Building Finance Company of Tennessee, Tower Associates II, Inc.</p> | <p>Commerce/Subcommittee on Oversight and Investigations, H.Rept. 105-792 (1998) After five months of attempting to gain documents and other information voluntarily, the Subcommittee on Oversight and Investigations of the Committee on Commerce voted on April 30, 1998, to authorize the issuance of subpoenas in furtherance of the Committee's investigation into the circumstances surrounding the planned relocation of the Federal Communications Commission (FCC) to the Portals - a relocation that has become embroiled in controversy over the possible use of improper or illegal influence by certain key figures in the \$400 million deal. Pursuant to that authorization, Commerce Committee Chairman Tom Bliley signed and had served, on June 4, 1998, four subpoenas demanding that Franklin L. Haney - whose company Tower Associates II, Inc., is a general partner in the partnership that owns the Portals buildings - and three companies under his control produce specified documents before the Subcommittee at its business meeting on June 17, 1998. After debate and due consideration of these objections, and based on legal counsel provided by the Congressional Research Service, the House General Counsel's Office, and Committee counsel, the Subcommittee overruled all of Mr. Haney's objections. When Mr. Haney's attorney stated that his client would not comply at that time with the Subcommittee's ruling, the Subcommittee proceeded to hold Mr. Haney in contempt of Congress, and directed the Subcommittee chairman to report and refer the matter to the full Committee.</p> | <p>Report on contempt of Congress issued by committee. Documents were produced. See Staff of Subcomm. on Oversight and Investigations, 105th Cong., Portals and Related Matters 69 (Comm. Print 1998)</p> |
| <p>Project on Government Oversight (POGO) Henry M. Banta, Director and former Chairman of the Board of POGO Robert A. Berman, Department of the Interior</p> | <p>Resources, H.Rept. 106-801 (2000) Since May 1999, the Committee on Resources has been conducting an oversight review of payments made by a private corporation to two federal employees with duties affecting public lands. During the course of our work, many witnesses refused voluntary interviews and requests for records. In June 1999, the Committee authorized the Chairman to issue subpoenas in this oversight project. Chairman Young thereupon issued subpoenas requiring the production of records from various parties. In spite of the plain requirements of one subpoena, certain documents were heavily redacted. In February 2000, that same party and two others announced publicly that they intended to refuse production under subpoenas issued on February 17, 2000. Further subpoenas were also met with defiance. On May 4, 2000, the Subcommittee on Energy and Mineral Resources began a series of hearings in this matter. Because many important witnesses had refused requests for interviews, I [Chairman Young] issued subpoenas</p> | <p>H. Res. 657, 106th Cong. (2000) Resolution withdrawn pursuant to clause 2, rule XVI on October 27, 2000. See 146 Cong. Rec. 25,201-31 (2000)</p> |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| <p>employee Keith Rutter, Assistant Executive Director of POGO Danielle Brian Stockton, Executive Director of POGO</p> | <p>requiring appearances at four hearings. During the course of these hearings, four witnesses refused to answer questions ruled by the Subcommittee to be pertinent and ordered to be answered.</p> <p>The Committee on Resources reports these facts to the House with a recommended resolution authorizing you to report the facts of these refusals to the United States Attorney for the District of Columbia. If the House accepts the Committee's recommendation and adopts our report, upon certification by you, the United States Attorney would ask a grand jury to consider contempt of Congress charges against these parties.</p> | |
| <p>Miles Jones, doctor and founder of Opening Lines</p> | <p>Commerce, H.Rept. 106-527 (2000)</p> <p>On November 9, 1999, the House of Representatives adopted a resolution calling upon the Congress to conduct an investigation into whether human fetuses and fetal tissue are being bought and sold in violation of Federal law (H. Res. 350).</p> <p>Following the passage of the House resolution, the Committee on Commerce launched an investigation into whether Opening Lines or others involved in procuring, selling, or buying fetal tissue were operating in compliance with Federal law. As part of this investigation, Chairman Bliley wrote to Dr. Miles Jones of Opening Lines on two separate occasions requesting that he respond to specific questions relating to Opening Lines' business practices. Dr. Jones failed to respond to either letter.</p> <p>Given these facts and Dr. Jones's failure to respond to voluntary Committee requests for information, Chairman Bliley authorized and issued, a subpoena ad testificandum on February 29, 2000, commanding Dr. Jones's appearance and testimony at a hearing of the Subcommittee on Health and Environment on March 9, 2000.