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Executive Branch Contempt of Congress

Josh Chafetz†

After former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten refused to comply with subpoenas issued by a congressional committee investigating the firing of a number of United States Attorneys, the House of Representatives voted in 2008 to hold them in contempt. The House then chose a curious method of enforcing its contempt citation: it filed a federal lawsuit seeking a declaratory judgment that Miers and Bolten were in contempt of Congress and an injunction ordering them to comply with the subpoenas. The district court ruled for the House, although that ruling was subsequently stayed and a compromise was reached.

This Article examines the constellation of issues arising out of contempt of Congress proceedings against executive branch officials. After briefly describing the Miers *litigation, it examines the development of legislative contempt against executive officials in Anglo-American law. It shows that the contempt power played a significant role in power struggles between the Crown and Parliament and between the Crown and colonial American legislatures, and that this role continued into the early state legislatures. It then traces Congress's uses of the contempt power against executive branch officials, including in two cases that have generally been overlooked by both judicial and academic commentators, in which a house of Congress sent its sergeant-at-arms to arrest an executive branch officer.*

The Article then uses that history to consider how cases of executive branch contempt of Congress should be dealt with today. It notes the variety of political tools that Anglo-American legislatures have used to enforce their contempt findings, as well as the fact that they did not turn to the courts to resolve such disputes until the late twentieth century. It then argues that the resolution of such disputes by the courts does significant harm to the American body politic. This Article therefore concludes both that Congress erred in seeking judicial resolution of the Miers *dispute and that the courts erred in finding it justiciable.*

Introduction

In 2008, for only the second time in the nation's history, a house of Congress sued high-ranking executive branch officials in an attempt to enforce a subpoena for their testimony in the face of the officials' claims of executive privilege.[1] Unlike the previous suit, in which the

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1 See *Committee on the Judiciary v Miers*, 558 F Supp 2d 53, 55–56 (DDC 2008) (holding that the House Judiciary Committee can bring an action in a district court to compel an executive official to testify before the committee).

defendant was none other than the president of the United States,[2] the 2008 suit was successful.[3] This is a nearly perfect separation of powers storm: the *legislature* invoked the aid of the *judiciary* in an attempt to get what it wanted from the *executive*. More precisely, in seeking a declaratory judgment that the executive officials must comply with the congressional subpoena, the House of Representatives was asking the court to adjudicate between the executive privilege of confidential communication and the legislative privileges of investigation and punishment for contempt.

This Article examines the constellation of issues arising from such situations. It should be noted that this Article does not focus on the merits of any particular executive privilege claim. Rather, the focus here is on the various contempt options available to a house of Congress to deal with an uncooperative executive branch, the options available for punishing executive branch officials, and the question of whether there is a role for the judiciary in such disputes. This necessarily involves a historical examination of the role of the contempt power in disputes between Anglo-American legislatures and executives. The political context for these disputes is crucial; it is a fundamental contention of this Article that the legislative contempt power has played, and should continue to play, a key role in resolving contested questions of the allocation of power within the federal government.

Part I briefly describes both the events surrounding the House of Representatives' 2008 determination that former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten were in contempt of Congress and the district court decision arising out of that determination.

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[2] See *Senate Select Committee on Presidential Campaign Activities v Nixon*, 370 F Supp 521, 522–24 (DDC 1974) (refusing to enforce a Senate committee's subpoena against the president because the committee did not demonstrate that the subpoenaed tapes were needed for further public hearings and nondisclosure was important to protect the fairness of pending criminal prosecutions), affd 498 F2d 725, 733 (DC Cir 1974). Oddly, both the Congressional Research Service and the Judiciary Committee in the 2008 case at first seemed unaware of the *Nixon* precedent. See Morton Rosenberg and Todd B. Tatelman, *Congress's Contempt Power: Law, History, Practice, and Procedure* 65 CRS Report RL34097 (Apr 15, 2008) (claiming mistakenly that the *Miers* suit is "the first civil lawsuit filed by a House of Congress in an attempt to enforce its prerogatives"); William Branigin, *House Panel Sues to Force Bush Aides to the Table*, Wash Post A3 (Mar 11, 2008) ("The committee's action marked the first time in U.S. history that either chamber of Congress has sued the Executive Branch to enforce a subpoena, according to a spokesman for the House Judiciary Committee."). The *Nixon* case is discussed at length in Part IV.B.3.

[3] See *Miers*, 558 F Supp 2d at 56, 108 (ruling that the executive officials must testify in front of the committee and produce any nonprivileged documents requested through subpoena).

Part II begins the Article's historical analysis of the scope of legislative contempt findings, examining the development of the contempt power in the English Parliament. This historical treatment is necessary because Congress's privileges have their origins in Parliament's, and Congress has traditionally looked to parliamentary precedents in understanding its privileges.[4] This Part pays special attention to the numerous findings of breach of privilege against Charles I and presents the onset of the English Civil War as a struggle between royal prerogative—a precursor to executive privilege—and Parliament's contempt powers. This Part demonstrates the ways in which contempt findings were used to combat attempts to consolidate and expand royal power, and it examines the numerous methods relied upon by the houses of Parliament to give teeth to their contempt findings.

Part III traces the contempt power into preconstitutional America, showing that both colonial legislatures and pre-1789 state legislatures made use of the contempt power in their struggles with executive officials. That is, it traces how this parliamentary privilege came to be translated into American legislative practice.

Part IV looks at the congressional houses' contempt powers under the Constitution. It shows that these British and preconstitutional American practices continued into a long American history of holding executive branch officials—including presidents themselves—in contempt of Congress or breach of privilege. This Part moreover discusses two cases, which have been generally neglected by both judicial and academic commentators, in which a house of Congress sent its sergeant-at-arms to arrest an executive branch official.

Finally, Part V considers the lessons of this historical treatment. It concludes that the houses of Congress have the authority to hold executive branch officials in contempt, and that defiance of a congressional subpoena qualifies as contempt. Most notably, it argues that each house is properly understood as the final arbiter of disputes arising out of its contempt power—that is, when an executive branch official raises executive privilege as a defense justifying her defiance of a congressional subpoena, the house of Congress is the proper tribunal to determine whether the invocation of executive privilege was ap-

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[4] In this regard, it is worth noting that Thomas Jefferson's *Manual of Parliamentary Practice*, which remains the authoritative manual of practice in the House of Representatives and is widely consulted in Senate practice, discusses British precedent in great detail. See generally Thomas Jefferson, *Manual of Parliamentary Practice*, in *Constitution of the United States of America, with the Amendments Thereto: To Which Are Added Jefferson's Manual of Parliamentary Practice, the Standing Rules and Orders for Conducting Business in the House of Representatives and Senate of the United States, and Barclay's Digest* (GPO 1861).

propriate. This means that legislative-executive disputes over the contempt power should be understood to be nonjusticiable. This Part notes that the houses of Congress, like their historical predecessors, have a large number of tools by which to enforce compliance with their contempt findings, including the powers of arrest, impeachment, and obstruction of the president's agenda. Moreover, this Part argues that Congress has been wrong, since the 1970s, in seeking judicial enforcement of contempt citations against executive branch officials, and that the courts have been wrong in finding such disputes justiciable, for two reasons. First, the courts' interpretation of Congress's contempt power has been substantively too stingy and court-centric; second, and perhaps more importantly, Congress's abdication of this power aggrandizes the executive and judicial branches at Congress's expense, upsetting the proper balance of the separation of powers. Finally, this Part will apply these lessons to *Miers*, arguing that this case shows that, while both the executive and judicial branches are comfortable pushing their powers to their limits, Congress has become too timid to do so. This Part argues that this congressional timidity is harmful to the polity as a whole.

I. THE *MIERS* CASE

The events surrounding the Bush administration's politically motivated dismissal of nine United States Attorneys in 2006 have been well described elsewhere, both in the scholarly[5] and journalistic literature,[6] and it is unnecessary to rehash the details here. For the purposes

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[5] See, for example, John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 Seattle U L Rev 265, 265–92 (2008) (providing an overview of the firing of the United States Attorneys and discussing the problems with politically motivated dismissals of prosecutors); Mark J. Rozell and Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorneys Firings*, 38 Pres Stud Q 315, 319–24 (2008) (describing the confrontation between the president and Congress over whether the executive branch must turn over information); David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 Mich L Rev 317, 322–27 (2008) (examining the public information regarding the attorneys' firings and concluding that legislation should be enacted to prevent partisan-inspired firings of federal prosecutors).

[6] See, for example, Allegra Hartley, *Timeline: How the U.S. Attorneys Were Fired*, US News & World Rep (Mar 21, 2007), online at http://www.usnews.com/usnews/news/articles/070321/21attorneys-timeline.htm (visited Sept 1, 2009) (providing a detailed chronology of the actions leading up to the United States Attorneys' firings); Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, Time (Mar 7, 2007), online at http://www.time.com/time/nation/article/0,8599,1597085,00.html (visited Sept 1, 2009) (same); Dan Eggen and Paul Kane, *Fired U.S. Attorneys Tell of Calls, Threats before Dismissal*, Wash Post A1 (Mar 7, 2007) (describing the various methods the White House used to force several United States Attorneys to resign); Dan Eggen, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, Wash Post A11 (Feb 18, 2007) (contradicting Alberto

of this Article, it suffices to note that, after the dismissals became public, the House and Senate Judiciary Committees sought testimony and documents from various executive branch officials. In March 2007, White House Counsel Fred Fielding told the Senate Judiciary Committee that the White House would allow the House and Senate Judiciary Committees to conduct private interviews with White House advisor Karl Rove, former White House Counsel Harriet Miers, Deputy White House Counsel William Kelley, and Rove aide Scott Jennings. The interviews were to be conducted behind closed doors, with no transcript taken, and with no oath having been administered; the committees would also have to agree not to subpoena those officials in the future.[7] The White House also agreed to turn over certain communications regarding the dismissals, but not any communications between White House officials.[8] The committees rejected the offer,[9] and two days later, the House Judiciary Committee voted to authorize subpoenas for the testimony of Rove, Miers, Kelley, Jennings, and Kyle Sampson, the former chief of staff to former Attorney General Alberto Gonzales, as well as documents in their possession concerning the firings.[10] Although the subpoenas were authorized, the committee did not vote to issue them, in the hopes that the matter would be resolved through further negotiation with the White House.[11]

On June 13, 2007, after almost three months of fruitless discussions, the House Judiciary Committee issued two subpoenas: one to Miers, directing her to testify and produce certain documents, and the other to White House Chief of Staff Joshua Bolten, directing him to produce documents.[12] (The Senate on the same day subpoenaed for-

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Gonzales's assertions that the United States Attorneys had poor performance reviews); Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, Wash Post A2 (Jan 19, 2007) (reporting Gonzales's claim that the United States Attorneys were fired over "performance issues"). For an excellent detailed overview of the key events, see *TPM Canned US Attorney Scandal Timeline*, Talking Points Memo (May 14, 2007), online at http://www.talkingpointsmemo.com/usa-timeline.php (visited Sept 1, 2009).

7 Sheryl Gay Stolenberg, *Bush in Conflict with Lawmakers on Prosecutors*, NY Times A1 (Mar 21, 2007).

8 Id.

9 Id (quoting Senator Patrick Leahy that the offer "is not constructive" and that "it is not helpful to be telling the Senate how to do [the] investigation or to prejudge its outcome").

10 Carl Hulse, *Panel Approves Rove Subpoena on Prosecutors*, NY Times A1 (Mar 22, 2007).

11 Id.

12 *Miers*, 558 F Supp 2d at 61 (detailing the timeline of the requests for testimony made by the House Judiciary Committee to Bolten and Miers).

mer White House political director Sara Taylor.[13]) On the advice of Acting Attorney General Paul Clement, President George W. Bush asserted executive privilege and informed the committees that the executive branch would neither produce the requested documents nor make the former officials available to testify.[14]

When Miers and Bolten failed to respond to the subpoenas, Representative Linda Sanchez, Chairwoman of the House Subcommittee on Commercial and Administrative Law, ruled that the assertion of executive privilege did not excuse them from complying with the subpoenas. Sanchez's ruling was upheld by a vote of the subcommittee.[15] On July 25, 2007, the full House Judiciary Committee adopted a resolution recommending that Bolten and Miers be cited for contempt of Congress.[16] After several more months of failed attempts at a negotiated settlement, the House of Representatives voted to hold Miers and Bolten in contempt on February 14, 2008.[17] The House also adopted two resolutions: one provided for the Speaker to certify the Judiciary Committee's report to the United States Attorney for the District of Columbia "to the end that [Miers and Bolten] be proceeded against in the manner and form provided by law,"[18] while the other authorized the Chairman of the Judiciary Committee

> to initiate or intervene in judicial proceedings in any Federal court of competent jurisdiction, on behalf of the Committee on the Judiciary, to seek declaratory judgments affirming the duty of any individual to comply with any subpoena . . . issued to such individual by the Committee as part of its investigation into the firing of certain United States Attorneys and related matters, and to seek appropriate ancillary relief, including injunctive relief.[19]

Two weeks later, the Speaker of the House certified the contempt report to Jeffrey Taylor, the United States Attorney for the District of Columbia,[20] and she called on the Attorney General to ensure that

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13 Dan Eggen and Paul Kane, *2 Former Aides to Bush Get Subpoenas*, Wash Post A1 (June 14, 2007) (claiming that Taylor played a large role in efforts to name a former colleague as a United States Attorney).

14 Michael Abramowitz and Amy Goldstein, *Bush Claims Executive Privilege on Subpoenas*, Wash Post A1 (June 29, 2007).

15 153 Cong Rec D969 (July 12, 2007); 153 Cong Rec D1015 (July 19, 2007).

16 153 Cong Rec D1055 (July 25, 2007).

17 154 Cong Rec H962 (Feb 14, 2008) (noting that the final vote was 223 to 32).

18 H Res 979, 2d Sess 110th Cong (Feb 13, 2008).

19 H Res 980, 2d Sess 110th Cong (Feb 13, 2008).

20 Letter from Representative Nancy Pelosi, Speaker of the House, to Jeffrey A. Taylor, United States Attorney for the District of Columbia (Feb 28, 2008), online at

Taylor filed criminal contempt charges against Miers and Bolten.[21] The next day, the Attorney General replied that, because (in the Department of Justice's view) Bolten and Miers had properly invoked executive privilege in refusing to comply with the subpoenas, "noncompliance by Mr. Bolten and Ms. Miers with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."[22]

The Judiciary Committee then filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment that Miers and Bolten were in contempt and an injunction ordering them to comply with the congressional subpoenas.[23] Miers and Bolten moved to dismiss on the grounds that the committee lacked standing to bring the suit, that there was no proper cause of action, that the suit was nonjusticiable, and that the court should decline jurisdiction on discretionary bases. They also entered a defense on the merits, arguing for a broad executive privilege.[24]

On the question of standing, Miers and Bolten raised two arguments: first, that the Judiciary Committee had not suffered a cognizable personal injury; and second, that the case did not present "the type of dispute traditionally capable of resolution before an Article III court."[25] As to the first argument, the court, relying on DC Circuit precedent, found that the committee had standing to sue to enforce a duly issued subpoena.[26] The court found that the committee suffered injuries both in its loss of access to the information it sought and in "the institutional diminution of its subpoena power."[27] As to the second argument, the court found the case resolvable for two reasons:

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http://judiciary.house.gov/hearings/pdf/Pelosi080228.pdf (visited Sept 1, 2009) (citing the failure of Miers and Bolten to "appear, testify, and furnish certain documents" as required by the subpoena).

21 Letter from Representative Nancy Pelosi, Speaker of the House, to Attorney General Michael B. Mukasey (Feb 28, 2008), online at http://judiciary.house.gov/hearings/pdf/PelosiToMukasey080228.pdf (visited Apr 22, 2009) (suggesting that the Attorney General should not tolerate a witness ignoring a subpoena to appear before a federal grand jury).

22 Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb 29, 2008), online at http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf (visited Sept 1, 2009).

23 *Miers*, 558 F Supp 2d at 55, 63–64.

