**The Road To Effective Enforcement Of House**

 **Committee Subpoenas**

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 **Recent media articles and commentary have been replete with speculation and anticipation about the flood tide of subpoenas that will be issued by the new Democratic Party House majority and the topics of executive branch policies, actions or inactions that will be the targets of such compulsory demands, a process that has already started. The Washington Post’s April 17 front page article updates more of the same. All of them have essentially avoided mention of the 800 pound gorilla that is in the room. None have broached the critical question that has arisen whether congressional committees presently have the legal authority to effectively enforce testimonial or documentary subpoenas against executive officials, or even the will to ensure that it will take the necessary and available measures that will make it effective.**

**Since 2006 the Executive has successfully obstructed Congress’s investigative oversight capabilities. It has accomplished this contrary to the long recognized legal and practical understanding that Congress, acting as a body or through its committees, has the virtually absolute constitutional power, and responsibility, to make and enforce information access demands to the executive branch it deems necessary to accomplish its legislative duties. It has ignored established congressional rules, tools and support mechanisms that identify, analyze and effectively utilize such sought after information, and that allow committees to make the initial determination whether there is an overriding need for the sought after information. The Department of Justice (DOJ), instead, has instituted and executed a thus far congressionally uncontested strategy of compelling committees to seek judicial assistance in order to gain compliance with their document and testimonial subpoenas by civil court proceedings. It has done this by declaring that Congress’s resort to its historic, constitutionally recognized self-protective mechanisms of inherent and criminal contempt proceedings are unconstitutional. The demonstrable consequence of this stratagem has been the crippling of the legislature’s information gathering authority and thereby undermining its core, constitutionally-mandated legislative function. It has done this by shifting the burden historically placed on a recalcitrant executive official to defend against a charge of contempt of Congress through either the inherent or criminal contempt processes on a responsible committee that now must seek judicial assistance to obtain compliance. Litigation, however, takes time and risks aberrant judicial rulings, both of which have occurred.**

**The uncertainty of whether committees can impose timely, meaningful consequences for delays or outright refusals to comply with legitimate information demands has fostered an environment of agency slow-walking and encouraged the assertion of dilatory, non-constitutional privileges. The failure to challenge such a blatant executive usurpation reflects an abnegation of institutional integrity and will. While Congress cannot expressly abdicate its core constitutional responsibilities, by inaction or acquiescence it can be effectively ceded elsewhere. That would be intolerable. It is not an exaggeration to categorize this situation as a constitutional crisis that must be addressed immediately and aggressively.**

**What can and should be done? In my 35 years as a senior legal analyst at Congressional Research Service specializing in questions about separation of powers and investigative oversight, and in the last 10 years of retirement mulling about those experiences, I have concluded that despite the Supreme Court’s consistent recognition of the breadth of Congress’s authority to access information about executive activities, the enduring lesson of successful past congressional oversight inquiries is that committees must establish their credibility with the White House and the executive departments and agencies they wish to oversee early, often and consistently, and in a manner invoking respect, if not fear. Thus, while standing and special committees have been vested with a formidable array of rules and tools to support their powers of inquiry and have developed over time an efficacious, nuanced staged investigatory process, one that proceeds from one level of persuasion or pressure to the next to achieve a mutually acceptable basis of accommodation with the executive, what has been absolutely critical to the success of such endeavors is that there has been a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. The desired goal of interbranch comity in resolving contested congressional investigative information demands has seldom if ever been achieved without such leverage, even in the best of times. The current historic state of political dysfunction puts such comity out of reasonable expectation.**

**For over 200 years that threat has been the possibility of a citation of inherent contempt before the bar of either of the Houses of Congress (1795-1935) or criminal prosecutions for contempt of Congress (1857- 2002), both of which could result in detention, incarceration and/or fines. Both were consistently successful in inducing executive branch officials to comply even before commencement of such formal proceedings. Between 1975 and 1998 ten such instances of compliance by executive officials before criminal trials occurred, many of which I was involved with. Essentially, the common factor in each one was the reluctance of the accused contemnors to subject themselves to a criminal prosecution for the sake of establishing a principle of constitutional law, policy or common law privilege for the president. The tale of EPA director Anne Gorsuch Burford’s contempt experience is both a clear illustration of the effectiveness of the leverage that serious consequences for executive obstruction of congressional prerogatives provides and puts in proper historic perspective the beginnings of the deliberate executive design to establish a presidential hegemony over the administrative bureaucracy, the so-called notion of the unitary executive.**

