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Congressional Subpoenas: Enforcing Executive Branch Compliance

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SUMMARY

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Congressional Subpoenas: Enforcing Executive Branch Compliance

Congress gathers much of the information necessary to oversee the implementation of existing laws or to evaluate whether new laws are necessary from the executive branch. While executive branch officials comply with most congressional requests for information, there are times when the executive branch chooses to resist disclosure.

When Congress finds an inquiry blocked by the withholding of information by the executive branch, or where the traditional process of negotiation and accommodation is inappropriate or unavailing, a subpoena—either for testimony or documents—may be used to compel compliance with congressional demands. The recipient of a duly issued and valid congressional subpoena has a legal obligation to comply, absent a valid and overriding privilege or other legal justification. But the subpoena is only as effective as the means by which it may be enforced. Without a process by which Congress can coerce compliance or deter non-compliance, the subpoena would be reduced to a formalized request rather than a constitutionally based demand for information.

Congress currently employs an ad hoc combination of methods to combat non-compliance with subpoenas. The two predominant methods rely on the authority and participation of another branch of government. First, the criminal contempt statute permits a single house of Congress to certify a contempt citation to the executive branch for the criminal prosecution of an individual who has willfully refused to comply with a committee subpoena. Once the contempt citation is received, any prosecution lies within the control of the executive branch. Second, Congress may try to enforce a subpoena by seeking a civil judgment declaring that the recipient is legally obligated to comply. This process of civil enforcement relies on the help of the courts to enforce congressional demands.

But these mechanisms do not always ensure congressional access to requested information. Recent controversies could be interpreted to suggest that the existing mechanisms are at times inadequate—particularly in the instance that enforcement is necessary to respond to a current or former executive branch official who has refused to comply with a subpoena. There would appear to be several ways in which Congress could alter its approach to enforcing committee subpoenas issued to executive branch officials. These alternatives include the enactment of laws that would expedite judicial consideration of subpoena-enforcement lawsuits filed by either house of Congress; the establishment of an independent office charged with enforcing the criminal contempt of Congress statute; or the creation of an automatic consequence, such as a withholding of appropriated funds, triggered by the approval of a contempt citation. In addition, either the House or Senate could consider acting on internal rules of procedure to revive the long-dormant inherent contempt power as a way to enforce subpoenas issued to executive branch officials. Yet, because of the institutional prerogatives that are often implicated in inter-branch oversight disputes, some of these proposals may raise constitutional concerns.

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Introduction

Through its investigative powers, Congress gathers information it considers necessary to oversee the implementation of existing laws or to evaluate whether new laws are necessary.[1] This "power of inquiry" is essential to the legislative function and derives directly, though implicitly, from the Constitution's vesting of legislative power in the Congress.[2]

The information that Congress seeks, whether to inform itself for lawmaking purposes or to conduct oversight, often lies in the executive branch's possession.[3] And while executive branch officials comply with most congressional requests for information,[4] "experience has taught that mere requests" can sometimes be "unavailing," and that "information which is volunteered is not always accurate or complete . . . ."[5] The Supreme Court has therefore determined that "some means of compulsion [is] essential" for Congress "to obtain what is needed."[6] When Congress finds an inquiry blocked by the withholding of information, or where the traditional process of negotiation and accommodation[7] is considered inappropriate or unavailing, a subpoena—either for testimony or documents—may be used to compel compliance with congressional demands.[8] An individual—whether a member of the public or an executive branch official—has a legal

[1] Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate . . . ."); Watkins v. United States, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."). *See also* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951) (describing the power of investigation as "perhaps the most necessary of all the powers underlying the legislative function").

[2] Congress's power of inquiry is both essential in purpose and extensive in scope. *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Barenblatt*, 360 U.S. at 111 ("The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."). Yet, the power remains subject to legal limitations. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited . . . . We have made it clear [] that Congress is not invested with a 'general power to inquire into private affairs.' The subject of any inquiry always must be one 'on which legislation could be had.'") (citations omitted).

[3] The Supreme Court has stated that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *McGrain*, 273 U.S. at 175.

[4] *See, e.g.*, Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 116 (1996) ("Cooperation dominates most congressional requests for information, with the executive turning over the requested information as a matter of routine. On rare occasion, however, the executive resists information requests."); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (noting that the "process of negotiation and accommodation . . . most often leads to resolution of disputes between the political branches").

[5] *McGrain*, 273 U.S. at 175.

[6] *Id*.

[7] *See* United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977) (noting that the Framers relied "on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system").

[8] *Id*. Each standing committee has been delegated subpoena power by House or Senate rule. *See* HOUSE RULE XI (2)(m)(3); SENATE RULE XXVI(1).

obligation to comply with a duly issued and valid congressional subpoena, unless a valid and overriding privilege or other legal justification permits non-compliance.[9] The subpoena, however, is only as effective as the means by which it is potentially enforced. Without a process by which Congress can coerce compliance or deter non-compliance, the subpoena would be reduced to a formalized request rather than a constitutionally based demand for information.[10]

Congress currently employs an ad hoc combination of methods to combat non-compliance with subpoenas. The two predominant methods rely on the authority and participation of another branch of government. First, the *criminal contempt* statute permits a single house of Congress to certify a contempt citation to the executive branch for the criminal prosecution of an individual who has willfully refused to comply with a committee subpoena.[11] Once the contempt citation is received, any later prosecution lies within the control of the executive branch.[12] Second, Congress may try to enforce a subpoena by seeking a civil judgment declaring that the recipient is legally obligated to comply.[13] This process of *civil enforcement* relies on the help of the courts to enforce congressional demands.

Congress has only rarely resorted to either criminal contempt or civil enforcement to combat non-compliance with subpoenas.[14] In most circumstances involving the executive branch, committees can obtain the information they seek through voluntary requests or after issuing (but not yet seeking enforcement of) a subpoena. Even where the executive branch is initially reluctant to provide information, Congress can use the application of various forms of legislative leverage, along with an informal political process of negotiation and accommodation, to obtain what it needs.[15] Congress exercises substantial power over the executive branch by controlling agency authority, funding, and, in the case of the Senate, confirmation of executive officers.[16] The use or

[9] Watkins v. United States, 354 U.S. 178, 187–88 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.").

[10] *McGrain*, 273 U.S. at 174 (observing that the "process to enforce" the investigatory power is "essential" to the "legislative function").

[11] 2 U.S.C. §§ 192, 194.

[12] Although the criminal contempt statute provides that "it shall be" the U.S. Attorney's "duty . . . to bring the matter before the grand jury for its action," the executive branch has asserted discretion in whether to present the matter to the grand jury. *See, e.g.*, Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015); 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) [hereinafter *Olson Opinion*].

[13] *See* 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008) ("The Court concludes that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power."). *See also* CRS Report RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey (discussing the two predominant subpoena enforcement mechanisms).

[14] *See* "The Current Process in Use."

[15] *See* Devins, *supra* note 4, at 114 (arguing that "Congress rarely makes use of its subpoena power" partly because of the "benefits that each branch receives by cooperating with the other"). The D.C. Circuit has suggested that Congress and the executive branch have an "implicit constitutional mandate" to accommodate each other's needs during a conflict. United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977) ("Each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.").

[16] CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner (discussing various tools that Congress may use to compel or incentivize agency compliance

threatened use of these powers in a way that would impose burdens on an agency can encourage compliance with subpoenas (or make it more likely that requested information will be provided without need to issue a subpoena) and solidify Congress's position when trying to negotiate a compromise during an investigative dispute with the executive branch.[17]

But legislative leverage and the subpoena enforcement mechanisms do not always ensure congressional access to requested information, particularly from the executive branch. Recent controversies could be interpreted to suggest that the existing mechanisms are at times inadequate—at least in the relatively rare instance that enforcement is necessary to respond to a current or former executive branch official who has refused to comply with a subpoena.[18]

Four times since 2008, the House of Representatives has held an executive branch official (or former official) in criminal contempt of Congress for denying a committee information subpoenaed during an ongoing investigation.[19] In each instance the executive branch determined not to bring the matter before a grand jury.[20] In three of the four instances, the House also looked to the federal courts for civil enforcement of the outstanding subpoena.[21] The committees involved eventually obtained much of the information sought through those lawsuits, but only after prolonged litigation, and, in one of the cases, only after a judicial decision that could be viewed as potentially hindering Congress's access to executive branch information in the future.[22]

The House's decision to resort to criminal contempt of Congress and civil enforcement in these cases was not without controversy, as in each instance the executive official asserted that a constitutional privilege limited Congress's right to the information sought.[23] This report will not address whether the officials in each case invoked a valid privilege or whether the privilege asserted was adequate to justify withholding information from Congress. Nor will this report

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with congressional demands).

[17] *See* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 931 (2014) ("Congress may use legislative authorizations and appropriations as leverage against the Executive Branch to obtain requested information."); Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002) (noting that oversight disputes are often "decided by the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable.").

[18] *See infra* "The Current Process in Use." Although modern examples have highlighted potential problems with Congress's current subpoena enforcement options, such inefficiencies are not a new development. For example, political scientist James Burnham wrote in 1959 that the process for enforcing committee subpoenas:

> is neither sure nor speedy. It can be postponed indefinitely when it is not avoided altogether, by legal technicalities, the plea of civil rights, or Congress' own unwillingness to pursue the matter vigorously. Thus, with very little personal hazard, witnesses may defeat the ends of a current inquiry: there will be a new Congress with new interests before the question of punishment is decided one way or the other.

JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 245 (1959).

[19] H. Res. 574, 113th Cong. (2014) (former Internal Revenue Service official Lois Lerner); H. Res 711, 112th Cong. (2012) (Attorney General Eric Holder); H. Res. 979, 110th Cong. (2008) (White House advisers Harriet Miers and Joshua Bolten). These examples do not account for the instances in which a committee was denied access to subpoenaed information but nevertheless chose, for any number of reasons, not to pursue enforcement.

[20] *See* "The Current Process in Use."

[21] H. Res. 706, 112th Cong. (2012) (authorizing lawsuit to compel compliance with subpoena issued to Attorney General Holder); H. Res 980, 110th Cong. (2008) (authorizing lawsuit to compel compliance with subpoena issued to White House advisers Miers and Bolten).

[22] *See infra* "The Current Process in Use."

[23] Each report recommending adoption of the contempt resolution contained minority views opposing the action. *See* H. REP. NO. 113-465, at 338 (2014); H. REP. NO. 112-546, at 161 (2012); H. REP. NO. 110-423, at 99 (2007).

address whether, under the circumstances, it was appropriate for Congress to exercise its contempt power. Rather, this report will examine the legal enforcement of congressional subpoenas in a contemporary and historical context and discuss legal issues associated with alternative subpoena-enforcement frameworks that Congress may consider to obtain information from the executive branch.

The Current Process: Criminal Contempt and Civil Enforcement of Subpoenas

Besides leveraging its general legislative powers, Congress currently relies on two formal legal mechanisms to enforce subpoenas: criminal contempt of Congress and civil enforcement of subpoenas in the federal courts.

Criminal Contempt of Congress

The criminal contempt of Congress statute, enacted in 1857 and only slightly modified since, makes the failure to comply with a duly issued congressional subpoena a criminal offense.[24] The statute, now codified under 2 U.S.C. § 192, provides that any person who "willfully" fails to comply with a properly issued committee subpoena for testimony or documents is guilty of a misdemeanor, punishable by a substantial fine and imprisonment for up to one year.[25]

The criminal contempt statute outlines the process by which the House or Senate may refer the non-compliant witness to the Department of Justice (DOJ) for criminal prosecution. Under 2 U.S.C. § 194, once a committee reports the failure to comply with a subpoena to its parent body, the President of the Senate or the Speaker of the House is directed to "certify[] the statement of facts . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."[26] The statute does not expressly require approval of the contempt citation by the committee's parent body, but both congressional practice and judicial decisions suggest that approval may be necessary.[27] Although approval of a criminal contempt citation under § 194 appears to impose a mandatory duty on the U.S. Attorney to submit the violation to a grand jury, the executive branch has repeatedly asserted that it retains the discretion to determine whether to do so.[28]

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[24] R. S. § 102; Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155 (now codified at 2 U.S.C. § 192).

[25] 2 U.S.C. § 192. The subpoena that gives rise to the contempt must have been issued for a legislative purpose, be pertinent to the matter under inquiry, and relate to a matter within the House or Senate committee's jurisdiction. *See* Senate Perm. Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 134–38 (D.D.C. 2016).

[26] 2 U.S.C. § 194. The DOJ has previously obtained convictions under 2 U.S. C. § 192 against executive branch officials pursuant to plea deals without a vote of the House or Senate. *See Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov'tl Relations of the H. Comm. on the Judiciary*, 98th Cong. 23--24 (1983).

[27] *See* HOUSE PRACTICE, ch. 17 § 2; Wilson v. United States, 369 F.2d 198, 201–02 (D.C. Cir. 1966) ("It has been the consistent legislative course that the Speaker is not under a 'mandatory' duty to certify the report of the committee, but on the contrary that the committee's report is subject to further consideration on the merits by the House involved. When the House is in session the Speaker does not automatically transmit the report of alleged contempt to the United States Attorney. Instead as a matter of routine a member of the committee offers a resolution for the consideration of the House involved.").

[28] *See, e.g.*, Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015) (declining to present criminal contempt citation to a grand jury); *Olson Opinion*, *supra* note 12, at 102.

A successful contempt prosecution may lead to criminal punishment of the witness in the form of incarceration, a fine, or both.[29] Because the criminal contempt statute is punitive, its use is mainly as a deterrent. In other words, while the threat of criminal contempt can be used as leverage to encourage compliance with a specific request, a conviction does not necessarily lead to release of the information to Congress.[30]

Civil Enforcement of Subpoenas

Congress may also choose to enforce a subpoena through a civil suit in the federal courts by a process known as civil enforcement. Under this process, either house of Congress may unilaterally authorize one of its committees or another legislative entity to file a suit in federal district court seeking a court order declaring that the subpoena recipient is legally required to comply with the demand for information.[31] In the past, this authorization has been provided through a simple House or Senate resolution.[32]

Federal law provides the jurisdictional basis for the Senate's exercise of its civil enforcement power.[33] Under 28 U.S.C. § 1365, the U.S. District Court for the District of Columbia (D.C. District Court) has jurisdiction "over any civil action brought by the Senate or committee or subcommittee of the Senate to enforce . . . any subpoena."[34] The law, however, makes clear that the grant of jurisdiction "shall not apply" to an action to enforce a subpoena issued to an executive branch official acting in his or her official capacity who has asserted a "governmental privilege."[35] Yet at least one district court has suggested that the limitation found within § 1365 does not necessarily bar the courts from exercising jurisdiction over Senate claims to enforce a subpoena against an executive official under other jurisdictional provisions.[36]

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[29] 2 U.S.C. § 192.

[30] For example, during an investigation into the White House Travel Office, contested documents were turned over to Congress on the day a contempt resolution against the White House Counsel was scheduled for a floor vote. *See* H. REP. NO. 104-874, at 47 (1997).

[31] *See* 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365; Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008).

[32] *See, e.g.*, H. Res. 706, 112th Cong. (2012) (Holder); H. Res. 980 110th Cong. (2008) (Miers and Bolten); S. Res. 377, 114th Cong. (2016) (Ferrer). An alternative mechanism of authorizing legal action on behalf of the House may exist under House rules. . *See* HOUSE RULE II (establishing that the "Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters."); 165 CONG. REC. H30 (daily ed. Jan. 3, 2019) (statement of Rep. McGovern) ("If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule II(8)(b), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee's subpoena(s) in federal district court."). *See also*, CRS Report R45636, *Congressional Participation in Litigation: Article III and Legislative Standing*, by Wilson C. Freeman and Kevin M. Lewis, at 38.

[33] 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365.

[34] 28 U.S.C. § 1365.

[35] *Id.* § 1365(a) ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government.").

