GIBSON DUNN

July 9, 2018

H.R. 4010: THE CONGRESSIONAL SUBPOENA COMPLIANCE AND ENFORCEMENT ACT OF 2017

To Our Clients and Friends:

Late last year, the U.S. House of Representatives passed H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act of 2017 (the "Bill").[1] The Bill seeks to strengthen Congressional subpoena enforcement power by: (1) codifying the subpoena enforcement power and process in statute; (2) expediting litigation arising from non-compliance with the subpoena; (3) codifying a court's power to levy financial penalties against the head of a U.S. government agency who willfully fails to comply with a subpoena; and (4) requiring the production of a privilege log in cases where a subpoena recipient refuses to comply on the basis of privilege.

The Bill was introduced by Rep. Darrell Issa (R-CA) and ordered reported out of the Committee on the Judiciary by a unanimous vote. It passed in the House by voice vote. The Bill was received in the Senate and referred to the Committee on the Judiciary, where it is currently pending.

The Bill has support from both sides of the aisle, which is not surprising given that, historically, both parties, when in control of Congress, have experienced delays and difficulties when attempting to enforce subpoenas against the Executive Branch, as well as private parties. As discussed below, courts have resolved recent cases favorably to Congress, but only after significant delays that likely impacted the usefulness of the eventually-disclosed information to congressional oversight.

I. Background and Purpose

The stated purpose of the Bill is to enhance compliance with requests for information pursuant to legislative power under Article I of the Constitution. While the Bill was pending in the House, Members expressed concern over significant delays in the enforcement of congressional subpoenas, particularly with regard to subpoenas served on the Executive Branch.[2] House Judiciary Committee Chairman Bob Goodlatte (R-VA) commented in his opening statement during markup that "the existing framework to enforce congressional subpoenas has proved to be an inadequate means of protecting congressional prerogatives."[3] Rep. Issa, the Bill's sponsor and former Chairman of the Oversight and Government Reform Committee, said he saw subpoenaed parties, in particular the Executive Branch, go to great lengths to avoid turning over documents or materials to congressional committees for review.[4] He noted that such "delays were unfair to the body and unfair to the American people because it denied them in any reasonable period of time the effect of factfinding."[5] He also commented that both parties have tried to take advantage of partisan rivalries while in control of the Executive Branch.[6] Statements by then-Ranking Member John Conyers (D-MI) echoed concerns about the

failure to comply with subpoenas and the hope that putting requirements in writing would ensure that subpoena recipients understand their full legal force.[7]

A. Congressional Subpoena Enforcement

Congress may combat non-compliance with a subpoena in three ways: 1) through its inherent contempt power; 2) through the criminal contempt statute; or 3) through civil contempt proceedings, which differ between the House and Senate.[8] The first, which has not been used since 1935, allows Congress to bring an individual before the full House or Senate for trial, and may result in imprisonment for a specified time or until compliance.[9] Under the criminal contempt statute, a contempt citation must be approved by the full committee, then the full House or Senate, and eventually is presented to the U.S. Attorney, who has a "duty" to bring the matter before a grand jury.[10] In practice, the Department of Justice has taken the position that it may direct the U.S. Attorney to refuse to proceed on the contempt citation.[11] This position is based on a constitutional separation-of-powers argument that posits the Executive Branch's prosecutorial discretion authority cannot be interfered with by the Legislature or Judiciary.

The DOJ's position rests on the theory that any legislative or judicial interference with prosecutorial discretion would unconstitutionally interfere with the Executive Branch's essential functions.[12] Prosecutorial discretion allows the Executive Branch to balance "various legal, practical, and political considerations" when deciding which legal violations to pursue.[13] According to the Justice Department, this discretion is constitutionally absolute; the Executive must always have full and independent authority to dictate whether a criminal case will move forward. Therefore, the argument goes, any attempt by Congress to force the Attorney General to take executive action on a contempt citation violates separation-of-powers principles by unconstitutionally interfering with his or her discretionary authority.[14] This position essentially takes criminal contempt off the table of options available to Congress as a means of enforcing a subpoena against an Executive Branch employee, thus effectively leaving Congress with the third procedure, civil contempt.

