
RESTORING EFFECTIVE CONGRESSIONAL OVERSIGHT: REFORM PROPOSALS FOR THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS

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This Article proposes possible legislative reforms to Congress's exercise of its contempt power in combating non-compliance with subpoenas duly issued as part of congressional investigations. With the recent trends in leveraging congressional investigations as an effective tool of separation of powers, this Article seeks to explore the exact bounds of congressional power in responding to executive officers' noncompliance with congressional subpoenas, and whether or not current practice could be expanded beyond what has historically been tried by the legislative branch. This Article provides a brief summary of the historic practice behind different options for responding to non-compliance with subpoenas (inherent contempt power, statutory criminal contempt, and civil enforcement of subpoenas), explores both political and legal incentives that create deficiencies for each option in the context of recent and current ongoing congressional investigations, and includes possible proposals for new avenues of redress for Congress. This Article will also include discussion of controlling Supreme Court decisions that clarify the exact nature of Congress's investigative power and whether these new reform proposals would be in line with past Supreme Court decisions. It also specifically analyzes the option of legislative reform aimed at triggering salary diminution or imposing other fiscal pressures on agency officials as a tool for shaping political incentives that lead to better compliance with congressional subpoenas.

"[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both ... [P]eople who mean to be their own Governors, must arm themselves with the power which knowledge gives."

—James Madison¹

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¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910).

INTRODUCTION

To ensure political accountability and transparency when public interest and demand for inquiry and information reaches its zenith, congressional oversight and investigation remains the uniquely timeless respite provided by the American constitutional system. This perception is even more palpable today when, in the aftermath of a portentous presidential campaign, public pressure for congressional inquiry into many election-related controversies persists.² It is not surprising that this renewed popular awareness about the importance of congressional inquiry coincides with a formative political event, such as a presidential campaign, as many such subject matters of high political interest do not lend themselves to resolution by the judicial branch through criminal investigation.³ They are instead more ripe for political resolution through avenues of congressional investigation.⁴ From precise and productive congressional investigations that led to the enactment of monumental reforms, such as the Federal Reserve Act of 1913 and the Clayton Antitrust Act, to more unpleasant ventures, such as the McCarthy investigations of the 1950s that have equally left their mark on American history, popular perception of the practice has varied greatly.⁵ Understandably, the powers and procedures of congressional investigations are always subject to new challenges and criticisms. Today, these criticisms are often aimed at the increasing cost of high-profile investigations and the increasing tendency for partisan battles that reduce the public's trust in the effectiveness of the process.⁶ Yet, as the pages of American history have turned, Congress has shown incredible malleability in adjusting its response to political obstructions that hinder its investigatory power and has preserved this grant of inherent power, with roots tracing back to the House of Commons' practice in the sixteenth century.⁷

2 Matt Fuller, *Democrats Ask Oversight Committee to Investigate Trump's Potential Conflicts of Interest*, FORBES (Nov. 28, 2016) http://www.huffingtonpost.com/entry/democrats-letter-chaffetz-trump-conflicts-of-interest_us_583ca265e4b04b66c01b6c5a; Adam Schiff & Jane Harman, *Russia Attacked Our Democracy. That Demands Intense Review by Congress*, WASH. POST (Dec. 23, 2016) https://www.washingtonpost.com/opinions/russia-attacked-our-democracy-that-demands-intense-review-by-congress/2016/12/23/291be72c-c865-11e6-8bee-54e800ef2a63_story.html?utm_term=.5840829676e0; Chas Danner, *Trump Asks Congress to Investigate Obama Over Wiretap that White House Refuses to Provide Evidence For*, N.Y. MAG. (Mar. 5, 2017) <http://nymag.com/daily/intelligencer/2017/03/trump-asks-congress-to-investigate-wiretap-conspiracy-theory.html>.

3 See *infra* note 5 and accompanying text.

4 TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 3 (2012) (describing the role of congressional investigations in exposing corruption, inefficiency, or waste). In fact, the Congress's first attempt at asserting its contempt authority involved an investigation into accusations of bribery of its members, a matter more suited for resolution by the legislative body itself, as opposed to the courts. *Id.* at 8–9.

5 See Matthew Mantel, *Congressional Investigations: A Bibliography*, 100 L. LIBR. J. 323 (2008).

6 Michelle Cottle, *What Congress Is Actually Good At*, THE ATLANTIC (Sept. 21, 2016), <http://www.theatlantic.com/politics/archive/2016/09/what-congress-is-actually-good-at/500876/>; Joshua Roberts, *How Much Has Trump-Russia Investigation Cost? Kellyanne Conway Says 'Millions' of Dollars*, NEWSWEEK (June 19, 2017), <https://www.newsweek.com/trump-russia-cost-627204>.

7 See C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 780 (1926), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8117&context=penn_law_review. See also HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 195 (1875) (Hallam traces the first exercise of quasi-judicial contempt power by the House of Commons to the Ferrer's case of 1543).

Today, Congress's investigatory power faces a primary obstacle: the weakness of the congressional subpoena. This has resulted in the diminishment of Congress's contempt power—their main coercive tool to address refusals to comply—further weakening Congress's ability to investigate. This problem is heightened when the subject of the congressional subpoena is an executive branch official and the contempt power is exercised against an officer who is under the direct supervision of the President. Practical limitations that prevent Congress from imposing penalties on executive officers who do not comply with congressional subpoenas naturally limit Congress's access to critical information that is necessary for conducting investigations. Without proper reordering of these incentives, these predictable political challenges to congressional investigations effectively delay and hinder inquiries. Beyond the negative impact on the legislative process, this institutional dysfunction imposes a social cost that is visibly reflected in the increasing cost of congressional investigations.⁸

The political challenges contributing to this problem are mainly rooted in how each branch perceives the exact nature of congressional investigations. While the executive branch views the process of congressional oversight as one marked and defined by “negotiation and accommodation” between two co-equal branches, Congress perceives its investigatory power to be synonymous with the legal process carried out by courts of law, with “all indicia of court proceeding.”⁹ This theoretical disagreement colors the recent conflicts associated with the exact proper weight of congressional subpoenas and the options available to the legislative branch in punishing noncompliance with those subpoenas.

This Article seeks to outline the nature of the political and constitutional limitations imposed on congressional committees in enforcing congressional subpoenas and its contempt power, considering this issue through the lens of one of the most recent oversight inquiries into the Internal Revenue Service (IRS) political-targeting scandal. This Article proposes a new solution to said institutional challenge by reexamining the boundaries of Congress's constitutional power to impose monetary fines and penalties for contemptuous behavior by executive officers or introduce wage garnishment measures in response to nonpayment of fines. This Article will analyze the history and tradition of Congress's contempt power, address potential constitutional challenges, and propose ideas for venturing into this new practice.