**The Executive challenge to congressional subpoena enforcement did not suddenly materialize full blown in 2006. It was the product of the strategic failure to effectively utilize Burford’s misguided political loyalty. By the end of 1982 it became readily apparent to the recently installed Reagan administration that its anti-government deregulatory agenda could not be accomplished through legislative means and that increased reliance on an aggressive administrative and litigation strategy was essential to securing its ideological goals. Fundamental to this scheme was the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the President or his delegate. In support of this end the administration and its supporters articulated a constitutionally based theory of a unitary executive and took a variety of administrative and litigative actions to make this idea an operative fact. These included, among others, centralizing control of agency rulemaking in the Office of Management by executive orders that created and empowered the Office of Information and Regulatory Affairs; challenging the constitutionality of independent regulatory agencies; asserting the inability of Congress to vest discretionary authority in subordinate executive officials who are free from presidential supervision and control; refusing to implement congressional enactments it deemed unconstitutional; questioning the authority of Congress to vest the appointment of an executive officer with prosecutorial powers in the courts and to provide for removal of that officer only for cause; and denying the authority of Congress to empower an agency to issue statutorily prescribed unilateral compliance orders to sister agencies found in violation of laws and regulations applicable to them or to resort to court action to force compliance with such orders. Does this sound familiar?**

**But of particular concern to the Reagan Administration was the growing threat of successful congressional resort to citations of criminal contempt of cabinet level officials. Four had been cited by votes of full or subcommittees during the Ford Administration and by 1983 three (Secretary of Energy James B. Edwards, Attorney General William French Smith and Secretary of the Interior James Watt) had so far been cited during Reagan years. Smith was allowed cooperate when he expressed distress at having been so cited. And Watt, when he learned about Smith’s easy treatment by the White was outraged and forced the administration to allow him settle by providing the sought after documents. Burford’s autobiography relates the reason he gave her for his outrage to a White House official as follows: “You’re telling me that the Attorney General had a case similar to mine and the principle for which you marched me to the end of the plank is not important enough for him to stand on? But it’s important enough for me to stand on and get abused like I have been abused?...You get me out within twenty-four hours or I’m going to the Congress personally and hand deliver those papers—because I will not be abused by the White House or the Department of Justice If the principle is not strong enough for the Attorney General of the United States to fight for, I’m not going to let you guys use me any longer.”**

**When it became Burford’s turn to face the burden of establishing the presidential withholding privilege against a criminal contempt citation she ignored Watt’s warning to her regret: “[F]rom the beginning he warned me not to let happen to me what almost happened to him. I did not listen as closely as I obviously should have, mainly because I simply didn’t think it *could* happen to me. But I did not know about his hallway conversation with Fred Fielding regarding the fact that Attorney General William French Smith had been given a special dispensation when it came to the executive privilege fight. If I had known that, would I have done anything differently? Yes. I would have felt much the way Jim did. Principle does not rest on personality. But it is something I should have known, and it is also something that Fred Fielding and the people at the Justice Department who so eagerly enlisted my participation should have told me.”**

**DOJ’s new strategy was to force a House contempt citation and go to court before the citation was transmitted to the United States Attorney to enjoin its execution. Burford was assured that DOJ had a fool proof constitutional argument that would result in dismissal of the citation before any trial. The court was of a different mind. It ruled that the suit was premature and that the constitutional issue could only be resolved during the trial. It dismissed the suit and suggested that further negotiations might be advised. Burford then refused to be part of the venture any further. Settlement negotiations with the Rep. Elliot Levitas, the chair of the House Public Works subcommittee that had issued the subpoena that was the vehicle for the contempt, ensued and were completed. But Rep. John Dingell, chair of both the Energy and Commerce Committee and its oversight subcommittee, which had also issued a subpoena to Burford, saw the deal as totally inadequate, refused to be bound by it, and threatened a new subpoena and contempt citation. New negotiations resulted in a total capitulation to his document request and an agreement that Burford’s contempt citation would vitiated.**

