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Note

THE COURT OF CONGRESSIONAL CONTEMPT

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I. Introduction

In February 1934, Time Magazine reported that the U.S. Senate had "set out to demonstrate the full measure of its might and power." [1] This demonstration included the arrest of William P. MacCracken, former Assistant Secretary of Commerce, by Senate Sergeant-at-Arms Chesley E. Jurney on the charge of contempt of Congress. [2] After MacCracken refused to produce papers subpoenaed by a Senate investigating committee, [3] the ***42** Senate voted to issue an arrest warrant for MacCracken and ordered Sergeant Jurney to bring him "forthwith" to the bar of the Senate. [4] The Senate resolved to try MacCracken, along with others who removed documents from MacCracken's office, before the bar of the Senate. [5] But on the day of trial, with the Senate gallery "filled with visitors to see the spectacle," Sergeant Jurney reported that he could not locate MacCracken--he was on the run. [6] MacCracken eventually turned himself in, and, after two unsuccessful attempts at judicial review, he stood trial for contempt before the full body of the U.S. Senate. After only six hours of deliberation, Vice President John Garner announced the "order of the Senate" that MacCracken be found guilty and imprisoned in the D.C. Jail. [7] The Supreme Court, in the celebrated case of Jurney v. MacCracken, declined to grant MacCracken's petition for habeas corpus. [8] MacCracken served ten days in jail. [9]

The MacCracken case is but one of many recognizing the power of Congress to compel cooperation with its processes and punish for interference with its activities. [10] Although the Constitution does not expressly arm Congress with the power to punish non-Members for contempt, the Supreme Court in 1821 confirmed that Congress has the inherent common-law right to do so. [11] In exercising this contempt power, Congress may either directly take the contemnor into custody for trial and punishment or certify the contempt to the U.S. Attorney for prosecution under an 1857 federal criminal statute. [12] Congress's earliest exercise of its contempt power was through a 1795 direct contempt proceeding, and, since then, Congress has used this method to punish non-Members on numerous occasions. In 1860, for instance, the Senate arrested Thaddeus Hyatt after he disregarded a Senate subpoena to appear before a committee investigating the raid on Harper's Ferry. [13] Following usual procedure, the Senate Sergeant-at-Arms executed the arrest warrant against Hyatt and ***43** brought him to the bar of the Senate for questioning. [14] After Hyatt once again refused to cooperate, the Senate summarily ordered Hyatt imprisoned in the D.C. Jail for contempt, where he remained until the investigating committee disbanded. [15]

Although Congress retains this common-law direct right to summarily arrest and punish non-Members like Hyatt for contempt, Congress has increasingly opted not to use direct contempt proceedings, instead referring instances of contempt to the U.S. Attorney for prosecution under the 1857 statute. In fact, Congress has not exercised its direct contempt powers in any significant way since 1935. [16] Under the statute, the offended House votes to cite the offender for contempt and then certifies the citation to the U.S. Attorney for prosecution. Because the U.S. Attorney has the discretion to decline to prosecute, [17] this move towards statutory contempt has necessarily shifted power away from Congress in favor of the Executive.

Recent events show that Congress's decision to rely exclusively on statutory contempt certification to the U.S. Attorney is problematic. On June 13, 2007, for instance, the House committee investigating the resignations of nine U.S. Attorneys subpoenaed testimony and documents from Harriet Miers, former White House Counsel, and documents from Joshua Bolten, White House Chief of Staff. Both individuals, citing executive privilege, refused to comply, and, consequently, the investigating committee cited both for contempt. Although the full House certified the citation to the U.S. Attorney for prosecution, the Department of Justice declined to prosecute. Unlike the MacCracken case, the House neither issued an arrest warrant nor dispatched its Sergeant-at-Arms to arrest Miers and Bolten. Although this most recent situation involves Executive Branch officials, it nonetheless shows more generally that Congress has become vulnerable to the discretion of federal prosecutors who could similarly decline to prosecute private citizens who act in contempt of Congress. [18]

***44** This Article argues that Congress should again look to its direct power to punish for contempt in an effort to reclaim its role in the political system and restore the effectiveness of the national legislature. Part II focuses on two related and implied powers of Congress: the power to investigate and the power to punish for contempt. Next, against the backdrop of recent challenges to the contempt power, Part III argues that Congress should in certain cases resort to direct contempt proceedings. To this end, each House could dispatch its Sergeant-at-Arms to arrest the contemnor and bring him to the U.S. Capitol for trial and, if necessary, punishment. Part IV discusses how direct contempt proceedings might operate in a modern Congress. Specifically, it considers three procedures that a modern Congress could employ to carry out the direct power to punish: proceedings before the full chamber of the offended house, proceedings before a committee thereof, or proceedings before a specialized internal congressional tribunal that is termed here the "Court of Congressional Contempt." This tribunal would--consistent with due process--adjudicate contempt citations and forward its factual findings and legal conclusions to the full body of the appropriate chamber for final determination of guilt and, if necessary, punishment.

II. Congress as the "Sole Constitutional Depository of Legislative Power" [19]

Many of the powers of Congress are clearly delineated in the Constitution. [20] For instance, Congress has the power to "lay and collect Taxes"; [21] "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; [22] and "raise and support Armies." [23] One must look beyond these enumerated powers, however, to determine the full panoply

of congressional authority.[24] Indeed, Congress has extensive common-law powers that do not appear in the text of the ***45** Constitution,[25] including two separate but closely related powers: the power to investigate and the power to punish for contempt.

A. The Implied Power to Investigate

1. Positive Power

Congress has the power to investigate matters within its jurisdiction.[26] This includes subjects related to legislation and the oversight of the other branches.[27] Although not found in the text of the Constitution,[28] this authority is "inherent in [Congress's] power to make laws,"[29] and is quite broad.[30] In the absence of such an implied power, the Supreme Court has explained, Congress could not "wisely or effectively" consider potential legislation.[31] In other words, this power is necessary if Congress is to function as a national legislature. Accordingly, one scholar has ***46** summarized the purpose of the power as aiding "law-making, checking the executive branch, inquiring into internal matters of Congress, and formulating . . . public opinion."[32] Although some quibble over the importance of the power,[33] the prevailing view is that the congressional power of inquiry "is one of the most effective means of gathering facts for the enactment of sound legislation."[34] Then-Senator Harry Truman even argued that the investigatory power is closely linked to the legitimacy of Congress in the eyes of the People.[35]

The power to investigate enjoys a rich history, often propelling young officials to the heights of power.[36] The first investigation by the House dates back to 1792, when it inquired into the military defeat of Major General Arthur St. Clair at the hands of Miami, Shawnee, and Delaware Indians.[37] The Senate's first investigation concerned General Andrew Jackson's Seminole campaign in 1818.[38] As seen by these early investigations and others like Congress's post-Civil War inquiry into the Union Army's defeats at Bull Run and Balls Bluff,[39] most pre-20th century investigations were related to the civil and military affairs of the Executive Branch.[40] But beginning in the early 1900s--although Congress continued ***47** to investigate the Executive Branch[41]--congressional interest turned to concentrated economic power, culminating in a slew of legislation, including the Federal Reserve Act of 1913, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1914.[42] Then, during the New Deal period, investigations turned to the causes of social and economic upheaval, focusing on the operation of the stock market, unfair labor practices, and railroad reorganization, all of which contributed to legislation that fundamentally altered national government.[43] The post-World War II era has been complete with congressional investigations into Executive Branch scandals, including Watergate, Iran-Contra, and Monica Lewinsky; organized crime; alleged communist activities of private citizens;[44] the restructuring of the auto industry;[45] and, more recently, multi-billion dollar pyramid schemes[46] and steroid use in major league baseball.[47]

2. Must be "in aid of the legislative function"[48]

Although the congressional power to investigate is broad, this power is not without any limitation.[49] The basic restriction is that congressional investigations must be in pursuit of a valid legislative purpose,[50] without which Congress does not have jurisdiction to pursue the matter.[51] In this regard, a valid legislative purpose includes gathering information relevant ***48** to potential legislation, exercising oversight of the federal government, and informing the public about matters of national concern.[52] As the Supreme Court made clear in Watkins v. United States,[53] because Congress is neither a trial court nor a law enforcement agency, "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."[54] If this were not the case, then Congress could more easily infringe upon individual rights protected under

the Bill of Rights. [55] In this regard, examples of improper Congressional investigations include "expos[ing] the private affairs of individuals without justification in terms of the functions of the Congress" [56] and investigations for the mere "personal aggrandizement of the investigators." [57]

Whether Congress is acting within its proper legislative sphere is significant because the congressional power to investigate, when properly exercised, falls within the protection of the Speech and Debate Clause. [58] That Clause makes congressional actions, including the issuance of subpoenas, unreviewable if Congress is acting within its proper sphere. [59] The Clause thus gives Congress broad power to compel cooperation, [60] as seen in Eastland v. United States Servicemen's Fund, [61] where the Supreme Court denied judicial review of a congressional subpoena, reasoning that the issuance of the subpoena was within the proper legislative scope and was thus protected absolutely under the Speech and Debate Clause. With such protection, the only way one may challenge a valid subpoena is to refuse to comply and then put forth an affirmative defense during any prosecution for contempt that might result. [62]

***49** 3. Tools of Investigation

In pursuit of its investigative function, Congress has several tools at its disposal to require the cooperation of private citizens, all of which relate to Congress's legislating, informing, oversight, and quasi-judicial functions. [63] One of the most important tools of congressional inquiry is the power to subpoena both the appearance of witnesses and the production of documents. [64] The congressional subpoena--which is just as effective as a judicial subpoena [65] --has been an "integral element" of the congressional investigation since 1792. [66] In practice, each House delegates this subpoena power to individual investigating committees. [67] Those committees then issue and serve subpoenas according to their internal rules. [68] Beyond the subpoena power, Congress's other investigatory tools include the ability to take sworn testimony, [69] to compel unsworn testimony, [70] to grant partial immunity to circumvent the Fifth Amendment privilege, [71] to initiate civil actions to seek compliance with its subpoenas, and, most relevant here, to punish for contempt.

***50 B. The Implied Power to Defend Itself: Contempt of Congress**

1. Positive Power

Closely related to the power to investigate is Congress's power to punish for contempt. [72] This power is similar to the judiciary's power to hold individuals in contempt of court in that it empowers Congress to "respond[] to certain acts that in its view obstruct the legislative process." [73] Congress may either punish for contempt through direct proceedings-- independently arresting and trying the offender--or by statutory certification--referring the matter to the U.S. Attorney for prosecution. [74] While the Constitution does not explicitly provide for the contempt power, the Supreme Court has sustained it as an inherent common-law self-defense right of the legislature. [75] Indeed, Congress derives its contempt power from the English common law, where contempt of legislature had long been used as a means for Parliament to defend itself from the Crown. [76] The Supreme Court has relied in part on this common-law history to sustain the power. [77] Although American government ***51** inherited the British common-law legislative contempt power, [78] the development of contempt of legislature has been "notably different" in the United States than England. [79] The legislative contempt power has played a more minor role in contemporary England than in modern American government. [80]

The power of Congress to punish for contempt is most often justified "on the ground of necessity" [81] --that the power is necessary for Congress "to investigate and legislate effectively." [82] A recent report to Congress notes that the power is a necessary

corollary to the legislative power of inquiry because it backs up congressional demands for information with the threat of punishment.[83] To be sure, the power also preserves order during proceedings and allows Congress to interdict obstacles to the performance of its constitutional mandate.[84] In the end, though, the contempt power "rests only upon the right of self-preservation."[85] As one early court opined, the grant of power to legislate "implied the right of Congress to preserve itself" by punishing for contempt.[86] To conduct the business of the People,[87] Congress has the "right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty . . . ."[88] Consistent with its policy rationale, the use of the contempt power may be either coercive[89] or punitive.[90]

***52** Congress may use its contempt power to punish acts that fall within two broad categories, both of which relate to obstructing the functioning of Congress in some manner.[91] The first category encompasses interference with or attacks upon the Congress or its Members.[92] This could include bribery,[93] assault,[94] and preventing a Member from getting to Congress.[95] During the Fourth Congress, for example, Robert Randall and Charles Whitney were held in contempt after it was reported that the two attempted to bribe Members of Congress.[96] Another example of this first category comes from the Twenty-second Congress, where the House arrested Samuel Houston for contempt after he assaulted a Member in response to the Member's comments during a floor debate. After the attack, the House ordered Houston remanded to the custody of Congress, where--over some objection[97]--the House convicted Houston (although he was discharged with a mere reprimand from the Speaker).[98] Unlike bribery and assault, defamatory comments do not generally constitute contempt because they do not obstruct the functioning of the Congress,[99] yet verbal assaults may be punishable.[100]

