The Congressional Contempt Power: A Lethal Weapon in the Battle over Information?

Introduction

According to Representative Henry A. Waxman of the House Oversight Committee, “A subpoena is not a request; it’s a demand for information.”¹ Waxman’s words cut to the heart of the ongoing controversy between the Congress and the White House over two competing powers: Congressional oversight and executive privilege.

The dispute centers on Congressional investigations into the firing of eight U.S. attorneys (nearly ten percent of America’s top prosecutors²) in December 2006. Earlier in that same year, the USA Patriot Act was reauthorized to include a provision that allowed Attorney General Alberto R. Gonzales to appoint replacement prosecutors on an indefinite basis, without approval

by the Senate.³ The connection between the amended Patriot Act and these firings has prompted much speculation over whether the firings were motivated by the political agenda of the Bush Administration. Many have questioned whether “some of the U.S. attorneys were fired because they were investigating Republican wrongdoing too energetically or not investigating Democrats vigorously enough in the view of the White House.”⁴ One Senator said that the firings “reek of politics” and “[e]ven the hiring and firing of our top federal prosecutors has become infused and corrupted with political, rather than prudent, considerations.”⁵

Justice Department officials repeatedly affirmed that the firings were based on personnel decisions related to the prosecutors “performance-related” problems. However, on March 2, 2007, “officials acknowledged that the ousters were based


⁴ Joe Hilyard, Your Opinions, Milwaukee Journal Sentinel, Mar. 26, 2007, at A8. Note that since this article was published, one more U.S. attorney was fired, for a total of nine.

primarily on the administration’s unhappiness with the prosecutors’ policy decisions and revealed the White House’s role in the matter.”⁶ In response to the speculation over the political nature of the firings, Attorney General Alberto Gonzales stated,

I acknowledge that mistakes were made here. I accept the responsibility. And my pledge to the American people is to find out what went wrong here, to access accountability and to make improvements so that the mistakes that occurred in this instance do not occur again in the future.⁷

On August 27, 2007, Alberto Gonzales resigned.⁸

Outraged by the political scandal currently tainting the Department of Justice, Congress has taken action to investigate the circumstances surrounding the firings. In pursuit of answers, Congress has issued subpoenas ordering members of the Bush Administration, including Karl Rove, Chief of Staff, Joshua Bolten, and former White House counsel Harriet Miers, to testify

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about their roles or knowledge regarding the firings. Their efforts however have been rebuked. Subpoenaed White House officials including Harriet Miers and Karl Rove have refused to testify, asserting “executive privilege.” In response, Congress has initiated proceedings to hold these officials in contempt, invoking 2 U.S.C. sections 192 and 194, an infrequently used statutory power which under certain circumstances authorizes Congress to issue criminal contempt citations against an individual who refuses to comply with a subpoena.

Thus, the stage is set for an all-out battle between Congress and the White House over access to information. Put in a broader perspective, this conflict implicates the fundamental principle of separation of powers, which has been blurred under the auspices of the Bush Administration.

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9 See Steve Mills, 10 Things You Might Want to Know About Executive Privilege, Chi. Trib., Mar. 25, 2007, at C2 (providing a brief overview of some of the features of executive privilege). See also, Dan Eggan & Paul Kane, supra note 1.


This note seeks not to analyze the abuse of executive privilege but rather focuses on Congress’ remedy against it—namely contempt citations.

Part I outlines the basic doctrine of executive privilege and analyzes its connection to Congress’ power to conduct investigations. Part II then discusses the history and scope of Congress’ power to hold individuals who refuse to heed to its subpoenas in contempt. Specifically, Part II analyzes three manifestations of the contempt power: inherent contempt, criminal contempt, and civil contempt. This discussion will also compare the strengths and weaknesses of each mode of the contempt power.

Part III discusses the official position of the Department of Justice on the Congressional contempt power and how that has historically and presently influenced its exercise. Part IV tracks Congress’ current use of the contempt power in its quest to investigate the U.S. Attorney firings. This section concludes with exposing the inherent flaw in the criminal contempt power which threatens to undermine its effectiveness. The apparent dilemma is that in order to issue a contempt citation, Congress must refer the matter to the U.S. Attorney, who bears the
responsibility of submitting the matter to a grand jury. This section concludes with pointing out that it is unrealistic for the U.S. Attorney to follow through with this duty, given that it is a direct action against itself.

Finally, Part V proposes a judicial solution which circumvents the inherent problems with the contempt citation remedy. Specifically, this proposal suggests that a three judge panel be convened to determine whether the congressional subpoenas are valid over objections of executive privilege. This judicial alternative requires appointing an independent prosecutor to bring the case on behalf of Congress before the panel for adjudication. The panel would ultimately decide whether or not to issue an injunction ordering the White House officials to submit to the subpoenas.

When the legislative and executive branches are beyond reconciliation, as they are today, only a judicial remedy can preserve the balance of power. This proposal thus aims to use judicial integrity to restore public confidence in the

\[12\] See 2 U.S.C. §194 ((1982) (“it shall be the duty of the said President of the Senate or Speaker of the House...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.”).
government in terms of the relationship between Congress and the Executive on such sensitive issues.

