NOTES

THE "PARDONABILITY" OF INHERENT CONTEMPT AND STATUTORY CRIMINAL CONTEMPT OF CONGRESS

Natalie Cappuzzo*

ABSTRACT

Recent political events have highlighted questions surrounding both the President's pardon power and Congress' contempt power. Two aides to President Donald J. Trump were convicted of criminal contempt of Congress—Steve Bannon in 2021, and Peter Navarro in 2023. This Note argues that a pardon for statutory criminal contempt, like that of Bannon and Navarro, would be permissible because the two were held in contempt under 2 U.S.C. § 192, Congress' statutory criminal contempt power. However, Congress has another contempt power available: inherent contempt. Inherent contempt is, as it sounds, inherent in Congress' legislative function and is not enumerated in any statute.

Because of certain critical differences between inherent contempt and statutory contempt, inherent contempt should not be subject to the President's pardon power. First, inherent contempt is not an "Offence[] against the United States." Second, allowing the President to pardon inherent contempt of Congress would violate the separation of powers between the executive and the legislature. Finally, Ex parte Grossman*, which found that criminal contempt of court was a pardonable offense, is not controlling regarding inherent contempt of Congress. The reasons for finding inherent contempt unreachable by the pardon power do not apply to statutory contempt because with statutory criminal contempt, Congress has voluntarily brought the executive into the lawmaking process, and once Congress chooses to do this, it cannot later cut the executive out.*

* Georgetown University Law Center, J.D. 2024; Georgetown University, B.A. 2021. The author wishes to thank the entire ACLR staff for their hard work in editing this Note. The author would also like to thank Paul Clement, Lisa Blatt, Matthew Rowen, and the entire Fall 2023 Separation of Powers Seminar class for their feedback and guidance.

INTRODUCTION

Congress' investigatory powers, including criminal contempt of Congress, have received increased attention over the past few years. In October 2022, Steve Bannon, President Trump's former chief strategist, was convicted of criminal contempt of Congress in connection to the January sixth investigation.[1] Peter Navarro,

1. Judgment in a Criminal Case at 1, United States v. Bannon, No. 21-670 (D.D.C. Oct. 21, 2022), ECF No. 161 [hereinafter Bannon Judgement]. Steve Bannon was sentenced to "four months of incarceration and ordered to pay a fine of $6,500." Press Release, U.S. Dep't of Just., Stephen K. Bannon Sentenced to Four Months in Prison on Two Counts of Contempt of Congress (Oct. 21, 2022), https://www.justice.gov/usao-dc/pr/stephen-k-bannon-sentenced-four-months-prison-two-counts-contempt-congress.

a White House advisor to Trump, was convicted of criminal contempt of Congress in 2023.[2] The convictions relied on Congress' statutory criminal contempt power, which is enshrined in the United States Code.[3] Both convictions were unusual—the Department of Justice has seldom brought charges of criminal contempt of Congress against a government official in recent decades.[4] In the twenty-first century, there has been a trend against prosecuting government officials who refuse compliance based on a sitting President's invocation of executive privilege.[5]

In addition to statutory criminal contempt, Congress has another form of contempt power—inherent contempt, which is not written out anywhere, but is instead implied by the legislature's inherent investigatory function.[6] This Note seeks to differentiate the two forms of congressional contempt and argues that inherent contempt should be unreachable by the pardon power, but statutory criminal contempt should be pardonable. Part I provides a brief background on the separation of powers and the President's pardon power. Part II argues that inherent contempt is not subject to the pardon power because it is not an "Offence[] against the United States,"[7] and separation of powers concerns support an inherent contempt exception to the pardon power. Part II also addresses the case of *Ex parte Grossman*, which found contempt of *court* to be pardonable,[8] and explains why this holding does not and should not apply to inherent contempt of Congress. Part III discusses statutory criminal contempt of Congress and addresses arguments both for and against the pardon power's applicability, ultimately concluding that arguments in favor of the pardon power's use against statutory criminal contempt of Congress are stronger. Part IV briefly addresses the implications of these conclusions.

I. Background Concepts

A. The Separation of Powers

The Framers of the Constitution intentionally devised the United States government in a way that would avoid tyranny by combining the ideas of separation of

2. Kyle Cheney, *Peter Navarro Convicted of Contempt for Defying Jan. 6 Select Committee*, Politico (Sept. 7, 2023, 4:29 PM), https://www.politico.com/news/2023/09/07/peter-navarro-contempt-trial-00114453. Navarro was sentenced to four months of incarceration and ordered to pay a $9,500 fine. Devan Cole & Holmes Lybrand, *Former Trump Adviser Peter Navarro Sentenced to 4 Months in Jail for Defying Congressional Subpoena*, CNN (Jan. 25, 2024, 11:33 PM), https://www.cnn.com/2024/01/25/politics/peter-navarro-contempt-congress-sentence/index.html. Both men have appealed their convictions. *Id.*

3. 2 U.S.C. § 192.

4. *See* Todd Garvey & Michael A. Foster, Cong. Rsch. Serv., LSB10660, The Bannon Indictment and Prosecution 1 (2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10660.

5. Katie Benner & Luke Broadwater, *Bannon Indicted on Contempt Charges over House's Capitol Riot Inquiry*, N.Y. Times (July 22, 2022), https://www.nytimes.com/2021/11/12/us/politics/bannon-indicted.html.

6. McGrain v. Daugherty, 273 U.S. 135, 161–75 (1927); s*ee also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975) ("The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws . . . .").

7. U.S. Const. art. II, § 2, cl. 1.

8. *Ex parte* Grossman, 267 U.S. 87, 115 (1925).

powers and checks and balances.[9] The concept of separation of powers was set forth in Federalist No. 47 where James Madison stated: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[10] Thus, in Article I, Congress is given the power to legislate.[11] In Article II, the President is given the power to execute the laws.[12] And in Article III, the Supreme Court and inferior courts created by Congress are vested with the judicial power.[13]

Although this division of powers seems straightforward, the Constitution is silent on whether the powers should be rigidly divided.[14] Instead, each branch "is dependent on the cooperation of the other two."[15] For example, the Constitution gives the President veto power over legislation passed by Congress if a two-thirds majority cannot be reached to override that veto.[16] The Constitution grants Congress the power to hold impeachment proceedings against judicial and executive branch officials.[17] Additionally, the Senate can hold up the appointments process, divesting the President of their appointment power.[18] Critical to this Note, the President can "reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress."[19]

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9. *See, e.g.*, Frank O. Bowman III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 425, 438 (2021). Bowman writes:

> [T]he defining innovation of the Framers' federal constitution was not that it attempted to impose a rigid separation of powers, but that it separated core executive, legislative, and judicial functions into three branches, and then overlaid a web of interbranch constraints that we call "checks and balances" to ensure that no branch overwhelmed the others.

Id. See also Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1881). The Court explained:

> [T]he perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted [sic] with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others . . . .

Id.

10. THE FEDERALIST NO. 47 (James Madison).

11. U.S. CONST. art. I.

12. U.S. CONST. art. II.

13. U.S. CONST. art. III, § 1.

14. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 119 (1925) ("The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent.").

15. *Id.* at 120.