***53** The second category--the most common in modern history[101]--is refusal to cooperate with Congress.[102] This situation often arises when a witness refuses to answer a question posed by an investigating committee. As early as the Twelfth Congress, for instance, the House arrested Nathaniel Rounsavell for refusal to answer questions of a House select committee.[103] The Thirty-fifth Congress similarly arrested John Wolcott for his failure to answer questions posed to him by an investigating committee completely.[104] Most recently, the full House cited Harriet Miers for contempt for her failure to appear after being subpoenaed by a committee investigating the resignations of nine U.S. Attorneys.[105] Contempt under this second category also extends to refusal to turn over documents requested by Congress, such as the situation that occurred when four members of a Louisiana canvassing board were held in contempt for their failure to produce election materials sought by Congress.[106] A witness's failure to appear, as Thaddeus Hyatt did when the Senate subpoenaed him as a witness at the investigation into the raid on Harper's Ferry, also obstructs Congress and is contemptuous under this second category.[107]

2. Development & Procedures

As described above,[108] the Constitution is silent about the contempt power.[109] This anomaly, combined with the Constitution's enumeration of specific congressional privileges[110] and the Constitutional Convention's rejection of a proposal to include an express grant of a contempt power, led ***54** some early lawmakers to argue that Congress could not, consistent with the Constitution, punish for contempt.[111] These arguments, however, were soon put to rest when Congress first exercised its contempt power in 1795 against Robert Randall and Charles Whitney for bribery of Members of Congress.[112] This 1795 action was important because it set the precedent for Congress's continued exercise of its contempt powers,[113] before the Supreme Court ultimately blessed the practice in the landmark 1821 case of Anderson v. Dunn, described below.[114] As one commentator notes, the combination of Congress's early use of its contempt power and the Supreme Court's approval of this practice "insured the incorporation of the contempt process into the American political tradition."[115] As the following sections explain, Congress generally has two options to punish for contempt: the broader direct contempt proceeding, or the more limited statutory contempt certification.[116]

a. Direct Punishment by Congress

Early congressional exercises of the contempt power were pursuant to its direct power to punish. [117] This direct power is an inherent common-law device that allows either House to order its Sergeant-at-Arms to arrest the offender and bring him to the bar of the aggrieved chamber to be punished according to the wishes of the House. [118] This is incidental to the authority of each house to use its Sergeant-at-Arms to enforce its own rules and privileges. As became congressional practice, the offender was often ***55** provided counsel and opportunity to summon witnesses for a defense during a trial at the bar of the offended House. [119] If the offended House voted to convict, the House would have discretion over the penalty to impose, which could include a reprimand by the presiding officer, [120] monetary fine, [121] or temporary confinement in the basement of the Capitol Building, or, more commonly, the D.C. Jail. [122] Note that direct contempt proceedings are handled entirely by the legislative branch, with neither the need to enlist Article II prosecutors nor Article III judges.

Although the last direct contempt proceeding by Congress occurred more than seventy years ago, [123] American history is replete with examples of its exercise. According to a study by Professor Beck, between 1795 and 1943, the House and Senate punished individuals for a variety of offenses, including bribery, refusal to appear or answer questions or produce documents, and publication of scandalous materials. [124] Among the more notable examples of direct contempt proceedings were the arrests of Thaddeus Hyatt for failure to appear during the Harper's Ferry investigation, [125] Sam Houston for assaulting Rep. William Stanbery, [126] and Joseph Stewart, counsel for Union Pacific Railroad, for refusal to answer questions during the Credit Mobilier investigations on the grounds on attorney-client privilege. [127] The Stewart case is especially interesting because of Stewart's posh confinement. Diverging from the treatment of other prisoners, the Sergeant-at-Arms confined Stewart to a room in the Capitol Building where Stewart's company ensured he was "royally supplied with sustenance while imprisoned." [128] Although this practice is relatively uncommon, Stewart was not the only prisoner who lived in luxury in the Capitol Building. [129] Perhaps because of backlash over ***56** Stewart's high living in congressional custody, the next recalcitrant witness that Congress jailed for contempt, R.B. Irwin, was denied lodging in the Capitol and was sent to the D.C. Jail. [130]

The federal courts had early occasion to consider the practice of direct contempt proceedings by Congress. The Supreme Court sustained the practice in the first such case to reach its bench. [131] The 1821 case of Anderson v. Dunn arose out of the direct contempt conviction of Col. John Anderson for attempted bribery. [132] Contempt proceedings began when Rep. Lewis Williams of North Carolina reported to the House that he had received $500 from Anderson that William believed to be a bribe. [133] Relying on congressional precedent, the House ordered House Sergeant-at-Arms Thomas Dunn "to take into custody the body of the said John [Anderson], wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge . . . ." [134] After his arrest, the House referred Anderson to the Committee on Privileges, which voted that the Speaker question Anderson before the bar of the House. [135] The House convicted Anderson, and discharged him after the Speaker reprimanded him for his "outrage." [136]

Believing this procedure was unlawful, Anderson brought suit against Sergeant Dunn for assault and battery and false imprisonment. [137] The case eventually reached the Supreme Court, where the issue was whether the House could punish for contempt. The Court held that Congress had the inherent power to punish for contempt, and accordingly dismissed Anderson's charges against Dunn. [138] Recognizing that Congress has no express constitutional authority to punish non-Members for contempt, [139] the Court nonetheless sustained Dunn's actions as incident to a necessary power of Congress. [140] The Court reasoned that if Congress did not have this power, it would be "exposed to every indignity and interruption that ***57** rudeness,

caprice, or even conspiracy, may mediate against it." [141] The Court did not define the scope of the contempt power--although bribery presumably fell within that power--rather seeming to defer to the judgment of the House. [142]

Another early contempt case to arrive at the federal courts involved John Nugent who allegedly provided the New York Herald with a copy of a secret treaty between the United States and Mexico. [143] After Nugent refused to answer questions relating to this incident, the Senate Sergeant-at-Arms, on the order of the President of the Senate, imprisoned him for contempt. On petition for habeas corpus, the federal district court in Ex parte Nugent rejected Nugent's petition, [144] reasoning, "every court, including the Senate and the House of Representatives, is the sole judge of its own contempts." [145]

Not all challenges to Congress's use of its contempt power, however, were unsuccessful. In Kilbourn v. Thompson, [146] the Supreme Court considered a challenge to the contempt power that arose in the context of a House investigation into the bankruptcy of Jay Cooke & Co., of which the federal government was a creditor. [147] In the course of the investigation, the committee subpoenaed Hallet Kilbourn, the manager of the real estate pool, who was subsequently arrested by the Sergeant-at-Arms after he refused to cooperate. [148] After his release, Kilbourn filed suit against the Speaker, Committee, and Sergeant-at-Arms for false imprisonment on facts similar to Dunn. [149] Although the Court did not overrule Dunn, [150] it declined to follow its expansive view of the contempt power, instead rejecting reliance on English common-law precedent and engaging in a discussion of separation of powers. [151] The Court held that the instant investigation was not in pursuit of a legitimate congressional inquiry ***58** because it was an attempt to investigate the personal finances of Kilbourn. [152] Although Kilbourn may have been immediately read significantly to curtail the power of Congress to punish for contempt, subsequent case law, like the 1927 case of McGrain v. Daugherty, [153] has blunted its effect. [154] The continuing value of Kilbourn lies only in its holding that Congress "has no power to probe into private affairs, such as the personal finances of an individual, on which legislation could not be enacted." [155]

This series of cases, combined with others examining Congress's investigatory powers, [156] reveals that although Congress's contempt power is broad, it is limited. To begin, as seen best in Kilbourn, Congress can only punish for contempt if the underlying matter falls within Congress's jurisdiction, which is confined to investigations with a valid legislative purpose and obstructions to the legislative process. Another limitation, established in Anderson v. Dunn, is that Congress may only imprison a contemnor until the adjournment of that House. [157] Furthermore, congressional contempt proceedings must comply with the Due Process Clause. [158] With regard to these limitations, judicial review is available to the contemnor through either filing a civil suit against the arresting officer or seeking a petition for habeas corpus.

In a habeas proceeding, a federal court's review is limited to two issues. [159] First, the court may review whether the House exercising its contempt power had jurisdiction over the underlying matter giving rise to the alleged contempt. [160] This inquiry asks "whether the information a witness failed to produce was sought pursuant to an investigation supported by a valid legislative purpose or whether the offending conduct ***59** actually obstructed some legislative function." [161] Second, the court may review whether the chamber's contempt procedures comply with the Due Process Clause. [162] In the case of a civil suit against the arresting officer, [163] liability turns on whether the offended House had jurisdiction over the matter. [164] In neither case, however, may a court inquire into the underlying merits of the contempt charge. [165]

b. Prosecution in Federal Court

In addition to direct proceedings to punish for contempt, Congress in 1857 criminalized certain acts of contempt, allowing for the prosecution of recalcitrant witnesses in federal court. [166] This criminal statute, codified at Title 2, Sections 192 and 194 of the U.S. Code, is narrower than Congress's direct contempt power, because it only criminalizes refusals to cooperate

with Congress, not other interferences with Congress such as bribery, assault, or preventing Members from attending sessions. Although Congress has exclusively relied on this statute to punish for contempt since 1935, [167] Congress retains its common-law power to try the contemnor before the bar of the offended House. [168] Indeed, Congress was initially reluctant to shift its focus to the statute, and continued to use its inherent powers even after the enactment of the statute. [169] As the Supreme Court pointedly has held, "The power of either House of Congress to punish for ***60** contempt was not impaired by the enactment in 1857 of [the contempt statute]." [170] The Act merely supplements Congress's direct power. [171]

The motive for passage of the Act was largely punitive, [172] and arose out of the 1850s direct contempt case against J.W. Simonton, a Washington correspondent for the New York Times. [173] Simonton had claimed that certain congressmen were soliciting bribes, but when he refused to divulge names of the corrupt Members to a congressional committee, the House cited him for contempt and imprisoned him for over two weeks until he decided to testify. [174] Although Simonton eventually disclosed the names, Members wanted to impose a harsher penalty on Simonton beyond that permitted by the limitations announced in Anderson v. Dunn. [175] Consequently, Congress passed a statute making it a federal crime to refuse to give testimony or turn over physical evidence demanded by Congress.

The procedures for statutory contempt are outlined in the U.S. Code and differ considerably from inherent contempt procedures. [176] Once a committee determines that an act of contempt has occurred, it then reports this to the President of the Senate or Speaker of the House. [177] Following a vote by the affected chamber, the presiding officer certifies the contempt to the U.S. Attorney in the district in which the contempt was committed. [178] Then, the U.S. Attorney should convene a grand jury for possible indictment, followed by a trial in federal court. [179] If an individual is indicted, "he stands trial in federal court as any other accused criminal." [180] ***61** Conviction at trial requires, by the statute's own terms, proof of certain elements, including valid committee authority to demand cooperation, valid legislative purpose of the committee, the defendant's willful default of his obligation, and pertinence of the committee's inquiry. [181]

III. Constitutional Clash: Recent Challenges to the Contempt Power

A. Overview of Recent Challenges

Congress's decision to rely exclusively on statutory contempt certification to punish for contempt has left the national legislature vulnerable. The recent Congressional investigation into the resignations of nine U.S. Attorneys provides a prime example in this regard. After the House committee charged with the investigation was unable informally to obtain information from the White House, it subpoenaed the testimony of Harriet Miers, former White House Counsel, and documents from Joshua Bolten, White House Chief of Staff and Custodian of Records. [182] The White House, however, asserted executive privilege over the testimony and documents and instructed both individuals not to comply. [183] As a result of their non-compliance, the House committee voted on July 25, 2007, to hold Miers and Bolten in contempt of Congress, [184] and the full House did the same on February 14, 2008. [185] Then, on February 28, 2008, the Speaker of the House certified the contempt citations to the U.S. Attorney for the District of Columbia to present to a grand jury, per Title 2, Sections 192, 194 of the U.S. Code. [186]