I. Overview of Executive Privilege

The scope of Congress’ ability to investigate the operations of the executive branch is inexorably tied to the doctrine of executive privilege. Thus, in order to analyze Congress’ power of contempt, it is first necessary to visit the doctrine of executive privilege, for contempt is a direct remedy against its abuses. The idea behind executive privilege is that members of the executive branch can preclude Congress and/or the courts, and ultimately the public from accessing documents, probing conversations, and hearing testimony on the grounds that the Constitution grants the President a right to secrecy when it comes to issues of national security and protecting privacy when it is in the best interest of the public.13 Executive privilege however, is not explicitly mentioned in the Constitution, but rather has been interpreted as emanating from the constitutional powers granted to the President under the vesting clause of

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Article II, and the Commander in Chief Clause, and derived from the basic construct of separation of powers.\textsuperscript{14}

Executive privilege enjoys a long history of being invoked by many presidents, dating as far back as George Washington and Thomas Jefferson.\textsuperscript{15} In more recent times, the Supreme Court has validated executive privilege in \textit{United States v. Nixon}, where although the Court held that executive privilege did not shield Nixon from withholding classified tapes and documents, it simultaneously affirmed the validity of executive privilege in other circumstances.\textsuperscript{16} In evaluating the interests of the President and his officials, the Court found that “the privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”\textsuperscript{17}

While the Court recognized a qualified privilege, it seemed to limit its application to certain contexts, particularly to claims of the need to protect national security.\textsuperscript{18} Under other

\textsuperscript{14} See Mills, supra note 9; Prakash, supra note 13, at 1143;

\textbf{Const. Art. II §1-2}.

\textsuperscript{15} See Mills, supra note 9; Rozell supra note 13, at 1069.


\textsuperscript{17} \textit{Id.} at 708.

\textsuperscript{18} \textit{Id.} at 706 (“Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it
circumstances, it is less clear whether executive privilege will trump Congressional subpoenas. In *Walker v. Cheney*, one of the rare recent cases addressing executive privilege, the Court sided with the administration in its refusal to disclose records from Vice President Dick Cheney’s Energy Task Force.\textsuperscript{19}

Despite the Court’s decisions in *U.S. v. Nixon* and *Walker v. Cheney*, courts have generally shied away from stepping in to adjudicate conflicts between the legislative and executive over executive privilege.\textsuperscript{20} Moreover, few such disputes have even made it to the courts because for the most part, the conflicts are negotiated on the political playing field; “one side usually blinks first, and a court fight is averted.”\textsuperscript{21} One journalist difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material...”).


\textsuperscript{21} Mills, supra note 9. See also, Morton Rosenberg & Todd B. Tatelman, *Presidential claims of executive privilege: history, law practice and recent developments*, *CRS Reports*, July 1, 2007. “Few such interbranch disputes over access to information have reached the courts for substantive resolution, the vast majority
offers the reason for this preference being that “political imperatives often trump high-brow legal principles. A White House that looks as if it is hiding something pays a political price. The same is true of a Congress that looks too much like an inquisition.”\(^2^2\) Therefore, judicial precedent or guidance for defining the boundaries of executive privilege is lacking.

This is especially disconcerting given that the Bush Administration can be characterized by an attempt to expand the scope of executive privilege.\(^2^3\) According to legal scholar Mark Rozell, “President Bush chose some very nontraditional cases for reestablishing executive privilege.”\(^2^4\) Examples include where the President attempted to expand the scope of executive privilege for former presidents, and where the Bush administration endeavored to apply the doctrine to protect

achieving resolution through political negotiation and accommodation.” Id. at 1.


\(^2^3\) For a lengthy discussion about the implications of executive privilege in the Bush Administration, see Mark J. Rozell, Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency, 52 Duke L.J. 403 (2002).

\(^2^4\) Id., at 407.
Department of Justice documents from investigations that had already been closed.\textsuperscript{25} Stated by Rozell, “[t]he common thread in the Bush Administration case is the use of executive privilege in circumstances where there is little precedent for such action.”\textsuperscript{26} The Bush Administration’s attempts at expanding executive privilege have come to a head in the U.S. Attorney scandal, where members of the executive branch have asserted executive privilege in order to escape testifying and publicizing documents.

In response to Congressional demands for testimony and documents, the administration has agreed to release certain e-mails from within the Justice Department “but has drawn the line at releasing communications among members of the White House staff, citing the tradition that a president is entitled to advice from his aides that does not have to be couched out of concern that it will become public.”\textsuperscript{27} Invoking the shield of executive privilege, President Bush made it clear that he would oppose any subpoenas brought against White House officials,

\begin{footnotes}
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\item Id.
\item Id.
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stating that “We will not go along with a partisan fishing expedition aimed at honorable public servants.”

The pertinent question is whether absent direct judicial findings regarding the validity of executive privilege claims, Congress has any effective means with which to test such assertions. The next section will discuss Congress’ power to issue contempt citations as a remedy against the claims of executive privilege.

II. Congress’ Remedy: The Contempt Power

A. Investigatory Authority: The Scope

Just as the Constitution fails to explicitly mention executive privilege, so too does it lack any direct reference to Congress’ power to issue contempt citations. Rather, Congress’ authority to issue contempt citations derives from its Article I powers and the overarching doctrine of separation of powers. It is

\[28\] Id.

\[29\] See Morton Rosenberg & Todd Tatelman, Congress’s contempt power: a sketch, CRS Report RL34119, August 1, 2007 at 1 ("While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be
further validated by a long history of its implementation, recognition by the Supreme Court, and its eventual incorporation into statute.\textsuperscript{30} Moreover, “[t]he power of Congress to punish for implied from the general vesting of legislative powers in Congress”). See also, \textit{U.S. Const.} art. I, §1 (“All legislative powers...shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”).

