



Criminal Contempt of Congress: Frequently Asked Questions

June 5, 2023

The House Committee on Oversight and Accountability (Committee) has [been engaged](#) in an oversight dispute with the Federal Bureau of Investigation (FBI) over an agency document that reportedly contains information regarding “an alleged criminal scheme involving then Vice President Biden.” The Committee’s original subpoena, issued on May 3, 2023, demanded the production of any FBI form FD-1023—a form used to “record unverified reporting from a confidential human source”—containing the term “Biden.” The Committee shortly thereafter [narrowed](#) the subpoena by adding additional terms to limit the number of responsive documents. The amended subpoena contained a return date of May 30.

In response, the FBI briefed the Committee and expressed a willingness to pursue an “[optimal accommodation](#),” but it did not provide the Committee with documents responsive to the subpoena. The FBI [outlined](#) its position in a May 10 letter to the Committee, asserting that

It is critical to the integrity of the entire criminal justice process and to the fulfillment of our law enforcement duties that FBI avoid revealing information—including unverified or incomplete information—that could harm investigations, prejudice prosecutions or judicial proceedings, unfairly violate privacy or reputational interests, or create misimpressions in the public.

The letter concluded by offering to “discuss whether and how we can accommodate your request without violating our law enforcement and national security obligations.”

On May 30, the FBI [informed](#) the Committee that it would not provide the Committee with the subpoenaed document but would allow Chairman James Comer and Ranking Member Jamie Raskin to view the document in a secure facility. Chairman Comer and Representative Raskin will [reportedly](#) view the document and receive additional contextual information through a briefing on June 5, but Chairman Comer has [reiterated](#) that “if the FBI fails to hand over the FD-1023 form as required by the subpoena, the House Oversight Committee will begin contempt of Congress proceedings” against FBI Director Christopher Wray.

The context of this dispute suggests that Chairman Comer is likely considering a citation for [criminal contempt of Congress](#)—a criminal offense outlined in [federal law](#) for noncompliance with a congressional subpoena. This Sidebar answers a number of frequently asked questions about criminal contempt of Congress.

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What is criminal contempt of Congress?

Criminal contempt of Congress is a process by which the House or Senate can seek to hold a witness accountable for failing to comply with a committee subpoena. Under [2 U.S.C. § 192](#), it is a misdemeanor criminal offense to “willfully” fail to comply with a valid congressional subpoena for either documents or testimony “upon any matter under inquiry before either House . . . or any committee of either House of Congress.” Whereas the House and Senate [originally](#) used their own legislative powers to enforce subpoenas, Congress chose to criminalize subpoena noncompliance in [1857](#). By the 1930s, both chambers were relying on criminal contempt as a chief method of subpoena enforcement.

What are the penalties for being held in criminal contempt?

A witness suffers no direct legal consequence from House or Senate approval of a contempt citation, though a variety of political consequences may flow from being held in contempt. If the individual is prosecuted and convicted, violations of § 192 are [punishable](#) by a fine of up to \$100,000 and imprisonment “for not less than one month nor more than twelve months.” The federal sentencing guidelines also inform the severity of the penalties. Former presidential adviser Stephen Bannon, for example, was [convicted of criminal contempt of Congress](#) in 2022 and sentenced to four months in jail and ordered to pay a fine of \$6,500.

What is the purpose of holding an individual in criminal contempt?

The criminal contempt of Congress provision supports Congress’s investigative and oversight functions. Criminal contempt serves two specific purposes. First, it serves to punish an individual for failure to comply with a lawful congressional subpoena. Those who willfully refuse valid congressional demands can be held accountable through the criminal law. Second, the provision serves to [deter](#) future noncompliance with congressional investigations. The mere knowledge that refusing a subpoena can result in imprisonment and fine can dissuade a witness from ignoring congressional demands and encourage cooperation with congressional investigations.

Criminal contempt may also serve to assist a committee in obtaining the information it seeks. This purpose, however, is served only indirectly in that even a successful criminal contempt prosecution does not necessarily lead to the release of the information to Congress. The potential consequence of a conviction is [jail time and fine](#), not a legal mandate to turn over the subpoenaed information. The threat of criminal contempt, however, can be used as leverage to encourage compliance with a subpoena. The House Foreign Affairs Committee, for example, [recently](#) used the threat of contempt when it successfully obtained information from the U.S. State Department on the Afghanistan withdrawal.