***62** Even though the Speaker followed the statutorily prescribed procedure, the Attorney General informed the House that the Department of Justice would not prosecute Miers and Bolten. [187] Writing to Speaker Pelosi, the Attorney General stated that he believed the "non-compliance by Mr. Bolten and Ms. Miers with the Judiciary Committee subpoenas did not constitute a crime . . . ." [188] The Attorney General argued that the contempt of Congress statute does not apply to Executive Branch officials who assert the President's claim of executive privilege. [189] Thus, the Attorney General concluded, "the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or

Ms. Miers." [190] As a result, the House sought civil enforcement of the subpoenas in federal district court. [191] Miers has since agreed to testify. [192]

A similar situation occurred in the early 1980s with then-Administrator of the Environmental Protection Agency (EPA) Anne Gorsuch Burford. [193] During a House investigation into the EPA's implementation of the Superfund statute, a committee subpoenaed testimony and documents from Burford. [194] Although she appeared before the committee, Burford refused to turn over the documents requested on the grounds of executive privilege, on orders from President Reagan. [195] For her non-compliance, the House cited Burford for contempt on December 16, 1982. [196] Despite a valid contempt citation certified to the U.S. Attorney pursuant to Section 194, the U.S. Attorney for the District of Columbia refused to present an indictment to the grand jury. [197] The parties ultimately reached a political compromise, [198] as is often the case. [199]

***63** As these situations show, although the contempt statute speaks in terms of the U.S. Attorney's "duty" to present the citation to a grand jury, [200] the U.S. Attorney has exercised discretion not to do so. This ability of the Justice Department to refuse to present the citation to a grand jury is an outgrowth of the Executive's almost unfettered discretion over prosecutions. Although disagreement exists over whether this "duty" is in fact mandatory or discretionary, [201] the Supreme Court has made clear in another context that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." [202] This discretion to enforce the law has allowed officials to act in contempt of Congress without consequence, [203] and could similarly allow private citizens to do so. [204]

B. Need to Resort to Self-Help

Given these challenges, Congress should in certain cases resort to its direct power to punish for contempt. [205] This self-help power would allow Congress to take control over its own defense of Congressional privilege and set aside reliance on another branch for protection, especially in cases where that branch is unwilling to act. [206] As the Miers, Bolten, and Burford cases show, the Executive's refusal to prosecute may result in unremedied obstruction to the legislative process, making a "mockery" of the legislative power. [207] Indeed, both the early English House of Commons ***64** and the early U.S. Congress understood that "accepting help from the executive means subordination to the executive." [208] This is often why the U.S. Congress continued to resort to its direct power to punish, even after it passed the 1857 contempt statute. [209]

Congress can hardly accept Executive prosecutorial discretion stonewalling its contempt citations. [210] Doing so has thwarted public accountability in cases where Congress has been unable to obtain the information that it desired. [211] Especially when investigating the Executive Branch, [212] delegating to the Department of Justice the task of enforcing subpoenas "leaves Congress beholden to hostile Executive Branch officials" whose own administration might be under investigation. [213] Even with regard to the judiciary, delegating the punishment power of the Congress to the judiciary through prosecution in federal court may result in "impermissible judicial meddling into the internal rules and procedures of the Houses." [214] In the end, undue interference by either the Executive or the courts cannot be in the national interest, since the preservation of a strong direct contempt power serves the interests of the People. [215]

If one is to give effect to the maxim salus populi supreona lex--the welfare of the people is the supreme law--then one must ensure the ability of Congress to investigate, legislate, and otherwise fulfill its constitutional mandate. [216] It is Congress's ability to "repel" obstruction to its legislative processes that allows it effectively to operate with the confidence of the People. [217] If individuals may rebuff congressional subpoenas without ***65** consequence because the executive refuses to prosecute, then, as one Member stated, Congress might not "be able to get anybody in front of this committee or any other." [218] For this reason,

courts do not solely rely on the executive to prosecute criminal contempt of court because "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution." [219] Although statutory contempt proceedings might be preferable in certain situations, these proceedings are cumbersome and complex and do not lend themselves to quick determination of the issues. [220]

Once the chamber resorts to direct contempt proceedings, the general procedures begin with the offended House authorizing its presiding officer to issue an arrest warrant for the contemnor. Then, the Sergeant-at-Arms, who is the chief law enforcement officer of the chamber, [221] executes the warrant on the individual and brings him, perhaps by force, to the bar of the offended chamber. [222] The presiding officer will then inform the contemnor of the charges against him, and the contemnor might have the brief opportunity to respond and make special requests. [223] If the chamber desires to proceed with punishing the contemnor after this quasi-arraignment, it would hold a full-scale trial, or employ some alternative procedure, prior to the full body voting whether to convict. [224] If the chamber votes to convict, it would have discretion over what, if any, punishment to impose, subject to the Constitution and those limits delineated by the Supreme Court in Anderson v. Dunn. [225]

Procedures aside, some may raise substantive concerns over Congress's use of its direct power. Chief among them might be fairness: how can ***66** Congress, a highly political body, fairly adjudicate contempts? [226] Although courts might be institutionally more competent to handle trials, early legislators did not see direct proceedings as inherently unfair. Indeed, the movement of contempt proceedings from the bar of the offended House to the federal courts was primarily motivated by a draconian desire to inflict greater punishment, not alleviate any unfairness. [227] In fact, the Senate continued to rely on its inherent contempt power even after the statute was enacted. [228] To the extent fairness is a concern, Congress is aware of the potential for abuse of this process and has acted to minimize this risk; of the fifteen persons charged with failure to comply with subpoenas between the period 1787-1943, none was referred to the courts and only two were punished by Congress--showing that Congress is not a lawless body; it exercises restraint. [229] Furthermore, the Due Process Clause, the limits on congressional jurisdiction, habeas ***67** relief, [230] and the voters each stand as independent safeguards of fairness. [231] Furthermore, Congress may make the process more or less fair depending on the procedures it employs after taking the contemnor into custody. One such procedure that might be more fair is using the proposed "Court of Congressional Contempt," described below. [232]

Another concern might be that Congress is neither equipped to be a law enforcement agency nor an adjudicative body. These concerns, though, are easily addressed. To begin, each House employs a Sergeant-at-Arms who is charged with maintaining the order and security of the House and its Members and sits on the board overseeing the Capitol Police. [233] The current Senate Sergeant-at-Arms, for instance, is a former police officer and has a staff of over 900. [234] Moreover, the Office of the Sergeant-at-Arms has over two centuries of experience arresting contemnors and otherwise enforcing the rules of the chamber. [235] In 1988, for example, after a number of Senators fled the Senate to deprive it of quorum to take up campaign finance legislation, Senate Majority Leader Robert Byrd ordered the Senate Sergeant-at-Arms to arrest these Senators and bring them to the chamber. [236] The Sergeant-at-Arms complied, enlisting plain-clothed capitol police officers to arrest Senator Robert Packwood for the offense of fleeing a quorum call, and carrying him to the floor. [237] ***68** Furthermore, Congress has experience as a quasi-adjudicative body. This experience is seen in Congress's control over impeachments, its committee hearings, and its experience in directly punishing for contempt. Indeed, as Professor Potts notes, one of the four primary functions of Congress is judicial. [238] And as an institution, Congress has over two centuries of exercising this function.

IV. Direct Contempt Proceedings in a Modern Congress

Assuming the need for Congress to once again exercise its direct power to punish for contempt of its authority, this Article now turns to the process by which Congress could do so. As a preliminary matter, whatever process Congress selects might

be insulated from judicial review as a non-justiciable political question by analogy to Nixon v. United States.[239] There, after Walter L. Nixon, Jr., a former Chief Judge of the U.S. District Court of the Southern District of Mississippi, was convicted of making false statements, the House voted to bring impeachment proceedings against him.[240] The Senate held a trial and convicted the former Chief Judge. Nixon, however, challenged his conviction as a violation of the Impeachment Clause, which gives the Senate the "sole Power to try all Impeachments."[241] Specifically, Nixon argued that Senate Impeachment Rule XI, which allowed a committee of Senators to "receive evidence and take testimony,"[242] unconstitutionally prevented the full body from taking part in evidentiary hearings.[243]

The Supreme Court, however, held the case to be a non-justiciable political question.[244] Looking to the text of the Impeachment Clause, the Court reasoned the word "sole" indicates that the impeachment power is ***69** not to be had by any other branch,[245] and "the word 'try' . . . lacks sufficient precision to afford any judicially manageable standard of review . . . ."[246] Moreover, the Court refused to read the word "Senate" as meaning only the full chamber of the Senate.[247] The Court next looked to the history of impeachment, which revealed intent to limit judicial interference.[248] The Court also believed that judicial interference here would "'expose the political life of the country to months, or perhaps years, of chaos."'[249] It might also undermine the legitimacy of the impeached office.[250] And finally, the Court found it unclear what relief it could order.[251] In the end, the Court held that the Impeachment Clause "does not provide an identifiable textual limit on the authority which is committed to the Senate."[252]

Similarly, in the context of direct contempt proceedings, the manner in which either House decides to proceed might be a non-justiciable political question. Although the contempt power, unlike the impeachment power, is not enumerated in the Constitution,[253] the contempt power has become firmly established in our constitutional heritage through the development of the constitutional common law.[254] Supreme Court precedent and congressional practice have removed any doubt that Congress has the direct power to punish for contempt.[255] Thus, if we are to include the common law of the Constitution into the political question inquiry, one can certainly find an implied "textually demonstrable constitutional commitment" of contempt punishment to Congress.[256] This commitment counsels against judicial interference when Congress is operating within its powers of arrest, trial, and punishment for contempt, subject to certain limits described above.[257] Moreover, and related to the idea of textual ***70** commitment to another branch,[258] courts might find a "lack of judicially discoverable and manageable standards for resolving" disputes over contempt procedures.[259] Indeed, the courts rarely interfere with internal congressional procedures,[260] and, in fact, the Supreme Court has held that Congress has broad power to define its procedures in the congressional investigations context. In United States v. Watkins, for instance, the Court elaborated on Congress's power to establish its own procedures:

> It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected.[261]

A. Proceedings Before the Full Body of the Chamber

One option for Congress in exercising its direct contempt power would be to replicate the procedures of old; that is, arresting the contemnor and bringing him before the bar of the offended House to answer the contempt charges against him. Proceedings before the full body were the most common historical method that Congress used to punish for contempt.[262] Under this procedure, the Sergeant-at-Arms would present the contemnor to the bar of the chamber after taking the contemnor into

custody.[263] Once presented, assuming the chamber wanted to move forward, the chamber would hold a full-scale trial on the House or Senate floor to determine whether the contemnor is guilty of contempt before punishing him.[264] During the trial, the chamber would likely afford the contemnor counsel ***71** and opportunity to be heard in his defense,[265] as the First Congress did in 1795.[266] The contemnor would also have the opportunity to subpoena witnesses on his behalf.[267] The chamber would prosecute the case, and its Members would deliberate and vote as a jury.[268] Conviction would be upon a majority vote, or as the chamber may otherwise prescribe by internal rule.[269]

Notwithstanding historical practice, it would be impractical for the modern Congress to hold contempt proceedings before the full body of either House. Today's Congress is more complex than the last Congress to try a full-scale contempt trial. The federal government has grown in size and scope,[270] placing increasing demands on Congress as an institution and Members as individuals. Congress has itself grown in size.[271] Indeed, as the Supreme Court has recognized, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[272] Similarly, a recent congressional report notes that direct contempt proceedings have "been described as 'unseemly,' cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress . . . ."[273] Permitting full-scale trials on the floor would be highly disruptive, interrupting the flow of legislation.[274] Although the contempt power is in the People's interest by protecting the integrity of the legislative process,[275] full-scale trials may be counter-productive because ***72** they too obstruct Congress from doing the People's business. To this end, one scholar credits the move toward statutory contempt on "other legislative responsibilities bec[oming] too pressing to allow full-scale congressional trials."[276]

B. Delegation of Contempt Proceedings

Given the drawbacks of trying the contemnor before the full body of the chamber, Congress should delegate certain contempt functions to either a congressional committee or a specialized internal tribunal. Indeed, historical evidence indicates that although most contempt trials were before the bar of the offended House, this was not the exclusive procedure; committees handled contempt functions.[277] As early as 1795, for example, in the case against Randall and Whitney, the House resolved that the Speaker would interrogate the contemnors when they were brought to the bar of the House, and that if any further inquiry was needed, the matter would be "conducted by a committee to be appointed for that purpose."[278] Congress also delegated its contempt power to committee in the 1865 contempt case against A.P. Field.[279] The House by resolution authorized a five-member select committee to "inquire into the said alleged breach of privilege" by taking evidence.[280] Field was present during the proceedings, and the committee eventually recommended that the House arrest Field and reprimand him at the bar of the House, which it did.[281] The Supreme Court has also implicitly condoned Congress's delegation of its contempt powers.[282]

This historical practice combined with Nixon v. United States[283] supports the proposition that Congress can delegate contempt proceedings ***73** to inferior bodies.[284] As discussed above,[285] Nixon considered a similar delegation of authority from the full chamber to a body thereof to take evidence.[286] Although the case did not involve trials for contempt, a recent report to Congress notes that Nixon "clearly indicates that the use of committees for contempt proceedings . . . is a permissible exercise of each House's Article I, section 5 rulemaking power."[287] In addition to historical practice and the Court's decision in Nixon, delegation of the contempt power may also be defended by analogy to the Supreme Court's use of special masters in cases that fall within its original jurisdiction,[288] and the fairly recent practice of the U.S. Court of Claims providing recommendations to Congress about whether to settle a claim against the United States[289] --both of which are treated below.