II. BACKGROUND ON THE IRS INVESTIGATION

In February of 2012, various media outlets began publishing stories that documented anecdotal evidence suggesting that a number of non-profit organizations were facing extra-ordinary scrutiny from the Internal Revenue Service (IRS) in obtaining tax-exemption status under § 501(c)(4) of the Tax Code.¹⁰ These reports suggested that beginning in 2011, an increase in demand for tax-exemption status by non-profit organizations led to an issuance of IRS directives to its lower officials in

⁸ See *supra* note 6 and accompanying text.

⁹ CONSTITUTION PROJECT, *Separation of Powers and Congressional Oversight, Part 1*, C-SPAN, 00:45:25, 00:46:10 (Oct. 25, 2016), <https://www.c-span.org/video/?417428-1/discussion-focuses-separation-powers-congressional-oversight&start=4560>.

¹⁰ Mike Opelka, *Is Obama Using the IRS to Silence Opposition Voices?*, THE BLAZE (Feb. 14, 2012), <http://www.theblaze.com/stories/2012/02/14/is-obama-using-the-irs-to-silence-opposition-voices/>.

local branches to further scrutinize qualification for tax-exempt status, incorporating politically charged key words such as “Tea Party” and “9/12 Project.”¹¹ These guidelines were set out in “Be on the Lookout” (BOLO) documents sent to various IRS offices. In June 2011, the then-acting Director of Exempt Organizations, Lois Lerner, a Senior Executive Service Employee, was advised of this practice, two years prior to the disclosure of this practice to the members of Congress.¹² In March of 2012, IRS Commissioner Doug Shulman testified before the House Ways & Means Subcommittee on Oversight that the IRS had not targeted any conservative organizations.¹³

Pursuant to media reports, in February 2012, Representative Darrell Issa (R-CA) and Representative Jim Jordan (R-OH), on behalf of the House Oversight Committee, asked the Treasury Inspector General for Tax Administration (TIGTA) to conduct a review into the IRS allegedly applying erroneous scrutiny to certain applications based on political considerations.¹⁴ In May 2013, the TIGTA issued its report and concluded that the IRS had in fact used “inappropriate criteria” in determining tax-exempt status for certain political advocacy groups.¹⁵ The report, however, indicated that IRS officials continued to maintain that the keywords were used “as shorthand to efficiently manage a deluge of new political advocacy groups.”¹⁶ Subsequently, Attorney General Eric Holder announced that the FBI would initiate an investigation to determine whether any criminal violations had taken place at the IRS.¹⁷ After pressure from the White House, the Acting Commissioner for the IRS, Steve Miller, resigned in the summer of 2013.¹⁸ While testifying before the House Committee on Oversight and Government Reform in May of 2013, IRS official Lois Lerner pleaded the Fifth Amendment and refused to testify.¹⁹ Reports also indicated that Lerner refused to resign despite the IRS

11 Issa Talks IRS Targeting Investigation, *Previews Thursday's IRS Conference Spending Hearing on CNN SOTU*, COMM. ON OVERSIGHT & GOV'T REFORM (June 2, 2013), <https://republicans-oversight.house.gov/release/issa-talks-irs-targeting-investigation-previews-thursdays-irs-conference-spending-hearing-on-cnn-sotu/>.

12 Kelly Phillips Erb, *Updated: Timeline of IRS Tax Exempt Organization Scandal*, FORBES (Mar. 2, 2015), <http://www.forbes.com/sites/kellyphillips/2015/03/02/updated-timeline-of-irs-tax-exempt-organization-scandal/#1975dea27b2b>; *FBI Investigation Documents of IRS Scandal*, JUDICIAL WATCH (July 27, 2016), <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-fbi-investigation-documents-irs-scandal/>.

13 Rachael Bade, *Timeline of IRS Scandal*, POLITICO (Aug. 22, 2014), <http://www.Politico.com/story/2014/09/timeline-of-the-irs-scandal-111185>.

14 *Investigation of the IRS*, HOUSE REPUBLICANS https://www.gop.gov/solution_content/irs-investigation/ (last visited Apr. 18, 2019).

15 TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF TREASURY, NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

16 Juliet Eilperin & Zachary A. Goldfarb, *Criminal Probe of IRS Launched as Report Details Targeting of Conservative Groups*, WASH. POST (May 14, 2013), https://www.washingtonpost.com/business/economy/holder-orders-fbi-justice-probe-of-irs/2013/05/14/7891fde6-bcc0-11e2-9b09-1638acc3942e_story.html?utm_term=.9ed7b8e7feab; see TREASURY INSPECTOR GEN. FOR TAX ADMIN, *supra* note 15 at 7.

17 *Id.*

18 Bade, *supra* note, at 13.

19 Ed O'Keefe & William Branigin, *Lois Lerner Invokes Fifth Amendment in House Hearing on IRS Targeting*, WASH. POST (May 22, 2013), https://www.washingtonpost.com/politics/lois-lerner-invokes-fifth-amendment-in-house-hearing-on-irs-targeting/2013/05/22/03539900-c2e6-11e2-8c3b-0b5e9247e8ca_story.html?tid=a_inl&utm_term=.e70bd039314d.

Commissioner's request, but was put on administrative leave and continued to receive federal pay and benefits.²⁰ Political criticism of the IRS's actions were further intensified in reaction to related news that the Agency had given its employees \$70 million in bonuses in conflict with the Office of Management and Budget's request to all agencies to halt these payments due to budgetary constraints.²¹ It was also reported that Lois Lerner had received sizable retention bonuses during her time at the IRS.²² Lois Lerner eventually resigned in September 2013.²³

In December 2013, following a 59-36 confirmation vote, John Koskinen was sworn in as the new IRS Commissioner.²⁴ The FBI investigation ultimately found evidence of "a mismanaged bureaucracy enforcing rules about tax-exemption", but did not find the indiscretion to rise to the level of violation of criminal law, further exacerbating the Republican legislators' political suspicions.²⁵ During an address to the National Press Club in April 2014, John Koskinen stated that the IRS had spent close to \$14 million in ensuring compliance and cooperation with various ongoing investigations related to the scandal, including four separate congressional investigations.²⁶ In May 2014, the House of Representatives, dissatisfied with Lerner's lack of cooperation in clarifying her role in the administration of the program, passed H. Res. 574 by a vote of 231-to-187, holding Lerner in contempt of Congress for refusal to comply with subpoenas issued by the Committee on Oversight and Government Reform.²⁷

The IRS's internal oversight of the emails that were subject of congressional investigation was furthered questioned when in June 2014, the Agency told Congress that it had "determined that Ms. Lerner's computer [had] crashed in mid-2011," and that some of her emails were lost.²⁸ The Treasury Department and the Department of Justice (DOJ) continued to investigate whether the disappearance of the emails could be linked to any criminal activity.²⁹ DOJ announced that it would not pursue criminal contempt charges against Lois Lerner, finding that she had not waived her Fifth Amendment rights and advised Congress that DOJ's own investigation would also not result in filing of charges against Lerner. Representative Jason Chaffetz (R-UT) and the House Judiciary Committee Chairman Bob Goodlatte (R-VA) turned their attention to the IRS Commissioner John Koskinen.³⁰

20 Ed O'Keefe, *Lois Lerner Put on Administrative Leave by IRS*, WASH. POST (May 23, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/05/23/lois-lerner-put-on-administrative-leave/?utm_term=.091f52b9cb0d.