What is the process for holding someone in criminal contempt?

Criminal contempt of Congress is a unique criminal offense; as a result, its enforcement process is different from that of traditional criminal violations. That process is established in [2 U.S.C. § 194](#). Under that provision, when a committee reports to the House or Senate that a witness has failed to comply with a subpoena, “it shall be the duty” of the President of the Senate or the Speaker of the House to “certify” the facts of the contempt “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.” Although the statute does not expressly require approval of the contempt citation by the committee’s parent body, both [congressional practice](#) and at least one [judicial decision](#) suggest that approval by the committee’s chamber may be necessary. As a result, the process of holding an individual in contempt [generally](#) includes a vote of the committee reporting the matter to the full House or Senate, followed by a vote of the full chamber to direct the certification of the matter to the U.S. Attorney.

Who enforces criminal contempt?

Like other federal criminal offenses, the contempt statute is enforced by the Department of Justice (DOJ). Congress may not act as a “law enforcement agency,” and thus it must rely on the executive branch to prosecute violations of federal criminal law, *even when the offense is committed against Congress itself*. Congress’s reliance on DOJ to prosecute criminal contempt charges represents the key weakness to the use of criminal contempt as a subpoena enforcement mechanism against executive branch officials. Although 2 U.S.C. § 194 explicitly states that it “shall be the duty” of the U.S. Attorney to present an approved contempt citation to a grand jury, DOJ has not *interpreted* the statute as creating a mandatory duty, asserting instead that it retains discretion over any individual contempt referral from Congress. Since 2008, the House has held *ten individuals* in criminal contempt of Congress. Of those referrals, the DOJ sought the indictment of two.

What justification has DOJ provided for its decisions not to seek indictments?

Both *Democratic* and *Republican* administrations have *generally been unwilling* to prosecute current or former executive branch officials for criminal contempt of Congress when the official was acting under direction from the sitting President in denying Congress access to the subpoenaed information. The majority of these declination decisions have involved claims of *executive privilege*, with DOJ repeatedly concluding that the contempt statutes cannot constitutionally be applied to an executive branch official who is protecting the President’s claim of executive privilege. The DOJ position, however, does not *require* that a declination decision be tethered to a claim of executive privilege. The Department has *argued* that it “retains traditional prosecutorial discretion regardless of whether the contempt citation is related to an assertion of executive privilege.” Pursuant to this asserted discretion, a U.S. Attorney may, based on any number of reasons, leave a congressional citation unenforced.

If a contempt citation is approved, would DOJ prosecute Director Wray?

If the House holds Director Wray in criminal contempt of Congress, the contempt citation would be certified to the U.S. Attorney for the District of Columbia. Past practice suggests that either the U.S. Attorney or DOJ would then evaluate the case for further action. Any criminal contempt citation would be assessed on its individual facts, but past executive branch practice suggests that DOJ likely would not refer the matter to a grand jury.

The President has not asserted executive privilege to protect the subpoenaed FD-1023. The executive branch has, however, *previously* considered *law enforcement sensitive* information as falling under the umbrella of executive privilege. If the President asserts executive privilege over the form, that assertion would likely be the proffered ground for inaction. If the President does not assert executive privilege, executive branch policy would still allow DOJ to rely on traditional principles of prosecutorial discretion to decline to pursue the contempt. For example, it is possible DOJ could assert that the FBI’s confidentiality interests justify not seeking an indictment in this specific case.

What is the status of the various criminal contempt of Congress citations approved by the House over the last four years?

The House has approved *six* criminal contempt of Congress citations since 2019. In four instances (involving *Dan Scavino*, *Mark Meadows*, *William Barr*, and *Wilbur Ross*) the DOJ declined to present the citations to the grand jury, and the criminal matters ceased. In the other two instances (concerning *Peter Navarro* and Stephen Bannon), the DOJ sought and received an indictment. Mr. Bannon was *convicted and sentenced* in 2022, but his sentence has been stayed pending appeal to the U.S. Court of Appeals for the D.C. Circuit. Mr. Navarro’s trial is *scheduled* to begin this September.

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