**The matter did not end there however. The House Judiciary Committee commenced an investigation into whether the DOJ’s actions were an attempt to obstruct the House’s legitimate investigation as to whether EPA had been properly been conducting enforcement of the Superfund Act. A principal focus of the inquiry was on the role of Ted Olson, the head of DOJ’s Office of Legal Counsel (OLC), the acknowledged author of the failed strategy. The inquiry was even more contentious than the initial investigation and played out over two years. During the course of that investigation Olson authored the 1984 OLC report that reiterated the constitutional bases he had unsuccessfully presented to the court for rejecting compliance with inherent and criminal contempt processes against executive branch officials. The Judiciary Committee’s final report was submitted to the Attorney General with a recommendation that an independent counsel be appointed to investigate whether Olson and several other named DOJ officials had engaged in obstructive actions against the Congress. With the obvious agreement of Olson, Attorney General Meese requested court appointment of an independent counsel under Ethics Reform Act to investigate Olson’s conduct. Olson refused comply with subpoena requests by the independent counsel which set in motion the Executive’s desired challenge to the constitutionality of the Independent Counsel statute. The Supreme Court’s 1988 ruling in *Morrison v. Olson* stunned the Executive. In addition to generally confirming Congress’s authority to structure the administrative bureaucracy, it specifically endorsed its authority to limit the president’s authority to unilaterally fire executive officials and declared that prosecutorial discretion was not a core and exclusive executive authority. Any doubt about the breadth of Chief Justice Rehnquist’s opinion for 7-1 majority may be dispelled by a reading of Justice Scalia’s rabid dissent. The ruling was a blow to the advocates of the unitary executive theory and put the 1984 Olson memo on the shelf. Subsequent contempt votes against White House Counsel John Quinn (1996) and Attorney General Janet Reno (1998) were complied with before a criminal citation was issued.**

**But legal trench warfare over the last three plus decades has succeeded in bringing the Olson opinion back to the forefront as the authority to bring about the reversal of *Morrison* and the advent of Executive dominance in our scheme of separated powers. That is what the call to challenge the threat to Congress’s subpoena enforcement power is all about.**

**What form should challenges take? One would be a revival of the independent counsel model with appropriate modifications for control over the perceived flaws in the original. That route, however, would require legislative action that would be unlikely to be signed into law by any president.**

**More appropriate would be for the House to exercise its rulemaking authority to establish a more “seemly” inherent contempt procedure. That process consisted of the arrest of a person refusing to comply with a subpoena for documents and/or testimony, detention until a trial was conducted on the floor of the House or Senate, and the imposition of a sentence of imprisonment upon a vote to convict. Historically the inherent contempt process was very successful and was used against two sitting executive officials. The threat of arrest, detention and incarceration was formidable and its constitutionality and its necessity as an indispensable institutional self-protective mechanism was recognized by the Supreme Court in 1821 in *Anderson v. Dunn* and reiterated at least four times since then. Indeed, the landmark Supreme Court ruling in *McGrain v*. *Daugherty* in 1927, which established the modern day breadth and legitimacy of Congress’s investigative authority, was the result of such an inherent contempt proceeding conducted during the investigation of maladministration at the DOJ in its failure to act in the face of evidence of wrongdoing in the emerging Teapot Dome scandal. It has not been utilized since 1935 because it took up much too much floor time, often entailed time consuming *habeus corpus* proceedings, and its punishment of imprisonment was limited to the end of the session in which the contempt occurred.**

**The alternative of criminal contempt prosecutions, legislatively established in 1857, avoided those burdens with similar success and has been used exclusively since 1935. Its fearsome consequences, since Burford, had dampened any enthusiasm for individual executive official martyrdom.**

**In recent times some courts and commentators have questioned inherent contempt’s seeming draconian nature but none have questioned its continued constitutionality or that it can modified by the House’s rulemaking authority to conform to modern sensibilities and still be effective. It could design an alternative procedure that eliminates arrest, detention and jail time and substitutes a speedier internal institutional process that reflects due process concerns and relies on hefty, incrementally increasing monetary fines as its coercive incentive. The 1821 *Anderson* case, recognizing the validity congressional inherent contempt, strongly suggested that fines were a permissible, analogizing it the inherent self-protective power of courts to impose fines as well as imprisonment for contemptuous conduct.**