1. Congressional Committee

If Congress delegates its authority, one likely candidate to receive this power would be a congressional committee--select or standing. [290] This committee, consistent with historical practice, could serve a variety of functions, including receiving evidence like testimony and documents, [291] and considering defenses. [292] With the aid of its staff, the committee would ultimately make a report to the full chamber for a final vote. Proceeding by committee has the advantage of efficiency; it frees up time in the main chamber. Although the full body would still debate and ultimately vote on ***74** whether to convict, it would no longer need to hold a full-scale trial on the floor. [293]

Delegating to a committee, however, has two distinct drawbacks. First, the efficiency gains realized by the chamber are somewhat misleading. While it is true that the full chamber would be relieved of trying the contempt case, the committee would nonetheless be comprised of Members who have to devote significant time to gather evidence, take testimony, and prepare a report to the full chamber. Even though Members could, to some extent, rely on committee staff, the Members' work on the committee would detract from their myriad other roles, including constituent services, legislation, investigating matters of national concern, oversight of the other branches, and traveling within the home district. [294] Second, to the extent fairness, impartiality and politics are a concern, delegating contempt functions to a committee does little to alleviate this problem. Since fairness concerns are often related to the perceived politicization of the legislature, it is hard to see how a committee comprised of Members would not have the same problem. [295] Indeed, the political leadership of the full body selects committee members and it is the individual political actions of Members that lead to charges of the body being too political. It may also be problematic that the committee Members would act as partisan prosecutors, impartial fact-finders, and then jurors. [296]

***75** 2. The Court of Congressional Contempt

a. Overview

Another option--albeit unexplored--would be for Congress to delegate its contempt power to a specialized internal body that would adjudicate contempt citations and forward its findings and recommendations to the full chamber for final disposition. This internal Article I tribunal would be constituted under Congress's inherent power to punish for contempt and is proposed here as the “Court of Congressional Contempt.” Because each House is the judge of its own contempt proceedings, the tribunal would have two divisions, one for the House, the other for the Senate. [297] Each division would have the authority of a special master to hear evidence, make preliminary orders, and generally assure fairness of process. Although Congress would have wide discretion to determine the structure, location, [298] and procedures of this tribunal, [299] this Article, by way of example, offers one proposal of how Congress might do so.

Each division of the tribunal would be comprised of non-Member examiners appointed by the full chamber. Members would not sit on the tribunal. To insulate this body from politics, appointment of an examiner would be upon three-fourths majority of the appointing chamber. This would ensure some degree of bipartisan cooperation and tend to promote merit-based selection. To further guarantee the examiner's impartibility, Congress, analogizing to the Administrative Procedures Act, could bar the examiners from discussing the contempt case with Members during preliminary proceedings until a final report is submitted to the chamber. [300] The examiner, who would likely come from the ranks of academia or the bar, would serve until the adjournment of appointing chamber, at which time the next session of the chamber could re-appoint the examiner.

***76** Although the examiner might in practice have the title of “Judge,” the examiner would not be an Article III judge. Instead she would act as a magistrate or special master appointed by Congress and assigned to this tribunal to complete a very specific task. [301] The duties of the examiner would include receiving evidence, making findings of fact and conclusions of law, and ultimately drafting a recommendation to the full chamber. [302] This might require the examiner to conduct trial-type hearings, review documents, and subpoena witnesses. In these tasks, the examiner would not be bound by the Federal Rules of Evidence, but would be free to use those rules as a guide. Congress would also make staff available to the examiners.

Given the nature of the examiner position, an examiner's appointment by either House of Congress faces no significant problem under the Appointments Clause.[303] This is for the primary reason that Congress has the exclusive power to appoint its own employees and officers.[304] The appointment of an examiner on the tribunal is similar to the appointment of other internal non-Member officers of the Congress, including the Sergeant-at-Arms, the Clerk, and the Director of the Congressional Budget Office, all of whom are appointed by Congress without any action by the Executive.[305] These appointments rest with the sound judgment of the appointing chamber, and are necessary to assist the chamber in carrying out its constitutional mandate. Moreover, even if the appointment of an examiner did fall within the Appointments Clause, the examiner would be an "inferior officer," subject to appointment by Congress. This is because ***77** the examiner is not a "principal officer," like an Article III Judge or Cabinet Secretary; her duties are clearly delineated in congressional rules and are necessarily narrow: the examiner acts as a special master to gather facts and transmit a report and recommendation to the chamber. The examiner is an agent of Congress, subject to the "control or direction of . . . [a] legislative authority."[306] The examiner's term expires at the adjournment of the chamber, and she has no ability to enter dispositive orders--the report and recommendation are not binding on the chamber.

In addition to appointing examiners on the tribunal, the chamber would also appoint a prosecutor to argue the chamber's case before the examiner and, if required, the full body of the chamber. The prosecutor could be a staff member--similar to the appointment of David Ellis to prosecute the impeachment of Rod Blagojevich[307]--or Members of the chamber--similar to House Members who prosecuted the impeachment of Bill Clinton.[308] The prosecutor could also be a private party, in the same manner that district courts may appoint private individuals to prosecute criminal contempt of court.[309] In any event, the appointment of a prosecutor would be upon a majority vote. Although this figure is less than the three-quarters required for the appointment of an examiner, fairness in this selection is less of a concern because here we are focused on the chamber's representation, not the rights of the accused.

Once appointed, the examiner would administer the procedures of the tribunal, which would be designed to ensure fairness of process. At a minimum, the procedures would respect individual rights[310] and generally allow for notice and opportunity to be heard.[311] Indeed, as the Supreme Court made clear in Groppi v. Leslie,[312] procedural due process extends to legislative trials for contempt.[313] In that case, the Court invalidated the state legislative contempt conviction of James Groppi because the Wisconsin State Legislature "sentenced him to confinement without giving ***78** him notice of any kind or opportunity to answer."[314] To prevent claims like Groppi's, and in the general interest of ensuring fairness, this tribunal would not only provide minimal notice and opportunity to be heard, but it would also allow for the right to counsel,[315] to subpoena witnesses in one's defense, to cross-examine witnesses, and to otherwise present written evidence.[316] Although these procedures might be time consuming, the examiners are not saddled with other legislative responsibilities as are Members of Congress and are thus able to devote the necessary time. Once the examiner has heard the evidence, she will create and transmit a report to the full chamber detailing the factual background and the examiner's recommendations.

b. Rationale and Concerns

Establishing a "Court of Congressional Contempt" or similar institution would be desirable for a number of reasons, all of which dilute the problems associated with direct contempt proceedings. To begin, proceeding through this tribunal mitigates some of the fairness concerns associated with trials by the full chamber or delegation to a congressional committee thereof.[317] The examiners of this tribunal would be appointed upon a three-fourths vote of the chamber, making bi-partisan support for their appointment all but certain. This three-fourths requirement ensures that the chamber will not select examiners for purely partisan reasons but rather based upon skill, experience, and impartiality. To this end, the tribunal would, to some extent, insulate the contemnor from any political forces that may have caused his arrest. In the most egregious cases, it would act as a barrier between the contemnor and those "irresponsible power holders" who seek to "create the anomalous result of kingliness in a government."[318] Moreover, to the extent some argue that Congress as an ***79** institution is not competent to act in a

quasi-judicial capacity,[319] this type of tribunal could alleviate that concern by providing a judicial-like and quasi-independent mechanism to adjudicate contempt citations.

Furthermore, the impartiality and independence of the examiner would allow for the creation of a reliable evidentiary record and recommendation upon which Members would consider and rely before voting for or against a conviction. Not only would this record subject the tribunal to public scrutiny, and perhaps be useful in any judicial review, but it would also cause Members to be held publicly accountable to explain why they voted for or against the recommendation. This practice--testing Members contempt votes against an impartial record--would tend to remove politics from the process and protect the rights of the contemnor from political forces.[320] Members have a greater incentive to put partisan politics aside when considering a neutral report from the examiner, rather than that of a committee, or after witnessing a trial on the floor of the chamber.

Additionally, the tribunal would be in line with the institutional interests of Congress. Not only would Congress realize efficiencies by proceeding through this tribunal instead of a committee or the full chamber,[321] but this tribunal would also allow Congress to build institutional competence in the area of contempt. To that end, the work of the tribunal would complement existing congressional record-keeping by creating a body of internal precedent that could guide future contempt adjudications.[322] This precedent--a congressional common law of contempt--would encourage consistency of contempt adjudications and might make due allowance for certain defenses, including, perhaps, executive privilege.[323] This precedent, of course, would only provide the basis for the examiner's ***80** recommendation; the full body must still vote to convict. Moreover, the establishment of a tribunal would be an expressive act by Congress, demonstrating to the public and the Executive Branch that Congress is serious about protecting its role as the "sole constitutional depository of legislative power."[324] As such, the establishment of this tribunal may deter individuals from committing contempts against Congress.

Although this idea of establishing a "Court of Congressional Contempt" is unique, modern government is replete with analogous approaches. The U.S. Supreme Court, for instance, employs a similar mechanism in cases that fall within its original jurisdiction. Instead of engaging in trial court-type work in such cases, the Court often appoints a special master to handle these tasks.[325] Although much of the Court's procedure in this regard is unknown,[326] the special master, once appointed, exercises broad authority over the litigation and the Supreme Court, which sits as a reviewing court in this regard, most often adopts its findings.[327] Beyond the Supreme Court's practice of using special masters, another analogous approach to the "Court of Congressional Contempt" is the early U.S. Court of Claims.[328] Congress established the first Court of Claims to advise Congress whether it should pay large claims against the United States.[329] Although Congress has since modified the role of this court, the Supreme Court in an 1865 case sustained this early practice of an Article I court making recommendations to Congress, opining "Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress . . . ."[330]

*81 V. Conclusion

The U.S. Senate's order sentencing William P. MacCracken to ten days in the D.C. jail marks the last significant use of the direct contempt power by either House of Congress.[331] Since that time, Congress has forgone its direct power to punish in favor of statutory contempt certification. In this regard, instead of ordering its Sergeant-at-Arms to arrest the contemnor, the offended House votes to cite the contemnor for contempt and then certifies the citation to the U.S. Attorney for prosecution under a federal criminal statute. Although the statute directs the U.S. Attorney to present the citation to a grand jury, this move towards statutory contempt certification is problematic because the U.S. Attorney has the discretion to refuse to prosecute individuals for contempt. This is best seen by the recent decision of the Department of Justice not to prosecute Harriet Miers and Joshua Bolten for contempt after the House cited them for their failure to comply with a congressional subpoena. As a result, Congress's move

towards statutory contempt has shifted power away from Congress in favor of the Executive. It leaves Congress vulnerable to the discretion of federal prosecutors who could similarly decline to prosecute private citizens who act in contempt of Congress.

Given these challenges to the contempt power, this Article argues that Congress should employ its direct power to punish for contempt in an effort to reclaim its role in the political system and restore the effectiveness of the national legislature. Instead of entrusting its defense to another branch, each House could dispatch its Sergeant-at-Arms to arrest the contemnor and bring him to the U.S. Capitol for trial and, if necessary, punishment. Recognizing the difficulties that contempt proceedings pose for a modern Congress, this Article discusses three procedures that a modern Congress could use to carry out its contempt function: proceedings before the full chamber of the offended house, proceedings before a committee thereof, or proceedings before a proposed specialized internal congressional tribunal that this Article terms "Court of Congressional Contempt." This tribunal would adjudicate contempt citations and forward its factual findings and legal conclusions to the full body of the appropriate chamber for final determination of guilt and, if necessary, punishment. In the end, the Court of Congressional Contempt has the benefit of being more efficient than a trial before the full chamber, more independent than a ***82** committee comprised of Members, and more able to advance the institutional interests of the national legislature.