24 Id at 55–56.

25 Id at 66.

26 Id at 68–71, citing *United States v American Telephone and Telegraph Co*, 551 F2d 384, 391 (DC Cir 1976).

27 *Miers*, 558 F Supp 2d at 71.

> (1) in essence, this lawsuit merely seeks enforcement of a subpoena, which is a routine and quintessential judicial task; and (2) the Supreme Court has held that the judiciary is the final arbiter of executive privilege, and the grounds asserted for the Executive's refusal to comply with the subpoena are ultimately rooted in executive privilege.[28]

For this second point, the court relied on the Supreme Court's decision in the *Nixon Tapes Case*[29] and the DC Circuit's opinion in *Senate Select Committee v Nixon*.[30] Indeed, the latter case was procedurally very similar to the *Miers* case: The Senate Select Committee on Presidential Campaign Activities brought a suit seeking a declaratory judgment that President Richard Nixon was legally obligated to comply with a congressional subpoena directing him to produce the White House tapes.[31] Although the court ultimately held that the tapes were, in fact, covered by executive privilege, and therefore affirmed the lower court's dismissal of the suit,[32] it did reach the merits. In the view of the *Miers* court, this conclusively resolved the justiciability of the claim.[33] Moreover, the court noted that the executive branch itself, in the form of two memos from the Justice Department's Office of Legal Counsel (OLC), had concluded that civil suits to enforce a congressional subpoena were justiciable.[34]

In response to Miers and Bolten's argument that there was no cause of action here, the court held both that the Constitution itself gave Congress a right to investigate and therefore a cause of action that allowed it to invoke the Declaratory Judgment Act,[35] and that it had "an implied cause of action derived from Article I to seek a judi-

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28 Id.

29 *United States v Nixon*, 418 US 683 (1974).

30 498 F2d 725 (DC Cir 1974) (en banc).

31 Id at 726 (noting that the requested tapes were of five conversations between the president and his former Counsel John W. Dean).

32 Id at 733 (concluding that the need demonstrated by the Select Committee was "too attenuated and too tangential to its functions").

33 *Miers*, 558 F Supp 2d at 74 (noting that the *Senate Select Committee* court "evidently agreed" with the lower court's explicit determination that the issue was justiciable "because it proceeded directly to the merits of the controversy").

34 Id at 75–77. See also Charles Cooper, *Response to Congressional Requests for Information Regarding Decisions Made under the Independent Counsel Act,* 10 Op Off Legal Counsel 68 (1986) ("*OLC Memo*"); Theodore Olson, *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op Off Legal Counsel 101, 137 (1984) ("*OLC Memo*").

35 *Miers* 558 F Supp 2d at 78–88 (referencing case law "indicating that the [Declaratory Judgment] Act 'should be liberally construed to achieve the objectives of the declaratory remedy'").

cial declaration concerning the validity of its subpoena power."[36] In responding to this second argument, Miers and Bolten claimed that the issue need not be justiciable because Congress could rely on its inherent contempt powers. To this, the court replied that

> imprisoning current (and even former) senior presidential advisors and prosecuting them before the House would only exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis. Indeed, one can easily imagine a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion. [And] even if the Committee did exercise inherent contempt, the disputed issue would in all likelihood end up before this Court, just by a different vehicle—a writ of habeas corpus brought by Ms. Miers and Mr. Bolten. In either event there would be judicial resolution of the underlying issue.[37]

The court also suggested that Miers and Bolten were estopped from arguing that the House should have relied on its inherent contempt powers because the executive branch, in its OLC memos, had taken the position that the inherent contempt power was not available against executive branch officials.[38] Moreover, the court noted that negotiations between the branches had reached a "stalemate" and were therefore unlikely to be resolved by the usual process of interbranch "accommodation and negotiation."[39]

Finally, the court rejected Miers and Bolten's claim that it should exercise its equitable discretion to dismiss the suit.[40] The court asserted that "the judiciary is the ultimate arbiter of claims of executive privilege," and therefore that the political branches take "the availability of ultimate judicial intervention in exactly this sort of controversy" as a background assumption.[41] (Indeed, the court referred to itself as the "ultimate arbiter" of executive privilege claims five times over the

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36 Id at 88.

37 Id at 92 (quotation marks and citations omitted).

38 Id (stating that although the OLC opinions were not dispositive, the executive could not simultaneously question the availability of an alternative remedy while insisting that it must be exhausted before a civil cause of action is available).

39 *Miers*, 558 F Supp 2d at 92–93.

40 Id at 94–99.

41 Id at 96.

course of the opinion.[42]) As justification for the totality of its holdings that it could hear the case—that is, its holdings on standing, cause of action, and equitable discretion—the court proclaimed that "only judicial intervention can prevent a stalemate between the other two branches that could result in a particular paralysis of government operations."[43] In the few remaining pages of its opinion, the court concluded that neither Miers nor Bolten was protected by absolute executive privilege, but that both could still make specific claims of privilege against specific demands by the committee.[44]

Miers and Bolten appealed and moved for a stay pending appeal and expedited review. The DC Circuit granted the motion for a stay.[45] However, it denied the motion for expedited review on the grounds that

> even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.[46]

Given the risk that the case would then become moot, the court found that expedited briefing would be useless.[47] In a concurring opinion, Judge David Tatel argued that, if the case would become moot with the expiration of the congressional term, then a stay should not be issued; however, he was convinced that the case would survive the congressional term.[48]

On March 4, 2009—a month and a half into the Obama administration and two months into the 111th Congress—an agreement was reached under which Miers (and Rove) would testify under oath in closed proceedings and a number of documents would be turned over

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42 See id at 56, 76, 96, 103, 107.

43 *Miers*, 558 F Supp 2d at 99.

44 Id at 99–108.

45 *Committee on the Judiciary v Miers*, 542 F3d 909, 911 (DC Cir 2008) (per curiam).

46 Id.

47 Id.

48 Id at 911–12 (Tatel concurring) (emphasizing that "the successor Congress can assert the prior Committee's investigatory interest").

to the committee.[49] Pending the testimony and document delivery, the DC Circuit granted the parties' motion to stay the proceedings.[50]

It is the contention of this Article that all three branches—including, and perhaps most significantly, Congress itself—have acted improperly in this case so as to diminish Congress's constitutional powers. Defending this claim will require an examination of legislative findings of contempt against executive officials throughout Anglo-American history, placed in the broader context of legislative-executive power struggles.

II. CONTEMPT OF PARLIAMENT

Contempt of Parliament—and its sibling, breach of parliamentary privilege[51]—have a long history in English law. Tracing that history, including the context in which disputes between Parliament and the Crown gave rise to assertions of contempt or breach of privilege against Crown officers or even monarchs themselves, will help us understand the origin of the American contempt power and its appropriate scope.

A. Contempt of Parliament as a Royal Offense

The offense of contempt of Parliament dates to the institution's inception. Parliament's origins were as an advisory body meant to assist the monarch in the administration of his kingdom.[52] As such, the

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[49] Carrie Johnson, *Deal Clears Rove, Miers to Discuss Prosecutor Firings*, Wash Post A8 (Mar 5, 2009) (citing the desire of the White House to "avert a federal court showdown that could have restricted the authority of the president in future disputes with other branches of government").

[50] Per Curiam Order Filed Granting the Joint Motion to Stay Briefing and Oral Argument, *Committee on the Judiciary v Miers*, No 08-5357 (DC Cir Mar 5, 2009).

[51] See Thomas Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 75 (Lexis UK 23d ed 2004) (William McKay, ed):

> When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish contempts, that is, actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity.

See also Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 206 (Da Capo 1971):

> Often [contempt] was synonymous with breach of privilege, and the House of Commons, as well as a colonial assembly, might use the two terms interchangeably. . . . Indeed, there is logically a very close relation between the two. Anything that was a recognized breach of the assembly's privilege might be considered contemptuous; and any expression of contempt was in clear violation of the "undoubted right" of the assembly to be treated with dignity.

[52] See Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L J 177, 185 (2008) (noting that "Parliament's origins lie in

earliest contempts were treated as offenses against the Crown. In 1290, the Prior of the Holy Trinity cited the Earl of Cornwall to appear before the Archbishop of Canterbury. The King had also summoned the Earl to Parliament, and serving process on a member of Parliament during a session was considered a breach of parliamentary privilege.[53] Both the Prior and the man who actually served the citation were summoned before the King, who had them both sent to the Tower of London.[54] Likewise, in 1404, Richard Cheddre, the servant of a member of Parliament,[55] was "emblemished and maimed even to the peril of death" by John Sallage.[56] The House petitioned the King for a draconian system of punishments for such offenses:

> [I]f any man shall kill or murther any that is come under your protection to Parliament, that it be adjudged treason; and if any do maim or disfigure any such so come under your protection, that he lose his hand; and if any do assault or beat any such so come, that he be imprisoned for a year, and make fine and ransome to the king: and that it would please you of your special grace hereafter to abstain from charters of pardon in such cases, unless that the parties be fully agreed.[57]

The King was unwilling to assent to this general scheme, but he did command Sallage to appear before the King's Bench. There, he was

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the medieval *curia regis*, the king's council"); Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* 22 (Clarendon 1999):

> The first parliaments were meetings of the King and his tenants-in-chief, in which he sought their counsel, consent, and material support in discharging his principal responsibilities, the defence of the realm and the dispensation of justice within it. The acts of those parliaments were acts of the King, and their authority was his authority, fortified by counsel and consent.

Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* 14–38 (Yale 1910) (describing the development of Parliament from its origins as the king's council).

53 See Henry Elsynge, *The Manner of Holding Parliaments in England* 184–85 (Richardson & Clark 1768) (describing the Prior's attempt to serve process on the Earl of Cornwall and the King's reaction thereto); Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 24 (Flesher 1644) (describing the same events). For a historical discussion of the parliamentary privilege against civil arrest and legal process, see Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* 111–33 (Yale 2007).

54 Elsynge, *The Manner of Holding Parliaments in England* at 184–85 (cited in note 53).

55 Many of the privileges of members of Parliament also applied to members' servants until the late seventeenth century. See Chafetz, *Democracy's Privileged Few* at 124–29 (cited in note 53) (describing the privileges enjoyed by servants of members of Parliament).

56 Elsynge, *Manner of Holding Parliaments in England* at 189 (cited in note 53).

57 Id at 190.

ordered to pay double damages, plus a fine and ransom to the Crown.[58] In 1433, a law was passed making double damages, fine, and ransom the punishments for all cases of assault upon a member of Parliament.[59] The fact that the fine and ransom were paid to the Crown, as well as the fact that they were dispensed through the mechanisms of royal justice, make it clear that the contempt was against the King. The fifteenth-century Parliament did not yet have sufficient institutional independence for the assault on Cheddre to be considered a matter for the House's own cognizance.[60]

B. Contempt of Parliament as an Offense Punishable in Parliament

Beginning in the sixteenth century, however, the houses themselves began to punish contempts. In 1543, George Ferrers, a member of Parliament from Plymouth, was arrested in London pursuant to an action in the King's Bench to recover a debt (for which Ferrers served as a surety).[61] Upon being notified of Ferrers's arrest, the House of Commons sent its sergeant to demand his release.[62] Rather than surrender him, however, the jailers, "after many stout words[,] . . . forcibly resisted" the sergeant's demands.[63] In the resulting melee, the sergeant "was driven to defend himself with his mace of armes, and had the crown thereof broken by bearing off a stroke, and his man stroken down."[64] The London sheriffs arrived on the scene but promptly sided with the jailers against the sergeant.[65] The sergeant returned to the House of Commons and reported; the Commons took the matter "in so ill part, that they all together . . . rose up wholly, and retired to the Upper House," where they acquainted the Lords with their grievances.[66]

The House of Lords, "judging the contempt to be very great, referred the punishment thereof to the order of the Commons House."[67]

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58 Id at 190–91.

59 11 Hen 6, ch 11 (1433).

60 For other examples of pre-sixteenth-century Parliaments appealing to the Crown to vindicate their privileges, see Chafetz, *Democracy's Privileged Few* at 112–16, 145–47 (cited in note 53) (describing the House of Commons's reliance on the Crown to enforce its privileges); Chafetz, 58 Duke L J at 185 (cited in note 52) (noting that resignation from Parliament required the King's permission).

61 John Hatsell, 1 *Precedents of Proceedings in the House of Commons; With Observations* 53 (Hughs 2d ed 1785).

62 Id.

63 Id at 53–54.

64 Id at 54.

65 Hatsell, 1 *Precedents of Proceedings in the House of Commons* at 54 (cited in note 61).

66 Id.

67 Id.

The Lord Chancellor, a Crown official,[68] offered to arm the sergeant with a royal writ, but "the Commons House refused, being of a clear opinion, that all commandments and other acts proceeding from the [House of Commons], were to be done and executed by their Serjeant without writ, only by shew of his mace, which was his warrant."[69] Meanwhile, the London sheriffs, having received word of "how haynously the matter was taken" and having decided that discretion was the better part of valor, decided to turn Ferrers over without a fight when the sergeant returned.[70] The sergeant, upon securing Ferrers's release, charged the sheriffs, jailers, and the person upon whose suit Ferrers was arrested in the first place, to appear before the House of Commons the next morning to answer for their contempt of Parliament.[71]

When they appeared in the House, they were denied counsel. After they spoke in response to the contempt charge, the sheriffs and the person who instituted the suit were committed to the Tower of London, and the arresting officer and most of the jailers were sent to Newgate prison.[72] The jailer who started the physical confrontation with the sergeant was committed to the Little Ease dungeon[73] of the Tower of London.[74] The House released its prisoners three days later, but only after "humble suit made by the Mayor of L[ondon] and other their friends."[75]

In addition to being a member of the House of Commons, Ferrers was also a servant of King Henry VIII. After the Commons released the sheriffs and jailers, the King called prominent members of the House before him.

> First commending their wisdome in maintaining the Privileges of the House (which he would not have to be infringed in any point) alledged that he, being head of the Parliament, and attend-

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68 See F.W. Maitland, *The Constitutional History of England* 202 (Cambridge 1963) (H.A.L. Fisher, ed) (noting that, through Tudor times, "the chancellor is the king's first minister").

69 Hatsell, 1 *Precedents of Proceedings in the House of Commons* at 54–55 (cited in note 61).

70 Id at 55.

71 Id.

72 Id.

73 The Little Ease was a cell so small that a prisoner could not fully stretch out in any direction. "He was obliged to sit in a squatting position and was kept confined there." L.A. Parry, *The History of Torture in England* 80 (Sampson Low 1933). For an insightful discussion of the psychological impact of this form of torture, see Albert Camus, *The Fall* 109–10 (Knopf 1984) (Justin O'Brien, trans) ("*Mon cher*, there was genius—and I am weighing my words—in that so simple invention. Every day through the unchanging restriction that stiffened his body, the condemned man learned that he was guilty and that innocence consists in stretching joyously.").

74 Hatsell, 1 *Precedents of Proceedings in the House of Commons* at 55 (cited in note 61).

75 Id at 55–56.

> ing in his own person upon the business thereof, ought in reason to have Privilege for him, and all his servants attending there upon him. So that if the said Ferrers had been no Burgess, but only his servant, that in respect thereof he was to have the Privilege, as well as any other. For I understand, quoth he, that you, not only for your own persons, but also for your necessary servants, even to your cooks and horse-keepers, enjoy the said Privilege. . . . And further, we be informed by our Judges; that we at no time stand so highly in our Estate Royal, as in the time of Parliament; wherein we as Head, and you as Members, are conjoin'd and knit together into one Body Politick, so as whatsoever offence or injury (during that time) is offered to the meanest Member of the House, is to be judg'd as done against our Person and the whole Court of Parliament; which prerogative of the Court is so great (as our learned Counsel informeth us) as all acts and processes coming out of any other inferior Courts, must for the time cease and give place to the highest.[76]

Beneath the superficial pleasantries, there lay a struggle over the role of Parliament in the English constitutional order. The Commons's refusal to accept the Lord Chancellor's proffered writ constituted an assertion that the House's contempt power was independent of royal authority. The sergeant needed only show his mace, the symbol of the authority vested in him *by the House*, in order to free Ferrers and imprison those who held him. The King, by contrast, attempted to reassert Parliament's role as his advisory body. His claim that his servants should be accorded parliamentary privilege was a claim that privilege was intended to help members of Parliament serve the King.

