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# Chapter 17
# Contempt

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6 Cannon §§ 332-334
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 U.S. 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 (*Anderson* v. *Dunn*, 19 U.S. 204 (1821)) so far as necessary to preserve and exercise the legislative authority expressly granted (*Marshall* v. *Gordon*, 243 U.S. 521 (1917)). However, as a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment. *Manual* §§ 294-296.

To supplement this inherent power, 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 statutory procedure is the one used in modern practice, but the ''inherent power'' remains available. In one instance, the House invoked both procedures against a witness. 3 Hinds § 1672.

In contrast, the Senate may invoke its civil contempt statute (2 USC § 288d) to direct the Senate legal counsel to bring an action in Federal court

to compel a witness to comply with the subpoena of a committee of the Senate.

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. 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, the respondent was 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 U.S. 204 (1821). 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 from executive session. 3 Hinds § 1666. Such powers had been exercised before the adoption of the Constitution by the Continental Congress as well as by England's House of Lords and House of Commons. *Jurney* v. *MacCracken*, 294 U.S. 125 (1935). Although the use of such powers was supported by the Supreme Court in *Jurney*, neither House has used them since 1935.

## § 2. Statutory Contempt Procedure

### Generally

An alternative statutory contempt procedure was enacted in 1857. Under this statute the wrongful 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. A committee may vote to seek a contempt citation against a recalcitrant witness. This action is then reported to the House. 2 USC § 192. If a resolution to that end 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 the House adopted such a resolution 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 cabinet-level executive branch official for contempt of Congress. *Manual* § 299; H. Rept. 97-968. In the same Congress, Secretary of the Interior James G. Watt was cited for contempt for withholding from a com-

mittee subpoenaed documents and for failure to answer its questions. The contempt citation was reported to the House by the oversight and investigations subcommittee through the full Committee on Energy and Commerce. H. Rept. 97-898. An accommodation was reached on the documents, and the House took no action on the report. Similarly, in 1998, a committee report recommended the adoption of a resolution finding Attorney General Janet Reno in contempt of Congress for failing to produce documents subpoenaed by the Committee. H. Rept. 105-728. 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. H. Rept. 98-190. The House then adopted a resolution certifying such refusal to the U.S. Attorney. *Manual* § 299.

In 2008, the House adopted (by special order of business) a resolution, reported by the Committee on the Judiciary, directing the Speaker to certify to the United States Attorney the refusal of the White House Chief of Staff to produce documents to a committee, and the refusal of former White House Counsel to appear and testify and produce documents to a subcommittee, each as directed by subpoena. 110-2, H. Res. 979, Feb. 14, 2008, p 2190; *Manual* § 299.

**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.D.C. 1940). A committee report relating to the refusal of a witness to testify is privileged for consideration in the House if called up by the chair or other authorized member of the reporting committee. *Manual* § 299. A report relating to the refusal of a witness to produce certain documents as ordered is also privileged. Deschler Ch 15 § 20.9. The report is presented and read. A resolution may then be offered directing the Speaker to certify the refusal to a U.S. Attorney. *Id.* Such a resolution may be offered from the floor as privileged, because 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. Clause 4(a)(2)(C) of rule XIII; *Manual* §§ 299, 850.

A resolution with two ''resolved'' 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 (contempt proceedings against Ralph and Joseph Bernstein, *Manual* § 299); as is a resolution with one ''resolved'' clause certifying contemptuous conduct of several

individuals. *Manual* § 299; *cf.* Deschler-Brown Ch 30 § 49.1. A contempt resolution may be withdrawn as a matter of right before action thereon. *Manual* § 299.

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

The controlling statute provides that when a 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 a 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 F.2d 198 (D.C. Cir. 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 decision, no contempt reports have been produced following a *sine die* adjournment, so the authority of the Speaker has not been used.

## § 4. — Defenses; Pertinence Requirement

The statute that penalizes the refusal to respond 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 that 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 Congress, it must be established that the committee or subcommittee was duly authorized and that its investigation was within the scope of delegated authority. *United States* v. *Seeger*, 303 F.2d 478 (2nd Cir. 1962). A clear chain of authority from the House to its committee is an essential element. *Gojack* v. *United States*, 384 U.S. 702 (1966).

The statutory requirement that a question be pertinent is an essential factor in prosecuting the witness for contempt. Pertinence will not be presumed. *Bowers* v. *United States*, 202 F.2d 447 (D.C. Cir. 1953). The right of a witness to refuse to answer a nonpertinent question is not waived by mere lack of assertion. The committee has a burden to explain to the witness that a question is pertinent and that despite the witness's objection, the committee demands an answer. *Barenblatt* v. *United States*, 252 F.2d 129 (D.C. Cir. 1958), *aff'd*, 360 U.S. 109 (1959); *Davis* v. *United States*, 269 F.2d 357 (6th Cir. 1959), *cert. denied*, 361 U.S. 919 (1959).

In judicial contempt proceedings brought under the statute, constitutional claims and other objections to House investigatory procedures may be raised by way of defense. *United States* v. *House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). The courts must accord a defendant every right ''guaranteed to defendants in all other criminal cases.'' *Watkins* v. *United States*, 354 U.S. 178 (1957). All elements of the offense, including willfulness, must be proven beyond a reasonable doubt. *Flaxer* v. *United States*, 358 U.S. 147 (1958). However, 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, *e.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *United States* v. *House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

During committee proceedings, where a report to the House is contemplated, a witness's defense (including objections based on relevance, attorney-client privilege, or executive privilege) may be considered separately by the committee or may merge with a vote on reporting to the House.

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 U.S. 683 (1974). Moreover, noncompliance with a congressional subpoena by government officials may not be justified on the ground that they were acting under the orders of a 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 comply with its terms before the issuance of an indictment. 3 Hinds §§ 1666, 1686. However, once judicial proceedings to enforce the subpoena have been initiated, the defendant cannot be purged 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 U.S. 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 U.S. Attorney to the end that contempt proceedings be discontinued. *Manual* § 299; Deschler Ch 15 § 21. For example, in the 98th Congress, after EPA Administrator Anne M. Gorsuch had been cited

by a prior Congress for contempt for failure to produce certain documents to a House subcommittee, the House adopted a resolution certifying to the U.S. Attorney that an agreement giving the committee access to those documents had been reached. *Manual* § 299.

Although witnesses cannot purge contempt after judicial proceedings have begun, a court may suspend the sentence of witnesses convicted of contempt and give them an opportunity to avoid punishment by providing the testimony sought. Deschler Ch 15 § 21.