

Contempt Power

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- 2 Hinds §§ 1597–1640; 3 Hinds §§ 1666–1724
- 6 Cannon §§ 332–334
- 4 Deschler Ch 15 §§ 17–22
- Manual §§ 293–299
- 2 USC §§ 192, 194

§ 1. In General

An individual who fails or refuses to comply with a House subpoena may be cited for contempt of Congress. *Eastland v United States Servicemen's Fund*, 421 US 491 (1975). Although the Constitution does not expressly grant Congress the power to punish witnesses for contempt, that power has been deemed an inherent attribute of the legislative authority of Congress. See *Anderson v Dunn*, 19 US 204 (1821).

To supplement this inherent power, the Congress in 1857 adopted an alternative statutory contempt procedure (§ 2, *infra*). Thus, the House may either (1) certify a recalcitrant witness to the appropriate United States Attorney for possible indictment under this statute or (2) exercise its inherent power to commit for contempt by detaining the witness in the custody of the Sergeant at Arms. *Manual* § 296. The first procedure is the one utilized today, but the “inherent power” still remains available. In one instance, the House invoked not only its inherent contempt power, but also proceeded against a witness under the alternative statutory contempt procedure. 3 Hinds § 1672.

Under the inherent contempt power of the House, the recalcitrant witness may be arrested and brought to trial before the bar of the House, with the offender facing possible incarceration. 3 Hinds § 1685. The first exercise of this power in the House occurred in 1812, when the House proceeded against a newspaper editor who declined to identify his source of information that had been disclosed in executive session. 3 Hinds § 1666. Such powers had been exercised prior to the adoption of the U.S. Constitution

by the Continental Congress as well as by England's House of Lords and House of Commons. *Jurney v MacCracken*, 294 US 125 (1935).

At the trial of the witness in the House, questions may be put to the witness by the Speaker (2 Hinds § 1602) or by a committee (2 Hinds § 1617; 3 Hinds § 1668). In one instance, the matter was investigated by a committee and the respondent then brought to the bar of the House, and a resolution was reported to the House for its vote. 2 Hinds § 1628.

The inherent power of Congress to find a recalcitrant witness in contempt has not been invoked by the House in recent years because of the time-consuming nature of the trial and because the jurisdiction of the House cannot extend beyond the end of a Congress. See *Anderson v Dunn*, 19 US 204 (1821).

§ 2. Statutory Contempt Procedure

Generally

An alternative statutory contempt procedure was adopted in 1857. Under this statute, the refusal to comply with a congressional subpoena is made punishable by a fine of up to \$1,000 and imprisonment for up to one year. 2 USC § 192. Pursuant to this statute, a committee may vote to seek a contempt citation against the recalcitrant witness; this action is then reported by resolution to the House. If the resolution is adopted by the House, the matter is referred to a U.S. Attorney who is to seek an indictment. See 2 USC § 194; *Manual* § 299. In the 97th Congress, such a resolution was adopted following the failure of an official of the executive branch (EPA Administrator Anne M. Gorsuch) to submit executive branch documents to a House subcommittee pursuant to a subpoena. This was the first occasion on which the House cited a chief executive branch official for contempt of Congress. See H. Res. 632, 97-2, Dec. 16, 1982, pp 31746, 31754-56, 31776. In the same Congress, Secretary of the Interior James G. Watt was cited for contempt for withholding subpoenaed documents and for failure to answer questions. The contempt citation was reported to the House by the oversight and investigations subcommittee of the Committee on Energy and Commerce. See H. Rept. No. 97-898. An accommodation was reached on the documents, and the House took no action on the report. In 1983, a committee report recommended the adoption of a resolution finding Rita M. LaVelle (former EPA Assistant Administrator) in contempt of Congress for failing to appear in response to a subpoena. See H. Rept. No. 98-190, May 16, 1983. The House then adopted a resolution certifying such refusal to the U.S. Attorney. 98-1, May 18, 1983, p 12720.

Floor Consideration

A contempt citation must be reported to the House pursuant to formal action by the committee. *Ex parte Frankfield*, 32 F Supp 915 (D.C.D.C. 1940). A committee report relating to the refusal of a witness to testify is privileged for consideration in the House (86–1, Sept. 3, 1959, pp 17927–34), as is a report relating to the refusal of a witness to produce certain documents as ordered. 86–2, Aug. 23, 1960, pp 17278 *et seq.* The report is presented and read. A resolution may then be offered directing the Speaker to certify the refusal to a U.S. Attorney. 86–2, Aug. 23, 1960, pp 17278–313. Such a resolution may be offered from the floor as privileged, since the privileges of the House are involved, and a committee report to accompany the resolution may be presented to the House without regard to the three-day availability requirement for other reports. 92–1, July 13, 1971, pp 24720–23.

