Bipartisan Coalition Urges Congress to Restore Lost Subpoena Enforcement Powers with Inherent Contempt Procedure

October 21, 2020

Rep. Nancy Pelosi,
Speaker, U.S. House of Representatives
The Capitol, Room H-232

Rep. Kevin McCarthy,
Minority Leader, U.S. House of Representatives
The Capitol, Room H-204

Rep. James McGovern, Chairman
Committee on Rules
U.S. House of Representatives
The Capitol, Room H-312

Rep. Tom Cole, Ranking Member
Committee on Rules
U.S. House of Representatives
The Capitol, Room H-152

Re: Inherent Contempt Procedure to Restore House Subpoena Enforcement Power

Dear Speaker Pelosi and Leader McCarthy,

On behalf of the undersigned bipartisan group of civil society organizations and individuals, we encourage you to include in the rules package for the 117th Congress the provisions of H.Res. 1029, the Congressional Inherent Contempt Resolution, which proposes to establish a modified version of the traditional inherent contempt enforcement procedure to address the intensifying crisis of noncompliance with congressional subpoenas.

H.Res. 1029, sponsored by Rep. Ted Lieu, would create a process whereby the House could unilaterally conduct trials of, convict, and directly penalize executive branch officials and others who defy congressional subpoenas with heavy personal fines. This proposal can be implemented by amendment of House rules or passage of a resolution.

The root cause of the current challenges of enforcing legislative subpoenas is the abdication by Congress over the past fifteen years of a credible threat of personal punishment for government officials who defy congressional subpoenas. The emergence of this situation is no accident. The executive branch has waged a concerted, decades-long campaign to subvert the use of Congress' two most powerful enforcement methods, the inherent and criminal contempt procedures, and instead force Congress to use the civil enforcement process which does not entail any credible threat of personal punishment for uncooperative witnesses. This inevitably forfeits to courts the absolute right of House committees to make initial rulings on claims of privilege, exposes Congress to aberrant judicial decisions subversive of its authority, and deteriorates into prolonged litigation that is incompatible with expedient legislative oversight.

Unfortunately, Congress also shares substantial responsibility for the diminishment of its authority, and has yet to challenge these executive branch usurpations appropriately. We therefore urge you to repair this damage now by acting decisively to restore the credible threat of significant punishment necessary to compel recalcitrant executive branch officials to comply with congressional subpoenas.

The modified inherent contempt process proposed in H.Res. 1029 reestablishes this credible threat of punishment for contempt of Congress in a measured, responsible, and workable manner by limiting penalties to monetary fines, eliminating arrest and detention from the process, incorporating extensive internal and external checks against abuse, and including necessary due process safeguards. The procedure features an initial series of internal checks that require contempt recommendations of the originating committee to be reviewed and affirmed by the whole House before an alleged contemnor can be penalized for noncompliance.

The due process rights of the accused including adequate notice, opportunity to be heard, and access to counsel are also secured throughout the process. The judgment of committees, committee chairs, and members of Congress will ensure proceedings remain within the narrow bounds of House contempt jurisdiction and satisfy the standards of proper authorization, valid legislative purpose, and pertinence of questions. These jurisdictional and due process elements of the proceedings are subject to the external check of limited judicial review to ensure House compliance with these constitutional requirements.

The authority of the House to impose fines for contempt is supported by strong Supreme Court and appellate court precedents including *Anderson v. Dunn, Ex Parte Nugent, McGrain v. Daugherty,* and *Jurney v. MacCracken* among others affirming the equivalence of the legislative and judicial contempt powers, the validity of judicially-imposed fines to punish contempts of court, and, in the case of *Anderson,* the permissibility of fines for legislative contempt.

Congressional authority to punish contempt with fines also encompasses the power to collect such fines unilaterally without the assistance of courts and using the same methods available to all creditors. Congressional resolutions imposing inherent contempt penalties are the legal and constitutional equivalents of court judgments given the analogous nature of the contempt powers of the two branches.

On October 1, 2020, the Rules Committee heard testimony from Rep. Lieu in favor of H. Res. 1029. Members of the Committee agreed that the status quo wherein Congress effectively cannot enforce its subpoenas is unworkable. Members agreed that finding a solution to this crisis was of utmost importance. Rep. Jamie Raskin, Chairman of the Rules Committee's Subcommittee on Expedited Procedures, spoke in favor of the measure at the hearing as well. In addition, several other committee members emphasized the necessity of strengthened subpoena enforcement in response to the problem of rising disrespect for congressional investigative authority. Furthermore, the proposal enjoys the support of the Congressional Progressive Caucus, two dozen cosponsors, and a growing number of other House members.

The obstruction of congressional subpoena power and the rising insolence of executive branch repudiations of congressional authority under both Democrat and Republican administrations confront the nation with a constitutional crisis requiring urgent address. Congress should respond to this challenge by adopting a modified inherent contempt process to restore its subpoena enforcement capacity to provide the indispensable institutional protection envisioned by the Framers, required by its constitutional responsibilities, deserved by all who have sacrificed to preserve American ideals, and expected rightfully by citizens.

Sincerely,

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Constitution Fellow, The Constitution Project

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Executive Director, Project on Government Oversight

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Citizens for Responsibility and Ethics in Washington

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cc:

Rep. Carolyn Maloney, Chairwoman
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2157 Rayburn House Office Building

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