Footnotes

1 Bar of the Senate, Time, Feb. 19, 1934, at 10.

2 Id.

3 See Carl Beck, Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957, at 212 (1959).

4 Bar of the Senate, supra note 1.

5 Id.

6 Id.

7 Order of the Senate, Time, Feb. 26, 1934, at 10.

8 294 U.S. 125, 152 (1935).

9 Order of the Senate, supra note 7.

10 See, e.g., Watkins v. United States, 354 U.S. 178 (1957); Marshall v. Gordon, 243 U.S. 521, 542 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). Congress's contempt power is similar to the general power of contempt held by many departments of government. See generally Ronald L. Goldfarb, The Contempt Power 1 (1963).

11 See Dunn, 19 U.S. (6 Wheat.) at 204.

12 This Article refers to the former method as direct contempt proceedings, and the latter as statutory contempt certification. Both are discussed in depth infra Part II.B.

13 Beck, supra note 3, at 197.

14 Id.

15 Id.

16 Although Congress used its direct contempt power to imprison recalcitrant witnesses in the years following the MacCracken case, these incidents were of less significance and did not result in full-scale trials before the legislature. See Beck, supra note 3, at 212-16.

17 See, e.g., United States v. Nixon, 418 U.S. 683, 693 (1974) (holding that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments, and Questions 975-1026 (11th ed. 2005).

18 One could imagine the U.S. Attorney declining to prosecute a popular private citizen for her failure to cooperate with an unpopular but legitimate congressional investigation.

19 Watkins, 354 U.S. at 215.

20 See generally U.S. Const. art. I (vesting Congress with legislative powers "herein granted").

21 Id. § 8, cl. 1.

22 Id. § 8, cl. 3.

23 Id. § 8, cl. 12.

24 See, e.g., Goldfarb, supra note 10, at 29. Although the Constitution refers to the legislative powers as those "herein granted," it is generally accepted that Congress has powers beyond those enumerated in Article I. See, e.g., Beck, supra note 3, at 3-15.

25 Analyzing the Constitution through a common law lens is not new. See, e.g., Bernadette Meyler, Towards a Common Law Originalism, 59 Stan. L. Rev. 551 (2006). By looking to the common law with a purposivist eye, courts have held that the Constitution's grant of legislative power to the Congress necessarily included the powers of inquiry and punishment for contempt. See, e.g., Jurney v. MacCracken, 294 U.S. 125 (1935); see also Goldfarb, supra note 10, at 1 ("The legal literature of the common law is replete with references to the contempt power."). The development of these common law powers has created a body of law that one scholar calls the "constitutional law of congressional procedure," see generally Adrian Vermeule, The Constitutional Law of Congressional Procedure, 71 U. Chi. L. Rev. 361 (2004), which often embodies purposivist analysis. Cf. Meyler, supra, at 553 n.6 (discussing the Supreme Court's interpretation of the Eleventh Amendment to bar suits by a state's citizens against that state, even though the express language does not support such a reading).

26 See, e.g., Watkins, 354 U.S. at 187 ("The power of the Congress to conduct investigations is inherent in the legislative process."). The usual procedure is for Congress to investigate through either a standing committee with jurisdiction over a certain area, or a select, special, or standing committee to which Congress specifically assigns the investigation. See Valerie Heitshusen, Cong. Research Serv., Committee Types and Roles (2007), available at http://www.rules.house.gov/archives/98-241.pdf.

27 See, e.g., Sinclair v. United States, 279 U.S. 263 (1929) (upholding committee's authority to investigate Teapot Dome scandal, even when there was a criminal investigation on-going).

28 Howard R. Sklamberg, Investigation Versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses, 78 N.C. L. Rev. 153, 181 (1999).

29 Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975); see also Watkins, 354 U.S. at 187; McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (upholding contempt of Congress conviction of the brother of the Attorney General, opining, "[T]he power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function."); Morton Rosenberg & Todd B. Tatelman, Cong. Research Serv., Congress's Contempt Power: Law, History, Practice, and Procedure 2 (2008) [hereinafter CRS Report].

30 Watkins, 354 U.S. at 187 ("[The] power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."); see also James Hamilton, The Power to Probe: A Study of Congressional Investigations xii (1976) ("Congress can probe into every matter where there is legitimate federal interest.").

31 Daugherty, 273 U.S. at 175.

32 Beck, supra note 3, at 12.

33 See id. at 10.

34 Id.; see also Arthur M. Schlesinger, Jr., Robert Kennedy and His Times 185 (2002) ("'There is no power on earth that can tear away the veil behind which powerful and audacious and unscrupulous groups operate save the sovereign legislative power armed with the right of subpoena and search."') (quoting Sen. Black).

35 90 Cong. Rec. 6747 (1944) ("[T]he power of investigation is one of the most important powers of the Congress. The manner in which that power is exercised will largely determine the position and prestige of the Congress in the future. An informed Congress is a wise Congress; an uninformed Congress surely will forfeit a large portion of the respect and confidence of the people.") (statement of Sen. Truman).

36 Investigations propelled the likes of Charles Evan Hughes and Harry Truman to national prominence. See John C. Grabow, Congressional Investigations: Law and Practice § 1.2 (1988).

37 Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 36 (1928). For a detailed description of the battle, and the ensuing investigation, see generally Grabow, supra note 36, § 2.2 (noting that over half of the General's 1,500 soldiers were killed or wounded). A recent article also nicely chronicles some of the major congressional investigations. See generally James Hamilton et al., Congressional Investigations: Politics and Process, 44 Am. Crim. L. Rev. 1115, 1118-22 (2007). Additionally, the U.S. Senate maintains a list online. See U.S. Senate Investigations, http:// www.senate.gov/reference/reference_index_subjects/Investigations_vrd.htm (last visited Feb. 2, 2009).

38 See Hamilton, supra note 30, at 5.

39 See id.

40 See id. at 6 ("The legislative investigation, for better or worse, found its heyday in the present century.").

41 See id. at 7 (noting the many investigations into the Harding Administration, including the infamous Teapot Dome scandal). For general background on the Teapot Dome scandal, see Laton McCartney, The Teapot Dome Scandal: How Big Oil Bought the Harding White House and Tried to Steal the Country (2008).

42 See Hamilton, supra note 30, at 6-7.

43 Id. at 7-8.

44 Professor Beck has written an exhaustive study on the Committee on Un-American Activities. See generally Beck, supra note 3.

45 See John Hughes & Laura Litvan, General Motors, Ford Ask Congress for Up to $27 Billion in Aid, Bloomberg News, Dec. 2, 2008.

46 See SEC's Top Enforcer to Testify at Madoff Hearing, Reuters., Jan. 26, 2009.

47 See Rick Klein, House Panel Warns Ballplayers, League to Testify on Steroids, Boston Globe, Mar. 11, 2005, at A1. The legislative nexus here is baseball's antitrust exemption. See Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

48 Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

49 Watkins, 354 U.S. at 187.

50 Hamilton et al., supra note 37, at 1122.

51 See, e.g., In re Chapman, 166 U.S. 661, 668-69 (1897) (holding that congressional inquiry into the attempted bribery of Members of Congress was in pursuit of a valid legislative purpose). Cf. Kilbourn, 103 U.S. 168 (holding that Congress had no legitimate purpose to probe into personal finances of a private citizen). As one scholar notes, this limitation might not be much of a limitation at all. See Hamilton, supra note 30, at xii-xiii ("In the modern age, where government is involved in multifaceted aspects of our daily lives, there are increasingly few areas where Congress may not delve.").

52 See, e.g., Watkins, 354 U.S. at 200 & n.33. This is Congress's informing function. See Hamilton et al., supra note 37, at 1122 & n. 24.

53 354 U.S. 178 (1957).

54 Watkins, 354 U.S. at 187. Watkins, decided in the shadow of the McCarthy-era investigations, represents the Court's attempt to delineate the limits of the investigatory power more clearly.

55 Id. at 200 (“[Congress's power to investigate] cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals.”).

56 Id. at 187. The most notable example of an improper investigation was the case of Kilbourn v. Thompson, discussed infra Part II.B.

57 Watkins, 354 U.S. at 187.

58 U.S. Const. art. I, § 6, cl. 1.

59 See id.; Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503-07 (1975); Mins v. McCarthy, 209 F.2d 307 (D.C. Cir. 1953). For background on the Speech and Debate Clause, see generally United States v. Brewster, 408 U.S. 501, 507-08 (1972) (describing its English roots).

60 CRS Report, supra note 29, at 2-4.

61 421 U.S. 491 (1975).

62 See Frederick M. Kaiser et al, Cong. Research Serv., Congressional Oversight Manual 34 (2007), available at http:// www.fas.org/ sgp/crs/misc/RL30240.pdf (noting a witness's “sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise the objections as a defense in a contempt prosecution”).

63 See Josh Chafetz, Democracy's Privileged Few 207 (2007) (“As with the Houses of Parliament, if the Houses of Congress are to be able effectively to control their proceedings, they must be able to prevent both Members and non-Members from disrupting their orderly functioning.”). For an elaboration on the functions of Congress, see generally C.S. Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 789-814 (1926) (dividing Congressional power functionally into five categories: [1] protective or defensive against obstructions; [2] defensive against slander and libel; [3] judicial; [4] legislative; and [5] informing or educative).

64 Like the investigative power generally, the power to subpoena is not enumerated in the Constitution; it is inferred as an “indispensible ingredient” of Congress's Article I powers. Eastland, 421 U.S. at 505; see also McGrain, 273 U.S. at 175 (“[S]ome means of compulsion are essential to obtain what is needed.”).

65 See Nixon v. Sirica, 487 F.2d 700, 737 (D.C. Cir. 1973) (MacKinnon, J.) (“Congressional subpoenas seek information in aid of the power to legislate for the entire nation while judicial subpoenas seek information in aid of the power to adjudicate controversies between individual litigants in a single civil or criminal case. A grand jury subpoena seeks facts to determine whether there is probable cause that a criminal law has been violated by a few people in a particular instance. A congressional subpoena seeks facts[,] which become the basis for legislation that directly affects over 200 million people. Thus, both congressional and judicial subpoenas serve vital interests, and one interest is no more vital than the other.”).

66 Grabow, supra note 36, § 3.2.

67 See, e.g., Gov't Launches Criminal Probe in Peanut Recall, Boston Globe, Jan. 30, 2009 (reporting that the House Energy and Commerce Committee plans to investigate a salmonella outbreak in the peanut butter industry).

68 Hamilton et al., supra note 37, at 1125 (stating that individual committees have “broad latitude” to create rules and procedures governing committee subpoenas). Once the committee issues a subpoena, the usual practice is for a U.S. Marshall, committee staff member, or, perhaps, the Sergeant-at-Arms to serve the subpoena. See Grabow, supra note 36, § 3.2[b].

69 2 U.S.C. § 191 (2006); Hamilton et al., supra note 37, at 1126-30.

70 See Hamilton, supra note 30, at 68 (noting that taking unsworn testimony is less time consuming).

71 See generally id. at 78-85.

72 See, e.g., Watkins, 354 U.S. at 178. Legislative contempt powers are not unique to the United States. See generally Krishna Jagadisha Aiyer, Aiyer's Law of Contempt of Court, Legislature, and Public Servants (V. Prasad ed., 5th ed. 1976) (1970) [hereinafter Aiyer's on Contempt] (exploring the law of contempt in Canada, India, England, and the United States).

73 CRS Report, supra note 29, at 1. Contempt law generally has a rich history in the common-law and is defined very broadly. See, e.g., Aiyer's on Contempt, supra note 72, at 182; Goldfarb, supra note 10, at 1.

74 See 2 U.S.C. §§ 192, 194 (2006).

75 See Dunn, 19 U.S. (6 Wheat.) at 204; Watkins, 354 U.S. at 178; Potts, supra note 63, at 780 (noting that Congress has the power to "protect [its] rightful privilege[s] and to remove obstructions to the proper performance of [legislative] functions, by use of the[] contempt power against offenders."). Cf. Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65-66 (1924) (opining that "the power to punish for contempts is inherent in all courts ....").

