U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

June 24, 2024

MEMORANDUM

TO: Merrick Garland, Attorney General

FROM: Christopher Fonzone, Assistant Attorney General CCF

RE: Whether Congress May Use Its Inherent Contempt Authority to Arrest Executive Branch Officials Who Withhold Subpoenaed Materials Based on an Assertion of Executive Privilege by the President

On May 16, 2024, the President asserted executive privilege and directed you not to produce certain materials subpoenaed by the House Committee on the Judiciary and the House Committee on Oversight and Accountability ("Committees") related to the investigation conducted by Special Counsel Robert K. Hur. On June 12, 2024, the House of Representatives adopted a contempt resolution and directed the Speaker of the House to certify the report on the resolution to the U.S. Attorney for the District of Columbia for prosecution under the contempt of Congress statute, 2 U.S.C. §§ 192, 194. *See* H.R. Res. 1292, 118th Cong. (2024) (enacted). The Department of Justice subsequently informed House Speaker Mike Johnson that it would not bring the congressional contempt citation before a grand jury or take any other prosecutorial action in the matter. That determination was based on the Executive Branch's longstanding position that the criminal contempt of Congress statute does not apply, and could not constitutionally be applied, to Executive Branch officials who comply with the President's direction not to disclose materials over which the President asserted executive privilege.

A Member of Congress has expressed an intent to force a vote on a resolution directing the House Sergeant at Arms to arrest you and bring you before the House pursuant to the House's inherent power of contempt. *See* H.R. Res. 1205, 118th Cong. (2024). You have thus asked whether Congress can utilize its inherent contempt power to arrest or imprison an Executive Branch official for complying with the President's assertion of executive privilege and direction not to produce the privileged materials. In a 1984 opinion, our Office concluded that the separation of powers precludes Congress from taking this step, *see Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 n.42 (1984) ("*Prosecution for Contempt*"), and we have repeatedly reaffirmed that conclusion in subsequent opinions. This memorandum confirms our continued adherence to that view.

I.

It would be unprecedented for Congress to use its inherent contempt power against an Executive Branch official who withholds subpoenaed materials on the orders of the President after the President asserts executive privilege over the materials. Although the House and Senate used their inherent contempt power with some frequency for much of the Nation's early history, neither chamber has attempted to exercise the power since before World War II. *See* Ben Wilhelm et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* at 52 (updated Dec. 22, 2022); *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 86 (1986) ("*Response to Congressional Requests*"). And the vast majority of the historical instances in which Congress has invoked its inherent contempt power have involved private individuals rather than federal officials.

Indeed, as far as we are aware, there have been only two congressional arrests of Executive Branch officials for contempt in our Nation's history. *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1132–39 (2009) ("*Executive Branch Contempt*"). First, in 1879, the House ordered the Sergeant at Arms to arrest the U.S. Minister to China, George Seward, for contempt related to his refusal to produce materials to the House Committee on Expenditures in the State Department, which was investigating whether he should be impeached for his alleged misappropriation of funds. *See* Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. Pa. J. Const. L. 77, 127–28 (2011). Seward appeared before the House, where he presented a written statement asserting that because the Committee subpoenaed the materials as part of an impeachment investigation, he had a Fifth Amendment right not to produce them. 8 Cong. Rec. 2138–41 (1879). The House referred Seward's statement to the Judiciary Committee and agreed to "allow[] [Seward] to depart on his own recognizance." *Id.* at 2143–44. The Committee on Expenditures in the State Department reported articles of impeachment against Seward, but the full House did not vote on them before the legislative session ended. Chafetz, *Executive Branch Contempt*, at 1137. On the last day of the session, the Judiciary Committee reported that Seward should not be compelled to incriminate himself during the pendency of impeachment proceedings. *Id.* Seward was never found guilty of contempt, and he did not challenge his arrest. *Id.*

Second, in 1916, the House found that H. Snowden Marshall, the U.S. Attorney for the Southern District of New York, was guilty of contempt of Congress for sending and simultaneously releasing to the press an "unparliamentary and manifestly ill tempered" letter to a House subcommittee that was investigating him for misconduct. *Marshall v. Gordon*, 243 U.S. 521, 530–32 (1917). The House then issued a formal warrant for Marshall's arrest, the Sergeant at Arms executed that warrant in New York, and Marshall filed a petition for habeas corpus. *Id.* at 532. The district court denied the petition, *United States ex rel. Marshall v. Gordon*, 235 F. 422, 433 (S.D.N.Y. 1916) (Hand, J.), but the Supreme Court reversed on the theory that the House had exceeded the scope of its authority in holding him in inherent contempt for conduct that did not obstruct the House's legislative duties, *Marshall,* 243 U.S. at 546 ("[T]he contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties.").

Neither of these two instances involved an assertion of executive privilege. To our knowledge, Congress has never invoked its inherent contempt power to arrest or prosecute an Executive Branch official for refusing to disclose subpoenaed materials over which the President asserted executive privilege.

II.