16. *Id.* ("By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation."); U.S. CONST. art. I, § 7, cl. 3.

17. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6; *see also Grossman*, 267 U.S. at 120 (discussing impeachment).

18. U.S. CONST. art. II, § 2, cl. 2; *see also Grossman*, 267 U.S. at 120 ("The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.").

19. *Grossman*, 267 U.S. at 120 (citing *Ex parte* Garland, 4 Wall. 333, 380 (1866)).

B. The Presidential Pardon Power

The President's pardon power is explicitly granted by the Constitution, which states the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[20] The purposes of a presidential pardon include to "negate an unjust conviction, reduce a draconian punishment, or reward a convict's journey to personal redemption."[21] There may also be public policy reasons justifying a pardon,[22] such as when President George Washington pardoned those involved in the Whiskey Rebellion and President Andrew Johnson pardoned Confederates after the Civil War.[23] Those pardons were issued to promote national unity and "reconcile deep societal divisions."[24]

The pardon power has a lengthy history; its origins lie in the practice of English kings who would pardon their subjects for certain offenses.[25] Royal pardons were seen as "necessary to moderate the unjust harshness that will result in some cases from the unyielding imposition of the letter of the law."[26] Whereas English pardons were grounded in the sovereignty of the king, the American presidential pardon is grounded in the President's role in our constitutional scheme.[27]

The pardon power is commonly exercised by Presidents.[28] For example, President Obama granted 212 pardons and 1,715 commutations during his two terms in office.[29] By the end of his presidency in January 2021, President Trump had granted 144 pardons and 94 commutations.[30] The earliest statistic the Office of the Pardon Attorney has is for President McKinley, who granted 129 pardons and 73 commutations in 1900, and 162 pardons and 50 commutations in 1901.[31]

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20. U.S. CONST. art. II, § 2, cl. 1.

21. Bowman, *supra* note 9, at 428; *see also* Sanya Shahrasbi, Note, *Can a Presidential Pardon Trump an Article III Court's Criminal Contempt Conviction? A Separation of Powers Analysis of President Trump's Pardon of Sheriff Joe Arpaio*, 18 GEO. J.L. & PUB. POL'Y 207, 218 (2020) ("Executive clemency exists to provide relief from 'undue harshness' or 'evident mistake' as the administration of justice by the courts is not necessarily 'always wise or certainly considerate of circumstances which may properly mitigate guilt.'" (quoting *Grossman*, 267 U.S. at 120–21)).

22. *See* WILLIAM RAWLE, VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 174–75 (2d ed., W.S. Hein 2003) (1829).

23. Bowman, *supra* note 9, at 428.

24. *Id.*

25. *Id.* at 434 ("[T]he Framers inherited an English legal tradition of executive clemency rooted, in its ancestral forms, in the idea that the will of the king was the source of law and thus he could release his subjects from its rigors as an act of royal grace.").

26. *Id.* at 435.

27. *Id.*

28. *See, e.g.*, Off. of the Pardon Att'y, *Clemency Receipts*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/clemency-recipients (July 20, 2023) [hereinafter *Clemency Receipts*]. While a pardon is an "expression of forgiveness" and eliminates the consequences of the conviction, a commutation is the reduction of a sentence. *See* Off. of the Pardon Att'y, *Help Me Choose*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/help-me-choose (Sept. 23, 2024).

29. *See* Off. of the Pardon Att'y, *Clemency Statistics*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/clemency-statistics (Aug. 7, 2024).

30. *Id.*

31. *Id.*

The pardon power has come under increased scrutiny since President Trump issued pardons to political allies and considered pardoning himself towards the end of his first term.[32] President Trump, however, is not the first President whose motivations behind pardons have been questioned; for example, some criticized President Richard Nixon's use of the pardon power to "buy silence" from "minions and co-conspirators" in the Watergate scandal.[33] Some express a concern that a "corrupt and unprincipled president" could use the pardon power as a "mechanism for promoting in America a culture of official impunity that is one crippling hallmark of modern autocracies."[34]

C. When the Pardon Power and Contempt of Congress Collide

Pardons for statutory contempt of Congress are extremely rare, and it does not appear that there has ever been a pardon for inherent contempt of Congress.[35] One pardon for statutory criminal contempt of Congress was granted by President Franklin Delano Roosevelt to Dr. Francis E. Townsend in 1938.[36] Townsend was convicted for walking out of a hearing called by the House of Representatives on old-age pensions.[37] Townsend did not follow normal procedure in seeking a pardon for himself—instead, an "unsolicited pardon from Roosevelt miraculously appeared" as Townsend was about to enter the D.C. jail to serve his thirty-day sentence.[38] The pardon was not challenged in the courts.[39] This issue could arise again if Navarro or Bannon seek pardons for their contempt of Congress convictions.

II. THE PRESIDENT CANNOT PARDON INHERENT CONTEMPT OF CONGRESS

A. Origins of the Inherent Contempt Power of Congress

Inherent contempt of Congress is not explicitly mentioned in the Constitution, but it is implied as a power necessary for Congress to carry out its legislative

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32. *See, e.g.*, Jeannie Suk Gersen, *The Dangerous Possibilities of Trump's Pardon Power*, THE NEW YORKER (Dec. 3, 2020), https://www.newyorker.com/news/our-columnists/the-dangerous-possibilities-of-trumps-pardon-power ("Trump's use of the pardon power since 2017 has largely appeared self-interested . . . ."); Michael S. Schmidt & Maggie Haberman, *Trump Is Said to Have Discussed Pardoning Himself*, N.Y. TIMES (Mar. 21, 2021), https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html ("President Trump has suggested to aides he wants to pardon himself in the final days of his presidency . . . .").

33. Bowman, *supra* note 9, at 429.

34. *Id.*

35. Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 181 (1999). The Office of the Pardon Attorney's website only shows the exact offense that was pardoned from President George H.W. Bush onwards, and a search of these pardon receipts did not reveal one for inherent contempt. *See Clemency Receipts*, *supra* note 28.

36. *Townsend's Thanks Given to Roosevelt*, N.Y. TIMES (Apr. 22, 1938), https://timesmachine.nytimes.com/timesmachine/1938/04/22/98124536.html?pageNumber=2.

37. Townsend v. United States, 95 F.2d 352, 354 (D.C. Cir. 1938).

38. Daniel J.B. Mitchell, *Townsend and Roosevelt: Lessons from the Struggle for Elderly Income Support*, 42 LAB. HIST. 255, 260 (2001) (emphasis omitted).