[36] *See Miers*, 558 F. Supp. 2d at 86–87 ("In any event, the fact that § 288d may create an independent cause of action for the Senate does not establish that the Senate (or the House) could not proceed under the [Declaratory Judgment Act (DJA)]. Section 288d can simply be viewed as a more specific application of the general relief made available by the DJA . . . .That conclusion is consistent with statements found in a contemporaneous Senate Report indicating that 'the

The House has no corresponding statutory framework for beginning a civil enforcement lawsuit, but still retains the authority to seek assistance from the courts.[37] Recent practice, approved by the D.C. District Court, suggests that the House may authorize[38] a committee or other entity to file a civil claim in federal court to enforce a subpoena on behalf of the body.[39] This process has been used on various occasions to bring civil enforcement lawsuits against an executive branch official.[40]

As opposed to criminal contempt, a successful civil enforcement suit generally has the benefit of securing compliance with the congressional subpoena—meaning the committee may obtain the information it seeks. If the court orders compliance with the subpoena and disclosure of the information, generally after finding both that the subpoena is valid and that the individual has not invoked an adequate privilege justifying non-compliance, continued defiance may lead to contempt of court as opposed to contempt of Congress.[41]

The Current Process in Use

Modern congressional disputes with the executive branch over access to information provide insight into the functioning of both the criminal contempt of Congress and civil enforcement processes.

The Burford Contempt

In 1982, a pair of House committees[42] issued subpoenas to Environmental Protection Agency (EPA) Administrator Anne Burford for litigation documents relating to EPA's enforcement of the federal "Superfund" law.[43] At the direction of President Ronald Reagan, Administrator Burford refused to disclose the files on the ground that they were protected by executive privilege.[44] In

statute is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the federal government.'") (citing S. REP. NO. 95-170, at 91–92).

[37] The conference report accompanying the legislation which established the Senate procedure explained that the relevant House committees had not yet considered the proposal for judicial enforcement of House subpoenas. H. REP. NO. 95-1756, 95th Cong., at 80 (1978). The statute should not be read to deprive implicitly the House of the authority to enforce subpoenas in federal court. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 17–20 (D.D.C. 2013). The Senate had authorized its committees to bring lawsuits for some time before enactment of the 1978 law. *See* S. Res. 262, 70th Cong. (1928) (providing that "any committee of the Senate is hereby to bring suit . . . in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it").

[38] *See supra* note 30.

[39] *See Miers*, 558 F. Supp. 2d, at 78–88; *Holder*, 979 F. Supp. 2d, at 3.

[40] *See* H. Res. 706, 112th Cong. (2012) (Holder); H. Res. 980, 110th Cong. (2008) (Miers and Bolten).

[41] 18 U.S.C. §§ 401–02.

[42] The subpoenas were issued by the House Committee on Public Works and Transportation Subcommittee on Investigations and Oversight and the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations.

[43] *See generally*, H. REP. NO. 97-968, 97th Cong. (1982).

[44] *Id*. at 42–43. As articulated by the Office of Legal Counsel, the executive branch has asserted that executive privilege provides protections for "open law enforcement files" like those at issue in the Burford dispute. *Olson Opinion*, *supra* note 12, at 117.

response, the House approved a criminal contempt citation under 2 U.S.C. § 192 and § 194 for Burford's failure to comply with the committee subpoenas.[45]

Shortly after passage of the contempt resolution, and before the Speaker delivered the citation to the U.S. Attorney, the DOJ filed a lawsuit asking a federal court to declare that Administrator Burford had acted appropriately in withholding the litigation documents.[46] The lawsuit was ultimately dismissed, with the court determining that judicial intervention in such executive-legislative disputes "should be delayed until all possibilities for settlement have been exhausted."[47] That point, the court reasoned, would not occur until Administrator Burford was prosecuted for criminal contempt of Congress.[48] The U.S. Attorney subsequently refused to present the criminal contempt to a grand jury, asserting that despite the apparently mandatory language of 2 U.S.C. § 194, the statute left him with discretion to withhold the citation.[49] Two separate compromises were ultimately reached in which both congressional committees were provided access to the subpoenaed documents, at least partly in exchange for proposing a resolution effectively withdrawing the contempt citation.[50]

Shortly thereafter, the DOJ Office of Legal Counsel (OLC), which acts as a legal adviser to the President and the executive branch, released an opinion articulating the legal reasoning underlying the Administration's decision not to pursue a contempt prosecution against Administrator Burford. Based on both statutory interpretation and the constitutional separation of powers, the OLC concluded that (1) Congress "may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred," and (2) "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege . . . ."[51] Specifically, the opinion asserted that interpreting 2 U.S.C. § 194 as requiring the executive branch to bring a criminal contempt prosecution under these circumstances would "burden" and "nullif[y]" the President's exercise of executive privilege, and impermissibly interfere with the "prosecutorial discretion of the Executive by directing the executive branch to prosecute particular individuals."[52]

The Miers and Bolten Contempts

In 2007, former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten failed to comply with subpoenas issued by the House Judiciary Committee for testimony

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[45] H. Res. 632, 97th Cong. (1982).

[46] United States v. U.S. House of Representatives, 556 F. Supp. 150, 151–52 (D.D.C. 1983).

[47] *Id*. at 152. The court further noted: "Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator [Burford] becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. [] The difficulties apparent in prosecuting Administrator [Burford] for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement." *Id*. at 153.

[48] *Id*. (noting that criminal contempt of Congress is an "orderly and often approved means of vindicating constitutional claims arising from a legislative investigation," and one in which "constitutional claims and other objections . . . may be raised as defenses").

[49] *See* H. REP. NO. 98-323, 98th Cong., at 10 (1983).

[50] *Id*. at 18–25. The House subsequently enacted a resolution stating that "further proceedings concerning the contumacious conduct of the witness were unnecessary." H. Res. 180, 98th Cong. (1983). *See also Olson Opinion*, *supra* note 12, at 109. Despite the House action, the U.S. Attorney then presented the citation to the grand jury who did not return an indictment against Administrator Burford. *Id*. at 110.

[51] *Olson Opinion*, *supra* note 12, at 102.

[52] *Id*. at 102, 115.

and documents relating to the dismissal of various United States Attorneys during the George W. Bush Administration.[53] The President asserted executive privilege in each case, asserting that the subpoenaed testimony and documents involved protected White House communications. Both Miers and Bolten relied on the President's determination as justification for non-compliance with the committee subpoenas.[54] After failed negotiations, the House held both individuals in criminal contempt of Congress and—presumably in response to the position taken by the DOJ in the Burford contempt—simultaneously approved a separate resolution authorizing the Judiciary Committee to initiate a civil lawsuit in federal court to enforce the subpoenas.[55] After receiving the criminal contempt citation, the Attorney General informed the Speaker that the DOJ would exercise its discretion and not take any action to prosecute Mr. Bolten or Ms. Miers for criminal contempt of Congress.[56] The DOJ's position, as in the Burford contempt, was that requiring such a prosecution would inhibit the President's ability to assert executive privilege and infringe on the DOJ's prosecutorial discretion.[57] Shortly thereafter, the House Judiciary Committee filed suit, asking the federal court to direct compliance with the subpoenas.[58]

In *Committee on the Judiciary v Miers*, the D.C. District Court rejected the Administration's main argument that a senior presidential adviser asserting executive privilege at the direction of the President is immune from being compelled to testify before Congress.[59] The court described the asserted immunity as "entirely unsupported by existing case law" and instead held that Ms. Miers had to appear, but was free to assert executive privilege "in response to any specific questions posed by the Committee."[60] Thus, Ms. Miers could still assert the protections of executive privilege during her testimony depending on the substance of any individual question asked by a Member of the Committee.[61] As for Mr. Bolten, the court directed that the executive branch produce a "detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege" to allow the court to resolve those claims.[62] The district court decision was appealed. Almost two years after the first subpoena was issued, with the appeal pending before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) and a newly elected Congress and President in office, the parties reached a settlement and the case was dismissed.[63] Under that settlement, most of the requested documents were provided to the Committee and Ms. Miers would testify, under oath, in a closed but transcribed hearing.[64]

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[53] *See* H. REP. NO. 110-423, 110th Cong., at 4–7 (2007).

[54] *Id*. at 5.

[55] *See* H. Res. 979, 110th Cong. (2008); H. Res. 980, 110th Cong. (2008); H. Res. 982, 110th Cong. (2008).

[56] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008).

[57] *Id*.

[58] Specifically, the Committee asked the court to direct that Ms. Miers testify and Mr. Bolten provide a privilege log. *Id*. at 55 ("The Committee . . . asks the Court to declare that . . . Miers must comply with a subpoena and appear before the Committee to testify . . . and that current White House Chief of Staff Joshua Bolten must produce a privilege log in response to a congressional subpoena."). The case filed by the Committee was limited only to whether Ms. Miers and Mr. Bolten could be forced to comply with the issued subpoenas, not whether the House had the authority to hold either in contempt of Congress.

[59] *Id*. at 99. The court also ordered Mr. Bolten to "produce more detailed documentation concerning privilege claims." *Id*. at 98.

[60] *Id*, at 105.

[61] *Id*.

[62] *Id*. at 107.

[63] Comm. on the Judiciary v. Miers, No. 08-5357, 2009 U.S. App. LEXIS 29374, at *1 (D.C. Cir. Oct. 14, 2009).

[64] *See* David Johnston, *Top Bush Aides to Testify in Attorneys' Firings*, N.Y. TIMES (Mar. 4, 2009), https://www.nytimes.com/2009/03/05/us/politics/05rove.html.

The Holder Contempt

In 2012, Attorney General Eric Holder failed to comply with a House Oversight and Government Reform Committee subpoena seeking documents relating to misleading communications made by the DOJ in response to the committee's ongoing investigation into operation Fast and Furious—a Bureau of Alcohol, Tobacco, Firearms, and Explosives operation in which firearms were permitted to be "walked," or trafficked, to gunrunners and other criminals in Mexico.[65] Like the previous controversies, the President asserted executive privilege over the pertinent documents and directed the Attorney General not to comply with the subpoena.[66] Procedurally, the Holder controversy mirrored that of Miers and Bolten. The House held the Attorney General in criminal contempt of Congress and simultaneously passed a resolution authorizing the committee to enforce the subpoena in federal court.[67] The DOJ shortly thereafter informed the Speaker that it would not take any action on the criminal contempt citation, again citing congressional encroachments on executive privilege and prosecutorial discretion.[68] The committee responded by filing a lawsuit, authorized by House resolution, seeking judicial enforcement of the subpoena.[69]

The D.C. District Court held that it had jurisdiction to hear the dispute in 2013[70] and denied the committee's motion for summary judgment in 2014.[71] But it was not until 2016—in a new Congress and after Attorney General Holder had left his position—that the D.C. District Court issued an opinion in *Committee on Oversight and Government Reform v. Lynch* instructing the new Attorney General to comply with the subpoena.[72] The court rejected the DOJ's argument that the deliberative process privilege—a prong of executive privilege that protects pre-decisional and deliberative agency communications—justified withholding the subpoenaed documents in the case.[73] In "balancing the competing interests" at stake, the court held that the asserted privilege must yield to Congress's "legitimate need" for the documents.[74]

Despite the committee's victory, two aspects of the court's reasoning may affect Congress's ability to obtain similar documents from the executive branch. First, in denying the committee's earlier motion for summary judgment, the court rejected the argument that the deliberative process privilege can never justify withholding documents in the face of a congressional subpoena.[75] While a previous D.C. Circuit decision had suggested that the deliberative process privilege is a "common law" privilege,[76] typically subject to override by legislative action, the

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[65] H. REP. NO. 112-546, 112th Cong., at 3–10 (2012). The Department had initially provided the Committee with a letter stating that it had no knowledge of the gun walking, but that letter was subsequently withdrawn as inaccurate. *See* Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley (Dec. 2, 2011), http://oversight.house.gov/wp-content/uploads/2012/06/Feb-4-Dec-2-letters.pdf.

[66] H. REP. NO. 112-546, 112th Cong., at 39–40 (2012).

[67] *See* H. Res. 711, 112th Cong. (2012); H. Res. 706, 112th Cong. (2012).

[68] Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House (June 28, 2012).

[69] Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

[70] *Id*. at 4.

[71] Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, 2014 U.S. Dist. LEXIS 200278 (D.D.C. Aug. 20, 2014).

[72] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104, 107 (D.D.C. 2016).

[73] *Id*. at 104.

[74] *Id*. at 112, 115.

[75] *See id*. at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at *2–8).

[76] In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) (noting that the "deliberative process privilege is primarily a common law privilege").

district court determined that "there is an important constitutional dimension to the deliberative process aspect of the executive privilege."[77] Although the scope of the deliberative process privilege remains unsettled, by explicitly concluding that it has some degree of constitutional foundation the court's decision might have strengthened the privilege in certain contexts, especially for its use in response to a congressional subpoena.[78]

Second, in ordering disclosure of the subpoenaed material, the court emphasized that the substance of the DOJ's internal deliberations had been publicly disclosed as part of a DOJ Inspector General investigation and report.[79] Thus, in considering the DOJ's interests, the court noted that the agency would suffer only "incremental harm" from disclosing the documents to the committee.[80] This suggests that in a scenario where deliberative process privilege documents have not been disclosed, a court may give more weight than the *Lynch* court to the agency's interest in protecting the confidentiality of its communications.

Although the committee won the case, it still appealed the decision to the D.C. Circuit out of concern for the reasoning applied.[81] As with *Miers*, the litigation has spanned different Congresses and different presidential Administrations. The case is being held in abeyance pending a potential settlement between the committee and the Trump Administration.[82] Although the parties reportedly reached a negotiated settlement in March 2018, that settlement was contingent upon the vacation of two specific orders issued by the district court earlier in the case.[83] In October 2018, the district court declined to vacate those decisions, leaving the fate of the negotiated settlement uncertain.[84]

The Lerner Contempt

Finally, in 2013, former Internal Revenue Service (IRS) official Lois Lerner appeared before the House Oversight and Government Reform Committee for a hearing on allegations that the IRS had given increased scrutiny to conservative political groups applying for tax-exempt status.[85] After Ms. Lerner provided an opening statement denying any wrongdoing, she invoked her Fifth Amendment privilege against self-incrimination, and refused to respond to questions from committee members.[86] After further deliberation, the committee ruled that she had waived her Fifth Amendment privilege by making an opening statement proclaiming her innocence.[87] About 10 months later, the committee recalled her to provide testimony and she again asserted her Fifth Amendment privilege.[88] Ultimately, the House adopted a resolution citing Ms. Lerner for criminal

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[77] *Lynch*, 156 F. Supp. 3d, at 104 (citing *Holder*, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at *2).

[78] *See* MORT ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 72 (2017) (noting the decision's "immediate and long-range disruptive consequences for effective [] oversight").

[79] *Lynch*, 156 F. Supp. 3d, at 112–15.

[80] *Id*. at 114.

[81] Comm. on Oversight & Gov't Reform v. Sessions, No. 16-5078 (D.C. Cir. filed Apr. 18, 2016).

[82] *Id*.

[83] *See* Josh Gerstein, *Judge Upends Settlement in Fast and Furious Documents Case*, POLITICO (Oct. 22, 2018), https://www.politico.com/story/2018/10/22/fast-and-furious-documents-case-926645.

[84] Comm. on Oversight & Gov't Reform v. Sessions, 344 F. Supp. 3d 1 (D.D.C. 2018).

[85] H. REP. NO. 113-415, 113th Cong., at 7–9 (2014).

[86] *Id*. at 9–11.

[87] *Id*. at 11–13.

[88] *Id*. at 12–14.

contempt of Congress,[89] but did not choose to approve a resolution authorizing the committee to pursue civil enforcement of the subpoena in federal court, as had been done in 2008 with Ms. Miers and 2012 with Attorney General Holder. The U.S. Attorney for the District of Columbia later informed the Speaker that Ms. Lerner's actions did not warrant a prosecution for criminal contempt, as he had determined that she had not waived her Fifth Amendment rights.[90] This decision was notable in that unlike the Burford, Miers, Bolten, and Holder scenarios, Ms. Lerner was relying on a personal privilege rather than the President's assertion of executive privilege as justification for her non-compliance.

