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INSIGHT: Congressional Subpoenas, Special Prosecutors, and the Capitol Jail—Let the Games Begin

Congress has options for investigating and ''going after'' federal officials, but reality shows it is difficult to enforce subpoenas, use its inherent contempt powers, or seek civil enforcement or criminal prosecution. Preston Burton and Paige Ammons, attorneys with Buckley Sandler LLP, lay out the realities for House Democrats taking office in January and considering Trump administration investigations and ask whether another special prosecutor could solve the enforcement dilemma.

BY PRESTON BURTON AND PAIGE AMMONS

President Donald Trump has been predictably defiant in responding to the suggestion that House Democrats will unleash their newly won subpoena powers to investigate him, his administration, or his companies, warning that he is prepared to assume a ''war-like posture'' and that the Democrats ''can play that game but we can play it better.''

He may be right—though we may not know the ultimate winner until the next call for a special counsel is answered.

The chief problem House Democrats face: if challenged, Congress can't do much to enforce its own subpoenas quickly or effectively. A witness hauled before a House committee can simply invoke Fifth Amendment protections, and administration officials can also claim executive privilege. The committee can hold the witness in contempt; either chamber of Congress can pass a formal resolution of contempt through a simple majority vote. But a contempt citation is not self-executing.

The three enforcement options then available to Congress—exercise its inherent contempt powers, seek a civil judgment from a federal court, or refer the matter for criminal prosecution—may not strike much fear into the heart of someone in contempt.

'Long Dormant' Contempt Powers

A May 2017 Congressional Research Service report politely described Congress's inherent contempt powers as ''long dormant,'' and a little research explains why. Congress has the rarely exercised power to act on a contempt resolution by instructing its sergeant at arms to arrest witnesses and bring them before the chamber's presiding officer, with a conviction—presumably following some congressional ''trial''—resulting in imprisonment in a cell in the Capitol.

While turning the Capitol into the Tower of London may have a certain quaint appeal and would almost certainly be swifter (and possibly more effective) than the

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other enforcement options, neither chamber of Congress has used this procedure since 1935 and never against an executive-branch official. While it's amusing to think about the Senate's sergeant at arms scouring the countryside for recalcitrant witnesses, it's hard to see how this long-neglected practice storms back into fashion.

Civil Litigation Takes Time

Congress could pursue more traditional avenues of civil enforcement proceedings or referrals for criminal prosecution, but both options face steep obstacles.

A civil lawsuit in federal court is time-consuming and subject to the court's interpretation of the privileges at stake. Relief under this option would require the court to agree that the witness does not have a viable privilege to resist testifying or producing requested documents. In the event the witness remained noncompliant after such a ruling, the parties would litigate the lack of compliance and only then could the court employ remedies. However, that solution could be complicated by appeals and other litigation delays.

In 2012, then-Attorney General Eric Holder withheld subpoenaed documents about Operation Fast and Furious and became the first sitting Cabinet official to be held in contempt of Congress. The House Oversight Committee brought a civil action in federal court in Washington. The district judge ordered Holder to produce some responsive materials but did not hold him in contempt.

Nearly six years (and multiple privilege disputes and orders later), all of the subpoenaed documents still have not been produced and the district court recently rejected the parties' attempted settlement as not in the public interest. The civil process cannot be relied upon to yield timely or effective results.

Former FBI Director James Comey's recent attempt to use the federal courts to preemptively dictate how Congress will carry out its investigations is unlikely to be a harbinger of a shift in congressional subpoena enforcement. Although Comey and the House Judiciary Committee cut a deal that obviated a decision on his motion to quash, the court's statements suggested it would be unlikely to grant his motion because of a reluctance of the courts to interfere in congressional investigations, particularly where—as Comey conceded—the legitimacy of the inquiry was not being challenged.

Criminal Prosecution Not Realistic

Referral for criminal prosecution is theoretically the most powerful enforcement tool for Congress, and a relatively popular one, but also not a very realistic one when administration officials are the contemnors. Action on such referrals necessarily falls to the discretion of the Department of Justice—part of the very administration resisting compliance.

Former IRS official Lois Lerner was held in contempt of Congress in 2014 after a hearing on IRS audits of political groups. The House Committee on Oversight and Government Reform argued she could not invoke her Fifth Amendment right to silence because she proclaimed innocence in her opening statement.

The contempt citation fell to then-U.S. Attorney Ronald Machen, who, on his last day in office, advised the House that his office was declining to prosecute Lerner. That spurred partisan criticism about the separation of power issues, but didn't result in prosecution. Criminal referrals for Holder in 2012, Bush White House Chief of Staff Josh Bolten in 2007, and former White House counsel Harriet Miers in 2008 fared much the same.

Indeed, the last prosecution for noncompliance with a subpoena was for EPA official Rita Lavelle in 1984. She was acquitted of contempt—but convicted of perjury and sentenced to six months in prison.

Getting an administration official to criminally prosecute another official of the same administration is a daunting task, notwithstanding statutory language imposing a ''duty'' upon the U.S. Attorney to present the charges to the grand jury.

Currently, the person with that duty is likely the U.S. Attorney for the District of Columbia, Jessie Liu. Her nomination was controversial because President Trump personally interviewed her prior to selecting her for the post. Indeed, some senators highlighted President Trump's break from traditional appointment practice and further noted that whoever ended up in the position would likely decide whether to pursue indictments related to the Mueller investigation. Little if any concern focused at that time on the fact that this same position would also decide whether to enforce congressional subpoenas or contempt referrals for criminal prosecution.

House Democrats are unlikely to sit still should the DOJ decline to pursue a criminal contempt referral. Their recourse? Demand the appointment of another special counsel to consider the request. That would presumably require the attorney general, acting or otherwise, to choose between a tarnished legacy or a president Tweeting about another witch hunt.

The attorney general's choice may be immaterial in the end: Criminal contempt is a federal offense, and pardonable by the president even before the charges come to trial. The president's confidence about how much better he ''plays the game'' rests firmly in the constitutional aces up his sleeve.

Where does that leave House Democrats? Reconsidering the viability of a dusty jail cell somewhere in the bowels of the Capitol.

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