

ROLL CALL

Congress' 'Contemptuous' Power

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The story goes something like this: A president fires nine U.S. attorneys for purely political reasons. An enraged Congress opens an investigation, eventually subpoenaing the president's former top aides. The president refuses to comply, instructing his former aides to remain mute. Congress responds, approving a citation to hold the president's aides in contempt. Then, as if scripted by Kafka himself, the contempt citation lands on the desk of the president's own political appointee — the U.S. attorney — for enforcement.

This bizarre twist stems from an 1857 law that empowers Congress to issue a contempt citation against a recalcitrant witness. Standing alone, however, that citation means little. To enforce it, Congress must forward it to the U.S. attorney who has a "duty," the statute says, to seek an indictment.

But what if the U.S. attorney does not indict? What if the president orders him not to file charges? Or what if the president fires him before any charges are filed?

Congress could open another investigation, the president could refuse to comply, Congress could issue more contempt citations, and the U.S. attorney could ... you get the point.

Certainly, Congress has other tools at its disposal. But with each tool, the story has the same ending. For instance, Congress has an "inherent contempt" power, which allows it to prosecute a wayward witness. The problem is that "inherent contempt" requires a trial before the Senate or the House. The last one took place more than 70 years ago and lasted more than a week. The American public does not have the patience for such theater today.

Congress can always pursue civil contempt. That route, however, is littered with limitations. The punishment is less severe than a criminal sanction, does not apply to House proceedings and does not cover executive branch officials.

That leaves two purely political tools. Congress can withhold funds from the executive branch or refuse to confirm a presidential nominee. But these tools also are far from perfect. It is Congress — not the president — that takes the heat when it cuts off funding. And with less than two years left in the president's term, the Senate's power to withhold confirmation is not much of a power at all.

What all of this means is quite simple: When in a pitched battle with the executive branch, Congress is very ill-equipped.

A few comparisons prove the point.

The federal courts have more power to impose contempt sanctions than their supposedly coequal branch of government. Under the Federal Rules of Criminal Procedure, a federal court may punish a person who commits criminal contempt without the need for an indictment or a hearing.

The all-powerful secretary of Agriculture may “invoke the aid” of the federal court to hold a witness in contempt.

The Federal Communications Commission has identical power.

And, of course, let’s not forget about the registrar of the China Trade Act corporation, who, in the case of “contumacy of any witness,” may invoke the aid of a federal court to subject a witness to contempt.

The ultimate irony is that Congress itself wrote this script. Congress passed the 1857 law limiting its powers while, at a later time, providing the China Trade corporation with an easy path to enforce its will.

It is Congress, therefore, that must fix the problem.

At a minimum, Congress should give itself the same power that others have: a clear and easy means to go to court, in all circumstances, to enforce its contempt citations. Rather than hold more hearings in which former White House officials don’t appear, Congress should change the law so that, in the future, it has the power to chastise the empty chair.

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