Henry's words notwithstanding, it was the House's deeds that set the tone for the future. Without royal assistance, the House of Commons had freed Ferrers and imprisoned those who had violated the House's privileges. Henceforth, it would be the House, and the House alone, that would punish contempts. By punishing these contempts itself, the House asserted an institutional identity independent from the Crown: contempts were no longer interferences with the functioning of royal governance; rather, they were interferences with the House's ability to do its own business.

One important consequence of this change was that it became conceivable to hold Crown officers—indeed, even monarchs themselves—in contempt. When Parliament was just one instrument of

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[76] Id at 56–57.

royal governance, a dispute between Parliament and some (other) Crown official was determinable by reference to what the monarch wanted. But with Parliament beginning to assert institutional powers distinct from the Crown, it became possible to conceive of contempts committed by Crown officials. A number of cases, beginning in the late sixteenth century, makes this clear.

C. Contempt against Crown Officials

In 1566, a joint committee of the Lords and Commons sent Queen Elizabeth a petition requesting both that she "dispose [herself] to marry, where it shall please [her], with whom it shall please [her], and as soon as it shall please [her]," and that she settle the matter of succession in case she should die unmarried and without heirs.[77] The Queen sent back a brief reply assuring Parliament that all would be settled in due course.[78] A number of members of the House of Commons were unsatisfied and spoke critically of the Queen's refusal to address directly their concerns.[79] In response, Elizabeth summoned thirty members of the House of Commons, as well as the Lords who had served on the joint committee that drafted the petition, to appear before her.[80] When they appeared, she delivered "a smart reproof," albeit one in which "she mixed some sweetness with maj[esty]."[81] She "promised them to manage things not only with the care of a prince, but the tenderness of a parent."[82] And she forbade them to discuss issues of succession any further.[83]

In the House of Commons, Paul Wentworth questioned whether forbidding further discussion of an issue constituted a breach of privilege.[84] This question was extensively debated on the day it was raised, and the next day, the Speaker of the House of Commons was again summoned to appear before the Queen.[85] There, she commanded him to allow no further discussion of the matter.[86] This command was inef-

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77 William Cobbett, 1 *Parliamentary History of England* 711 (Hansard 1806).

78 Id at 714–15 ("[I]f I can bend my liking to your need, I will not resist such a mind.").

79 Cobbett records that some members spoke "with much heat and great insolence" and that they were "so audacious as to back their pertness with invectives and abuses." Id at 715.

80 Id at 716.

81 Cobbett, 1 *Parliamentary History of England* at 716 (cited in note 77).

82 Id.

83 Id. For a different version of this address, albeit one with the same tenor, see J.E. Neale, 1 *Elizabeth I and Her Parliaments, 1559–1581* 146–50 (Alden 1953).

84 Cobbett, 1 *Parliamentary History of England* at 716 (cited in note 77).

85 Id.

86 Id.

fectual—the House immediately appointed a committee to draft a response.[87] The document produced by this committee suggested that, in ordering the House to cease debate, the Queen had infringed upon their traditional liberties, and it urged her to lift the restraint.[88] Although this petition was never presented to the Queen, the Commons did request a meeting with her to discuss their privileges.[89] Realizing that, as long as the Commons believed that she was infringing on their liberties, the House would refuse to attend to other business, Elizabeth gave in.[90] Two weeks after ordering the House to suspend discussion of the succession issue, the Queen revoked that command, although she made it known that she "desired the house to proceed no further in the matter at that time."[91] This incident is important, not simply because of the outcome—that is, in a dispute framed in the language of royal prerogative versus parliamentary privilege, the latter won—but also precisely because it was framed in those terms. That is, both the House and the Queen herself thought it conceivable that the Queen could breach parliamentary privilege.

A similar pattern, in which the House won a contest that pit claims of prerogative against those of privilege, played out only a few years later, in 1571. That year, William Strickland, a member of the House of Commons, was summoned before the Queen's Council and ordered not to attend the House because he had introduced a bill moving for the reformation of the Book of Common Prayer.[92] (As Elizabeth was head of the Church of England,[93] she considered all matters of religion to fall within her royal prerogative and, therefore, outside of Parliament's purview.[94]) Several members argued that this

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87 Neale, 1 *Elizabeth I and Her Parliaments* at 154 (cited in note 83).

88 Id at 155–56 (protesting that surely "your Majesty meant not . . . to diminish our accustomed liberties").

89 Id at 156.

90 Id.

91 Cobbett, 1 *Parliamentary History of England* at 716 (cited in note 77).

92 Id at 761–62, 765. For background on the dispute between Elizabeth and the 1571 Parliament over religious reforms, see generally J.E. Neale, *Parliament and the Articles of Religion, 1571*, 67 Eng Hist Rev 510 (1952).

93 See Act of Supremacy, 1534, 26 Hen 8, ch 1:

> [Recognizing the monarch's] full Power and Authority from Time to Time [as head of the Anglican Church] to visit, repress, redress, reform, order, correct, restrain and amend all such Errors, heresies, Abuses, Offenses, Contempts, and Enormities, whatsoever they be, which in any manner of spiritual Authority or Jurisdiction ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained or amended.

94 See G.R. Elton, *The Tudor Constitution: Documents and Commentary* 334 (Cambridge 1960) (describing Elizabeth's belief in strong personal supremacy over the Church).

interference of the Crown in Strickland's performance of his parliamentary duties constituted a breach of privilege.[95] Christopher Yelverton insisted that Strickland's arrest created a "perilous" precedent,[96] and that the House had a right to debate "all matters not treason, or too much to the derogation of the imperial crown."[97] He concluded that "it was fit for princes to have their prerogatives; but yet the same to be straitened within reasonable limits."[98] The next day, the Queen yielded and Strickland was again allowed to attend the House.[99]

D. Charles I

But it was during the reign of the House of Stuart that clashes between royal prerogative and parliamentary privilege really came to the fore. In 1621, for example, James I ordered the House of Commons to stop meddling in the "mysteries of state" when it questioned his desire to marry off the Prince of Wales to the Spanish Infanta.[100] When the House replied that freedom of speech and debate was part of its "ancient and undoubted right,"[101] James claimed that all privileges derived from royal grace—but insisted that he would be glad to show the House that grace, so long as it refrained from encroaching on royal prerogative.[102] When the House replied by passing a resolution reasserting the claim that its privileges were its "ancient and undoubted birthright,"[103] James responded by sending for the Commons's journal, tearing out their protestation, declaring it "invalid, annulled, void, and of no effect," imprisoning some of the parliamentary ringleaders, sending others off to Ireland as royal commissioners, and dissolving Parliament.[104]

James's fights with Parliament were nothing, however, as compared to those of his son. Indeed, Charles I's clashes with Parliament are worth discussing in great detail because they were often framed as clashes between royal prerogative and legislative privilege. Some of these clashes look rather familiar, as when Charles repeatedly asserted

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95 Cobbett, 1 *Parliamentary History of England* at 761–63 (cited in note 77).
96 Id at 762.
97 Id.
98 Id.
99 Cobbett, 1 *Parliamentary History of England* at 765 (cited in note 77).
100 Id at 1326–27.
101 Id at 1335.
102 Id at 1344.
103 Cobbett, 1 *Parliamentary History of England* at 1361 (cited in note 77).
104 Id at 1362–71. See also Hannis Taylor, 2 *The Origin and Growth of the English Constitution* 249 (Houghton Mifflin 1898).

a right, grounded in royal prerogative, to withhold documents from Parliament and to prevent his advisors from having to testify before Parliament. In fact, the English Civil War can well be thought of as the victory of parliamentary privilege over such claims of royal prerogative—indeed, as the ultimate finding of contempt of Parliament. This is, of course, not the only way of thinking about the origins of the Civil War, and the treatment below necessarily gives short shrift to other important issues, especially religious conflict.[105] By focusing on the conflict between Crown and Parliament, this Part aims to give a clearer picture of the growth and development of Parliament's ability to hold Crown officials, including the King, in contempt.

Charles had come to the throne with "his heart . . . set upon a war with Spain, a war which, though approved by the last parliament of his father, had not yet been declared, and might easily have been avoided."[106] But going to war required money, which Charles would have to requisition from Parliament. For two centuries, whenever a new monarch ascended the throne, Parliament had immediately granted him the customs duties of tonnage and poundage for the rest of his life.[107] However, in 1625, the House of Commons, upset that the new King showed no intention of redressing some of the House's grievances remaining from his father's reign,[108] voted to grant tonnage and poundage for only a single year.[109] As a result, the House of Lords rejected the bill, leaving Charles to collect the duties without any statutory authorization.[110] Although the Commons passed a resolution declaring that "we will be ready in convenient time, and in a Parliamentary way freely and

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[105] On the importance of religious conflict to the English Civil War, see Roger Lockyer, *The Early Stuarts: A Political History of England 1603–1642* 302–04 (Longman 1989).

[106] Theodore F.T. Plucknett, *Taswell-Langmead's English Constitutional History from the Teutonic Conquest to the Present Time* 362 (Sweet & Maxwell 1960).

[107] Id at 363. See also Linda S. Popofsky, *The Crisis over Tonnage and Poundage in Parliament in 1629*, 126 Past & Present 44, 49 (1990) (describing tonnage and poundage as being "traditionally associated with the expectation of royal defence of the seas and foreign trade").

[108] See Henry Hallam, 1 *The Constitutional History of England from the Accession of Henry VII to the Death of George II* 376 (John Murray 1876):

> [The House of Commons did not] forget that none of the chief grievances of the last reign were yet redressed, and that supplies must be voted slowly and conditionally if they would hope for reformation.

These grievances included the fallout from the dispute discussed previously in text accompanying notes 100–104.

[109] Hallam, 1 *The Constitutional History of England* at 376 (cited in note 108).

[110] William Cobbett, 2 *Parliamentary History of England* 6 (Hansard 1806). See also Conrad Russell, *Parliaments and English Politics, 1621–1629* 229 (Oxford 1979); Maitland, *The Constitutional History of England* at 307 (cited in note 68); Plucknett, *Taswell-Langmead's English Constitutional History* at 363 (cited in note 106).

dutifully to . . . afford all necessary Supply to his most Excellent Majesty, upon his present, and all other his just Occasions and Designs,"[111] Charles despaired of getting any more money out of the House and accordingly dissolved Parliament.[112]

However, the defeat of English forces at Cadiz shortly after the dissolution of Parliament,[113] along with heightening tensions between England and France,[114] meant that Charles soon found himself in desperate need of new funds.[115] He was therefore forced to call a new Parliament in early 1626.[116] In an attempt to ensure that this Parliament went more smoothly for him, Charles appointed six of the more charismatic leaders of the previous Parliament to the post of sheriffs, which made them legally ineligible to sit in the new Parliament.[117] The Commons, however, resented these perceived invasions of its privileges, and it refused to grant the King the funds he sought until after its concerns about its privileges had been addressed.[118] Moreover, parliamentary opposition to the Duke of Buckingham, a royal favorite, had been growing in the 1625 Parliament, where he was accused of bearing primary responsibility for the lackluster conduct of the war and for Charles's heavy-handed approach to parliamentary relations.[119] In the 1626 Parliament, the Commons "commenced with redoubled vigour" its investigation of Buckingham.[120] When the Commons explicitly conditioned the granting of funds to the King on his addressing their grievances,[121] he replied:

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111 John Rushworth, 1 *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments, Beginning the Sixteenth Year of King James, Anno 1618, and Ending the Fifth Year of King Charls, Anno 1629* 190 (Thomas Newcomb 1659).

112 Id at 191.

113 See Lockyer, *The Early Stuarts* at 25–26 (cited in note 105) (describing the Cadiz expedition).

114 See Russell, *Parliaments and English Politics* at 263–66 (cited in note 110).

115 See id at 262 ("It was hard to see, without large further revenues, what other sort of war was open to the English [besides a war fought primarily by privateers].").

116 Id at 267 (noting that Buckingham, the most influential figure in Charles's court, "could not avoid [calling] a Parliament: the Spanish war, in which he and Charles had invested too much political capital to draw back, could not be sustained without one. Even if there had been an immediate peace, a Parliament would probably still have been necessary, to raise the money to meet arrears of pay already owed to sailors and soldiers under arms").

117 Edward Porritt, 1 *The Unreformed House of Commons: Parliamentary Representation before 1832* 383–84 (Cambridge 1903). See also Harold Hulme, *The Sheriff as a Member of the House of Commons from Elizabeth to Cromwell*, 1 J Mod Hist 361, 367–70 (1929) (describing the unwilling sheriffs and the resulting uproar in the House of Commons).

118 Cobbett, 2 *Parliamentary History of England* at 45–49 (cited in note 110).

119 See Russell, *Parliaments and English Politics* at 262–69 (cited in note 110).

120 Porritt, 1 *The Unreformed House of Commons* at 385 (cited in note 117).

121 Cobbett, 2 *Parliamentary History of England* at 49 (cited in note 110).

> I must let you know, that I will not allow any of my servants to be questioned amongst you, much less such are as of eminent place, and near under me. . . . I see you specially aim at the duke of Buckingham. . . . [I] can assure you, he hath not meddled, or done any thing concerning the public or common wealth, but by special directions and appointment, and as my servant.[122]

The House, however, was not chastened, and continued its proceedings against Buckingham.[123] Additionally, a committee report, which was accepted by the House, proposed that funds be granted to the King as soon as "they had presented their grievances, and received his answer to them."[124]

Charles promptly summoned both houses to appear before him, and, after thanking the Lords for their "care of the state of the kingdom,"[125] he turned to chastising the Commons for behaving in an "unparliamentary" manner.[126] The Lord Keeper, speaking on the King's behalf, then made it clear that Charles would

> by no means suffer [royal prerogative] to be violated by any pretended colour of parliamentary liberty; wherein his maj. doth not forget that the parliament is his council, and therefore ought to have the liberty of a council; but his maj. understands the difference betwixt council and controlling, and between liberty and the abuse of liberty.[127]

The King was particularly outraged by the ongoing proceedings against Buckingham, and the Lord Keeper declared that Charles regarded any attack on the Duke as an attack on himself.[128] Accordingly, Charles ordered the Commons to "yield obedience unto those directions which you have formerly received, and cease this unparliamentary inquisition."[129] Charles also took exception to the House's presuming to question his counselors and to its having "sent a general warrant to his signet-office, and commanded his officers, not only to produce and shew the records, but their books and private notes, which they made for his maj.'s service."[130] That is, to use somewhat anachro-

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122 Id at 49–50.
123 Id at 50–55.
124 Id at 56.
125 Cobbett, 2 *Parliamentary History of England* at 56 (cited in note 110).
126 Id.
127 Id at 57.
128 Id at 58.
129 Cobbett, 2 *Parliamentary History of England* at 58 (cited in note 110).
130 Id.

nistic language, he made a protest, grounded in executive privilege, to the Commons's summoning royal officials to testify and ordering them to produce documents. Finally, the promised funds from the House were deemed wholly inadequate.[131] The King ordered the House to deliberate quickly and return an answer to the question of "what further Supply you will add to this you have already agreed on; and that to be without condition"; noncompliance, he threatened, would be punished by dissolution.[132]

In reply, the Commons asserted that "it hath been the antient, constant, and undoubted right and usage of parliaments, to question and complain of all persons, of what degree soever, found grievous to the common-wealth, in abusing the power and trust committed to them by their sovereign."[133] In other words, the parliamentary power of investigation trumps assertions of executive privilege. The Commons then set aside all other business—including the King's request for funds—to proceed against Buckingham.[134] On May 10, 1626, the Commons presented thirteen articles of impeachment against Buckingham to the House of Lords.[135]

The Lords were, at the time, locked in their own struggle with the Crown over their privileges, and were therefore perhaps less inclined to look favorably on Buckingham than they might otherwise have been. Several months earlier, Charles had committed the Earl of Arundel to the Tower of London.[136] Although the King did not immediately give a reason, some thought that the cause was the marriage of the Earl's eldest son to a relative of the King's—a match of which the monarch did not approve.[137] Others noted, however, that Arundel was one of Buckingham's arch-opponents in the House of Lords and suggested that this factor explained his imprisonment.[138] Whatever the King's reason, the House of Lords, concerned that Arundel's imprisonment might constitute an attack on its privileges, began looking into the matter.[139] Upon learning of the House's inquiry, the King sent

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131 Id at 59.

