



U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

July 10, 2024

MEMORANDUM

TO: Merrick Garland, Attorney General

FROM: Christopher Fonzone, Assistant Attorney General CCF

RE: Whether Congress May Use Its Inherent Contempt Authority to Fine Executive Branch Officials Who Withhold Subpoenaed Materials Based on a Presidential Assertion of Executive Privilege

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. On June 24, 2024, this Office advised you that it would be unconstitutional for the House of Representatives to use its inherent contempt authority to arrest or imprison you for not disclosing these subpoenaed materials. *See* Memorandum for Merrick Garland, Attorney General, from Christopher Fonzone, Assistant Attorney General, *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* at 4–5 (June 24, 2024) (“June 24 Memorandum”). On July 9, 2024, a Member of the House of Representatives introduced a resolution that would, rather than order your arrest, impose fines of \$10,000 per day against you until you comply with the relevant subpoena. *See* H.R. Res. 1344, 118th Cong. (2024) (“July 9 Resolution”). You have thus asked us whether our June 24 advice applies if the House attempts to use its inherent contempt power not to arrest you, but rather to fine you for declining to disclose subpoenaed materials at the President’s direction based on his assertion of executive privilege. This memorandum concludes that it does.

Our June 24 Memorandum reaffirmed the Executive Branch’s longstanding position that the separation of powers precludes Congress from utilizing its inherent contempt power to arrest, imprison, or punish an Executive Branch official for complying with the President’s assertion of executive privilege and direction not to produce the subpoenaed materials. *See, e.g., 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*”); *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. ___, at *20 (May 20, 2019) (“*Testimonial Immunity of the Former Counsel*”). While the anticipated congressional action addressed in our June 24 Memorandum was arrest by the House Sergeant-at-Arms, there is no principled basis for treating fines like those the July 9 Resolution would impose differently than arrests in these circumstances.

Assuming the House has the authority to issue fines,¹ our June 24 Memorandum makes clear that the House could not constitutionally do so here. As we explained, it would be “unprecedented for Congress to use its inherent contempt power”—through arrest, fines, or otherwise—“against an Executive Branch official who withholds subpoenaed materials on the orders of the President after the President asserts executive privilege over the materials.” June 24 Memorandum at 2. Moreover, if Congress could use inherent contempt to impose sanctions on 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.” *Id.* at 3. Indeed, whether Congress chooses to order an Executive Branch official’s arrest or to impose sanctions on the official in the form of fines, its use of inherent contempt “would drain the President’s constitutional privilege of ‘any practical substance’ and intolerably burden the exercise of the President’s constitutional functions.” *Id.* (quoting *Prosecution for Contempt*, 8 Op. O.L.C. at 140); see also *Testimonial Immunity of the Former Counsel* at *20 (“The constitutional separation of powers bars Congress from exercising its inherent contempt power in the face of a presidential assertion of executive privilege.”).

We therefore conclude that it would be unconstitutional for the House to use its inherent contempt authority to impose fines like those contemplated by the July 9 Resolution 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.

¹ Our June 24 Memorandum analyzed “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,” and we noted that, given the limited time available, our focus on the separation of powers “should not be taken to suggest that Congress’s use of inherent contempt in these circumstances could not present other constitutional defects.” June 24 Memorandum at 4–5 n.1. We repeat that disclaimer here. For instance, our focus on the separation of powers here should not be taken to suggest that Congress’s inherent contempt authority includes the authority to impose fines. Indeed, as far as we are aware, neither House of Congress has ever attempted to issue a fine using its inherent contempt power. See Todd Garvey, Cong. Research Serv., R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance* at 34 (Mar. 27, 2019) (“Neither the House nor the Senate has ever imposed a monetary penalty through the exercise of inherent contempt[.]”). Similarly, fines like those contemplated by the July 9 Resolution could present other constitutional defects, such as a “serious due process problem” that might result from subjecting an Executive Branch official to punishment for “obeying an express Presidential order” to withhold materials that the President determined were protected by executive privilege. *Prosecution for Contempt*, 8 Op. O.L.C. at 134 n.34.