

Statement for Inherent Contempt Forum

Mort Rosenberg

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The problem we are addressing today is not a simple political problem that can be resolved by electing a new House majority that will control and institute oversight and investigative proceedings that will reveal what is actually going on in executive branch departments and agencies and the White House. Recent media articles and commentary have been replete with speculation and anticipation about the flood tide of subpoenas that will be issued by a new majority and the topics of administrative branch policies, actions or inactions that will be the targets of such compulsory demands. All of them have 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 measures that will make it effective.

Over the last decade 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 Justice Department, instead, has instituted and executed a thus far 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 unconstitutional. The demonstrable consequence of this stratagem has been the crippling of the legislature's information gathering authority and thereby undermining of 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 inherent or criminal contempt on to a committee that now must seek judicial assistance to obtain compliance. Litigation 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 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. I would 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 CRS specializing in questions about separation of powers and investigative oversight, and in the last 10 years of mulling about those experiences, I have conclude 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, it has been absolutely critical to the success

of such endeavors that there be a credible threat of meaningful consequences for refusals to provide necessary information in a timely manner. For over 200 years that threat has been the possibility of a citation of inherent contempt before the bar of the Houses of Congress (1795-1935) or criminal prosecutions for contempt of Congress (1857- 2002), which could result in incarceration and/or fines had been 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 trials occurred, many of which I was involved with. Essentially the common factor in each one was the reluctance of the subject contemnor to him or her self to a criminal prosecution for the sake of establishing a principle constitutional or common law privilege for the president. The case of Anne Gorsuch Burford is a clear case in point. It spawned the 1984 Olson memo, the litigation that upheld the independent counsel statute and the ultimate revival of the Olson theory.

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

More appropriate would be for the House to exercise its rulemaking authority to establish a "seemly" inherent contempt procedure. Historically the inherent contempt process was very successful was used against two sitting officials. The threat of arrest, detention and incarceration formidable and constitutionality and its necessity as an institutional self-protective mechanism was recognized by the Supreme Court at least four times. 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 respecting an investigation of maladministration at the DOJ. It has not been utilized since 1935 because it took up much too much floor time, often entailed consuming habeas 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 avoided those burdens with similar success and has been used exclusively since 1935.

In recent times, some courts and commentators have questioned its seeming draconian nature but none have questioned its continued constitutionality or that it can be modified to conform to modern sensibilities and still be effective. I have designed 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 of congressional inherent contempt strongly suggested that fines were a permissible, analogizing the inherent self-protective power of courts to impose fines as well as imprisonment. [Here describe other features of the proposed rule including the safety valve feature, the fact that it makes clear that committees are to make the initial determinations of the acceptability of claims of claimed assertions of presidential, common law and statutory privileges, and that the proposal does not alter discretionary authority of individual committee chairs to develop particular inquiries].

A third possibility is for the House to directly appoint a private sector attorney to prosecute a contemnor. The Supreme Court in a 1987 ruling (*Louis Vuitton*) upheld the inherent authority of a district court judge to make such an appointment pursuant to its inherent self-protective authority. That ruling, and the dicta in *Anderson* were at the basis of a 9th Circuit ruling a week ago last Wednesday (*U. S. v. Arpaio*) that reiterated the inherent authority of a district court to appoint a special counsel. The long standing judicial recognition of the analogous self-protective authorities 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 has recognized the legitimacy of concurrent or seriatim inherent and criminal contempt citations. 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.