132 Id at 59, 60 ("[I]f you shall not by that time resolve on a more ample Supply, his maj. cannot . . . promise you to sit longer together.").

133 Cobbett, 2 *Parliamentary History of England* at 69 (cited in note 110).

134 Id at 79 (resolving that "setting all other business aside, they would proceed in the great Affair of the duke of Buckingham, morning and afternoon, until it was done").

135 3 HL J 619–26 (May 15, 1626).

136 Elsynge, *The Manner of Holding Parliaments in England* at 192 (cited in note 53).

137 Hatsell, 1 *Precedents of Proceedings in the House of Commons* at 140 (cited in note 61).

138 Vernon F. Snow, *The Arundel Case, 1626*, 26 The Historian 323, 327–37 (1964).

139 Elsynge, *The Manner of Holding Parliaments in England* at 192 (cited in note 53).

the Lord Keeper to communicate to the House that "the earl of Arundel was restrained for a misdemeanor which was personal to his majestie, and lay in the proper knowledge of his majestie, and had no relation to matters of Parliament."[140] The House of Lords then formed a subcommittee to inquire into the matter.[141] Upon learning of this, the King sent a second message, assuring the House that he had acted "justly" and had "not diminished the privilege of the house."[142] The House was unconvinced, however, and resolved that "no lord of Parliament, sitting the Parliament, or within the usual times of privilege of Parliament, is to be imprisoned, or restrained, without sentence or order of the House; unless it be for treason or felony, or for refusing to give surety for the peace."[143] There followed a month of messages sent back and forth between the King and the House, in which the House pressed its privilege claim and demanded an immediate answer and Charles insisted that an answer would be forthcoming in due course.[144] Finally, when the House's patience was exhausted, it suspended all other business "that consideration might be had how their privileges may be preserved unto posterity."[145] (Among the business that did not proceed while the Lords were pondering their privileges was the Duke of Buckingham's attempt to respond to the impeachment charges.[146]) The King sent word that he was "resolved, to satisfy your lordships fully in what you then desired,"[147] but the Lords adjourned, refusing to do any business until they were satisfied.[148] When the House reconvened a week later, the King again tried to postpone replying to its assertion of privilege.[149] The Lords again resolved "all other business to cease, but this of the earl of *Arundel*'s concerning the privilege of the house."[150] Five days later, on June 8, 1626, Arundel was released.[151] Again, it is worth noting that the Crown here acquiesced in

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140 Id at 193 (emphasis omitted).

141 Id.

142 Id at 194 (emphasis omitted).

143 Elsynge, *The Manner of Holding Parliaments in England* at 223 (cited in note 53) (emphasis omitted).

144 Id at 224–38.

145 Id at 238.

146 See id at 239 (noting that Buckingham tried to raise an issue about his defense, but "the lords would not hear him, because they would entertain no business").

147 Elsynge, *The Manner of Holding Parliaments in England* at 239 (cited in note 53) (emphasis omitted).

148 Id.

149 Id at 240 (detailing the King's message to the House, which stated that the King "hath endeavoured as much as may be to ripen [the issue], but cannot yet effect it").

150 Id.

151 Elsynge, *The Manner of Holding Parliaments in England* at 242 (cited in note 53).

the assertion by a house of Parliament that the King's actions constituted a breach of privilege.

Four days after Arundel's release, the King's supporters in the House of Commons made one final attempt to get the House to provide the funds the King sought. The attempt went nowhere, and, on June 15, Charles dissolved his second Parliament.[152] However, the Crown's need for funds continued to increase,[153] and with Charles unwilling to make the compromises necessary to receive a parliamentary grant of supply, he turned to fundraising methods of dubious constitutionality. Most notably, he ordered his treasury officials to collect the duties of tonnage and poundage, despite the fact that Parliament had refused to grant him this right,[154] and he ordered the collection of a "forced loan"—that is, he required that his subjects provide a loan proportional to the value of their property.[155] These two devices led to massive public resistance.[156] When Randolph Crewe, the Chief Justice of the King's Bench, refused to bless the legality of these measures, Charles summarily dismissed him and replaced him with someone more compliant.[157] The new Chief Justice, Nicholas Hyde, promptly denied habeas petitions by those who had been imprisoned for refusing to pay the forced loan.[158]

The growing resistance to the Crown's use of prerogative powers to raise funds, combined with the increasing need for funds, forced Charles in 1628 to call his third Parliament.[159] In the hopes of convincing the new Parliament to be generous, Charles released all those who had been imprisoned for refusing to pay the forced loan. Of the seven-

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152 Cobbett, 2 *Parliamentary History of England* at 193–200 (cited in note 110).

153 Russell, *Parliaments and English Politics* at 328–30 (cited in note 110) (noting the drift towards war with France and the corresponding need for more money).

154 See *Commission for Raising Tonnage and Poundage with Impositions* (July 26, 1626), reprinted in Samuel Rawson Gardiner, ed, *The Constitutional Documents of the Puritan Revolution, 1625–1660* 49 (Oxford 1906).

155 See *The Commission and Instructions for Raising the Forced Loan in Middlesex* (Sept 23, 1626), in Gardiner, ed, *The Constitutional Documents of the Puritan Revolution* at 51 (cited in note 154).

156 See Lockyer, *The Early Stuarts* at 223 (cited in note 105) (noting that the forced loan was "parliamentary taxation without parliamentary sanction, and as such it ran counter to many Englishmen's most deeply-held beliefs"); D. Lindsay Keir, *The Constitutional History of Modern Britain 1485–1937* 190 (Black 1943) (noting the "disastrous political cost" attendant on Charles's fundraising methods).

157 For a decidedly partial, but nonetheless generally accurate, description of Crewe's conflict with Charles, see John Lord Campbell, 1 *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* 374–75 (John Murray 1849).

158 *The Five Knights' Case*, 3 How St Tr 1, 51–59 (KB 1627).

159 See Cobbett, 2 *Parliamentary History of England* 217 (cited in note 110).

ty-six who had been imprisoned for that reason, twenty-seven were elected to the new Parliament.[160] As Conrad Russell has noted, this Parliament assembled "with the conscious and deliberate aim of vindicating English liberties."[161] Although Charles was desperate for immediate funds,[162] the Commons would do nothing until their liberties were addressed. Accordingly, less than three months after the Parliament was assembled, Charles was compelled to give his assent to the Petition of Right,[163] in which, among other things, he promised to levy no more forced loans.[164] While Charles was considering whether or not to assent to the Petition, the Commons voted him both tonnage and poundage and additional subsidies, but they refused to finalize the grants until he had given satisfactory assent to the Petition.[165] After Charles gave in to the House's demands, the House voted him subsidies, but not tonnage and poundage.[166] The House drew up a remonstrance, explaining that there was insufficient time before the end of the parliamentary session to prepare an adequate bill granting him tonnage and poundage,[167] and warning Charles against attempting to collect the duties on his own: "[T]he receiving of Tunnage and Poundage, and other Impositions, not granted by Parliament, is a breach of the Fundamental Liberties of this Kingdom, and contrary to your Majesty's Royal Answer to the said Petition of Right."[168] Before the remonstrance could be presented to him, however, Charles prorogued the Parliament:

> Now since I am certainly informed, that a . . . Remonstrance is preparing for me, to take away my Profit of my Tonage and Poundage (One of the Chief Maintenances of the Crown) by alleging, that I have given away my Right thereof by my Answer to your Petition; this is so prejudicial unto me, that I am forced to end this Session some few Hours before I meant it, being not willing, to receive any more Remonstrances, to which I must give a harsh Answer.[169]

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160 Plucknett, *Taswell-Langmead's English Constitutional History* at 366 (cited in note 106).
161 Russell, *Parliaments and English Politics* at 343 (cited in note 110).
162 Id at 341 (noting Charles's "unseemly haste for money").
163 3 Car 1, ch 1 (1628).
164 3 Car 1, ch 1, § 8.
165 See Lockyer, *The Early Stuarts* at 338 (cited in note 105).
166 Id at 345.
167 Rushworth, 1 *Historical Collections* at 629 (cited in note 111).
168 Id at 630.
169 1 HC J 919 (June 26, 1628).

Roughly two months after Parliament was prorogued, Buckingham was assassinated by a disgruntled army veteran.[170] This assassination removed from the royal court one of the strongest advocates for the ongoing wars with Spain and France,[171] wars which were already broadly unpopular.[172] This raised the possibility of peace but did nothing to alleviate the King's immediate need for funds. During the prorogation, Charles continued to collect tonnage and poundage without parliamentary sanction.[173] London merchants, many of whom were either members of Parliament or friends of members, openly rebelled, at one point breaking into the royal customs warehouse and taking back goods that had been impounded because of their refusal to pay the duties.[174] When Parliament reconvened on January 20, 1629, Charles was facing a "full-fledged merchant revolt."[175]

Two days into the new session, the House of Commons impaneled a committee to look into the complaints of John Rolle, a merchant and a member of the House.[176] The gist of Rolle's complaint was that "his goods were seized by the officers of the customs, for refusing to pay the rates by them demanded."[177] Two days later, Charles addressed both houses of Parliament, telling them that the best way to ensure that the collection of tonnage and poundage without parliamentary approval would not become a precedent for future expansive interpretations of royal prerogative would be to retroactively authorize tonnage and poundage since the beginning of his reign.[178] The House did not take this suggestion well, refusing even to debate a bill granting tonnage and poundage.[179] The King was displeased—he sent a

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170 Russell, *Parliaments and English Politics* at 392 (cited in note 110) (noting that the assassin John Felton "stabbed the Duke, who died almost instantly"). The assassin's precise motives continue to be debated. See Thomas Cogswell, *John Felton, Popular Political Culture, and the Assassination of the Duke of Buckingham*, 49 Hist J 357, 357, 361–62 (2006) (analyzing the motivations behind Buckingham's murder, including his family's "tortured" relationship with the regime and Felton's participation in a disastrous military campaign). Immediate public reaction to the assassination was exuberant. See id at 358.

171 See Lockyer, *The Early Stuarts* at 345–46 (cited in note 105); Russell, *Parliaments and English Politics* at 392 (cited in note 110). See also note 116 and text accompanying note 119.

172 Russell, *Parliaments and English Politics* at 393 (cited in note 110).

173 Popofsky, 126 Past & Present at 59 (cited in note 107).

174 Id ("Infuriated at the impounding of their goods by customs officials for non-payment of duties, some thirty merchants broke into the customers' warehouse and carried off a large portion of the confiscated merchandise.").

175 Id at 61.

176 1 HC J 921 (Jan 22, 1629).

177 Cobbett, 2 *Parliamentary History of England* at 437 (cited in note 110).

178 Id at 443 (noting that, "by passing the bill [granting tonnage and poundage] as my ancestors have had it, my by-past actions will be concluded, and my future proceedings authorized").

179 Id.

message expressing his hope that the House would take up the bill,[180] followed the next day by another message expressing his expectation that the House would do so and pointedly noting that he "expects rather thanks than a remonstrance."[181] The House chose not to proceed with tonnage and poundage.

On February 10, Rolle came before the House and complained that his warehouse had been locked and he had been served with a subpoena to appear in the Star Chamber.[182] Sir Robert Philips told his colleagues in the House that such actions made them "the subject of scorn and *contempt*" and insisted that the House inquire "by whose procurement this subpoena was taken forth: if those that throw these scorns upon us may go unquestioned, it is in vain to sit here."[183] When the customs official who had seized Rolle's goods came before the House, he explained that he had seized the goods under royal authority.[184] Moreover, he reported that "the king sent for him on Sunday last, and commanded him to make no further answer" to the House.[185] The House was outraged. John Selden thundered, "If there be any near the king that misinterpret our actions, let the curse light on them, and not on us: I believe it is high time to right ourselves; and until we vindicate ourselves in this, it will be vain for us to sit here."[186] The next day, the royal warrant by which the duties were collected was laid before the House. In it, Charles ordered the customs officials to collect tonnage and poundage "as they were in the time of our . . . father. . . . And if any person shall refuse to pay, then our will is, that the lords of the council and the treasurer shall commit to prison such so refusing."[187] In other words, the warrant asserted Charles's prerogative powers to collect the same tonnage and poundage duties that his father had collected, despite the fact that Parliament had specifically authorized James to collect tonnage and poundage and had specifically denied Charles that right. As Philips remarked, "Thus you see how fast the prerogative of the king doth intrench on the liberty of the subject, and how hardly it is recovered."[188] There was some debate as to whether the House should construe the royal warrant as authorizing the collec-

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180 Id at 449.
181 Cobbett, 2 *Parliamentary History of England* at 453 (cited in note 110).
182 Id at 461.
183 Id at 461–62 (emphasis added).
184 Id at 477.
185 Cobbett, 2 *Parliamentary History of England* at 477 (cited in note 110).
186 Id at 478.
187 Id.
188 Id at 480.

tion of the duties against members of Parliament, or whether the House should assume that the customs officials had acted outside the scope of the warrant.[189] Nathaniel Rich welcomed the possibility of asserting that the customs officials had acted outside of the scope of the warrant, saying that it provided "a way open to go to this question, without relation to the king's commission or command."[190] Charles, however, was spoiling for a fight: he dispatched Sir John Coke to inform the House that the customs officials acted "by his own direct orders and command, or by order of the council-board, his maj. himself being present; and, therefore, would not have it divided from his act."[191] Charles thereby forced the House's hand: either it would have to back down and allow tonnage and poundage to be collected, even from its own members, on the strength of royal prerogative powers alone, or it would have to assert that the King had breached parliamentary privilege.

The House chose the latter route, and passed a resolution expressing its belief that parliamentary privilege extended to members' goods.[192] John Eliot read in the House a proposed remonstrance to the Crown, in which he asserted that the collection of tonnage and poundage generally without parliamentary consent was "a breach of the fundamental liberties of this kingdom, and contrary to your majesty's royal Answer to the Petition of Right."[193] When Eliot finished reading his proposed remonstrance, he moved for a vote on presenting it to the King.[194] The Speaker refused, claiming that the King had commanded him to rise from the Speaker's chair, thereby adjourning the House.[195] At this point, several members of the House forcibly held the Speaker in his chair, while the House passed three resolutions, one of which read, "Whosoever shall counsel, or advise, the taking and levying of the subsidies of Tunnage and Poundage, not being granted by Parliament; or shall be an actor or instrument therein, shall . . . be reputed an innovator in the government, and a capital enemy to this kingdom and commonwealth."[196] Meanwhile, the King, having heard that the House continued to sit against his express command, sent for

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189 Cobbett, 2 *Parliamentary History of England* at 479–82 (cited in note 110).

