"Some Means of Compulsion are Essential to Obtain What is Needed": Reviving Congress's Oversight Authority of the Executive Branch by Imposing Fines for Non-Compliance with Congressional Subpoenas

MAX G. LESSER*

INTRODUCTION

Congressional oversight has played a critical role in uncovering wrongdoing in the executive branch, from the historic corruption of the Teapot Dome Scandal to the presidential abuses of power in Watergate. Underpinning these investigations has been the Supreme Court's long-standing recognition of the broad oversight authority possessed by Congress, which empowers the body to compel testimony and documentation.[1] Possessing investigative power allows Congress to fulfill several critical responsibilities. First, Congress can oversee whether the laws it passes are being faithfully executed, in terms of how "effectively, efficiently, and frugally the executive branch is carrying out congressional mandates."[2] Second, Congress can identify any executive misconduct, such as "poor administration, arbitrary and capricious behavior, abuse, waste, dishonesty, and fraud."[3] Third, Congress can utilize the information gained from investigative oversight to address issues through appropriate legislation, the body's core constitutional function. For these reasons, the Supreme Court has described congressional oversight as "essential"[4] for the Article I branch of our government.

When congressional oversight faces resistance, the contempt power provides Congress a tool for coercing compliance and punishing those who obstruct its investigations.[5] The power has generally been utilized to address non-compliance with a congressionally issued subpoena, and has historically been enforced by the

---

* J.D., Georgetown University Law Center (expected May 2022); M.S.Ed., Hunter College of The City University of New York - Graduate School of Education (2016); B.A., The George Washington University (2014).

1. *See generally* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); Watkins v. United States, 354 U.S. 178 (1957); McGrain v. Daugherty, 273 U.S. 135 (1927); Kilbourn v. Thompson, 103 U.S. 168 (1880).

2. WALTER J. OLESZEK ET. AL., CONGRESSIONAL PROCEDURES & THE POLICY PROCESS – TENTH EDITION 376 (2016).

3. *See* ALISSA M. DOLAN ET. AL, CONG. RES. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 2 (2014).

4. *McGrain*, 273 U.S. at 174.

5. *See* ALISSA M. DOLAN ET. AL, *supra* note 3, at 33.

Department of Justice under Congress's criminal contempt power,[6] civil judgments from the federal courts,[7] or through the body's inherent contempt powers.[8] Collectively, these enforcement vehicles have served as Congress's means of compulsion for gaining documentation and testimony from those who refuse to provide it.

Significant challenges have arisen for the enforcement of congressional subpoenas directed at the executive branch, which has grown rapidly in size and power in the modern era.[9] There have been signs of escalating constitutional tension in oversight disputes in the Bush[10] and Obama[11] administrations, but in the Trump administration congressional oversight has reached a breaking point. The administration's ignorance of subpoenas,[12] wide-ranging utilization of executive privilege,[13] and policy of complete obstructionism regarding congressional demands for information are not only historically unprecedented, but have "declared war on the House [of Representatives]'s investigation[s] of the executive branch—and, effectively, on the Constitution itself."[14]

In this context, Congress's traditional tools for enforcing its subpoenas have proven unavailing. Utilization of criminal contempt has been impossible, given the constitutional and political challenges of having a U.S. attorney open a

---

6. *See* 2 U.S.C. §192; 2 U.S.C. §194; United States v. U.S. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983); *see also* Letter from James M. Cole, Deputy Attorney Gen., to John Boehner, Speaker of the House, June 28, 2012, http://abcnews.go.com/images/Politics/062812%20letter.pdf [https://perma.cc/6BZU-8CQH].

7. *See* Comm. on the Judiciary v. McGhan, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2019); Comm. on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1, 4–5 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 108 (D.D.C. 2008).

8. *See* McGrain v. Daugherty, 273 U.S. 135, 330–31 (1927); Anderson v. Dunn, 19 U.S. 204, 227–28 (1821).

9. *See generally* ARTHUR SCHLESINGER, IMPERIAL PRESIDENCY (BOSTON: HOUGHTON MIFFLIN 1973); Gene Healy, *Congressional Abdication and The Cult of the Presidency*, 10 WHITE HOUSE STUDIES 89 (2010), https://www.cato.org/sites/cato.org/files/articles/WHS-2010-vol10n2.pdf [https://perma.cc/LN4U-EFY8]; David A. Graham, *The Strange Thing About Trump's Approach to Presidential Power*, THE ATLANTIC (Jun. 7, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-strangest-thing-about-trumps-approach-to-presidential-power/562271/ [https://perma.cc/GT4C-TJY3]; Jay Cost, *The Expanding Power of the Presidency*, HOOVER INST. (Oct. 2, 2012), https://www.hoover.org/research/expanding-power-presidency [https://perma.cc/AN9Z-X2JW].

10. *See Miers*, 558 F. Supp. 2d at 108 (involving a criminal contempt charge against White House counsel Harriet Miers).

11. *See Holder*, 979 F. Supp. 2d at 4–5 (involving a criminal contempt charge against Attorney General Eric Holder).

12. *See* Kurt Anderson, *Experts: White House has dubious reasons to ignore subpoenas*, AP (Nov. 4, 2019), https://apnews.com/48c57b063e3a4da699cd9a8ee8dbfe91 [https://perma.cc/79SD-PXHM].

13. *See* Neal Katyal, *Trump's Abuse of Executive Privilege Is More Than a Present Danger*, N.Y. TIMES (June 17, 2019), https://www.nytimes.com/2019/06/17/opinion/trump-executive-privilege.html [https://perma.cc/ZT6F-DSSZ].

14. *See, e.g.*, Kerry Kircher, *Trump's Unprecedented Fight to Withhold Information*, THE ATLANTIC (Aug. 27, 2017), https://www.theatlantic.com/ideas/archive/2019/08/house-needs-its-subpoena-power-against-trump/596857/ [https://perma.cc/455N-DKYB]. Ms. Kircher was "general counsel of the House of Representatives from 2011 to 2016 under speakers John Boehner and Paul Ryan, and deputy general counsel of the House from 1996 to 2010 under speakers Newt Gingrich, Dennis Hastert, and Nancy Pelosi." *Id.*

criminal case against another executive officer for refusing congressional oversight. Enforcement of congressional subpoenas through the courts has also proven difficult, given the time-consuming nature of litigation and courts' unwillingness to get stuck in the middle of contentious political disputes between the executive and legislative branches.[15] Without any enforcement mechanism, executive stonewalling risks crippling the oversight authority of our Article I branch of government. Such an eventuality will also set a dangerous precedent that incentivizes future Presidents to defy legislative demands for information, decreasing transparency and accountability from the executive branch. Similarly, the White House's complete refusal to cooperate with the House of Representatives' impeachment inquiry[16] poses a precedential risk for the body's ability to carry out its sole power of impeachment. In the absence of any change, legislative oversight will be rendered toothless and the impeachment power will be dead letter law.

Congress's long dormant inherent contempt power can provide a solution to this crisis. Unlike other methods of enforcement, inherent contempt does not rely on any other branch of government—allowing Congress to coerce compliance with its subpoenas using the body's *own* institutional authority. This Note will analyze the history and operation of the inherent contempt power, which historically involved Congress's Sergeant at Arms detaining or imprisoning an individual for contempt of Congress. It will then make the case that Congress can modernize its inherent contempt powers in order to directly fine federal officials who defy and obstruct the body's oversight authority.

An inherent contempt scheme that imposes fines in order to enforce congressional subpoenas would have several critical advantages. First, such a scheme has a strong legal basis in Supreme Court precedent and mirrors the use of fines by the nation's courts. Second, congressional fines would place officials held in contempt under *immediate* pressure to comply with legislative demands, placing the ball in the executive branch's court to fight the penalty before a judge. Such a dynamic contrasts directly with the current status quo, in which Congress has looked to the courts to enforce its subpoenas but the executive branch has dragged out litigation and delayed any judicial orders to produce documents for years at a time. Third, fines through inherent contempt avoids reliance on the executive and judicial branches for enforcement altogether, while also doing away with the

15. *See* Comm. On the Judiciary v. McGhan, 415 F. Supp. 3d 148, 120 (D.D.C. 2019) (holding that courts can enforce a congressional oversight subpoena), *rev'd*, Comm. On the Judiciary v. McGahn, Civ. No.1:19-cv-02379, 37 (D.C. Cir. 2019) (holding that courts should not get involved in subpoena enforcement disputes between the political branches); *Holder*, 979 F. Supp. 2d at 1 (litigation in this case took nearly five years for judicial resolution and the enforcement of a congressional subpoena).

16. *See* Shannon Pettypiece & Kristen Welker, *White House refuses to cooperate with impeachment investigation*, NBC NEWS (Oct. 9, 2019), https://www.nbcnews.com/politics/trump-impeachment-inquiry/white-house-refuses-turn-over-documents-democrats-impeachment-inquiry-n1063771 [https://perma.cc/3AAD-78CL].

"unseemly"[17] consequences of traditional arrests and detention of administration officials. For these reasons, fines through the inherent contempt power would provide a modernized tool for enforcing congressional subpoenas, strengthening oversight of the executive branch.

Lastly, this Note will consider various procedures for operationalizing fines through the inherent contempt power. Although there are relative advantages and disadvantages to each of these approaches, the common denominator is that they would all provide potential sources of leverage for the enforcement of congressional subpoenas. And while congressional fines would have to navigate various privileges—such as executive privilege and attorney-client privilege—a valid subpoena could overcome either in the right circumstances without violating the separation of powers or principles of legal ethics.

James Madison wrote in Federalist Paper No. 51 that "in republican government, the legislative authority necessarily predominates."[18] At a time when congressional authority is being broadly delegitimized, its oversight powers stymied, and its impeachment authority rejected outright, Congress cannot afford to leave any potential tool unused in defending its institutional authority. In an era of unprecedented obstruction, some new "means of *compulsion* are essential to obtain what is needed."[19] Monetary fines through inherent contempt could provide such a tool for enforcing congressional subpoenas and strengthening oversight of the executive branch. In doing so, this enforcement mechanism could prove critical not only for Congress's very "self-preservation,"[20] but for the re-assertion of the intended, predominant role of the Article I branch in our constitutional republic.

I. BREAKING FROM CONSTITUTIONAL DESIGN: INCREASING EXECUTIVE POWER AND INTRANSIGENCE TO CONGRESSIONAL OVERSIGHT

A. CONGRESSIONAL OVERSIGHT AUTHORITY

It is often noted that the United States Constitution created three "co-equal" branches of government, but the reality is that the framers centered the design of the national government on the role of the legislative branch. The Article I branch makes up nearly sixty percent of the Constitution's exposition of the powers of the three branches of government, and "in virtually every important area of governance, the Constitution gives Congress the last word."[21] For example, Congress has the exclusive power to declare war,[22] make tax and spending decisions,[23] and

17. Morton Rosenburg, *When Congress Comes Calling - A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry*, THE CONSTITUTION PROJECT, 31 (2017), https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf [https://perma.cc/Z47M-VHRF].

18. THE FEDERALIST PAPERS: NO. 51 (Hamilton or Madison) [hereinafter Federalist No. 51].

19. McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (emphasis added).

20. Anderson v. Dunn, 19 U.S. 204, 230 (1821).

21. Healy, *supra* note 9, at 90.

22. U.S. CONST. art. I, § 8, cl. 11.

23. *Id*. art. I, § 8, cl. 1.

confirm cabinet members and Justices of the Supreme Court.[24] It also empowers Congress to ratify treaties,[25] override presidential vetoes of legislation,[26] establish federal circuit and district courts,[27] propose constitutional amendments,[28] and remove executive officers, including the President, through impeachment.[29] Furthermore, Congress possesses significant governing authority under Article I, Section 8, including the power to regulate interstate commerce[30] and the sweeping "necessary and proper" clause.[31]

Taken together, these broad powers support the proposition that it was "*Congress's* job, not the president's, to set the national direction in terms of policy."[32] They also collectively reflect James Madison's vision of the dominant role of the legislature in our democracy's original constitutional design.[33] The President's role in this vision, on the other hand, was largely to execute the enactments and prerogatives of the legislative branch. In contrast with his expansive framing of legislative power, Madison described the office of the President as one "carefully limited[,] both in the extent and the duration of its power."[34]

Given these baselines of constitutional authority, the framers believed checks and balances and the separation of powers would prevent encroachments by one branch of government on the powers of the others, as "ambition . . . counteract[ed] ambition."[35] Such a design would ensure no branch of government came to subsume the powers of the others. In this way, our Constitution was not intended "to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[36]

Early case law from the Supreme Court describes how the central role of the legislature in our Constitution eventually translated into robust congressional authority for oversight and investigations. The Supreme Court held in *McGrain v. Daugherty* that Congress's power to investigate and compel testimony from the executive branch is "essential and appropriate auxiliary to the legislative

---

24. *Id*. art. II, § 2, cl. 2.
25. *Id*. art. II, § 2, cl. 2.
26. *Id*. art. I, § 7, cl. 2.
27. *Id*. art. III, § 1.
28. *Id*. art. V.
29. *Id*. art. I § 2, cl. 5; art. I § 3, cl. 6-7; art. II § 4.
30. *Id*. art. I, § 8, cl. 3.
31. *Id*. art. I, § 8, cl. 17 (Congress has the power "to make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.") (emphasis added).
32. Healy, *supra* note 9, at 91 (emphasis added).
33. *See* Federalist No. 51, *supra* note 18.
34. THE FEDERALIST PAPERS: NO. 48 (Madison) [hereinafter Federalist No. 48].
35. *Id*.
36. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

function."[37] The Court further reasoned in *Quinn v. United States* that "[w]ithout the power to investigate — including of course the authority to compel testimony, either through its own processes or through judicial trial — Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."[38] These cases illustrate that investigative authority was considered an implied power necessary for Congress's basic ability to do its job. A legislature simply cannot legislate without the ability to acquire—and, if needed, compel—information.