39. Berger, *supra* note 35, at 181.

duties.[40] In order to effectively *legislate*, Congress also must be able to effectively *investigate*, which includes the "power to secure needed information."[41] Inherent contempt is one way that Congress may achieve this—by coercing a witness to testify or produce documents related to an investigation.[42] Congress also needs to be able to punish those who act "to obstruct the performance of the duties of the legislature."[43] For example such punishment would be appropriate when someone attempts to bribe a Representative[44] or when a witness destroys papers demanded via subpoena.[45]

The process of inherent contempt involves the House or the Senate bringing an individual before that body, trying the individual, and then detaining or imprisoning the individual, likely in the Capitol.[46] An individual held in contempt "can be imprisoned for a specified period of time as punishment, or for an indefinite period . . . until [the individual] agrees to comply."[47]

The first use of Congress' inherent contempt power occurred in 1795 when three members of the House of Representatives claimed they had been bribed by Robert Randall and Charles Whitney.[48] The process went as follows: the House "reported a resolution ordering their arrest and detention by the Sergeant-at-Arms, pending further action by the House," a referral was made to the Special Committee on Privileges, and then that committee recommended that formal proceedings be commenced at the bar of the House.[49] The formal proceedings included written interrogatories, providing both of the accused with counsel, and an opportunity to question and cross-examine witnesses.[50] Ultimately, the House found Randall guilty of inherent contempt by a vote of seventy-eight to seventeen, and "ordered Mr. Randall to be brought to the bar, reprimanded by the Speaker, and held in custody until further resolution of the House."[51]

The Supreme Court affirmed Congress' inherent contempt power in *Anderson v. Dunn*, reasoning that the notion "that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be

40. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

41. *Id.* at 161; *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975) ("The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws . . . .").

42. *See, e.g.*, TODD GARVEY, CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 8–11 (2017) [hereinafter CRS CONTEMPT HISTORY] (discussing Kilbourn v. Thompson, 103 U.S. 168 (1881)).

43. Jurney v. MacCracken, 294 U.S. 125, 148 (1935).

44. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228–29 (1821).

45. *See Jurney*, 294 U.S. at 144.

46. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 10.

47. *Id.* at 11. While the Court in *Anderson* said that the House can only hold a witness in contempt until the end of the legislative session, which occurs each January, the Senate is viewed as a "continuing body" and could in theory hold a witness indefinitely. *See id.* at 8, 12 (citing *Anderson*, 19 U.S. at 231); *infra* Part IV.

48. CRS CONTEMPT HISTORY, *supra* note 42, at 4.

49. *Id.*

50. *Id.* at 4–5.

51. *Id.* at 5.

suggested."[52] In *Anderson*, Henry Clay, who was Speaker of the House at the time, directed the Sergeant-at-Arms "to take into custody the body of the said John Anderson" as he was "guilty of a breach of the privileges of the said House, and of a high contempt of its dignity and authority."[53] It was alleged that Anderson had bribed a member of Congress.[54] Anderson brought an action against the Sergeant-at-Arms for assault, battery, and false imprisonment, arguing that the House of Representatives had no authority to issue the warrant.[55] The Supreme Court ruled against Anderson and instead affirmed Congress' inherent contempt power.[56]

There is one major advantage for Congress in invoking inherent contempt: it involves neither the judicial nor the executive branch.[57] An individual held in contempt may petition the court via a writ of *habeas corpus*, but the review is more limited than the plenary review afforded to criminal convictions.[58]

B. Inherent Contempt Is Not an "Offence[] [A]gainst the United States"

The text of the Pardon Clause states that: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[59] The Pardon Clause appears to be straightforward—the President can pardon "Offences against the United States," otherwise known as federal criminal offenses, except for impeachments.[60] The question of whether the President can pardon someone of inherent contempt of Congress therefore turns on whether inherent contempt of Congress is an "Offence[] against the United States."[61] Because of the unique characteristics of inherent contempt and the executive branch's lack of a role in its execution, inherent contempt almost certainly is not an "Offence[] against the United States."[62]

Procedurally, inherent contempt is different from a federal criminal offense in several respects. First, all other federal criminal offenses appear in the United States Code,[63] but inherent contempt does not. Additionally, in a proceeding for an offense against the United States, the executive brings the prosecution, and the judiciary renders the final decision and sentence—the legislature is not involved at

52. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 229 (1821).
53. *Id.* at 209.
54. *Id.* at 215.
55. *Id.* at 204.
56. *Id.* at 229.
57. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 12.
58. *Id.*
59. U.S. CONST. art. II, § 2, cl. 1.
60. *Id.*
61. *Id.*
62. *Id.*
63. *E.g.*, John L. Gray, *Federal Jurisdiction—Common Law Crimes Against the United States*, 27 MARQ. L. REV. 219, 222 (1943) ("It has been consistently held that there are no common law crimes against the United States. All Federal crimes must be specifically provided for by statute.").

all.[64] The inherent contempt process involves a resolution ordering arrest and detention of the subject by the Sergeant-at-Arms, a referral to a special committee, and a recommendation for formal proceedings including written interrogatories and testimony.[65] Notably, there is no prosecutor, no formal judge, no randomly selected jury, no arraignment, no prototypical trial, and no plea bargaining. In short, many of the aspects central to American criminal procedure are not present in inherent criminal contempt proceedings. Instead, the chamber of Congress that brings the inherent contempt citation has the power to control the proceedings, and the executive and judiciary play no role.[66] This is the exact opposite of proceedings for normal federal criminal offenses. Inherent contempt of Congress is best understood as an "offense against a house of Congress,"[67] and therefore not an "Offence[] against the United States."[68]

C. Allowing the President to Pardon Inherent Contempt Would Violate the Separation of Powers Between the Executive and Legislature

William Rawle, an "early giant" and "major legal commentator[]" of the nineteenth century,[69] actually included Congress' inherent contempt power as an exception to the pardon power in his treatise on the Constitution.[70] Rawle's treatise, *A View of the Constitution of the United States of America*, is regarded as one of "the three great constitutional treatises of early nineteenth century."[71] In the chapter discussing the pardon power, Rawle first explains the impeachment exception.[72] He then continues, "[i]n respect to another jurisdiction, it may be doubted whether [the President] possesses the power to pardon."[73] Rawle asserts this second exception is for inherent contempt of Congress[74] and is supported because "[t]he main object is to preserve the purity and independence of the legislature, for the benefit of the people."[75] Although Rawle recognizes that "[t]he Constitution is as silent in respect to the right of granting

64. *See Steps in the Federal Criminal Process*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/steps-federal-criminal-process (last visited Oct. 2, 2024).

65. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 4–5, 11.

66. *See id.* at 12.

67. *Id.* at 38.

68. U.S. CONST. art. II, § 2, cl. 1.

69. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1370 (1998).

70. RAWLE, *supra* note 22, at 177. Rawle was elected to the Pennsylvania legislature in 1789 and he "declined George Washington's repeated offers to serve as the first Attorney General" instead accepting an appointment as United States Attorney for Pennsylvania. Kopel, *supra* note 69, at 1386. The second edition of Rawle's treatise was originally published in 1829, before 2 U.S.C. § 192 was passed. *See infra* note 74. Therefore, his use of "contempt" refers to inherent contempt of Congress.

71. Kopel, *supra* note 69, at 1359.

72. RAWLE, *supra* note 22, at 176.

73. *Id.* at 177.

74. Although Rawle does not actually say "inherent" contempt, he could only have been referring to inherent contempt because this edition of his treatise was written in 1829, and statutory contempt of Congress was not codified until 1857. CRS CONTEMPT HISTORY, *supra* note 42, at 4.