21 Lauren French, *IRS Bonuses Fuel GOP Anger*, POLITICO (July 19, 2013), <http://www.POLITICO.com/story/2013/06/chuck-grassley-irs-to-pay-70m-in-employee-bonuses-093044>.

22 C.J. Ciaramella, *Ex-IRS official Lois Lerner Received \$129,000 in Bonuses, Records Show*, FOX NEWS (Feb. 25, 2015), <http://www.foxnews.com/politics/2015/02/25/ex-irs-official-lois-lerner-received-12000-in-bonuses-records-show.html>.

23 Bade, *supra* note 13.

24 Erb, *supra* note 12.

25 Devlin Barret, *Criminal Charges Not Expected in IRS Probe*, WALL ST. J. (Jan. 13, 2014), <http://www.wsj.com/articles/SB10001424052702303819704579318983271821584>.

26 Erb, *supra* note 12.

27 Ed O'Keefe, *Post Politics House Votes to Hold Lois Lerner in Contempt of Congress*, WASH. POST (May 7, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/05/07/house-votes-to-hold-lois-lerner-in-contempt-of-congress/?utm_term=.d98c772a0f7a; Erb, *supra* note 12.

28 Bade, *supra* note 13.

29 *Id.*; see also Erb, *supra* note 12.

30 Rachael Bade & John Bresnahan, *DOJ: No Contempt Charges for Former IRS Official Lerner*, POLIT-

Koskinen's tenure at the IRS began years after the alleged misconduct at the IRS local branches had already taken place, but members of the House believed that Koskinen's internal management of the Agency obstructed the congressional investigation process.³¹ In February 2014, eight weeks after Koskinen had taken the helm at the IRS, the House Oversight and Government Reform Committee issued a subpoena asking for any and all emails to and from Lois Lerner and others in the Cincinnati and Washington offices involving those in charge of making decisions about non-exempt status scrutiny. Generally, the dissatisfaction expressed by the members of the House emanated from the time it took the Agency to notify the Committee that career officials in West Virginia had erased backup tapes containing many of Lerner's emails that would have been covered by the subpoena.³² Although many members of the House called for Koskinen's impeachment,³³ the House Oversight Committee eventually voted to censure the IRS Commissioner for engaging "in a pattern of conduct inconsistent with the trust and confidence placed in him."³⁴ The Republican voices in the House claimed that the existence of the subpoena imposed a legal duty on the Commissioner to preserve all relevant documents, while many Democratic leaders found absence of malicious intent to obstruct to be critical in absolving Koskinen of any wrongdoing.³⁵ More specifically, the Republican members pointed to Koskinen's comments before the Senate Finance Committee in Spring 2014—which expressed his belief that every email had been preserved—as indication that Koskinen attempted to mislead the lawmakers.³⁶ The House Resolution also expressed the sense of the House that Koskinen should be barred from receiving his pension, a move that lacks any legally binding effect.³⁷ At the conclusion of the investigations, Rep. Elijah Cummings (D-MD), Ranking Member of the House Oversight Committee, announced that the investigation into the IRS handling of the tax-exempt scandal had cost taxpayers \$20 million.³⁸

ICO (Apr. 1, 2015), <http://www.POLITICO.com/story/2015/04/lois-lerner-no-contempt-charges-justice-department-116577>.

31 Erb, *supra* note 12.

32 Norm Ornstein, *The Show Trial of IRS Commissioner John Koskinen*, THE ATLANTIC (June 22, 2016), <http://www.theatlantic.com/politics/archive/2016/06/the-show-trial-of-irs-commissioner-john-koskinen/488147/>.

33 Katy O'Donnell, *House Panel Votes to Censure Koskinen*, POLITICO (July 15, 2016), <http://www.POLITICO.com/story/2016/06/john-koskinen-house-censure-224374>.

34 *Id.* In expressing the sense of dissatisfaction shared by the Republican members of the House in imposing punishment on Koskinen, Representative Jason Chaffetz (R-UT), the Chairman of the House Oversight and Government Reform Committee stated, "We're left with no other remedy. The F.B.I. is not going to take action. The President is not going to take action, but clearly he provided false testimony." David M. Herszenhorn & Jackie Calmes, *House to Consider I.R.S. Commissioner's Impeachment*, N.Y. TIMES (May 23, 2016), <http://www.nytimes.com/2016/05/24/us/politics/house-set-to-begin-irs-commissioners-impeachment-hearing.html>.

35 O'Donnell, *supra* note 33; Lisa Rein, *Republicans censure IRS chief they accuse of lying to Congress*, WASH. POST (June 15, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/06/15/irs-chief-censured-by-gop-lawmakers-in-rare-vote-over-treatment-of-conservatives/?utm_term=.e3b58e717b54.

36 Lynneley Browning & Henri Gendreau, *IRS Chief Koskinen Calls Impeachment 'Improper' at Hearing*, BLOOMBERG (Sept. 21, 2016), <https://www.bloomberg.com/politics/articles/2016-09-21/irs-chief-koskinen-calls-impeachment-improper-during-hearing>.

37 O'Donnell, *supra* note 33.

38 Bade, *supra* note 13.

III. CONGRESS'S CONTEMPT POWER

Congress's investigatory powers are historically linked to the transfer of similar powers as exercised by the English House of Commons.³⁹ The House of Commons itself exercised its investigatory powers based on the presumption that the power to obtain the information necessary for lawmaking is incidental to, and a necessary condition for, carrying out the privilege of law-making.⁴⁰ In the foundational case *McCulloch v. Maryland*, Chief Justice John Marshall stated that powers that are necessary for the preservation of an express grant of power and are reasonably appropriate for carrying out that power are assumed to accompany that grant of power.⁴¹ Principally, this rule indicates that the Constitution's grant of "all legislative power" to Congress, implies the power to investigate and obtain the information necessary for legislating.⁴² Congress's power to investigate is deemed to operate at its peak when the subject of inquiry is "waste, fraud, abuse, or maladministration within a government department."⁴³

To ensure the effectiveness of its investigational process, Congress is also armed with contempt power.⁴⁴ Although the most recent exercises of the contempt power have been closely associated with addressing noncompliance with congressional subpoenas, the Supreme Court has recognized that the scope of the contempt power extends to *all* actions designed to "remov[e] an existing obstruction to the performance of [the legislature's] duties."⁴⁵ This understanding imposes two restrictions on Congress's contempt power. First, Congress's use of its contempt power to remove obstructions can only be exercised in furtherance of a legislative purpose. For example, if it is evident that Congress's true intention in using the contempt power has been to aid the prosecution of pending law suits, its powers can be restricted.⁴⁶ Second, Congress's contempt power should only be used to combat those actions that directly "obstruct its deliberative proceedings."⁴⁷ Refusal to appear for testimony before a committee or a refusal to produce requested documents can constitute this form of obstruction.⁴⁸

When noncompliance with a duly-issued congressional subpoena persists, Congress maintains a number of options in exercising its power to punish for contempt. First, Congress preserves the extreme power to physically arrest and detain the individual responsible for the obstruction, under what is known as the

39 See Potts, *supra* note 7, at 669, 708. Further evidence of this direct transfer of power from the House of Commons to the legislative bodies in America can be shown through the examples of the earliest uses of the legislative contempt power by the colonial state assemblies in states such as New York and Virginia. *Id.* at 701–06.