76 Goldfarb, supra note 10, at 25. The Supreme Court has detailed the history of English contempt of legislature. See Watkins, 354 U.S. at 188-93; Kilbourn, 103 U.S. at 168 (calling into question the importance of English contempt law); Beck, supra note 3, at 1 (1959) ("Like many American political institutions and practices, the power to punish for contempt has its roots in English parliamentary procedure."). As Professor Beck writes, the contempt power developed in England as a result of centuries-long struggle between the Parliament and the Crown. See Beck, supra, at 1-2. For another thorough review of the development of Parliament's contempt powers, and its influence on contempt law in the New World, see generally Goldfarb, supra note 10, at 25-27.

77 Consider, for example, Chief Justice White's reasoning in the early case of Marshall v. Gordon, 243 U.S. 521, 533 (1917): "Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment ...."

78 Beyond Congress, the early American colonial assemblies asserted the power to punish for contempt, see Beck, supra note 3, at 2, with the 1718 Virginia Assembly thinking itself entitled to "all the rights and privileges of an 'English Parliament,"' see Eberling, supra note 37, at 17.

79 Watkins, 354 U.S. at 192.

80 Goldfarb, supra note 10, at 45.

81 Potts, supra note 63, at 780.

82 CRS Report, supra note 29, at 12. As C.S. Potts argues, the contempt power "is not an end in itself but a means to an end." Potts, supra note 63, at 782.

83 CRS Report, supra note 29, at 2 ("The power of Congress to punish for contempt is inextricably related to the power of Congress to investigate.").

84 See, e.g., Chafetz, supra note 63, at 207 ("As with the Houses of Parliament, if the Houses of Congress are to be able effectively to control their proceedings, they must be able to prevent both Members and non-Members from disrupting their orderly functioning.").

85 Marshall, 243 U.S. at 542. For a historical account of the Marshall case, see House Committee Scores Marshall, N.Y. Times, Apr. 15, 1916.

86 Gordon, 243 U.S. at 537. Cf. Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 842 (2008) ("A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them 'courts' in possession of 'the judicial power."').

87 Potts, supra note 63, at 782 (quoting Joseph Story as saying, "Nor is the power to be viewed in an unfavorable light. It is a privilege, not of the members of either House; but, like all privileges of Congress, mainly intended as a privilege of the people, and for their benefit.").

88 Gordon, 243 U.S. at 542.

89 See, e.g., McGrain v. Daugherty, 273 U.S. 134, 161 (1927).

90 See, e.g., Jurney v. MacCracken, 294 U.S. 125, 148 (1935) ("[W]here the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance."). Note, however, that Watkins, decided in 1957, merely opines in terms of coercion. See Watkins, 354 U.S. at 206-07.

91 Chafetz, supra note 63, at 212.

92 Id.

93 During the Fifteenth Congress, for example, Col. John Anderson was convicted of contempt after trial at the bar of the House. The conviction was upheld on review by the Supreme Court in the famous case of Anderson v. Dunn. See discussion infra Part II.B.

94 The Forty-first Congress saw the arrest of Patrick Woods for an assault on Congressman Charles Porter in Virginia. Woods was convicted after trial before the bar of the House and sentenced to three months in jail. Chafetz, supra note 63, at 224.

95 Id. at 212.

96 Jurney, 294 U.S. at 149 n.4.

97 Most notably, James Polk argued that Houston should be charged under District of Columbia law, not held in contempt of Congress, because the former is more in line with republican notions of government. Chafetz, supra note 63, at 224.

98 Hamilton, supra note 30, at 88.

99 Jurney, 294 U.S. at 150 (citing Marshall v. Gordon, 243 U.S. 521 (1917)); Chafetz, supra note 63, at 212.

100 Chafetz, supra note 63, at 225 (noting that the power to punish here is "questionable at best"). For example, the Sixth Congress imprisoned William Duane, a newspaper editor, for his failure to appear before a committee investigating an alleged scandalous article that he had written about the Senate. See CRS Report, supra note 29, at 6. Although the contempt arose out of Duane's failure to appear, one scholar believes this punishment really was for having written the underlying article. See Chafetz, supra note 63, at 225. Similarly, the Twenty-ninth Congress expelled all reporters from the New York Tribune after that paper published a letter that was "'personally abusive"' towards a Member. Id.

101 See CRS Report, supra note 29, at 1 ("[I]n the last seventy years the contempt power has generally been employed only in instances of refusals of witnesses to appear before committees, to respond to questions, or to produce documents.").

102 As explored earlier, citizens have a duty to cooperate with Congress. See, e.g., Watkins, 354 U.S. at 187 ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislation action.").

103 Chafetz, supra note 63, at 227 (noting that the witness was discharged after he apologized).

104 See Beck, supra note 3, at 195-96.

105 See discussion of this case infra Part III.A.

106 Chafetz, supra note 63, at 228-29.

107 Id. at 227-28.

108 See supra text accompanying notes 72-90.

109 Note, however, that the Constitution does empower each House to remedy contempts committed by Members. U.S. Const. art. I, § 5, cl. 2. Although the punishment of Members is beyond the scope of this Article, for background on the matter, see generally Chafetz, supra note 63, at 214-22.

110 See, e.g., U.S. Const. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of

the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

111 Beck, supra note 3, at 3; see also Chafetz, supra note 63, at 212 ("The Houses' power to punish non-Members for contempt rests upon shakier footing than their power to punish Members. Nowhere in the Constitution is this power explicitly granted.").

112 See CRS Report, supra note 29, at 5.

113 Beck, supra note 3, at 3. During the 1795 proceedings against Randall and Whitney, "almost no question" was raised about Congress's power to punish for contempt, CRS Report, supra note 29, at 6, because Members "substantially agreed that the grant of the legislative power to Congress carried with it by implication the power to punish for contempt." Potts, supra note 63, at 720. For an account of internal dispute over use of the contempt power, see CRS Report, supra note 29, at 6-7.

114 19 U.S. (6 Wheat.) 204 (1821) (upholding Congress's power to punish non-Members for contempt).

115 Beck, supra note 3, at 5.

116 Although beyond the scope of this Article, Congress has also provided for the civil enforcement of its subpoenas, see 2 U.S.C. § 288d; 28 U.S.C. § 1365 (2006), but this has limitations, see CRS Report, supra note 29, at 36-37, 39.

117 Grabow, supra note 36, § 3.4[a].

118 Beck, supra note 3; see also Hamilton, supra note 30, at 85. The traditional method is explained well by Thomas L. Shriner, Jr., in Note, Legislative Contempt and Due Process: The Groppi Cases, 46 Ind. L.J. 480, 491 (1971). In Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 208 (1821), for instance, the Speaker ordered the Sergeant-at-Arms "to take into custody the body of the said John [Anderson], wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge ...."

119 See infra Part IV.

120 This was the case in Dunn, 19 U.S. (6 Wheat.) 204, discussed infra notes 131-142 and accompanying text.

121 See CRS Report, supra note 29, at 13-14 (noting that Congress could analogize to the Courts' inherent power to impose monetary penalties for contempt of court and seize upon dicta in Supreme Court case law to justify a monetary fine). A recent report to Congress notes that a fine would have the advantage of avoiding imprisonment and judicial review through habeas corpus. See id.

122 Hamilton et al., supra note 37, at 1132.

123 See CRS Report, supra note 29, at 15; Beck, supra note 3, at 215-16.

124 Beck, supra note 3, at 3-4. In the appendices to his book, Beck summarizes in data tables various cases of contempt and their disposition.

125 Hamilton, supra note 30, at 87-88.

126 Id. at 88 (noting that Houston escaped with a mere reprimand).

127 Id.

128 Id.

129 Kilbourn's friends fed him well while he was in congressional custody, even providing vintage wines. See id. Kilbourn, as one may recognize the name, was the plaintiff in the important case Kilbourn v. Thompson, 103 U.S. 168 (1881), which helped to define the proper scope of Congress's power to investigate.

130 Hamilton, supra note 30, at 88.

131 See Dunn, 19 U.S. (6 Wheat.) at 222.

132 See id. at 212.

133 See Chafetz, supra note 63, at 223.

134 Dunn, 19 U.S. (6 Wheat.) at 208; CRS Report, supra note 29, at 7-8.

135 CRS Report, supra note 29, at 8.

136 Dunn, 19 U.S. (6 Wheat.) at 212; CRS Report, supra note 29, at 8.

137 Dunn, 19 U.S. (6 Wheat.). at 204.

138 Id. at 235.

139 Id. at 225.

140 Id. at 227.

141 Id. at 228 (continuing that the argument that the House has no inherent contempt power "is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived.").

142 Id. at 234 ("[I]t is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual.").

143 Ex parte Nugent, 18 F. Cas. 471, 471 (C.C.D.C. 1848) (No. 10375); Beck, supra note 3, at 4-5.

144 Goldfarb, supra note 10, at 33.

145 Beck, supra note 3, at 5 (quoting Nugent, 18 F. Cas. at 481).

146 103 U.S. 168 (1880).

147 Id. at 171; see also CRS Report, supra note 29, at 9-10.

148 CRS Report, supra note 29, at 10.

149 Kilbourn, 103 U.S. at 170; see also Goldfarb, supra note 10, at 33-34.

150 Goldfarb, supra note 10, at 36.

151 Kilbourn, 103 U.S. at 183-90.

152 Id. at 200; CRS Report, supra note 29, at 11.

153 273 U.S. 135, 177 (1927) (upholding inherent contempt action against a relative of the Attorney General for failure to comply with congressional subpoena, because the request was a probe of the Department of Justice and was thus "one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.").

154 See, e.g., Goldfarb, supra note 10, at 36.

155 CRS Report, supra note 29, at 11-12.

156 See supra Part II.A (discussing Congress's power to investigate).

157 Dunn, 19 U.S. (6 Wheat.) at 231 ("It follows, that imprisonment must terminate with that adjournment."). Some argue that this limitation may not apply to the Senate since it is a "continuing body"--less than half of its membership turns over each election cycle. See CRS Report, supra note 29, at 9. It is also unclear how a court would enforce this limitation, with the House only once violating the rule, without objection from the prisoner. See id.

158 Groppi v. Leslie, 404 U.S. 496 (1972).

159 CRS Report, supra note 29, at 13.

160 See, e,g., Hamilton, supra note 30, at 89-90.

161 See id. at 89 ("Congress does not enjoy general powers of punishment and can only penalize conduct that interferes with or obstructs its legislative duties."); id. at 90. This inquiry is more fully explained supra Part II.A.2 (discussing limitations on Congress's power to investigate).

162 This Article considers due process in Part IV, focusing on the principal case of Groppi, 404 U.S. 496, which held that a state legislative contempt conviction violated due process where the legislature neither gave the contemnor notice nor opportunity to be heard in his defense.

163 Recall that this is the usual procedural posture of these cases, beginning with Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), where the prisoner brought a civil action against the Sergeant-at-Arms, who successfully defended that he was acting pursuant to a lawful congressional purpose.

164 See supra notes 156-157 and accompanying text.

165 See, e.g., Jurney, 294 U.S. at 152 (rejecting contemnor's arguments about guilt as "questions which the Senate proposes to try," reasoning "[t]he sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes."); Hamilton et al., supra note 37, at 1133 ("The court may not decide whether the witness actually committed the acts giving rise to the contempt finding.").

166 See 2 U.S.C. §§ 192, 194 (2006); Beck, supra note 3, at 6. Note beyond the threat of contempt of Congress prosecution, other federal statutes limit one's behavior before the legislature. See, e.g., 18 U.S.C. § 1621 (2006) (perjury); id. § 1505 (obstruction of justice).

167 Watkins, 354 U.S. at 206 ("Since World War II, the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House.").

168 See, e.g., Hamilton, supra note 30, at 85 ("But Congress need not deliver defiance of its subpoenas and orders to prosecutorial authorities because it has its own self-help powers as a remedy.").

169 Beck, supra note 3, at 7.

170 MacCracken, 294 U.S. at 151.

171 Grabow, supra note 36, § 3.4[b] n.42; see also MacCracken, 294 U.S. at 151; In re Chapman, 166 U.S. 661, 671 (1897); Aiyer's on Contempt, supra note 72, at 193 (noting that the purpose of statutory contempt is to "supplement the power of contempt by providing for additional punishment.").

172 Beck, supra note 3, at 6; see 2 U.S.C. § 192 (2006).

173 Beck, supra note 3, at 195; see Cong. Globe, 34th Cong., 3d Sess. 405 (1857) (noting that passage of the contempt statute was intended to give the House the authority "to inflict a greater punishment than the committee believed the House possesses the power to inflict."); see also Beck, supra note 3, at 6 (noting that the statute "was aimed mostly at punishing."); Hamilton, supra note 30, at 91.