</p> <p>Following opening statements from the Members of the Subcommittee, Subcommittee Chairman Michael Bilirakis called the scheduled witnesses to the witness table, but Dr. Jones did not appear as commanded by his subpoena.</p> <p>Chairman Bilirakis recessed the hearing and convened a business meeting of the subcommittee. Chairman Bliley introduced a resolution finding that Dr. Jones was lawfully served with a subpoena and finding Dr. Jones in contempt of Congress for his contumacious failure to appear as commanded. The resolution was approved by a record vote of 27 ayes and no nays.</p> | <p>Report on contempt of Congress issued by committee.</p> <p>Dr. Jones subsequently agreed to testify before the Committee, so the Chairman did not forward the Report on contempt to the full House. However, due to concerns raised by the FBI—which launched a criminal inquiry into Dr. Jones's activities—the Committee did not recall Dr. Jones to testify. See H.Rept. 106-1047 at 162 (2001)</p> |
| <p>Karl Rove, former White House Advisor</p> | <p>Judiciary, H.Rept. 110-847 (2008)</p> <p>Beginning in March 2007, the House Judiciary Committee and its Subcommittee on Commercial and Administrative Law (CAL Subcommittee) held a number of hearings on the alleged politicization of the Justice Department, including the termination of U.S. Attorneys in 2006, allegations of selective prosecution, and related issues.</p> <p>Because Mr. Rove was considered a central witness who could provide information that was unavailable through any other source, in March 2007 Chairman John Conyers, Jr., and CAL Subcommittee Chair Linda Sanchez sought Mr. Rove's voluntary compliance with the Committee's investigation, along with that of other witnesses, by letter to White House Counsel Fred Fielding.</p> <p>In response, Mr. Fielding explained that he was prepared to make Mr. Rove and other White House officials available for interviews with the House and Senate Judiciary Committees on a joint basis; but his offer was conditioned on various preconditions and scope restrictions.</p> <p>On March 21, 2007, the CAL Subcommittee authorized Chairman Conyers to issue subpoenas to Karl Rove and other present and former White House</p> | <p>Report on contempt of Congress issued by committee.</p> <p>In March 2009, the Committee reached an agreement with the former Administration to resolve the Committee's lawsuit and contempt citations. Pursuant to that agreement, the Committee proceeded over the next several months to receive access to previously subpoenaed documents and to obtain the on-</p> |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| | <p>officials to obtain testimony and documents.</p> <p>Former White House Deputy Chief of Staff Karl Rove refused to comply with a subpoena requiring his appearance before the CAL Subcommittee on July 10, 2008, failing to appear for the hearing to answer questions.</p> <p>On July 10, 2008, CAL Subcommittee Chair Sanchez proceeded to overrule the claims of immunity and privilege with respect to Mr. Rove, and the ruling was sustained by CAL Subcommittee Members in a recorded vote of 7-1.</p> <p>On July 30, 2008, the Committee met in open session and ordered [H.Rept. 110-847, resolution recommending that the House of Representatives find Karl Rove in contempt of Congress for refusal to comply with a subpoena duly issued by the Committee on the Judiciary] favorably reported, without amendment, by a vote of 20 to 14.</p> | <p>the-record testimony of former White House officials Harriet Miers and Karl Rove. See H.Rept. 111-712 at 17 (2011)</p> |
| <p>Bryan Pagliano, former State Department IT Specialist,</p> | <p>Oversight and Government Reform, H.Rept. 114-792 (2016)</p> <p>In 2015, the House Committee on Oversight and Government Reform began to investigate former Secretary of State Hillary Clinton's use of a private email server to conduct government business during her tenure at the State Department.</p> <p>On September 6, 2016, the Committee requested the testimony of Mr. Pagliano, who had helped set up and maintain Secretary Clinton's private server. Mr. Pagliano declined to testify, citing to his Fifth Amendment privilege against self-incrimination.</p> <p>On September 8, 2016, Chairman Jason Chaffetz issued a subpoena compelling Mr. Pagliano to appear at a hearing before the Committee on September 13, 2016. Mr. Pagliano did not appear at the hearing.</p> <p>On September 16, 2016, Chairman Chaffetz issued a second subpoena for Mr. Pagliano to testify before the Committee on September 22, 2016. Mr. Pagliano again failed to appear at the hearing.</p> <p>On September 27, 2017, the Committee determined that Mr. Pagliano demonstrated no legal basis for his refusal to appear before the Committee, and, by a vote of 19 to 15, issued a resolution recommending that the House of Representatives find him in contempt of Congress for failure to comply with a congressional subpoena.</p> | <p>On February 16, 2017, Chairman Chaffetz sent a letter to Attorney General Jeff Sessions, requesting the DOJ to pursue criminal contempt charges against Mr. Pagliano.</p> |