40 John W. Gilligan, *Congressional Investigations*, 41 J. CRIM. L. & CRIMINOLOGY 618, 618 (1951).

41 *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819); see also *Anderson v. Dunn*, 19 U.S. 204, 218–19 (1821) ("The necessity of self-defence is as incidental to legislative, as to judicial authority.").

42 See U.S. CONST. art. I, §1; *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) ("In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate.").

43 GARVEY & DOLAN, *supra* note 4, at 7.

44 See generally *id.*

45 See *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935).

46 See *Sinclair v. United States*, 279 U.S. 263 (1929). See also *Kilbourn v. Thompson*, 103 U.S. 168 (1880) (finding that Congress could not use its investigatory power to inquire into individuals' personal lives).

47 GARVEY & DOLAN, *supra* note 4, at 9–10.

48 *Id.* at 5–6.

“inherent contempt power.”⁴⁹ This power is carried out through an order to the Sergeant-in-Arms of Congress, and the contemnor can be held in custody until the information sought is provided or until the end of the legislative session.⁵⁰ However, given the unseemly nature of practicing this power, Congress has not leveraged its inherent contempt powers since 1935.⁵¹

As a second option, pursuant to the criminal contempt statute, first enacted in 1857 and codified today at 2 U.S.C. §§ 192 and 194, Congress has the power to certify a contempt citation that presents the U.S. Attorney General with the opportunity for criminal prosecution of the contemnor.⁵² The criminal contempt statute was envisioned to be a substitute for the inherent contempt power, and the legislative history behind the Act suggests that the lawmakers perceived the law to apply to executive branch officials.⁵³

Third, Congress may decide to pursue civil litigation in order to obtain a federal judgment declaring that the contemnor is legally obligated to comply with congressional subpoenas. Civil action is a particularly attractive option for Congress when the subpoena is directed at federal officials, as the Department of Justice is often reluctant to pursue criminal action in those situations, particularly if the law suit is deemed to implicate issues of executive privilege.⁵⁴ Currently, institutional standing to bring civil suits in federal courts is based on an existing statutory authority in the Senate and established through separate House resolutions for committees in the House.⁵⁵ In both criminal contempt suits and civil litigation, Congress’s objective is to hold the opposing party in contempt of court.⁵⁶ Noncompliance with a court order can then result in contempt sanctions issued by the court. Court sanctions can take the form of a civil coercive sanction which includes imprisonment or issuance of periodic fines until compliance is achieved.⁵⁷

49 The power to “fix a prolonged term of imprisonment” was also practice by the House of Commons in its contempt power and transferred in whole to the American legislative body. See *Marshall v. Gordon*, 243 U.S. 521, 533 (1917).

50 GARVEY & DOLAN, *supra* note 4, at 8; see also *Anderson v. Dunn*, 19 U.S. at 231 (1821).

51 GARVEY & DOLAN, *supra* note 4, at 17. Hesitance to subject federal officials to physical arrest is not unique to the legislative branch, Article III courts armed with the same contempt power are also “adamantly averse” to exercising that privilege, historically reserving that power for “exceptional incidents.” See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 745 (2018).

52 2 U.S.C. §§ 192, 194 (2012).

53 GARVEY & DOLAN, *supra* note 4, at 42–43 (citing 42 CONG. GLOBE 429 (statement of Rep. Marshall) (1857)).

54 See Memorandum from the Office of Legal Counsel on Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of

Executive Privilege, to the U.S. Attorney Gen. 140 (May 30, 1984) (on file with author) (“Thus, when the major impact on the President’s ability to exercise his constitutionally mandated function is balanced against the relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs, we believe that the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of executive privilege.”).

55 House resolutions often include the civil contempt resolutions and empower the Committee in charge of the investigation to sue the contemnor on behalf of the body. See e.g., John Bresnahan & Seung Min Kim, *Holder Held in Contempt*, POLITICO (July 28, 2012), <http://www.Politico.com/story/2012/06/holder-held-in-contempt-077988>

56 GARVEY & DOLAN, *supra* note 4, at 27.

57 MOORE’S MANUAL—FEDERAL PRACTICE AND PROCEDURE § 10A.20 (2015).

A. *CURRENT CHALLENGES IN ENFORCING CONGRESSIONAL CONTEMPT POWER AGAINST AN EXECUTIVE BRANCH OFFICIAL*

Despite the number of alternative approaches available to the members of Congress in exercising the contempt power, all the aforementioned remedies have recently developed their own problems. The inherent contempt power has understandably grown to be viewed as an unseemly and particularly inefficient method of ensuring compliance from executive officers.⁵⁸ Similarly, the power to remove obstructions through criminal contempt statutes faces predictable political challenges that arise out of DOJ's discretion in refusing to file criminal charges. Although the criminal contempt statute provides that "it shall be" the duty of the U.S. Attorney "to bring the matter before the grand jury for its action," absent conclusive judicial determination to the contrary, DOJ has refused to present the grand jury with contempt citations issued in many cases.⁵⁹ Most recently, in four high-profile investigations involving sitting or former senior executive officials and cabinet members (former White House Counsel Harriet Miers, EPA Administrator Anne Gorsuch Burford, White House Chief of Staff Joshua Bolten, and Attorney General Eric Holder), a certification of contempt citation to the U.S. Attorney for the District of Columbia by Congress did not result in filing of criminal charges.⁶⁰ In these cases, DOJ refused to file criminal charges, either citing its belief that the protections of executive privilege bar the attorneys from filing charges or that the Department does not find the actions targeted by the contempt citation to constitute a federal crime.⁶¹

As Congress has become more accustomed to the futility of relying on the executive branch for criminal prosecution of federal officials found in contempt of Congress, the House has developed the practice of accompanying its criminal contempt resolution with resolutions authorizing agents to seek civil enforcement of congressional subpoenas.⁶² However, this avenue faces its own practical limitations and challenges. First, because the main aim of resorting to assistance from the judicial branch in civil litigation is to force compliance with a duly issued subpoena, the courts are presented with politically sensitive challenges that might increase the possibility of triggering the political question doctrine in dismissing the case.⁶³ More importantly, the larger issue contributing to the ineffectiveness of civil litigation is that this option is exceedingly more costly and time consuming.⁶⁴ Understandably,

58 GARVEY & DOLAN, *supra* note 4, at 22.

59 *Id.* at 27.