In the more recent cases of *Watkins v. United States* and *Barenblatt v. United States*, the Court further expounded on the *scope* of the oversight powers possessed by Congress. In *Watkins*, the Court found that congressional oversight authority is "broad" and "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[39] In *Barenblatt*, the Justices further concluded that the scope of congressional investigations may be "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[40] These broad grants of authority make sense. In order to fulfill its responsibilities for determining how "effectively, efficiently, and frugally the executive branch is in carrying out congressional mandates,"[41] the legislature must have wide-ranging authority to oversee and investigate the executive branch. How else could Congress ensure that the laws it passes are being carried out with fidelity?

The Supreme Court has deemed the subpoena power to be a natural corollary for Congress's broad oversight authority.[42] In *Eastland v. U. S. Servicemen's Fund*, the Court referenced the Supreme Court's language in *McGrain* for why a congressional subpoena power is necessary, given that "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 what is needed."[43] The Supreme Court further elaborated on the test for legal sufficiency and validity of a congressional subpoena in *Wilkinson v. United States*.[44] More specifically, the Court constructed a deferential standard in which (1) the broad subject matter area of the investigation must be authorized by Congress,[45] (2) the investigation must be pursuant to a "valid legislative purpose,"[46] and (3) the specific inquiries must be

37. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).
38. Quinn v. United States, 349 U.S. 155, 160–61 (1955).
39. Watkins v. United States, 354 U.S. 178, 187 (1957).
40. Barenblatt v. United States, 421 U.S. 491, 491 (1975).
41. WALTER J. OLESZEK ET. AL, *supra* note 2.
42. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975) ("[The] issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.").
43. *Id.* at 504–05 (referencing *McGrain*, 273 U.S. at 175) (emphasis added).
44. Wilkinson v. United States, 365 U.S. 399 (1961).
45. *See id.* at 408.
46. *Id.*

pertinent to the broad subject matter areas that have been authorized by Congress.[47] If these general conditions are met, the subpoena is legal—and the information demanded must be provided.

The takeaway from the case law is that the Supreme Court has explicated an extremely broad and deferential standard for congressional oversight, investigations, and subpoenas. This authority is critical in our constitutional scheme, given that "Congress is the institution through which the people make their will known and attempt to *control* the national government."[48] Congressional oversight fundamentally ensures laws passed by the people's representative are carried out as intended, serving the public interest. By the same tame token, investigations also uncover "poor administration, arbitrary and capricious behavior, abuse, waste, dishonesty, and fraud,"[49] which violate the public trust. The historical record has revealed countless examples where Congress has uncovered precisely this kind of nefarious behavior, reinforcing the necessity of the body's investigative powers.

B. GROWING EXECUTIVE POWER AND INTRANSIGENCE TO CONGRESSIONAL OVERSIGHT

In spite of our constitutional design of legislative predominance and robust oversight, modern America has seen explosive growth in the power of the executive branch. As the presidency has expanded in size and scope beyond anything envisioned in our constitutional design, we have seen a corresponding diminishment of congressional authority and investigative power. Justice Brandeis's fears of one branch of government overwhelming and dominating the others has increasingly become reality.

With a few notable historical exceptions,[50] the Executive Branch for most of the 19th Century was a "weak" institution with limited staffing, and "[t]he president's job was to execute policy, rarely to make it."[51] Since World War II, however, the presidency has played a singular role in foreign affairs, and has been increasingly dominant in domestic policy through executive agencies.[52] Historian Arthur Schlesinger argues that the growth of the "Imperial Presidency"[53] was "as

47. *Id.*

48. William J. Murphy, *Inherent Contempt Fines Rule*, GOOD GOVT. NOW (Sept. 22, 2018) (emphasis added), https://goodgovernmentnow.org/2018/09/22/ggn-inherent-contempt-enforcement-rule/ [https://perma.cc/FRU8-LGZ9].

49. *See* ALISSA M. DOLAN ET. AL, *supra* note 3, at 2.

50. Benjamin Ginsberg, *The Growth of Presidential Power*, YALE U. PRESS BLOG (May. 17, 2016), http://blog.yalebooks.com/2016/05/17/growth-presidential-power/ [https://perma.cc/7AC8-SZ85] ("In unusual circumstances, a Jefferson, a Jackson, or a Lincoln might exercise extraordinary power, but most presidents held little influence over the congressional barons or provincial chieftains who actually steered the government.").

51. *Id.*

52. *See generally* James M. Goldgeier & Elizabeth N. Saunders, *The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump*, COUNCIL ON FOREIGN RELATIONS (Aug. 14, 2018) https://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump [https://perma.cc/UG98-352X].

53. SCHLESINGER, *supra* note 9.

much a matter of congressional abdication as of presidential usurpation,"[54] as Congress continually delegated authority to executive agencies and the administrative state. Furthermore, Historian Benjamin Ginsberg points out that the asymmetric relationship between congressional and presidential power also contributes to this dynamic. "Every time Congress legislates it empowers the executive to do something, thereby contributing, albeit inadvertently, to the onward march of executive power."[55]

We see the manifestation of these dynamics in the size and power of the executive branch today. For example, "[f]ederal spending, adjusted for inflation, has quintupled" since 1960,[56] and there are an estimated fourteen million people who work for the federal government, for-profit contractors, or federally-funded state government, local government, and non-profit employees.[57] Of these federal employees, Congress only employs slightly over 20,000 people.[58] The comparatively thinly staffed body has often lacked the manpower or political will to drive the public policy process—deferring to the President's agenda and authority.[59] This dynamic led one former Congressman to conclude "[t]he modern presidency has become a giant centrifuge, sucking power from both Congress and the states, making de facto law through regulation and executive order."[60] So rather than playing the central role in policymaking envisioned by the Constitution, the legislative branch has increasingly delegated enormous swaths of authority to the President and executive agencies.

As the scope of executive power has expanded, congressional oversight of the Article II branch has continued to diminish—a dynamic that is now reaching a crisis point in the Trump administration. There have been signs of the increasing tensions over the enforcement of congressional subpoenas against executive officials prior to Trump's presidency, such as the demand for documents from White House Counsel Harriet Miers in the Bush administration and Attorney General Eric Holder in the Obama administration.[61] The reality is, however, that these

---

54. *Id*. at ix.

55. Ginsberg, *supra* note 50.

56. *See* George Will, *'Big Government' is Ever Growing, on the Sly*, NAT'L REV. (Feb. 25, 2017), https://www.nationalreview.com/2017/02/federal-government-growth-continues-while-federal-employee-numbers-hold/ [https://perma.cc/P6D2-XVL3].

57. *Id*.

58. *Vital Statistics on Congress – Chapter 5: Congressional Staff and Operating Expenses*, BROOKINGS (July 11, 2013), https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf [https://perma.cc/Y4DH-SHTV].

59. *See generally* Mitchell Nemeth, *Why Congress Must Stop Deferring Its Authority to the Executive Branch*, FOUND. FOR ECON. EDUC. (Sept. 18, 2018), https://fee.org/articles/why-congress-must-stop-deferring-its-authority-to-the-executive-branch/ [https://perma.cc/TAC6-A6HF].

60. Mickey Edwards, *We No Longer Have Three Branches of Government*, POLITICO (Feb. 27, 2017), https://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812 [https://perma.cc/UQ79-VDWM].

61. *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Comm. on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

were the only two instances in which the House of Representatives felt compelled to go to court to enforce its subpoenas prior to the 2016 election.[62] Historically, most cases of conflict over oversight between the legislative and executive branches have been "resolved most frequently by negotiation, bargaining, and compromise."[63]

Today, on the other hand, the White House has defied or obstructed compliance with House-committee subpoenas in more than half a dozen different matters, with the President himself stating "we're fighting all the subpoenas."[64] To date, the administration has filed suit to block a House Oversight and Government Reform subpoena to a private accounting firm for Trump financial records, House Intelligence Committee subpoenas to Deutsche Bank, and a House Ways and Means suit for disclosure of the President's tax returns.[65] Furthermore, the Treasury Secretary has refused to comply with congressional subpoenas, as have the Attorney General and Commerce Secretary regarding the inclusion of a citizenship question on the census form.[66] In response to the House Judiciary Committee's subpoena for the unredacted report of Special Counsel Robert Mueller, Attorney General William Barr responded by invoking executive privilege and refused to produce the demanded documents.[67] Unlike historical disputes over congressional oversight where some level of accommodation has been found,[68] the late Oversight Chairman Elijah Cummings made clear the situation today was different: "The White House has not turned over a single piece of paper to our committee or made a single official available for testimony during the 116th Congress."[69]

The conflicts between the branches over congressional subpoenas only intensified when the House of Representatives initiated its impeachment inquiry relating to President Trump's withholding Ukrainian aid.[70] White House Counsel Pat

62. ALISSA M. DOLAN ET. AL, *supra* note 3, at 35.

63. *See* WALTER J. OLESZEK ET. AL, *supra* note 2, at 5.

64. Kircher, *supra* note 14.

65. *See* Matthew Callahan & Reuben Fischer-Baum, *Where the Trump administration is thwarting House oversight*, WASH. POST (Oct. 11, 2019), https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress/ [https://perma.cc/K3VB-YHR6].

66. *Id.*

67. *See* Benjamin Siegel & Katherine Faulders, *Trump asserts executive privilege over Mueller report*, ABC NEWS (May 8, 2019), https://www.abccolumbia.com/2019/05/08/trump-asserts-executive-privilege-over-mueller-report/ [https://perma.cc/6UFQ-D36D].

68. *See* United States v. U.S. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983); H.R. Res. 180, 98th Cong. After Congress threatened a criminal contempt citation against EPA administrator Anne Gorsuch Burford, the House eventually passed a resolution stating the charge was no longer necessary following implementation of an agreement in which the House gained access to documents which had been formerly withheld under a claim of executive privilege. *Id.*

69. Griffin Connolly, *White House hasn't provided 'a single piece of paper' to Oversight, despite 12 requests*, ROLL CALL (Mar. 20, 2019), https://www.rollcall.com/2019/03/20/white-house-hasnt-provided-a-single-piece-of-paper-to-oversight-despite-12-requests/ [https://perma.cc/6VEE-VV2F].

70. *See* Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html [https://perma.cc/GPE9-SPFK].

Cipillone penned a letter to Congress questioning the legitimacy of the impeachment inquiry as "partisan and unconstitutional"[71] before concluding the White House "cannot participate."[72] As a result, the House Judiciary and Intelligence committees did not receive a "single document . . . [from] the White House, the Office of the Vice President, the Office of Management and Budget, the Department of State, the Department of Defense, or the Department of Energy."[73] So despite exercising its singular power of impeachment, the House of Representatives received *none* of the documentation it legally demanded and only heard from witnesses who ignored the administration's directive not to participate.[74] Multiple high-level officials who were direct fact witnesses in the administration simply defied congressional subpoenas to testify.[75] The Republican controlled Senate eventually moved to acquit the President of the two impeachment charges voted out of the House,[76] despite the administration's complete refusal to comply with the impeachment inquiry.

The current conflict between the legislative and executive branches over congressional subpoenas has enormous stakes for the future of congressional oversight and the checks and balances in our system of government. As the Supreme Court stated in *McGrain*, 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."[77] If Congress cannot engage in oversight by gaining the documents it needs for understanding an issue or addressing a problem, then our legislature cannot legislate. The same can be said for the House's "sole power of impeachment."[78] President George Washington himself believed that

---

71. Letter from Patrick Cipollone, White House Counsel, to Speaker Pelosi and Messrs. Chairmen (Oct. 8, 2019), https://assets.documentcloud.org/documents/6459967/PAC-Letter-10-08-2019.pdf [https://perma.cc/6LQY-V226].

72. *Id.*

73. THE TRUMP UKRAINE IMPEACHMENT REPORT, REPORT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE PURSUANT TO H. RES 660 IN CONSULTATION WITH THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM AND THE HOUSE COMMITTEE ON FOREIGN AFFAIRS 216 (Dec. 2019), https://intelligence.house.gov/uploadedfiles/the_trump-ukraine_impeachment_inquiry_report.pdf#page=216 [https://perma.cc/378A-J4R8]; IMPEACHMENT OF DONALD J. TRUMP - PRESIDENT OF THE UNITED STATES – REPORT OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 116th Congress – First Session 216, https://docs.house.gov/billsthisweek/20191216/CRPT-116hrpt346.pdf#page=576 [https://perma.cc/A8RP-RPJS] ("Pursuant to the President's orders, the White House, federal departments and agencies, and key witnesses refused to produce any documents in response to duly authorized subpoenas issued pursuant to the House's impeachment inquiry.").