We recently reaffirmed the Office's well-established position that the separation of powers precludes application of the criminal contempt of Congress statute to Executive Branch officials who comply with the President's direction not to disclose materials over which the President asserted executive privilege. *See* Memorandum for Merrick Garland, Attorney General, from Christopher Fonzone, Assistant Attorney General, Office of Legal Counsel, et al., *Re: Executive Privilege Assertion for Audio Recordings* at 4 (May 15, 2024). We noted that the rationale behind this position is detailed in a 1984 opinion of our Office, *id.* (citing *Prosecution for Contempt*, 8 Op. O.L.C. at 102), which explains how application of the criminal contempt statute to an official who complies with a presidential assertion of executive privilege would "immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions," *Prosecution for Contempt*, 8 Op. O.L.C. at 136. Specifically, the opinion explains how the possibility of criminal contempt would put Executive Branch officials "to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege," and the President would thus be faced with the "untenable position of having to place a subordinate at the risk" of prosecution in order to carry out his constitutional functions. *Id.* Accordingly, the opinion reasoned, if Congress "could use the power of criminal contempt to coerce the President either not to assert or to abandon his right to assert executive privilege," the privilege would be effectively "nullified." *Id.* at 138.

As our 1984 opinion recognized, this same reasoning and conclusion would apply to any attempt by Congress to utilize its inherent contempt powers against an Executive Branch official who asserted a Presidential claim of executive privilege. *Id.* at 140 n.42. Like a prosecution under the criminal contempt statute, Congress's exercise of its inherent contempt power creates a risk of imprisonment or other potential punishment for individuals in these circumstances. And, just as with criminal contempt, if Congress could use inherent contempt to arrest, imprison, or otherwise punish an Executive Branch official for complying with the President's direction to withhold materials over which the President asserted executive privilege, that official would be presented with the untenable choice of risking congressional punishment or defying the President's directive. *See id.* at 136. Therefore, our view is that, just as with criminal contempt, Congress's use of inherent contempt in this manner would drain the President's constitutional privilege of "any practical substance" and intolerably burden the exercise of the President's constitutional functions. *Id.* at 140.

Since 1984, we have repeatedly reaffirmed this view. *See, e.g.*, *Response to Congressional Requests*, 10 Op. O.L.C. at 86; Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Demands to Interview Prosecutors and Review Deliberative Documents in Closed Cases* at 8 (Nov. 23, 1993); *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, at *20 (May 20, 2019); *Congressional Oversight of the White House*, 45 Op.

O.L.C. __, at *49 (Jan. 8, 2021). And although no court has ruled on whether Congress may use its inherent contempt authority to arrest or punish an Executive Branch official for withholding subpoenaed materials on executive privilege grounds, the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia have both credited our Office's views on this issue. *See Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 776 (D.C. Cir. 2020) (en banc) ("[T]he 'contempt of Congress statute does not require and could not constitutionally require a prosecution' of an Executive Branch official who defies a congressional subpoena on the basis of Executive privilege . . . [and] detaining [a former Executive Branch official] pursuant to the House's inherent contempt authority[] is similarly impracticable." (quoting *Prosecution for Contempt*, 8 Op. O.L.C. at 142)); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 92 (D.D.C. 2008) ("[T]here are strong reasons to doubt the viability of Congress's inherent contempt authority vis-a-vis senior executive officials." (citing *Prosecution for Contempt*, 8 Op. O.L.C. at 140 n.42, and *Response to Congressional Requests*, 10 Op. O.L.C. at 83)).

History also supports our Office's position that Congress may not use its inherent contempt authority against an Executive Branch official who withheld subpoenaed materials after a presidential privilege assertion. As noted above, Congress, as far as we know, has never taken such a step before, despite numerous "highly visible battles over the subject of executive privilege." *Prosecution for Contempt*, 8 Op. O.L.C. at 131. Our 1984 opinion also observed that, when Congress enacted the criminal contempt of Congress statute, there is reason to believe it did not understand its inherent contempt power as applying to Executive Branch officials withholding information based on a presidential privilege claim. In particular, the opinion noted that "the legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive" with Congress's inherent contempt power, *id.* at 140 n.42 (citing Cong. Globe, 34th Cong., 3d Sess. 406 (1857) (statement of Rep. Davis)), and that "[n]either the legislative history nor the historical implementation of the contempt statute supports the proposition that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of privilege," *id.* at 129. And, in any event, since "longstanding practice is a consideration of great weight in cases concerning the allocation of power between the two elected branches of Government," including and perhaps especially in the areas of congressional oversight and executive privilege, *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (cleaned up), the fact that Congress has never used its inherent contempt authority in this manner is highly suggestive of the fact that it lacks the power to do so, *cf. Printz v. United States*, 521 U.S. 898, 905 (1997) ("[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.").

We thus continue to adhere to the Executive Branch's longstanding position that the constitutional separation of powers precludes Congress from using its inherent contempt authority to arrest or punish an Executive Branch official who complies with the President's direction not to disclose materials over which the President asserted executive privilege.[1]

[1] In the time available, we have limited our analysis in this memorandum to whether the separation of powers allows Congress to arrest or imprison an Executive Branch official who complies with the President's direction not to disclose materials over which the President asserted executive privilege. In so doing, we follow our Office's precedents in this area, which similarly focus on the separation of powers. This focus should not be taken to suggest

Therefore, any attempt by the House to use its inherent contempt authority against you for not disclosing the materials related to the investigation conducted by Special Counsel Robert K. Hur over which the President has asserted executive privilege would be unconstitutional.

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that Congress's use of inherent contempt in these circumstances could not present other constitutional defects. We have previously noted, for example, that subjecting an Executive Branch official to imprisonment or punishment for "obeying an express Presidential order" to withhold materials that the President determined were covered by executive privilege could raise "a serious due process problem." *Prosecution for Contempt,* 8 Op. O.L.C. at 134 n.34.