60 *Id.* at 52. In the context of the contempt citation issued against Attorney General Eric Holder, Deputy Attorney General James Cole informed the House on the same day that the Department will not bring the citation before the grand jury, as the Department had determined that the Attorney General's actions did not constitute a crime. *Id.*

61 *Id.* at 55.

62 *Id.* at 52.

63 *Id.* at 30 (*citing* comments by the then-Assistant Attorney General Antonin Scalia positing that such cases involve "the very type of 'political question' from which ... the courts [should] abstain."); U.S. House of Representatives v. Holder, No. 12-1332, 2013 U.S. Dist. LEXIS 140994, at *28 (D.D.C. 2013) (refusing to dismiss the case under the political question doctrine).

64 See CONSTITUTION PROJECT, *Separation of Powers and Congressional Oversight, Part 1*, C-SPAN, 1:00:00 (Oct. 25, 2016) (discussing the factor of time in pursuing civil litigation in the context of congressional investigations), <https://www.c-span.org/video/?417428-1/discussion-focuses-separation-powers-congressional-oversight&start=4560>; see also *Prosecution of Contempt of Congress: Hearing Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 98th Cong. 24 (1983) (statement of Stanley Brand) ("As a lawyer involved in civil litigation, if you allow me to set foot into

a conglomeration of these limitations completely dismantles Congress's efforts to conduct fruitful investigations of high-profile matters involving senior executive officers, as the IRS investigations show. In this light, the discussion of other potential avenues for redress can open up possibilities for resolving this delicate issue of separation of powers without risking a constitutional crisis.

Entertaining new options for enforcement of subpoenas will rejuvenate congressional investigations and restore the legislative branch's equal status. First, as the Court noted in *McGrain v. Daugherty*, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information ... recourse must be had to others who possess it."⁶⁵ In the context of the IRS investigations, remedial agency regulations, which are drafted by the IRS and the Treasury Department pursuant to the rulemaking power previously delegated to them, ultimately replaced potential standalone legislative reform that could have arisen out of a full investigation by Congress.⁶⁶ The growth of the administrative state, in conjunction with the executive branch's growing willingness to assert executive privilege in withholding information relating to the internal process of the agencies from Congress,⁶⁷ effectively ensures that the administrative agencies expand their power to legislate in response to scandals at the expense of the legislative body that finds itself unable to obtain the requisite information to frame a legislative response.⁶⁸

Second, Congress's investigatory power has always been intrinsically linked with Congress's appropriation power.⁶⁹ As more popular criticism of the increasing cost of congressional investigations amass, a new approach that is focused on reining in this cost can show that Congress is serious about self-preserving the power of the purse and ensuring fiscal accountability.⁷⁰ The two aforementioned justifications for restoring Congress's contempt power coalesce in the most recent perceptible trends in the relationship between the federal courts and the federal agencies in the context

Federal district court to litigate a claim of privilege, I can guarantee you I will be there for at least 3 years, well beyond the time it takes for this Congress to go through one of its 2-year cycles.").

65 *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927).

66 *Statement for the Record: The Internal Revenue Service's Response to Committee Recommendations Contained in Its August 5, 2015 Report*, 114th Cong. 92 (2015) (statement of Stephen Spaulding, Senior Policy Counsel & Legal Dir., U.S. Senate Comm. on Fin.) <https://www.finance.senate.gov/imo/media/doc/22724.pdf>.

67 See generally TODD GARVEY, CONG. RESEARCH SERV., RL42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS (2012).

68 Courts have already shown concern for this problem, recognizing that sometimes Congress's investigator power may be necessary in order to decide "not to legislate" or "what to appropriate." See *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (emphasis added).

69 See *id.* at 111 ("[Congress's power to investigate] has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate."). In fact, historical survey of legislative investigation as practiced in colonial America shows that even the earliest instances of legislative investigation by colonial assemblies were intrinsically tied with the legislative bodies' power of the purse. The Massachusetts House of Representatives defined the reach of its investigatory power to extend to "any Officer in the pay and service of [the] government" with the goal of obtaining information about "the account of [their] [m]anagement in while in the Public Employ." Potts, *supra* note 7, at 708.

70 Ecochamberlain, *Adding up the Billions Wasted by the House Republicans*, DAILY KOS (Sept. 1, 2014), <http://www.dailykos.com/story/2014/9/1/1326246/-Adding-up-the-billions-wasted-by-the-House-Republicans>. It is important to note that the legislative history behind the criminal contempt statute—Congress's last attempt at expanding its contempt power—indicates that the sponsors found the law's potential in safeguarding the House's appropriation power to be a defense of its constitutionality. See GARVEY & DOLAN, *supra* note 4, at 38–39.

of unruly agency behavior. Recent evidence suggests that federal courts are increasingly and uniformly less likely to sanction federal officials who have been held in contempt of court and have nonetheless continued to ignore judicial orders.⁷¹ Survey of past practice among federal courts shows that although federal judges have in principle defended their power to attach sanctions to contempt findings—by imposing either imprisonment or individual fines against officials—they have shown “virtually complete unwillingness” to carry out those sanctions.⁷² In the specific case of imposition of compensatory or coercive fines on federal officials, the courts’ restrained approach can be attributed to two separation of powers principles: (1) DOJ has repeatedly invoked the principle of federal sovereign immunity in arguing that fines against federal agencies are barred,⁷³ and (2) the Appropriation Clause’s mandate that no money can be drawn from the treasury unless Congress appropriates creates legal uncertainty as to whether federal funds could be used for judicial penalties.⁷⁴ Therefore, in the usual battles between the federal courts and the federal agencies, where federal courts are entertaining the use of their equitable discretion to force agency compliance with a court order through contempt sanctions, stonewalling by the agencies is known to result in prolonged negotiations that can take up to six years before federal judges exercise their equitable power to find agency officials in contempt of court.⁷⁵ In rare instances where district courts have resorted to attaching sanctions to their contempt findings—either imposing fines or ordering imprisonment against federal officials—higher courts have intervened, often at last minute, to block enforcement of sanctions based on technical reasons, always circumventing any pronouncements that would call into question the court’s constitutional power to issue said sanctions.⁷⁶ Therefore, courts remain silent on whether monetary penalties against recalcitrant federal officers are constitutionally available in principle, yet they are clearly burdened by an institutionalized sense of political discomfort and unease in enforcing such sanctions.⁷⁷ However, the field of appropriation law, foreclosing Article III solutions to curbing unruly agency actions, invites congressional action to occupy that empty space.