74. *See* Kylie Atwood, *Witnesses who put careers on the line during impeachment inquiry brace for fallout of Senate trial*, CNN (Feb. 6, 2020), https://www.cnn.com/2020/02/05/politics/witnesses-impeachment-fallout/index.html [https://perma.cc/3A6P-BK7K].

75. *See* John Wagner, *White House officials defy subpoenas to testify in impeachment inquiry as investigators release transcripts*, DENVER POST (Nov. 4, 2019), https://www.denverpost.com/2019/11/04/white-house-officials-defy-subpoenas-impeachment-inquiry/ [https://perma.cc/E8QT-2VTK].

76. *See* Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html [https://perma.cc/MS5Q-BFSX].

77. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

78. U.S. CONST. art. I, § 2, cl. 5.

the impeachment power brought with it "the right to demand from the Executive all papers and information in his possession."[79] But if a President can flatly reject the authority of the House of Representatives to carry out an impeachment inquiry—by completely refusing to hand over any subpoenaed documents—then the impeachment power itself runs the risk of becoming dead letter law. This grave state of affairs begs several critical questions. What are the methods of enforcement for the congressional subpoena power? What recourse is available for Congress when executive branch officials defy congressional subpoenas? And what is the relative efficacy of these enforcement methods?

II. ENFORCEMENT OF THE CONGRESSIONAL SUBPOENA POWER THROUGH CONTEMPT AND THE STRUCTURAL CHALLENGE OF HOLDING EXECUTIVE OFFICIALS IN CONTEMPT

The Supreme Court recognized early in our history that congressional oversight would be ineffective without some kind of enforcement mechanism, which was an "inherent attribute of [Congress's] legislative authority."[80] In *Anderson v. Dunn*, for example, the Court recognized that without any coercive power, Congress's oversight efforts would be "exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."[81] Accordingly, Congress possesses an inherent contempt power, which may be used "in response to actions that obstruct the legislative process in order to command compliance with the subpoena and punish the person violating the order."[82] Nonetheless, Congress has not utilized its inherent contempt power in the modern era, instead relying on criminal contempt processes enforced by the executive branch and civil contempt through the judiciary.

A. CRIMINAL CONTEMPT

Congress enacted a statutory criminal contempt procedure in 1957 that gives either House of Congress the ability to summon an individual to give testimony or to produce papers upon any matter under inquiry.[83] Individuals who fail to appear before Congress "shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."[84] As a result of congressional classification of offenses, the penalty for contempt of Congress is now a Class A misdemeanor, meaning the maximum fine today is $100,000.[85] In

79. TODD GARVEY, CONG. RES. SERV., R45983, CONGRESSIONAL ACCESS TO INFORMATION IN AN IMPEACHMENT INVESTIGATION 16 n.106 (2019).

80. Rosenburg, *supra* note 17, at 23 (citing Anderson v. Dunn, 19 U.S. 204, 230 (1821)).

81. *Anderson*, 19 U.S. at 228.

82. Rosenburg, *supra* note 17, at 23.

83. 2 U.S.C. § 192; 2 U.S.C. § 194.

84. 2 U.S.C. § 192.

85. *See* 18 U.S.C. §§3559, 3571 (2012).

terms of process, "a contempt citation must be approved by the subcommittee (if that was where the contempt initially occurred), the full committee, and then by the full House or Senate."[86] The contempt citation must then be certified by the President of the Senate or the Speaker of the House, after which point it becomes the "duty" of the United States Attorney for the District of Columbia "to bring the matter before the grand jury for its action."[87] No executive branch official had ever been the target of a criminal contempt proceeding prior to Watergate, but since 1975, "thirteen cabinet-level or senior executive officials have been cited for failure to testify or produce documents subpoenaed by Congress."[88]

Although the language of the statute does not appear to provide discretion to the U.S. Attorney, the legal question of whether they are required to proceed with the charges has proven difficult to resolve. The courts are divided on "the nature of the mandatory language in these provisions and the obligations of officials involved,"[89] failing to provide clarity on the operation of criminal contempt. The District Court of the United States for the District of Columbia, for example, came to the conclusion that the statute "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."[90] The United States Court of Appeals for the District of Columbia Circuit, on the other hand, came to the opposite conclusion regarding an even earlier stage in the process, finding that that the Speaker of the House actually has discretion in certifying contempt citations and that the process is not automatic.[91] To date, "[t]he question of the U.S. Attorney's 'duty' under § 192 to enforce contempt citations remains unresolved."[92]

Judicial ambiguity on the question notwithstanding, recent examples of criminal contempt of executive officials strongly suggest that the U.S. Attorney receiving such a citation will exercise prosecutorial discretion in refusing to pursue charges against a member of the executive branch.[93] This is unsurprising given that such a proceeding essentially requires the executive branch to prosecute itself—and possibly a U.S. Attorney's superior. Thus, the procedure is essentially inoperable as a political matter. During the George H.W. Bush and George W. Bush Administrations, three officials were held in criminal contempt of Congress: Environmental Protection Agency Administrator Anne Gorsuch Burford in 1982 during the first President Bush, and former White House Chief of Staff Joshua Bolten and White House Counsel Harriet Miers in the second

86. Rosenburg, *supra* note 17, at 26.

87. 2 U.S.C. § 194.

88. ALISSA M. DOLAN ET. AL, *supra* note 3, at 34.

89. Brian Wanglin, *Reclaiming Congress's Contempt Powers Over the Executive*, 15 GEO. J. L. & PUB. POL'Y 457, 465 (2017).

90. Ex parte Frankfeld, 32 F. Supp. 915, 916 (D.D.C. 1940) (emphasis added).

91. *See* Wilson v. United States, 369 F.2d 198, 201 (D.C. Cir. 1966).

92. ALISSA M. DOLAN ET. AL, *supra* note 3, at 34.

93. *See* Rosenburg, *supra* note 17, at 31; Wanglin, *supra* note 89, at 465.

Bush administration.[94] In each case the U.S. Attorney exercised prosecutorial discretion and declined to file charges.[95] The Department of Justice's Office of Legal Counsel submitted a memorandum that questioned whether Congress could compel the U.S. Attorney to submit the citation to a grand jury when that official has invoked executive privilege.[96] In Burford's case, the requested documents were eventually provided in a negotiated settlement before further litigation could be pursued.[97]

The unwillingness to prosecute criminal contempt charges against members of the executive branch continued unabated in subsequent administrations. During the Obama Administration, for example, Attorney General Eric Holder was held in criminal contempt of Congress.[98] The Department of Justice again cited executive privilege as a reason for not pursuing criminal contempt charges.[99] IRS employee Lois Lerner was also held in criminal contempt of Congress in 2014, but the executive branch cited the Fifth Amendment privilege as grounds for its decision not to prosecute in her case.[100] In the Trump administration, the House of Representatives held Attorney General William Barr and Commerce Secretary Wilbur Ross in criminal contempt of Congress, but yet again the Justice Department declined to pursue charges.[101] These collective cases make clear it is extremely unlikely a U.S. Attorney will defy Department practice and prosecute their own administration for contempt of Congress.

---

94. *See* Ari Shapiro, *Bush Aides in Contempt; Will They Be Prosecuted?*, NPR (July 25, 2007), https://www.npr.org/templates/story/story.php?storyId=12234115 [https://perma.cc/8MM6-2WLU].

95. Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 102 (1984); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008).

96. *See* MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, PROSECUTION FOR CONTEMPT OF CONGRESS OF AN EXECUTIVE BRANCH OFFICIAL WHO HAS ASSERTED A CLAIM OF EXECUTIVE PRIVILEGE 101 (May 30, 1984), https://www.justice.gov/sites/default/files/olc/opinions/1984/05/31/op-olc-v008-p0101.pdf [https://perma.cc/9WVD-WSFQ] ("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 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.").

97. *See* Rosenburg, *supra* note 17, at 77 n.2 (citing H.R. REP. No. 968, 97th Cong., 2d Sess. 18, 28–29 (1982)).

98. *See* John Bresnahan & Seung Min Kim, *Holder held in contempt*, POLITICO (Jun. 28, 2012), https://www.politico.com/story/2012/06/holder-held-in-contempt-of-congress-077988 [https://perma.cc/VH3M-YGEX].

99. *See* TODD GARVEY, CONG. RES. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 46 (2017), https://goodgovernmentnow.org/wp-content/uploads/2018/09/congress_-contempt-power-and-enforcement-cong-subpoenas-crs-rl34097-20170512.pdf [https://perma.cc/SFD8-NJKN] [hereinafter GARVEY, CONGRESS'S CONTEMPT POWER].

100. *See id*. at 52.

101. *See* Sunny Kim, *Justice Department won't bring charges against Attorney General William Barr, Commerce Secretary Wilbur Ross after contempt vote*, CNBC (July 25, 2019), https://www.cnbc.com/2019/07/25/doj-wont-bring-charges-against-barr-ross-after-contempt-vote.html [https://perma.cc/H4CY-F84T].

This dynamic goes deeper than politics or professional self-interest. Criminal contempt raises significant problems for the separation of powers, placing a U.S. Attorney between a rock—the non-discretionary language of 2 U.S.C. § 194—and a hard place—the legal ramifications when their own administration is implicated and especially when individual cited has invoked executive privilege. In summary, for cases involving executive officials, criminal contempt is unlikely to prove an enforceable remedy for Congress, although it may create pressure for some level of accommodation.

B. CIVIL CONTEMPT

The next avenue for enforcing congressional subpoenas is civil contempt. Congress enacted a civil enforcement procedure in 1978 as an alternative to criminal contempt but made the procedure only applicable in the Senate.[102] Under 2 U.S.C. § 288d, the Senate has statutory authority "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"[103] in civil actions in the U.S. District Court for the District of Columbia. This procedure essentially outsources enforcement of the contempt power to the courts, which can indefinitely impose sanctions such as imprisonment or fines on an uncooperative defendant in order to coerce compliance.[104] These features of civil contempt distinguish it from its criminal and inherent counterparts, creating an incentive for compliance to end the punishment.

The Senate has sought civil enforcement of a subpoena for documents or testimony seven times since the statute's enactment.[105] These proceedings generally move faster than those involving criminal contempt because the latter involve more serious threats to defendant's constitutional rights and receive more heightened scrutiny.[106] In the context of congressional oversight of the executive, however, civil enforcement in the Senate has a glaring downside: the statute does not apply to a subpoena directed "to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity."[107] The Senate Report clarifies that enforcing a congressional subpoena against an executive officer in federal court is possible but that the statute does not confer it.[108] The House Judiciary Committee has since tried to clarify that the exclusion in the statute should "apply only in cases in which the president had directed the

---

102. *See* 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)).

103. 2 U.S.C. § 288d.

104. *See* 28 U.S.C. § 1365(b).

105. *See* Rosenburg, *supra* note 17, at 28.

106. *See id.*

107. *See* 28 U.S.C. § 1365(a) (2000).

108. *See id.*

recipient of the subpoena not to comply with its terms."[109] Either way, the Senate has not yet faced the dilemma of an executive branch official refusing to comply with a congressional subpoena, likely because the Senate lacks the authority to subpoena executive officials in the first place.

Although the House of Representatives does not have an explicit statutory basis for civil contempt, the body has historically pursued civil enforcement through resolutions. More specifically, the process for civil enforcement has involved a resolution by the full House finding an individual in contempt and authorizing the committee in question or House General Counsel to file suit in the appropriate federal district court for declaratory or injunctive relief to enforce the subpoena.[110] Direct enforcement through the courts in this fashion is a new phenomenon and had only been employed twice prior to the Trump administration: in 2008 against Harriet Miers and Josh Bolten,[111] and in 2012 against Attorney General Eric Holder.[112] Both cases reveal valuable insight into the nature and operation of this enforcement mechanism for congressional subpoenas.

Committee on the Judiciary v. Miers was Congress's first attempt to seek civil enforcement of a subpoena in federal court solely by resolution of a single House.[113] The case involved disputes over the firing of U.S. attorneys in the Bush administration, with the House of Representatives issuing subpoenas to White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten.[114] The United States District Court for the District of Columbia held that "[b]ecause this dispute concerns an allegation that Ms. Miers and Mr. Bolten failed to comply with duly issued congressional subpoenas, and such subpoena power derives implicitly from Article I of the Constitution, this case arises under the Constitution."[115] In so doing, the court confirmed that the House may authorize a committee to seek a civil enforcement action to force compliance with a subpoena. The case was eventually settled after a change in presidential administrations.[116]

In the Obama Administration, the House of Representatives held Attorney General Eric Holder in criminal contempt of Congress.[117] The basis for the charge was a congressional investigation into the "Fast and Furious" sting operation by the Bureau of Alcohol, Tobacco, and Firearms that led to the illegal sale of nearly

109. Rosenburg, *supra* note 17, at 28 (citing H. Comm. on the Judiciary, Clarifying the Investigatory Powers of the United States Congress, H.R. Rep. No. 100-1040 at 2 (1988)).

110. *See* ALISSA M. DOLAN ET. AL, *supra* note 3, at 35.

111. *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

112. *See* Comm. on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

113. *See* Rosenburg, *supra* note 17, at 29.

114. *Id*.

115. *Miers*, 558 F. Supp. 2d at 64.