\textsuperscript{30} Congress first used the contempt powering 1795, when three members of the House of Representatives issued contempt citations against two individuals who reportedly attempted to bribe them. Morton Rosenberg & Todd B. Tatelman, \textit{Congress’ Contempt Power: A Sketch}, \textit{CRS Report RL34119}, August 1, 2007, at 3. Under the contempt power, the House proceeded to arrest and detain the accused pending further investigation. \textit{Id.} The first time the Supreme Court upheld the constitutionality of the contempt power was in 1821, in \textit{Anderson v. Dunn}, 19 U.S. 204 (1821). “Between 1795 and 1857, 14 inherent contempt actions were initiated by the House and Senate” and because the existing procedure at the time seemed inefficient, “[i]n 1857, a statutory criminal contempt procedure was enacted....” \textit{Id.} at 7.
contempt is inextricably related to the power of Congress to investigate."³¹

In McGrain v. Daughtery, the Supreme Court validated Congress’ authority to conduct oversight and investigations.³² The facts of McGrain are startlingly similar to the scandal surrounding the Department of Justice today. Harry M. Daughtery had been the Attorney General from 1921-1924, and was the central figure surrounding a Senate investigation of various charges of misfeasance and nonfeasance in the Department of Justice under his reign.³³ The Senate committee heading the investigation subpoenaed the former Attorney General’s brother, commanding him to give testimony and submit documents that were suspected to corroborate suspicions of unethical activity.³⁴ The summoned individual failed to appear.³⁵ In determining whether Congress had the power to compel a private individual to appear before it, the Court opined that

[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative


³³ Id. at 151.

³⁴ Id. at 152.

³⁵ Id.
function....[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....\textsuperscript{36}

Subsequent Court rulings such as \textit{Eastland v. United States Servicemen’s Fund}\textsuperscript{37} and \textit{Watkins v. United States}\textsuperscript{38} have reaffirmed Congress’ power to investigate. In \textit{Eastland}, the subpoena issued on behalf of a Senate subcommittee directing that a certain bank produce all its records pertaining to the United States Servicemen’s Fund, was met with refusal. The Court held that that Congress’ authority to issue subpoenas falls within the sphere of the Speech and Debate clause of the Constitution.\textsuperscript{39} The Court found that authority to issue a subpoena in the midst of an investigation is “an indispensable ingredient of law making” without which Congress’ role of lawmaking and deliberating “would be meaningless.”\textsuperscript{40}

Similarly, in \textit{Watkins}, where the petitioner was held in contempt for failing to make certain disclosures to the Un-American Activities Committee, the Court once again defined the

\textsuperscript{36} Id. at 175.

\textsuperscript{37} Eastland v. United States Servicemen’s Fund, 421 U.S. 491 (1975).


\textsuperscript{39} Eastland, 421 U.S. at 501.

\textsuperscript{40} Id. at 505.
scope of Congress’ investigative powers as “broad” in that it “encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes.”

Although the Court ultimately held that petitioner’s conviction for refusal to answer was invalid under due process, it made a point of validating Congress’ power to issue contempt citations as derived from its right to inquiry.

In Wilkinson v. United States, the Court set forth five requirements for the validity of a Congressional subpoena. These include: 1) the investigation must be authorized by Congress; 2) the subcommittee must be pursuing a valid legislative purpose; 3) the question asked the subpoenaed individual must be pertinent to the subject matter of the investigation; 4) the individual must be apprised of the pertinence of the question; and 5) the subcommittee’s interrogation cannot violate the subpoenaed individual’s First Amendment rights.

As reiterated by the Court in Barenblatt v. United States, “The scope of the power of inquiry, in short, is as penetrating

41 Watkins, 354 U.S. at 187.

42 Id.


44 Id.
and far-reaching as the potential power to enact and appropriate under the Constitution.”

Given the Court’s affirmation of both the value of and the validity for Congress’ power to investigate, it naturally follows that Congress should have the means with which to enforce its subpoenas; and it does. Congress possesses the power to put those individuals who refuse to answer subpoenas in contempt. There are three means through which Congress can employ its contempt power: 1) inherent contempt; 2) statutory criminal contempt; and 3) civil contempt. These three approaches are discussed below.

B. Inherent Contempt

Before the power to issue contempt citations was codified by statute, Congress had an inherent contempt power wielded throughout history and verified by the Supreme Court. Anderson v. Dunn represents the first case in which the Supreme Court expressly acknowledged this power as inherent and valid. In Anderson, the Court considered the argument that the power of Congress to punish for contempt can only be employed pursuant to a legislative grant, but ultimately found that the interests of Congress in effectively representing the American people were


46 Anderson v. Dunn, 19 U.S. 204 (1821).
more persuasive.\textsuperscript{47} In holding that Congress indeed had an inherent contempt power, the Court reasoned that the right to punish for contempt is essential to maintaining the dignity of and confidence in Congress as a legislative assembly.\textsuperscript{48}

In their report on Congress’s contempt power for the Congressional Research Service, Morton Rosenberg and Todd B. Tatelman explain the process for holding an individual in contempt under the inherent contempt power.\textsuperscript{49} The process begins when the offending individual is brought before the House or Senate by the Sergeant-at-Arms, is then tried at the bar of the body, and finally can be imprisoned in the Capitol jail.\textsuperscript{50} The imprisonment can be punitive, lasting for a specific period of time as punishment, or coercive, for an indefinite period until the witness agrees to comply.\textsuperscript{51} There have also been instances where the Court has seemingly approved of imposing fines as

\textsuperscript{47} Id., at 29.

\textsuperscript{48} Id. at 30, 31.


\textsuperscript{50} Id. at 1.

\textsuperscript{51} Id. See also, McGrain v. Daughtery, 273 U.S. at 161.
opposed to imprisonment.\textsuperscript{52} Inherent contempt proceedings can be distinguished from other types of contempt proceedings in that inherent contempt does not require the oversight or cooperation of either the executive or judicial branches.”\textsuperscript{53} In other words, inherent contempt only requires the approval of the chamber concerned.