Source: Information compiled from committee reports, hearings, the *Congressional Record* and news sources by CRS using LexisNexis, ProQuest Congressional, ProQuest Historical Newspapers, and the Legislative Information Service (LIS) databases.

Table A-3. Floor Votes on Civil Enforcement Resolutions in the Senate, 1980-Present

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
|--|--|---|
| William Cammisano, Prisoner | <p>Governmental Affairs, S.Rept. 96-899 (1980)</p> <p>Pursuant to Senate Resolution 361, the Senate Permanent Subcommittee on Investigations voted to hold a hearing on or after April 28, 1980 concerning organized crime and its use of violence. The Subcommittee also voted to recommend to the Committee that an immunity order be obtained for William Cammisano. On April 3, the Chairman of the Subcommittee issued a subpoena for William Cammisano, which was served on him at Springfield Medical Center, Missouri, on April 6. On April 10, the Subcommittee applied for a Writ of Habeas Corpus Ad Testificandum in order to summon Cammisano, who as a prisoner was in the custody of the United States; the writ was issued that day.</p> <p>On May 1, 1980, William Cammisano appeared before the Subcommittee in its fourth day of hearings. He refused, even after immunization, to answer any substantive questions.</p> <p>On August 5, 1980, the Committee on Government Affairs met and approved a resolution directing the Senate Legal Counsel to bring a civil action to enforce the subpoena of the Senate Permanent Subcommittee on Investigations to William Cammisano. A quorum for the purposes of transacting business, voted to approve the resolution—9 Senators. One vote in favor of the resolution was reported by proxy.</p> | <p>S. Res. 502, 96th Cong. (1980)</p> <p>Agreed to in Senate with a preamble by Voice Vote on September 15, 1980. See 126 Cong. Rec. 25,284 (1980)</p> |
| Anthony J. Accardo, Member of Organized Crime in Chicago | <p>Governmental Affairs, S.Rept. 98-354 (1984)</p> <p>On November 17, 1983, Anthony J. Accardo, an alleged member of organized crime in Chicago, appeared under subpoena at a hearing of the Permanent Subcommittee on Investigation on labor racketeering. Mr. Accardo was immunized under court order, but nevertheless refused to answer the Subcommittee's substantive questions. The Subcommittee and the Committee on Governmental Affairs recommended that the Senate authorize a civil enforcement action to require Mr. Accardo to testify.</p> <p>On February 9, 1984, the resolution was approved by vote of nine members of the Permanent Subcommittee on Investigation.</p> | <p>S. Res. 293, 98th Cong. (1984)</p> <p>Agreed to in Senate with a preamble by Voice Vote on February 23, 1984. See 130 Cong. Rec. 3,139 (1984)</p> |
| William A. Borders, Jr., Washington, D.C. Attorney | <p>Impeachment Trial, S.Rept. 101-98 (1989)</p> <p>On July 24 and 27, 1989, William A. Borders, Jr., appeared under subpoena before the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, but refused to answer the Committee's questions. Mr. Borders was a central figure in the Articles of Impeachment. The Committee recommended that the Senate direct the Senate Legal Counsel to bring a civil action to require Mr. Borders to testify on facts that are pertinent to the Articles of Impeachment.</p> <p>The record of the roll call vote of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings to report the original resolution favorably was as follows: Yeas-12 and Nays-0.</p> | <p>S. Res. 162, 101st Cong. (1989)</p> <p>Agreed to in Senate with a preamble by Voice Vote on August 3, 1989. See 135 Cong. Rec. 18,475 (1989)</p> |