A resolution with two resolve clauses separately directing the certification of the contemptuous conduct of two individuals is subject to a demand for a division of the question as to each individual. 99–2, Feb. 27, 1986, p 3061.

§ 3. — Duties of the Speaker and U.S. Attorney

The controlling statute provides that when the witness fails or refuses to answer or produce the required documents, and such failure is reported to the House—or to the Speaker when the House is not in session—it “shall be the duty” of the Speaker to certify the facts to the United States Attorney for presentation to the grand jury. 2 USC § 194. Notwithstanding the language in the statute referring to the “duty” of the Speaker, the court in *Wilson v United States*, 369 F2d 198 (1966) held that the Speaker erred in construing the statute to prohibit any inquiry into the matter by him, and that his automatic certification of a case to the U.S. Attorney during a period of *sine die* adjournment was invalid. Since the incident that gave rise to this judicial decision, no contempt reports have been filed following a *sine die* adjournment so the authority of the Speaker has not been utilized.

§ 4. — Defenses; Pertinency Requirement

The statute which penalizes the refusal to answer in response to a congressional subpoena provides that the question must be “pertinent to the question under inquiry.” 2 USC § 192. That is, the answers requested must (1) relate to a legislative purpose which Congress may constitutionally entertain, and (2) fall within the grant of authority actually made by Congress to the committee. Deschler Ch 15 § 6. In a prosecution for contempt of Con-

gress it must be established that the committee or subcommittee was duly authorized and that its investigation was within the scope of delegated authority. *US v Seeger*, C.A.N.Y. 303 F2d 478 (1962). A clear chain of authority from the House to its committee is an essential element of the offense. *Gojack v US*, 384 US 702 (1966).

The statutory requirement that a committee question be pertinent is an essential factor in prosecuting the witness for contempt. The right of a witness to refuse to answer a question that is not pertinent is not a personal privilege that can be waived if not asserted. Pertinency will not be presumed. *Bowers v United States*, 202 F2d 447 (D.C. Cir. 1953). The committee has a burden to explain to the witness that a question is pertinent and that despite the witness' objection, the committee demands an answer. *Barenblatt v United States*, 252 F2d 129 (D.C. Cir. 1958), *aff'd*, 360 US 109 (1959); *Davis v United States*, 269 F2d 357 (6th Cir.), *cert. denied*, 361 US 919 (1959).

In contempt proceedings brought under the statute, constitutional claims and other objections to House investigatory procedures may be raised by way of defense. *US v House of Representatives*, 556 F Supp 150 (1983). The courts must accord the defendant every right "guaranteed to defendants in all other criminal cases." *Watkins v United States*, 354 US 178 (1957). All elements of the offense, including willfulness, must be proven beyond a reasonable doubt. *Flaxer v United States*, 358 US 147 (1958). But the courts have been extremely reluctant to interfere with the statutory scheme by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief. See, for example, *Eastland v United States Servicemen's Fund*, 421 US 491 (1975); *US v House of Representatives*, 556 F Supp 150 (1983).

To justify withholding subpoenaed information, a witness sometimes contends that the President has claimed executive privilege with respect thereto or has directed the witness not to disclose the information. However, the Supreme Court has rejected the claim that the President has an absolute, unreviewable executive privilege. See *United States v Nixon*, 418 US 683 (1974). Moreover, noncompliance with a congressional subpoena by a government official may not be justified on the ground that he was acting under the orders of his superior. See *United States v Tobin*, 195 F Supp 588 (D.D.C. 1961).

§ 5. Purging Contempt

A witness in violation of a House subpoena has been permitted to purge himself by compliance with its terms prior to the issuance of an indictment.

3 Hinds §§ 1666, 1686. However, once judicial proceedings to enforce the subpoena have been initiated, the defendant cannot purge himself of contempt merely by producing the documents or testimony sought. See *United States v Brewster*, 154 F Supp 126 (D.D.C. 1957), *cert. denied*, 358 US 842 (1958). At this stage, the House itself must consider and vote on whether to permit a discontinuance. The committee that sought the contempt citation submits a report to the House indicating that substantial compliance on the part of the witness has been accomplished; the House then adopts a resolution certifying the facts to the United States Attorney to the end that contempt proceedings be discontinued. *Manual* § 299. For example, in the 98th Congress, after EPA Administrator Anne Gorsuch had been cited in the prior Congress for contempt for failure to produce certain documents for a House subcommittee, the House adopted a resolution certifying to the U.S. Attorney that agreement had been reached between the committee and the executive branch giving the committee access to those documents. 98-1, Aug. 3, 1983, p 22698.

It should be pointed out that while a witness cannot by himself purge his contempt after judicial proceedings have begun, a court may suspend the sentence of a witness convicted of contempt and give him an opportunity to avoid punishment by giving testimony before a committee whose questions he had refused to answer. Deschler Ch 15 § 21.