116. *See* Rosenburg, *supra* note 17, at 14.

117. *See* Bresnahan & Kim, *supra* note 96.

2,000 firearms.[118] Many of these weapons were obtained by Mexican cartels, leading to the death of a border patrol agent.[119] Speaker of the House John A. Boehner believed the White House's cooperation in the House's investigation was insufficient, which contributed to the House eventually voting to hold Attorney General Holder in criminal contempt.[120] When the U.S. Attorney for the District of Columbia declined to pursue the charge, the House initiated a civil lawsuit on behalf of the Committee to enforce its subpoenas.[121] In 2013, the U.S. District Court for the District of Columbia court rejected a motion to dismiss by the Department of Justice based on jurisdiction and justiciability arguments.[122] More specifically, Judge Amy Berman Jackson held that (1) the political question doctrine did not preclude jurisdiction;[123] (2) the district court had federal question jurisdiction;[124] (3) the Committee adequately alleged concrete and particularized injury;[125] and (4) prudential and equitable considerations did not warrant a discretionary dismissal of action.[126] The merits of the case were eventually resolved in 2016 when Judge Berman Jackson ordered the Department of Justice to turn over thousands of documents related to the Fast and Furious investigation.[127]

It is tempting to look at the decision of this case and conclude that the House of Representatives has a viable enforcement method for its subpoenas. The court's decision may very well have been a "Pyrrhic victory,"[128] however. First, the litigation lasted over seven years, persisting even after Judge Jackson's order.[129] This drawn out timeline is connected with the fact that civil contempt is politically charged and essentially incentivizes "agency slow-walking" in responding to congressional subpoenas.[130] This drawn out timeframe raises real problems. There can be a completely different Congress and President in such an extended

---

118. *See* Alan Neuhauser, *House, DOJ On Verge of Settling 7-Year Fast and Furious Legal Battle*, U.S. NEWS AND WORLD REP. (May 9, 2019), https://www.usnews.com/news/politics/articles/2019-05-09/house-justice-department-announce-settlement-in-7-year-fast-and-furious-fight [https://perma.cc/6LCG-MTS5].

119. *Id.*

120. *See* Bresnahan & Kim, *supra* note 98.

121. *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).

122. *See* Committee on Oversight and Government Reform v. Holder, 979 F. Supp. 2d 1, 3–4 (D.D.C. 2013).

123. *Id.* at 10.

124. *Id.* at 17.

125. *Id.* at 16.

126. *Id.* at 24.

127. *See* Committee on Oversight and Government Reform v. Lynch, 156 F. Supp 3d. 101, 120–21 (2016).

128. Chris Armstrong, *A Costly Victory for Congress: Executive Privilege after Committee on Oversight and Government Reform v. Lynch*, 17 FEDERALIST SOC'Y REV. 28, 28 (Jun. 16, 2016), https://fedsoc.org/commentary/publications/a-costly-victory-for-congress-executive-privilege-after-committee-on-oversight-and-government-reform-v-lynch [https://perma.cc/C8F3-HD7Y].

129. *See* Alan Neuhauser, *House, DOJ On Verge of Settling 7-Year Fast and Furious Legal Battle*, U.S. News & World Rep. (May 9, 2019), https://www.usnews.com/news/politics/articles/2019-05-09/house-justice-department-announce-settlement-in-7-year-fast-and-furious-fight [https://perma.cc/PYS8-W664].

130. *See* Rosenburg, *supra* note 17, at 31.

period, which means that (1) executive wrongdoing will either never come to light or (2) a President may never face a political price for stonewalling while actually in office. Second, Judge Berman Jackson's decision in 2016 was based on "narrow factual circumstances while laying out a vision of an expansive deliberative process privilege [within executive privilege] that—if it stands—may diminish Congress's powers to investigate the Executive Branch."[131] Thus, civil contempt can be extremely time consuming, and even though Judge Jackson's decision led to the release of documents, her decision also expanded the ability of the Executive to withhold information. As a result, there are serious limitations on civil contempt as an effective enforcement mechanism for congressional subpoenas.

Courts also do not necessarily want to play referee between disputes of the legislative and executive branches on matters heavily laden with politics, especially given that these conflicts have historically been handled through negotiation and accommodation.[132] This orientation has roots in the political question doctrine, which holds that certain questions are fundamentally political rather than legal—and thus are inappropriate for judicial consideration.[133] Expounding on a similar principal, the Supreme Court suggested in *Raines v. Byrd* that federal courts are not responsible for an "amorphous general supervision of the operations of government."[134] From this perspective, courts should stay out of fights between the legislative and executive branches, which have their own tools for placing pressure on one another and resolving disputes.

This skepticism of the judiciary adjudicating civil contempt lawsuits was recently thrown into stark relief when the District Court of the District of Columbia ordered President Trump's former White House Counsel Donald McGhan to comply with a subpoena from the House of Representatives in November, 2019.[135] The administration immediately appealed to the D.C. Circuit, which rejected the ability of the House of Representatives to enforce its subpoenas in federal court altogether.[136] This decision essentially nullified the civil contempt power.

---

131. Armstrong, *supra* note 128.

132. *See* United States v. U.S. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (dismissing the suit against EPA Administrator Anne Gorsuch Burford as premature because settlement opportunities had not been exhausted).

133. *See Political Question Doctrine*, CORNELL LAW SCHOOL – LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/political_question_doctrine [https://perma.cc/6L3C-QTML]; Baker v. Carr, 369 U.S. 186, 209–37 (1962) (holding that federal courts should not hear cases which deal directly with issues that the Constitution makes the sole responsibility of the Executive or Legislative branches).

134. Raines v. Byrd, 521 U.S. 811, 829 (1997).

135. *See* Comm. on the Judiciary v. McGhan, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2019).

136. *See* Charlie Savage, *Court Rules Congress Cannot Sue to Force Executive Branch Officials to Testify*, N.Y. TIMES (Feb. 28, 2020), https://www.nytimes.com/2020/02/28/us/mcgahn-subpoena-trump.html [https://perma.cc/4VHN-GKLR].

Writing for the majority, Judge Griffith agreed that "Article III of the Constitution forbids federal courts from resolving this kind of interbranch information dispute,"[137] meaning Congress lacked standing and the federal courts lacked jurisdiction for civil contempt cases. Furthermore, he asserted that "Congress can wield . . . political weapons [in these disputes] without dragging judges into the fray."[138] For example, Griffith wrote that these "weapons" include Congress's ability to "hold officers in [criminal] contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers."[139] This was a *thunderclap* of a decision with "reasoning [that] would shut the door to judicial recourse whenever a president directs a subordinate not to cooperate with congressional oversight investigations."[140] Judge Henderson, in concurrence, agreed that the House lacked standing to enforce its subpoena, although she questioned Mr. McGhan's assertion of absolute testimonial immunity against compelled congressional process.[141]

Judge Rogers' dissent made abundantly clear the disturbing consequences of the majority's decision: "the court removes any incentive for the Executive Branch to engage in the negotiation process seeking accommodation, all but assures future Presidential stonewalling of Congress, and further impairs the House's ability to perform its constitutional duties."[142] Judge Rogers worried the majority's decision would greenlight future presidents to "direct wide-scale noncompliance with lawful congressional inquiries, secure in the knowledge that Congress can do little to enforce a subpoena short of directing a Sergeant at Arms to physically arrest an Executive Branch officer," with the consequence of "dramatically undermining . . . [Congress's] ability to fulfill its constitutional obligations now and going forward."[143] Simply put, she feared the majority's ruling would decimate congressional oversight and push Congress to more extreme enforcement methods. Lawyers for the House of Representatives appealed the ruling, and the full bench of the D.C. Circuit Court of Appeals has agreed to rehear the case beyond questions of standing.[144] The D.C. Circuit's recent decision to re-hear the case en-banc effectively wipes out the two to one ruling by

137. Comm. on the Judiciary v. McGhan, Civ. No.1:19-cv-02379, 2 (D.C. Cir. 2019).

138. *Id*. at 13.

139. *Id*.

140. Savage, *supra* note 136.

141. *See* Comm. on the Judiciary v. McGhan, Civ. No.1:19-cv-02379, 1–20 (D.C. Cir. 2019) (Henderson, J., concurring).

142. *Id*. at 1 (Rogers, J., dissenting).

143. *Id*. at 19, 24–25.

144. *See* Josh Gerstein, *Full appeals court to hear McGhan, border wall cases*, POLITICO (Mar. 13, 2020), https://www.politico.com/news/2020/03/13/appeals-court-don-mcgahn-border-wall-cases-128914 [https://perma.cc/VQ58-QQJW].

Judges Griffith and Henderson, adding to the uncertainty about the future of civil contempt against executive officers.[145]

Judicial ambiguity notwithstanding, it is worth noting that an order from a court arising from a civil contempt lawsuit does not necessarily get rid of the enforcement problem. The U.S. Marshals Service is charged with the responsibility of enforcing all court orders in the District of Columbia,[146] but the Marshals are appointed by the President and the U.S. Marshals Service is a bureau within the Department of Justice under the authority and direction of the Attorney General.[147] One can imagine the difficulty in persuading the Attorney General to deputize Marshalls for the purpose of punishing executive branch officials or forcing them to testify, which parallels similar enforcement problems with criminal contempt.

Thus, both criminal contempt and civil contempt have major enforceability problems against executive officials. Criminal contempt relies on enforcement from a U.S. Attorney who answers to the Attorney General, requiring the executive branch to prosecute itself—a process no administration has historically countenanced. Civil contempt can end up leading to the release of documents and testimony, but the process can be extremely time-consuming, force courts into an unnatural dispute resolution role on highly charged political matters and can eventually result in a contempt order that suffers from similar enforcement issues. For the time being, the basic legal status of civil contempt against executive officers also remains very much up in the air ahead of re-hearing in the McGhan case before the full D.C. Circuit. The Supreme Court also recently heard arguments regarding a lawsuit by the House of Representatives against private financial institutions in pursuit of President Trump's tax returns,[148] which may eventually yield a decision that could shape Congress's civil contempt power more generally.

III. A FINAL METHOD FOR ENFORCING CONGRESSIONAL SUBPOENAS: INHERENT CONTEMPT

There is one last method for the enforcement of congressional subpoenas: inherent contempt. There is a reason why inherent contempt has not been a familiar part of the congressional oversight dialogue. The power has not been utilized since 1935[149] and its processes can seem unseemly and crudely punitive. Inherent

145. *Id.*

146. *See* 28 U.S.C. § 566(a).

147. *See* 28 U.S.C. § 561(a).

148. *See* Robert Barnes & Ann E. Marimow, *Trump's bid to shield his tax returns and finances, broad claims of presidential immunity head to Supreme Court*, WA. PO. (May 11, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-trump-tax-returns-finances/2020/05/11/dd9bd598-92df-11ea-91d7-cf4423d47683_story.html [https://perma.cc/ZHV7-C566].

149. *See* Rosenburg, *supra* note 17, at 25 (citing 4 Deschler's Precedents of the U.S. House of Representatives, ch. 15 § 17, 139 n.7 (1977)).

contempt involves an individual who refuses to comply with a lawful subpoena being "brought before the House or Senate by the Sergeant at Arms, tried in the House or Senate chamber, and then can be imprisoned upon conviction."[150] The purpose of the punishment may be punitive[151] or coercive[152] for compliance purposes. As a result, "the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period until he or she agrees to comply[,]"[153] although this period cannot extend beyond the end of a session of Congress in the House.[154] Dr. William Murphy argues that Congress's ability to enforce its own subpoenas through inherent contempt provided a means for "defending . . . [Congress's] institutional authority by holding trials to convict and sanction individuals who obstruct the legislative process."[155] Inherent contempt also possesses a distinguishing characteristic: it is the one method of congressional subpoena enforcement that does not require the assistance of a separate branch of government.[156]

Although a fairly draconian form of recourse for non-compliance, inherent contempt has a strong basis in Supreme Court precedent and was a common method for enforcing congressional subpoenas in the 19th and early 20th centuries.[157] The first relevant case was *Anderson v. Dunn*[158] in 1821, which involved a Congressman who believed he had received a letter from John Anderson that he interpreted as a bribe.[159] Anderson was brought before the Speaker of the House and detained by the Sergeant at Arms, and he subsequently filed suit while in detention.[160] The Supreme Court heard the case and concluded that the Congress possessed the inherent authority to punish for contempt.[161] In explaining its reasoning, the Court determined that without an inherent contempt power, congressional oversight would not be taken seriously and would be "exposed to every

150. *Id*. at 24.

151. *See* Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935).

152. *See* McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

153. Rosenburg, *supra* note 17, at 24.

154. *Id*.

155. Murphy, *supra* note 48.

156. *See* Rosenburg, *supra* note 17, at 25 ("Unlike criminal and civil contempt proceedings, Congress's inherent contempt power may be used without the cooperation or assistance of either the executive or judicial branches.").

157. Legislative attorney Todd Garvey has pointed out that a statutory criminal contempt mechanism was not enacted until 1857, and civil enforcement did not occur until after Watergate. Thus, "for much of American history the House and Senate instead used what is known as the inherent contempt power to enforce their investigative powers." *See* TODD GARVEY, CONG. RES. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 12–13 (2019), https://fas.org/sgp/crs/misc/R45653.pdf [https://perma.cc/7KKJ-QR84] [hereinafter GARVEY, CONGRESSIONAL SUBPOENAS]. More specifically, "between 1795 and 1934 the House and Senate utilized the inherent contempt power over 85 times, in most instances to obtain (successfully) testimony and/or production of documents." ALISSA M. DOLAN ET. AL, *supra* note 3 at 33.