*B. IMPOSITION OF MONETARY FINES ON EXECUTIVE OFFICERS FOR
CONTEMPTUOUS BEHAVIOR*

With no other conceivable avenue for redress in the IRS investigations, members of the House opened discussions about innovative ways to combat the Agency and the Commissioner’s perceived disobedience. Many legislators recommended using impeachment powers to rectify their concerns.⁷⁸ The fact that Koskinen would have been the first appointed executive branch official to face impeachment since 1876 testifies to the sense of exasperation among legislative officials on shortcomings of their investigatory powers and their inability to punish

⁷¹ See generally Parrillo, *supra* note 51, at 773.

⁷² *Id.* at 686, 697.

⁷³ *Id.* at 712–26.

⁷⁴ *Id.* at 693, 738–71.

⁷⁵ *Id.* at 689 n.13.

⁷⁶ *Id.* at 757–58.

⁷⁷ *Id.* at 766.

⁷⁸ Herszenhorn & Calmes, *supra* note 34.

contemnors.⁷⁹ Nonetheless, many legal commentators found the use of impeachment powers to be inappropriate and unsupported.⁸⁰ Proposed resolutions also aimed to reduce Chief Koskinen's federal salary to zero but were rejected in the House, despite widespread support from many prominent Republican officials including the House Ways and Means Committee Chairman Kevin Brady (R-Texas).⁸¹ Similarly, it was widely reported that Congress lacked the power to pass a resolution denying Koskinen his pension and other federal benefits based on the understanding that this power will implicate the Bill of Attainder Clause of the Constitution.⁸² However, the constitutional dilemmas surrounding these mentioned proposals are exceedingly less pronounced in the context of a different innovative reproach, namely that of issuing contempt citations in the nature of monetary fines.

Although the power to issue contempt citations that impose monetary fines has never been practiced,⁸³ there are few reasons to believe that Congress does indeed possess this power. First, prior judicial pronouncements on the scope of Congress's investigative authority, which have shaped Congress's approach to practicing this power over the years, include distinctly broad and permissive language. Most famously, in *Eastland v. United States Servicemen's Fund*, the Court affirmatively declared that "[t]he scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."⁸⁴ Such language affirms the general understanding that the outer boundaries of Congress's power in this area remain largely unclear and unexplored.

Moreover, in many other areas of constitutional law where clear constitutional grants of power to either branch do not present clear standards for judges to determine the exact contours of that delegated power, legal theory often resorts to the famous maxim that the greater power equals the lesser.⁸⁵ Justice Holmes elucidated this principle by stating that "[e]ven in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."⁸⁶ Federal courts have used the principle in defining the boundaries of their own contempt powers. In *Hutto v. Finney*, the Supreme Court tackled the constitutionality of judicial awards of attorneys' fee

79 Lynnley Browning, *IRS Chief Koskinen Fights First Appointee Impeachment Since 1876*, BLOOMBERG (June 21, 2016), <https://www.bloomberg.com/politics/articles/2016-06-21/irs-chief-koskinen-fights-first-appointee-impeachment-since-1876>.

80 Kelly Phillips Erb, *More Than 100 Law Professors to Congress: Impeaching the IRS Commissioner is a Bad Idea*, FORBES (Aug. 30, 2016), <http://www.forbes.com/sites/kellyphillips/2016/08/30/more-than-100-law-professors-to-congress-impeaching-the-irs-commissioner-is-a-bad-idea/#434a16315d91>.

81 Naomi Jagoda, *House Rejects Measure to cut IRS Chief's Salary to Zero*, THE HILL (July 7, 2016), <http://thehill.com/policy/finance/286913-house-rejects-amendment-to-cut-irs-heads-salary-to-zero>.

82 O'Donnell, *supra* note 33.

83 GARVEY & DOLAN, *supra* note 4, at 16.

84 421 U.S. 491, 504, n.15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. at 111).

85 See, e.g., *Posadas de P.R. Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 340–44 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (finding that the grant of greater power to kill includes the lesser power to detain); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54–55 (1975) (discussing the Supreme Court's opinion in *Sheldon v. Sill*, 49 U.S. 441 (1850), applying the greater means lesser argument in deciding that Congress's power to create federal courts means the power to restrict their jurisdiction). Some previous Court decisions also suggest that the contempt power itself can be considered a lesser power derived from the greater express power to impeach. See *Anderson v. Dunn*, 19 U.S. at 210.

86 *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910).

against state officials who had violated court injunctions; by analogizing to the scope of the courts' contempt power, the Court stated that "principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief."⁸⁷ In the case of Congress's investigatory power and, more specifically, congressional contempt power, the greater power to physically detain and jail a contemnor is not a mere theoretical assertion, but a power traditionally exercised by Congress in numerous instances and affirmatively upheld by the courts.⁸⁸ Furthermore, other constitutional constraints that already limit Congress's imposition of fines and penalties on federal employees (or deduction of federal salaries) can guarantee that the power to fine or to garnish federal salaries of those who are in contempt of Congress, in practice, imposes a monetary harm of lesser severity than the greater power to physically detain.⁸⁹

Additionally, previous Supreme Court opinions on other subjects of first impression involving Congress's investigatory power and the contempt power have repeatedly relied on comparisons with contempt proceedings as they are practiced in the judicial branch, as the closest available analogy. As an example, in analyzing whether an unsworn committee report can form the basis for a warrant issued by the Senate subcommittee, the Court in *McGrain v. Daugherty* drew an analogy between the congressional contempt power and the power of courts of law to punish contemptuous behavior committed in their presence.⁹⁰ Finding that the court of law possessed the power to "order commitments without other proof than their own knowledge of the occurrence," the Court found that the same power must extend to the legislative branch and the congressional committees in charge of investigation in carrying out the same quasi-judicial process.⁹¹ Similarly, in *Kilbourn v. Thompson*,⁹² in analyzing the scope of another quasi-judicial function carried out by Congress—that of trying and impeaching government officials—the Court resorted to the same analogy between the contempt remedies available to the courts of law and the power invested in congressional committees charged with carrying out that quasi-judicial power. Justice Miller noted that that the congressional body in charge of an investigation should be able to carry out that duty "in the same manner and by the use of the same means that courts of justice can in like cases."⁹³ The Court then acknowledged, in dicta, that a power to punish by "fine or imprisonment" is

87 *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978).

88 GARVEY & DOLAN, *supra* note 4, at 15–17.

89 As an example, 15 U.S.C. § 1673 clarifies the amount of disposable earning that can be legally subjected to garnishment.

90 *McGrain v. Daugherty*, 273 U.S. 135, 157 (1927).

91 In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), Justice Miller noted that some similarities between investigatory powers of the legislative body and adjudicatory powers of courts of law stem from the historical fact that the power of congressional investigation, as endorsed by the American constitution, was derived from the practice of the English House of Commons, and that House functioned "as a court as well as a legislative body." Potts, *supra* note 7, at 720. Neither does granting the same power to Congress mean that its powers of investigation will be aggrandized at the expense of the judicial branch, as this rule dictates that Congress will be bound by the same due process restrictions that the courts of law are bound by. See *Anderson*, 19 U.S. (6 Wheat.) at 217 ("[T]he rights of congress on the subject of contempts, have been considered similar and equal to those of the federal courts."); see also *Groppi v. Leslie*, 404 U.S. 496 (1972) (finding that contempt proceeding should comply with the same due process requirements as court proceedings).