Implications of Recent Practice

A pair of observations may be gleaned from the above events. First, efforts to punish an executive branch official for non-compliance with a committee subpoena through the criminal contempt of Congress statute will likely prove unavailing in certain circumstances. For example, when the President directs or endorses the non-compliance of the official, such as when the official refuses to disclose information pursuant to the President's decision that the information is protected by executive privilege, past practice suggests that the DOJ is unlikely to pursue a prosecution for criminal contempt.[91] As a result, it would appear arguable that there is not currently a credible threat of prosecution for violating 2 U.S.C. § 192 when an executive branch official refuses to comply with a congressional subpoena at the direction of the President.[92]

Even when the official is not acting at the clear direction of the President, as in the Lerner controversy, the executive branch has contended that it retains the authority to make an independent assessment of whether the official (or former official) has in fact violated the criminal contempt statute.[93] If the executive branch determines either that the statute has not been violated or that a defense is available that would bar the prosecution, then it may—in an exercise of discretion—leave a congressional citation unenforced. The criminal contempt statute, therefore, may have limited utility as a deterrent to non-compliance with congressional subpoenas by executive branch officials faced with similar circumstances.[94]

Second, seeking enforcement of congressional subpoenas in the courts, even when successful, may lead to significant delays in Congress obtaining the sought-after information.[95] This

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[89] H. Res. 574, 113th Cong. (2014).

[90] Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

[91] *See* Letter from James M. Cole, Deputy Attorney General, to John Boehner, Speaker of the House (June 28, 2012); Olson Opinion, *supra* note 12, at 102.

[92] *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1146 (2009) ("As the president is unlikely to authorize one of his subordinates (the United States Attorney) to file charges against another of his subordinates who was acting according to his orders, it is safe to assume that the executive branch will generally decline to prosecute an executive branch official for criminal contempt of Congress.").

[93] *See* Letter from Ronald C. Machen Jr., United States Attorney, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015).

[94] *But see* Fisher, supra note 17, at 347-59 (describing instances from 1975-2000 in which committee action on a criminal contempt citation was effective in obtaining compliance with a congressional subpoena).

[95] The Senate recently had a rather different experience in enforcing a subpoena against a private citizen. After authorizing civil enforcement of a Senate committee subpoena issued to Carl Ferrer, the Chief Executive Officer of Backpage.com, the Senate was able to obtain a district court decision directing compliance in less than five months. *See* Senate Perm. Subcomm. on Investigations v. Ferrer, 199 F. Supp. 3d 125, 128 (D.D.C. 2016). Mr. Ferrer's subsequent appeal was dismissed as moot. Senate Perm. Subcom. on Investigations v. Ferrer, 856 F.3d 1080, 1083 (D.C. Cir. 2017). *See also* S. REP. NO. 114-214 (2016). This could suggest that subpoenas to members of the general public can be

shortcoming was apparent in *Miers* and the Fast and Furious litigation. *Miers*, which never reached a decision on the merits by the D.C. Circuit, was dismissed at the request of the parties after about 19 months.[96] Similarly, the Fast and Furious litigation, which remains pending on appeal before the D.C. Circuit, was filed more than six years ago.[97] The passage of time, together with the intervening congressional and presidential elections in each case, could be said to have diminished both the value of the disclosure and the committee's ability to engage in effective, timely oversight.[98]

Relying on civil enforcement also involves the risk to Congress that the court will reach a decision that will make it harder for committees to obtain information in the future. For example, while the *Miers* decision rejected absolute immunity for senior presidential advisers and may have removed a barrier to Congress's access to such testimony in the future, the district court opinions in the Fast and Furious litigation may have more limiting effect on congressional efforts to access testimony by certain executive branch officials, because the court recognized that the deliberative process privilege has constitutional roots and must be balanced against Congress's need for the information.[99]

The Historical Process: Inherent Contempt

Historically, the House and Senate relied on their own institutional power to not only enforce congressional subpoenas, but also to respond to other actions that either house viewed as obstructing their legislative processes or prerogatives.[100] Indeed, the criminal contempt statute was not enacted until 1857, and the courts do not appear to have entertained a civil action to enforce a congressional subpoena against an executive official until the Watergate era.[101] For

enforced more expeditiously through the courts.

[96] Comm. on the Judiciary v. Miers, No. 08-5357, 2009 U.S. App. LEXIS 29374, at *1 (D.C. Cir. Oct. 14, 2009) (granting appellants' motion for voluntary dismissal).

[97] Complaint, Comm. on Oversight and Gov. Reform v. Holder, No. 1:12-cv-1332 (D.D.C. Aug. 13, 2012), http://oversight.house.gov/wp-content/uploads/2012/08/Complaint-08-13-12-1.pdf.

[98] *See* ROSENBERG, *supra* note 77, at 3 (arguing that civil enforcement "has been shown to cause intolerable delays that undermine the effectiveness of timely committee oversight").

[99] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (rejecting a claim of absolute immunity for presidential advisers); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016) (describing the district court order on motion for summary judgment as holding that "there is an important constitutional dimension to the deliberative process aspect of the executive privilege"); Comm. on Oversight & Gov't Reform v. Holder, No. 12-1332, 2014 U.S. Dist. LEXIS 200278, at *2–8 (D.D.C. Aug. 20, 2014) ("So, the Court rejects the Committee's suggestion that the only privilege the executive can invoke in response to a subpoena is the Presidential communications privilege.").

[100] Congress first exercised its inherent contempt authority in 1795 when the House detained two private citizens for attempted bribery of Members of the House. 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1599 (1907) [hereinafter HINDS' PRECEDENTS OF THE HOUSE]. The Supreme Court first affirmed Congress's use of the inherent contempt power in the 1821 decision of *Anderson v. Dunn*, 19 U.S. 204 (1821).

[101] *See, e.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In 1928, members of a Senate special investigative committee brought suit to obtain documents associated with a disputed Senate election, but the Court dismissed that claim on jurisdictional grounds due to a lack of Senate authorization for the suit. Reed v. Delaware Cty. Comm., 277 U.S. 376, 389 (1928). JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 197 (1976) (noting that the Senate Select Committee's lawsuit to enforce the subpoena issued to President Nixon was "the first civil action to enforce a congressional subpoena issued to the executive").

much of American history the House and Senate instead used what is known as the inherent contempt power to enforce their investigative powers.

The inherent contempt power is a constitutionally based authority given to each house to unilaterally arrest and detain an individual found to be "obstruct[ing] the performance of the duties of the legislature."[102] The power is therefore broader in scope than the criminal contempt statute in that it may be used not only to combat subpoena non-compliance, but also in response to other actions that could be viewed as "obstructing" or threatening either house's exercise of its legislative powers.[103]

In practice, the inherent contempt power has been exercised using a multi-step process. Upon adopting a House or Senate resolution authorizing the execution of an arrest warrant by that chamber's Sergeant-at-Arms, the individual alleged to have engaged in contemptuous conduct is taken into custody and brought before the House or Senate.[104] A hearing or "trial" follows in which allegations are heard and defenses raised.[105] Although generally occurring before the full body, it would appear likely that the contempt hearing could also permissibly take place before a congressional committee who reports its findings to the whole House or Senate.[106] If judged guilty, the House or Senate may then direct that the witness be detained or imprisoned until the obstruction to the exercise of legislative power is removed.[107] Although the purpose of the detention may vary, for subpoena non-compliance the use of the power has generally not been

[102] Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935) ("No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature.").

[103] *See* Marshall v. Gordon, 243 U.S. 521, 543 (1917) (noting that inherent contempt has been used to "deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel").

[104] The procedure followed by the House in the contempt citation that was at issue in *Anderson v. Dunn*, 19 U.S. 204 (1821), is typical of that employed in the inherent contempt cases. Thomas L. Shriner, Jr., *Legislative Contempt and Due Process: The* Groppi *Cases*, 46 IND. L. J. 480, 491 (1971) ("The House adopted a resolution pursuant to which the Speaker ordered the Sergeant-at-Arms to arrest Anderson and bring him before the bar of the House (to answer the charge). When Anderson appeared, the Speaker informed him why he had been brought before the House and asked if he had any requests for assistance in answering the charge. Anderson stated his requests, and the House granted him counsel, compulsory process for defense witnesses, and a copy, of the accusatory letter. Anderson called his witnesses; the House heard and questioned them and him. It then passed a resolution finding him guilty of contempt and directing the Speaker to reprimand him and then to discharge him from custody. The pattern was thereby established of attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges, identification of the accuser, compulsory process, counsel, and a hearing; determination of guilt; imposition of penalty.").

[105] *Id*. The subject of a trial for contempt of Congress is not afforded the same procedural protections as a defendant in a criminal trial. *See* Groppi v. Leslie, 404 U.S. 496, 500–01 (1972) ("[t]he past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him.").

[106] The House has previously adopted resolutions authorizing a select committee to investigate contempt allegations and then report its findings to the House. *See* 3 HINDS' PRECEDENTS OF THE HOUSE, *supra* note 100, §1630; Cong. Globe, 38th Cong., 2nd Sess., 371 (1865).

[107] *See* 3 HINDS' PRECEDENTS OF THE HOUSE, supra note 100, §§1666, 1669, 1693.

punitive.[108] Rather, the goal is to detain the witness until he or she discloses the information sought, but not beyond the end of the Congress.[109]

Despite its title, "inherent" contempt is more accurately characterized as an *implied* constitutional power.[110] The Supreme Court has repeatedly held that although the contempt power is not specifically granted by the Constitution, it is still "an essential and appropriate auxiliary to the legislative function," and thus implied from the general vesting of legislative powers in Congress.[111] The Court has viewed the power as one rooted in self-preservation, concluding that the "power to legislate" includes an "implied right of Congress to preserve itself" by dealing "with direct obstructions to its legislative duties" through contempt.[112]

The Court has also suggested that Congress may effectuate this implied power through the Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."[113] The 1857 criminal contempt provision, for example, has been viewed as "an act necessary and proper for carrying into execution the powers vested in . . . each House."[114] To that end, it seems understood that the criminal contempt statute was intended to supplement each house's inherent contempt power, rather than to replace it. The Supreme Court has specifically articulated this view and, in fact, gone further to suggest that "Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt."[115] Historical practice also supports this conclusion, as Congress continued to use the inherent contempt power after enactment of the criminal contempt statute.[116]

As applied to subpoena enforcement, the Supreme Court has affirmed the existence of each house's constitutionally based authority to arrest and detain individuals for refusing to comply

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[108] Marshall v. Gordon, 243 U.S. 521, 544 (1917) (noting that the Court had discovered "no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify"). Indeed, the Court has suggested that the power "does not embrace punishment for contempt as punishment." *Id*. at 542. *But see* Jurney v. MacCracken, 294 U.S. 125, 148 (1935) (affirming exercise of contempt power even after the obstruction to the legislative process had been removed).

[109] Watkins v. United States, 354 U.S. 178, 207 n.45 (1957); *Anderson*, 19 U.S. at 231.

[110] The contempt power is an implied aspect of the legislative power. *Marshall*, 243 U.S. at 537 (noting that "it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties."). As opposed to an inherent power, which may not be tethered to a textual grant of authority, an implied power is derived by implication from an enumerated power. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42–43 (2001).

[111] McGrain v. Daugherty, 273 U.S. 135, 173–74 (1927); ("[T]he two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective . . . .").

[112] *Marshall* 243 U.S. at 537; *Anderson*, 19 U.S. at 228 (holding that in the absence of a contempt power the House would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it").

[113] U.S. CONST. art. I, § 8 cl. 18.

[114] In re Chapman, 166 U.S. 661, 671–72 (1897) (noting that the purpose of the statute was to "aid each of the Houses in the discharge of its constitutional functions"); Jurney v. MacCracken, 294 U.S. 125, 151 (1935) ("The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.").

[115] *Chapman*, 166 U.S. at 671–72.

[116] HAMILTON, *supra* note 101, at 95 ("For a time after passage of the 1857 criminal statute, Congress normally opted to use its self-help powers to punish contempts.").

with congressional demands for information.[117] The 1927 case of *McGrain v. Daugherty* may be viewed as the high-water mark of the judiciary's recognition of this power.[118] *McGrain* arose from a Senate investigation into the alleged failure of the Attorney General to prosecute federal antitrust violations associated with the Teapot Dome Scandal.[119] As part of that investigation, a subpoena was issued to Mallie Daugherty, the brother of the Attorney General and president of an Ohio bank, for relevant testimony.[120] When Daugherty refused to comply, the Senate exercised its inherent contempt power and ordered its Sergeant-at-Arms to take Mr. Daugherty into custody.[121] Once arrested, Daugherty filed a writ of habeas corpus with the local district court, which, upon review, held the House's action unlawful and directed that Daugherty be discharged from the Sergeant-at-Arm's custody.[122] The Supreme Court reversed and upheld the House's authority to arrest and detain a witness in order to obtain information for legislative purposes—noting that "[t]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[123] In an oft-quoted passage, the Court declared:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[124]

Although broadly conceived, the Court has policed the outer confines of the inherent contempt power. In *Jurney v MacCracken*, the Court clarified that no act is punishable for contempt "unless it is of a nature to obstruct the performance of the duties of the legislature."[125] The Court identified two scenarios to which the power to punish would not extend: (1) where Congress lacks a "legislative duty to be performed" or (2) where "the act complained of is deemed not to be of a character to obstruct the legislative process."[126]

The first scenario is reflected in *Kilbourn v. Thompson,* a case in which the Court held that no person may be made subject to the contempt power unless the subject matter of the investigation giving rise to the contempt was within the body's authority.[127] In *Kilbourn*, the Court ordered the release of a witness held under the contempt power after determining that the House had exceeded its authority when it authorized an investigation into a bankrupt private real-estate pool, of which the United States was a creditor pursuing payment in the bankruptcy court. The Court viewed the investigation—and therefore the contempt—as exceeding the House's constitutional authority because Congress had "no general power of making inquiry into the private affairs of

[117] *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174–75 (1927); *Jurney*, 294 U.S. at 147–49.

[118] *McGrain*, 273 U.S. at 160–80.

[119] *Id*. at 150–52.

[120] *Id*. at 152.

[121] *Id*. at 153.

[122] *Id*. at 154.

[123] *Id*. at 174.

[124] *Id*. at 175.

[125] 294 U.S 125, 148 (1935).

[126] *Id*. at 148.

[127] Kilbourn v. Thompson, 103 U.S. 168, 190 (1881) ("[W]e 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 . . . .").

the citizen."[128] Instead, the Court concluded that by interfering in an issue properly resolved in the bankruptcy courts, the House had "assumed power . . . [that was] in its nature clearly judicial."[129]

The second scenario set forth in *MacCracken* is reflected in *Marshall v. Gordon*.[130] There it was held that a "manifestly ill-tempered" letter written to a committee chair was not related enough to obstructing the powers of the House to constitute a contempt.[131] The *Marshall* opinion began by establishing that the exercise of the contempt power is appropriate only as "necessary to preserve and carry out the legislative authority given" to Congress. The power could, for example, be used to remedy

> physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.[132]

The Court concluded that because the Marshall contempt was approved in response to the writing of an "irritating" letter, and "not because of any obstruction to the performance of legislative duty,"[133] it was "not intrinsic to the right of the House to preserve the means of discharging its legislative duties" and thus invalid.[134]

Despite its potential reach, the inherent contempt power has been described by some observers as cumbersome, inefficient, and "unseemly."[135] Presumably for these reasons, it does not appear that either house has exercised its inherent contempt power to enforce subpoenas or to remove any other obstruction to the exercise of the legislative power since the 1930s.[136] Even so, the mere threat of arrest and detention by the Sergeant-at-Arms can be used to encourage compliance with congressional demands. For example, Senator Sam Ervin, when serving as chairman of the Senate Select Committee on Presidential Campaign Activities, invoked the inherent contempt power several times to encourage compliance with the committee's requests for information during its investigation of the Nixon Administration.[137] Although the power has long lain dormant, it remains a tool that Congress may use to enforce subpoenas.[138]

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[128] *Id*. at 190.

[129] *Id*. at 192.

[130] Marshall v. Gordon, 243 U.S. 521, 546 (1917).

[131] *Id*. at 531.

[132] *Id*. at 543.

[133] *Id*. at 545.

[134] *Id*. at 546.

[135] *See* Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 254 (writing that "[t]here is something unseemly about a House of Congress getting into the business of trial and punishment"); S. REP. NO. 95-170, at 97 (1977) (describing Congress's inherent contempt power, which requires a trial in the House or the Senate, as "time consuming and not very effective").

[136] CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 163 (3rd ed. 1982).

[137] *See* HAMILTON, *supra* note 101, at 96–97 (describing Chairman Ervin using a threat of inherent contempt to obtain the testimony of White House aide Alexander Butterfield); *id*. at 160 (noting that President Nixon was "determined to prohibit his top aides" from testifying before Congress until Chairman Ervin "threatened to dispatch the Senate sergeant at arms to transport them to the Senate").

[138] *Id*. at 95 ("[T]he self-help powers of Congress remain an alternate method to nudge intransigent witnesses into giving evidence to Congressional bodies.").