190 Id at 481.

191 Id at 482.

192 Id.

193 Cobbett, 2 *Parliamentary History of England* at 490 (cited in note 110).

194 Id.

195 Id.

196 Id at 490–91. For a discussion of the issues arising out of the prosecution of the members who held the Speaker in his chair, see Chafetz, *Democracy's Privileged Few* at 73–74 (cited in note 53).

troops to break down the door of the House, but the House adjourned before the troops arrived.[197]

On the day that the House reconvened after this adjournment, the King dissolved Parliament.[198] In his statement of reasons, he laid the blame entirely at the feet of the Commons, reserving special umbrage for the Commons's position on the issue of tonnage and poundage.[199] He complained specifically that, in the course of investigating his levying of the duties, the members of the House

> send for the officers of the customs, enforcing them to attend, day after day, by the space of a month altogether; they cause them to produce their letters patent under our great seal, and the warrants made in our privy council, for levying of those duties. They examine the officers upon what questions they please, thereby to entrap them for doing our service and commandment.[200]

Even more outrageous to Charles was that the House "sent messengers to examine our attorney general, (who is an officer of trust and secrecy) touching the execution of some commandments of ours, of which, without our leave first obtained, he was not to give account to any but ourself."[201] That is, he considered it a breach of his royal prerogative to have his subordinates and their records examined by the House. He was, finally, outraged at the extension of privilege to members' goods, a privilege he proclaimed that he would "never admit."[202]

Charles governed without Parliament for the next eleven years, until a Scottish revolt and the ensuing Bishops War once again forced him to convene Parliament in April 1640 for the purpose of raising money.[203] The Commons, however, refused to consider granting any funds until Charles addressed their grievances—chief among which were the Crown's continuing use of prerogative taxation (including tonnage and poundage)[204] and the House's insistence that its privileges had been breached in 1629 both by the Crown's order to the Speaker to adjourn the House, and by the subsequent prosecution of the members who held the Speaker in his chair in order to allow House busi-

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197 Cobbett, 2 *Parliamentary History of England* at 491 (cited in note 110).

198 Id at 492.

199 Id at 492–96.

200 Id at 499.

201 Cobbett, 2 *Parliamentary History of England* at 500 (cited in note 110).

202 Id at 501.

203 Lockyer, *The Early Stuarts* at 354 (cited in note 105) (noting that Charles was forced to assemble Parliament because he was in need of funds).

204 Id at 355–56.

ness to continue.[205] Charles, outraged, dissolved the new Parliament a mere three weeks after it had assembled;[206] this Parliament has been known to posterity as the "Short Parliament."

Military defeat by the Scots and continuing lack of funds forced Charles to call another Parliament—his final—in November 1640.[207] It will come as no surprise that this Parliament assembled in no mood to kowtow to the Crown.[208] The clash came to a head in January of 1642, when Charles accused five members of the House of Commons and one member of the House of Lords of treason, and had his attorney general bring accusations against them before the House of Lords.[209] Simultaneously, royal officers had gone to the homes of the accused members and sealed their studies.[210] Both houses were outraged. The Commons immediately passed a resolution stating that

> the several Parties now sealing up the Trunks or Doors, or seizing the Papers of . . . any . . . Member of this House, that the Serjeant shall be informed of, shall be forthwith apprehended, and brought hither, as Delinquents; And that the Serjeants shall have Power to break open the Doors, and to break the Seals off from the Trunk.[211]

The Commons further resolved that if

> any Person whatsoever shall offer to arrest or detain the Person of any Member of this House, without first acquainting this House therewith, and receiving further Order from this House,

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205 2 HC J 11 (Apr 24, 1640) (listing, as one of the Commons's grievances, the "[p]unishing [of] men out of parliament, for things done in parliament"—a reference to punishing the members who held the Speaker in his chair); 2 HC J 7 (Apr 20, 1640) (resolving that the adjournment order was a breach of parliamentary privilege). See also Plucknett, *Taswell-Langmead's English Constitutional History* at 390–91 (cited in note 106) (describing the heads of the Commons's complaints); Keir, *The Constitutional History of Modern Britain* at 210 (cited in note 156) (noting that the Commons "made it evident that a Scottish invasion was in their eyes less important than the invasion of English liberties in the name of Prerogative," and listing the liberties that the House believed had been infringed).

206 2 HC J 19 (May 5, 1640). Charles's statement of his reasons for dissolving Parliament is reprinted in Cobbett, 2 *Parliamentary History of England* at 572–79 (cited in note 110) (claiming that a few men "endeavoured nothing more than to bring into contempt and disorder all government and magistracy").

207 Plucknett, *Taswell-Langmead's English Constitutional History* at 392–93 (cited in note 106).

208 For a catalogue of the Long Parliament's actions in its first two years, see id at 393–413.

209 The specific accusations are printed at 4 HL J 500–01 (Jan 3, 1642) (including, for example, accusations that the members encouraged a foreign power to invade England, sought to "alientate the Affections" of the people for their King, and conspired to levy war against the King).

210 Cobbett, 2 *Parliamentary History of England* at 1007 (cited in note 110).

211 2 HC J 366 (Jan 3, 1642).

> [then] it is lawful for such Member, or any Person to assist him, to stand upon his and their Guard of Defence, and to make Resistance, according to the Protestation taken to defend the Privileges of Parliament.[212]

In other words, the House authorized armed resistance to Crown officers acting on the King's behalf, on the grounds that such actions were a breach of parliamentary privilege. The Commons moreover sought a meeting with the Lords, both to discuss this breach of privilege, and, more ominously, to discuss the deployment of armed guards around the Palace of Westminster.[213] After the meeting, the Lords, likewise, resolved that the sealing of the members' studies was a breach of privilege and that there should be armed guards around Parliament.[214] Charles, meanwhile, sent a message to the Commons demanding that the five accused members of that house be delivered into his custody.[215] The House replied that it would consider the matter and get back to him.[216]

The next day, by order of the Commons, the five accused members attended the House.[217] The Journals entry for that day ends abruptly with the notation:

> His Majesty came into the House; and took Mr. Speaker's Chair.
>
> "Gentlemen,"
>
> "I AM sorry to have this Occasion to come unto you
>
> * * * *
>
> *Resolved*, upon the Question, That the House shall adjourn itself till To-morrow One of Clock.[218]

Fortunately, other sources fill in where the overwhelmed Journals clerk left off. John Rushworth, who was, at the time, the Clerk-Assistant to the House of Commons,[219] recounted that, as soon as the accused members assembled in the House, news arrived that "his Majesty was coming with a Guard of Military Men, Commanders and

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212 Id.
213 Id at 366–67.
214 4 HL J 502 (Jan 3, 1642).
215 2 HC J 367 (Jan 3, 1642).
216 Id.
217 2 HC J 368 (Jan 4, 1642).
218 Id.
219 See 2 HC J 12 (Apr 25, 1640) (appointing Rushworth Clerk-Assistant at the request of the Clerk).

Souldiers."[220] In order to avoid violence, the House ordered the five members to leave immediately.[221] Shortly thereafter, the door of the House was "thrown open," and Charles entered, attended by his troops.[222] Not seeing any of the five members in attendance, he ascended to the Speaker's chair and informed the House that, when he had the previous day sent a messenger demanding that the five members be delivered to him, he "did expect Obedience, and not a Message."[223] He insisted that parliamentary privilege did not protect members against charges of treason and that he would expect them to be delivered as soon as they returned to the House.[224] When he asked the Speaker where the members had gone, the Speaker rather courageously replied,

> May it please your Majesty,
>
> I Have neither Eyes to see, nor Tongue to speak in this place, but as the House is pleased to direct me, whose Servant I am here, and humbly beg your Majesties Pardon, that I cannot give any other Answer than this, to what your Majesty is pleased to demand of me.[225]

The King then left the chamber; as he was going out "many Members cryed out, aloud so as he might hear them, *Privilege*! *Privilege*!"[226]

The next day, the House of Commons passed a resolution declaring the King's action to have been

> a high Breach of the Rights and Privilege of Parliament, and inconsistent with the Liberties and Freedom thereof: And therefore this House doth conceive, they cannot, with the Safety of their own Persons or the Indemnity of the Rights and Privilege of Parliament, sit here any longer without a full Vindication of so high a Breach, and a sufficient Guard wherein they may confide.[227]

As the King was walking the streets of London later that day, "some People did cry out aloud *Priviledges of Parliament*! *Priviledges of Par-*

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220 John Rushworth, 3 *Historical Collections. The Third Part; In Two Volumes. Containing the Principal Matters Which Happened from the Meeting of the Parliament, November the 3d. 1640. To the End of the Year 1644.* 477 (Richard Chitwell & Thomas Cockerill 1692).

221 Id.

222 Id.

223 Id.

224 Rushworth, 3 *Historical Collections* at 477–78 (cited in note 220).

225 Id at 478 (emphasis omitted).

226 Id.

227 2 HC J 368 (Jan 5, 1642).

liament!"[228] Five days later, Charles left London, first moving his court to Hampton Court and then to York.[229] Within two days, the House declared that anyone who arrested a member of Parliament "by Pretence or Colour of any Warrant issuing out from the King only, is guilty of the Breach of the Liberties of the Subject, and of the Privilege of Parliament, and a publick Enemy to the Commonwealth."[230] By the next month, "[t]he conflict had [ ] extended from Westminster to the country at large, and civil war became inevitable."[231] And, indeed, the Battle of Edgehill—marking the beginning of the Civil War—took place that October.[232]

After the ensuing six years of bloody struggle, the House of Commons,[233] on January 6, 1649, created a High Court of Justice to try Charles for treason. In the act creating the Court, the House declared that Charles "hath had a wicked design totally to subvert the ancient and fundamental laws and liberties of this nation, and in their place to introduce an arbitrary and tyrannical government."[234] The charges ultimately pressed against Charles focused on his acts of war against Parliament between 1642 and 1648,[235] but the preamble to the charges asserted broadly that Charles had acted

> out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, yea, to take away and make void the foundations thereof, and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the

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228 Rushworth, 3 *Historical Collections* at 479 (cited in note 220).

229 Id at 484.

230 2 HC J 373 (Jan 12, 1642).

231 Christopher Hill, *The Century of Revolution: 1603–1714* 112 (Nelson 1961).

232 Id.

233 The Commons had, two days earlier, declared themselves "the Supreme Power in this Nation," thus obviating the need for the consent of the Lords or the Crown to any piece of legislation. 6 HC J 111 (Jan 4, 1649).

234 *The Act Erecting a High Court of Justice for the King's Trial* (passed Jan 6, 1649), reprinted in Gardiner, ed, *The Constitutional Documents of the Puritan Revolution* at 357 (cited in note 154).

235 This "minimalist approach" to the charges was taken against the wishes of chief prosecutor John Cooke and a number of the other trial commissioners. Sean Kelsey, *The Trial of Charles I*, 118 Eng Hist Rev 583, 598–99 (2003) (suggesting that Cooke desired additional charges that included complicity in James I's supposed murder, imposing taxes and oaths contrary to undertakings given at his coronation, and conspiring to reintroduce Catholicism).

> right and power of frequent and successive Parliaments, or national meetings in Council.[236]

Charles, who refused to recognize the legitimacy of the High Court,[237] was convicted on January 27, 1649,[238] and executed on January 30. Parliament would govern without a King until the Restoration in 1660.

Importantly, many of the complaints leveled against Charles—including the event that precipitated his departure from London in 1642—were characterized as contempts of Parliament or breaches of parliamentary privilege. Everything from Charles's illegal collection of tonnage and poundage, to his attempt to keep troublemakers out of Parliament by appointing them sheriffs, to his attempts to protect Buckingham, to his arrest of Arundel, to his violation of the Petition of Right, to his seizure of Rolle's goods, to his attempt to arrest the five members accused of treason was framed by the House in terms of contempt and breach of privilege. Indeed, we have even seen examples of what might somewhat anachronistically be called a clash between executive privilege and parliamentary privilege, as when Charles repeatedly refused to allow his ministers and close advisors to be questioned by Parliament, or when he complained about the House's demands that Crown officers turn over certain documents. Most dramatically, of course, the House used its privileges not only as a shield to protect the five members accused of treason in 1642, but also as a sword to justify resistance to Charles after he barged into their chamber in search of the members. Charles's flight from London was precipitated by Parliament's—and much of the nation's—outrage over that breach of privilege.

E. The Restoration and Revolution Settlements

Although the House of Commons's rule without King or Lords was short-lived, the Restoration Parliaments were determined not to countenance a return to claims of unfettered royal prerogative. Thus, in response to Charles II's appointment of Edmund Jennings, a member of

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236 *The Charge against the King* (Jan 20, 1649), reprinted in Gardiner, ed, *The Constitutional Documents of the Puritan Revolution* at 372 (cited in note 154).

237 See *The King's Reasons for Declining the Jurisdiction of the High Court of Justice* (Jan 21, 1649), reprinted in Gardiner, ed, *The Constitutional Documents of the Puritan Revolution*, at 374–76 (cited in note 154).

238 See *The Sentence of the High Court of Justice upon the King* (Jan 27, 1649), reprinted in Gardiner, ed, *The Constitutional Documents of the Puritan Revolution* at 377–80 (cited in note 154). See generally *Trial of King Charles I*, 4 How St Tr 1045 (1649) (reprinting many of the relevant documents of the trial, including the Journal of the High Court).

the House, as Sheriff of York in 1675, even the Cavalier-dominated Parliament passed a resolution declaring it to be a "Breach of the Privilege of this House, for any Member thereof to be made a Sheriff during the Continuance of Parliament."[239] That is, the House found impermissible Charles II's use of the same procedure for removing members from the House that his father had used in 1626.[240]

It was, of course, Charles II's brother, James II, who attempted to revive some of his father's ideas about royal power.[241] This, famously, ended poorly for James. The Revolution Settlement that emerged in 1689 was the triumph of law—that is, legislation passed through Parliament—over royal prerogative.[242] In putting William and Mary on the throne, Parliament prescribed a new Coronation Oath under which the first thing a new monarch swore was to "Governe the People of this Kingdome . . . according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same."[243] With the Mutiny Act,[244] Parliament created a criminal offense of mutiny from the army,[245] but provided that the law would sunset in one year.[246] This ensured that the new monarchs would have to either disband the standing army or call a Parliament at least once a year—otherwise, their soldiers could desert without consequence. Either choice would prevent a return to royal tyranny. Moreover, after the Revolution, Parliament never again granted the Crown large sums of money for the life of the monarch; rather, William and Mary and their successors had to come to Parliament for appropriations each year—and Parliament was not shy about

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239 9 HC J 378 (Nov 16, 1675).

240 See text accompanying note 117.

241 See George Macaulay Trevelyan, *The English Revolution, 1688–1689* 32–40 (Oxford 1965) (noting James's attempt to rule by prerogative power after he was unable to get his legislative program through Parliament).

242 Id at 71.

243 Coronation Oath Act, 1 W and M, ch 6, § 3 (1689).

244 Mutiny Act, 1 W and M, ch 5 (1689).

245 Previously, there had been no statutory offense of mutiny from the army. James II had exercised his prerogative powers to remove judges until he found some who would declare desertion from the army to be a felony. See Trevelyan, *The English Revolution* at 36–37 (cited in note 241) (observing that "packing of the Judicial Bench" was essential to James II's policies); W.S. Holdsworth, 6 *A History of English Law* 228–30 (Little, Brown 1924). Accordingly, the preamble of the Mutiny Act provides that "noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner than by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme." 1 W and M, ch 5, § 1.

Note that the concern of the Mutiny Act is with the army alone, as the navy was not seen as a threat to domestic liberty. See William Blackstone, 1 *Commentaries on the Laws of England* *405 (Chicago 1979) (referring to the navy as "the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty").

246 Mutiny Act, 1 W and M, ch 5, § 8.

exacting something in return.[247] And finally, Parliament required William and Mary to assent to the Bill of Rights,[248] which laid out Parliament's complaints against James II's government and declared illegal, among other things, prerogative taxation and the Crown's asserted power to suspend or dispense with the laws.[249]

The Revolution Settlement became further entrenched in subsequent years. After Mary's death, when it was clear that neither William nor his successor, Mary's sister Anne, would have any children, Parliament passed the Act of Settlement[250] to ensure that the Crown did not return to the House of Stuart.[251] The Act therefore provided for the Crown to pass to the House of Hanover upon Anne's death[252]—and it imposed several new restrictions on royal power (including good-behavior tenure for judges), all of which were not to take effect until the Hanovers came to the throne.[253] The Act of Settlement was therefore a natural successor to the Bill of Rights: in both cases, Parliament bestowed the Crown on a new house, but only after first cabining the power of that Crown.[254]

As the power of Parliament vis-à-vis the Crown thus increased, it became the norm that the King's ministers should be chosen from the same party that controlled Parliament.[255] The principle of ministerial responsibility to Parliament thereafter developed and strengthened over the course of the eighteenth century.[256] As actual executive power devolved from the person of the King to his ministers, and as those ministers became increasingly tied to Parliament, the principle of par-

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247 Trevelyan, *The English Revolution* at 96 (cited in note 241) ("Money was not voted till the King had made some concession, or withdrawn his opposition to some measure or policy which he disliked.").