**A third possibility is for the House to directly appoint a private sector attorney to prosecute a contemnor. The alternative of criminal contempt citations by each House, legislatively established in 1857, avoided the perceived burdens of the inherent contempt process and has been used exclusively since 1935. As I have related, the fearsome consequences, since Burford, had dampened any enthusiasm for individual executive official martyrdom. That legislation placed reliance on United States attorneys to enforce congressional contempt citations, which has now been put in doubt by the Olson strategy. There is, however, sound support for direct appointment by the Speaker of a private attorney to conduct such prosecutions in law, history and practice. As I have indicated, the Supreme Court in *Anderson v.* *Dunn* (1821) upheld the constitutionality of the use of inherent contempt by the House and based that ruling on the analogy to its recognition of the inherent power of judges to protect their judicial integrity and authority from attack by means of contempt citations. It particularly noted that no statutory authorization was necessary because such self-protective actions were critical to the maintenance of the judiciary’s institutional independence. However, the *Anderson* Court’s qualification that any imposition of jail time could not exceed the session in which the contempt occurred ultimately led to the legislative decision in 1857 to provide the alternative possibility of a criminal contempt prosecution for failures to comply with committee subpoenas. The legislative history of that enactment makes it clear that it was to apply to executive branch officials. Prosecutions under that law were to be conducted by United States Attorneys. What has been currently and conveniently overlooked by DOJ is that at that time United States Attorneys were independent contract employees; there was no Justice Department until 1870. It must be presumed that Congress was aware of this and was simply authorizing the Speaker to utilize those *non-governmental* contract attorneys in the same manner that the *Anderson* court recognized that judges could appoint private prosecutors to vindicate the integrity of their judicial responsibilities, an understanding that the Supreme Court clearly articulated in its 1987 ruling in *Young v. U.S. ex re Louis Vuitton* upholding court appointment of a private sector attorney to prosecute its contempt citation, which was reiterated the next year in its ruling in *Morrison v. Olson*. The most recent recognition of this inherent institutional authority was in the 9th Circuit’s October 2018 *en banc* ruling in *U.S. v. Arpaio*. These consistent judicial rulings note that this inherent institutional self-protective authority needs no statutory basis and is so constitutionally indispensable that it may not be obstructed by either Congress or the Executive or abandoned by the Judiciary. The indisputable legal analogy to each House’s recognized self-protective authority is evident.**

**Finally, the appointment of two private prosecutors to assist in the Senate’s Teapot Dome investigation arguably provides further corroboration. The Senate’s inquiry had stalled and after Harding died and was succeeded by Coolidge, Attorney General Daugherty remained in office despite being suspected of deep complicity in the oil lease scandal. The Senate Committee, with the concurrence of Coolidge, agreed to a *joint resolution* for the appointment of two private counsels to assist in the Senate’s investigation of the lawfulness of the oil eases and to recapture the lost assets. The joint resolution specifically prohibited any DOJ role in their investigation or litigation actions. When Daugherty was forced to resign and a new Attorney General was confirmed a Senate resolution was passed directing a Senate committee investigation of corruption in DOJ during Daugherty’s leadership. The new AG retained the two private counsel as special assistants who brought the inherent contempt citation against Daugherty’s brother that resulted in the Supreme Court’s landmark ruling in *McGrain v Daugherty* (1927), which established Congress’s current broad investigatory powers, and *U.S. v. Sinclair* (1929) allowing a criminal citation for refusing to answer committee questions on the ground that he was the subject of a pending civil action regarding the oil leases.**

**The long standing judicial recognition of the analogous self-protective authorities of the Houses of Congress and judges should give rise to consideration of such a prosecutorial appointment by House authorization upon a vote of a criminal contempt citation by the House. There are plausible grounds for success and the Supreme Court’s recognition of the legitimacy of concurrent or seriatum inherent and criminal contempt citations provides additional constitutional support. The availability of both inherent and criminal processes would revive the historic leverage that made the threat of congressional subpoena enforcement so formidable and successful.**

**In 2008 Professors Eric A. Posner and Adrian Vermiel posited the time when a “constitutional showdown” between the political branches is necessary:**

 **[U]nder certain conditions the active virtues, the embrace of clarifying conflict, should be preferred to the passive virtues, or the evasion of unnecessary conflict....As against the passive virtues, however, decisive constitutional conflicts and precedent-setting showdowns should actually be encouraged where the value of waiting for more information is low, where similar issues will frequently recur in future generations (so that the value of settling questions now is high), and where legal uncertainty will impose high cost in the future…. Where aggregate future conflict, even properly discounted, imposes greater social costs than present conflict, a showdown in the current period would be beneficial.**

**Can it be doubted that such time has been reached and that Congress must challenge the Executive attack on the core of its institutional integrity and authority?**