75. RAWLE, *supra* note 22, at 177.

pardons in such cases, as it is in respect to the creation of the jurisdiction itself," he still concludes that contempt of Congress is an exception to the pardon power because it is "incompatible with the peculiar nature of the jurisdiction."[76] The "peculiar nature" of inherent contempt is that Congress acts "on its own power, without reference to, or dependence upon, any other."[77] The executive has no role in bringing an inherent contempt citation, unlike an ordinary federal prosecution where the executive chooses whether or not to bring forth a charge.[78]

Addressing the separation of powers concerns, Rawle states that if the executive could grant a pardon to "protect those who insidiously or violently interrupted or defeated" the operations of Congress, the "superior body" of the legislature "would be so far dependent on the good will of the executive."[79] Supreme Court Justice Joseph Story agreed, observing that if the executive could pardon inherent contempt, Congress "would be wholly dependent upon [the executive's] good will and pleasure for the exercise of their own powers."[80]

Implicit in these statements is the understanding that inherent contempt of Congress is a key legislative power that serves Congress' investigative and legislative functions.[81] When this core legislative power is pitted against the core executive pardon power, separation of powers is a paramount concern. The balance of these powers would be especially upset in a situation like that in *Jurney v. MacCracken*.[82] There, a witness was held in inherent contempt for destruction of and failure to produce complete documents in response to a congressional subpoena *duces tecum*.[83] In such a situation, "the President, not Congress, [would] ultimately determine[] who can be compelled to give congressional testimony."[84] Allowing a pardon for inherent contempt would disrupt Congress' core legislative function. In other words, "a pardon that interferes with the functions of another branch of government runs contrary to the separation of powers principle."[85] But to restrict the executive's use of the pardon power by excluding inherent contempt of Congress would not entirely nor even greatly affect the executive's function of enforcing the law.

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76. *Id.* at 177–78.

77. *Id.*

78. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 12.

79. RAWLE, *supra* note 22, at 177.

80. Berger, *supra* note 35, at 180 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 353 (Fred B. Rothman & Co. 1991) (1833)).

81. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975); *see also* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 220 (1821) ("[T]he grant of the powers expressly given to Congress in the constitution, involves all the incidental powers necessary and proper to carry them into effect.").

82. Jurney v. MacCracken, 294 U.S. 125, 144 (1935).

83. *Id.*

84. Berger, *supra* note 35, at 180. Berger argues that the pardon power cannot be used against contempt of Congress generally—he makes no differentiation between inherent contempt and statutory criminal contempt of Congress. For reasons discussed *infra*, this Note only agrees with his arguments insofar as they relate to *inherent* contempt, not statutory criminal contempt of Congress.

85. Shahrasbi, *supra* note 21, at 210.

D. Addressing Ex Parte Grossman

The use of the pardon power against contempt of *court* has already been upheld.[86] In 1925, the Supreme Court upheld President Calvin Coolidge's pardon of Grossman for a contempt of *court* charge.[87] Critically, this case was about criminal contempt of *court*, not criminal contempt of *Congress*, but even so, a logical challenge to this Note's thesis would be that *Grossman* applies to inherent contempt of *Congress* as well.

The case concerned Philip Grossman's violation of the National Prohibition Act by selling liquor in his Chicago business.[88] A temporary injunction was granted against Grossman, and several months later he was arrested for continuing to sell liquor despite the order.[89] He was tried and found guilty of contempt of court and was sentenced to a year of imprisonment and a fine of $1,000.[90] President Coolidge subsequently pardoned Grossman on the condition that he pay the fine.[91] Despite the pardon, the district court "committed Grossman to the Chicago House of Correction to serve the sentence."[92] The Supreme Court was asked to decide whether the President had the power to issue a pardon for contempt of court, and it ultimately found that "[n]othing in the ordinary meaning of the words 'offences against the United States' excludes criminal contempts."[93] Grossman was discharged.[94]

The first reason that this holding regarding criminal contempt of *court* should not apply to inherent contempt of *Congress* is that the opinion itself contemplated such a distinction. In discussing historical conceptions of the contempt power, Chief Justice Taft mentioned several Attorneys General who had approved of pardons of contempt of court. Chief Justice Taft distinguished the one Attorney General who mentioned that the pardon power did *not* extend to inherent contempt, stating:

> In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments *or contempts*, using Rawle's general words from his work on the Constitution. *Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress*.[95]

Attorney General Berrien, in Taft's opinion, was talking about inherent contempt of *Congress*, not *court*, and thus was aligned with the other Attorneys General

86. *Ex parte* Grossman, 267 U.S. 87, 115–22 (1925).
87. *Id.*
88. *Id.* at 107.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 115.
94. *Id.* at 122.
95. *Id.* at 118 (second emphasis added).

previously discussed.[96] However, its inclusion also suggests that Attorney General Berrien, William Rawle,[97] and even the Supreme Court recognized that inherent contempt of *Congress* was different from contempt of *court*.[98] Therefore, the fact that the Supreme Court confirmed in *Grossman* that the pardon power extends to contempt of *court* does not necessarily mean that pardons also extend to inherent contempt of *Congress*.

Others have also argued that *Grossman* was extremely limited in its holding because the relief imposed by President Coolidge upon Grossman was not really a pardon.[99] Instead of just pardoning Grossman, Coolidge conditioned the pardon on his payment of a $1,000 fine.[100] This is more like a commutation than a pardon and, therefore, *Grossman* may not even be controlling as it relates to a full pardon of criminal contempt of *court*,[101] let alone inherent contempt of *Congress*.

Another reason that the use of a pardon for criminal contempt of *court* does not apply to inherent contempt of *Congress* is that the "peculiar nature of the jurisdiction"[102] is different. Inherent contempt of Congress owes its "peculiar nature"[103] to the fact that the proceedings take place entirely within Congress, and the executive and judiciary play no role.[104] Even though the courts also have an inherent contempt power, it does not bear this peculiarity—inferior courts are all created by the legislature,[105] and matters are only brought before the courts because the executive has chosen to prosecute a particular offense.[106]

Additionally, Congress has modified the lower courts' contempt power through statutes.[107] When the lower court, such as in *Grossman*, exercises its contempt power, it is not acting "on its own power, without reference to, or dependence upon, any other"[108] because the court's very existence is dependent upon the legislature, and the existence of the matter before it is dependent on the executive—there is no longer a "peculiar nature of the jurisdiction."[109] Finally, when the President pardons a conviction for a federal criminal offense, as they are allowed

96. *See id.*
97. *See supra* Part II.C.
98. *Grossman*, 267 U.S. at 118.
99. Shahrasbi, *supra* note 21, at 221–22.
100. *Grossman*, 267 U.S. at 107.
101. Shahrasbi, *supra* note 21, at 222.
102. RAWLE, *supra* note 22, at 178.
103. *Id.*
104. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 12.
105. U.S. CONST. art. III, § 1.
106. *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 578–79 (1991).
107. *See* 18 U.S.C. § 401 (stating courts can punish contempt for "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.").
108. RAWLE, *supra* note 22, at 177.
109. *Id.* at 178.

to do, they are supplanting a judgment of the court with their own. Therefore, overturning the court's judgment for contempt of court is no different than overturning the court's judgment for any other criminal offense, which the President may lawfully do under the pardon power.