Subpoena-Enforcement Frameworks and Their Attendant Constitutional Concerns

Given the difficulties associated with Congress's current approach to subpoena enforcement, the House or Senate may find it desirable to consider potential alternative frameworks. Before turning to specific alternatives, it is necessary briefly to establish certain foundational separation-of-powers principles that are generally implicated in any discussion of Congress's authority to compel compliance with subpoenas issued to the executive branch.

Potentially Applicable Separation-of-Powers Principles

Although the text of the Constitution distributes the legislative, executive, and judicial powers among the three branches of government, the Supreme Court generally has not endorsed an absolute separation.[139] The allocation of powers was never intended, in the words of Justice Oliver Wendell Holmes, to cause the branches to be "hermetically sealed,"[140] or divided into "fields of black and white."[141] Instead, observed Justice Robert Jackson, the separation of powers "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity."[142] It is a doctrine often characterized by ambiguity and overlap rather than bright-line rules.

In the subpoena-enforcement context, potential separation-of-powers concerns may arise in three principle areas: congressional exercise of executive or judicial powers; congressional infringement upon executive privilege; and procedural compliance with the constitutional requirements of bicameralism and presentment.

Congressional Exercise of Executive or Judicial Powers

The separation of powers could be implicated either when Congress attempts to enforce a subpoena on its own;[143] seeks to limit or control the executive's discretion in conducting that enforcement;[144] or reserves for itself the ultimate right to adjudicate inter-branch disputes.[145] These actions, at least on the surface, might implicate enforcement and adjudication powers generally granted to the executive and judicial branches, respectively.[146]

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[139] *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *But see* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (articulating a strict view of the separation of powers and articulating the "fundamental necessity" that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others").

[140] INS v. Chadha, 462 U.S. 919, 951 (1983).

[141] Springer v. Gov't of Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

[142] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[143] *Springer*, 277 U.S. at 202 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.").

[144] Smith v. Meese, 821 F.2d 1484, 1491 (11th Cir. 1987) ("[T]he prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive.").

[145] Kilbourn v. Thompson, 103 U.S. 168, 192 (1881) (concluding that "no judicial power is vested in the Congress").

[146] Watkins v. United States, 354 U.S. 178, 187 (1957) ("Nor is Congress a law enforcement or trial agency. These are functions of the executive and judicial departments."); Hampton & Co. v United States, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law . . . if by law [Congress] attempts to invest itself or its members with either

While the Constitution provides Congress with "[a]ll legislative Powers herein granted," it is the executive branch, and the President specifically, that is directed to "take Care that the Laws be faithfully executed."[147] In enforcing these constitutionally articulated roles, the Court has carefully proscribed attempts by Congress to preserve for itself the authority to engage in executive functions, such as the execution or implementation of law. Congress, the Court has held, may neither execute the law itself,[148] nor appoint[149] or control[150] those engaged in the execution. In *Bowsher v. Synar*, for example, the Court struck down a provision of law that had delegated executive power to the Comptroller General, a legislative branch officer.[151] Under the law, the Comptroller General was to use his own "independent judgment" to identify spending reductions to be implemented by the President that were necessary to reduce the deficit to an established target.[152] In rejecting this arrangement, the Court held that the functions delegated to the Comptroller General were executive in nature, as he was required to "exercise judgment concerning facts that affect the application" and "interpretation" of the law, and had "ultimate authority to determine the budget cuts to be made."[153] Because "[t]he structure of the Constitution does not permit Congress to execute the laws," Congress could not constitutionally delegate that authority to a legislative officer under its control.[154]

The Court has also clearly stated that Congress is not "a law enforcement or trial agency."[155] "Legislative power," the Court has established, "is the authority to make laws, but not to enforce them."[156] Thus, "in order to forestall the danger of encroachment 'beyond the legislative sphere,'" Congress may not "invest itself or its Members with . . . executive power."[157] These general principles have specific application in the context of congressional investigations and contempt, in which the Court has held that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."[158]

A corollary to the principle that the Constitution has assigned the law enforcement power principally to the executive branch is the notion that when engaging in that enforcement, the executive branch generally retains some degree of "prosecutorial discretion."[159] This doctrine, which derives from a mixture of constitutional principles including the separation of powers, the

executive power or judicial power.").

[147] U.S. CONST. art. I, § 1; *id.* art. II § 3.

[148] Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[149] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

[150] Bowsher v. Synar, 478 U.S 714, 732–34 (1986).

[151] *Id*. at 735.

[152] *Id*. at 732–33.

[153] *Id*. at 733.

[154] *Id*. at 726.

[155] Watkins v. United States, 354 U.S. 178, 187 (1957). James Madison outlined this fundamental principle in *Federalist 47*, where he characterized the accumulation of legislative and executive power in a single entity as "the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

[156] Springer v. Gov't of Philippine Islands, 277 U.S. 189, 202 (1928).

[157] Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 274 (1991) (citing J. W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 406 (1928)).

[158] Quinn v. United States, 349 U.S. 155, 161 (1955).

[159] *See* Smith v. Meese, 821 F.2d 1484, 1491 (11th Cir. 1987) ("The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive, and the judicial branch's deference to the executive on prosecutorial decisionmaking is grounded in the constitutional separation of powers.").

Take Care Clause,[160] and the duties of a prosecutor as an appointee of the President, forms the foundation of the Court's statement in *United States v. Nixon* that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."[161] As noted previously, the executive branch has relied partially on prosecutorial discretion in declining to pursue some violations of criminal contempt of Congress.[162] The scope of this discretion is not well established, especially regarding the extent that Congress can require or curtail its exercise.[163] In any event, any attempt by Congress to *mandate* that the executive branch initiate a specific prosecution, including a prosecution for criminal contempt of Congress, has been opposed by the executive branch and may raise constitutional questions.[164]

Just as Congress is not a law enforcer, it is similarly not a court, and may not bestow upon itself the judicial power.[165] The Supreme Court has made clear that "no judicial power is vested in Congress" and has generally rebuked congressional attempts to "try" an individual for "any crime or wrongdoing."[166] The Constitution does not authorize Congress to exercise even "commingled" legislative and judicial powers.[167] In fact, the Court has declared that such an arrangement "would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution."[168] Relatedly, the Bill of Attainder Clause prohibits Congress from adjudicating specific legal disputes by taking action "that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[169]

One might assert that these general prohibitions on Congress's exercise of executive or judicial powers would cast doubt upon Congress's historical exercise of its inherent contempt power. It could be argued that when exercising that power, Congress, both as an institution and through officials such as the Sergeant-at-Arms, is exercising executive and judicial power by acting as an arresting officer, prosecutor, and judge. But in affirming the constitutionality of the inherent contempt power, the Court has viewed the power (including the attendant arrest, hearing, and detention of the witness) as an exercise of implied *legislative* power and thus not in contravention of general separation-of-powers principles.[170] Thus, in considering separation-of-powers

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[160] U.S. CONST. art II, § 3.

[161] United States v. Nixon, 418 U.S. 683, 693 (1974).

[162] *See Olson Opinion, supra* note 12, at 118.

[163] Congress would appear to have some authority to restrict the exercise of prosecutorial discretion through statute. *See* Nader v. Saxbe, 497 F. 2d 676, 679 n. 19 (D.C. Cir. 1974) ("It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review."). The DOJ, for example, has acknowledged that "prosecutorial discretion may be regulated to a certain extent by Congress . . . ." *Olson Opinion, supra* note 12 at 114, 126 (asserting that the doctrine of prosecutorial discretion requires that "the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress").

[164] *Olson Opinion, supra* note 12, at 126–35.

[165] *See* Kilbourn v. Thompson, 103 U.S. 168, 192 (1881) (holding that "[n]o judicial power is vested in the Congress . . . ." and observing that the House is "a body which is in no sense a court").

[166] *Id*.; McGrain v. Daugherty, 273 U.S. 135, 179 (1927).

[167] Marshall v. Gordon, 243 U.S. 521, 536 (1917).

[168] *Id*.

[169] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

[170] This is true at least to the extent that the contempt power is exercised in order to vindicate legislative prerogatives. *See Marshall*, 243 U.S. at 541 (holding that "in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as the authority was necessary to preserve and carry out the legislative authority given").

questions that arise from the various methods by which Congress can enforce its subpoenas, it is essential to distinguish between Congress exercising its own legislative powers pursuant to the inherent contempt power, and Congress attempting to enforce and judge general statutory prohibitions such as statutory criminal contempt violations under 2 U.S.C. § 192. In short, the former is a permissible exercise of legislative power to remedy an offense against Congress, while the latter may be an impermissible exercise of executive and judicial power to remedy a criminal offense against the United States.[171]

Executive Privilege

The use of some contempt procedures against an executive branch official invoking executive privilege at the direction of the President could be viewed as frustrating the President's ability to protect the confidentiality of his communications—a protection rooted in the separation of powers.[172] In general, executive privilege is an implied legal doctrine that permits the executive branch to "to resist disclosure of information the confidentiality of which [is] crucial to fulfillment of the unique role and responsibilities of the executive branch of our government."[173] Because past subpoena enforcement disputes between Congress and the executive branch have involved such assertions, it is necessary to outline briefly executive privilege's general contours.

The Supreme Court has only rarely addressed executive privilege, but its most significant explanation of the doctrine came in the unanimous opinion of *United States v. Nixon*.[174] *Nixon* involved the President's assertion of executive privilege in refusing to comply with a criminal trial subpoena—issued upon the request of a special prosecutor—for electronic recordings of conversations he had in the Oval Office with White House advisers.[175] The Court's opinion recognized an implied constitutional privilege protecting presidential communications, holding that the "privilege of confidentiality of presidential communications" is "fundamental to the operation of Government and inextricably rooted in the separation of powers."[176] The justification underlying the privilege related to the integrity of presidential decisionmaking, with the Court reasoning that the importance of protecting a President's communications with his advisers was "too plain to require further discussion," as "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[177]

Even so, the Court determined that when the President asserts only a "generalized interest" in the confidentiality of his communications, that interest must be weighed against the need for disclosure in the given case.[178] In conducting that balancing, the Court held that the President's

[171] This principle has been articulated by the Court in holding that punishment for the same act under both the criminal law and inherent contempt does not place a witness in "double jeopardy" for the same offense in violation of the Fifth Amendment. *See* In re Chapman, 166 U.S. 661, 672 (1897) ("[T]he same act may be an offence against one jurisdiction and an offence against another . . . .").

[172] *See Olson Opinion*, *supra* note 12, at 102 (asserting that the criminal contempt statute cannot "constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege").

[173] In re Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997).

[174] United States v. Nixon, 418 U.S. 683, 703–16 (1974).

[175] *Id*. at 686.

[176] *Id*. at 708. Like Congress's contempt power, executive privilege is therefore implied from constitutional text rather than expressly provided.

[177] *Id*. at 705.

[178] The Court reasoned that the analysis may be different when the President's interest in confidentiality is tethered to a "need to protect military, diplomatic, or sensitive national security secrets" rather than a generalized interest in

"generalized" assertion of privilege "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice," and therefore "must yield to the demonstrated, specific need for evidence in a pending criminal trial."[179]

The *Nixon* opinion[180] established three key characteristics of executive privilege, at least as it relates to presidential communications. First, the Court expressly rejected the assertion that the privilege was absolute. Instead, the Court found the privilege to be qualified, requiring that it be assessed in a way that balances "competing interests" and "preserves the essential functions of each branch."[181] Second, to protect the "public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking," the Court viewed confidential presidential communications as "presumptively privileged."[182] As a result, the Court appeared to suggest that some degree of deference is due to a President's initial determination that certain information is protected by the privilege.[183] Moreover, the burden would appear to be on the party seeking the information to overcome that "presumption" through a strong showing of need for the information.[184] Third, the Court viewed the privilege as limited to communications made "'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions. . . .'"[185] Thus, the privilege does not appear to apply to all presidential communications.

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confidentiality. *Id*. at 706. When communications relate to these "Article II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Id*. at 710.

[179] *Id*. at 713.

[180] The principles announced in *Nixon* were reaffirmed in *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) [hereinafter *Nixon II*].

[181] *Nixon*, 418 U.S. at 707.

[182] *Id*. at 708.

[183] *Id*. at 713 ("Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate" the requisite need.). Consistent with this principle, the D.C. Circuit has described its approach to executive privilege as creating a "staged decisional structure" in which overcoming the presumptive privilege results in disclosure to the court for in-camera review, rather than direct disclosure to the coordinate branch of government seeking the presidential communications. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730–31 (D.C. Cir. 1974) (holding that the requisite showing of need must be made "before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, together with particularized claims that the Court will weigh against whatever public interests disclosure might serve.").

[184] *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 730 ("The presumption can be overcome only by an appropriate showing of public need by the party seeking access to the conversations.").

[185] *Nixon II*, 433 U.S. at 449 (stating that *Nixon* "held that the privilege is limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions' . . ." (quoting *Nixon*, 418 U.S. at 708, 711, 713)). Lower courts, which have generally addressed executive privilege in the context of public access to information pursuant to the Freedom of Information Act or judicial access through a grand jury subpoena, have divided executive privilege into at least two prongs: the presidential communications privilege, which protects presidential communications, and the deliberative process privilege, which protects certain internal agency communications. *See* CRS Report R42670, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by Todd Garvey, at 8–12. The D.C. Circuit has consistently distinguished the privilege protecting presidential communications from the privilege protecting executive deliberative communications. *See* Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1113-14 (D.C. Cir. 2004); *In re* Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) ("While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes."). The D.C. Circuit has also established key limits on each of these privileges. *See In re* Sealed Case, 121 F.3d at 746 (concluding that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred"); *id*. at 752 (concluding that the presidential communications privilege "should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and

Although presidential claims of a right to protect executive branch confidentiality interests have occurred with relative frequency, the Supreme Court has not addressed executive privilege in any substantial way since the Nixon era, and, in fact, has never addressed the application of executive privilege in the context of a congressional investigation.[186] Indeed, in *Nixon*, the Court explicitly disclaimed any attempt to assess the application of executive privilege in a congressional investigation, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."[187] The lower federal courts have generally sought to avoid adjudicating disputes between the executive and legislative branches over executive privilege, instead encouraging the branches to settle their differences through political resolution.[188] Consistent with that approach, lower federal courts have suggested that judicial intervention in such disputes "should be delayed until all possibilities for settlement have been exhausted,"[189] and warned that the branches should not take an "adversarial" approach to executive privilege disagreements, but should instead "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[190]

The most significant judicial analysis of executive privilege in the context of a congressional investigation is the D.C. Circuit's decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.[191] *Senate Select Committee* involved an attempt by the Senate Select Committee on Presidential Campaign Activities to obtain the Nixon White House tapes and other materials as part of the committee's investigation into "illegal, improper, or unethical" actions during the 1972 presidential election.[192] The D.C. Circuit decision was issued shortly before the Supreme Court decision in *United States v. Nixon*, and contemporaneously to an impeachment investigation conducted by the House Judiciary Committee.[193] Although ultimately siding with the President, the D.C. Circuit's opinion affirmed the qualified nature of the privilege by making clear that a President's assertion of the privilege could be overcome by a "strong showing of need by another institution of government. . . ."[194] The court elaborated that Congress, in the exercise

received by those members of an immediate White House adviser's staff ").

[186] The Supreme Court engaged in a very limited discussion of executive privilege in *Cheney v. United States District Court*, 542 U.S. 367, 383–91 (2004). As a result of the Supreme Court's limited activity in defining the scope of executive privilege, each branch has been left with significant flexibility in adopting its own views of the privilege's reach. *See* Wright, *supra* note 17, at 946 (noting that "[i]n the absence of Supreme Court pronouncements, the political branches feel legally unconstrained to adhere to their incompatible constitutional perspectives").

[187] *Nixon*, 418 U.S. at 712 n.19.

[188] United States v. U.S. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (declaring that "[w]hen constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted"); United States v. AT&T Co., 567 F.2d 121, 123 (D.C. Cir. 1977) (describing the court's desire to "avoid a resolution that might disturb the balance of power between the two branches and inaccurately reflect their true needs" and to "refrain[] from deciding the merits of [the] claims").

[189] *House of Representatives*, 556 F. Supp. at 152. The court further noted: "Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator [Burford] becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. [] The difficulties apparent in prosecuting Administrator [Burford] for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement." *Id*. at 153.