174 Hamilton, supra note 30, at 91.

175 See Watkins, 354 U.S. at 207 n.45 (noting that Congress felt "it needed more severe sanctions to compel disclosures than were available" in the historical procedures of direct contempt proceedings); Hamilton, supra note 30, at 91.

176 Others have dealt with the statute in depth elsewhere, so this article only provides a brief overview of the points relevant here. See generally Grabow, supra note 36, § 3.4[b].

177 See, e.g., Neil A. Lewis, Panel Votes to Hold Two in Contempt of Congress, N.Y. Times, July 26, 2007, at A13.

178 2 U.S.C. § 194 (2006).

179 Watkins, 354 U.S. at 207 ("It has become customary to refer these matters to the United States Attorneys for prosecution under criminal law.").

180 Goldfarb, supra note 10, at 40; see also Watkins, 354 U.S. at 208 (noting that the defendant is given all the rights of other criminal defendants).

181 See generally Grabow, supra note 36, § 3.4[b].

182 CRS Report, supra note 29, at 65-66.

183 Id. at 66.

184 Dan Eggen & Paul Kane, House Panel Backs Citing Bush Aides for Contempt, Wash. Post, July 26, 2007, at A3; see also H.R. Rep. No. 110-423 (2008).

185 H.R. Res. 979, 110th Cong. (2008).

186 Letter from Nancy Pelosi, Speaker of the House, to Michael B. Mukasey, Att'y Gen. (Feb. 28, 2008), available at http://speaker.house.gov/blog/?p=1171. Harriet Miers and Josh Bolten were not the only Bush administration officials to clash with Congress--a Senate committee cited Karl Rove and Josh Bolten for contempt, but the full body never took up the citations. See Paul Kane, Rove, Bolton Found in Contempt of Congress; Senate Committee Cites Top Bush Advisers in Probe of U.S. Attorney Firings, Wash. Post, Dec. 14, 2007, at A8. A House committee similarly cited Rove. See David Stout, House Panel Cites Rove for Contempt, Int'l Herald Trib., Aug.1, 2008, at 7. Other officials may have acted in contempt of Congress, but were cited by neither a committee nor the full chamber. In April 2007, for example, Secretary of State Condoleezza Rice effectively refused to comply with a subpoena demanding testimony to aid a committee investigation into the Iraq war by agreeing to respond only in writing. See Josh Chafetz, House Arrest, Slate, Apr. 26, 2007, http://www.slate.com/id/2165127 [hereinafter House Arrest].

187 See No Investigation of 2 Bush Aides, N.Y. Times, Mar. 1, 2008, at A14.

188 Letter from Michael B. Mukasey, Att'y Gen., to Nancy Pelosi, Speaker of the House 2 (Feb. 29, 2008).

189 Id. at 1.

190 Id. at 2; see also Attorney General Declines to Investigate Bush Advisers, CNN.com, Feb. 29, 2008, http:// www.cnn.com/2008/POLITICS/02/29/congress.attorneys/index.html.

191 CRS Report, supra note 29, at 67.

192 Thomas Ferraro, Rove, Miers to Testify Before U.S. House Panel, Reuters, Mar. 5, 2009.

193 Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 N.Y.U. L. Rev. 563, 572-73 (1991); see Grabow, supra note 36, § 6.2[c].

194 See Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 205-08 (1992).

195 Grabow, supra note 36, § 3.4[b].

196 H.R. Res. 632, 97th Cong., 2d Sess. (1982); 128 Cong. Rec. 31746-76 (1982).

197 Panel Absolves Mrs. Burford, N.Y. Times, June 25, 1983.

198 See Grabow, supra note 36, § 6.3 (noting that because of the compromise, the "assertion of executive privilege was never judicially resolved.").

199 House Arrest, supra note 186; see also Ferraro, supra note 192.

200 2 U.S.C. § 194 (2006).

201 Compare, e.g., Ex parte Frankfeld, 32 F. Supp. 915 (D.D.C. 1940) (suggesting mandatory duty) and United States v. U.S. House of Reps., 556 F. Supp. 150, 151 (D.D.C. 1983) (same) with Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966) (opining whether the duty is mandatory). See generally Peterson, supra note 193, at 575-78 (discussing conflicting interpretations of the statute). Note, however, these cases all came before the Supreme Court's opinion in Nixon, 418 U.S. at 683. Because of this debate, Congress has recently introduced a bill entitled the Special Criminal Contempt of Congress Procedures Act of 2008, H.R. 6508, 110th Cong., 2d Sess. (2008), which would allow the appointment of an independent prosecutor to handle contempt of Congress citations.

202 United States v. Nixon, 418 U.S. 683, 693 (1974); Rex E. Lee, Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships, 1978 B.Y.U. L. Rev. 231, 256-57 (noting that criminal statutes are the province of the executive branch).

203 Note, however, that Nancy Pelosi, in a letter to Michael Mukasey, argues that the U.S. Attorney is required to bring the citation to a grand jury. See Letter from Nancy Pelosi, supra note 186.

204 Stout, supra note 186 ("It has been far more common for Congress to hold private citizens in contempt when they have been deemed uncooperative in investigations of criminal activities.").

205 See Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356108.

206 Cf. Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 801 (1987) (noting that the judiciary would be powerless if it was completely reliant on the executive branch for protection).

207 Cf. id. at 795-96 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911)) (describing the inherent right of courts to punish for contempt of court). Interestingly, Young, which held that district courts may appoint a special prosecutor to prosecute contempt of court, cited Anderson v. Dunn for the proposition that courts have the power to punish for disobedience. See id. at 798.

208 House Arrest, supra note 186.

209 See Beck, supra note 3, at 7.

210 See House Arrest, supra note 186.

211 Kane, supra note 186, at A8 (quoting Sen. Leahy as saying, "White House stonewalling is unilateralism at its worst, and it thwarts accountability. Executive privilege should not be invoked to prevent investigations into wrongdoing.").

212 As discussed earlier, Congress frequently focuses its investigatory powers on the Executive Branch. See generally Grabow, supra note 36, § 6.1.

213 Frank Askin, Editorial, Congress's Power to Compel, Wash. Post, July 21, 2007, at A13.

214 Chafetz, supra note 63, at 235. Cf. Nixon v. United States, 506 U.S. 224, 232 (1993) (opining that judicial review of impeachment procedures might "expose the political life of the country to months, or perhaps years, of chaos.").

215 Potts, supra note 63, at 782.

216 See Aiyer's on Contempt, supra note 72, at iii.

217 Dunn, 19 U.S. (6 Wheat.) at 228-29 ("That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a greater nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.").

218 See Eggen & Kane, supra note 184, at A3 (quoting Sen. John Conyers).

219 Young, 481 U.S. at 801.

220 Beck, supra note 3, at 7. Indeed, since statutory contempt proceedings involve the Judiciary, these proceedings might "'expose the political life of the country to months, or perhaps years, of chaos.'" Nixon, 506 U.S. at 236 (quoting Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991)).

221 See generally Lorraine H. Tong, Cong. Research Serv., House Sergeant at Arms: Fact Sheet on Legislative and Administrative Duties (2007), available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2270:1.

222 See Shriner, supra note 118, at 491.

223 Id.

224 Id.

225 19 U.S. (6 Wheat.) at 225, 231 (1821) ("[I]mprisonment must terminate with that adjournment.").

226 This concern is closely related to the Constitution's prohibition on Bills of Attainder. Sklamberg, supra note 28, at 188; see also U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); United States v. Lovett, 328 U.S. 303, 315 (1946) (defining a Bill of Attainder as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial ...."). But the Supreme Court has never applied the Bill of Attainder Clause to punishment for contempt of Congress. See Sklamberg, supra note 28, at 189; Recent Case, Constitutional Law--Freedom of the Press--Senate Resolution Conditionally Excluding a Newspaper's Reporters from Floor of State Senate is Unconstitutional, 79 Harv. L. Rev. 681, 682 (1966) ("[T]he constitutional prohibition against bills of attainder has never been interpreted to preclude Congress ... from punishing individuals or groups who are in contempt of their authority."). The inapplicability of the Bill of Attainder Clause to contempt might be justified as either a common-law exception to the Clause, or consistent with the original understanding of a bill of attainder, which did not encompass contempt proceedings by the legislature. See, e.g., St. George Tucker, Blackstone's Commentaries 1: App. 292-93 (1803), reprinted in 3 The Founders' Constitution 348 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Bills of attainder are legislative acts passed for the special purpose ... to inflict pains and penalties beyond, or contrary to the common law.") (emphasis added).

227 See, e.g., Watkins, 354 U.S. at 207 n.45; Jurney, 294 U.S. at 151 ("The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses."). This is not to say that greater fairness was not a concern at all. See Gojack v. United States, 384 U.S. 702, 707 (1966) (opining that in enacting Section 192, Congress "specifically indicated that it relied upon the courts to apply the exacting standards of criminal jurisprudence to changes of contempt of Congress in order to assure that the congressional investigative power, when enforced by penal sanctions, would not be abused.").

228 In 1860, for instance, the Senate imprisoned Thadders Hyatt for his refusal to appear before a committee investigating John Brown's raid on Harper's Ferry. See Grabow, supra note 36, § 3.4[b] n.43.

229 Beck, supra note 3, at 17. The Supreme Court has endorsed this optimistic view of Congress. See Groppi, 404 U.S. at 503 n.6 ("[A] legislative body, like a court, might direct a psychiatric examination. It can be assumed that one so disoriented as not to appreciate the nature of his acts would not be punished for contemptuous conduct.").

230 Through petitions for habeas corpus, courts might hear the defense of executive privilege to the extent it has a constitutional dimension. See, e.g., United States v. House of Reps., 556 F. Supp. 150, 152-53 (D.D.C. 1983) (holding that executive privilege is a defense that can only be raised in a prosecution for contempt; courts are reluctant to interfere beforehand); Peterson, supra note193, at 567 n.17 ("The witness may assert any defenses to the subpoena, including privilege and lack of congressional authority ... in a habeas corpus proceeding in court.").

231 Cf. Nixon, 506 U.S. at 235-36 (rejecting argument that lack of judicial review over impeachment trials would lead to the Senate "usurp[ing] judicial power" because of built-in procedural safeguards).

232 See infra Part IV.B.2.

233 See generally Lorraine H. Tong, Cong. Research Serv., House Sergeant at Arms: Fact Sheet on Legislative and Administrative Duties (2007), available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2270:1 (discussing the duties of the House

Sergeant-at-Arms); Office of the Sergeant at Arms and Doorkeeper, United States Senate, http:// www.senate.gov/reference/office/sergeant_at_arms.htm (last visited Feb. 1, 2009).

234 Senate's New Sergeant-at-Arms Brings Perspective from the City, Politico.com, Jan. 22, 2007, http://dyn.politico.com/printstory.cfm?uuid=4AE964FB-3048-5C12-00E2B799DEF45B08.

235 As discussed earlier, the Sergeant-at-Arms executed arrest warrants as early as 1795, see supra text accompanying note 112, and as recently as 1988, see Ed Mangnuson, Search and Seizure on Capitol Hill: A Clash Over Campaign Reform Leads to a Postmidnight Arrest, Time, Mar. 7, 1988, at 23.

236 Mangnuson, supra note 235. This situation also occurs on the state level. See, e.g., Senators 'In Contempt': Three Republican War Horses Called to the Bar, N.Y. Times, Jan 15, 1892, at 1 (reporting the arrest of sitting state senators for contempt).

237 Mangnuson, supra note 236, at 23 ("The police raiders struck after midnight. Armed but in plain clothes, they knocked on the locked door. No response. Their leader inserted a passkey and pushed. On the inside, the fugitive [Packwood] braced a shoulder against the door and shoved back. But the lawmen burst in, reinjuring the suspect's broken finger. Reluctantly he allowed them to lead him into an elevator, then went limp. They lifted him up, carried him feet first through massive doors--and onto the floor of the U.S. Senate."). The Sergeant-at-Arms was not totally successful; the Miami Herald reports, "a posse of sergeants-at-arms backed down when Sen. Lowell Weicker, R-Conn., who is six feet six inches tall and weighs 235 pounds, dared it to try to force him back to the chamber." David Hess, Senate GOP Scuttles Political-Fund Vote; Republicans Prevail in Fight over Campaign-Spending Bill, Miami Herald, Feb. 27, 1988, at 11D.