Inherent contempt however, is not without its limitations. In \textit{Kilbourn v. Thompson}, the Court delineated the boundaries for when Congress can exercise the contempt power.\textsuperscript{54} In \textit{Kilbourn}, the House of Representative initiated contempt proceedings with imprisonment as the penalty, against a witness who refused to answer questions concerning the business of a real-estate partnership of which he was a member.\textsuperscript{55} In recognizing the existence of the contempt power, the Court would curb the doctrine to “a limited class of cases, or under special

\textsuperscript{52} Rosenberg and Tatelman, \textit{supra} note 42 at 2; Anderson v. Dunn, 19 U.S. at 227, 228; United States v. United Mine Workers, 330 U.S. 258 (1957) (upholding a fine against a labor union as punishment for disobedience and an incentive to dismantle a strike).

\textsuperscript{53} Rosenberg and Tatelman, \textit{supra} note 45 at 3.

\textsuperscript{54} \textit{Kilbourn v. Thompson}, 103 U.S. 168 (1880).

\textsuperscript{55} \textit{Kilbourn v. Thompson}, 103 U.S. 168 (1880).
circumstances; otherwise the limitation is unavailing and the
power omnipotent." The Court suggested that each body of
Congress is confined in executing the contempt power to
situations in which it is acting pursuant to its appropriate
sphere; for instance, when it is disciplining its own members,
evaluating their elections, or conducting impeachment
proceedings.

In sum, after Kilbourn, it was clear that although the
Court recognized some degree of an inherent contempt power, it
came with material limitations. Perhaps this is why the
inherent contempt power was last formally used in 1934.
Furthermore, inherent contempt has been criticized for other
reasons as well. According to Rosenberg, “inherent contempt has
been described as ‘unseemly’, cumbersome, time-consuming, and
relatively ineffective, especially for a modern Congress with a
heavy legislative workload that would be interrupted by a trial
at the bar.” Although the flaws of inherent contempt
ultimately render it an ineffective tool for Congress, the

56 Id. at 197.
57 Id., at 190-192. For a summary of Kilbourn, see Rosenberg &
Tatelman, supra note 29, at 4-5.
58 Rosenberg, supra note 29, at 6.
59 Id., at 6-7.
Court’s recognition of its existence gives Congress some muscle with which to exercise its authority to investigate

**Statutory Criminal Contempt**

A more practical procedure comes in the form of statutory criminal contempt. In 1857, Congress passed a federal statute providing for criminal punishment for contempt, shifting the inherent contempt power into an authority more concrete and tangible.\(^{60}\) According to the Court in *Chapman v. United States*, throughout history, when Congress has attempted to gain compliance with its subpoenas, it has encountered impenetrable obstacles in the form of “unwilling and contumacious witnesses,” for which the inherent contempt power was not equipped to overcome. “It was for the remedy of this evil that the act of 1857 was passed.”\(^{61}\) Today, statutory contempt is codified under 2 U.S.C. §192 and §194. Under §192,

> Every person who having been summoned as a witness by the authority of either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of


Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more that twelve months.

Section 194 explains how the process functions when the individual subpoenaed fails to appear or testify, or fails to produce the requested documents and information: “[t]he failure or refusal is reported to either House in the form of a statement of fact, the presiding officer of that House is to certify the statement to the appropriate United States Attorney, who is to bring the matter before a grand jury.”62 Additionally, “a formal report to Congress, made by the committee before whom the alleged statutory offense was committed is also said to be a prerequisite to a court trial.”63 Finally, “[t]he procedure prescribed for initiating criminal contempt proceedings is mandatory... [and] Congress, by providing for grand jury action, placed a duty on the federal courts to accord persons prosecuted

62 17 Am. Jur. 2d Contempt §229; 2 U.S.C. § 192. It is unclear whether the U.S. Attorney has a mandatory or discretionary duty to refer the matter to a grand jury, but this distinction will prove to be highly important to the issue of whether the statute is an effective remedy for the assertions of executive privilege out of the current U.S. Attorney situation.

63 17 Am. Jur. 2d Contempt §229.
under the contempt of Congress such safeguards as would be accorded in other federal criminal cases."\(^{64}\) Most importantly, section 194 shifts the enforcement of criminal contempt citations to the courts.

In *Russell v United States*, where Congress initiated prosecutions for refusal to testify, the Court found that one requirement for a section 192 criminal contempt proceeding is that the indictment “must identify the subject which was under inquiry at the time of the defendant’s alleged default or refusal to answer.”\(^{65}\) The Court stressed that “at the very core of criminality under 2 U.S.C. §192, is pertinency to the subject under inquiry of the questions which the defendant refused to answer.”\(^{66}\) Thus, in order to ensure that the proper procedural safeguards are in place, “an indictment must do more than simply repeat the language of the criminal statute.”\(^{67}\)

According to Rosenberg and Tatelman, in their report on Congress’ contempt power, “The criminal contempt statute and corresponding procedure are punitive in nature. It is used when the House or Senate wants to punish a recalcitrant witness and,  

\(^{64}\) Id.  
\(^{66}\) Id., at 764.  
\(^{67}\) Id.
by doing so, to deter others from similar contumacious conduct.\textsuperscript{68} Thus, the goal of criminal contempt proceedings is not coercion, that is, not an attempt to bring the witness into compliance, but rather to punish.