158. Anderson v. Dunn, 19 U.S. 204 (1821).

159. GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 97, at 6–7.

160. *Id*. at 7.

161. *Anderson*, 19 U.S. at 227–29.

indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[162] The decision did not define exactly what actions would constitute congressional grounds for inherent contempt, but the Court did indicate that it "centered on those actions committed in its presence that obstruct its deliberative proceedings."[163] The Court's stark warnings about the necessity of an inherent contempt power has led congressional scholar Todd Garvey to conclude that the Court essentially believed "such a power is necessary for Congress to protect itself."[164]

The Supreme Court further supported the idea of an inherent contempt power in *Kilbourne v. Thompson*,[165] though it narrowed the scope of its proper utilization. Congress was investigating the bankruptcy of Jay Cooke and Company, a real estate pool whose failure had led to financial losses for the United States government as a creditor.[166] Congress arrested a former executive of the company—Hallet Kilbourne—for his refusal to testify, answer any committee questions, or produce documents.[167] The Court reversed his conviction, finding:

> 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.[168]

The Court essentially believed Congress was prying into the finances of a private citizen rather than carrying out constitutionally appropriate oversight in an effort to develop legislation,[169] providing a limitation on the exercise of the inherent contempt power.[170]

In *McGrain v. Daugherty*, the Senate investigated the extensive bribery and corruption by the Warren G. Harding administration in leasing federal oil reserves in the Teapot Dome Scandal.[171] More specifically, Congress was inquiring into the alleged failure of the Attorney General to prosecute particular antitrust violations, and whether these decisions were influenced by corrupt favoritism.[172] In doing so, Congress issued a subpoena to Mally Daugherty, the brother of the Attorney General and the president of an Ohio bank.[173] When he failed to comply, Congress issued a warrant for Daugherty's arrest and he was

---

162. *Id*. at 228.
163. GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 99, at 7.
164. *See id*. at 7 (referencing *Anderson*, 19 U.S. at 204).
165. Kilbourn v. Thompson, 103 U.S. 168, 168 (1880).
166. *Id*. at 193.
167. Rosenburg, *supra* note 17, at 118; *Kilbourn*, 103 U.S. at 2.
168. *Kilbourn*, 103 U.S. at 189.
169. *Id*. at 189.
170. *See* GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 99, at 10.
171. *See* McGrain v. Daugherty, 273 U.S. 135 (1927).
172. *See id*. at 151–52.
173. *See id*. at 152.

eventually taken into custody by the Senate Sergeant at Arms in Ohio, where he filed a writ of habeas corpus.[174]

In its decision, the Supreme Court announced a strong constitutional basis for congressional oversight and the inherent contempt power. First, the Court held that the "power of inquiry [investigation]—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[175] Without the ability to investigate, Congress would essentially be institutionally incapable of acquiring the information legislating necessitates. Second, the Court recognized the necessity of the coercive power of contempt for securing such testimony, because "[e]xperience 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 what is needed."[176] While the Court recognized that such a power could potentially be abused, this possibility nonetheless "affords no ground for *denying* the [investigative] power [of Congress]."[177] Thus, the Supreme Court upheld the investigation and incarceration of Daugherty, because the inquiry "was one on which legislation could be had and would be materially aided by information which the investigation was calculated to elicit."[178]

The strength of the collective case law on inherent contempt has led Dr. William J. Murphy to conclude "the U.S. Supreme Court has ruled repeatedly and unequivocally that the authority to arrest, conduct trials of, and directly punish contemnors is inherent in the legislative power of Congress and is an essential institutional self-protective mechanism."[179] As unthinkable as it may seem today, there are two clearly documented cases where inherent contempt was utilized against high-level officials in the executive branch.[180] In 1879, the House of Representatives took the Minister to China, George F. Seward, into custody for contempt.[181] Seward's successor alleged in an affidavit to the committee that there were books that showed Seward had misappropriated large sums of money from the consulate, but Seward completely refused to provide the books or testify to their contents after he was arrested for inherent contempt of Congress.[182] Seward was eventually released from custody, however, because the Judiciary Committee decided Seward should not be compelled to incriminate himself when there were ongoing impeachment proceedings against him.[183] Although the case

174. *See id*. at 154.
175. *See id*. at 174.
176. *See id*. at 175.
177. McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (emphasis added).
178. *Id*. at 177.
179. Murphy, *supra* note 48.
180. *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHIC. L. REV. 1083, 1083 (2010).
181. *Id*. at 1135–36 (citing Marshall v. Gordon, 235 F. 422, 424–25 (S.D.N.Y. 1916)).
182. *Id*. (citing 8 CONG REC H. 1775 (Feb 22, 1879)).
183. *Id*. at 1136–37 (The Judiciary Committee's report is reprinted in Asher C. Hinds, 3 Hinds' Precedents of the House of Representatives of the United States § 1700 at 59–61 (GPO 1907)).

did not have a definitive conclusion, it is worth noting that the House of Representatives voted 105 to 47 to incarcerate an executive official for contempt of Congress.[184]

An even more fascinating case of inherent contempt against an executive official arose in 1915 against a federal office that is one of the most powerful in the country today: the United States Attorney for the Southern District of New York. The affair began when Congressman Frank Buchanan accused U.S. Attorney H. Snowden Marshall of impeachable offenses.[185] In retaliation, Marshall filed an antitrust lawsuit against Buchanan within two weeks.[186] Buchanan then introduced a resolution to investigate wrongdoing by Marshall, which was subsequently initiated in the Judiciary Committee.[187] A defamatory article was later published, accusing Congress of seeking to frustrate the grand jury proceedings in the antitrust case that had been filed.[188] The article—unsurprisingly—turned out to be written by Marshall, who admitted he was responsible for its charged and inflammatory contents.[189] The House responded by dispatching the Sergeant at Arms to arrest Marshall, the sitting U.S. Attorney in New York, for violating the House's "privileges, its honor, and its dignity."[190]

The Supreme Court eventually released Marshall from custody. In doing so, the Court "did not . . . consider whether the scope of the contempt power was different when applied to executive branch officials—it simply treated as given that the power extended to them."[191] The Court's decision was based in its belief that the contempt citation was the result of the defamatory statements in Marshall's letter to which the House took dignitary offense,[192] rather than from any obstruction of its legitimate oversight powers.[193] As remarkable as it may seem, "[n]either the House nor the Court seemed to have any doubt that the House could arrest and hold a federal prosecutor for actions which were truly within the scope of Congress's contempt power."[194]

Despite these precedents underpinning Congress's inherent contempt powers, as well as the obvious advantages for Congress in being able to act swiftly in enforcing its subpoenas without depending on the executive or judicial branches, there are valid reasons why the procedure has not been utilized in nearly a century. The most obvious reason is the perception that the process is "unseemly" in terms of the optics of Congress arresting a witness and having them marched out

184. *Id*. at 1136 (citing 8 CONG REC H. 2016 (Feb 27, 1879).
185. *See Gordon*, 235 F. at 425.
186. Chafetz, *supra* note 180, at 1137 (citing *Gordon*, 235 F. at 424–25).
187. *See Gordon*, 235 F. at 425.
188. Chafetz, *supra* note 180, at 1137 (citing Marshall v. Gordon, 243 U.S. 521, 532 (1917)).
189. *See id*.
190. *Id*. at 1138 (citing *Marshall*, 243 U.S. at 532).
191. *Id*.
192. *See id*. at 1138–39.
193. *See id*.
194. Chafetz, *supra* note 180, at 1139.

of a committee room in handcuffs. The political backlash for taking such a brutal step could be severe. Second, the resolutions and trial proceedings required in an inherent contempt action are time-consuming and cumbersome for a legislative body that is already stretched thin. Lastly, and perhaps most importantly, there are obvious limitations for utilizing inherent contempt against executive branch officials. Although it is true that two executive branch officials were arrested pursuant to contempt citations in the past, there are glaring problems with enforcement of inherent contempt against such officials today. As described earlier, the executive branch has become drastically more powerful in size and scope than at the time of these cases. Sending a House or Senate Sergeant at Arms to arrest an executive official today could lead to a dangerous standoff between respective security forces. In such a confrontation, especially outside of the geographic space of Congress, there is little doubt executive law enforcement officials would emerge victorious. This begs a key question: is there a way to utilize Congress's inherent contempt powers, with the strength of judicial precedence and unique lack of reliance on other branches of government for enforcement, in a manner other than physical incarceration of the official in question?

IV. UTILIZING CONGRESS'S INHERENT CONTEMPT POWERS TO FINE EXECUTIVE OFFICIALS FOR NON-COMPLIANCE WITH CONGRESSIONAL SUBPOENAS

A. LEGALITY

The unprecedented rejection of congressional oversight authority by the Trump administration has brought renewed attention to utilizing Congress's inherent contempt powers.[195] One avenue for enforcing congressional subpoenas through the inherent contempt power without relying on traditional detention is imposing financial penalties on the non-compliant individual. Using monetary fines against an executive official for inherent contempt would have several crucial advantages. First, such fines would not entirely rely on another branch of government for enforcement. Second, fines would be far more expeditious than civil contempt in the courts. They would place immediate pressure for compliance by executive officials while matters were litigated for resolution, while also avoiding the time-consuming nature of habeas petitions that are the consequence of actual physical detention.[196] Third, congressional contempt fines would rebalance congressional authority with executive power, by providing a tool for

195. *See* Zachary Basu, *Schiff considers fining Trump officials held in contempt $25,000 a day*, AXIOS (May 10, 2019), https://www.axios.com/adam-schiff-inherent-contempt-fines-trump-officials-4e1baae3-575c-4e9b-843b-e2bdd65baa4b.html [https://perma.cc/GGT3-PBUE] (House Intelligence Committee Chairman Adam Schiff has openly considered an inherent contempt scheme in public interviews that would fine executive officials $25,000 a day).

196. *See* GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 99, at 11.

Congress to deter presidential stonewalling. Such a new credible means of compulsion could incentivize compliance in oversight disputes.

Although fines through inherent contempt have never been employed before, there is a surprisingly strong legal basis for them in Supreme Court precedent. In *Anderson v. Dunn*, the Court considered the scope of Congress's inherent contempt powers in terms of the "extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation[.]"[197] The Court acknowledged the limits of the power as being "*fine* and imprisonment,"[198] meaning fines were *included* within the congressional enforcement power. Furthermore, the Court asserted that Congress and the courts have analogous powers to punish contempt with monetary fines. Although "the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts," they would still have this power "without the aid of the statute."[199] Similarly, the Court characterized the House's utilization of inherent contempt in that case as "a legislative assertion of this right."[200] *Kilbourne v. Thompson*[201] also mentions the possibility of congressional fines for inherent contempt, similarly analogizing the power to a Court's ability to compel testimony.[202] The Court wrote:

> Whether 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 . . . .[203]

Imposing a financial penalty on an executive branch official through inherent contempt today would inevitably trigger litigation, especially given the novelty of the legal question. Given the strong case law support and the even broader deference courts exercise when Congress is engaged in oversight (to say nothing of the body's sole power of impeachment), it appears such fines are on strong constitutional ground. Congressional scholar Mort Rosenburg, for example, believes our judiciary would allow such a process:

> Although most of the court decisions reviewing use of the inherent contempt power have involved incarceration, Congress, utilizing the House's internal rulemaking authority, would be able to impose monetary fines as an alternative to imprisonment that would automatically reduce the pay of the official held in contempt.[204]

---

197. Anderson v. Dunn, 19 U.S. 204, 230 (1821).
198. *Id*. at 228 (emphasis added).
199. *Id*. at 227.
200. *Id*.
201. 103 U.S. 168 (1880).
202. *See id*. at 190.
203. *Id*. at 190 (emphasis added).
204. Rosenburg, *supra* note 17, at 24.

A number of congressional experts have echoed this conclusion[205] and nonpartisan groups such as Good Government Now are openly calling for the implementation of such a process.[206] Furthermore, the courts could also consider Congress's exercise of its inherent contempt powers to be a "political question" and avoid involvement altogether. For example, the D.C. Circuit's recent decision foreclosing civil contempt through the courts also explicitly named Congress's contempt power as one of the "*political* tools [Congress can use] to bring the Executive Branch to heel."[207] Although the court is rehearing the case, the initial opinion concluded "Congress can wield these political weapons [such as contempt] without dragging judges into the fray"[208]—suggesting that if Congress modernized an inherent contempt process with fines, the courts may not involve themselves and simply let the fines stand.