238 See generally Potts, supra note 63, at 789-90, 802-04.

239 506 U.S. 224 (1993) (dismissing challenge to Senate impeachment procedures as non-justiciable political question).

240 Id. at 226.

241 U.S. Const. art. I, § 3, cl. 6 (emphasis added).

242 Nixon, 506 U.S. at 227.

243 Id. at 228.

244 Id. at 238.

245 Id. at 229.

246 Id. at 230 ("[T]he Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try' in the first sentence.").

247 Id. at 232.

248 Id. at 233-36.

249 Id. at 236 (quoting Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991)).

250 Nixon, 506 U.S. at 236.

251 Id.

252 Id. at 238.

253 Cf. U.S. Const. art. I, § 3, cl. 6.

254 For a discussion of constitutional common law, as it relates to the contempt power, see supra note 25 and accompanying text.

255 See, e.g., Jurney, 294 U.S. at 125; Dunn, 19 U.S. (6 Wheat.) at 204; see also supra Part II.B.

256 Baker v. Carr, 369 U.S. 186, 217 (1962).

257 See supra Part II.B.

258 Nixon, 506 U.S. at 228-29 ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.").

259 Id. at 228 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

260 For example, the "enrolled bill doctrine" generally prevents courts from inquiring into whether Congress followed proper procedures in passing a law. See Marshall Field & Co v. Clark, 143 U.S. 649, 671-72 (1892); Rebecca M. Kysar, Listening to Congress: Earmark Rules and Statutory Interpretation, 94 Cornell L. Rev. 519, 553-60 (2009).

261 Watkins, 354 U.S. at 205.

262 CRS Report, supra note 29, at 15.

263 Dunn, 19 U.S. (6 Wheat.) at 212.

264 See, e.g., Jurney, 294 U.S. at 125.

265 These requirements are in part based on the Due Process Clause, which applies to contempt proceedings. See Groppi, 404 U.S. at 496 (noting that the contemnor, at the minimum, must be provided with notice and opportunity to present a defense). Any departures outside the process required by that Clause would be in the discretion of the chamber. The process outlined here is based on historical procedures.

266 See Beck, supra note 3, at 3; Goldfarb, supra note 10, at 30.

267 Beck, supra note 3, at 4 (recalling that Congress afforded R. M. Whitney these rights in an early contempt case).

268 See, e.g., Order of the Senate, supra note 7 (discussing the Senate trial of William P. MacCracken, Jr.).

269 See U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings ....").

270 See generally Ballard C. Campbell, The Growth of American Government: Governance from the Cleveland Era to the Present (Harvey J. Graff ed., 1995).

271 The First Congress (1789-91), for instance, had 65 Members, while 110th Congress (2007-2009) has 435 Members. See House History, U.S. House of Representatives, http://clerk.house.gov/art_history/house_history (last visited Feb. 15, 2009).

272 Mistretta v. United States, 488 U.S. 361, 372 (1989).

273 CRS Report, supra note 29, at 15 (citation omitted).

274 According to Roll Call, Members of the 110th Congress introduced over 14,000 pieces of legislation. See Paul Singer, Members Offered Many Bills but Passed Few, Roll Call, Dec. 1, 2008, available at http:// www.rollcall.com/issues/54_61/news/30466-1.html.

275 See Potts, supra note 63, at 782.

276 Hamilton, supra note 30, at 95.

277 CRS Report, supra note 29, at 15. This, however, was over some objection. See, e.g., id. at 16 (quoting Rep. Hillhouse as saying the following: "However troublesome and difficult, the House must meet all the questions and decide them on this floor.").

278 Id. at 16 (quoting 2 Hinds' Precedent § 1599); Eberling, supra note 37, at 39.

279 CRS Report, supra note 29, at 17.

280 Journal of the House of Reps, 38th Cong., 2nd Sess., at 135.

281 CRS Report, supra note 29, at 18.

282 See, e.g., Groppi, 404 U.S. at 501 (“The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him.”) (emphasis added).
In Marshall v. Gordon, for example, the Court discussed the proceedings in Congress, where a committee issued a report and recommendation to the House, which it adopted before the Speaker issued an arrest warrant. 243 U.S. 521, 532 (1917). Congress can similarly delegate its investigatory powers to committee. See, e.g., Watkins, 354 U.S. at 200-01.

283 506 U.S. 224 (1993).

284 See CRS Report, supra note 29, at 15.

285 See supra notes 239-52and accompanying text.

286 See Nixon, 506 U.S. at 224. This rule is also seen in the Senate's general published rules on impeachment. See Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, at XI (1986) (“That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.”).

287 See CRS Report, supra note 29, at 19.

288 See Ann-Marie C. Carstens, Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases, 86 Minn. L. Rev. 625, 653-58 (2002).

289 See id. at 389 n.380.

290 See generally Heitshusen, supra note 26 (describing the congressional committee system). Congress could also create a joint committee, but in keeping with the historical practice of each house punishing its own contempts, this would likely not be a viable option.

291 See, e.g., Marshall, 243 U.S. at 521.

292 See Peterson, supra note 193, at 567 n.17 (1991) (“The witness may assert any defenses to the subpoena, including privilege and lack of congressional authority before Congress ....”).

293 See, e.g., CRS Report, supra note 29, at 19 (arguing that in light of Congress's ability to delegate its contempt powers to committee, “it would appear that one of the suggested reasons for the apparent abandonment of the use of Congress's inherent contempt power, namely, that it became to[o] cumbersome and time consuming to try contemptuous behavior on the floor of the body, is no longer compelling.”).

294 See generally R. Eric Petersen, Cong. Research Serv., Roles and Duties of a Member of Congress (2006).

295 See, e.g., Adam Clymer, Ethics Committees Stumble in Era of Partisanship, N.Y. Times, Aug. 14, 1995; Greg Miller, On a Senate Committee, Partisanship Boils Over, L.A. Times, Mar. 10, 2006.

296 Cf. Taking the Stand: The Testimony of Lieutenant Colonel Oliver L. North 264 (Daniel Schorr ed., 1987) (“[The Congressional investigatory power is] sort of like a baseball game in which you are both the player and the umpire. It's a game in which you call the balls and strikes and where you determine who is out and who is safe.”). Sklamberg, supra note 28, at 188 (“If unchecked, the inherent contempt power ... would allow a House of Congress to act as a legislature that could define contempt on an ad hoc basis, as a jury that could determine guilt, and as a judge who could pronounce any sentence she wanted.”).

297 Cf. Josh Chafetz, Comment, Cleaning House: Congressional Commissioners for Standards, 117 Yale L.J. 165, 171-72 & n.38 (2007) (suggesting the creation a Commissioner for Standards in each of the Houses to consider ethics complaints).

298 One possible location would be the Old Supreme Court Chamber in the U.S. Capitol Building. In fact, Congress has continued to use this chamber since the Supreme Court vacated, first as a reference library, then as the home of the Joint Committee on Atomic

Energy, and today as a museum. See Architect of the U.S. Capitol, The Old Supreme Court Chamber, http:// www.aoc.gov/cc/capitol/oscc.cfm (last visited Feb. 14, 2009).

299 See, e.g,. Nixon, 506 U.S. at 224.

300 Cf. Administrative Procedure Act, 5 U.S.C. § 554(d) (2006) ("The employee who presides at the reception of evidence ... may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.").

301 Cf. 28 U.S.C. § 631(a) (2006) (granting district courts the power to appoint magistrates).

302 This is similar to the duties of a special master. See, e.g., Carstens, supra note 289, at 653-57.

303 U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

304 See, e.g., U.S. Const. art I, §§ 2, 3 (vesting Congress with the authority to select its own officers); Charles K. Burdick, The Law of the American Constitution: Its Origin and Development 63 (1922) ("Congress has not the power to make appointments except of its own officers ....") (emphasis added).

305 See, e.g., 2 U.S.C. § 601(a)(2) (2006) ("The Director [of the Congressional Budget Office] shall be appointed by the Speaker of the House of Representatives and the President pro tempore of the Senate after considering recommendations received from the Committees on the Budget of the House and the Senate, without regard to political affiliation and solely on the basis of his fitness to perform his duties."). As the Supreme Court has held, "'lesser functionaries' need not be selected in compliance with the strict requirements" of the Appointments Clause. Freytag v. Comm'r, 501 U.S. 868, 880 (1991) (citing Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976)). Although the President appoints the Librarian of Congress, 2 U.S.C. § 136 (2006), this anomaly might be understood as the library not being just a legislative library, but rather a library for the entire federal government. See John Y. Cole, Jefferson's Legacy: The Functions of the Library of Congress, Past and Present, http://cool-palimpsest.stanford.edu/bytopic/orgs/lchist.html (last visited Feb. 5, 2009).

306 Buckley, 424 U.S. at 126 n.162 (opining that the commissioners at issue in the case were not mere employees of the United States because they were "appointed for a statutory term, [and] are not subject to the control or direction of any other executive, judicial, or legislative authority.").

307 See Dave McKinney, Ellis Named Special Prosecutor in Gov. Blagojevich Impeachment Trial, Chi. Sun-Times, Jan. 13, 2009.

308 See Brian Knowlton, House Prosecutors Make Final Appeal for Clinton's Removal from Office, Int'l Herald Trib., Feb. 9, 1999.

309 Cf. Young, 481 U.S. at 796 (permitting the appointment of private persons to prosecute criminal contempt in district courts).

310 See Watkins, 354 U.S. at 198-99.

311 See Groppi, 404 U.S. at 502-03.

312 404 U.S. 496 (1972).

313 Id. at 499.

314 Id.at 502.

315 This right to counsel is especially important here. As Rep. Sedwick reportedly stated during a 1795 contempt hearing, "The circumstances of the House being both accuser and judge affords very great reason why the prisoner should be allowed counsel." Eberling, supra note 37, at 39.

316 In its first inherent contempt proceeding in 1795, Congress afforded Robert Randall, accused of bribery, a right to counsel and the opportunity to plead his defense. See Beck, supra note 3, at 3; Goldfarb, supra note 10, at 30. In another early inherent contempt case, Congress allowed the defendant, R. M. Whitney, to subpoena a witness on his behalf. See Beck, supra note 3, at 4.

317 See supra text accompanying notes 226-32 (discussing fairness concerns).

318 Goldfarb, supra note 10, at 45 (“This blind heritage, in the hands of irresponsible power holders, could create the anomalous result of kingliness in a government which was conceived to establish the sovereignty of men.”).

319 Lee, supra note 202, at 254 (“There is something unseemly about a House of Congress getting into the business of trial and punishment. Congress is simply not geared to the determination of guilt or innocence or the meting out of punishment for improper conduct.”).

320 This is similar to the so-called “informing function” that Congressional committee reports serve. See generally Doe v. McMillan, 412 U.S. 306, 332 (1973) (Blackmun, J., concurring in part, dissenting in part) (“More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further object[] ... of enabling the public to evaluate the performance of their elected representatives in the Congress.”).

321 Proceeding by this tribunal would save the chamber and its committees time, and it would also encourage the finder-of-fact to spend more time on and devote more resources to proceedings because the finder-of-fact would not be saddled with other duties. This would also likely result in less reliance on staff.

322 Cf. Carstens, supra note 289, at 687 (noting that a proposed specialized tribunal to handle cases falling within the Supreme Court's original jurisdiction would “better preserve institutional memory.”).

323 See id. at 654 (noting that special masters appointed by the Supreme Court in cases of original jurisdiction apply a specialized body of federal common law).

324 Watkins, 354 U.S. at 215.

325 See generally Carstens, supra note 289.

326 Id. at 644.

327 Id. at 655-56.

328 See Hart and Wechsler's The Federal Courts and the Federal System 102-04 (Richard H. Fallon, Jr. et al. eds., 5th ed. 2003) (“The Court has assumed that it is permissible for Congress to employ non-Article III tribunals ... to adjudicate or to recommend to Congress whether to pay claims against the United States.”).

329 Litigation with the Federal Government 227 & n.9 (Gregory C. Sisk ed. 2000) (citing Michael F. Noone, Jr. & Urban A. Lester, Defining Tucker Act Jurisdiction After Bowen v. Massachusetts, 40 Cath. U. L. Rev. 571, 575 (1991) and William M. Wiecek, The Origin of the United States Court of Claims, 20 Admin. L. Rev. 387, 397 (1968)).

330 Gordon v. United States, 117 U.S. 697, 699 (1865).

331 Beck, supra note 3, at 212-16.

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