Since the contempt power is inextricably linked to Congress’ authority to make inquiries, its availability as a remedy depends on whether the initial investigation is within Congress’ legislative domain.\textsuperscript{69} However, in Chapman v. U.S., the court recognized that “[t]here is a great difficulty in clearly and distinctly marking the boundaries within which Congress may act with coercive power to compel the disclosure of facts deemed important to it....” The Court found however, that because the matter under senate investigation directly affected the Senate itself because it involved the actions and integrity of some of its own members, there was no doubt that the Senate acted within the scope of its authority in implicating the criminal contempt statute.\textsuperscript{70} This case makes it apparent that the statutory criminal contempt power is also subject to the requirement that

\begin{itemize}
  \item \textsuperscript{68} Rosenberg and Tatelman, supra note 29, at 8.
  \item \textsuperscript{69} 7A Fed. Proc., L. Ed. § 17:57. See discussion supra Part III.A.
\end{itemize}
the body of Congress must be acting within certain constitutional and legislative bounds.

In Barenblatt, the Court analyzed whether §192 was appropriately applied to punish an individual for contempt for his refusal to answer certain questions posed to him by a Subcommittee of the House Committee of Un-American Activities, regarding alleged Communist infiltration into the field of education.\footnote{Barenblatt vs. United States, 360 U.S. 109, 114 (1959).} When the petitioner refused to testify, invoking the 5\textsuperscript{th} Amendment, the matter was referred to the U.S. Attorney for the District of Colombia to initiate contempt proceedings.\footnote{Id. at 115.} In holding that the contempt proceedings did not violate the petitioner’s First Amendment rights, the Court confirmed the overall constitutionality of section 192.\footnote{Id. at 134.}

Perhaps the most distinctive characteristic of the criminal contempt statute is that it confers jurisdiction on the courts to be the final arbitrators of such disputes between the
executive and legislative branches. However, whether the courts eventually hear the case is within the discretion of the appropriate U.S. attorney. Thus, the effectiveness of this remedy is contingent upon prosecutorial discretion; there is no guarantee that it will be pursued.

D. Civil Contempt

The final avenue Congress has available to enforce its investigatory and subpoena powers is through the civil contempt procedure. Enacted in 1978 as part of the Ethics in Government Act, 2 U.S.C. §288b-d and 28 U.S.C. §1365 authorized only the Senate, and not the House, to bring a civil suit to enforce its subpoenas.\(^74\) Section 1365 grants the U.S. District Court for the District of Columbia original jurisdiction over Senate actions to enforce subpoenas.\(^75\) The statute provides for the Office of Senate Legal Counsel to represent the Senate in bringing such actions before the proper court.\(^76\) Under the civil statute, when the Senate seeks to enforce a judgment concerning a subpoena,


\(^{75}\) Id.

\(^{76}\) Id.
“the court will first review the subpoena’s validity. If the court finds that the subpoena ‘does not meet applicable legal standards for enforcement,’ it does not have jurisdiction to enjoin the congressional proceeding.”

One of the chief restrictions of civil contempt is that it includes an exception for enforcement of “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...” In other words, it cannot be employed against a member of the executive branch as long as that individual can be deemed to be operating in the scope of his or her executive duty. Whether this applies to former executive officials is unclear. However, this limitation directly impedes Congress’ ability to enforce subpoenas relating to the U.S. Attorney firings investigation given that the subpoenaed individuals were recently or are currently White House officials. The civil contempt statute is thus an ineffective remedy for Congress to assert its authority.

C. Statutory Versus Civil: An Important Distinction

Given the existence of both criminal and civil remedies for contempt of Congress, it is important to highlight the differences and consequences in utilizing one in lieu of the

77 Rosenberg & Tatelman, supra note 29, at 13.
other. One may ask why the Senate would elect to pursue the civil route as opposed to the more extreme criminal remedy. According to Rosenberg and Tatelman, “civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor” because in contrast to criminal contempt, “in a civil contempt, sanctions can be imposed until the subpoenaed party agrees to comply....”

Criminal contempt on the other hand, “may not be purged by agreeing to testify or produce documents....” According to legal scholar Todd D. Peterson in his analysis of the contempt power, this difference can have a tremendous impact in the context of congressional investigations because it demands “a witness must risk a criminal conviction in order to challenge a congressional subpoena or to assert a claim of privilege.”

Additionally, the civil contempt process can be viewed as more advantageous to Congress because since the stakes are higher in criminal proceedings, “a court may more closely scrutinize congressional procedures and give greater weight to

79 Rosenberg & Tatelman, supra note 29 at 13.
81 Id.
the defendant’s constitutional rights.”\textsuperscript{82} In criminal proceedings, the sanctions are more severe and are therefore “a more threatening and potentially abusive process.”\textsuperscript{83} Seen from this angle, Congress may hedge its bets and decide that civil proceedings could result in a more favorable outcome.

On the other hand, the very fact that the punishment for criminal contempt is harsh could make it a more effective tool for Congress. Perhaps the threat of criminal contempt will be taken more seriously by recalcitrant witnesses than the more innocuous civil contempt. Moreover, unlike civil contempt, the criminal contempt statute does not carve out an entire exception for members of the executive branch acting within their appropriate roles which therefore makes it a more effective remedy when it is a member of the executive branch who is subpoenaed. In sum, both the criminal and civil powers of contempt are accompanied by certain limitations that potentially threaten their effectiveness as a remedy. An analysis of how this will play out in light of the U.S. Attorney firings investigation is discussed in Section V.

\textsuperscript{82} Rosenberg \& Tatelman, supra note 29 at 12.

\textsuperscript{83} Peterson, supra note 78, at 612.
III. Department of Justice’s Position on Contempt

In 1984, a memorandum by the Office of Legal Counsel ("OLC") was sent out to the Attorney General, expressing a formal opinion regarding how amendable a member of the executive is to indictment and criminal prosecution. The opinions coming out of the OLC are designed to assist the Attorney General in his function as legal advisor to the President. According, they affect executive policies and are thus highly influential. Essentially, the position of the OLC on statutory criminal contempt is that "[a] United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President’s instruction to invoke the President’s claim of executive privilege...."