Under the third and most common procedure, a single house or committee of Congress may file suit in Federal district court seeking a declaration that the individual or entity in question is legally obligated to comply with the congressional subpoena. The Senate has existing statutory authority to pursue enforcement through civil contempt.[15] Notably, however, the statute is inapplicable by its terms in the case of a subpoena issued to an officer or employee of the Federal government acting in his or her official capacity.[16] The House has no such existing statutory authority, but as past precedent—including the decisions in *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), and *Committee on Oversight & Government Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016)—shows, the House may authorize a committee to seek a civil enforcement action to force compliance with a subpoena, even without specific statutory authorization.[17]

Nevertheless, reliance on a declaratory civil action to enforce a subpoena against an executive official has proven inadequate due to the time required to achieve a final, enforceable ruling in the case. In *Miers*, the district court rendered a decision favorable to Congress but the ruling was appealed and the D.C. Circuit did not reach a decision on the merits by the end of the 110th Congress. Ultimately, the

appeal was dismissed at the request of the parties. Similarly, in *HOGR v. Lynch*, the Department of Justice eventually was forced to disclose documents, but the production was made nearly five years after the documents were first requested.

Members are concerned that such delays undermine a committee's ability to conduct effective oversight. Accordingly, the Bill seeks to amend and codify the civil contempt enforcement process in two primary ways. First, it directs a district court to "expedite to the greatest possible extent the disposition of any such action and appeal" and allows the plaintiff to request the action be heard by a three-judge panel, with direct appeal to the Supreme Court.[18] Second, the Bill states that the court may impose financial penalties directly against the head of a government agency who willfully fails to comply with the congressional subpoena.[19] It stipulates that no taxpayer funds may be used to pay this penalty.

Rep. Issa made clear that expediting the judicial review process was the primary goal of the Bill. During markup, he stated that "speed matters when discovery is underway."[20] The intent of the Bill, he stated, is "not to change the outcome of any effort under a subpoena" but to get before a Federal judge "in a timely fashion."[21]

Members were eager to note Section 4 of the Bill, which states "[n]othing in this Act shall be interpreted to diminish Congress' inherent authority or previously established methods and practices for enforcing compliance with congressional subpoenas…"[22] Ranking Member Conyers stressed at markup that "Congress does not require a statute in order to enforce its subpoenas in Federal court."[23] Rep. Issa stated that the Bill does not seek new power, but only "an expeditious review by a Federal judge of a claim" for the production of documents or the appearance of a person.[24] Rep. Jerrold Nadler (D-NY) also commented that the statute to enforce subpoenas is not *required* but is "useful as a means to codify certain practices and to expedite enforcement of subpoenas."[25]

B. Privilege

The House and Senate take the position that they need not honor claims of attorney-client privilege or testimonial privilege for confidential communications (*e.g.*, those between a doctor and a patient).[26] This position is based on Congress' inherent constitutional prerogative to investigate, in contrast to the Judicial Branch, where privileges are judge-made exceptions to full disclosure, or based in statute or common law.[27] Generally, the decision whether to recognize a privilege has been informed by weighing considerations of legislative need, public policy, and the statutory duty of congressional committees to engage in continuous oversight against any possible injury to the witness.[28]

Section 3 of the Bill codifies the requirement that a subpoena recipient provide a privilege log for any records being withheld, in whole or in part.[29] Note that many congressional committees currently request a privilege log in instructions that accompany document request letters or subpoenas. Under the Bill, the privilege log must include the legal basis asserted for withholding the record. Recipients also are required to identify and explain any missing records. The Bill further provides that claims of privilege are waived if a privilege log is not produced.[30] This provision may have been motivated in

part by the Senate Permanent Subcommittee on Investigations' inquiry into Backpage.com, whose CEO refused to turn over documents on the basis of privilege but failed to produce a privilege log. On March 17, 2016, the Senate passed a resolution[31] authorizing civil enforcement of a subpoena against the CEO seeking the production of documents concerning the company's advertisements for commercial sex services, and a civil contempt proceeding was subsequently initiated in the U.S. District Court for the District of Columbia.[32] The court eventually held that any privilege had been waived by the failure of Backpage.com's CEO to timely file a log.[33]

Notably, Section 4 of the Bill states that nothing in the Bill shall "be interpreted to establish Congress' acceptance of any asserted privilege or other legal basis for noncompliance with a congressional subpoena."[34] Essentially, this Section of the Bill clarifies for parties responding to a congressional subpoena that the production of a privilege log does not mean that Congress will recognize any privilege, but a privilege log does preserve the privilege argument.

