

Proposed Modified Inherent Contempt Enforcement Rule for the U.S. House

History and Background

1) The proposed rule would establish an inherent contempt enforcement procedure for the U.S. House of Representatives and is authored by congressional oversight expert Mort Rosenberg.

2) **Inherent contempt** enforcement is the traditional 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.

3) **The U.S. Supreme Court** has ruled repeatedly and unequivocally that the authority to arrest, conduct trials of, and directly punish contemnors is inherent in the legislative power of Congress and is an essential institutional self-protective mechanism.

4) **Inherent contempt enforcement has been the most effective** of the three methods available to Congress for defending its institutional prerogatives against contumacious behavior and ensuring timely compliance with its information demands. Congress employed it highly successfully and almost exclusively until 1935, even after enactment of the criminal contempt statute in 1857. From 1857-1934, at least 28 witnesses complied with congressional information demands after being threatened with or charged in inherent contempt actions and two executive branch officials were arrested pursuant to contempt citations.

5) **Congress stopped employing inherent contempt after 1935 for three reasons:** (a) the associated **trials** at the bar of either house **consumed too much floor time**, (b) the ***habeas corpus suits*** that invariably accompanied the arrests and detentions of alleged contemnors **delayed the process excessively**, and (c) the **arrest and incarceration** of witnesses **was perceived unseemly**.

6) **DOJ /OLC declared inherent contempt and statutory criminal enforcement against executive branch officials unconstitutional in opinions issued in 1984 and 1986**, despite strong case law, history, and congressional practice to the contrary. These arguments are based on misguided legal theory that erroneously concludes that inherent and criminal enforcement are unconstitutional, and represent a calculated effort by DOJ to undermine congressional oversight by denying Congress recourse to its strongest enforcement mechanisms and channeling it toward an inferior civil enforcement option incapable of adequately defending its institutional interests. **Relying on these opinions, the Bush Administration began refusing to present congressional contempt citations of executive branch officials to grand juries in 2007**, a policy continued by the Obama Administration and unlikely to be reversed by subsequent presidents.

7) **Emergence of an Oversight Crisis.** Aggressive DOJ opposition to inherent and statutory criminal enforcement, the circumstantial congressional drift away from the inherent contempt procedure, and a variety of other systemic factors have produced a crisis in the effectiveness of congressional oversight.

Summary of Proposal

1) **Solution: A Revised Inherent Contempt Procedure.** The modified inherent contempt procedure we propose addresses the crisis in oversight effectiveness and solves the problems associated with the traditional inherent contempt method with **three changes**:

- a) **Select Committees:** Time consuming preparatory and investigative work is moved off the House floor and assigned to a Select Committee instead,
- b) **Summary Trials:** Floor proceedings are limited to a summary trial before the full House that can be completed quickly, and
- c) **Monetary Penalties Only:** Punishments imposed on contemnors are restricted to monetary fines only to avoid triggering *habeas corpus* actions.

Key Process Features

1) Committee Report of Initial Finding – Following an appropriate period of investigation, negotiation and attempted accommodation, the committee prepares a report explaining why it believes the repudiation of its compliance order by the executive branch official constitutes contempt of Congress and related matters. The chair transmits this committee report to the Speaker along with the request to form the Select Committee.

2) Committee Chair Requests Speaker to Form Bipartisan Select Committee – Upon the failure of a senior responsible official to comply with a committee order to produce documents or testimony, the committee chair requests the Speaker to form a Select Committee of five members, three appointed by the Speaker and two by the Minority Leader, to assess whether the committee’s investigation and conclusion that executive branch non-compliance rises to the level of contempt of Congress.

3) Select Committee Completes Assessment and Preparatory Work – The Select Committee assesses the alleged contemptuous behavior to determine whether it rises to the level of a contempt of the House and a trial at the bar of the House is warranted. The Select Committee prepares a report of its findings for the Speaker. If the Committee finds that a trial is warranted, it must also prepare a detailed contempt resolution along with a recommendation for the monetary fine constituting appropriate punishment.

4) Select Committee Assessment Process

- a) House General Counsel assists the Select Committee in conducting its assessment, which may include further investigation.
- b) Witnesses have the right to private legal counsel, but may not be represented by government lawyers, even if they are government employees.
- c) All testimony of contemnor and witnesses taken *in camera*.
- d) No one other than Select Committee members and staff, House General Counsel staff, and witnesses and their legal representatives may attend the proceedings.

5) Summary Floor Trial – The House will conduct a summary or expedited floor trial if the Select Committee recommends consideration of a resolution of contempt.

6) Procedures for Summary Floor Trial

- a) **Contempt Resolutions are Treated as Rule IX Questions Requiring Precedence** – Any contempt resolution recommended by the Select Committee will be reported to the House by the Speaker and treated as a Rule IX question of privilege of the House requiring precedence over all other questions until resolved and promptly scheduled for floor consideration.
- b) **House General Counsel presents case for passage of the contempt resolution.**
- c) **The alleged contemnor and counsel may present a defense.**
- d) Time may be allotted for questions by members from the floor.
- e) **House votes on passage of the contempt resolution** after the time allotted for presentations, questions, and debate.
- f) **House holds a second vote on imposition of a fine** if the contempt resolution passes.