B. INTERPLAY WITH PRIVILEGES

1. EXECUTIVE PRIVILEGE AND CONSTITUTIONAL CONSIDERATIONS

Another important legal question for a modernized inherent contempt procedure is what would happen if the subpoenaed official invoked a constitutional privilege. If, for example, a non-compliant subpoenaed official on the receiving end of a congressional fine claimed executive privilege, the courts would likely get involved. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[209] the D.C. Circuit built on the seminal holding by the Supreme Court in *United States v. Nixon*,[210] which first formally described the existence of an executive privilege that permits maintaining confidential executive branch communications from subpoenas in certain circumstances. The D.C. Circuit held that presidential communications were presumptively privileged but could be overcome by a sufficient showing of need from the requesting congressional

---

205. *See* GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 99, at 11 ("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."); Sophie Tatum, *What happens when a congressional subpoena is ignored in impeachment probe?*, ABC NEWS (Oct. 28, 2019), https://abcnews.go.com/Politics/congressional-subpoena-impeachment-probe/story?id=66586558 [https://perma.cc/9QQ5-EC7B] ("I think it [congressional fines] probably could be done pursuant to the Congress's inherent contempt power."); Kia Rahnama, *Can Congress Fine Federal Officials Under Its Contempt Power?*, LAWFARE (June 11, 2019), https://www.lawfareblog.com/can-congress-fine-federal-officials-under-its-contempt-power [https://perma.cc/3EMA-YDRM] ("The courts will have to provide a conclusive answer on its [fines through inherent contempt] propriety—but any thorough review of the history and legal precedent behind congressional investigations power in America, however, would suggest that Congress will prevail.").

206. *See* Murphy, *supra* note 48.

207. Comm. on the Judiciary v. McGahn, Civ. No.1:19-cv-02379, 13 (D.C. Cir. 2019) (emphasis added). "Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers." *Id*. (citing Chaffetz, supra note 180, at 1152–53).

208. *Id*.

209. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

210. 418 U.S. 683, 711–12 (1974).

committee.[211] Given that the congressional subpoena power is at its apex when the subject is "waste, fraud, abuse, or maladministration within a government department,"[212] it seems likely that a court would side with Congress in disputes that met these criteria and—by extension—demonstrated an appropriate showing of public need.

Judge Ketanji Brown Jackson, for example, recently decided in favor of the House of Representatives regarding a similar claim of 'absolute immunity' for the testimony of former White House Counsel Don McGhan.[213] On May 20, 2019, President Trump directed McGhan to defy a subpoena by the House Judiciary Committee to testify to his "connection with its investigation of Russia's interference into the 2016 presidential election and the Special Counsel's findings of fact concerning potential obstruction of justice by the President."[214] More specifically, the Department of Justice issued an opinion finding that "Congress may not constitutionally compel the former Counsel to testify about his official duties," and that "the same rationale applies equally to an exercise of inherent contempt powers."[215]

Judge Jackson forcefully rejected these arguments. Her decision had three core determinations: (1) "federal courts have the power to adjudicate subpoena related disputes between Congress and the executive branch";[216] (2) "House committees have the power to enforce their subpoenas in federal court when executive branch officials do not respond as required";[217] and (3) "the president does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity."[218] Expounding on point number three, Judge Jackson held that if "Congress issues a valid legislative subpoena to a current or former senior-level presidential aide, the law requires the aide to appear as directed, and assert executive privilege as appropriate."[219] What such an official could not do, however, was simply refuse to testify altogether under the absolute immunity doctrine.[220]

Although the district court's opinion focused on rejecting the "absolute immunity" claimed by the Trump administration, the decision suggested if an official invoked executive privilege when they appeared for testimony, the judiciary

211. Senate Select Comm. on Presidential Campaign Activities, 498 F.2d at 730.

212. ALISSA M. DOLAN ET. AL, *supra* note 3, at 23 (*citing* Watkins v. United States, 354 U.S. 178, 187 (1957)).

213. Comm. on the Judiciary v. McGhan, 415 F. Supp. 3d 148, 214–15 (D.D.C. 2019).

214. *Id*. at 153.

215. TESTIMONIAL IMMUNITY BEFORE CONGRESS OF THE FORMER COUNSEL TO THE PRESIDENT, OP. O.L.C. 1–21 (2019).

216. Comm. on the Judiciary v. McGhan, 415 F. Supp. 3d 148, 174 (D.D.C. 2019).

217. *Id*. at 187.

218. *Id*. at 199.

219. *Id*.

220. *Id*. at 200, 209 ("it appears that absolute testimonial immunity serves only the indefensible purpose of blocking testimony about *non*-protected subjects that are relevant to a congressional investigation and that such an aide would otherwise have a legal duty to disclose").

could assess whether the privilege should apply.[221] For example, Judge Jackson cited the reasoning from *Miers* that the "Judiciary is the ultimate arbiter when it comes to claims of executive privilege."[222] Furthermore, she noted the limitations on the privilege described in *Miers*: "executive privilege is not absolute even when Congress—rather than a grand jury—is the party."[223] Rather, the privilege has limits and can be overcome with a sufficient showing of need and the inability to obtain the information elsewhere.[224] Judge Jackson's holding in this case suggests that even if an executive official claimed executive privilege, a federal court would similarly side with Congress if there was a sufficient showing of need and the subpoena had a valid legislative or institutional purpose.

On the other hand, the decision for the appeal of this case before the D.C. Circuit sent much more mixed messages on executive privilege and congressional subpoenas. Although the court technically did not reach the merits of Mr. McGhan's absolute immunity claim, the three judges who heard the case signaled different approaches for claims of executive privilege in response to congressional subpoenas. Judge Griffith, for example, made the case that courts should not be involved at all in enforcing congressional subpoenas.[225] He pointed out that invocations of executive privilege by an official being ordered by a court to testify before Congress would lead "Congress's lawyers to make the trip [right back to court] often."[226] Griffith believed this dynamic would unacceptably entangle the courts within inter-branch disputes.[227] Since he did not believe federal courts should have jurisdiction in civil contempt cases, Judge Griffith had no need to explicate a standard for how invocations of executive privilege should be handled in such cases.

Judge Henderson ultimately concurred in the judgment that Congress lacked standing for its lawsuit but was much more critical of the government's claims of absolute immunity. According to Henderson, "[a]bsolute immunity, which provides more expansive protection than executive privilege, is nonetheless predicated on substantially the same rationales."[228] In McGhan's case, Henderson noted that his "claimed immunity rests on somewhat shaky legal ground,"[229] and that a "qualified executive privilege would seem . . . the most appropriate mechanism to govern a dispute like the one now before us."[230] So unlike Judge Griffith,

---

221. *See id*. at 161–162.

222. *McGhan*, 415 F. Supp. 3d at 161 (citing Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 96 (D.D.C. 2008).

223. *Id*. (citing *Miers*, 558 F. Supp. 2d at 96).

224. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974).

225. Comm. on the Judiciary v. McGhan, Civ. No.1:19-cv-02379, 2 (D.C. Cir. 2019).

226. *Id*. at 12.

227. *See id*. at 11.

228. *Id*. at 12 (J. Henderson, concurring).

229. *Id*.

230. *Id*. at 16.

Judge Henderson did not take the administration's expansive claims of absolute immunity when facing a congressional subpoena at face value—expressing significant skepticism instead.

Henderson was even more dubious about claims of executive privilege in the context of an impeachment inquiry. She cited historical evidence indicating early Presidents recognized that there would be extreme limitations on their ability to withhold information in an impeachment inquiry. [231] For example, she noted that President James K. Polk acknowledged "the power of the House, in the pursuit of this object [in an impeachment], would penetrate into the most secret recesses of the Executive Departments. . . . It could command the attendance of any and every agent of the Government, and compel them . . . to testify on oath to all facts within their knowledge."[232] Henderson concluded that this limited view of executive privilege stood in stark contradiction with the expansive immunity asserted by the Trump administration.[233] Furthermore, she expressed concern that "a categorical refusal to participate in congressional inquiries strikes a resounding blow to the system of compromise and accommodation that has governed these fights since the republic began."[234] Because the appeals court dismissed the suit based on lack of standing and executive privilege had not actually been invoked, however, Judge Henderson found that "the applicability of specific privileges in this case is not yet susceptible to judicial resolution."[235]

Judge Rogers disagreed forcefully with the majority in dissent. In addition to fundamentally rejecting the majority's finding that the House lacked standing for its lawsuit, Rogers deconstructed the majority's arguments on Congress's alternative remedies and their relationship with executive privilege. For example, Rogers argued that the majority's argument that Congress can utilize other contempt processes to enforce its subpoenas was flawed.[236] She highlighted that an OLC memoranda made "clear that the Department of Justice understands itself not to be required to prosecute an Executive Branch official who has declined, on the basis of Executive privilege"[237] and has never pursued such a course as a practical reality. Thus, criminal contempt is an unavailing method for enforcing a congressional subpoena against an executive officer, and even more so when executive privilege is invoked.

Interestingly, Judge Rogers briefly analyzed Congress's inherent contempt power as an avenue for enforcement. She noted that the Department of Justice

231. *Id*. at 17–18.

232. Comm. on the Judiciary v. Donald F. McGhan II, Civ. No.1:19-cv-02379, 18 (D.C. Cir. 2019). (J. Henderson, concurring) (citing Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1561 (1907)).

233. *Id*.

234. *Id*. at 20.

235. *Id*. at 19.

236. *Id*. at 13 (J. Rogers, dissenting).

237. *Id*. at 13.

treats inherent contempt enforcement against an executive official as similarly constitutionally unacceptable as a criminal contempt citation, and that such a situation seemed very unlikely and impracticable.[238] Nonetheless, her conclusion had an important caveat: "the prospect that the House will direct its Sergeant at Arms to arrest McGahn is vanishingly slim, *so long as a more peaceable judicial alternative remains available*."[239] This line of reasoning seemed to imply that the inability to enforce subpoenas in the courts would likely push Congress to other more severe methods, such as inherent contempt. Citing the concurring opinion, Judge Rogers ultimately concluded that Mr. McGahn would be "unlikely to prevail"[240] should his absolute immunity claim be considered on the merits.

The D.C. Circuit may have only been considering jurisdiction in *Committee on the Judiciary v. Donald F. McGhan II*, but it provided decidedly mixed signals on the interplay of congressional subpoenas, executive privilege, and inherent contempt. The Judiciary Committee recently wrote a letter explaining that the D.C. Circuit's decision "would leave Congress with little choice but to exercise extreme options—such as arresting 'current and former high-level' officials to get answers to its subpoenas."[241] Now that the D.C. Circuit has agreed to rehear the case, it is an open question what approach the court will take—and whether it will be closest to that espoused by Judge Griffith, Judge Henderson, or Judge Rogers. Judge Griffith's approach outright rejected judicial enforcement of congressional subpoenas, while signaling limited skepticism of claims of executive "absolute immunity."[242] Judge Henderson's approach suggests that Congress did not possess standing to sue in court, but was very critical of the administration's claims absolute testimonial immunity.[243] Judge Rogers believed Congress did possess standing to sue in federal court to enforce the body's subpoenas, and was also highly critical of President Trump's claims of absolute immunity for those who have worked for him.[244] Which of these approaches the D.C. Circuit, or even the Supreme Court, takes in rehearing the case will provide clarity on (1) whether Congress has the ability to enforce its subpoenas in court and (2) how such an ability would interact with constitutional privileges invoked by executive officials.

Ultimately the question of what would happen if Congress used a novel operation of its inherent contempt powers to fine an executive official—who then invoked executive privilege—is one an American court has never faced. In such

238. *Id*. at 14.

239. *Id*. (emphasis added).

240. *Id*. at 31.

241. Kyle Cheny, *Judiciary Committee says McGahn ruling leaves only extreme options — such as arrests — to get White House info*, POLITICO (Apr. 6, 2020), https://www.politico.com/news/2020/03/06/don-mcghan-testimony-ruling-122808?cid=apn [https://perma.cc/76D2-5BFH].

242. *See* Comm. on the Judiciary v. Donald F. McGhan II, Civ. No.1:19-cv-02379, 1-37 (D.C. Cir. 2019).

243. *Id*. at 1–20 (J. Henderson, concurring).

244. *Id*. at 1–31 (J. Rogers, dissenting).

circumstances, the judiciary would likely not have the luxury of dismissing the matter because executive privilege is constitutionally based. The court would likely then need to assess the invocation on the merits, similarly to how the Supreme Court weighed various institutional interests in *U.S. v. Nixon*. Todd Garvey, for example, believes such a decision would be governed by "a fact-based balancing of interests—weighing Congress's legislative or oversight need for the information against the Executive's need to maintain confidentiality in the specific instance."[245] If the court found in favor of the executive branch, it would presumably order Congress to end the fine and return any principal collected. Such a decision could draw on the District Court for the District of Columbia's 2016 decision that the deliberative process privilege was a legitimate prong of executive privilege, which could be validly asserted in response to a congressional subpoena to shield records as long as they were deliberative and pre-decisional.[246] If the court found in favor of Congress, the fine would presumably stand.

As mentioned earlier, it is possible a court would also weigh in on the constitutionality of the actual procedure of fines through inherent contempt itself. It appears likely, however, that the case law precedent for inherent contempt, and the explicit mentioning of fines by the Supreme Court, would weigh in favor of its constitutionality. A court could also simply follow the example of the initial holding of the D.C. Circuit and demur on its legal status as a political question. In either case, the procedure itself would survive judicial scrutiny. On the other hand, "the lack of any precedent for such an [actual] *assertion* of power may inform a court's judgment on the appropriate reach of Congress's power,"[247] which could feed skepticism for a reviewing court given the novelty of financial penalties through inherent contempt.