The OLC’s report was a direct response to an investigation led by the House into the Environmental Protection Agency’s ("EPA")


85 http://www.usdoj.gov/olc/

86 Olson Memo, at 1.
enforcement of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").\(^{87}\) The subpoenas issued by two subcommittees of the House demanded documents from the EPA’s files.\(^{88}\) Under the guide of President Reagan, EPA Administrator, Anne Burford, refused to hand over the documents, asserting executive privilege.\(^{89}\) According to the OLC, the question of whether 2 U.S.C. §194 mandates that the U.S. Attorney pursue the contempt citation, hinges on statutory construction and separation of powers considerations.\(^{90}\)

Regarding separation of powers, the OLC’s takes the perspective that if Congress were able to criminalize the assertion of “a presumptively valid claim” of executive privilege, “the exercise of [that] privilege would be so burdened as to be nullified.”\(^{91}\) Moreover, the OLC memo states that “even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore

\(^{87}\) Id. See also, Rosenberg & Tatelman, \textit{supra} note 31, at 9; Rosenberg & Tatleman, \textit{supra} note 51, at 1; Devins, \textit{supra} note 66, at 117.

\(^{88}\) Rosenberg & Tatelman, \textit{supra} note 31, at 9.

\(^{89}\) Id.

\(^{90}\) Olson Memo, at 2.

\(^{91}\) Id.
intolerable burden on the exercise by the President of his functions under the Constitution.”

Ultimately, the memo suggests that the congressional action of placing a member of the executive in criminal contempt amounts to Congress overstepping its authority at the expense of the executive branch, thus eroding the separation of powers.

However, it is important to note that the memo specifically points out that its “conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983”--namely the EPA controversy. This caveat is crucial because it begs the question of whether the reasoning behind the OLC opinion can be similarly applied to the contempt proceedings arising out of the U.S. Attorney firings investigation.

It is not surprising that an opinion compiled by the OLC will defend executive privilege, for the OLC itself is an executive agency. However, it does give the executive legs on which to argue the unconstitutionality of criminal contempt. If the law is as the OLC suggests, this would mean that a congressional investigation into the U.S. Attorney firings would be virtually impossible.

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92 Id. at 2, 3.
93 Id. at 3.
However, Stanley Brand, the Democratic House counsel during the Burford cases, criticized the OLC’s stance as “turn[ing] the constitutional enforcement process on its head. They are saying they will always place a claim of presidential privilege without any judicial determination above a congressional demand for evidence—without any basis in law.” Brand goes further to interpret the OLC’s words as saying to Congress, “[b]ecause we control the enforcement process, we are going to thumb our nose at you.” Therefore, although the OLC opinion offers insight into how the executive branch views the conflict, it does not necessarily mean that it should be given substantial weight.

IV. Application to the U.S. Attorney Investigation

Assertions of executive privilege have “stonewalled” Congress’s investigation into the U.S. Attorney firings. As a result, “Congressional leaders are armed with subpoenas and contempt citations, and are threatening to conduct a perjury

95 Id.
investigation and seek a special counsel.” 97 Senator Patrick Leahy, head of the Senate Judiciary Committee, has made it clear that Congress will meet such refusals by issuing criminal contempt citations. 98 In fact, the House Judiciary Committee has officially issued criminal contempt citations against White House Chief of Staff Josh Bolten and former White House counsel Harriet Miers. 99 However, “the White House has signaled it will block federal prosecutors from pursuing them.” 100 The obstinacy of both Congress and the White House has led to a political conundrum: both sides have asserted constitutionally and judicially recognized powers (contempt and executive privilege) that are inherently at odds. Whether Congress or the White House will prevail is the million dollar question.

Whether Congress can prevail depends on the scope of the contempt power. If, as the OLC suggests, the criminal contempt power can not be implemented against a claim of executive privilege, it stands to reason that Congress’ efforts to probe into the details of the firings will be stymied. If, on the


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100 Id.
other hand, Congress’s power to issue criminal contempt citations is recognized as a valid and essential tool for oversight of executive activities, then indeed, Congress may be able to get around the barriers of executive privilege.

Ironically, one of the chief obstacles Congress faces in implementing criminal contempt citations is not the obstinacy of the White House, but rather the provisions of the criminal contempt statute itself. A key step in the process of pursuing criminal contempt is that Congress must refer the matter to the U.S. Attorney for the District of Columbia. This results in an unprecedented conflict because the U.S. Attorney’s Office itself is the subject of the underlying investigation. The criminal contempt proceedings would thus mandate that the U.S. Attorney, an arm of the executive branch, act directly against itself.

Relying on the OLC memo, “administration officials argued [] that Congress has no power to force a U.S. attorney to pursue contempt charges in cases...in which the president has declared that testimony or documents are protected from release by

executive privilege.”¹⁰² One anonymous official stated that “[i]t has long been understood that, in circumstances like these, the constitutional prerogatives of the president would make it a futile and purely political act for Congress to refer contempt citations to U.S. attorneys.”¹⁰³

Further insight into how the matter will pan out lies in Attorney general nominee, Michael B. Mukasy’s responses to questions put forth by the Senate Judiciary Committee during his confirmation hearings.¹⁰⁴ During the questioning, “Mukasey indicated it would be hard for the Justice Department to prosecute [former White House officials] under [these] circumstances because department lawyers were the ones who gave advice to the White House that the officials could properly assert [executive] privilege.”¹⁰⁵ He went on to confirm that “the department, under both Democratic and Republican administrations, has made it a policy of declining to prosecute under those circumstances.”¹⁰⁶

¹⁰² Eggen & Goldstein, supra note 106.
¹⁰³ Id.
¹⁰⁵ Id.
¹⁰⁶ Id.
Therefore, as Christopher H. Schroeder (Duke University law professor and OLC deputy chief from 1994 to 1999) puts it, the administration’s position “as a legal matter may leave the Democrats without an effective remedy.”