[190] *AT&T Co.*, 567 F.2d at 127.

[191] 498 F.2d 725, 729–33 (D.C. Cir. 1974).

[192] *Id*. at 726–27.

[193] *Id*. at 732.

[194] *Id.* at 730.

of its investigative powers, may overcome the President's presumptive privilege when it can show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."[195] Notably, the court suggested that the "nature of the presidential conduct that the subpoenaed material might reveal," including President Nixon's alleged criminal misconduct, is not a significant factor in assessing whether the privilege is overcome.[196] Instead, that analysis depends "solely" on the "nature and appropriateness" of the function the committee is carrying out.[197]

The D.C. Circuit in *Senate Select Committee* concluded that the Select Committee on Presidential Campaign Activities had failed to make the requisite showing of need. That determination, however, appears to have been based on a pair of unique facts: first, that copies of the tapes had been provided to the House Judiciary Committee under that committee's impeachment investigation; and second, that the President had publicly released partial transcripts of the tapes.[198] Significantly, the Select Committee sought to make the required showing by arguing it had a "critical" need for the tapes to carry out two separate and distinct functions. First, pursuant to its *oversight function*, the committee argued that the tapes were necessary to "oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view."[199] Second, pursuant to its *legislative function*, the committee argued that "resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is necessary' and 'could help engender the public support needed for basic reforms in our electoral system.'"[200] As for the oversight function, the Court held that the Select Committee failed to show the requisite need—mainly because the House Judiciary Committee had already obtained the tapes. Any further investigative need by the Select Committee was therefore "merely cumulative," as the tapes were already in the possession of one committee of Congress.[201] With regard to the Select Committee's legislative functions, the court held that the particular content of the conversations was not essential to future legislation, as "legislative judgments normally depend more on the predicted consequences of proposed legislative actions . . . than on precise reconstruction of past events." Any "specific legislative decisions" faced by the Select Committee, the court concluded, could "responsibly be made" based on the released transcripts.[202]

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[195] *Id*. at 731.

[196] *Id*.

[197] *Id*. at 731.

[198] *Id.* at 732–33.

[199] *Id*. at 731.

[200] *Id*.

[201] *Id*. at 732.

[202] *Id*. ("Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing."). Courts have varied in their approach to comparing Congress's investigatory function to that exercised by a grand jury. *Compare Senate Select Committee*, 498 F.2d at 732 ("There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury. . . . While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.") *with* United States v. Bryan, 339 U.S. 323, 331 (1950) ("On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an

Given both *Nixon* and *Senate Select Committee*, it appears that executive privilege does not establish an absolute bar to Congress obtaining protected information, especially when the assertion of the privilege is based on a "generalized interest" in confidentiality rather than one connected to "military, diplomatic, or sensitive national security secrets." Instead, the appropriate inquiry appears to be fact-specific, focusing "solely" on whether the investigating committee can show that the information sought is "demonstrably critical" to a legitimate legislative function such as oversight or the consideration of legislation.[203]

Without more detailed judicial pronouncements the political branches have adopted somewhat divergent views on the scope of executive privilege. This interpretive divide has likely contributed to the frequency and intensity of inter-branch disputes over executive privilege. The executive branch has historically viewed the privilege broadly, providing protections to several different categories of documents and communications that relate to executive branch confidentiality interests.[204] Under the executive branch's interpretation, the privilege covers, among other possible areas, presidential communications; deliberative communications within the executive branch; military, diplomatic, and national security information; and law enforcement files.[205] Congress, however, has generally interpreted the privilege more narrowly, limiting its application to the types of core Article II duties and presidential communications referenced by the Supreme Court in *Nixon*, while also emphasizing that whatever the privilege's scope, it can be overcome by an adequate showing of need.[206]

It appears likely that the executive branch will continue to raise constitutional objections if Congress attempts to use the contempt power to either force the disclosure of information the President considers privileged or to punish an executive branch official for asserting executive privilege.[207] Yet judicial decisions and historical practice have set few clear legal standards for application in such disputes—except to establish that neither side's power is absolute and that Congress and the President have an obligation to attempt to accommodate each other's needs.[208] Thus, any conflict between the power of inquiry and executive privilege, either under the current system or as applied to the alternative approaches discussed in this report, would likely be governed not by bright-line rules, but by a balancing of the specific interests at play in the given dispute, and only after it had become apparent that the legislative and executive branches could

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invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity."). *See also*, HAMILTON, *supra* note 101, at 188.

[203] *Senate Select Committee*, 498 F.2d at 731.

[204] *See e.g.*, *Olson Opinion*, *supra* note 12, at 116 ("The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws.").

[205] *Id*. at 116–18.

[206] *See* Report of the Committee on Oversight and Government Reform U.S. House of Representatives Regarding President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey, 110th Cong. (2008) at 8 ("The Attorney General's argument that the subpoena implicates the 'law enforcement component' of executive privilege is equally flawed. There is no basis to support the proposition that a law enforcement privilege, particularly one applied to closed investigations, can shield from congressional scrutiny information that is important for addressing congressional oversight concerns. The Attorney General did not cite a single judicial decision recognizing this alleged privilege."); H. REP. NO. 105-728, 105th Cong. (1998) at 16 n. 43 ("As the D.C. Circuit has recently held, the doctrine of executive privilege which arises from the constitutional separation of powers applies only to decisionmaking of the President. Since the subject of the Committee's subpoena is not one that does (or legally could) involve Presidential decisionmaking, no constitutional privilege could be invoked here.") (citations omitted).

[207] *See supra* "The Current Process in Use."

[208] *See Nixon*, 418 U.S. at 707; United States v. AT&T Co., 567 F.2d 121, 127 (D.C. Cir. 1977).

not reach an acceptable settlement. How that balancing is implemented, and what legal standard is applied to evaluate an executive privilege claim made in response to a congressional subpoena, will likely depend on the type of information the privilege is asserted to protect. The courts appear to have adopted a hierarchical approach to various privileges within the executive privilege taxonomy. For example, the courts "have traditionally shown the utmost deference" to the executive's need to protect "military or diplomatic secrets."[209] Courts have not "extended this high degree of deference to a President's generalized interest in confidentiality" of his communications.[210] Other asserted aspects of executive privilege, for example the deliberative process privilege, have been given still less weight, and must be assessed differently in the face of an exercise of Congress's investigative powers.[211]

Ultimately, the framework through which Congress chooses to enforce a subpoena for information the President considers protected by executive privilege will impact the process by which executive branch assertions of the privilege are resolved. Under the criminal contempt framework, the Executive becomes the final arbiter of the appropriate scope of executive privilege by deciding whether to go forward with a criminal contempt prosecution of an official relying on the privilege. A decision not to move forward with a prosecution would generally not be subject to judicial review.[212] Under the civil enforcement framework, the initial determination on the application of the privilege is made by the Executive, subject to judicial review if the House or Senate chooses to challenge that determination in federal court. Under inherent contempt, the initial determination on the application of the privilege is made by Congress, subject to review in the courts if the subject of the contempt proceeding challenges his detention.[213]

Bicameralism and Presentment

Finally, because the power to seek enforcement of a congressional subpoena is independently vested in each house, rather than in Congress as a whole, constitutional questions may be raised over whether a single house, through approval of a contempt resolution, can trigger legal consequences or impose requirements upon the executive branch without compliance with bicameralism and presentment.[214]

The Supreme Court has made clear that Congress must exercise its legislative power in compliance with the "finely wrought and exhaustively considered[] procedure"[215] set forth in Article I, Section 7 of the Constitution, which provides that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the

[209] *Nixon*, 418 U.S. at 710.

[210] *Id*. at 711.

[211] In re Sealed Case, 121 F. 3d, 745–46 (D.C. Cir. 1997) (concluding that congressional "negation" of the deliberative process privilege is subject to less "scrutiny" than the presidential communications privilege and "disappears altogether when there is any reason to believe government misconduct occurred").

[212] *See* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings").

[213] *See* McGrain v. Daugherty, 273 U.S. 135, 150 (1927) (challenging exercise of inherent contempt through a habeas corpus proceeding); Anderson v. Dunn, 19 U.S. 204, 204 (1821) (challenging exercise of inherent contempt through an action for assault and battery and false imprisonment).

[214] *See* INS v. Chadha, 462 U.S. 919, 952–55 (1983).

[215] *Id.* at 951.

President of the United States."[216] This provision establishes the bedrock constitutional principle that before legislation is given the force and effect of statutory law, it must first satisfy the requirements of bicameralism (approval by both houses of Congress) and presentment (submission to the President for his signature or veto).[217]

In the seminal case *INS v. Chadha*, the Court relied on the bicameralism and presentment requirements to invalidate provisions of the Immigration and Nationality Act that authorized either house of Congress, by a one-house resolution, to "veto" an exercise of statutory authority delegated to an executive branch officer.[218] In invalidating this "legislative veto," the Court interpreted Article I, Section 7 of the Constitution as establishing that not only all bills, but all "legislative acts" are subject to the procedural requirements of bicameralism and presentment.[219] The Court defined a "legislative act" as any action "properly [] regarded as legislative in its character and effect" or taken with "the purpose and effect of altering the legal rights, duties and relations of persons. . . outside the legislative branch."[220] In other words, congressional actions that have the "force of law" generally must comply with the Constitution's "single, finely wrought" process—that of passage by both houses and presentment to the President.[221]

The *Chadha* opinion identified specific exceptions to the bicameralism and presentment requirements, noting that "[c]learly, when the [Constitution's] Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms."[222] The Constitution's impeachment provisions and those relating to Senate advice and consent to treaty ratification and the appointment of judges, ambassadors, and public officials are examples of such provisions.[223] The Court also noted that "[e]ach House has the power to act alone in determining specified internal matters."[224] That authority, the Court added, "only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances."[225]

The contempt power does not fit neatly into the *Chadha* mold. Indeed, the Court may have neglected the inherent contempt power in articulating its list of exceptions to *Chadha*'s bicameralism and presentment requirements.[226] Despite *Chadha*'s language, it does not appear that the Constitution always speaks "explicit[ly]" or "unambiguous[ly]" when conferring power to each house individually.[227] There is no explicit constitutional language conferring the contempt

[216] U.S. CONST. art. I, § 7.

[217] Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) ("The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" (citing *Chadha*, 462 U.S. at 951)).

[218] *Chadha*, 462 U.S. at 952–55.

[219] *Id*. at 952.

[220] *Id*.

[221] *Id*. at 951.

[222] *Id*. at 955–56.

[223] *Id*. at 955.

[224] *Id.* at 955 n.21 (referencing U.S. CONST. art. I, § 5, cl. 2 and § 7, cls. 2, 3).

[225] *Id*.

[226] The inherent contempt power arguably could fall within each house's "power to act alone in determining specified internal matters." *Id.* at 955 n.21.

[227] *Id*. at 955–56.

power or the power of inquiry to each individual house. Rather, as discussed, these powers are implied as essential to the legislative power.[228] Notably, no court has suggested that the exercise of the inherent contempt power by a single house of Congress, which could alter the legal rights or obligations of a detained witness, is inconsistent with the requirements of bicameralism or presentment.[229]

As for the criminal contempt statute, the DOJ has asserted that interpreting that statute to require that a contempt citation be brought before the grand jury would be inconsistent with *Chadha* by allowing one house to place a legal requirement on a U.S. Attorney.[230] To date, no court has had opportunity to consider the validity of the DOJ's position.[231] But it is possible that *Chadha*-like concerns could be raised by alterations to the contempt framework that would allow the approval of a contempt citation by a single house to create new legal rights or restrictions or otherwise alter the legal authority that may be exercised by executive branch officials.

With these general separation-of-powers principles established as background, this report now considers possible subpoena-enforcement frameworks and the key legal issues they raise.

Current Framework

As noted previously, most congressional requests for information from the executive branch are complied with, and in those cases when there is a dispute, negotiations between the committee and the executive agency generally lead to a resolution acceptable to both parties.[232] In the instances that Congress has resorted to its subpoena-enforcement mechanisms, the committee involved has generally been able to obtain eventually much of the information it sought.[233] Thus, an argument can be made that the current system acts as an adequate and effective way to obtain information and deter non-compliance with congressional subpoenas in most cases.

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[228] McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("[T]he power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it.").

[229] Nor was there any indication in *Chadha* that the opinion was intended to overturn the Court's longstanding approval of the inherent contempt power. *See e.g.,* Anderson v. Dunn, 19 U.S. 204, 228 (1821); *McGrain*, 273 U.S. at 175.

[230] *Olson Opinion*, *supra* note 12, at 128 n.28 (noting that if one house could "impose on the United States Attorney an affirmative legal duty to initiate a prosecution and take certain steps in that prosecution," such action would be "contrary to the clear language and rationale of *Chadha*").

[231] At least one court has suggested that as a matter of statutory interpretation, the criminal contempt provision imposes a mandatory obligation to refer the matter to the grand jury. Ex parte Frankfeld, 32 F. Supp. 915, 916 (D.D.C. 1940) ("It seems quite apparent that Congress . . . 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.").

[232] *See, e.g.*, Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 105 (2011) (noting that "Congress routinely obtains massive amounts of information from the executive branch on a daily basis," often through "informal requests from congressional staffers for information from a particular staffer."); Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H. REP. NO. 99-435, pt. 2, at 1106 (1986) ("[G]ood faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.").

[233] *See supra* "The Current Process in Use." Indeed, adoption of a criminal contempt citation at the committee level has been adequate to overcome executive resistance to a congressional subpoena on numerous cases. *See* Fisher, *supra* note 17, at 347–59 (describing instances in which committee action on a criminal contempt citation was effective in obtaining compliance with a congressional subpoena).

However, in the rare case that actual prosecution is necessary to compel an executive branch official to comply with a subpoena, criminal contempt (as described above) would not appear to be a wholly reliable means of enforcement. Congress would instead presumably be forced to rely on the traditional process of negotiation, accommodation, and compromise to encourage compliance,[234] or wield its other constitutional powers, such as the power of the purse, the confirmation power, impeachment, and its general legislative control over agency authority to encourage compliance by executive branch officials.[235]

When necessary, each house retains the authority to utilize the courts for assistance in enforcing subpoenas. Civil enforcement in the courts, especially when an executive branch official is asserting executive privilege at the direction of the President, conforms to general pronouncements from both the judicial and executive branches.[236] It accords with the judiciary's determination that its established authority to "say what the law is" includes the power to "construe and delineate" the scope of executive privilege[237] and the executive branch's previous statements that civil enforcement is a permissible way to resolve the competing interests of Congress and the Executive in information access disputes.[238]

But reliance on civil enforcement may have certain drawbacks. As discussed above, judicial resolution of oversight disputes can be lengthy and possibly lead to opinions that weaken Congress's oversight authority.[239] Moreover, although a series of district court opinions have recently held civil enforcement cases arising from oversight disputes between the legislative and executive branches to be justiciable, the last appellate opinion to reach the merits of such a dispute was *Senate Select Committee v. Nixon* in 1977.[240] The executive branch continues to assert the position that inter-branch oversight disputes are non-justiciable.[241] Although such

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[234] *See* United States v. AT&T Co., 567 F.2d 121, 130 (D.C. Cir. 1977) ("The Constitution contemplates such accommodation. Negotiation between two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

[235] *See* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 738 (2012) ("In a dispute over executive branch defiance of a subpoena, the houses of Congress have a number of tools to enforce compliance. They can turn to the power of the purse, zeroing-out the salary of the officer who has defied the subpoena or cutting funds for her department. The House can open an impeachment inquiry into the contemnor's conduct. The Senate can refuse to confirm the administration's nominees to executive branch offices until the Executive's officer complies with the subpoena. And either house can simply decide that it will not turn to legislative matters in which the executive is invested until its demands are satisfied. Each of these mechanisms is a form of leverage by which a single house of Congress, acting alone, can respond to executive branch contempt of Congress.").

[236] *See* United States v. Nixon, 418 U.S. 683, 705 (1974) (holding that "it is the province and duty of this Court 'to say what the law is' with respect to the claim of [executive] privilege presented in this case."); *Olson Opinion*, *supra* note 12, at 137 (asserting civil enforcement of subpoenas as an apparently available and preferred alternative to criminal contempt of Congress).

[237] *Nixon*, 418 U.S. at 703–05.

[238] *Olson Opinion*, *supra* note 12, at 137 (concluding that "Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena").