2. ATTORNEY-CLIENT PRIVILEGE AND LEGAL ETHICS CONSIDERATIONS

An additional privilege that has become newly relevant to the defiance of congressional subpoenas is the attorney-client privilege. President Trump's personal attorney, Rudolph Giuliani, was subpoenaed by the House of Representatives as part of its impeachment inquiry regarding the administration's actions regarding Ukraine.[248] Mr. Giuliani played a central role in this conduct investigated by the House Intelligence Committee.[249] In its subpoena to him, for example, the

245. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 157, at 33.

246. *See* Comm. on Oversight and Government Reform v. Lynch, 156 F. Supp. 3d 101, 110 (D.D.C. 2016).

247. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 157, at 36.

248. *See* Dan Mangan & Brian Shwartz, *Rudy Giuliani defies congressional subpoena in Trump impeachment probe*, CNBC (Oct. 15, 2019), https://www.cnbc.com/2019/10/15/rudy-giuliani-to-defy-congressional-subpoena-in-trump-impeachment.html [https://perma.cc/T52C-HJAA].

249. *See generally* Viola Gienger & Ryan Goodman, *Timeline: Trump, Giuliani, Biden, and Ukrainegate (updated)*, JUST SECURITY (Jan. 2, 2020), https://www.justsecurity.org/66271/timeline-trump-giuliani-bidens-and-ukrainegate/ [https://perma.cc/CDL7-ALEU] (documenting Mr. Giuliani's numerous contacts with Ukraine and his role in the scheme that would eventually be the focus of the impeachment inquiry).

committee stated: "[o]ur inquiry includes an investigation of credible allegations that you acted as an agent of the President in a scheme to advance his personal political interests by abusing the power of the Office of the President."[250] Nonetheless, Giuliani refused to comply with the subpoena, citing a variety of rationales that included an argument from his attorneys that the "documents sought in the subpoena are protected by attorney-client, attorney work-product, and executive privileges."[251] Thus, this case raises questions regarding the interplay of congressional subpoenas, inherent contempt, and common law privileges such as the attorney-client privilege. By assessing the issues involved in this case, we can better understand their application in an inherent contempt fine scheme.

The attorney-client privilege is not a constitutional privilege, but rather a "judge-made exception to the normal principle of full disclosure in the adversary process that is to be narrowly construed and has been confined to the judicial forum."[252] For the privilege to apply, "the person claiming the privilege must establish: (1) a communication, (2) made in confidence, (3) to an attorney, (4) by a client, and (5) for the purpose of seeking or obtaining legal advice."[253] Congressional expert Mort Rosenburg has asserted that recognition of privileges not based in the Constitution are a "matter of congressional discretion,"[254] because of the legislature's "inherent constitutional authority to investigate and the constitutional authority of each chamber to determine the rules of its proceedings."[255] As a judicial matter, the Supreme Court has not necessarily found the attorney-client privilege inapplicable in congressional proceedings,[256] but a D.C. Bar opinion provides some legal clarity.[257]

In its opinion, the Ethics Committee recommended that an attorney facing a congressional subpoena that would require breaking a client's confidence take all possible measures to quash or limit the subpoena.[258] If he or she is facing legal jeopardy from a contempt citation, however, the lawyer is "permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents."[259] Thus, a lawyer can produce documents that could reveal client confidences if facing a congressional contempt citation without running afoul of legal ethics.

---

250. Subpoena from the Permanent Select Committee on Intelligence to Rudolph Giuliani (Sept. 30, 2019).

251. Letter from John A. Sale, Counsel for Rudolph Giuliani, to John Mitchell, Investigation Counsel for the Permanent Select Comm. on Intelligence (Oct. 15, 2019).

252. ALISSA M. DOLAN ET. AL, *supra* note 3, at 46 (citing Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991)).

253. Rosenburg, *supra* note 17, at 65; United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

254. *See* ALISSA M. DOLAN ET. AL, *supra* note 3, at 47.

255. Rosenburg, *supra* note 17, at 66 (citing U.S. Const., art. I, § 5, cl. 2).

256. *See* ALISSA M. DOLAN ET. AL, *supra* note 3, at 47 (citing Hannah v. Larche, 363 U.S. 420, 425 (1960)).

257. *See* D.C. Legal Ethics Comm., Op. No. 288 (1999), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion288.cfm [https://perma.cc/U2TN-ZQ95] [hereinafter Op. No. 288].

258. *Id.*

259. *Id.*

Mort Rosenburg believes this opinion's conclusion reinforces the principle that it is "the congressional committee alone that determines whether to accept a claim of attorney-client privilege."[260] The ball is essentially in Congress's court, and if they hold a lawyer in contempt he can disclose information without legal ethics consequences. In actually exercising this discretion regarding an invocation of attorney client privilege, a congressional committee is likely to weigh several factors including: "the legislative need for disclosure against any possible resulting injury";[261] "the strength of the claimant's assertion";[262] the "practical unavailability of the relevant documents or information from other sources";[263] and the "committee's assessment of the witness's cooperation."[264]

With these principles in mind, there are several reasons the attorney-client privilege would be (1) inapplicable regarding Rudy Giuliani's subpoenaed testimony by Congress and (2) not violate principles of legal ethics. First, there does not appear to be any indication that Giuliani was acting in his capacity as a lawyer providing confidential legal advice when he reached out to foreign governments for compromising information on Vice President Joe Biden.[265] In fact, Mr. Giuliani himself stated "I'm not acting as a lawyer"[266] in regards to his activities in Ukraine, and that he is not compensated for his work.[267] Thus, such communications would be, by definition, outside the scope of the attorney-client privilege because Mr. Giuliani was—literally—not acting as an attorney.

Furthermore, there is no evidence the subpoenaed communications of Mr. Giuliani were for the purpose of seeking or obtaining legal advice, as required by the privilege. Mr. Giuliani stated that information from an investigation into the Bidens could provide "information [that] will be very, very helpful to my client."[268] Given that there is no litigation between President Trump and the Bidens, it is hard to discern any way this information could be "helpful" other than for

---

260. GARVEY, CONGRESS'S CONTEMPT POWER, *supra* note 99, at 63.

261. ALISSA M. DOLAN ET. AL, *supra* note 3, at 46 (citing HOUSE COMM. ON ENERGY & COMMERCE, SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, ATTORNEY-CLIENT PRIVILEGE: MEMORANDA OPINIONS OF THE AMERICAN LAW DIVISION, LIBRARY OF CONGRESS, COMM. PRINT 98-I, 98TH CONG. (1983)).

262. *Id*.

263. *Id*. at 47.

264. *Id*.

265. *See* Ed Pilkington, *Rudy Giuliani's quest for dirt on Biden via Ukraine – a timeline*, THE GUARDIAN (Sept. 21. 2019), https://www.theguardian.com/us-news/2019/sep/21/timeline-rudy-giuliani-ukraine-biden-trump [https://perma.cc/QJX8-3Y3B].

266. Elaina Plott, *Rudy Giuliani: 'You Should Be Happy for Your Country That I Uncovered This'*, THE ATLANTIC (Sept. 26, 2019), https://www.theatlantic.com/politics/archive/2019/09/giuliani-ukraine-trump-biden/598879/ [https://perma.cc/8MV5-5EW8].

267. Rosalind S. Helderman et. al, *Impeachment inquiry puts new focus on Giuliani's work for prominent figures in Ukraine*, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/politics/impeachment-inquiry-puts-new-focus-on-giulianis-work-for-prominent-figures-in-ukraine/2019/10/01/b3c6d08c-e089-11e9-be96-6adb81821e90_story.html [https://perma.cc/9XFY-AWER].

268. Kenneth P. Vogel, *Rudy Giuliani Plans Ukraine Trip to Push for Inquiries That Could Help Trump*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/us/politics/giuliani-ukraine-trump.html [https://perma.cc/9M29-8L8R].

President Trump's personal political gain—given that Mr. Biden is running against President Trump in the 2020 election. In his opinion on a citizenship question by the U.S. Census, Chief Justice Roberts rejected the Trump administration's stated rationale as a contrived pretext, stating that "[the court is] not required to exhibit a naiveté from which ordinary citizens are free."[269] Similarly here, we are not required to blind ourselves to the obvious takeaway that Mr. Giuliani's actions on behalf of President Trump were what Dr. Fiona Hill described in her testimony in the impeachment inquiry as a "domestic political errand"[270] rather than legitimate legal work. Such activities are not within the scope of the attorney-client privilege.

There are other reasons Mr. Giuliani's subpoenaed testimony would not be covered by attorney-client privilege as well. Even if we assumed Giuliani's testimony included communications that could be privileged, recognizing common law privileges is within Congress's discretion and is not a bar to disclosure. Congressional scholar John E. Bies has also noted that attorney-client privilege in Giuliani's case would be waived under the third-party-waiver doctrine because of the large number of people (and members of the press) to which he has revealed his efforts.[271] Mr. Bies has further asserted that the crime-fraud exception to the attorney-client privilege could also be applicable, given the dubious legality of Mr. Giuliani's actions abroad.[272] For example, reporting indicates that Mr. Giuliani is currently under investigation by the U.S. Attorney's Office for the Southern District of New York (SDNY).[273] More specifically, subpoenas by SDNY "reveal that prosecutors are looking into Giuliani's business and finances, that they're exploring his contacts with former top Ukrainian officials, and that they're investigating a host of potential crimes."[274]

Since Mr. Giuliani was not acting as a lawyer, engaging in legal work, and his activities may even fall within an exception to the attorney-client privilege, the D.C. Bar Ethics Committee's opinion that a lawyer has a "professional responsibility to seek to quash or limit the subpoena on all available legitimate grounds to protect confidential documents client secrets"[275] would be inapplicable. Furthermore, the D.C. Bar made clear that if Congress "threatens to hold the

---

269. Department of Commerce v. New York, 139 S. Ct. 2551, 2575 (2019) (citing United States v. Stanchich, 550 F.2d 1294, 1300 (1977)).

270. Eric Tucker et. al, *Impeachment hearing takeaways: A 'domestic political errand'*, AP (Nov. 21, 2019), https://apnews.com/e9fbfb19610b47ad90cee5271dec3660 [https://perma.cc/Z9JX-D9DQ].

271. *See* John E. Bies, *Giuliani Cannot Rely on Attorney-Client Privilege to Avoid Congressional Testimony*, LAWFARE (Sept. 30, 2019), https://www.lawfareblog.com/giuliani-cannot-rely-attorney-client-privilege-avoid-congressional-testimony [https://perma.cc/V7X7-BUY9].

272. *See id.*

273. *See* Andrew Prokop, *The latest news about SDNY's investigation into Rudy Giuliani, explained*, VOX (Nov. 26, 2019), https://www.vox.com/2019/11/26/20982629/rudy-giuliani-investigation-sdny-ukraine [https://perma.cc/SSV8-GHQ4].

274. *Id.*

275. Op. No. 288, *supra* note 257.

lawyer in contempt absent compliance with the subpoena," the lawyer is permitted to produce the subpoenaed documents.[276] Thus, even if Mr. Giuliani's testimony included communications that could be privileged, he would not be running afoul of legal ethics by producing them if he faced a contempt citation.[277] In fact, producing the subpoenaed documents by the Congress—rather than withholding them through attorney-client privilege—would vindicate the *Model Rules of Professional Conduct*'s exposition of lawyer's responsibilities for using "the law's procedures only for legitimate purposes and not to harass or intimidate others"[278] and "further[ing] . . . confidence in the rule of law."[279]

In summary, compelling Mr. Giuliani's testimony before Congress with a subpoena utilizing fines through inherent contempt does not pose a problem for legal ethics in regard to the interplay of compelled disclosure and the attorney-client privilege. On the contrary, holding Mr. Giuliani accountable for providing testimony would strengthen "the public's . . . confidence in . . . the justice system"[280] by ensuring there is a penalty for defying congressional subpoenas without a legitimate basis. Thus, this case not only illustrates the interplay of attorney-client privilege and contempt of Congress, but also indicates that this privilege would not be applicable for a highly relevant fact witness in a current congressional investigation.

C. OPERATION OF FINES THROUGH INHERENT CONTEMPT

As previously described, there is a strong legal basis for fines of executive officials for non-compliance with congressional subpoenas through inherent contempt. The more challenging question is how such a procedure would be operationalized. Several different proposals have been advanced, with the most thorough advanced by Dr. William J. Murphy at Good Government Now.[281] Dr. Murphy proposes a process centered on select committees in Congress to streamline the contempt process and address the issues that plagued full blown congressional trials in the past.[282]

Dr. Murphy suggests that after an "appropriate period of investigation, negotiation and attempted accommodation,"[283] a congressional committee prepare a report outlining why an executive official's non-compliance in an investigation

276. *Id*.

277. Such an action would not only be in line with the opinion by the D.C. Ethics Bar, but also the *Model Rules of Professional Conduct*, which provide that "a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary. . . to comply with other law or a court order." MODEL RULES OF PROF'L CONDUCT R. 1.6. (2018) [hereinafter MODEL RULES].

278. MODEL RULES pmbl. [5].

279. MODEL RULES pmbl. [6].

280. MODEL RULES pmbl. [6].

281. *See* Murphy, *supra* note 48.

282. *Id*.