The specific facts of *Grossman* also counsel against extending its holding to inherent contempt of *Congress*. Grossman was held in contempt for violating a court order to cease selling alcohol.[110] In the criminal contempt of Congress scenarios contemplated by this Note, the contemptuous act is that of an executive branch official refusing to testify or produce documents during a lawful investigation by Congress.[111] These factual differences show how criminal contempt of *court* can stretch beyond the courthouse, such as failure to adhere to an order, whereas criminal contempt of *Congress* solely concerns what happens inside the Capitol, such as failing to testify or produce documents. Selling alcohol in violation of a statute and court order looks a lot more like a criminal "Offence[]" contemplated for pardon eligibility under the Pardon Clause[112] than refusing to testify or produce documents in a congressional hearing because the latter impedes Congress' investigatory power as opposed to a larger offense against society.

Finally, the *Grossman* opinion credits the fact that pardons for criminal contempt of court had been issued twenty-seven times in the eighty-five years preceding the opinion,[113] suggesting that the regularity of the practice was a reason to find in favor of pardoning criminal contempt of court. In contrast, there has never been a pardon for inherent contempt of Congress.[114]

III. Statutory Criminal Contempt Is a Pardonable Offense

A. The Origins of Statutory Criminal Contempt of Congress

Statutory criminal contempt of Congress is codified in the United States Code and was initially enacted in 1857.[115] The statute states:

> 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 $1,000 nor less

110. *Ex parte* Grossman, 267 U.S. 87, 107 (1925).

111. *See supra* Introduction.

112. U.S. Const. art. II, § 2, cl. 1.

113. *Grossman*, 267 U.S. at 118.

114. *See* Berger, *supra* note 35, at 181. While Berger notes there has been one pardon for contempt of Congress, it was *statutory* contempt of Congress. *Id.*; Townsend v. United States, 95 F.2d 352, 353 (D.C. Cir. 1938) (noting Townsend was charged with violating 2 U.S.C. § 192).

115. 2 U.S.C. § 192; CRS Contempt History, *supra* note 42, at 4.

> than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.[116]

If a witness fails to testify or produce documents, as described in the statute, the President of the Senate or Speaker of the House must certify such facts to the appropriate United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[117]

After its passage, the criminal contempt of Congress statute was challenged before the Supreme Court.[118] In that case, Chapman appeared as a witness before Congress in relation to an investigation into whether certain Senators were acting corruptly in considering a tariff bill that would greatly affect the stock value of the American Sugar Refining Company but refused to answer questions.[119] He was tried for statutory criminal contempt of Congress under what is now 2 U.S.C. § 192, and he challenged the statute arguing that it was unconstitutional.[120] The Supreme Court found that the statute was constitutional, reasoning that where Congress has difficulty compelling unwilling witnesses to testify, it may remedy this issue through statutory criminal contempt so that Congress can properly function.[121] The Court concluded: "[i]t was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof."[122]

B. Arguments for the Pardonability of Statutory Criminal Contempt of Congress

This Section addresses two main arguments in support of allowing the President to pardon individuals of statutory criminal contempt of Congress. The first explores a textualist argument and the second addresses the separation of powers. Finally, this Section explains why the arguments against the application of *Ex parte Grossman* will fail for statutory criminal contempt.

1. A Textualist Analysis of the Pardon Clause Supports the Pardonability of Statutory Contempt

The Constitution's text regarding the pardon power clearly supports that the President may pardon someone of statutory criminal contempt of Congress.[123] The text of the Pardon Clause states that the President can pardon "Offences against the United States" other than impeachment.[124] Statutory criminal contempt of Congress is just that—an offense against the United States.

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116. 2 U.S.C. § 192. The process for statutory criminal contempt of Congress is outlined in 2 U.S.C. § 194.

117. 2 U.S.C. § 194. The role of the United States Attorney and the executive branch will be discussed in greater detail *infra* Part III.B.

118. *In re* Chapman, 166 U.S. 661, 664 (1897).

119. *Id.* at 663.

120. *Id.* at 664.

121. *Id.* at 671.

122. *Id.*

123. U.S. CONST. art. II, § 2, cl. 1.

124. *Id.*

"Offence[] against the United States" is understood to mean federal criminal offenses.[125] All offenses against the United States are codified in the United States Code.[126] All offenses against the United States are charged by an executive branch prosecutor.[127] If such a prosecution is brought, all offenses against the United States are tried in court before a judge and jury.[128] All offenses against the United States that are tried and result in convictions are then sentenced by a federal judge.[129]

Statutory criminal contempt of Congress follows the same exact procedure as all other offenses against the United States—statutory criminal contempt of Congress is codified in the United States Code.[130] Violation of this code provision is a federal criminal offense punishable by a fine and up to one year in jail.[131] A prosecution for statutory criminal contempt of Congress must be brought by an executive branch prosecutor.[132] If a prosecution is brought, statutory criminal contempt of Congress plays out in court before a judge and jury, just like other federal criminal offenses.[133] Finally, those convicted of statutory criminal contempt of Congress are sentenced by a judge.[134] The codification, procedure, and consequences of statutory criminal contempt of Congress are the same as any other federal criminal offense. Therefore, the text of the pardon power supports its applicability to a conviction of statutory criminal contempt of Congress.

2. There Is No Separation of Powers Concern with Statutory Contempt

Although the separation of powers argument is persuasive when discussing *inherent* contempt of Congress, the argument does not work for *statutory* criminal contempt of Congress. The process of statutory criminal contempt of Congress is very different from inherent contempt; instead of keeping everything within its own realm, when Congress chooses to use the statutory criminal contempt power in 2 U.S.C. § 192, it certifies the contempt to the United States Attorney's Office, thus bringing the executive into the fold.[135] Then, the United States Attorney decides whether to prosecute the case, and if so, the case goes before a United States District Court, thus bringing the judiciary into the process as well.[136] This is a crucial difference between the two types of contempt of Congress: inherent contempt does not involve the executive or the judiciary, but statutory contempt does.

125. Bowman, *supra* note 9, at 452 (citing *Ex parte* Grossman, 267 U.S. 87, 113–14 (1925)).
126. *See* Gray, *supra* note 63, at 222.
127. *See Criminal Cases*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases (last visited Sept. 13, 2024).
128. *Id.*; U.S. CONST. amend. VI.
129. U.S. CTS., *supra* note 127.
130. 2 U.S.C. § 192.
131. *Id.*
132. 2 U.S.C. § 194.
133. *See* Bannon Judgment, *supra* note 1, at 1.
134. *See id.*
135. *See* 2 U.S.C. §§ 192, 194.
136. *See id.*; U.S. CTS., *supra* note 127; Peterson, *supra* note 106, at 576.

This difference is important for the separation of powers concerns. Inherent contempt is different because the executive and judiciary are kept out of the equation, and only Congress' investigatory power is at play.[137] With statutory criminal contempt of Congress, there is no rigid separation of powers. Instead, each branch has a role to play: the legislature certifies the citation to the executive, the executive chooses to bring prosecution, and the judiciary adjudicates the eventual case.[138] This is a classic example of the blending of powers that the Framers allowed.[139]

For statutory contempt, the issue is more complicated because the executive's core power of prosecutorial discretion and the court's core judicial function are inextricably intertwined. Further, if the executive can decide whether to even bring the prosecution in the first place,[140] the executive should be able to pardon it.