92 *Kilbourn v. Thompson*, 103 U.S. at 190.

93 *Id.* at 190.

conceivable so long that the power is carried out in relation to an expressly granted authority.⁹⁴

The contempt power belonging to the federal courts in the United States has historically been perceived to encompass the power to impose fines on the contemnor, with the Judiciary Act of 1789 stating that the federal courts will have the power to punish “[a]ll contempts of authority” by “fine or imprisonment,” finding the two powers synonymous.⁹⁵ Furthermore, the same conclusion follows from the symmetry of separation of powers incident to the equal status of all three branches of government. It has already been recognized and accepted that in controlling its own internal procedures, the judicial branch can participate in quasi-legislative functions by fashioning its own rules of civil and criminal procedure.⁹⁶ These rules then give way to various avenues of civil and criminal contempt exercised by the courts, which include imposition of monetary fines and penalties.⁹⁷ It would logically follow that in carrying out a legislative function, namely investigation, Congress should be granted the quasi-judicial powers to issue monetary fines.

The final justification for Congress’s power to impose fines on contemnors also arises from previous Supreme Court decisions that elevate and recognize the status of contempt powers possessed by the congressional investigatory bodies to that possessed by traditional courts of law. In *Anderson v. Dunn*, in analyzing whether the House possessed the relatively more extreme power to jail a contemnor, Justice White observed that denying Congress the contempt power was inconsistent with the understanding that the same power was available “even to the most inferior magistrates.”⁹⁸ This language indicates that reference to the scope of contempt power exercised by other quasi-judicial bodies that have inferior status to congressional bodies, and the scope of duties assigned to the officers residing over those tribunals, can help assess the exact scope of contempt power available to congressional committees. Administrative agencies charged with quasi-judicial functions serve as an example of a tribunal of inferior status. Although the Supreme Court in *ICC v. Brimson* foreclosed administrative agencies’ use of “authority to compel obedience to [their] orders by a judgment of fine or imprisonment,” more recently courts have attempted to reconcile *Brimson*’s language with cases that followed that decision and showed much greater deference toward quasi-adjudicative practices by administrative agencies.⁹⁹ In *Atlantic Richfield Co. v. United States Department of Energy*, the D.C. Circuit, recognizing that *Brimson* was decided long before “the advent of the ‘modern administrative state’” held that “broad congressional power to

94 *Id.*

95 See Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 76. Today, 18 U.S.C. § 401 codifies the contempt power and gives the federal courts the “power to punish by *fine* or imprisonment, or both, at its discretion,” any disobedience in complying with the court’s orders. For a survey of instances where federal courts have issued individual contempt fines against federal officials or fines that aim to dock agency appropriation, see Parrillo, *supra* note 51, at 53–58.

96 See generally Alexander Volokh, *The Inherent-Power Corollary: Judicial Non-Delegation and Federal Common Law*, 66 EMORY L.J. 1391 (2015).

97 Sasha Volokh, *Can Congress Delegate Procedural Rulemaking Power to Courts?*, WASH. POST (Aug. 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/25/can-congress-delegate-procedural-rulemaking-power-to-courts/?utm_term=.ee29c81e8a14; see also Joseph J. Janatka, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U. L. Q. 429, 431 (1987) (“Generally, courts impose penalties upon attorneys in response to negligently caused inconvenience, delay, intentional obstructions of justice; failure to appear; discovery abuses; default; etc.”).

98 See *Anderson v. Dunn*, 19 U.S. at 219.

99 *ICC v. Brimson*, 154 U.S. 447, 485 (1894).

authorize agencies to adjudicate ‘public rights’ necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency’s adjudicatory proceedings.”¹⁰⁰ The Circuit Court proceeded to limit the reach of *Brimson* to prohibiting administrative agencies from issuing punitive fines or imprisonment without judicial involvement, but upheld the Department of Energy’s power to impose discovery sanctions administratively and without prior court approval so long as some avenues for judicial review remained. Furthermore, since the days of *Brimson*, other inferior judicial officers such as magistrate judges have been increasingly granted more expansive contempt power.¹⁰¹ The justification for granting contempt power in the form of imposition of monetary fines to both administrative tribunals and magistrate judges has mimicked the same reasoning that has justified Congress’s inherent power to detain contemnors—namely, that any quasi-judicial body should be armed with the reasonable tools to remove obstructions to the administration of justice. The Court’s reasoning in *Anderson* therefore would dictate that Congress can exercise the power to issue fines, as this power is currently invested in other inferior magistrates such as federal magistrate judges and quasi-judicial bodies of administrative agencies.

C. THE NEW CONTEMPT POWER AND INSTITUTIONAL BENEFITS

Substituting the old practices in exercising the inherent contempt power with the new approach of imposition of fines or penalties, akin to the power exercised by federal courts, can prove to be fairly useful in facilitating the legislative branch’s attempts to reclaim its investigative power in scenarios such as the IRS investigations. In conjunction with other statutory requirements imposed on the federal agencies to collect any debt owed to the United States by their employees, the imposition of fines can facilitate Congress’s reaction to contemptuous behavior and ensure compliance in a timelier manner. As an example, refusal to comply with contempt citations and payment of fines can further trigger possibility of wage garnishment for federal employees. Previous exercises of appropriation power in targeting public officials’ salaries are outside the context of congressional contempt power and often involve attempts by lawmakers to bring about indirect removal of an official or to impose accountability for an otherwise dissatisfactory performance.¹⁰² Many of these past congressional attempts at halting salary payments for executive officers have been deemed to violate clear constitutional principles such as the prohibition against bills of attainder or the presidential removal powers.¹⁰³ The courts’ analysis of the scope of appropriation powers in other areas of separation of powers generally supports the maxim that Congress cannot use its appropriation powers to “accomplish an unconstitutional objective.”¹⁰⁴ Any analysis

100 *Atlantic Richfield Co. v. Dep’t of Energy*, 769 F.2d 771, 794 (D.C. Cir. 1984).

101 See 28 U.S. Code § 636 (2015) (“A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge’s presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure. 28 U.S.C. § 636(e) (2000)”).

102 See L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 222 (2000).

103 U.S. CONST. art. I, § 9, cl. 3; see also *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (“Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.”).