248 Bill of Rights, 1 W and M, sess 2, ch 2 (1689). See Trevelyan, *The English Revolution* at 79 (cited in note 241) (noting that the Crown and the Bill of Rights were presented together to William and Mary).

249 1 W and M, sess 2, ch 2, §§ 1–2.

250 12 & 13 Will 3, ch 2 (1701).

251 12 & 13 Will 3, ch 2, § 3 (noting that the Act was passed in order to secure "our Religion Laws and Liberties from and after the Death of His Majesty and the Princess Ann of Denmark").

252 12 & 13 Will 3, ch 2, § 1.

253 12 & 13 Will 3, ch 2, § 3.

254 See Chafetz, 58 Duke L J at 188 n 49 (cited in note 52) (describing the Act of Settlement as a second Bill of Rights).

255 Trevelyan, *The English Revolution* at 96 (cited in note 241).

256 See Maitland, *The Constitutional History of England* at 395–96 (cited in note 68) (noting that the principle of common ministerial responsibility to Parliament dates from the 1721–1742 Walpole ministry). See also Colin R. Munro, *Studies in Constitutional Law* 56 (Butterworths 2d ed 1999) ("Every Prime Minister since Walpole has been a member of either the House of Commons or the House of Lords, and we may say that there is another well established convention to that effect, which has ensured that governments have been responsible to Parliament.").

liamentary control over the execution of the laws became ever more firmly entrenched.[257] This direct answerability of Crown officials to Parliament meant that breach of privilege and contempt of Parliament became less necessary tools for Parliament to use against recalcitrant executive officials. More direct mechanisms of control, such as confidence votes, increasingly became available.[258] Across the Atlantic, however, the American colonies and states carried on the tradition of using breach of privilege and contempt proceedings as a means of controlling the executive.

III. CONTEMPT IN PRECONSTITUTIONAL AMERICA

A. Contempt of Colonial Legislatures

The colonial American legislatures tended to model themselves on the House of Commons—particularly in matters relating to their privileges and procedures.[259] More specifically, as Jack Greene has demonstrated, the behavior of the colonial legislatures was "deeply rooted" in the political tradition arising out of parliamentary opposition to the Stuart monarchs.[260] That is to say, the colonists were apt to see an abuse of royal prerogative in every action of a colonial governor, and they were apt to look to the privileges of their elected assemblymen for protection. In Greene's words,

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[257] See Trevelyan, *The English Revolution* at 96 (cited in note 241) ("The accounts were carefully scrutinized by the Committees of the House of Commons; and woe to the Minister who used any sum for other purposes than those assigned by the appropriation.").

[258] This is not to say, however, that Parliament has wholly ceased using contempt proceedings against executive officials. In 1963, the House of Commons held John Profumo, the Secretary of State for War, in contempt for lying about his relationship with an attaché at the Soviet Embassy. After he resigned, the House decided not to punish Profumo. For the report of the government inquiry into the matter, see generally Alfred Denning, *Lord Denning's Report* (Her Majesty's Stationary Office 1963). For all the tawdry details, see generally Anthony Summers and Stephen Dorril, *Honeytrap* (Coronet 1988).

[259] See Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* 55 (North Carolina 2005) (noting that, in the New York colonial assembly, "[l]egislative procedure followed parliamentary lines"); Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* 197 (Virginia 1994) (noting that colonial legislatures looked to English sources for "a whole set of generalized and specific institutional imperatives for representative bodies, a particular pattern of behavior for their members, and a concrete program of political action"); J.R. Pole, *Political Representation in England and the Origins of the American Republic* 31 (California 1966) (noting that colonial "[a]ssemblies adopted for themselves the theory of the British House of Commons and modeled themselves on its precedents and procedures").

[260] Greene, *Negotiated Authorities* at 189–90 (cited in note 259).

> [C]olonial legislators had a strong predisposition to look at each governor as a potential Charles I or James II, to assume a hostile posture toward the executive, and to define with the broadest possible latitude the role of the lower house as "the main barrier of all those rights and privileges which British subjects enjoy."[261]

In some circumstances, however, adopting the principles underlying the Westminster model might mean adopting a somewhat different procedural emphasis than the House of Commons.[262] Parliament in the eighteenth century had less and less need to rely on contempt and breach of privilege in order to keep the executive in line, as new and stronger methods of ministerial accountability to Parliament became instituted and regularized.[263] But in the colonies, the governor was not legally answerable to the assembly.[264] Thus, in the struggle between executive and legislative authority, the latter had to rely on other methods.

Certainly, the contempt power was a familiar one to colonial assemblies. Perhaps most famously, in 1722, the young Benjamin Franklin was given his first chance at running a newspaper when the *New England Courant*, published by his brother James, to whom Benjamin was apprenticed, ran an article that "gave Offence to the [Massachusetts] Assembly."[265] James was "taken up, censur'd and imprison'd for a Month by the Speaker's Warrant."[266] This use of the contempt power

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261 Id at 199 (quoting a 1728 address of the Pennsylvania Assembly to the Lieutenant Governor). See also John Phillip Reid, *The Concept of Representation in the Age of the American Revolution* 29 (Chicago 1989) ("American constitutional theory was generally the same as British constitutional theory. Americans thought of their representatives as checks on executive authority.").

262 For example, the same concerns that required a member of the House of Commons who wished to give up his seat to make an application to the Chancellor of the Exchequer required a member of a colonial legislature who wanted to give up his seat to make an application to his house. See Chafetz, 58 Duke L J at 198–99 (cited in note 52).

263 See Part II.E.

264 See Hulsebosch, *Constituting Empire* at 53 (cited in note 259) ("The governor's authority rested on the king's commission."); Greene, *Negotiated Authorities* at 202 (cited in note 259) ("[E]xplicit restrictions of the kind Parliament successfully imposed upon the prerogative in England following the Glorious Revolution were never achieved in the colonies. As a result, the institutional cooperation made possible by the revolutionary settlement in England was rarely attainable in the colonies."); Pole, *Political Representation* at 29 (cited in note 259) ("[T]he Governor, whether royal or proprietary, stood not only as the 'executive' in a 'mixed' form of government but represented an interest and a point of view that were not based in the colony in which he held his appointment."); id at 529 ("The monarchical element [in the colonies] was provided by the presence and very real power of the royal Governor—or the proprietary one, in Pennsylvania.").

265 Benjamin Franklin, *The Autobiography of Benjamin Franklin*, in *Autobiography and Other Writings* 1, 21 (Oxford 1998).

266 Id.

against private citizens was quite common in the colonies,[267] as it was in England.[268] But what about contempt against executive—that is, Crown—officials?

The colonial assemblies were actually quite willing to use their contempt powers against Crown officials. The South Carolina House of Commons was particularly active in this regard—it arrested the Provost Marshal in 1726 for ignoring an order of the House, the Chief Justice in 1728 for refusing to appear before the House, the Council clerk for insolence in 1729, and the Surveyor General and his deputy in 1733 for contradicting its orders.[269] In 1749, the Virginia House of Burgesses arrested the public printer for printing a resolution of the Council that the House found offensive.[270] In 1733, the North Carolina Assembly arrested a Receiver of the Powder Money for refusing to submit his accounts to the House, and it attempted to arrest the Chief Justice for presenting a petition that displeased it.[271] In 1722, the Massachusetts House of Representatives fought a "long-drawn-out controversy with the Governor" over the House's right to call before it the two heads of the colonial forces in Maine.[272] The House finally secured their presence, and, having determined that the two had acted culpably, "brought about the[ir] retirement."[273] When one of them continued exercising the functions of his office nonetheless, the House ordered him taken into custody.[274]

Indeed, on occasion, assemblies were even willing to accuse royal governors themselves of breach of privilege. In 1763, in the midst of a dispute over whether the governor had the authority to determine that certain members of the assembly were ineligible to serve, the

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267 See Clarke, *Parliamentary Privilege* at 206–07 (cited in note 51); Ernest J. Eberling, *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt* 17–21 (Columbia 1928) (citing instances of private citizens held in contempt for bribing corrupt officials and printing criticisms of the house); C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U Pa L Rev 691, 700–12 (1926) (providing examples of arrests for legislative contempt in the colonies for offenses ranging from arresting members of the House (or their servants), to insulting members, to refusing to testify before the assembly).

268 See Chafetz, *Democracy's Privileged Few* at 193–206 (cited in note 53) (discussing Parliament's use of the contempt power against private subjects).

269 Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689–1776* 215–16 (North Carolina 1963).

270 Elmer I. Miller, *The Legislature of the Province of Virginia: Its Internal Development* 151 (Columbia 1907).

271 Greene, *The Quest for Power* at 216 (cited in note 269).

272 Potts, 74 U Pa L Rev at 708 (cited in note 267).

273 Id at 708 n 53.

274 Id.

South Carolina House of Commons resolved that "his Excellency the governor, by having repeatedly and contemptuously denied the just claims of this house (solely to examine and determine the validity of the elections of their own members) hath violated the rights and privileges of the commons house of assembly of this province."[275] The House further resolved not to "enter in any further business with him, until his excellency shall have done justice to this house."[276] In the midst of a dispute with Governor George Clinton in 1747, the New York House of Representatives passed a series of resolutions accusing Clinton of breaching its privileges and asserted, "Whoever advised his Excellency to send this message . . . has attempted to . . . subvert the Constitution of this Colony, and is an Enemy to the inhabitants thereof."[277] The House also drew up a lengthy remonstrance, which Clinton forbade the public printer to print.[278] When the printer was brought before the House and produced the governor's warrant, the House declared the warrant "arbitrary and illegal" and ordered him to print the remonstrance.[279] In 1767, the New York House of Representatives was insistent that Richard Jackson, a colonial official, be fired. The governor made it clear that he would not assent to the dismissal until some payment was also granted to Jackson. The House declared that such a demand was "an unconstitutional exercise of your power, and in breach of the privilege of the House."[280] Although the House earnestly desired Jackson's firing, "[W]e are not disposed to purchase it at the expense of our privileges as well as of our money."[281] And another New World colonial legislature, the Jamaican Assembly, declared the governor guilty of a "high breach of privilege" for taking notice of proceedings in the legislature not properly presented to him.[282]

Finally, it should be noted that arrest and strong words were not the only options available to an aggrieved colonial legislature. Although they had a voice neither in appointing nor in removing governors, the legislatures did exercise a significant amount of control over the finances of the colonies. Thus, when the Massachusetts Assembly in 1720 thought that the governor and lieutenant governor were in-

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275 *Extract of a Letter from South Carolina*, reprinted in Boston Post-Boy 3 (Mar 28, 1763).

276 Id.

277 Herbert L. Osgood, 4 *The American Colonies in the Eighteenth Century* 188 (Columbia 1958).

278 Id at 188–89.

279 Id at 190.

280 *Resolution of the New York House of Representatives*, reprinted in Boston Post-Boy 2 (Feb 23, 1767).

281 Id.

282 Clarke, *Parliamentary Privilege* at 231 (cited in note 51).

fringing on its rights, it reduced the governor's salary and paid him later than usual—and in rapidly depreciating currency, at that.[283] The lieutenant governor's salary "was also cut down to such an insignificant sum that he returned it in disgust."[284] In 1734, the South Carolina House of Commons, angry that the royally appointed chief justice had sided with the royally appointed governor in a dispute with the legislature, provided no salary at all for the chief justice.[285]

We can thus see that colonial legislatures largely picked up where the pre–Glorious Revolution Parliaments left off. They had no hesitation in using their breach of privilege and contempt powers against colonial governors and other royal officials, and they had methods ranging from censure to arrest to the withholding of salary in order to give teeth to their contempt findings.

B. Contempt of Preconstitutional State Legislatures

This deep suspicion of executive authority was reflected in the sorts of executives that the newly independent Americans began creating in 1776.[286] Indeed, the president under the Articles of Confederation was simply the presiding officer of the Continental Congress, with no independent authority or powers.[287] Actual executive power was wielded by the Congress itself.[288] There was, therefore, no independent executive who might incur the wrath of the legislature—in this regard, the government under the Articles of Confederation was similar to the British government after the solidification of the Revolution Settlement.[289] The Continental Congress was, however, familiar

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283 Herbert L. Osgood, 3 *The American Colonies in the Eighteenth Century* 156 (Columbia 1958) ("The semi-annual appropriation of the governor's salary was postponed until the close of session and then it was reduced by one hundred pounds, though the depreciation of the currency in which it was paid was already great and was steadily increasing.").

284 Id at 156–57.

285 Osgood, 4 *The American Colonies* at 123 (cited in note 277).

286 See Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 135–36 (North Carolina 1998) (describing the ways in which fear of concentrated authority led to a significant weakening of the powers of state executives in the early Republic).

287 Articles of Confederation, Art IX, § 5.

288 See Akhil Reed Amar, *America's Constitution: A Biography* 57, 131–32 (Random House 2005) (noting that the Continental Congress "acted less as a legislature than as an executive council"); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 184–85, 197–98 (Knopf 1979) (describing the problems created by Congress's control of executive functions).

289 See Part II.E.

with contempt procedures, as several findings of contempt against private citizens demonstrate.[290]

The state governments continued to exercise wide-ranging contempt powers in the years between independence and the drafting of the federal Constitution. Indeed, contempt findings against Crown officials played an important role in two states at the dawn of the Revolution. In June 1775, as the siege of Boston was underway, Lord Dunmore, the royal governor of Virginia, fearing for his safety, left Williamsburg in the middle of the night and took refuge on a British warship in the James River.[291] There, he summoned the House of Burgesses to attend upon him; the House unanimously passed a resolution declaring this a "high breach of the rights and privileges of this House."[292] Just under a year later, in June of 1776, the New Jersey Provincial Congress declared that the proclamation of royal Governor William Franklin (illegitimate son of Benjamin) summoning a meeting of the General Assembly "ought not to be obeyed" and constituted a "direct contempt and violation" of resolutions of the Continental Congress.[293] It immediately stopped Franklin's salary, and soon afterwards had him arrested.[294] With the approval of the Continental Congress, Franklin was sent to Connecticut, where he was held hostage until he was exchanged for Governor John McKinly of Delaware, a patriot being held by the British.[295]

In their revolutionary constitutions, a number of states specifically provided for investigation and contempt powers. The 1776 Pennsylvania Constitution provided for a unicameral legislature with the power to "administer oaths or affirmations on examination of witnesses" as well as "all other powers necessary for the legislature of a free state or commonwealth."[296] The 1777 and 1786 Vermont Constitutions were largely patterned on the Pennsylvania model, and had

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290 See Worthington Chauncey Ford, ed, 8 *Journals of the Continental Congress, 1774–1789* 458–61, 466–67 (GPO 1907) (reporting Gunning Bedford's contempt in June 1777); Worthington Chauncey Ford, ed, 4 *Journals of the Continental Congress, 1774–1789* 188, 190 (GPO 1906) (reporting Isaac Melchior's contempt in March 1776).

291 Allan Nevins, *The American States during and after the Revolution, 1775–1789* 77 (Macmillan 1924).

292 Va House of Burgesses J 281 (June 24, 1775).

293 *Resolution of the Provincial Congress of New Jersey*, reprinted in Pa Packet 3 (June 17, 1776).