Considering these key differences, the separation of powers concern with inherent contempt fades away for statutory criminal contempt of Congress. There is no "peculiar nature of the jurisdiction" that Rawle discusses and relies on in finding inherent contempt not pardonable[141] because the jurisdiction no longer solely belongs to Congress—it has invited the executive in. There is also no concern that the executive would be deciding who must give congressional testimony[142] because Congress could still take control using inherent contempt. Finally, there is no concern that the executive would try to undermine the will of the legislature[143] because the legislature has willingly brought the executive into the process, and now the executive's own powers take over.

3. *Ex Parte Grossman* Should Apply to Statutory Criminal Contempt of Congress

Both the textualist and separation of powers arguments above highlight differences between statutory contempt and inherent contempt. But those differences also underscore why the argument that *Grossman* should not apply to *inherent* contempt cannot be made for *statutory* contempt.[144] First, all the similarities between *statutory* criminal contempt of Congress and all other federal criminal offenses are absent for *inherent* contempt of Congress.[145] As stated in *Grossman*, "[n]othing in the ordinary meaning of the words 'offences against the United States' excludes criminal contempts."[146] Although it can be argued that inherent contempt's

137. *See supra* Part II.C.

138. *See id.*

139. *See Ex parte* Grossman, 267 U.S. 87, 119–20 (1925).

140. *See* TODD GARVEY, CONG. RSCH. SERV., LSB10974, CRIMINAL CONTEMPT OF CONGRESS: FREQUENTLY ASKED QUESTIONS 3 (2023) [hereinafter CRS CONTEMPT FAQS]; Peterson, *supra* note 106, at 576.

141. RAWLE, *supra* note 22, at 178.

142. *See* Berger, *supra* note 35, at 180.

143. *See* Shahrasbi, *supra* note 21, at 220 (discussing how pardons for criminal contempt of court can undermine the judiciary).

144. *See supra* Part II.D.

145. *See supra* Part II.B.

146. *Ex parte* Grossman, 267 U.S. 87, 115 (1925).

procedure eliminates it as an "offence,"[147] the same cannot be said for statutory contempt. As explained, statutory contempt is an offense against the United States, and is therefore pardonable, just like criminal contempt of court. Additionally, there is no "peculiar nature of the jurisdiction"[148] for statutory contempt, so this argument also cannot be used for statutory contempt. Therefore, the arguments supporting inherent contempt's evasion of *Grossman*'s holding do not apply to statutory contempt.

C. Addressing Counterarguments Against Allowing a Pardon for Statutory Criminal Contempt of Congress

Although this Note reaches the conclusion that the President *can* pardon statutory criminal contempt of Congress, it is important to address why one could argue that the President *cannot* do so. The following Section outlines two main counterarguments and addresses the weaknesses of these arguments, ultimately concluding that the President can issue a pardon for statutory criminal contempt of Congress.

1. Counterargument: If Inherent Contempt Is Exempt from the Pardon Power, Statutory Contempt Should Be Too

As previously discussed, inherent contempt of Congress is not subject to a presidential pardon.[149] When Congress codified the statutory contempt power of Congress, it intended to "supplement the power of contempt"[150] and "more effectually . . . enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony."[151]

The statute was not meant to "diminish Congress' inherent contempt authority."[152] Rather, its proponents were mainly concerned with the limitation that an individual can only be held by way of inherent contempt until the end of the legislative session.[153] Therefore, one could argue that if the President cannot pardon inherent contempt, and statutory contempt was intended to supplement rather than diminish Congress' inherent contempt power, then the President should not be able to pardon statutory contempt either.[154]

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147. *Id.*

148. RAWLE, *supra* note 22, at 178.

149. *See supra* Part II.

150. Jurney v. MacCracken, 294 U.S. 125, 151 (1935).

151. CRS CONTEMPT HISTORY, *supra* note 42, at 18 (quoting 42 CONG. GLOBE 34th Cong., 3d Sess. 403–04 (1857)). *See also In re* Chapman, 166 U.S. 661, 671 (1897) (discussing the constitutional power for Congress to pass an act aimed at enforcing witness' attendance and compelling their disclosure of evidence).

152. CRS CONTEMPT HISTORY, *supra* note 42, at 19.

153. *Id.*

154. *See* Shahrasbi, *supra* note 21, at 214 (arguing that the President should not be able to pardon criminal contempt of court because "a President cannot pardon for civil contempt [of court], which is the courts weaker enforcement order and thus, less integral to the court's functioning than criminal contempt conviction").

Although inherent contempt is not purely "criminal" or "civil," it certainly bears a punitive, criminal variant, and if one form of criminal contempt cannot be pardoned, neither should the other. In the context of criminal contempt of *court*, whether the contempt is civil or criminal turns on its purpose; contempt of court is civil when it is coercive and "the contemnor is able to purge the contempt" but criminal when it is punitive and a fine or sentence "is imposed retrospectively for a 'completed act of disobedience.'"[155] When applied to inherent contempt of *Congress*, however, it appears the power encompasses both a civil and criminal variant, as it can be used both to coerce and to punish.[156] For example, in *Jurney v. MacCracken*, a witness was punished for destroying documents in response to a subpoena and was held in inherent contempt.[157] In the situations contemplated by this Note, both Navarro and Bannon were convicted for their refusal to testify, with no opportunity to "purge the contempt,"[158] making the contempt punitive and criminal in nature.[159] Why should the pardon power be able to upend Navarro and Bannon's convictions, but not the inherent contempt of MacCracken?

2. Response: The Separation of Powers Concerns Are Different Such That Statutory Contempt Should Not Be Exempt from the Pardon Power

This counterargument fails to recognize the key differences in the separation of powers concerns posed by inherent contempt and statutory contempt.[160] As argued above, inherent contempt does not involve the executive or judiciary and instead is entirely contained within the legislature.[161] In contrast, statutory criminal contempt saves a seat at the table for both the executive and the judiciary—the executive branch must bring the prosecution, and the judiciary must hear the case.[162] *Congress itself* created this statutory scheme including the other branches of government. Congress *willingly* allowed the other two branches to have a role by codifying statutory criminal contempt in 2 U.S.C. § 192.

Additionally, the concern that allowing a pardon for *statutory* contempt will diminish Congress' *inherent* contempt power fails to recognize that the two powers are entirely different. By creating an avenue for statutory contempt proceedings, Congress did not cut off its access to inherent contempt, and just because Congress has not exercised its inherent contempt power recently[163] does not mean it cannot

155. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911)).

156. *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 172 (1881) (using inherent contempt to attempt to enforce a subpoena); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 229 (1821) (using inherent contempt to punish a briber).

157. Jurney v. MacCracken, 294 U.S. 125, 125–26 (1935).

158. *Bagwell*, 512 U.S. at 828.

159. *See supra* notes 1–2 and accompanying text.

160. *See supra* Part III.B.

161. *See supra* Part II.C.

162. *See* 2 U.S.C. § 194; *supra* Part III.B.

163. *See* Bowman, *supra* note 9, at 529; CRS CONTEMPT HISTORY, *supra* note 42, at 12.

still choose to do so when it wishes. Therefore, allowing a pardon for statutory contempt has no effect on inherent contempt.

