

## Why Congress Can Impose Fines for Contempt

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Good Government Now is recommending a legislative rule to establish an inherent contempt procedure for the U.S. House to reverse the crisis in declining effectiveness of congressional oversight and curb further escalation of executive branch obstruction of legitimate legislative branch information-gathering activities. Inherent contempt enforcement is the centuries-old practice of the U.S. Congress and other parliamentary bodies of defending their institutional authority by holding trials to convict and sanction individuals who obstruct the legislative process. Historically, inherent contempt has been the most effective contempt enforcement mechanism employed by Congress. Our proposal, authored by congressional oversight expert Mort Rosenberg, would establish an inherent contempt enforcement process whereby the House could conduct trials of, convict, and directly sanction executive branch officials who obstruct legislative inquiry or defy subpoenas. The process we recommend would rely on fines rather than arrest and detention as the principal sanctions against contemnors.

Several members of Congress, congressional staff, and policy experts have questioned whether, with its existing authorities, Congress can: (1) impose and enforce fines, and (2) freeze and seize assets as called for in our proposal. We also have been asked whether fines are encompassed within the Supreme Court rulings recognizing the validity of arrest, detention, and incarceration in the inherent contempt enforcement sphere. Our answer to all these questions is emphatically yes for three reasons: (1) the explicit declaration of the Supreme Court in *Anderson v. Dunn* that the congressional contempt power includes the authority to impose fines, (2) the explicit declaration of the Supreme Court in *Anderson* that the legislative and judicial branches possess analogous inherent or implied authority to fine for contempt, and (3) the explicit declaration of the High Court in *Kilbourne v. Thompson* that in cases where Congress has authority to investigate, it may compel testimony in the same manner and by use of the same means as a court of justice in like cases.

In addition, some have expressed concerns that our inherent contempt proposal raises separation of powers issues because Congress would be performing executive and judicial branch functions such as arrest, prosecution, and punishment. Separation of Powers issues, however, have been dismissed by the Supreme Court which has ruled consistently and unequivocally that the inherent contempt enforcement power is a vital institutional self-protection and self-preservation mechanism necessary for Congress to maintain its ability to properly execute its legislative authority and that Congress is performing a uniquely and exclusively legislative function when it exercises its contempt power.

Lastly, some of our colleagues have raised concerns about the financial, staff, and administrative burdens of supporting the select committees and major litigation in an initial test case our proposal would require. On these matters, we argue that the costs are within the ranges of what the House has been able to bear historically and that the institutional benefits of restoring oversight authority and constitutional balance justify the relatively modest investments necessary to secure such extraordinarily important values.

## **A) Why Congress Has the Authority to Fine for Contempt**

### **(1) Explicit Declaration of the Supreme Court in *Anderson v. Dunn* that the Congressional Contempt Power Includes the Authority to Impose Fines**

#### ***(a) Declaration that the Legislative Contempt Power Encompasses Fines***

The Supreme Court stated in its decision in *Anderson v. Dunn* that the “known and acknowledged limits” of the congressional contempt enforcement power included both “fine and imprisonment.” In the *Anderson* case, the Court considered the “extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self preservation.” This question arose in the context of a case involving a lawsuit brought against Thomas Dunn, the House Sergeant-At-Arms, for assault, battery, and false imprisonment by John Anderson, who had been arrested by Dunn and brought to the bar of the House to answer bribery charges in an inherent contempt proceeding. The relevant passage reads:

courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution. It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment. (19 U.S. (6 Wheat.) 227-28 (1821))

#### ***(b) Declaration that the Legislative Contempt Power is Historically Understood to Include Other Punishments Less Severe Than Imprisonment***

Furthermore, just a few pages later in the *Anderson* opinion, while affirming that the contempt power includes “the power of imprisonment,” the Court again referenced its earlier mention of the inclusion of fines in the repertoire of sanctions available to Congress, when it noted that punishment for contempt historically has been understood “to extend to other inflictions.” The Court also characterized such “other inflictions” as less severe punishments than imprisonment or “mere commutation for confinement.” The relevant passage reads:

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? Analogy, and the nature of the case, furnish the answer - “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.” (19 U.S. (6 Wheat.) 204, 230-31 (1821))

### **(2) Explicit Declaration by the Supreme Court in *Anderson v. Dunn* that the Legislative and Judicial Branches Possess Analogous Inherent Authority to Fine for Contempt**

The Supreme Court asserted in *Anderson v. Dunn* that Congress and the courts possess analogous inherent powers to punish contempt with monetary fines. In rendering its decision, the Court directly and unequivocally compared the inherent authority of the legislative branch to impose fines for contempt to the identical power possessed by the judiciary. The justices began their discussion by emphasizing that federal courts possess inherent power to punish contempt with fines and imprisonment of necessity for institutional self-preservation to defend themselves against obstruction of their proper functioning. The Court made this point by noting that although “the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts,” they would possess this power anyway “without the aid of the statute.” The Court then characterized the actions of the U.S. House in enforcing its contempt citation of John Anderson as “a legislative assertion of this right.” The relevant supporting passage is the same excerpt from pp. 227-28 of the *Anderson* decision already presented in item 1(a) above. (See 19 U.S. (6 Wheat.) 227-28 (1821)).