II. Observations

If the Bill becomes law, it would have practical implications for not only the Executive Branch, but for private parties subpoenaed by Congress. Upon receiving a subpoena from a congressional committee, private parties should be prepared to timely produce a log of any documents for which it believes a privilege may be asserted. While this may not ensure that claims of privilege will be recognized, it will prevent an automatic waiver of the privilege.

While it is not clear this Bill will become a law, it is not expected to fail for partisan reasons. Thus far, there is no apparent opposition to the Bill. Despite bipartisan support, however, it is not clear whether the Senate will take up the bill or might develop a bill of its own to accomplish similar objectives. As discussed above, some of the Senate's enforcement powers are already codified in statute, so the same urgency may not exist in the Senate as in the House. It is important to note, however, that, Senator Charles Grassley (R-IA), who serves as Chairman of the Senate Committee on the Judiciary, the committee to which the Bill has been referred, initiated his own inquiry into Operation Fast and Furious (the situation at issue in *Lynch*) while serving as Ranking Member of the committee, and has expressed similar frustrations about delays in the enforcement of subpoenas.[35] President Trump has not indicated whether he would support the measure.

It is impossible to know whether the Bill, if enacted, would actually expedite the judicial review process and lead to more efficient and effective congressional oversight. On the one hand, the bill could speed up judicial review of attempts by Congress to vindicate its subpoena authority and make Executive Branch officials think twice before ignoring a committee subpoena. On the other, it seems unlikely that statutory changes alone will solve Congress' issues with subpoena compliance, particularly when it comes to the Executive Branch. Perhaps what is needed is a combination of internal rules changes and statutory assistance, where Congress uses some of its inherent authorities to satisfy its oversight and investigative needs. After all, it seems unlikely that relying on a separate branch of government to vindicate a legislative prerogative alone is the answer.

[1] H.R. 4010, 115th Cong. (2017).

[2] An illustrative example of the perception that Congress' subpoena power may not have sufficient weight was noted by Rep. Eric Swalwell (D-CA) during markup and later discussed by Rep. Jerrold Nadler (D-NY) during floor debate. After an interview with the Intelligence Committee relating to alleged Russian interference in the 2016 election, a witness gave a public statement saying he had not disclosed certain information and documents during the interview because he was not under subpoena and had certain privileges to assert (despite the fact that he did not actually assert them). *See* 163 Cong. Rec. H8061 (daily ed. Oct. 23, 2017) (statement of Rep. Jerrold Nadler).

[3] *Markup of H.R. 4010; H.R. 2228; and H.R. 3996 before the H. Comm. on the Judiciary* (2017) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary), available at https://judiciary.house.gov/wp-content/uploads/2017/10/10.12.17-Markup-Transcript.pdf.

[4] Rep. Darrell Issa Press Release, "Rep. Issa Bill To Require Compliance with Congressional Subpoenas Passes Judiciary Committee," October 12, 2017, available at https://issa.house.gov/news-room/press-releases/rep-issa-bill-require-compliance-congressional-subpoenas-passes-judiciary.

[5] 163 Cong. Rec. H8061 (daily ed. Oct. 23, 2017) (statement of Rep. Darrell Issa).

[6] *Id.*

[7] *Markup of H.R. 4010; H.R. 2228; and H.R. 3996 before the H. Comm. on the Judiciary* (2017) (statement of Rep. John Conyers, Ranking Member, H. Comm. on the Judiciary), available at https://judiciary.house.gov/wp-content/uploads/2017/10/10.12.17-Markup-Transcript.pdf.