If indeed Congress is powerless to force the U.S. Attorney to act against the executive, then another option for resolving the matter must be explored.

V. Proposal

Before proposing a solution for resolving this dispute, it is first necessary to briefly dispense with the historic legal alternatives to criminal contempt.

A. Inherent Contempt is Doomed

First, an argument that Congress can avoid the pitfalls of criminal contempt by resurrecting inherent contempt is doomed. Although with inherent contempt Congress could hold its own trials, thus avoiding referring the matter to the U.S. attorney, inherent contempt has not been used since 1934 and with good reason. It has been characterized as “unseemly, cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be

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interrupted by at trial at the bar."\textsuperscript{108} There is no reason to suggest that as applied to the U.S. Attorney investigations, these problems would disappear.

Finally, as articulated in a newspaper report, “The prospect of a congressional sergeant-at-arms arresting former White House Counsel Miers, holding her in custody somewhere on Capitol Hill, and Congress trying her is unlikely.”\textsuperscript{109}

\textbf{B. Civil Contempt is Doomed}

Resorting to the civil remedy is also an untenable option. Civil contempt is impractical for two reasons. First, it can only be implemented by the Senate, which substantially diminishes its power and weight. Second, and even more importantly, the civil remedy is doomed simply because “it authorizes a suit against any person subpoenaed except an officer or employee of the federal government.”\textsuperscript{110} Thus, for all its merits, the civil contempt remedy is inapplicable to the

\textsuperscript{108} Id.

\textsuperscript{109} Id.

U.S. Attorney investigation because the subpoenaed individuals are officials of the executive branch.\textsuperscript{111}

\textbf{C. A Judicial Solution: Time for the Courts to Revisit U.S. v. Nixon}

Both Congress and the White House assert deeply rooted constitutional powers (executive privilege and contempt citations) that are inherently at odds. Only the courts have the independence and authority to ultimately determine which power shall prevail in this controversy. The matter should be brought before the judiciary in order to determine whether Congress’ subpoenas are enforceable over objections of executive privilege. In essence, the Court should revisit \textit{United States v. Nixon}.\textsuperscript{112}

\textsuperscript{111} An argument could be made that since Harriet Miers and Karl Rove resigned from the Bush Administration, they are no longer within their “official capacities.” However, although the application of the civil contempt statute may depend on how to interpret “official capacity,” chances are that a court would interpret the exemption as applying to Miers and Rove because the substantive information that the subpoenas requested covered the time period in which they were federal officials.

A judicial resolution to the standoff between Congress and the Executive branch is not a novel idea. Rather, it harkens back to the most fundamental feature of the United States government: separation of powers. When two branches of the government are at severe odds, where each is convinced that its authority trumps the other’s, the courts step in to mediate.

This triumvirate system, in which the courts are the final arbitrators, traces it roots to *Marbury v. Madison*, where the Court first established its power of judicial review. By granting the Court the authority to “speak the law” when a constitutional right is at issue, *Marbury* elevated the status of the Court from that of a co-equal branch, to the final overseer of executive or legislative actions in which an individual right is at stake. *Marbury* thus represents long-established precedent for a judicial remedy when the legislative and executive branches are in disputes over the scope of their constitutional powers.

Although courts have generally shied away from adjudicating controversies between the executive branch and Congress, considering them to be political battles in which the Court plays a limited role, if ever there were a need for judicial

113 5 U.S. (1 Cranch) 137 (1803).

114 *Id.* at 167.
oversight, now is the time. Just as the Court in *U.S. v. Nixon* determined whether executive privilege shielded the President from turning over subpoenaed information, the Court should do the same today.

However, a very specific judicial procedure needs to be in place for the adjudication of disputes over executive privilege and congressional subpoenas. Although the criminal contempt statute does ultimately involve a judicial remedy, the courts only come into play if the U.S. Attorney decides to pursue the case. Instead of pushing the case through the U.S. Attorney, Congress should enact legislation to appoint an independent counsel to prosecute its case.\(^{115}\) However, because special

\(^{115}\) Precedent for an independent counsel was established in *Morrison v. Olson*, 487 U.S. 654 (1988), where the Court upheld Congressional limitations on the Attorney General’s power to fire a prosecutor at will. The statutory framework for an independent counsel derives from the Independent Reauthorization Act of 1994. See P.L. 103-270. The original Independent Counsel Act was enacted by Congress in 1978 as part of the Ethics in Government Act, the purpose of which was “to preserve and promote confidence in the integrity of the federal government.” 28 U.S.C. §595. S. Rep. 103-101, §104; See also, Ethics in Government Act of 1978, P.L. 95-521. The Independent Counsel
prosecutors have not historically demonstrated their ability to be neutral\textsuperscript{116}, it is crucial that all possible procedures are in place to ensure true independence.

The best option would be for the Attorney General to recommend a special prosecutor for a specified term of years who would have to be approved by Congress. This special prosecutor would have independent discretion within the Justice Department and could only be fired by a showing of good cause, reviewable by a court. That way, both branches of the government have to

support the selection and the prosecutor does not have to answer to the Justice Department. Therefore, the first part of this proposal installs a special prosecutor, approved by both the Department of Justice and Congress to litigate the dispute.