294 See Sheila L. Skemp, *William Franklin: Son of a Patriot, Servant of a King* 202–12 (Oxford 1990).

295 See id at 212–26.

296 Pa Const of 1776, Art II, § 9 (superseded 1790), reprinted in Francis Newton Thorpe, ed, 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3084–85 (GPO 1909).

nearly identical provisions to those quoted above.[297] Maryland's 1776 Constitution had two relevant provisions. First, it gave the House of Delegates the power to

> inquire on the oath of witnesses, into all complaints, grievances, and offences, as the grand inquest of this State . . . [and to] call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of their inquiries, concerning affairs relating to the public interest.[298]

Second, both houses of the legislature "may punish, by imprisonment, any person who shall be guilty of a contempt in their view . . . by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege."[299] Georgia's 1777 Constitution also specifically mentioned the legislature's ability to call executive officers to account.[300] Massachusetts's 1780 Constitution gave both houses of the state legislature the "authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence."[301] The 1784 New Hampshire Constitution, which took the Massachusetts Constitution as a model, had a nearly identical provision.[302]

Other early state constitutions said nothing about a contempt power, but were interpreted as implicitly containing such a power. South Carolina's 1776 and 1778 Constitutions both provided that the state legislature "shall enjoy all other privileges which have at any

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297 Vt Const of 1777, ch 2, § 8 (superseded 1786), reprinted in Francis Newton Thorpe, ed, 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3742–43 (GPO 1909); Vt Const of 1786, ch 2, § 9 (superseded 1793), reprinted in Thorpe, ed, 6 *The Federal and State Constitutions* at 3755.

298 Md Const of 1776, Art X (superseded 1851), reprinted in Francis Newton Thorpe, ed, 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 1692 (GPO 1909).

299 Md Const of 1776, Art XII (superseded 1851), reprinted in Thorpe, ed, 3 *The Federal and State Constitutions* at 1693 (cited in note 298).

300 Ga Const of 1777, Art XLIX (superseded 1789), reprinted in Francis Newton Thorpe, ed, 2 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 784 (GPO 1909) ("Every officer of the State shall be liable to be called to account by the house of assembly.").

301 Mass Const of 1780, Pt 2, ch 1, § 2, Art X, reprinted in Thorpe, 3 *The Federal and State Constitutions* at 1899 (cited in note 298) (providing this power for the House of Representatives); Mass Const of 1780, Pt 2, ch 1, § 2, Art XI (providing the same power for the Senate).

302 NH Const of 1784, Pt 2, ¶ 31 (superseded 1792), reprinted in Francis Newton Thorpe, ed, 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 2462 (GPO 1909).

time been claimed or exercised by the commons house of assembly [that is, the South Carolina colonial legislature],"[303] which, as we have seen, included a right to hold executive officers in contempt or breach of privilege.[304] Similarly, the 1777 New York Constitution provided that the assembly would "enjoy the same privileges, and proceed in doing business in like manner as the assemblies of the colony of New York of right formerly did."[305] As we have seen, the right to hold the governor himself in contempt was one of those privileges claimed by the New York colonial assembly.[306] Finally, some states simply had generic provisions allowing the legislative houses to determine the rules of their own proceedings.[307] But even those states that merely had a generic rules-of-proceedings clause understood themselves to have the contempt power—and, moreover, understood that power to run against executive officials. Thus, in 1781, the Virginia House of Delegates ordered the arrest of a clerk in the Treasury Department upon rumors that he had engaged in misconduct.[308] And in 1786, the Virginia House of Delegates had its sergeant arrest Martin Pickett, a county sheriff, on the grounds that he had failed to make out a return for delegates to the House (that is, that he had failed to report who had won an election).[309] Pickett protested that he had, in fact, made the return; after a committee investigated the matter, it determined that he was right and released him.[310]

Thus, we see not only that many of the early American state constitutions explicitly gave state legislatures broad contempt powers, but also—and more importantly—that even those states that did not expli-

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303 SC Const of 1776, Art VII (superseded 1778), reprinted in Thorpe, 6 *The Federal and State Constitutions* at 3244 (cited in note 297); SC Const of 1778, Art XVI (superseded 1790), reprinted in Thorpe, 6 *The Federal and State Constitutions* at 3252 (cited in note 297).

304 See text accompanying note 269.

305 NY Const of 1777, Art IX (superseded 1821), reprinted in Thorpe, 5 *The Federal and State Constitutions* at 2631 (cited in note 296).

306 See text accompanying notes 277–281.

307 See, for example, Del Const of 1776, Art V (superseded 1792), reprinted in Francis Newton Thorpe, ed, 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 563 (GPO 1909) (providing that each legislative house could "settle its own rules of proceedings" and exercise "all other powers necessary for the legislature of a free and independent State"); Va Const of 1776, Art II, ¶ 27 (superseded 1830), reprinted in Francis Newton Thorpe, ed, 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3816 (GPO 1909) (allowing each house to "settle its own rules of proceedings").

308 Potts, 74 U Pa L Rev at 716–17 (cited in note 267).

309 Va H of Delegates J 35 (Nov 11, 1786).

310 Va H of Delegates J 36 (Nov 13, 1786).

citly mention contempt in their constitutions understood their legislatures to have broad contempt powers, even as against state executives.

IV. CONTEMPT OF CONGRESS UNDER THE CONSTITUTION

A. Constitutional Text and Structure

Unlike the congressional houses' authority to punish their members,[311] their authority to punish nonmembers has no explicit textual basis. At the Philadelphia Convention, Charles Pinckney of South Carolina proposed a provision reading: "Each House shall be the Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same."[312] His proposal was committed to the Committee of Detail,[313] where it died without recorded debate. No further mention seems to have been made of the houses' ability to punish nonmembers, in either the Philadelphia Convention, the state ratifying conventions, or the press.

The issue was, however, touched upon by several early commentators on the Constitution. Justice Joseph Story remarked that each house's "power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior or disobedience to those rules."[314] Story found it "remarkable" that the Constitution did not explicitly mention a power to punish nonmembers, "yet it is obvious that unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions."[315] Story, moreover, concluded that in America, as in Britain, "the legislative body was the proper and exclusive forum to decide when the contempt existed and when there was a breach of its privileges; and that the power to punish followed, as a necessary incident to the power to take cognizance of the offence."[316] The houses' power to imprison, however, is limited to punishment during the legislative session; at the end of a session, anyone imprisoned by the house must be released.[317] Story was not the only commentator who thought that, although the Constitution's text was silent on the houses' power to hold nonmembers in

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311 See US Const Art I, § 5, cl 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

312 Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 341 (Yale 1966).

313 Id at 342.

314 Joseph Story, 1 *Commentaries on the Constitution of the United States* § 837 at 607 (Little, Brown 5th ed 1891) (Melville M. Bigelow, ed).

315 Id § 845 at 612–13.

316 Id § 847 at 615.

317 Id § 849 at 621.

contempt, sound structural and historical reasoning dictated that such a power must exist. Chancellor James Kent likewise noted that such a power "was founded on the principle of self preservation."[318] Thomas Jefferson noted the arguments both for and against such a power and declared himself agnostic.[319]

B. Congressional Practice

1. Contempt against nonmembers generally.

From almost the beginning, the houses of Congress have, in fact, punished nonmembers. In December 1795, three members of the House of Representatives reported that a man named Robert Randall had approached them regarding a memorial that he and some associates were about to present to the House for a grant of about twenty million acres of Western lands.[320] Randall proposed that "[t]he property would be divided into forty shares, twenty-four of which should be reserved for such members of Congress as might favor the scheme."[321] Other members reported similar contacts with Randall, as well as with an associate of his named Charles Whitney.[322] Although the matter had already been communicated to the executive branch, and, indeed, there were reports that Randall was already in the custody of the Washington city marshal, the House ordered its sergeant-at-arms to take both men into custody, and it appointed a committee to consider what to do with them.[323] After some debate as to the proper mode of procedure,[324] the House finally agreed that the two were to be tried at the bar of the House.[325] Randall was tried first, and, after a three-day trial, the House voted seventy-eight to seventeen that Randall "has been guilty of a contempt to, and a breach of the privileges of, this House, by attempting to corrupt the integrity of its members."[326] The House additionally resolved that Randall was to be kept in the sergeant's custody "until further order of this House."[327] The House re-

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318 James Kent, 1 *Commentaries on American Law* 221 (Halsted 1826).
319 Jefferson, *Manual of Parliamentary Practice* at 43, 55–57 (cited in note 4).
320 5 Annals of Cong 166–67 (Dec 28, 1795).
321 Id at 166.
322 Id at 168–69.
323 5 Annals of Cong 169–70 (Dec 29, 1795).
324 See id at 171–94.
325 5 Annals of Cong 194–95 (Jan 1, 1796).
326 HR J, 4th Cong, 1st Sess 405 (Jan 6, 1796).
327 Id at 406.

leased him a week later.[328] Whitney was discharged from custody without any determination of innocence or guilt.[329]

The early Senate, too, was willing to use its contempt power against nonmembers. In March 1800, the Senate resolved that certain articles published in a Philadelphia newspaper called the "*General Advertiser*, or *Aurora*" contained

> assertions and pretended information respecting the Senate and the committee of the Senate, and their proceedings, which are false, defamatory, scandalous, and malicious, tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States; and that the said publication is a high breach of the privileges of this House.[330]

The Senate ordered the publisher, William Duane, to attend at the bar of the house.[331] Duane appeared and requested counsel, and his request was granted.[332] However, Duane thereafter refused to appear.[333] The Senate then voted him guilty of a contempt for this refusal and ordered its sergeant to take him into custody.[334] The sergeant never succeeded in doing so, however, and, at the end of the session, the Senate resolved to request the president to prosecute Duane under the Sedition Act.[335] Duane was subsequently convicted and sentenced to thirty days' imprisonment.[336] Vice President Thomas Jefferson presided over the Senate throughout the proceedings.[337]

It is, thus, clear that both houses of Congress believed from the beginning that they had a constitutional power to hold nonmembers in contempt.[338] In 1821, the Supreme Court blessed the practice, as well. After the House of Representatives found John Anderson guilty of contempt and breach of privilege for attempting to bribe a mem-

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328 HR J, 4th Cong, 1st Sess 414 (Jan 13, 1796).

329 HR J, 4th Cong, 1st Sess 407 (Jan 7, 1796).

330 Sen J, 6th Cong, 1st Sess 54 (Mar 20, 1800).

331 Id.

332 Sen J, 6th Cong, 1st Sess 56 (Mar 24, 1800).

333 Sen J, 6th Cong, 1st Sess 58 (Mar 26, 1800).

334 Sen J, 6th Cong, 1st Sess 60 (Mar 27, 1800).

335 Sen J, 6th Cong, 1st Sess 98 (May 14, 1800).

336 Eberling, *Congressional Investigations* at 45 (cited in note 267).

337 See, for example, Sen J, 6th Cong, 1st Sess 60–61 (Mar 27, 1800) (reprinting the warrant, signed by Jefferson, authorizing the Senate sergeant-at-arms to take Duane into custody).

338 It should be noted that the Senate's use of this power against Duane—as well as some subsequent uses of the power by both houses—raises serious First Amendment concerns. But the fact that the power can be used in such a way as to violate constitutional rights does not in any way undermine the existence of the power when it is used in a way that does not violate constitutional rights.

ber,[339] Anderson sued the sergeant-at-arms for assault and battery and false imprisonment.[340] Justice William Johnson, for a unanimous Supreme Court, framed the issue as follows: "whether the House of Representatives can take cognisance of contempts committed against themselves, under any circumstances?"[341] His answer was a resounding "yes"—the alternative, he wrote,

> obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.[342]

This structural reasoning was buttressed by historical analysis: the Constitution "is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments."[343] That is, the experience of the British, colonial, and state legislatures, as well as the Continental Congress, implies that, absent some compelling statement to the contrary, the privileges of those bodies were meant to be continued in Congress. But, as with the privileges, so too with the limitations on those privileges: the houses' power to punish is limited to the duration of the session.[344]

Although subsequent decisions have tinkered with the permissible scope of congressional contempt against nonmembers, no subsequent

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339 HR J, 15th Cong, 1st Sess 154 (Jan 16, 1818).
340 *Anderson v Dunn*, 19 US (6 Wheat) 204, 204 (1821).
341 Id at 224–25.
342 Id at 228–29.
343 Id at 232.
344 *Anderson*, 19 US (6 Wheat) at 231.

case has doubted its existence.[345] Thus, both houses of Congress, as well as the Supreme Court, have concluded that the structural and historical evidence supports an inherent power in each house to hold nonmembers in contempt.

2. The contempt statute.

However, recourse to the inherent contempt power was onerous, as it caused the houses to expend valuable time hearing contempt proceedings. In 1857, therefore, Congress passed a law providing that anyone who refused to obey a congressional subpoena would be criminally liable "in addition to the pains and penalties now existing."[346] Whenever a witness fails to comply with a congressional subpoena, the Speaker of the House or President of the Senate can certify the matter to the district attorney for the District of Columbia, "whose duty it shall be to bring the matter before the grand jury for their action."[347] The words "in addition to the pains and penalties now existing" were omitted when the statutory language was reworked in 1938,[348] and that is how the law stands today.[349]

Nothing in the contempt statute, however, evinces any desire to eliminate the houses' inherent contempt powers.[350] Indeed, given that

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[345] The case law has proceeded in ebbs and flows. The Court's most narrowly cabined view of the contempt power came in *Kilbourn v Thompson*, 103 US 168 (1881), in which the Court struck down a contempt citation against a witness who refused to testify at a hearing regarding the loss of federal funds in an investment scheme. The Court determined that such hearings were not legislative in nature and were therefore outside of the House's purview. Id at 192. Subsequent decisions again broadened the scope of the houses' contempt powers. See *In re Chapman*, 166 US 661, 672 (1897) (upholding a contempt conviction for refusing to answer questions from a committee regarding corruption in the passage of a bill); *McGrain v Daugherty*, 273 US 135, 180 (1927) (upholding a contempt citation where a witness refused to testify in front of a committee seeking information for the purpose of drafting legislation); *Jurney v MacCracken*, 294 US 125, 151 (1935) (upholding a contempt citation against a person who allowed papers subpoenaed by a Senate committee to be destroyed). With the coming of the McCarthy era, the Court somewhat narrowed the scope of the congressional contempt power. See *United States v Rumely*, 345 US 41, 47–48 (1953) (overturning a contempt citation on the grounds that a congressional committee had exceeded the scope of its authorizing resolution).

[346] An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony § 1, ch 19, 11 Stat 155, 155 (1857).

[347] Id at § 3.

[348] Joint Resolution Relating to Congressional Investigations § 102, ch 594, 52 Stat 942, 942 (1938).

[349] 2 USC §§ 192–94.

[350] See Rosenberg and Tatelman, *Congress's Contempt Power* at 21 (cited in note 2) ("It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an *alternative* to the inherent contempt power, not as a substitute for it.").

prosecutorial discretion is vested in the executive branch,[351] any attempt to eliminate the houses' inherent contempt powers would have represented a significant diminution in congressional power—in essence, it would have limited the houses' power to investigate to those topics the executive wished to have investigated.[352] Even assuming arguendo that Congress *could* surrender its constitutional powers in this way, we should not presume that it has, in fact, done so, absent some compelling evidence.

This is, of course, an especially important point because the executive is most likely to decline to prosecute precisely when the alleged contemnor is a member of the executive branch.[353] Indeed, as we have seen, the president declined to prosecute Harriet Miers and Joshua Bolten.[354] We now turn, therefore, to an analysis of how the houses of Congress have treated contempt by members of the executive branch.

3. Contempt proceedings against executive branch officers.

Fortunately for the stability of our government, most disputes between the executive and legislative branches over information have historically been settled by negotiation and accommodation.[355] There have, however, been moments when this arrangement has broken

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[351] See US Const Art II, § 3 ("[The president] shall take Care that the Laws be faithfully executed."). See also *United States v Cox*, 342 F2d 167, 171 (5th Cir 1965) (en banc) (holding that a federal judge may not compel a federal prosecutor to prosecute a case).

[352] As Allen Moreland put it,

> The investigative power of Congress is intimately related to its power to punish for contempt. In practical terms, the inquisitorial authority of the Congress ends at the point where a witness will be excused by the courts for refusing to obey a congressional summons to appear or to produce papers, or for refusing to answer questions posed by a member or committee of Congress.

Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S Cal L Rev 189, 189 (1967). Obviously, this holds not only where the *courts* will excuse the witness for refusing to comply with the subpoena, but also where the only competent prosecutorial authority refuses to prosecute the witness.