3. Counterargument: If the President Can Pardon Statutory Criminal Contempt of Congress, This Would Effectively Nullify That Power of Congress

When Congress issues a subpoena and threatens or commences statutory contempt proceedings, the executive branch is not powerless—executive branch officials can claim executive privilege. Executive privilege is based on the need to protect communications between high-level executive branch officials and their advisors, which "flow[s] from the nature of [the executive's] enumerated powers."[164]

In other words, the freedom to speak candidly without fear of public dissemination is crucial to the decision-making process.[165] However, this privilege is not unlimited or unqualified; "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[166] For example, in *Nixon*, President Nixon's claim of executive privilege over tape recordings related to the Watergate scandal did not outweigh the need for the evidence in the criminal trial.[167]

When a clash between executive privilege and statutory contempt of Congress occurs, the policy of the Department of Justice is that the Department generally should not proceed with prosecuting a statutory contempt of Congress' action.[168]

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164. United States v. Nixon, 418 U.S. 683, 705 (1974).

165. *See, e.g.*, *id.* at 708. The Court stated:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id.

166. *Id.* at 713.

167. *See id.*

168. *See* CRS CONTEMPT HISTORY, *supra* note 42, at 35–36; Whether the Dep't of Just. May Prosecute White House Offs. for Contempt of Cong., 32 Op. O.L.C. 65, 65 (2008), https://www.justice.gov/opinion/file/832851/download. The OLC stated:

> The Department of Justice may not bring before a grand jury criminal contempt of Congress citations, or take any other prosecutorial action, with respect to current or former White House officials who declined to provide documents or testimony, or who declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege or the immunity of senior presidential advisers from compelled congressional testimony.

Id.; *see also* Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 101 (1984), https://www.justice.gov/file/23631/download. The OLC also explained:

> As a matter of statutory construction and separation of powers analysis, a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute

The Department of Justice reasons that "the separation of powers principles protected by executive privilege would be eviscerated if reliance on the privilege carried with it criminal liability."[169] Executive privilege therefore limits the statutory contempt power significantly.

Even absent a claim of executive privilege, the Department of Justice may still decline to prosecute a referral from Congress of statutory contempt.[170] The language of the statute states that the Speaker of the House or President of the Senate certifies the contempt "to the appropriate United States attorney, *whose duty it shall be to bring the matter before the grand jury for its action*."[171] The criminal contempt statute refers to the "duty" of the United States Attorney to present the "matter" to a grand jury after a referral from Congress for criminal contempt, but it is disputed whether prosecution is mandatory.[172] The Department of Justice asserts that it has discretion over whether to present a contempt citation to the grand jury and to proceed with prosecution, as separation of powers demands that prosecution is the province of the executive branch.[173] Congress, however, could argue that referral to the grand jury at least is mandatory.[174] There is little caselaw supporting either position.[175]

Although the caselaw is sparse, the Department of Justice's argument also enjoys support from general principles of prosecutorial discretion.[176] In other contexts, even where statutory language uses mandatory language such as "shall," courts have refused to require prosecution, and instead granted prosecutors

> an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before a committee of Congress.

Id.

169. 32 Op. O.L.C. at 68.

170. CRS CONTEMPT FAQS, *supra* note 140, at 3; Peterson, *supra* note 106, at 563.

171. 2 U.S.C. § 194 (emphasis added).

172. *Id.*; Peterson, *supra* note 106, at 575–76.

173. CRS CONTEMPT FAQS, *supra* note 140, at 3; Peterson, *supra* note 106, at 576.

174. Peterson, *supra* note 106, at 575–76.

175. *Id.* at 577–79. In support of Congress' position, many cite to *Ex parte Frankfeld*, a case where the court considered whether a contempt referral from the individual secretary of a committee could support a contempt prosecution. *Ex parte* Frankfeld, 32 F. Supp. 915, 916 (D.D.C. 1940). In concluding the secretary did not have such authority, the court noted:

> 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.

Id. (emphasis added). As for the Department of Justice's position, supporters point to *Wilson v. United States*, where the D.C. Circuit held that despite the mandatory language, the Speaker of the House has discretion over whether to refer contempt citations to the Department of Justice. Peterson, *supra* note 106, at 578 (discussing Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966)). The discretion of the Speaker despite mandatory language suggests similar discretion for the Department of Justice. *Id.*

176. Peterson, *supra* note 106, at 579 ("Under the common-law doctrine of prosecutorial discretion, even statutory language that facially mandates prosecution does not always require prosecutors to institute criminal proceedings.").

discretion.[177] So far, the Department of Justice's argument has prevailed and statutory contempt referrals by Congress require Department of Justice discretion on whether to proceed.[178] This is another key limitation that is placed on the contempt power of Congress.

Keeping this background in mind, another argument against the use of the pardon power would be that adding the pardon power to the executive's arsenal against Congress would not preserve the separation of powers. Instead, it would create an imbalance of power in favor of the executive branch when considered with the executive's other powers of executive privilege and prosecutorial discretion. Statutory criminal contempt of Congress already faces extreme challenges from the executive branch in the face of executive privilege claims and prosecutorial discretion. If the President's pardon power was added on top of this, there would be three executive branch powers potentially wielded against Congress' one power. Statutory contempt of Congress would have no teeth, and this would hinder Congress' inherent investigatory power, and thus the separation of powers.

4. Response: Congress Is Not Left Powerless if Statutory Contempt May Be Pardoned

This argument can be dispensed with easily—if Congress is ever concerned about a statutory criminal contempt of Congress conviction being pardoned, Congress is not left powerless because it could choose to use its *inherent* contempt powers instead. Although inherent contempt has not been used since 1935,[179] Congress still has this power. Inherent and statutory contempt exist in tandem; statutory contempt was meant to supplement inherent contempt, not to replace it.[180] Therefore, Congress could make a conscious decision to utilize inherent contempt if it believes statutory contempt could be thwarted by a pardon.

IV. How the Availability of the Pardon Power Could Affect Congressional Contempt Decisions in the Future

If inherent contempt is exempt from the pardon power but statutory criminal contempt is not, as this Note argues, then Congress has a choice to make when it wants to hold someone in contempt. If Congress is really concerned about a contempt finding being overturned by a pardon, it can choose to use inherent contempt which brings the advantage of pardon exemption. If that is not a concern, Congress may choose to still use statutory criminal contempt.

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177. *See id.*

178. *See* CRS Contempt FAQs, *supra* note 140, at 3.

179. Bowman, *supra* note 9, at 529 ("[T]hat approach [inherent contempt] was last taken in 1935."); CRS Contempt History, *supra* note 42, at 12 ("[T]he inherent contempt process has not been used by either body since 1935.").

180. Jurney v. MacCracken, 294 U.S. 125, 151–52 (1935); *In re* Chapman, 166 U.S. 661, 671 (1897).

Inherent contempt has not been used since 1935.[181] However, it had been used prior to 1935, even after statutory criminal contempt was enacted.[182] This suggests that "the early U.S. Congress understood that 'accepting help from the executive means subordination to the executive'"[183] and continuing to rely on its inherent contempt power was a way to preserve Congress' power without the executive's interference. There is nothing standing in Congress' way of resuming use of this power except Congress itself.