7) Penalties and Enforcement

- a) **\$25,000 minimum initial fine, increased in \$25,000 increments daily** until the contempt is purged or the maximum penalty of \$250,000 is reached after 10 days; amount of fine depends on timeliness of compliance.
- b) **House General Counsel is authorized to recover accrued penalties upon expiration of the 10-day compliance period.**
- c) **No government funds may be used to pay any monetary fine imposed** and no person, organization or entity is permitted to pay or reimburse contemnors for any monetary penalties incurred; such actions may be regarded as a contempt of the House.

8) Effect of Noncompliance - Citation for Criminal Contempt and Direct Appointment of Private Attorney to Prosecute

- a) Summary of Provision for Direct Appointment of Private Attorney to Prosecute Criminal Contempt** - The contemnor may be cited for criminal contempt and prosecuted under the federal criminal contempt statute by a private attorney directly appointed by the House in the event of continuing noncompliance.
- b) Jurisdictional Committee Report & Request for Further Legislative Penalties** - Chair of complaining jurisdictional committee prepares a report for Select Committee at end of 10-day compliance period detailing degree of compliance by contemnor and whether it satisfies legislative needs of the committee. If committee deems compliance unsatisfactory, its report will include a description of its efforts to secure compliance and the obstructions it encountered along with a request for imposition of further legislative penalties.
- c) Select Committee Report & Criminal Contempt Recommendation** – The Select Committee convenes within three calendar days of receipt of committee report to consider whether the continued refusal to comply with House information demands warrants consideration of a resolution of criminal contempt of Congress by the House and to prepare a report of its findings for the Speaker. If the Select Committee recommends House consideration of a criminal contempt resolution is warranted, it must also prepare a detailed criminal contempt resolution along with a resolution authorizing the Speaker to appoint a private attorney to prosecute the criminal contempt.
- d) Procedures for Criminal Contempt Resolution**
 - i) Treated as Rule IX Question Requiring Precedence** – Any criminal contempt resolution recommended by the Select Committee will be reported to the House by the Speaker and treated as a Rule IX question of privilege of the House requiring precedence over all other questions until resolved and promptly scheduled for floor consideration.
 - ii) House General Counsel presents case for passage of the contempt resolution.**
 - iii) The alleged contemnor will be present and may be accompanied by counsel, either of whom may present a defense to the charge.**
 - iv) Time may be allotted for questions by members from the floor.
 - v) House votes on passage of the contempt resolution** after the time allotted for presentations, questions, and debate.
 - vi) House holds a second vote on direct appointment of a private attorney to prosecute the criminal contempt** if the contempt resolution passes.
- e) Criminal Prosecution Does Not Eliminate Monetary Penalties** - Initiation of a criminal contempt of Congress prosecution is not intended to vitiate any previously imposed and uncollected monetary penalties incurred by the same contemnor.

9) Points of Order on Appropriations – The rule provides for points of order against the appropriations of any agency whose employee is found guilty of contempt of Congress as follows:

- a) Reduction of the salary of the agency head** by the amount of any fine imposed by Congress in an inherent contempt conviction of an agency employee
- b) Reductions of appropriations for other offices, divisions or sections of the agency or other agencies as the committee chair may designate.**

Benefits of the Proposed Modified Inherent Contempt Procedure

1) Revives and Revises Congress' Most Powerful Contempt Enforcement Mechanism. Modernizes the historical inherent contempt process to make it usable and seemly by employing an investigative Select Committee to save floor time, conducting a summary floor trial, and replacing arrest and detention with monetary fines as the primary sanction imposed on contemnors.

2) Affirms Congress' Absolute Authority to Rule on All Claims of Privilege. Affirms that Congress has absolute authority and discretion to rule in the first instance on all objections and claims of privilege asserted in response to its demands for information from the executive.

3) Repudiates Illegitimate Executive Branch Stratagems to Disempower Congressional Contempt Enforcement. Reasserts congressional power by rejecting unsound executive branch arguments that inherent enforcement is unconstitutional and effectively resists manipulative executive channeling of Congress toward inferior civil enforcement actions incapable of effectively defending its oversight interests in a timely manner.

4) Imposes Consequential Sanctions. Enables the House to swiftly impose consequential sanctions on contemptuous executive branch officials.

5) Leverage. Enables the House to restore leverage over obstructive or recalcitrant executive branch officials in oversight disputes by having recourse to powerful sanctions.

6) Speed. Enables the House to obtain information essential to its oversight responsibilities more quickly than other available remedies.

7) Independent Action. Enables the House to act independently without the assistance of other branches or the Senate to resolve oversight disputes.

8) Ease of Adoption and Execution. Adoption and execution of the new procedure requires only promulgation of a House rule and minimal need for judicial assistance.

9) Every Step of the Proposed Rule is Supported by Supreme Court and lower federal court precedent. The Supreme Court has sustained the constitutional validity and necessity of inherent contempt as a self-protective institutional mechanism at least four times between 1821 and 1935. A [Supreme Court ruling](#) in 1993 [upheld](#) the power of the Senate to establish its own rules for the conduct of an impeachment and approved the appointment of a special committee to make findings of fact and recommendations before the floor trial, which is analogous to the proposed Select Committee. The Supreme Court and appellate courts have approved of practices and processes Congress has adopted for oversight and investigative hearings that do not accord with the full panoply of procedural rights enjoyed by witnesses in adjudicatory proceedings. Appellate court rulings and historic congressional practice have established that acceptance of common law privileges and assertions of the presidential communications privilege rest in the initial and sole discretion of jurisdictional committees and may be contested only during the defense of statutory criminal contempt or inherent proceedings.