283. *Id*.

constitutes contempt of Congress.[284] The committee chair would then request the formation of a select committee from the Speaker of the House to investigate further, with three members of the majority and two members of the minority.[285] The select committee would then further investigate whether inherent contempt is warranted with the assistance of House Counsel, preparing a comprehensive report for the full House and a determination of whether to impose congressional fines.[286] An expeditious summary floor trial would then commence, with a majority vote securing the following enforcement scheme: "$25,000 minimum initial fine, increased in $25,000 increments daily until the contempt is purged or the maximum penalty of $250,000 is reached after 10 days; amount of fine depends on timeliness of compliance."[287] In the event of continuing non-compliance, Murphy recommends a congressional enforcement of criminal contempt by a private attorney appointed by the House.[288]

The question of how to impose the fines themselves is the trickiest part of the analysis. In the judicial context, fines for contempt of court are paid to the U.S. Marshals, who can also seize property or act on a writ of garnishment from the court to "seize either money from the individual's bank or wages from the individual's employer."[289] Thus, the most direct and analogous method of enforcement of congressional fines through the legislature would involve Congress ordering the Sergeant at Arms to seize the offending official's wages or assets from their bank, issuing some type of formal document similar to a writ served by the Marshal from a Court.[290] Such an enforcement process would likely require a budgetary increase for the Office of the Sergeant at Arms, which could be challenging since this would require passage in both chambers. Congress also does not have its own capacity to locate individual's bank information, and it is an open question if a bank would comply with such a directive from the Sergeant at Arms.[291]

Congressional scholar Todd Garvey has echoed a similar proposal to Dr. Murphy's criminal contempt framework, which would require Congress passing a law for the appointment of an independent official to enforce violations of the criminal contempt statute.[292] Such a statute would be modeled on the Independent Counsel Act of 1978[293] that was upheld by the Supreme Court in *Morrison v. Olson*.[294] The law would create an office with an independent

284. *Id.*
285. *Id.*
286. *Id.*
287. *See id.*
288. *See id.*
289. *See* Wanglin, *supra* note 89, at 470.
290. *Id.* at 471.
291. *See id.*
292. *See* GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 157, at 36–39.
293. 28 U.S.C. §§ 591–99. The independent counsel provisions expired in 1999. 28 U.S.C. § 599.
294. 487 U.S. 654, 660 (1988).

prosecutor that "would arguably not be subject to the same 'subtle and direct' political pressure and controls that a traditional U.S. Attorney may face"[295] regarding the criminal contempt statutes. Such an alternative enforcement scheme would similarly impose consequential sanctions for non-compliance with a congressional subpoena, and provide the body a means of compulsion and basis for independent action.

If Congress was able to pass a kind of revised independent counsel statute to enforce criminal contempt citations (and potentially serve as a back-up in the case of continuing non-compliance after the imposition of fines through inherent contempt), the actual enforcement end of the equation would hypothetically be more straightforward. The independent prosecutor would have the same powers and discretion as any other U.S. Attorney. Such a statute, however, is unlikely to be signed into law given the current Congress and President. In addition, the new composition of the Supreme Court has also evinced skepticism of the *Morrison* decision and has proven to be more protective of executive power, although the more limited jurisdiction (solely contempt of Congress) of this proposed independent counsel statute could alleviate some of these concerns.[296]

Constitutional lawyer Kia Rahnama has identified several other methods of enforcement for congressional fines.[297] The first is utilizing the Debt Collection Improvement Act (DCIA),[298] which established "an administrative process for garnishing the salaries of federal officials found to be indebted to the U.S. government."[299] The DCIA defines non-tax debt to the government to include "[a]ny fines or penalties assessed by an agency."[300] The law further defines agencies as including all executive, judicial, and legislative departments or agencies[301]—meaning a fine from Congress could fall under the act. Congress has the power to levy fines against its own members to recoup the costs of an ethics investigation,[302] and Rahnama suggests "Congress could follow that model here and impose a fine commensurate with the additional cost imposed on the committees

295. GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 157, at 36.

296. *See id*. at 38–39.

297. *See* Rahnama, *supra* note 205.

298. 31 U.S.C. 3716(c)(6).

299. Rahnama, *supra* note 205.

300. *Frequently Asked Questions About Debt Collection Improvement Act*, Bureau of the Fiscal Service (Mar. 26, 2019), https://fiscal.treasury.gov/dms/faqs/faq-about-dcia.html [https://perma.cc/AK3D-WU8D].

301. *See* Rahnama, *supra* note 205 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, DEBT COLLECTION IMPROVEMENT ACT OF 1996: STATUS OF SELECTED AGENCIES' IMPLEMENTATION OF ADMINISTRATIVE WAGE GARNISHMENT, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES 4 (2002), https://www.gao.gov/assets/240/233765.pdf [https://perma.cc/NZ3B-XHSA]).

302. *See* JACK MASKELL, CONG. RES. SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES, 13–15 (2016), https://fas.org/sgp/crs/misc/RL31382.pdf [https://perma.cc/FUW4-V6YA] (citing H. Rept. 105-1, at 3 (1997), In the Matter of Representative Newt Gingrich).

as a result of stonewalling by the federal officials."[303] Thus, when executive non-compliance with a subpoena costs Congress time and resources, the body could fine the official to recoup the costs of the obstruction on their investigation. A writ of garnishment from Congress against an executive branch employee could also find support from the Government Accountability Office, which has stated that government agencies failing to withhold the salary of an official facing such a fine, or paying the fine themselves out of their budget, can face legal consequences.[304] It is unclear whether this approach could succeed without some level of compliance from the Treasury Secretary, however, and there appear to be caps on the extent of any imposed "debt" through this process.[305]

Rahnama also suggests Congress could utilize Section 713 of the Financial Services and General Government Appropriations Act,[306] an appropriation provision that has been included in the annual budget act since 1998.[307] Section 713 "prohibits the use of appropriated funds to pay the salary of any federal official who prohibits or prevents other federal employees from communicating with Congress"[308] and is enforced by the Government Accountability Office (GAO).[309] GAO is a legislative agency with deep institutional ties to Congress, and it has reviewed violations of Section 713 in the past simply from requests by Congress—getting around the consistent issues of depending on internal investigation within the executive branch.[310] Once an investigation is requested by lawmakers, the GAO reviews whether administration officials have blocked communication by federal employees with Congress and delivers a legal opinion.[311] Representative Mark Pocan, for example recently cited this provision in a letter to Secretary of State Mike Pompeo, asserting that Section 713 necessitates withholding the Secretary's salary for preventing the testimony of state department employees in the impeachment inquiry.[312] A challenge for this provision is that the agency of the employee in question ultimately requests repayment from the offending employee, and could theoretically refuse to implement the GAO determination.

---

303. Rahnama, *supra* note 205.

304. *See* B-188654, MAY 6, 1977, 56 COMP.GEN. 592, Government Accountability Office, https://www.gao.gov/products/426090#mt=e-report. [https://perma.cc/2BQ7-KMRN].

305. *See* 15 U.S. Code § 1673. Restriction on garnishment.

306. *See* H.R. 3351, 116th Cong. (2019-2020). Section 713 has been included as a provision of this larger spending bill that is regularly introduced to fund numerous agencies in the federal government.

307. Rahnama, *supra* note 205.

308. *Id*.

309. *Id*.

310. See *id*.

311. *See* Jennifer Shutt, *Democrats could tie paychecks to testimony in impeachment inquiry*, ROLL CALL (Oct. 22, 2019), https://www.rollcall.com/news/congress/democrats-could-tie-paychecks-to-testimony-in-impeachment-inquiry [https://perma.cc/UJB9-7A96].

312. *See* Julie Grace Brufke, *Top progressive calls for Pompeo's salary to be withheld over Sondland's blocked testimony*, THE HILL (Oct. 8, 2019), https://thehill.com/homenews/house/464918-top-progressive-calls-for-pompeos-salary-to-be-withheld-over-sondlands-blocked [https://perma.cc/3M82-6TS7].

Congress could also establish a more general "contingent contempt framework in which either house's approval of a contempt citation against an executive branch official automatically results in some other consequence to either the individual official who is the subject of the contempt citation or the official's agency."[313] For example, such a law could withhold a percentage of an official agency's appropriated funds until an outstanding subpoena is complied with, reflecting Congress's power of the purse. Such a scheme could face constitutional challenges based on the principles of *INS v. Chadha* that forcing agency action based on a determination by one house of Congress violates the requirements of presentment and bicameralism.[314] It could also be challenged for providing Congress "impermissible control over the execution of any law that ties budgetary reductions to the approval of a contempt resolution" under *Bowsher v. Snyar*,[315] or for burdening the President's ability to assert executive privilege.[316] A contingent contempt framework could address concerns regarding bi-cameralism by utilizing a joint resolution from both houses of Congress, but this approach would be subject to presidential veto. As an alternative, either the House or the Senate could also revise their own procedural rules in order to "limit consideration of any legislative measure that would fully fund either the salary of the official held in contempt or the office in which the official works."[317] Procedural rules can be internally changed within one house of Congress, so either the House or the Senate could engage in this process independently.

A last promising avenue for enforcing congressional subpoenas could be a newly developed appropriation rider in a spending bill that prohibits any official held in contempt of Congress from hiring outside counsel using taxpayer funding. The GAO has indicated that government agencies often utilize outside counsel,[318] and it is possible executive officials held in contempt of congress could be hiring law firms to provide legal services using public funding. As a result, an appropriation rider in a spending bill by Congress that explicitly prohibits this practice could effectively get to the same destination as direct fines, by forcing executive officials held in contempt to only use external or personal funding for such legal expenses. Restricting government officials facing adverse proceedings from hiring outside counsel finds support from the DOJ Office of Legal Counsel,[319] and could raise fewer constitutional issues than contingent contempt legislation.

---

313. *See* GARVEY, CONGRESSIONAL SUBPOENAS, *supra* note 157, at 39–44 (citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–72 (2002)).

314. *See id.* at 40–41 (citing INS v. Chadha, 462 U.S. 919, 952 (1983)).

315. *Id.* at 42 (citing Bowsher v. Snyar, 478 U.S. 714 (1986)).

316. *Id.* at 43.

317. *Id.* at 44 (citing H.R. Rep. No. 114-848, at 401).

318. *See generally* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, CHAPTER 3 - AVAILABILITY OF APPROPRIATIONS, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE - OFFICE OF THE GENERAL COUNSEL (4th Ed., 2017), 112-26, https://www.gao.gov/assets/690/687162.pdf [https://perma.cc/X3R7-Z5EJ].

319. *See* MEMORANDUM TO DEPUTY ATTORNEY GENERAL GEORGE SCHMULTS FROM ASSISTANT ATTORNEY GENERAL OLSON, OFFICE OF LEGAL COUNSEL (May 20, 1983), https://www.justice.gov/olc/file/626866/

CONCLUSION

The Supreme Court predicted that without a method of coercion for its oversight powers, Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[320] This eventuality has come to fruition in the Trump administration. In the face of historic intransigence to congressional oversight and the flat rejection of its impeachment powers, Congress must seriously consider all available options for enforcing congressional subpoenas. The Article I branch's basic authority is on the line.

One of the most powerful and ancient weapons in Congress's arsenal is inherent contempt, which has been described as the body's "institutional self-protective mechanism."[321] By modernizing this power into a fines process, Congress would have a tool for credibly enforcing its subpoenas against executive officers. Fines through inherent contempt would draw on strong case law support and provide Congress an enforcement mechanism that gets around the glaring limitations of civil and criminal contempt. Instead of relying on the other branches of government to take its subpoenas seriously, Congress would be depending on its own authority.

Armed with such a power, Congress could impose swift and serious sanctions on those who defy its investigative subpoenas, "shift[ing] the burden associated with time-consuming and inexpedient court litigation . . . [so] Congress can enforce its punishment first and leave it to the executive branch to reverse the decision in the courts."[322] By backing its subpoenas with a robust and independent enforcement mechanism, congressional oversight would have teeth. And even more importantly, Congress would be defending its institutional authority in the strongest possible terms. Such a move is critical for re-asserting the body's intended and predominant role as the representative body of the people in our constitutional republic.

President Trump may believe that he has "an Article 2 [of the U.S. Constitution] where I have the right to do whatever I want as president,"[323] but in the words of Judge Ketanji Brown Jackson, "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings."[324] For the latter—and not the former—to be true, Congress must defend its oversight authority with a new "means of *compulsion* . . . to obtain what is needed"[325]: fines through inherent contempt.

---

download [https://perma.cc/7DKZ-RFVB] ("[P]roviding for the use of private counsel to represent the United States in debt collection actions is constitutionally problematic").

320. Anderson v. Dunn, 19 U.S. 204, 228 (1821).

321. Murphy, *supra* note 48.

322. Rahnama, *supra* note 205.

323. *Trump: 'I have an Article 2 where I have the right to do whatever I want as president'*, THE WEEK (July 23, 2019), https://theweek.com/speedreads/854487/trump-have-article-2-where-have-right-whatever-want-president [https://perma.cc/P56P-NVPV].

324. Comm. on the Judiciary v. Donald F. McGhan II, 415 F. Supp. 3d 148, 213 (D.D.C. 2019).

325. McGrain v. Daugherty, 273 U.S. 135,175 (1927) (emphasis added).