The second prong of this proposal establishes a three judge panel to rule on the issue of whether claims of executive privilege are proper. This judicial procedure would supplant sections 192 and 194 of the criminal contempt statute. Three judge panels are generally convened to adjudicate very narrow issues of the law, such as Voting Rights or congressional redistricting cases.\textsuperscript{117}

There are two main purposes of the three-judge panel system, both of which are applicable to the issue at hand. First, in such areas where this system is used, such as for Voting Rights and congressional redistricting cases, it is because “it is the judgment of the [Senate Judiciary] committee that these issues are of such importance that they ought to be

heard by a three-judge court....”\textsuperscript{118} The statutory intent in providing three judge panels is “to secure the public interest in a ‘limited class of cases of special importance.’”\textsuperscript{119}

Since it is the Senate Judiciary Committee which initiated contempt proceedings against the White House officials in the first place, it stands to reason that the committee would likewise deem refusals to answer its subpoenas in that category of issues so important as to warrant review by the collective judgment of three judges instead of one. Furthermore, just as Voting Rights cases are heard by a three-judge panel because they deeply implicate public interests, so too does the matter of congressional oversight and executive accountability cut right to heart of public confidence in the government.

The second, perhaps more practical purpose of a three-judge scheme is “to expedite important litigation.”\textsuperscript{120} One of the drawbacks of a judicial resolution for controversies regarding executive privilege and congressional subpoenas is that the court system can be so time-consuming. By the time a contempt

\textsuperscript{118} Id. at 1-2 (quoting S.Rep. No. 204, 94\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., 1975, p.9, 1976 U.S. Code Cong. & Admin.News 1988, 1996)
\textsuperscript{119} Jones v. Branigin, 433 F.2d 576, 578 (6\textsuperscript{th} Cir. 1970) (quoting Phillips v. United States, 312 U.S. 246, 259 (1941)).
\textsuperscript{120} Swift & Co. v. Wickham, 382 U.S. 111 (1965).
case against Harriet Miers or Joshua Bolten edges its way through the courts, the political climate will probably have tempered—the momentum subsided. In other words, if the courts eventually decide to uphold the congressional subpoenas against Harriet Miers and Joshua Bolten, by that time, it is likely that a new administration will already be in place. Therefore, the impact of such a decision may be lost, for the public and even Congress will have probably moved on. However, a three panel judge procedure would expedite the process.

As a practical matter, in line with other procedures for the narrow set of disputes which trigger three judge panels, Congress would bring an action in the United States District Court for the District of Columbia, for injunctive relief on the ground that assertions of executive privilege are unconstitutional. 121

In delegating disputes over the validity of its subpoenas to a three-judge panel, Congress could model its statute after 2 U.S.C. §922, which provides for three judges in adjudicating congressional attempts to eliminate budget deficits. 122 This statute serves as an ideal template for Congress to follow

121 See e.g., 2 U.S.C. §922 (setting up the procedure for a three judge panel in cases involving budget deficits).
because it allows for any member of Congress to bring an action directly to the United States District Court of the District of Columbia without the downside of appointing the U.S. Attorney or a special prosecutor.\textsuperscript{123} In ensuring an expedited process, the statute imposes a duty on the District Court and the Supreme Court “to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under [this] section.”\textsuperscript{124}

Any request for a three judge panel would have to be in accordance with 28 U.S.C. §2284(b), which sets out the procedural requirements.\textsuperscript{125} Section 2284(b) provides that a request for three judges be presented to one of the district judges who would immediately notify the chief judge of the circuit.\textsuperscript{126} The chief circuit judge then bears the responsibility for designating two other judges, one of whom must be a circuit judge.\textsuperscript{127} Thus, the ultimate three judges would include the initial district judge to whom the request was

\textsuperscript{123} Id. at (a).
\textsuperscript{124} Id. at section (c).
\textsuperscript{125} 28 U.S.C. §2284 (b).
\textsuperscript{126} See id.
\textsuperscript{127} Id.
originally made, and two other judges, one of whom must be a circuit judge.\textsuperscript{128}

With precedent already established for a three-judge panel and a special prosecutor, all Congress has to do is enact the proper legislation to get the ball rolling.

\textbf{Conclusion}

Ten days after the House Judiciary Committee issued a report in favor of pursuing contempt proceedings\textsuperscript{129}, a New York Times article stated that “[i]f Congress wants to maintain its Constitutional role, it needs to stand up for itself.”\textsuperscript{130} The bottom line is that Congress’ powers to enforce its subpoenas against claims of executive privilege are insufficient. The criminal contempt power, in all its forms, is not an adequate tool with which to resolve the issue.

In order to restore the balance of power within the government, all three branches need to perform their designated

\textsuperscript{128} Id.

\textsuperscript{129} Staff of H. Comm. On the Judiciary, 110\textsuperscript{th} Cong., Resolution Recommending that the House of Representatives Find Harriet Miers and Joshua Bolten, Chief of Staff, White House, in Contempt of Congress for Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary, available at http://juridicary.house.gov/Printshop.aspx?Section=741.

\textsuperscript{130} In Contempt, \textit{N.Y.Times}, November 16, 2007, at A32.
roles. In order for Congress to effectively legislate, it must possess the means by which to conduct a thorough investigation into allegations of corruption within the government. At the same time, its investigative authority is not limitless. Only the courts can draw those boundaries. When the strategy of negotiation and compromise is exhausted, Congress should require the Attorney General to recommend a special prosecutor to be approved by Congress, who would litigate the dispute before a three-judge panel. Indeed Congress will run the risk of losing; however, better an independent judiciary to decide than to give up the battle.