The Supreme Court again recognized the necessity of the authority to punish contempt with fines to the proper functioning of the courts in its decision in the 1947 *United States v. United Mine Workers* case when it upheld a court-imposed \$700,000 fine against the labor union for disobeying a preliminary injunction to end a strike as well as the imposition of an additional \$2.8 million fine if the union didn’t quit the strike within five days of the order. (Rosenberg, p. 24 and Garvey and Dolan, p. 12) As Josh Chafetz has emphasized, echoing the reasoning of the Court in *Anderson* and *United Mine Workers*, “if it is essential that courts have the power to compel testimony and evidence in order to render justice in particular cases, then it must be at least as essential for the houses of Congress to have this power . . .” (Chafetz, p. 191). Any doubt with respect to the validity of this constitutional analogy has been erased by the High Court’s more recent ruling in *Young v. U.S. ex rel. Louis Vuitton et Fils*, 481 U.S. 787 (1987). In *Young* the Court recognized that district courts may appoint private attorneys to act as prosecutorial officers for the limited purpose of vindicating their inherent self-protective authority without statutory authorization.

The consistent affirmation by the Supreme Court of the vital necessity of broad investigative and information gathering powers accompanied by auxiliary enforcement power to enable the ability of Congress to perform its constitutionally assigned core legislative function effectively confirms the validity of this insight. Other experts including Mort Rosenberg, Todd Garvey, and Alissa Dolan of the Congressional Research Service have argued that although there is no direct precedent for congressional imposition of fines for contempt, the analogous inherent authority of courts to assess fines, and to designate private counsel to prosecute, for contemptuous behavior, suggests that Congress, in its exercise of a similar inherent function, is able to impose fines rather than incarceration in inherent contempt proceedings. (Rosenberg, pp. 24-25; Garvey and Dolan, p. 12)

### **(3) Declarations of the Supreme Court in *Kilbourn v. Thompson***

In *Kilbourn v. Thompson*, the Court further suggested that in certain cases where the Congress had authority to investigate, it may compel testimony in the same manner and by use of the same means as a court of justice in like cases. Specifically, the Court 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...”

(103 U.S. 168, 190 (1881); Garvey and Dolan, p. 12)

## **B) Key Foundational Issue**

### **Inherent Contempt Enforcement for Congressional Institutional Self-Protection is a Purely and Exclusively Legislative Function**

The Supreme Court has ruled consistently and unequivocally that the inherent contempt enforcement power is a vital institutional self-protection and self-preservation mechanism necessary for Congress to maintain its ability to properly execute its legislative authority granted by the Constitution. No sound consideration of the inherent contempt power can proceed without first clearly understanding this foundational truth.

All the key decisions have emphasized that Congress would not be able to perform its legislative functions, especially its need to gather information, without the capacity to coerce compliance of recalcitrant parties with its demands for information. This point is decisive in overcoming separation of powers objections. Congress is performing a vital and unique legislative institutional protective function when exercising its contempt power and is not crossing over into the lanes of the other branches. Consider the pertinent statements from three key Supreme Court opinions:

**1) In *Anderson v. Dunn***, the Court said that the absence of an effective contempt power “obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. The *Anderson* opinion continued by emphasizing that the notion Congress should not “possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.” (19 U.S. (6 Wheat) at 228-29 (1821)).

**2) Likewise, in *Marshall v. Gordon***, a case involving the arrest, trial and conviction of an executive branch official, the Supreme Court again emphasized that the House possessed “a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given” in the Constitution. (243 U.S. at 541 (1917))

**3) And finally, in *McGrain v Daugherty***, the Supreme Court asserted 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 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 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. All this was true before and when the Constitution was framed and adopted. In that period the 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. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the

two houses are intended to include this attribute to the end that the function may be effectively exercised.” (273 U.S. at 174-75 (1927))

### **C) Institutional Benefits and Necessary Initial Investment**

#### **1) Institutional Benefits: Reclamation of Oversight Formidability and Effectiveness**

The U.S. House must act with urgency to reclaim its fundamental institutional prerogatives, restore effective oversight, and neutralize illegitimate Department of Justice policies and practices that are intended to prevent it from employing its historically essential and demonstrably successful contempt enforcement powers. Indeed, the Justice Department tactic for undermining effective congressional investigative oversight by forcing committees to seek enforcement of information gathering subpoenas has succeeded. The inevitable attendant excessive delays, and aberrant judicial rulings, has rendered its ultimate untimely availability essentially useless. The result has been that the critical lines of constitutional authority in this vital area have become unclear and the uncertainty is having, and will continue to have a paralyzing effect on congressional oversight. Until it is resolved it raises the specter of the concomitant danger of Executive encroachment and aggrandizement and the destabilization of the Constitution’s intended allocation of powers. The current situation unquestionably warrants a constitutional confrontation.