| Senator Bob Packwood | <p>Select Committee on Ethics, S.Rept. 103-164 (1993)</p> <p>On March 29, 1993 and July 16, 1993, the Committee requested that Senator Packwood produce to the Committee documents relevant to the Committee's preliminary inquiry into allegations of sexual misconduct and intimidation of witnesses by Senator Packwood.</p> <p>During a deposition of Senator Bob Packwood on October 5 and 6, 1993, in connection with the Committee's preliminary inquiry into allegation of sexual misconduct and intimidation of witnesses by Senator Packwood, it became apparent that Senator Packwood's diaries covering 1969 to the present, and which had to been produced to the Committee in response to its two</p> | <p>S. Res. 153, 103rd Cong. (1993)</p> <p>Agreed to in Senate with a preamble by Yea-Nay Vote: 94-6 (Record Vote No: 348) on November 2, 1993. See 139 Cong. Rec. 27,031 (1993)</p> |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| | <p>document requests, contained information relevant to the Committee's inquiry.</p> <p>After much discussion and negotiation between Senator Packwood and his attorneys, and the Committee, Senator Packwood agreed to produce his diaries for review by the Committee. As the Committee's review proceeded Senator Packwood refused to produce additional diaries, until he be allowed to mask additional private and personal information in the diaries, in violation of the original agreement.</p> <p>In lieu of issuing a subpoena, the Committee offered a compromise. Senator Packwood refused to produce his diaries under the terms of this proposed compromise.</p> <p>On October 20, 1993, the Committee voted to authorize the issuance of a subpoena to Senator Bob Packwood, requiring him to produce his daily diaries for the years 1989 to the present.</p> <p>On October 21, the Committee voted to recommend that the Senate Legal counsel bring a civil law suit to enforce the Committee's subpoena: Yeas-6 and Nays-0.</p> | |
| <p>William H. Kennedy, III, Former Associate Counsel to President Clinton</p> | <p>Special Committee to Investigate Whitewater Development Corporation and Related Matters, S.Rept. 104-191 (1995)</p> <p>On December 8, 1995, the Committee issued a subpoena to William H. Kennedy, III, former Associate Counsel to the President and now of counsel to the Rose Law Firm of Little Rock, Arkansas, to produce notes that he took at a meeting held on November 5, 1993, at the law firm of Williams & Connolly. The purpose of this meeting, which was attended by both personal counsel for the President and Mrs. Clinton and by White House officials, was to discuss Whitewater Development Corporation ("Whitewater") and related matters.</p> <p>On December 8, 1995, the Committee issued a subpoena to Mr. Kennedy directing him to "[p]roduce any and all documents, including but not limited to, notes, transcripts, memoranda, or recordings, reflecting, referring or relating to a November 5, 1993 meeting attended by William Kennedy at the offices of Williams & Connolly." The Committee advised Mr. Kennedy that, if he had objections to the subpoena, he was invited to submit a legal memorandum to the Committee by December 12, 1995.</p> <p>On December 18, 1995, the Committee received a letter indicating that Mr. Kennedy had declined to comply with the Committee's December 15 subpoena. That same day, the Chairman of the Committee overruled the objections to the subpoena and ordered and directed Mr. Kennedy to produce the subpoenaed documents by 3:00 p.m. the following day. Mr. Kennedy did not comply with this order.</p> <p>Accordingly, the Committee recommended that the Senate authorize a civil enforcement proceeding to compel Mr. Kennedy to comply with the Committee's subpoena.</p> <p>The record of the roll call vote of the Special Committee to Investigate Whitewater Development Corporation and Related Matters to report the original resolution favorably was as follows: Yeas-10 and Nays-8.</p> | <p>S. Res. 199, 104th Cong. (1995)</p> <p>Agreed to in Senate with an amendment and an amendment to the Title and an amended preamble by Yea-Nay Vote: 51-45 (Record Vote No: 610) on December 20, 1995. See 141 Cong. Rec. 37,761 (1995)</p> |
| <p>Carl Ferrer, Chief Executive Officer of Backpage.com</p> | <p>Homeland Security and Governmental Affairs/Permanent Subcommittee on Investigations, S.Rept. 114-214 (2016)</p> <p>In April 2015, the Permanent Subcommittee on Investigations began an investigation of sex trafficking on the Internet. On October 1, 2015, the Subcommittee issued a subpoena to Carl Ferrer, the Chief Executive Officer of Backpage.com, a website for classified listings, directing him to produce documents concerning the company's review and screening of advertisements by October 23, 2015.</p> | <p>S. Res. 377, 114th Cong. (2016)</p> <p>Agreed to in Senate with a preamble by Yea-Nay Vote: 96-0 (Rollcall Vote No: 38) on March 17, 2016. See 162 Cong. Rec.</p> |