[239] *See supra* notes 86–90; *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov'tl Relations of the H. Comm. on the Judiciary*, 98th Cong. 24 (1983) (testimony of Stanley Brand) ("As a lawyer involved in civil litigation, if you allow me to set foot into Federal district court to litigate a claim of privilege, I can guarantee you I will be there for at least 3 years, well beyond the time it takes for this Congress to go through one of its 2-year cycles.").

[240] *Senate Select*, 498 F.2d at 727. Jurisdiction in *Senate Select* was based upon a statute explicitly providing the courts with jurisdiction over any civil action to enforce a subpoena brought by the Senate Select Committee on Presidential Campaign Activities. Pub. L. No. 93-190, 87 Stat. 736 (1973).

[241] *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 9 (D.D.C. 2013) ("The defendant does not simply suggest that the traditional process of confrontation, compromise, and resolution is the preferable one; he

arguments have been rejected by the D.C. District Court, if an appellate court were to adopt the executive's position, that decision could leave both the existing criminal and civil enforcement avenues with only limited effect for use against an executive branch official.

Alternative Subpoenas Enforcement Frameworks

There would appear to be several ways in which Congress could alter its approach to enforcing committee subpoenas issued to executive branch officials. But because of the separation-of-powers issues highlighted above, many of these options have potential legal concerns. The extensive ambiguity in this area results from a combination of a lack of applicable judicial precedent; the vast differences in how the executive and legislative branches interpret their own institutional powers; and the importance of practical implementation issues.[242]

Establish Expedited Civil Enforcement in the Courts

Congress could try to expedite the civil enforcement process by either statutorily establishing timetables for review or urging speedy judicial consideration of civil subpoena-enforcement cases filed in the federal judiciary by the House or Senate.[243] For example, H.R. 4010, introduced in the 115th Congress, would have amended 28 U.S.C. § 1365a to provide that "it shall be the duty" of the federal courts to "advance on the docket and to expedite to the greatest possible extent the disposition" of any civil enforcement lawsuit.[244] The bill would have also provided the House and Senate with the option of having the claim heard by a three-judge panel with a direct appeal to the Supreme Court.[245]

Such an approach would appear to be well within Congress's power. Congress has broad authority over the rules of procedure for federal courts, including setting general timetables for judicial consideration of "cases and controversies."[246] Various examples of expedited judicial review procedures exist elsewhere in federal law.[247] Some provisions combine expedited review with the ability to file the lawsuit directly with a federal appellate court rather than a federal district court.[248]

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maintains that Article III of the Constitution actually prohibits the Court from exercising jurisdiction over what he characterizes as 'an inherently political dispute about the scope of the respective powers and responsibilities of the two political Branches.'").

[242] This uncertainty is arguably part and parcel of the American separation of powers. *See* Bowsher v. Synar, 478 U.S 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.").

[243] *See* H.R. 4010, Congressional Subpoena Compliance Act of 2017, 115th Cong. § 2; H. REP. NO. 115-360, at 6–7 (2017).

[244] H.R. 4010, 115th Cong. § 2 (2017).

[245] *Id. See also* H.R. 3362, 111th Cong. § 201(e) (2009) (providing that the courts "shall hear and determine" a civil action to enforce a subpoena under the bill "as expeditiously as possible, and to the maximum extent practicable during the Congress in which the action is commenced.").

[246] *See* Burlington N. R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts.").

[247] *See, e.g.*, 52 USCS § 30110 note (establishing that any action challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 shall be advanced and expedited "to the greatest possible extent"); 15 U.S.C. § 717r (establishing expedited judicial review of certain orders of the Federal Power Commission).

[248] *See* 15 U.S.C. § 6714 (allowing preemption conflicts between state and federal insurance regulators to be filed

Federal law had provided for expedited judicial review of lawsuits filed by the Senate to enforce subpoenas. Under 28 U.S.C. § 1364(c), Senate subpoena-enforcement actions were to be set for hearing at the "earliest practicable date" and "in every way to be expedited."[249] Those provisions were repealed in 1984.[250]

Establishing expedited judicial review of congressional subpoena-enforcement actions may mitigate some drawbacks of the current civil enforcement process. Yet even if expedited procedures lead to swifter judicial decisions, the risk remains to Congress that a reviewing court could issue a decision adverse to the legislative branch's investigative and oversight interests. Moreover, some commentators have suggested that *any* attempt to seek assistance from the courts to enforce Congress's own constitutional powers effectively weakens the legislative branch.[251]

Return to the Inherent Contempt Power

The House or Senate may also seek to utilize the inherent contempt power to enforce compliance with congressional subpoenas issued to executive branch officials. As noted, the Supreme Court has confirmed the existence of each house's independent and unilateral authority to arrest and detain individuals in order to compel compliance with a subpoena.[252] If either the House or Senate was to revive the inherent contempt power, the chamber may consider establishing specific procedures to be followed in its exercise. Such procedures could govern consideration of an inherent contempt resolution and actions of the Sergeant-at-Arms, as well as the process by which the House or Senate would conduct the "trial."[253] These procedures could be established by a one-house resolution or—if both the House and Senate seek to use uniform procedures—by concurrent resolution or by statute.

Although rare, the inherent contempt power has been used to detain executive branch officials, including for non-compliance with a congressional subpoena. During an 1879 investigation into allegations of maladministration by George F. Seward while a consul general in Shanghai, a House committee issued a subpoena to Seward for relevant documents and testimony.[254] When Seward—then an ambassador to China—refused to comply, the House passed a resolution holding him in contempt and directing the Sergeant-at-Arms to take him into custody and bring

directly in the appropriate U.S. Court of Appeals, which is to render an opinion within sixty days).

[249] Pub. L. No. 95-421 Title VII, § 705(f)(2), 92 Stat. 1879 (1978).

[250] Pub. L. No. 98-620, Title IV, Subtitle A, § 402(29)(D), 98 Stat. 3359 (1986). The repeal was part of a larger effort to reduce the number of expedited consideration provisions.

[251] Chafetz, *supra* note 92, at 1147 ("To invoke the aid of a third party is to admit weakness—to admit that one's own authority is insufficient to get what one wants."). *See also* HAMILTON, *supra* note 101, at 317 ("Congress is jealous of its prerogatives and would undoubtedly be hesitant to call on the judiciary for instructions on legislative powers.").

[252] *See*, *e.g.*, Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935) (upholding use of inherent contempt power to punish witness for destruction of subpoenaed documents); McGrain v. Daugherty, 273 U.S. 135, 173–76 (1927) (upholding use of inherent contempt power in response to non-compliance with subpoena); Marshall v. Gordon, 243 U.S. 521, 543 (1917) (holding that the inherent contempt power is applicable to "contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel").

[253] *See* William J. Murphy & Morton Rosenberg, *Proposed Inherent Contempt Enforcement Rule for the U.S. House* (2018), https://goodgovernmentnow.org/wp-content/uploads/2018/09/summary-house-inherent-contempt-rule-proposal-v7.pdf.

[254] 8 Cong. Rec. H 1771–72 (Feb. 22, 1879).

him before the House.[255] Seward was taken into custody and brought before the House, where he was ultimately released while the House considered impeachment articles.[256]

In another example which gave rise to *Marshall v. Gordon*, the House adopted a contempt resolution directing the Sergeant-at-Arms to arrest U.S. Attorney Snowden Marshall for an insulting letter sent to a committee chair.[257] The arrest was then made and quickly challenged in federal court, where ultimately the Supreme Court ordered Marshall released.[258] In doing so, the Court reaffirmed the contempt power generally, but concluded that in Marshall's case the contempt was invalid as "not intrinsic to the right of the House to preserve the means of discharging its legislative duties."[259] Notably, the Court was silent on whether Marshall's status as an executive branch official had any impact on the House's exercise of the power.[260]

Given these examples, and the Supreme Court's general statements on the reach of the inherent contempt power, it would appear to be within Congress's power to use inherent contempt to compel executive branch compliance with congressional subpoenas, at least in certain circumstances. But neither the Seward nor Marshall example involved an assertion of executive privilege, meaning that the Court did not need to consider what, if any, constraints that privilege may impose upon Congress's exercise of its inherent contempt authority.[261]

Moreover, an attempt by Congress to arrest or detain an executive official may carry other risks. There would appear to be a possibility that, if the Sergeant-at-Arms attempted to arrest an executive official, a standoff might occur with executive branch law enforcement tasked with protecting that official.[262] This concern is also applicable in the event that a judicial marshal enforces a judicial order of contempt against an executive official, and perhaps will always be "attendant in high-stakes separation-of-powers controversies."[263]

Inherent Contempt and Executive Privilege

Although any subpoena-enforcement mechanism used to override the President's assertion of executive privilege may raise constitutional considerations, use of the inherent contempt power to detain an executive official to obtain documents or testimony the President has found to be privileged would likely raise unique concerns.

As discussed, the 1984 OLC opinion issued in the wake of the Burford contempt concluded that the criminal contempt of Congress provision could not constitutionally be applied to an executive

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[255] 8 Cong. Rec. H 1775 (Feb. 22, 1879).

[256] Chafetz, *supra* note 92, at 1137.

[257] *Marshall*, 243 U.S. at 530.

[258] *Id*. at 532.

[259] *Id*. at 541, 546.

[260] Chafetz, *supra* note 92, at 1138 (noting that "the Court did not even find it necessary to 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"). *But see Peterson*, supra note 232, at 130 (noting that "this case . . . not only does not involve a claim of executive privilege, it does not involve a separation of powers dispute between Congress and the executive branch. Indeed, this case does not even involve a congressional subpoena for documents or testimony.").

[261] Peterson, *supra* note 232, at 127 (noting that neither the Seward nor Marshall contempts "involved an assertion of executive privilege by the official").

[262] Josh Chafetz, Opinion, *If the House holds Holder in contempt, what then?*, WASH. POST., June 21, 2012, https://www.washingtonpost.com/opinions/if-the-house-censures-holder-what-then/2012/06/21/gJQATRPEtV_story.html?utm_term=.85ee229865de.

[263] *Id.*

official asserting a President's claim of executive privilege.[264] The alternative, the OLC argued, "would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions" by requiring that subordinates risk a criminal trial and possible conviction to "vindicate" the privilege.[265] In a footnote, the opinion extended that same conclusion to Congress's use of inherent contempt to "arrest" and "punish" an executive branch official invoking a President's claim of executive privilege.[266] The OLC asserted that because the "reach" of the criminal contempt statute was "intended to be coextensive with Congress's inherent civil contempt powers," the "same reasoning that suggests that the criminal contempt statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well."[267] This argument has never been tested in court, but was alluded to in *Miers*. There, the district court stated that the executive branch position was not "dispositive" and that the court "need not decide the issue."[268] Nevertheless, the court acknowledged that "there are strong reasons to doubt the viability of Congress's inherent contempt authority vis-a-vis senior executive officials."[269]

An argument can be made that the OLC position is based on a conception of inherent contempt not entirely consistent with the power's historical use. For example, the criminal contempt statute does not appear to have been intended to be "coextensive" with inherent contempt.[270] While 2 U.S.C. § 192 and its predecessors apply only to non-compliance with congressional subpoenas, the inherent contempt power applies to a much wider range of actions that threaten Congress's ability to discharge the legislative function.[271] The Supreme Court also appears to have viewed the two powers as distinct, noting that they are "separately exercised" and "*diverso intuito*."[272] As opposed to prosecution under the criminal contempt statute, inherent contempt is not necessarily imposed to "punish" the contemnor.[273] In the context of subpoena enforcement, inherent contempt has in fact generally been remedial rather than punitive, in that any detention has generally been lifted once the subpoena is complied with. The Supreme Court, for example, noted in 1917 that it could not identify a "single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify . . . ."[274] Even so, the Court also appears to have recognized that Congress retains the authority to use the inherent contempt power "solely" for purposes of punishment.[275]

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[264] *Olson Opinion*, *supra* note 12, at 102.

[265] *Id*. at 136.

[266] *Id*. at 140 n.42.

[267] *Id*.

[268] Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 92 (D.D.C. 2008).

[269] *Id*.

[270] *Olson Opinion*, *supra* note 12, at 140 n.42.

[271] Marshall v. Gordon, 243 U.S. 521, 543 (1917).

[272] *Id*. at 538 (*citing* In re Chapman, 166 U.S. 661, 672 (1897)). *See also* Pearce v. Aldrich Mining Co., 184 Ala. 610, 632 (1913) (defining *diverso intuito* as "actions of different natures").

[273] *Olson Opinion*, *supra* note 12, at 140 n.42.

[274] *Marshall*, 243 U.S. at 544.

[275] Jurney v. MacCracken, 294 U.S. 125, 147–48 (1935) (upholding the use of inherent contempt to punish a witness for the destruction of documents, and explicitly rejecting the argument that "the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely qua punishment."). *Id*. at 48 ("[W]here the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.").

Conflicts between the President's constitutionally implied privilege to protect confidential executive branch communications and Congress's constitutionally implied power to conduct investigative oversight prerogatives are not novel.[276] Indeed, they have consistently arisen throughout American history, beginning as early as the first Congress when President Washington asserted that although the executive branch had a general obligation to comply with congressional requests for information, it still "ought to refuse those [papers], the disclosure of which would injure the public."[277] A full analysis of this long-standing debate is beyond the scope of this report. It is enough to suggest that historical practice and the limited case law both suggest that neither the President's executive privilege nor Congress's inherent contempt power is absolute.[278] In the case of a conflict, judicial decisions relating to both executive privilege and Congress's oversight and contempt powers would suggest that a resolution would most appropriately come through good-faith negotiations between the political branches in which each seeks to accommodate the needs of the other. If those negotiations fail, and Congress chooses to invoke the inherent contempt power against an executive branch official claiming executive privilege, a court would likely be called upon to resolve the dispute, presumably in the posture of a habeas proceeding or a civil suit for wrongful detention.[279] Although the scope of this review is somewhat unclear, it would seem likely that a reviewing court would engage in 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.[280]

Inherent Contempt and the Power to Fine: An Alternative to Detention

The use of the inherent contempt power to arrest and detain an executive branch official asserting executive privilege at the direction of the President would likely also raise practical concerns relating to historical comity between the branches. The district court in *Miers* articulated this

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[276] *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 177–85 (5th ed. 2007) (describing examples of executive privilege conflict between Congress and the executive branch); MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 160–63 (2d ed. 2002) (describing the role of Congress in executive privilege disputes).

[277] *See* LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 10–11 (2004).

[278] *See* United States v. AT&T Co., 567 F.2d 121, 128 (D.C. Cir. 1977) ("[I]t is necessary for this Court to consider the conflicting claims of the parties to absolute authority. Both claims are put in absolute terms, to run without limit; and neither can be accepted as put."). *See also* Ronald L. Claveloux, *Note: The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1358 (1983) ("Congress's oversight power has long been recognized as an incident of the constitutional grant of legislative power. Executive privilege is based on the need for confidentiality of executive communications and is implied by the separation of powers doctrine. Neither congressional oversight nor executive secrecy is absolute, and it is inevitable that the two doctrines will conflict with one another from time to time.").

[279] The scope of judicial review in a habeas corpus proceeding is generally quite narrow. *See Jurney*, 294 U.S. at 152 ("The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes.") Thus, it is not clear exactly how a court would review an executive privilege claim. Chafetz, *supra* note 92, at 1152 (noting habeas review is "narrowly circumscribed"). Nevertheless, it has been noted that "where the liberty of an individual is at stake," as is the case in a habeas proceeding, "the courts tend to construe the powers of Congress strictly." HAMILTON, supra note 101, at 198. Moreover, in *Comm. on the Judiciary v. Miers*, the district court noted that in addition to the "central issue of the scope and nature of Congress's subpoena power" there "would also be a host of other issues raised by the habeas corpus petition" including the "scope of Congress's asserted inherent contempt power." 558 F. Supp. 2d, 83 n.20 (D.D.C. 2008).