There is little doubt that the Department of Justice will vigorously oppose any effort by the House to assert its inherent contempt power and that any such challenge will reach the Supreme Court for final resolution. There is likewise scant question that the House will prevail before the High Court. The well-established doctrine of institutional implied powers, the clarity and consistency of Supreme Court precedent, and the reality of centuries of history, custom, and practice will ensure victory for the House over the executive branch in any case challenging the authority of the House to punish executive officials for contempt with monetary fines. It would require the overruling of the Court’s landmark rulings in *Anderson v. Dunn* and *McGrain v. Daugherty* and their innumerable precedential progeny, which is improbable and unthinkable.

We must not underestimate the tremendous institutional benefits the House will reap from its victory at the Supreme Court. Success in the initial test case will dramatically re-establish the historic oversight dynamic between the legislative and executive branches. Once the Court validates the new inherent contempt process, there will be a profound reluctance of targeted executive officials to subject themselves to such penalties for the sake of presidential principle or political loyalty. The power, authority, and influence of the House will be restored to their proper weight in the constitutional balance. The obstruction, arrogance, and insolence of executive branch officials will be moderated just as the courtesy and respect they afford citizens and their Congress will become more appropriate to the constitutional republic in which all government authorities are derived from the governed.

Voluminous historical evidence confirms the overwhelming tendency of executive branch officials to comply with congressional subpoenas rather than risk consequential sanctions in inherent or criminal contempt proceedings. From 1857 to 1934, at least 28 executive branch and other witnesses complied with congressional information demands after being threatened with or charged in inherent contempt actions. (Rosenberg, p. 25) More recently, ten executive branch officials substantially or fully complied with congressional information demands between

1975 and 1998 after being cited for contempt rather than risk prosecution under the criminal statute when this threat was still credible. (Rosenberg, p. 26)

## 2) Necessary Initial Investments and Logistical Prerequisites

The House will need to invest human and financial resources to vanquish the executive branch legal challenge that will certainly occur in response to the first use of the new inherent contempt process. The first requirement will be adequate staff and financial support for the select committee evaluation and inquiry process. Next, the House must be prepared to staff and finance its legal effort in response to what will certainly be hard-fought legal opposition from the executive branch. Although it is likely this initial dispute will escalate to the Supreme Court quickly, the litigation cycle could take as long as a year or a year-and-a-half before final resolution. Some colleagues with whom we have consulted have expressed concerns about the staffing, financial, and administrative burdens, particularly on the House Office of General Counsel, of operating select committees and supporting major litigation. It will be important for the House to plan for these issues when first invoking our inherent contempt proposal. A variety of options exist such as increasing the legislative operating budget; enlarging contingency, emergency, or reserve funds; adding permanent or temporary staff to the House Counsel's office, and engaging outside counsel, among others.

From our perspective, the vital importance of restoring the oversight authority of the House and safeguarding its institutional integrity far outweigh the costs of these efforts which are, in the end, manageable and in the range of burdens the House has routinely shouldered previously in successful efforts challenging the validity Executive raids on congressional offices, protecting the Speech or Debate rights of Members from Executive intrusions, and upholding the House's unilateral authority to empower the House General Counsel to represent its oversight interests in court litigation involving subpoena enforcement and agency violations of the Constitution's preclusion of expenditures without congressional authorization. There can be no price tag on safeguarding matters involving preservation of the House's core institutional prerogatives.

## References

[Anderson v. Dunn](#), 19 U.S. (6 Wheat) (1821).

Chafetz, Josh. [Congress's Constitution: Legislative Authority and the Separation of Powers](#). 1st Edition. Yale University Press. 2017. (Google Books)

Garvey, Todd and Dolan, Alissa M. [Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure](#). Congressional Research Service Report RL34097, May 8, 2014.

[Kilbourn v. Thompson](#), 103 U.S. (1881).

[Marshall v. Gordon](#), 243 U.S. (1917).

[McGrain v. Daugherty](#), 273 U.S. (1927).

Rosenberg, Morton. [When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry](#). The Constitution Project. Washington, DC. May 23, 2017.