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| | <p>Mr. Ferrer refused to provide the requested documents principally on the grounds that the subpoena violated the First Amendment. On November 12, 2015, the Subcommittee rejected Mr. Ferrer's First Amendment arguments because he did not show that the subpoena sought information that violated recognized First Amendment rights, or that it was unsupported by an adequate legislative purpose, and directed him to comply with the subpoena by November 12, 2015. Maintaining his First Amendment objections, Mr. Ferrer continued not to comply with the subpoena, and also failed to appear before the Subcommittee at a November 19, 2015 hearing.</p> <p>On February 29, 2016, the Subcommittee issued a resolution recommending that the Senate authorize a civil enforcement action to compel Mr. Ferrer to comply with the subpoena.</p> | S1561-02 (2016) |

Source: Information compiled from committee reports, hearings, the *Congressional Record* and news sources by CRS using LexisNexis, ProQuest Congressional, ProQuest Historical Newspapers, and the Legislative Information Service (LIS) databases.

Table A-4. Other Committee Actions on Contempt Resolutions in the Senate, 1980-Present

| Name and Title | Recommending Committee/Subcommittee and Document Excerpt | Last Action |
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| <p>William French Smith, Attorney General</p> | <p>Judiciary. <i>Smith Cited for Contempt of Congress</i>, Facts on File World News Digest, Nov. 4, 1984, p. 812 F2.</p> <p>On October 31, 1984 the Senate Judiciary Committee's Subcommittee on International Trade, Finance, and Security Economics cited Attorney General William French Smith for contempt of Congress for refusing to produce Justice Department documents on an investigation of General Dynamics Corp.</p> <p>The documents pertained to a 1982 decision by the department to close a fraud probe of cost overruns on Navy nuclear attack submarines built by the Electric Boat Division of General Dynamics during the 1970s. A separate Subcommittee had previously voted to subpoena department records related to the decision.</p> <p>Assistant Attorney General Stephen S. Trott argued that the material was confidential because the General Dynamics investigation had been reopened by the department.</p> <p>Under congressional rules, the contempt citation would not become valid until approved by the full Judiciary Committee and passed as a resolution on the Senate floor.</p> | Contempt citation dated October 31, 1984. |
| <p>Joshua Bolten, White House Chief of Staff</p> <p>Karl Rove, Deputy Chief of Staff</p> | <p>Judiciary, S.Rept. 110-522 (2008)</p> <p>The Committee on the Judiciary, reported favorably on original resolutions (S. Res. 707) authorizing the President of the Senate to certify the facts of the failure of Joshua Bolten, as the Custodian of Records at the White House, to appear before the Committee on the Judiciary and produce documents as required by Committee subpoena, and (S. Res. 708) authorizing the President of the Senate to certify the facts of the failure of Karl Rove to appear and testify before the Committee on the Judiciary and to produce documents as required by Committee subpoena, and recommends that the resolutions do pass.</p> <p>Since the beginning of the 110th Congress, the Judiciary Committee had conducted an investigation into the unprecedented mass firings of Federal prosecutors by those in the administration of the President who appointed them.</p> <p>The Committee's attempted to obtain information from the White House, first requested voluntarily and later legally compelled by subpoena. In the process, the White House asserted blanket claims of executive privilege, and claims of absolute immunity, to block current and former officials from testifying and</p> | <p>S. Res. 707, 110th Cong. (2007)</p> <p>S. Res. 708, 110th Cong. (2007)</p> <p>Placed on Senate Legislative Calendar under General Orders on November 19, 2008. See 154 Cong. Rec. S10,660 (2007)</p> |

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| | <p>producing documents in compliance with the Committee's subpoenas.</p> <p>On November 29, 2007, Chairman Leahy ruled that the White House's claims of executive privilege and immunity were not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation. Accordingly, Chairman Leahy directed Karl Rove and White House Chief of Staff Joshua Bolten to comply immediately with the Committee's subpoenas by producing documents and testimony. They failed to do so, and on December 13, 2007, a bipartisan majority of the Committee voted to report favorably resolutions finding Mr. Rove and Mr. Bolten in contempt of Congress.</p> <p>The Senate Judiciary Committee considered the resolutions on December 13, 2007. After debate, the Committee agreed to report the resolutions favorably to the Senate by the following vote: Yeas-12 and Nays-7.</p> | |

Source: Information compiled from committee reports, hearings, the *Congressional Record* and news sources by CRS using LexisNexis, ProQuest Congressional, ProQuest Historical Newspapers, and the Legislative Information Service (LIS) databases.

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