[8] *See* CRS Report, "Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure," May 12, 2017, available at http://www.crs.gov/Reports/RL34097?source=search&guid=423009d34fd84a7b98a6fabe7ef0db57&index=0.

[9] *See, e.g., Jurney v. MacCracken*, 294 U.S. 125 (1935); *McGrain v. Daughtery*, 273 U.S. 135 (1927); *Anderson v. Dunn*, 19 U.S. 204 (1821).

[10] 2 U.S.C. §§ 192, 194.

[11] *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 122 (1984) [hereinafter 8 Op. O.L.C.].

[12] 8 Op. O.L.C. at 115 ("The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

[13] *Morrison v. Olson*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) ("to take [prosecutorial discretion] away is to remove the core of the prosecutorial function."); *see also* 8 Op. O.L.C. at 113–15 (quoting *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967)) ("The discretion of the Attorney General in choosing whether to prosecute or not to prosecute . . . is absolute [and . . .] required in all cases).

[14] 8 Op. O.L.C. at 125 ("A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution.") (citing cases).

[15] 2 U.S.C. §§ 288b(b), 288d, 1365.

[16] 28 U.S.C. §1365(a) (2012).

[17] *See* CRS Report at 30. In *Miers*, the court held that the subpoena power "derives implicitly from Article I of the Constitution" thus concluding that the case "arises under the Constitution" and therefore qualifies for federal question jurisdiction. *Miers*, 558 F. Supp. 2d at 64. In *Lynch*, the House pursued a civil action in Federal court to enforce a subpoena against Attorney General Eric Holder for his failure to comply with subpoenas issued pursuant to the investigation of Operation Fast and Furious. In its opinion rejecting the Department of Justice's motion to dismiss based on jurisdictional and justiciability arguments, the court largely adopted the reasoning in *Miers*. Following *Miers* and *Lynch*, it appears all that is legally required for House committees to seek civil enforcement of subpoenas is that authorization be granted by resolution of the full House.

[18] H.R. 4010, 115th Cong. §2 (2017).

[19] *Id.*

[20] *Markup of H.R. 4010; H.R. 2228; and H.R. 3996 before the H. Comm. on the Judiciary* (2017) (statement of Rep. Darrell Issa), available at https://judiciary.house.gov/wp-content/uploads/2017/10/10.12.17-Markup-Transcript.pdf.

[21] *Id.*

[22] H.R. 4010, 115th Cong. §4 (2017).

[23] *Markup of H.R. 4010; H.R. 2228; and H.R. 3996 before the H. Comm. on the Judiciary* (2017) (statement of Rep. John Conyers, Ranking Member, H. Comm. on the Judiciary), available at https://judiciary.house.gov/wp-content/uploads/2017/10/10.12.17-Markup-Transcript.pdf.

[24] 163 Cong. Rec. H8060 (daily ed. Oct. 23, 2017) (statement of Rep. Darrell Issa).

[25] *Id.*

[26] CRS Report at 61.

[27] *Id.*

[28] *Id.* at 60.

[29] H.R. 4010, 115th Cong. §3 (2017).

[30] H.R. 4010, 115th Cong. §2(a) (2017).

[31] S. Res. 377, 114th Cong. (2016).

[32] *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C. 2016).

[33] *Id.*

[34] H.R. 4010, 115th Cong. §4 (2017).

[35] *See, e.g., Operation Fast and Furious: Obstruction of Congress by the Department of Justice: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. (2017) (statement of Sen. Charles Grassley, Chairman, S. Comm. on the Judiciary) ("This case has broad implications for the ability of the elected representatives of the American people to do our constitutional duty to act as a check on the executive branch. Clearly, Congress needs to do something. It cannot take years for this body to get answers from a co-equal branch of government about information that has no legal basis to stay hidden from Congress.")

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work or the following lawyers:

Michael D. Bopp - Chair, Congressional Investigations Subgroup (+1 202-955-8256, mbopp@gibsondunn.com)
Emily Yezerski - Washington, D.C. (+1 202-887-3549, eyezerski@gibsondunn.com)