[280] Thus, it would appear that no matter what subpoena enforcement route is chosen, the claim of privilege may ultimately be evaluated by the courts. If a criminal contempt prosecution is brought, executive privilege could be raised as a defense in that proceeding. In civil enforcement, the privilege argument would likely form the foundation of the courts' evaluation of whether to order compliance with the subpoena. And finally, if a witness is taken into custody pursuant to inherent contempt, a court would likely evaluate the privilege issue in a habeas proceeding.

view,[281] warning that the use of the inherent contempt power to imprison current or even former executive branch officials would "exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis."[282] The court suggested that a "stand-off" between the Sergeant-at-Arms and an executive branch official would be an "unseemly" and "provocative clash" that should be avoided.[283]

If Congress agrees with the sentiments expressed in the *Miers* opinion about the "unseemly" nature of directing the Sergeant-at-Arms to arrest and detain an executive branch official, it may consider imposing less onerous penalties on an official deemed guilty of contempt through the inherent contempt process. For example, the imposition of a fine or other monetary penalty, rather than detention and imprisonment, could mitigate some concerns associated with a physical arrest. Neither the House nor the Senate has ever imposed a monetary penalty through the exercise of inherent contempt, yet there may be an argument supporting the existence of that power.[284]

Such an argument would likely rely both on dicta from the Supreme Court's opinion in *Kilbourn v. Thompson*[285] and an analogy to the judiciary's contempt power. In *Kilbourn*, the Court made a passing reference to fines during a discussion of the scope of the House's power to "punish."[286] After establishing that the House clearly had authority to punish its own Members for "disorderly behavior," and perhaps the power to punish others as part of either an inquiry into a contested election or an impeachment investigation, the Court then noted that "[w]hether the power of punishment in either House by *fine or imprisonment* goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire."[287] This may be interpreted to suggest that so long as punishment is appropriate, the form of punishment that may be imposed could include a fine.

In *Anderson v. Dunn*, the Court drew analogies between Congress's power and the judiciary's power to punish for contempt.[288] The courts, the opinion noted, had been delegated authority by

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[281] *Miers*, 558 F. Supp. 2d at 91–92 (noting that "this administration, along with previous executive administrations, has observed that inherent contempt is not available for use against senior executive branch officials who claim executive privilege").

[282] *Id*. at 92. The court noted the inconsistency of the executive branch positions that inherent contempt was both an available alternative to civil enforcement and unavailable against an executive branch official claiming executive privilege. *Id*. at 92 ("The Executive cannot simultaneously question the sufficiency and availability of an alternative remedy but nevertheless insist that the Committee must attempt to 'exhaust' it before a civil cause of action is available.").

[283] *Id*.

[284] There is a suggestion in *Jurney v. MacCracken* that "[i]n 1832, Samuel Huston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees." 294 U.S 125, 148 n.5 (1935). This, however, does not appear to be the case. Although Houston was reprimanded by the House it does not appear that he was fined. It was only in a later judicial proceeding for assault that a fine was imposed. 2 Ops. Atty. Gen. 655 (1834).

[285] Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).

[286] *Id*.

[287] *Id*. at 190 (emphasis added). The *Kilbourn* opinion's narrow view of Congress's investigative power has been subject to significant criticism. *See* United States v. Rumely, 345 U.S. 41, 46 (1953) (acknowledging that *Kilbourn*'s "loose language" has been the subject of "weighty criticism").

[288] *Anderson* was the Court's first approval of the contempt power. It is of historical interest that the Speaker retained the sitting Attorney General of the United States, William Wirt, to represent the House's interest in the litigation. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 628 n.214 (1989).

statute to punish contemptuous conduct with a fine, imprisonment, or both.[289] The Court suggested, however, that the courts could have exercised the "power to fine and imprison for contempts . . . without the aid of the statute" pursuant to a constitutional contempt authority "incidental to a grant of judicial power."[290] The purpose of the judicial contempt statute, the Court reasoned, was to make a "legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."[291] This statement could be read to suggest that the court viewed the imposition of a fine as a "known and acknowledged" form of punishment for inherent contempt, at least in the courts.[292] If such a power inheres to the courts, it might also inhere to Congress as a coordinate branch of government.

Yet additional language from *Anderson* suggests that the power to punish for inherent contempt in the congressional context may be limited to imprisonment. After discussing the judicial contempt power, the *Anderson* opinion appears to have directly considered[293] the scope of Congress's authority, noting that the "extent of [Congress's] punishing power" is

> "the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious.[294]

Despite the Court's statement that "imprisonment" was the "least possible power adequate" to remedy contemptuous conduct, monetary penalties have generally been viewed as less severe than imprisonment. The Supreme Court, for example, has viewed the imposition of a fine as a "lesser punishment" than the "punishment of imprisonment."[295] Still, the Court later reaffirmed the notion that imprisonment was the appropriate penalty for contempt in *Marshall* by stating that *Anderson* imposed two limitations on the contempt power: "the power . . . is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."[296]

It would appear, therefore, that whether Congress has the authority to impose a fine or other monetary penalty on a witness found to be in contempt by either house is an open question. However, in the case of a legal challenge to a fine, the lack of any precedent for such an assertion of power may inform a court's judgment on the appropriate reach of Congress's power.[297]

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[289] Anderson v. Dunn, 19 U.S. 204, 227 (1821).

[290] *Id*.

[291] *Id*. at 227–28.

[292] *See* William J. Murphy and Morton Rosenberg, *Why Congress Can Impose Fines for Contempt* (2018), https://goodgovernmentnow.org/why-congress-can-impose-fines-v3.pdf (defending Congress's authority to impose a fine through inherent contempt).

[293] *Anderson*, 19 U.S. at 230 ("The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?").

[294] *Id*. at 230–31.

[295] *See* Solem v. Helm, 463 U.S. 277, 289 (1983) (distinguishing between the "lesser punishment of a fine," the "intermediate punishment of imprisonment," and the "the greater punishment of death").

[296] Marshall v. Gordon, 243 U.S. 521, 542 (1917).

[297] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) (identifying a "lack of historical precedent" as a "telling indication" of constitutional problems). Even assuming the legal authority to impose fines for non-compliance with a subpoena, there may be practical difficulties in collecting such a fine if the contemnor does not choose to voluntarily remit the sum.

Moreover, even if Congress retains this authority, it is unclear how such a fine would be implemented and, in the case that the contemnor refuses to remit the sum, collected.

Provide for the Appointment of an Independent Official to Enforce Violations of the Criminal Contempt of Congress Statute

Another proposed alternative for subpoena enforcement has been to establish statutorily a procedure for the appointment of an independent official responsible for prosecuting criminal contempt of Congress citations against executive branch officials.[298] Such a law would seek to create an independent prosecutor authorized to make litigation and enforcement decisions, including the decision to initiate and pursue a criminal contempt prosecution pursuant to 2 U.S.C. § 192 and § 194 under reduced influence from the President and the DOJ. The independent prosecutor would retain prosecutorial discretion in enforcement decisions, but would arguably not be subject to the same "subtle and direct" political pressure and controls that a traditional U.S. Attorney may face.[299] This office would likely be loosely modeled on the expired Office of Independent Counsel (Independent Counsel) established in the Independent Counsel Act of 1978 (Independent Counsel Act or ICA) and upheld by the Supreme Court in *Morrison v Olson*.[300]

The ICA created a statutory framework by which an Independent Counsel could be appointed to investigate and prosecute high-ranking government officials for a variety of violations of federal law, including criminal contempt of Congress.[301] The actual appointment took place under a three-step process. First, the law required that the Attorney General conduct a preliminary investigation upon receiving "information sufficient to constitute grounds to investigate whether" a covered federal criminal violation has occurred.[302] Second, if the Attorney General determined that there were "reasonable grounds to believe that further investigation is warranted," the Attorney General had to "apply" to a three-judge panel of the D.C. Circuit for the appointment of an Independent Counsel.[303] Third, upon receipt of an application from the Attorney General, the three-judge panel had to "appoint an appropriate independent counsel . . . ."[304] Thus, although the

[298] For example, H.R. 2684 introduced in the 98th Congress, would have amended the Ethics in Government Act to provide that "the Attorney General shall apply to the division of the court for the appointment of an independent counsel within five days after" after a House contempt citation is certified pursuant to 2 U.S.C. § 194. H.R. 2684, 98th Cong. (1983). *See also* H.R. 3362, 111th Cong. § 202 (2009) and H.R. 277, 111th Cong. §§ 2–5 (2009) (providing for the appointment of an independent special counsel by the Chief Judge of the appropriate United States District Court to prosecute criminal contempt of Congress after the DOJ has informed the House that it will not initiate a prosecution).

[299] *See Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov'tl Relations of the H. Comm. on the Judiciary*, 98th Cong. 30 (1983) (statement of Stanley F. Brand, former Counsel to the Clerk of the House of Representatives) (noting that H.R. 2684 would remove "control from the United States Attorney in situations where he may be subject to both subtle and direct pressure not to proceed."). Under the terms of the expired independent counsel statute, there is some question as to whether the Independent Counsel would be bound by the OLC's determination that the criminal contempt statute cannot constitutionally be enforced against an executive branch official asserting executive privilege at the direction of the President. *See* 28 U.S.C. § 594(f) ("An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.").

[300] 28 U.S.C. §§ 591–99; 487 U.S. 654, 660 (1988). The independent counsel provisions expired in 1999. 28 U.S.C. § 599.

[301] *See* Peterson, *supra* note 232, at 232 (noting that "[n]o independent counsel was appointed in the [Burford] case because the Administrator of the EPA is not one of the federal officials within the scope of the independent counsel provisions of the Ethics in Government Act").

[302] 28 U.S.C. § 591(a).

[303] *Id*. § 592(c).

[304] *Id*. § 593(b).

actual appointment was made by the judiciary, the Attorney General's preliminary investigation determined whether the court's appointment authority was triggered. Under the law, Congress could request an appointment of an Independent Counsel, but it could not mandate that the Attorney General initiate the appointment process.[305] Nor was a decision by the Attorney General not to seek appointment of an Independent Counsel subject to judicial review.[306]

Once appointed, the Independent Counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[307] Moreover, he would exercise those powers with a substantial degree of independence established through removal protections and other provisions ensuring the Independent Counsel's authority to make investigatory and prosecutorial decisions without direction from the Attorney General.[308] With regard to removal, the law provided that the Independent Counsel "may be removed from office . . . only by the personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."[309]

The ICA was upheld against constitutional challenge in the 1988 case of *Morrison v. Olson*.[310] In a 7-1 decision, the Court held that the law was consistent with both the Appointments Clause and the general separation of powers.[311] With regard to the Appointments Clause, the Court determined that the Independent Counsel was an inferior officer, and was thus not required to be appointed by the President with the advice and consent of the Senate, but could permissibly be appointed by the "courts of law."[312] As for the general separation of powers, the Court held that Congress could provide the Independent Counsel with substantial autonomy and protection from removal despite his law enforcement powers. The majority opinion reasoned that although the Independent Counsel was "to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors," the ICA still provided the Attorney General with several adequate means of "supervising or controlling" the Independent Counsel's prosecutorial powers, preserving in the executive branch "sufficient control over the Independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[313]

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[305] *Id*. § 592(g).

[306] *Id*. § 592(f).

[307] *Id*. § 594(a).

[308] *Id*. §§ 594(a), 594(i), 596.

[309] *Id*. § 596(a)(1). In addition, after removing an independent counsel the Attorney General was required to submit a report to the court and to Congress "specifying the facts found and the ultimate grounds for such removal." *Id*. §596(a)(2).

[310] 487 U.S. 654, 660 (1988).

[311] *Id*.

[312] *Id*. at 670–77 (concluding that the independent counsel was an inferior officer because he was "subject to removal by a higher Executive Branch official"; "empowered by the Act to perform only certain, limited duties"; and had a "limited" jurisdiction.).

[313] The Court noted three aspects of the law that provided the Attorney General with adequate supervision over the Independent Counsel:

> Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion . . . In addition, the jurisdiction of the

Although subject to some external criticism in the decades since its issuance, the *Morrison* opinion has neither been overturned nor even directly criticized by a majority opinion of the Supreme Court.[314] That said, the composition of the Court has changed, and its more recent decisions have arguably been more protective of executive power, specifically with regard to the President's authority to supervise and control executive branch officials.[315] In any event, if Congress were to seek to establish an independent office for the prosecution of criminal contempt of Congress, it would seem prudent to mirror the Independent Counsel framework approved in *Morrison*, subject to some potential adjustments.

Perhaps the chief criticism of the independent counsel statute, and arguably the reason the statute was permitted to expire, was the breadth of the Independent Counsel's jurisdiction.[316] The ICA authorized the appointment of an independent counsel to investigate and prosecute a wide array of crimes, while also providing the option for the expansion of an appointed counsel's initial jurisdiction with the approval of the three-judge panel.[317] Strictly limiting a new Independent Counsel's jurisdiction to only the investigation and prosecution of the specific criminal contempt of Congress citation approved by either the House or the Senate, with no option for jurisdictional expansion, might sufficiently restrict the authority of the Independent Counsel to alleviate some of those concerns.

Congress may also seek to alter the triggering mechanism for the appointment of an independent counsel, for example, by removing the requirement for a preliminary investigation and instead simply requiring appointment by the court upon the approval of a contempt citation by either house of Congress.[318] This alteration would prevent the Attorney General from effectively blocking an appointment at that preliminary stage by concluding that the official's non-compliance with the subpoena had legal merit. It would appear, however, that such a change could raise additional constitutional concerns to an already debated framework.[319] Providing the

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> independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so.

Id. at 696.

[314] In drawing the line of demarcation between inferior and principal officers the courts appear to have implicitly transitioned away from the flexible, multi-factor standard applied in *Morrison* to a more formalistic analysis in which the question of whether the official is "directed and supervised" by another principle officer is "by far the most important" factor. *See* In re Grand Jury Investigation, 315 F. Supp. 3d 602, 626 (D.D.C. 2018) (citing Edmond v. United States, 520 U.S. 651, 662–63 (1997)). *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (applying the *Edmond* "directed and supervised" test). In *Edmond v. United States* the Court held that "[g]enerally speaking the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." 520 U.S. at 662. In any event, "[n]either *Morrison* nor *Edmond* establish[] a bright-line test .. . . " United States v. Libby, 429 F. Supp. 2d 27, 37 (D.D.C. 2006).

[315] *See Free. Enter. Fund*, 561 U.S. at 484 (holding that a "multilevel protection from removal" provided to members of the Public Company Accounting Oversight Board was "contrary to Article II's vesting of the executive power in the President" and that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them").

[316] *See* 149 Cong. Rec. S12160, 12162 (2004) (statement of Sen. Schumer) (asserting that "the independent counsel law expired because people were worried about" a "runaway counsel").

[317] 28 U.S.C. §§ 591(a), 593(c).

[318] *See* H.R. 2684, 98th Cong. (1983) (providing that "the Attorney General shall apply to the division of the court for the appointment of an independent counsel within five days after" after a House contempt citation is certified pursuant to 2 U.S.C. § 194).

[319] The Senate Committee on the Judiciary recently engaged in a debate focused on the merits and continued validity of the *Morrison* decision. *See The Special Counsel Independence and Integrity Act: Hearing on S. 2644 Before S. Comm.*

Attorney General with discretion in triggering the appointment was important to the Court's ultimate approval of independent counsel provisions in *Morrison*. The Court noted the Attorney General's control in both discussing whether the law authorized an unconstitutional "usurpation" of "executive functions" and whether the law otherwise undermines "the powers of the executive branch."[320] Specifically, the Court noted that the special division could not appoint an independent counsel "sua sponte," and that because the Attorney General retained authority over the appointment, the law gave "the executive a degree of control over the power to initiate an investigation by the independent counsel."[321] Given these statements, removal of the discretionary authority provided to the Attorney General in triggering the appointment would likely create additional avenues of legal challenge to the law.[322]

Contingent Contempt Legislation

Congress might also seek to establish a 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.[323] Like the criminal contempt of Congress provisions, such a statute would arguably be enacted as "necessary and proper" to Congress's enforcement of its investigative subpoena power.[324] Any number of consequences may be built into this type of contingent framework, but perhaps the most effective approach would be to utilize Congress's power of the purse to establish some form of conditional limitation or reduction on an agency's funding that is triggered by the approval of a contempt citation against the agency's official.[325] For example, a law might seek to establish that the approval of a contempt resolution against an executive branch official would lead to the temporary withholding of a certain percentage of the official's agency's appropriated funds until the outstanding subpoena is complied with.[326] A law could, for example,

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on the Judiciary, 115th Cong. (2018).

[320] *Morrison*, 487 U.S. at 695.