104 Sutin, *supra* note 102, at 225.

of Congress's potential violation of separation of powers by abusing its appropriation powers will, therefore, likely entail consideration of the exact concerns that drove Congress's decision to restrict funding.¹⁰⁵

Accordingly, Congress cannot use its appropriation powers to enlarge congressional power at the expense of other branches or to encroach on powers directly granted to the other branches.¹⁰⁶ As an example, although Congress does not have the power to refuse appropriation of funds for the President to make treaties, because that power is expressly delegated to the President, it may deny appropriations to implement finished treaties because the House preserves the general power to ensure fiscal responsibility.¹⁰⁷ Similarly, in the context of determining whether the House has acted pursuant to the Constitution in its practice of determining the budget appropriated to the federal courts, the Supreme Court has focused on assessing whether the objective behind appropriation decisions has been to promote fiscal accountability or the illicit desire to frustrate the judicial branch's power to carry out its obligations.¹⁰⁸ This subtle difference distinguishes the theoretical use of contempt fines which are commensurate with the cost of congressional investigations and are mainly designed to compensate congressional committees for the fiscal burdens arising out of noncompliance with subpoenas, from Congress's previous attempts at targeting public officials' salaries, which often had the illicit purpose of removing those officials from office.

In 1943, after investigations by the House Committee on Un-American Activities identified three federal employees to be linked with Communist organizations, the Special Subcommittee of the Appropriations Committee passed an amendment to the annual appropriation bill that relied on the Committee's findings in denying any appropriated money for the use of salary or compensation payment to those named federal employees. In *United States v. Lovett*, Justice Black held that the appropriation amendment was an unconstitutional bill of attainder.¹⁰⁹ The *Lovett* principle, as it came to be, stands for the proposition that "no pay provisions" directed at specifically named officials, with the intent to punish those officers for asserted wrongdoings, violate the Bill of Attainder Clause of the Constitution.¹¹⁰ Accordingly, it can be argued that issuance of contempt citations that impose fines in response to refusals to comply with subpoenas could potentially run afoul of the *Lovett* principle. However, a congressional plan designed to include a wage garnishment provision in the annual appropriation bills directed at officers who have refused to pay contempt fines can be distinguished from the cases that involve the *Lovett* principle. This is principally because the Courts are often faced with clear evidence of Congress's intent to indirectly remove an officer in cases involving the *Lovett* principle, but congressional fines in the context of contempt power can have clear indicia of Congress's legitimate goal to retain its fiscal accountability and, to that end, can be clearly assessed to merely reimburse the committees for the

105 *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

106 J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1166 (1989).

107 Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 762 (1989).

108 See generally Todd D. Peterson, *Controlling the Federal Courts Through the Appropriation Process*, 1998 WIS. L. REV. 993 (1998).

109 *United States v. Lovett*, 328 U.S. 303, 315 (1946).

110 Sutin, *supra* note 102, at 230.

additional cost imposed by refusal to comply with subpoenas.¹¹¹ As previously discussed, the federal courts have shown unwillingness to sanction federal officials with contempt fines precisely due to respect for the congressional power of the purse.¹¹² It can, therefore, be presumed that when congressional attempts to deduct the salary of a federal official who has refused payment of a contempt fine are supported by evidence showing the legislative intent to recoup the necessary additional cost for continuing the congressional investigation, neither the power to issue the fine nor the subsequent wage garnishment would violate the Constitution. This is because the courts will likely not view such actions as naked attempts to aggrandize or enlarge congressional power at the expense of the executive office; rather they can find such actions justified as attempts to protect inherently congressional powers, such as the power of the purse, against executive encroachment.¹¹³

Specifically, this new approach can be modeled after both Congressional Houses' power to issue fines for disciplinary purposes against their own members.¹¹⁴ Although infrequently utilized, the House has previously issued monetary fines against its own members commensurate with all or some of the cost of the investigations into their behavior.¹¹⁵ Members have also been fined in the amount necessary to reimburse the body for misuse of committee appropriations.¹¹⁶ This historical precedent, in conjunction with other court pronouncements highlighting the necessity of preserving Congress's appropriation powers, suggests that both houses of Congress may possess the power to impose monetary fines against contemnors when any refusal to comply with a subpoena can be reasonably linked to additional costs imposed on the investigatory body.

Inherent contempt proceedings do not require discretionary cooperation from the Executive Branch; they thereby avoid scenarios similar to the IRS investigation where Congress's attempt at enforcement of subpoenas is ultimately diverted by the Department of Justice's discretionary power to not pursue criminal charges.¹¹⁷ Unlike the criminal contempt statute, the argument outlined in this Article does not necessitate that Congress presents the president with a separate statute and obtain presidential signature for issuing contempt citations. Instead, the power to issue fines will be exercised in a similar fashion to the inherent contempt power to detain and its further enforcement in the case of refusal by federal officials to pay fines can be done through appropriation riders which leverage significantly more power against the president.¹¹⁸

Finally, it is likely that the power to issue fines and penalties will require similar pre-enforcement procedural requirements as the inherent contempt proceeding. This means that the imposition of fines will likely be preceded by a trial-like process of fact-finding and examination of findings and records, before

111 *Id.* at 6.

112 *See* Parrillo, *supra* note 71 and accompanying text.

113 *Id.* at 13.

114 JACK MASKELL, CONG. RESEARCH SERV., EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 17 (2016).

115 *Id.* at 14.

116 *Id.*

117 GARVEY & DOLAN, *supra* note 4, at 16.

118 Sutin, *supra* note 102, at 233.

recommendation to the full body is made.¹¹⁹ By inviting participation from other committees beyond the select investigation committees, such as the House Ways and Means Committee or the Senate Finance Committee, this avenue is likely to reduce conflicts that might arise among subcommittees with regards to overreach of power, invite participation from other committees, and increase the likelihood of producing a final resolution that has the support of the majority of the body.¹²⁰

CONCLUSION

As political partisanship intensifies and the legislative body finds itself more susceptible to criticism of grid-lock and inefficiency, restoring the process of congressional oversight can provide an opportunity to restore trust in Congress. Rebalancing Congress's status as an equal branch of the government also necessitates entertaining options that will preserve one of the branch's oldest expressed duties. Recent struggles in holding executive officers accountable for conduct that is deemed questionable in the eyes of elected officials indicates that one necessary reform must focus on Congress's power to punish those officers who are found guilty of contemptuous behavior. Many commentators have noted that the main impediment to effective exercise of congressional oversight is the absence of adequate monetary resources rather than issues of separation of powers.¹²¹ The power to impose fines and monetary penalties on executive officers guilty of contemptuous behavior can serve the purpose of strengthening this old practice, as well as ensure fiscal accountability in conducting congressional investigations.

119 GARVEY & DOLAN, *supra* note 4, at 17.

120 See generally Jason M. Crawford, *Solar Power Struggle: The Inter-Branch Dispute Over Information in the Solyndra Congressional Investigation*, 39 SETON HALL LEGIS. J. 1, 20 (2015).

121 CONSTITUTION PROJECT, *Separation of Powers and Congressional Oversight, Part 1*, C-SPAN, 00:52:20 (Oct. 25, 2016), <https://www.c-span.org/video/?417428-1/discussion-focuses-separation-powers-congressional-oversight&start=4560>.