There are several potential reasons inherent contempt has not been used since 1935. One disadvantage of inherent contempt is that the term of imprisonment may not last beyond the end of the current session of Congress.[184] For the House of Representatives, this would mean that a contemnor essentially could not be held beyond the first few days of January each year, as that is when one session typically ends and another begins.[185] Therefore, the amount of time a contemnor could be held would largely depend on when in the year they are held in contempt. For example, someone held in contempt in mid-January could be held for almost an entire year, whereas someone held in contempt in late December would only be held for a handful of days. The Senate, on the other hand, is seen as a "continuing body."[186] As the end of the "current session" is less clear, the Senate may be able to hold contemnors for longer.[187] The Senate only addressed this issue once in 1871, close to the end of session.[188] No formal rule was established, but the Senate ended up releasing the prisoners held in contempt.[189] It is possible that this question could arise again if there is a resurgence of inherent contempt proceedings.

Additionally, some have described inherent contempt 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."[190] Inherent contempt proceedings include resolutions and referrals, interrogatories, and testimony, which can all be time consuming.[191] The statutory

181. *See supra* note 179 and accompanying text. However, Republican members of the House of Representatives recently attempted to use its inherent contempt power against Attorney General Merrick Garland, though the vote failed. Ryan Tarinelli, *House Rejects 'Inherent Contempt' Resolution for Garland over Tape of Biden Interview*, ROLL CALL (July 11, 2024), https://rollcall.com/2024/07/11/house-rejects-inherent-contempt-resolution-for-garland-over-tape-of-biden-interview/.

182. *See* Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 64 (2009).

183. *Id.* (quoting Josh Chafetz, *House Arrest*, SLATE, (Apr. 26, 2007, 4:06 PM), https://slate.com/news-and-politics/2007/04/why-congress-has-the-power-to-make-arrests.html).

184. CRS CONTEMPT HISTORY, *supra* note 42, at 12.

185. *See Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm (last visited Oct. 19, 2024); U.S. CONST. amend. XX, § 2.

186. CRS CONTEMPT HISTORY, *supra* note 42, at 8.

187. *See id.*

188. *Id.*

189. *Id.*

190. *Id.* at 12; *see also* Bowman, *supra* note 9, at 529 (describing inherent contempt as "outmoded, cumbersome, and probably ineffectual").

191. *See, e.g.*, CRS CONTEMPT HISTORY, *supra* note 42, at 4–5, 12.

contempt proceedings for Navarro lasted almost two years from indictment to sentencing, including many status conferences, motions hearings, and briefs, and concluding in a day-long trial.[192] Although inherent contempt proceedings would likely be faster than a trial, they still involve complex legal issues that Congress would have to take time out of its regular business to handle. Congress frequently receives complaints about its inefficiency[193] and pursuing inherent contempt proceedings would only add to its already very full plate.

One way that Congress could reduce the disruptive effect inherent contempt proceedings would have on its workload would be to try inherent contempt charges before a congressional committee.[194] Most inherent contempt proceedings have taken place before the entire House or Senate, but that has not been the exclusive procedure, and historical practice suggests the power could be delegated to a smaller committee.[195] The committee could receive evidence, hear witnesses, and report back to the full body for a final vote.[196] However, delegation to a committee would still take time away from the regular business of the members of the committee.[197] Additionally, the same political polarization concerns that exist with the full Congress still exist in smaller committees, and questions of fairness could arise.[198]

It is worth nothing that inherent contempt has received criticism, with some claiming that it should be declared unconstitutional.[199] One concern is due process: statutory contempt requires a charge be brought by a prosecutor and tried before a judge;[200] inherent contempt allows the House or Senate to act as both prosecutor and judge.[201] After the first use of inherent contempt against Robert Randall, for example, some argued that "the House had violated due process of law by punishing Randall without indictment or presentment of a grand jury, and without conviction by an impartial jury of the state and district where the crime had been committed," and thus violated his due process rights.[202]

A related concern is whether the use of inherent contempt, specifically against an executive branch official, undermines the Constitution's "finely wrought" impeachment requirements.[203] The Constitution provides that executive officers

192. *See* Cole & Lybrand, *supra* note 2; United States v. Navarro, 651 F. Supp. 3d 212 (D.D.C. 2023).

193. *See, e.g.*, Joe LoCascio, Benjamin Siegel & Ivan Pereira, *118th Congress On Track to Become One of the Least Productive in US History*, ABC NEWS (Jan. 10, 2024), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012.

194. Zuckerman, *supra* note 182, at 73–74.

195. *Id.* at 72.

196. *Id.* at 73.

197. *Id.* at 74.

198. *Id.*

199. *See* E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1419, 1423 (2019).

200. *See supra* Part III.B.

201. CRS CONTEMPT HISTORY, *supra* note 42, at 10.

202. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1741 (2012).

203. West, *supra* note 199, at 1425.

may be impeached[204] and that the House of Representatives has the power to impeach,[205] while the Senate has the power to try all impeachments.[206] The use of inherent contempt against executive branch officials, however, allows one house of Congress to "claim *independent* authority to sanction recalcitrant witnesses and contumacious citizens."[207] With inherent contempt, there is no "structural House-Senate separation," nor the higher voting threshold of a two-thirds majority that is required for impeachment.[208]

Although the Supreme Court upheld the inherent contempt power in *Anderson*,[209] the arguments against inherent contempt deserve mention because they reflect a concern that excessive use of the inherent contempt power might undermine public faith in the rule of law and due process. Congress would have to consider the potential disadvantages and legitimacy concerns when deciding whether to use their inherent contempt power.

CONCLUSION

There are critical differences between inherent contempt of Congress and statutory criminal contempt of Congress that suggest the first is not pardonable, but the second is. As explained in this Note, inherent contempt is likely not an offense against the United States because its procedure takes place entirely within one chamber of Congress and involves neither the executive nor the judiciary, and therefore, is not within the realm of pardonable offenses. Further, the separation of powers concerns suggest that the legislature's core investigative function, which is served by the inherent contempt power, is stronger than the executive's interest in pardoning the offense. In contrast, when Congress takes the statutory criminal contempt route, it voluntarily brings the executive and judiciary into the process. Just like any other federal criminal offense against the United States, a statutory criminal contempt proceeding involves a prosecutor and a judge, and Congress' only role is in certifying the citation to the United States Attorney. This situation bears the classic blending of powers that echoes throughout the American system of government, and once Congress chooses to bring the executive in, it cannot subsequently try to cut it out. Therefore, statutory criminal contempt of Congress can be pardoned.

This leaves Congress with a choice to make when initiating contempt proceedings. Congress can choose to go it alone and keep everything "in-house" through inherent contempt, thus insulating its determination from the presidential pardon. Alternatively, Congress can enlist the help of the executive through statutory criminal contempt, where the final determination rests not with Congress but with the court, and the executive could pardon the offense.

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204. U.S. CONST. art. II, § 4.
205. U.S. CONST. art. I, § 2, cl. 5.
206. U.S. CONST. art. I, § 3, cl. 6.
207. West, *supra* note 199, at 1444.
208. *Id.* at 1445.
209. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 204 (1821).