[321] *Id*. at 695–96. Moreover, by diminishing the Attorney General's supervision and control, such an alteration would also make the independent counsel more likely to be classified as a principal officer that must be appointed by the President with advice and consent of the Senate. *See* Edmond v. United States, 520 U.S. 651, 662 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior.").

[322] The DOJ opposed a bill that would have mandated appointment of an independent counsel upon approval of a criminal contempt citation by either house. *See Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov'tl Relations of the H. Comm. on the Judiciary*, 98th Cong. 43 (1983).

[323] *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–72 (2002) (discussing the constitutionality of contingent legislation generally: "Laws can take effect immediately, on some specific future date, or on the happening of some future event that may or may not be certain to occur. If a law takes effect only on the happening of some future event that is not certain to occur (or is not certain to occur at a specific time), it is contingent legislation.")

[324] U.S. CONST. art. I, § 8; In re Chapman, 166 U.S. 661, 671–72 (1897).

[325] U.S. CONST. art. I, § 8, cl. 1 (Taxing and Spending Clause); *Id*. § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."). For example, Congress enacted a provision prohibiting the use of appropriated funds to carry out provisions of the Mutual Security Act of 1954 unless the International Cooperation Administration complied with congressional committee or Comptroller General requests for information. Pub. L. No. 86-383, § 111(d), 73 Stat. 717 (1959).

[326] Congress could also seek to restrict the executive official's salary. Appropriations riders have previously been enacted that prohibit the use of funds to pay the salary of any federal official or employee that prevents another official or employee from communicating with Congress. *See* Pub. L. No. 114-113, Div. E, § 713, 129 Stat. 2242, 2475–76 (2015). It has previously been recommended that Congress enact a similar rider "disallowing the use of any appropriation to pay the salary of a federal official held in contempt of Congress." *See* H. R. REP. NO. 114-848, at 402;

place an obligation on the Office of Management and Budget (OMB) to restrict the release of a percentage of the applicable agency's funds at the next quarterly apportionment.[327] Such an arrangement would use Congress's control over agency funding to encourage and incentivize agency cooperation with committee subpoenas.

Contingent (or conditional) legislation—typically defined as legislation in which a provision is triggered, activated, or given legal effect only upon the occurrence of some future event or decision—has generally been approved by the courts. That said,[328] the triggering event built into previously approved contingent legislation has generally been an action, finding, or decision of an executive branch official.[329] The Supreme Court has explained the purpose of this type of legislation, writing that due to the uncertainty of "future conditions," Congress "may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective," and instead "may leave the determination of such time to the decision of an Executive."[330] A statute that would instead effectively leave that determination to a single house of Congress—through the approval of a contempt resolution—would appear to be a unique and potentially problematic arrangement. Such a statutory arrangement could arguably be viewed as an impermissible exercise of either legislative or executive power by a single house of Congress.[331]

The argument that tying a reduction in agency funding to the approval of a contempt resolution[332] may represent an invalid exercise of *legislative* power by a single house of Congress would be based on the principles of *Chadha*. As noted, *Chadha* limited Congress's authority to wield legislative power—which the Court defined as any action with "the purpose and effect" of "altering the legal rights" of those outside the legislative branch—without complying with the Constitution's "finely wrought" process of bicameralism and presentment.[333] Once Congress makes a legislative choice it generally must abide by that choice until "legislatively altered or

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H.R. 4447, 113th Cong. § 2 (2014) (prohibiting the payment of compensation to an officer or employee of the Federal government who has been held in contempt of Congress by the House or Senate). There may be some concern that such an approach could constitute a bill of attainder in contravention of U.S. CONST. art I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed.") *See* Cummings v. Missouri, 71 U.S. 277, 323 (1867) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial."); United States v. Lovett, 328 U.S. 303, 316–18 (1946) (invalidating as a bill of attainder an appropriations provision that permanently prohibited the use of federal funds to pay salaries of named officials). However, unlike the provision at issue in *Lovett*, a contingent contempt framework that restricts an official's salary would not specifically name any individuals, nor would it act as a "permanent proscription from any opportunity to serve the Government . . . ." *Lovett*, 328 U.S. at 316.

[327] 31 U.S.C. § 1512(a); OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 120 (June 2018), https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf.

[328] *See, e.g.*, Lawson, *supra* note 323, at 363; United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577–78 (1939); Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892); Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1475 (D.C. Cir. 1998) ("Through such contingent legislation, Congress enacts a policy . . . which is to be implemented upon the Executive's finding of the conditions specified by Congress . . . .").

[329] *See, e.g.*, *Marshall Field & Co.*, 143 U.S. at 693 (upholding a law that authorized the President to suspend statutory exemptions from trade duties upon certain findings). The Court has also upheld triggering events within the control of private parties. Currin v. Wallace, 306 U.S. 1, 6 (1939) (upholding a law that made agency authority contingent upon the vote of private tobacco growers).

[330] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928).

[331] *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 276 ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.").

[332] The contempt resolution and the procedures required to enact it could be described in the law or linked to the procedures of 2 U.S.C. § 194.

[333] INS v. Chadha, 462 U.S. 919, 952 (1983).

revoked."[334] Thus, Congress cannot, even by statute, provide one house with the power to override or alter authority delegated to the executive branch. A contingent contempt framework that would allow one house effectively to amend an agency's legal authority to obligate funds by adopting a contempt resolution could be viewed as in tension with this principle. The executive branch, for example, has objected to legislative proposals that would create a "permanent [contempt] mechanism to be triggered by the vote of one house," at least when that mechanism would "impose. . . an affirmative legal duty" on the executive branch.[335] Such an arrangement, the executive has argued, would be "contrary to the clear language and rationale of *Chadha*."[336]

The limits that the *Chadha* decision imposes on contingent contempt legislation are difficult to assess. It is clear, for example, that in the typical legislative scenario a one-house resolution cannot constitutionally have the legal effect of altering statutorily authorized appropriations.[337] If Congress wants to amend an appropriations provision, it generally must do so by enacting a new law. Even so, it would appear that an argument could be made that the restrictions of *Chadha* are either inapplicable or apply with less force in the investigative and oversight context, perhaps because it is an area in which the Constitution has implicitly authorized a single house to act with legal authority.[338] There are a variety of existing investigative authorities that appear to allow a single house, or a single committee, to alter the legal rights and obligations of those outside the legislative branch. These include issuing a subpoena, which triggers a legal obligation to comply;[339] the inherent contempt power, which allows one house to arrest and detain those outside the legislative branch;[340] the criminal contempt statute, which by its terms and as interpreted by some courts appears to impose an obligation on the U.S. Attorney that flows from the approval of a contempt resolution; and the federal immunity statute, which allows a single committee or single house to obtain a court order granting a witness immunity and requiring their testimony following an assertion of the Fifth Amendment privilege against self-incrimination.[341] Decisions of at least two federal appellate courts have explicitly recognized each house's authority to act unilaterally in the investigatory context, holding that "[t]here is no doubt that Congress constitutionally can act, without recourse to the full legislative procedure of bicameral passage and presentment, to investigate the conduct of executive officials and others outside the legislative branch."[342] Because the "process to enforce" investigative demands has been viewed

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[334] *Id.* at 955.

[335] *Olson Opinion*, supra note 12, at 128 n.28.

[336] *Id*.

[337] *See Chadha*, 462 U.S. at 952; U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, GAO-16-464SP 2-43, 2-46 (4th ed. 2016), https://www.gao.gov/assets/680/675709.pdf (discussing *Chadha* in the reprogramming context).

[338] *See* Jack M. Beermann, *Congress's (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins*, 99 CORNELL L. REV. ONLINE 166, 179 (2014) ("When a subpoena is enforced or contempt is punished, it is pursuant to the general legislative powers of Congress, not part of an attempt to alter subjects' legal rights. Further, any penalty imposed by Congress can be tested in federal court, for example by a petition for a writ of habeas corpus if the subject of an investigation is physically detained. Subpoena enforcement and contempt punishment should thus not be viewed as among those congressional actions to which bicameralism and presentment apply."). *But see* Nat'l Wildlife Fed'n v. Watt, 571 F. Supp. 1145, 1155 (D.D.C. 1983) (suggesting that *Chadha* limitations apply whenever the underlying authority for the legislative act "derives solely from Article I of the Constitution").

[339] *See* Watkins v. United States, 354 U.S. 178, 187–88 (1957) (holding that the recipient of a subpoena has an "unremitting obligation to respond").

[340] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[341] *See* 18 U.S.C. §§ 6002, 6005.

[342] Lear Siegler, Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1109 (9th Cir. 1988), *rev'd in part*, 893 F.2d 205 (9th Cir. 1989) (reversing holding on attorneys fees); *Id*. at 1108 ("[T]he congressional power to issue subpoenas to coerce

as part of the "power of inquiry," an argument could be made that laws incidental to enforcing congressional subpoenas (like contingent contempt legislation) should not be subject to bicameralism and presentment limitations.[343]

The argument that tying a reduction in agency funding to the approval of a contempt resolution may represent an impermissible exercise of *executive* power by a single house of Congress would likely be based on the principles of *Bowsher v. Synar.* As discussed, in *Bowsher*, the Court relied on the separation of powers to invalidate a federal law that had empowered the Comptroller General, a legislative branch officer, to identify and mandate executive branch spending reductions.[344] The Court concluded that by vesting the "ultimate authority" to interpret and implement the law in one of its officers, Congress had in effect "retained control over the execution of the Act" and unconstitutionally "intruded into the executive function."[345] Congress, the Court concluded, may "control the execution of its enactment only indirectly . . . by passing new legislation."[346]

As in *Bowsher*, it could be argued that the House and Senate would retain impermissible control over the execution of any law that ties budgetary reductions to the approval of a contempt resolution. Arguably, however, the Comptroller General's authority at issue in *Bowsher* could be distinguished from that exercised by the House or Senate in a contingent contempt framework. In determining that the Comptroller General was exercising executive authority, the *Bowsher* Court focused on the fact that the Comptroller General used his own "interpretation" and "judgment" to "determine precisely what budgetary calculations are required" and the "budget cuts to be made."[347] Under a contingent contempt framework that established a set percentage funding reduction the House and Senate would exercise no such "interpretation" or "judgment" in determining the cuts to be made. To the contrary, a house would have discretion in determining whether an official was in contempt (a legislative act) but would exercise no discretion in the resulting execution or implementation (an executive act) of the budget restrictions, which would be implemented in an arguably ministerial manner by the executive branch.

A contingent funding restriction in this context may also run into some of the same implementation obstacles as enforcement of subpoenas through criminal contempt of Congress,

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testimony before investigative committees, without resort to legislation, is not in doubt. Yet it is also true that such activity 'binds' and 'directly affects' parties outside the legislative branch."); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 992–93 (3d Cir. 1986) ("Notwithstanding the limitations on its authority when Congress does not act through legislation . . . the courts have long recognized that Congress may legitimately investigate executive and other conduct even when it does not act through legislation."). *See also*, The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 138 (1996) ("[C]ongressional committees can exercise limited but legally coercive authority over persons outside the legislative branch through the power to issue subpoenas to compel testimony.").

[343] *McGrain*, 273 U.S. at 174 ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[344] 478 U.S. 714 (1986).

[345] *Id*. at 733–34.

[346] *Id*. ("[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends.").

[347] *Id*. at 732–34. Federal courts have generally not interpreted the restrictions of *Chadha* and *Bowsher* broadly. *See, e.g.*, *Lear Seigler*, 842 F.2d at 1108 (rejecting the government's proposed "extension" of *Bowsher* and *Chadha* and holding instead that "[t]he appropriate formal test . . . suggests improper congressional action to be the exercise of ultimate authority over an executive official, or a final disposition of the rights of persons outside the legislative branch. Put another way, the critical issue is whether Congress or its agent seeks to control (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process. If Congress 'in effect has retained control,' its action and the statutory provision on which it is based is unconstitutional.") (citing *Bowsher*, 478 U.S. at 734.).

especially if executive privilege is being asserted.[348] This is because the withholding of already appropriated funds would likely require the assistance of the executive branch—either through OMB withholding or through DOJ enforcement of a violation of the Anti-Deficiency Act.[349] The executive branch has objected to congressional attempts to use the spending power to encourage compliance with investigative demands in a way that "infringe[s] on the President's constitutional authority."[350] For example, in 1960 the Attorney General directed that appropriated funds "continue to be available" to the State Department despite the agency withholding information from Congress that triggered a conditional provision terminating certain funds if congressional requests for documents were not complied with.[351] Thus, in a contempt dispute involving executive privilege, if the President views the contingent contempt funding restriction as a "burden" on his ability to assert executive privilege, he might direct the OMB not to withhold applicable funding.[352]

The uncertainty associated with tying automatic funding reduction to the approval of a contempt resolution in mind, Congress may consider creating a contingent contempt framework that uses the power of the purse to *reward* agencies for compliance with congressional subpoenas rather than to *punish* them. This approach may provide the executive branch with a clear budgetary incentive to disclose subpoenaed information to a committee. For example, future appropriations bills could contain provisions that would make additional funding available (at some later point in the fiscal year) to an agency that has not had an official held in contempt of Congress. This carrot, rather than stick, approach has been used to encourage agency compliance with congressional wishes.[353] Even though arguments may still be put forward that this arrangement raises *Chadha* or *Bowsher* concerns by giving a single house control over an agency's funding level, it may not be in the Executive's interest to challenge such a provision given that invalidation of the provision would remove agency access to the increased funds.

Rather than trying to establish an automatic alteration to agency funds, Congress could avoid any potential constitutional concerns by instead allowing for the introduction of a joint resolution that would provide for the withholding of the agency's funding upon the approval of a contempt citation by either house. That resolution could be given "fast track procedures" to encourage speedy consideration by both the House and Senate.[354] Upon passage by the House and Senate, the joint resolution would be presented to the President. This arrangement would satisfy the requirements of bicameralism and presentment and entail no execution of the law by the

[348] *See* Memorandum for the Honorable Leonard Garment, Counsel to the President, from Leon Ulman, Assistant Attorney General, Office of Legal Counsel, Regarding Constitutionality of Section 13 of the State/USIA Authorization (July 16, 1973) (asserting that "where the penalty attached to the exercise of the privilege is such that as a practical matter the President has no choice but to comply with every Congressional demand no matter how injurious to the public interest or unreasonable").

[349] 31 U.S.C. § 1341. It is also possible that the House or Senate may have standing to bring a suit to enforce a violation of a contingent contempt funding restriction. *See* House v. Burwell, 130 F. Supp. 3d 53, 74075 (D.D.C. 2015) (granting the House standing to challenge a constitutional violation of the Appropriations Clause).

[350] *See* Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 266 (1996).

[351] 41 Op. Att'y Gen. 507, 531 (1960).

[352] *Olson Opinion*, *supra* note 12, at 102.

[353] *See* Pub. L. No. 115-141 § 113 (providing $320 million to the Internal Revenue Service "[i]n addition to the amounts otherwise made available" so long as the Commissioner "submits to the Committees on Appropriations of the House of Representatives and the Senate a spending plan for such funds").

[354] See CRS Report RS20234, *Expedited or "Fast-Track" Legislative Procedures*, by Christopher M. Davis.

legislative branch or its competent parts. The joint resolution would, however, be subject to presidential veto.[355]

In the alternative, the House or Senate may establish parliamentary procedural consequences that flow from the approval of a contempt citation under each body's constitutional authority to "determine the Rules of its Proceedings."[356] For example, either the House or Senate could 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.[357] Like other rules, such a provision would be enforceable by a point of order, and subject to waiver under the usual processes.[358]

Conclusion

Congress's ability to issue and enforce its own subpoenas is essential to the legislative function and an "indispensable ingredient of lawmaking."[359] That said, the prevailing enforcement mechanisms of criminal contempt of Congress and civil enforcement, both of which rely on the assistance and participation of the other branches of government, have certain drawbacks that arguably limit their effectiveness in ensuring timely compliance with congressional subpoenas by executive branch officials. As discussed, alternatives to the current framework are available, but both the constitutional separation of powers and the practical limitations arising from the political nature of congressional executive information access disputes would likely need to be considered in any potential effort at reform.

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[355] U.S. CONST. art I, § 7.

[356] *Id.* § 5.

[357] *See* H. R. REP. NO. 114-848, at 401.

[358] *See* HOUSE PRACTICE, A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE ch. 50, § 4, pp. 854–56 (2017).

[359] McGrain v. Daugherty, 273 U.S. 135, 174 (1927); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 505 (1975).

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