Moreover, even if the executive branch could be forced to prosecute against its will, it could hardly be forced to do a good job. A prosecutor who wants a grand jury to return a no bill or who wants a petit jury to acquit can surely find some way of accomplishing that objective.

[353] Indeed, the executive branch takes the position that the criminal contempt statute does not apply to members of the executive branch, as a matter of both statutory and constitutional interpretation. See Olson, *OLC Memo* at 129–42 (cited in note 34) (noting that "the contempt of Congress statute does not require . . . prosecution of [an executive branch] official").

[354] See text accompanying notes 18–22.

[355] Irving Younger has catalogued a number of such cases. See Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U Pitt L Rev 755, 756–69 (1959).

down and a house of Congress has resorted to the use of its contempt powers against executive officers.

On March 28, 1834, in response to President Andrew Jackson's removal of federal money from the Second Bank of the United States and deposit of that money into state banks,[356] the Senate adopted a resolution proclaiming that "the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."[357] Jackson replied with a lengthy message of protest.[358] He insisted that the only constitutional checks on the presidency were impeachment, criminal trial, civil suit, and public opinion—as the Senate's resolution was none of the above, he insisted that the Senate resolution was "wholly unauthorized by the constitution, and in derogation of its entire spirit."[359] The Senate was not amused at having its own words thrown back in its face. After some debate, it passed a series of resolutions asserting that the president had overstepped his constitutional authority and usurped powers belonging to Congress, that he had no right to make formal protests against votes or proceedings in a house of Congress, and that his protest constituted "a breach of the privileges of the Senate."[360] (In 1837, as Jackson was on his way out of office and after his Democratic Party had picked up seats in the Senate, the resolution censuring him was officially "expunged" from the Senate Journal.[361])

Several years later, the House borrowed the Senate's language to determine that another president had breached legislative privilege. On August 9, 1842, President John Tyler vetoed a tariff and land distribution bill.[362] The next day, the House created a select committee to consider the president's objections.[363] The committee, chaired by John

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356 See 10 Reg Deb 1185–87 (Mar 28, 1834) (Senator Gabriel Moore) (explaining his reasoning for voting for the resolutions). The Bank's charter was due to expire in 1836, and Jackson had already, in 1832, vetoed a bill to renew the charter. He sought to kill the Bank off even earlier by removing all federal deposits in 1834. See generally Bray Hammond, *Jackson, Biddle, and the Bank of the United States*, 7 J Econ Hist 1 (1947).

357 Sen J, 23d Cong, 1st Sess 197 (Mar 28, 1834).

358 See 10 Reg Deb 1317–36 (Apr 17, 1834).

359 Id at 1318.

360 Sen J, 23d Cong, 1st Sess 252–53 (May 7, 1834).

361 Sen J, 24th Cong, 2d Sess 123–24 (Jan 16, 1837). See David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* 73–75 (Chicago 2005) (describing the debate over expunging the Senate Journal).

362 HR J, 27th Cong, 2d Sess 1242–47 (Aug 9, 1842).

363 HR J, 27th Cong, 2d Sess 1254 (Aug 10, 1842).

Quincy Adams, returned with a scathing report,[364] which began by referring to the veto message as "the last of a series of executive measures, the result of which has been to defeat and nullify the whole action of the legislative authority of this Union, upon the most important interests of the nation,"[365] and got more combative from there. The report ended by recommending a constitutional amendment that would allow Congress to override a presidential veto by a bare majority.[366] President Tyler replied with a protest message,[367] complaining that the House's report charged him with serious offenses without giving him the opportunity to defend himself.[368] The House then resolved that the president had no right to make a protest against its votes or proceedings, and that the protest message constituted a "breach of the privileges of this House."[369]

It was not just presidents themselves who were found to have breached congressional privilege. In 1866, Representative James Blaine laid before the House a letter from James Fry, the Provost Marshal General of the Army.[370] The letter was a response to a speech made several days earlier by Representative Roscoe Conkling, in which he had referred to Fry as "an undeserving public servant" and asserted that, during the Civil War, the Provost Marshal General's office had "turned the business of recruiting and drafting into one carnival of corrupt disorder, into a paradise of coxcombs and thieves."[371] In response, Fry wrote, inter alia, that the enmity between Conkling and himself "arose altogether from my unwillingness to gratify him in certain matters in which he had a strong personal interest. It is true, also, that he was foiled in his efforts to obtain undue concessions from my bureau, and to discredit me in the eyes of my superiors."[372] After the letter was read, the House created a select committee to inquire into the matter.[373] The committee reported back two resolutions, which were overwhelmingly adopted by the House. The first

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364 Cong Globe, 27th Cong, 2d Sess 894–96 (Aug 16, 1842).

365 Id at 894.

366 Id at 896.

367 John Tyler, Protest (Aug 30, 1842), reprinted in James D. Richardson, ed, 4 *A Compilation of the Messages and Papers of the Presidents, 1797–1897* 190 (GPO 1897).

368 Id at 191–92.

369 HR J, 27th Cong, 2d Sess 1464 (Aug 30, 1842).

370 Cong Globe, 39th Cong, 1st Sess 2292–93 (Apr 30, 1866).

371 Cong Globe, 39th Cong, 1st Sess 2151 (Apr 24, 1866) (reporting a statement of Representative Conkling).

372 Cong Globe, 39th Cong, 1st Sess 2293 (Apr 30, 1866).

373 HR J, 39th Cong, 1st Sess 639 (Apr 30, 1866).

proclaimed that Fry's allegations of corruption by Conkling were "wholly without foundation in truth."[374] The second determined that

> General Fry, an officer of the government of the United States, and head of one of its military bureaus, in writing and publishing these accusations . . . and which, owing to the crimes and wrongs which they impute to a member of this body, are of a nature deeply injurious to the official and personal character, influence, and privileges of such member, and their publication originating, as in the judgment of the House they did, in no misapprehension of facts, but in the resentment and passion of their author, was guilty of a gross violation of the privileges of such member and of this house, and his conduct in that regard merits and receives its unqualified disapprobation.[375]

The Provost Marshal General's Bureau was abolished the next month.[376]

In 1879, the House of Representatives actually had its sergeant take an executive branch officer into custody for contempt. In 1878, the House resolved that its Committee on Expenditures in the State Department was empowered to investigate the past and present business of that department. The resolution specifically authorized the committee "to send for papers and persons."[377] Soon thereafter, the committee received a communication from John C. Myers, a former consul-general to Shanghai, alleging that George F. Seward,[378] then the Minister to China, was guilty of malfeasance during his time as Shanghai consul-general.[379] The committee determined that certain books that "contained original entries of fees received at the consulate at Shanghai from the year 1863 to 1871, had not been transmitted to the State Department," but had rather been taken with Seward when he moved to Peking.[380] The committee believed that the books were "necessary to a thorough and complete investigation of the receipts

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374 HR J, 39th Cong, 1st Sess 1056–57 (Jul 19, 1866).

375 Id at 1057.

376 An Act to Increase and Fix the Military Peace Establishment of the United States § 33, ch 299, 14 Stat 332, 337 (1866) (ordering the closure of the Provost Marshal General's Bureau within thirty days).

377 8 Cong Rec H 1771 (Feb 22, 1879) (reprinting the committee's report, including its authorizing resolution).

378 Seward also happened to be the nephew of Secretary of State William H. Seward. For an overview of Seward's career—albeit one that omits all mention of his tussles with the House—see generally Paul Hibbert Clyde, *Attitudes and Policies of George F. Seward, American Minister at Peking, 1876–1880*, 2 Pac Hist Rev 387 (1933).

379 8 Cong Rec H 1771 (Feb 22, 1879).

380 Id.

and expenditures at the Shanghai consulate."[381] Myers, who succeeded Seward in Shanghai, alleged in an affidavit to the committee that the books would show that Seward had misappropriated large sums of money from the consulate.[382]

On February 19, 1879, the committee subpoenaed Seward both to appear and to bring the books with him.[383] Seward, who had returned from China for the hearings, appeared the next day; his counsel argued that the committee had no authority to compel production of the books.[384] In response, the committee adopted a number of resolutions asserting that the books were public property and that Seward had no right to withhold them from the committee.[385] In response to the committee's renewed demands for Seward either to produce the books or to testify as to their contents, Seward's counsel asserted that such demands violated Seward's right against compelled self-incrimination.[386] The committee did not accept this argument, asserting that "an investigation before a congressional committee is not *a criminal case*, within the meaning of the Constitution."[387] The committee accordingly recommended that the sergeant be ordered to

> take into custody forthwith, wherever to be found, the body of George F. Seward and him bring to the bar of the House, to show cause why he should not be punished for contempt; and in the meantime keep the said George F. Seward in his custody to abide the further order of the House.[388]

On February 27, the House adopted the committee's proposed order by a vote of 105 to 47.[389]

On February 28, the sergeant brought Seward to the bar of the House. In response to the Speaker's inquiring whether he was ready to cooperate, Seward presented a written statement contending that the committee's investigation was leading to impeachment charges,

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381 Id.

382 Id at 1771–72.

383 8 Cong Rec H 1772 (Feb 22, 1879).

384 Id.

385 Id.

386 Id at 1773.

387 8 Cong Rec H 1774 (Feb 22, 1879). For an argument that the Fifth Amendment would have application to congressional proceedings only if the congressional proceedings were actually introduced in a criminal trial, see Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 206 n 55 (Yale 1997).

388 8 Cong Rec H 1775 (Feb 22, 1879).

389 8 Cong Rec H 2016 (Feb 27, 1879).

and that he therefore had a right not to be a witness against himself.[390] The House voted to commit his reply to the Judiciary Committee, and he was released on his own recognizance while that committee deliberated.[391] On March 1, the Committee on Expenditures in the State Department reported articles of impeachment against Seward.[392] The session ended two days later, without a vote on the impeachment articles. On the final day of the session, the Judiciary Committee reported that Seward should not be compelled to incriminate himself when there were ongoing impeachment proceedings against him.[393] That report was never voted on by the House.

The House again arrested an executive branch official in 1916. In December 1915, Representative Frank Buchanan accused United States District Attorney for the Southern District of New York H. Snowden Marshall of high crimes and misdemeanors. Two weeks later, a federal grand jury convened by Marshall indicted Buchanan for violations of the Sherman Antitrust Act.[394] Buchanan then introduced a resolution calling for the appointment of a committee to investigate alleged misconduct by Marshall; on February 1, 1916, a subcommittee of the Judiciary Committee was appointed for this task.[395] While the subcommittee was investigating, an article appeared in a newspaper accusing the subcommittee of attempting to frustrate the grand jury investigation.[396] When the reporter refused to name his sources to the subcommittee, he was threatened with contempt proceedings.[397] At that point, Marshall wrote a letter to the subcommittee acknowledging that he was the source for the article; the letter went on to restate the charges in language that the Supreme Court described as "certainly unparliamentary and manifestly ill-tempered, and which was well calculated to arouse the indignation not only of the members of the subcommittee, but of those of the House generally."[398] Marshall also released the letter to the press.[399] The House then adopted a resolution declaring the letter "defamatory and insulting" and asserting that it

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390 8 Cong Rec H 2138–41 (Feb 28, 1879).

391 Id at 2143–44.

392 8 Cong Rec H 2350–51 (Mar 3, 1879).

393 The Judiciary Committee's report is reprinted in Asher C. Hinds, 3 *Hinds' Precedents of the House of Representatives of the United States* § 1700 at 59–61 (GPO 1907).

394 *Marshall v Gordon*, 235 F 422, 424–25 (SDNY 1916).

395 Id at 425.

396 See *Marshall v Gordon*, 243 US 521, 531 (1917).

397 Id.

398 Id at 531–32. The letter is reprinted in *Marshall*, 235 F at 423–24.

399 *Marshall*, 243 US at 532.

"tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violating of its privileges, its honor, and its dignity."[400] The sergeant-at-arms was dispatched to New York to arrest Marshall.[401]

Marshall's habeas petition was denied by Judge Learned Hand.[402] The Supreme Court reversed; however, its reasons for reversal are crucial. The Court had no doubt that the House possessed "a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given" in the Constitution.[403] And the Court did not even find it necessary to consider whether the scope of the contempt power was different when applied to executive branch officials—it simply treated as given that the power extended to them. Rather, the Court ordered Marshall released from custody because

> the contempt was deemed to result from the writing of the letter, not because of any obstruction to the performance of legislative duty resulting from the letter, or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind, or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties, and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-

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400 Id.
401 Id.
402 *Marshall*, 235 F at 433.
403 *Marshall*, 243 US at 541.

> preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.[404]

That is, the House would have had full power to punish Marshall for obstructing its proceedings; however, the Court said, this contempt power does not extend to mere dignitary offenses that do not affect the House's proceedings. Neither the House nor the Court seemed to have any doubt that the House could arrest and hold a federal prosecutor for actions which were truly within the scope of Congress's contempt power, rightly construed.

The Watergate scandal again brought to the fore clashes between the executive and legislative branches over the scope of the latter's contempt power. In 1973, the Senate Select Committee on Campaign Activities demanded five tapes of White House conversations between President Richard Nixon and presidential advisor John Dean.[405] When Nixon, asserting executive privilege, refused to turn the tapes over, the committee went to court, seeking a declaratory judgment that it had a right to the tapes and an injunction ordering Nixon to turn them over.[406] The district court dispatched with justiciability concerns in a brief paragraph, noting that the DC Circuit had recently held that an assertion of executive privilege as against a grand jury subpoena was justiciable,[407] and insisting that the reasoning in that case "is equally applicable to the subpoena of a congressional committee."[408] The court then proceeded to balance the public interest in the president's privilege claim against the public interest in disclosure to the committee, and it determined that "[i]t has not been demonstrated to the Court's satisfaction" that the latter outweighed the former.[409] The court was especially concerned that disclosure of the tapes might harm "the integrity of the criminal trials arising out of Watergate."[410] Noting that the tapes were available to the grand juries investigating Watergate, the court concluded that "[t]o suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has

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404 Id at 545–46.

405 *Senate Select Committee on Presidential Campaign Activities v Nixon*, 370 F Supp 521, 521 (DDC 1974).

406 Id at 522.

407 Id, citing *Nixon v Sirica*, 487 F2d 700, 712 (DC Cir 1973).

408 *Senate Select Committee*, 370 F Supp at 522.

409 Id.

410 Id at 523.

not been or will not be effective in this matter."[411] The court accordingly dismissed the complaint.[412]

The DC Circuit, sitting en banc, affirmed.[413] It did not discuss the issue of justiciability at all. Instead, noting that presidential conversations are "presumptively privileged,"[414] the court claimed that the committee had shown no interest sufficiently compelling so as to defeat the presumption.[415] The court reasoned that because the House Judiciary Committee, which was considering articles of impeachment, already had the tapes, the Select Committee's need for them was "merely cumulative."[416] And, the court suggested, any potential legislative use the committee had for the tapes was of a lesser weight than a grand jury's need for the tapes (which the court had previously upheld against an assertion of executive privilege).[417] Two months after the DC Circuit's opinion, the Supreme Court unanimously ordered the tapes to be turned over to the district court in which White House officials were being tried for their involvement in Watergate.[418] Within days of that decision, the House Judiciary Committee adopted articles of impeachment against Nixon,[419] and he resigned less than two weeks later.

In the years after Nixon's resignation, a number of cabinet officers and other high-ranking executive branch officials have been held in contempt of Congress, but those disputes have generally ended in disclosure of the requested information before any punitive measures were taken.[420] The case that came closest to outright confrontation was the result of an investigation by the House Committee on Public Works and Transportation into the Environmental Protection Agency's (EPA) administration of the Superfund scheme.[421] In 1982, the Public Works Committee's Subcommittee on Investigations and Over-

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411 Id at 524.

412 *Senate Select Committee*, 370 F Supp at 524.

413 *Senate Select Committee on Presidential Campaign Activities v Nixon*, 498 F2d 725, 726 (DC Cir 1974) (en banc).

414 Id at 730, quoting *Nixon*, 487 F2d at 717.

415 *Senate Select Committee*, 498 F2d at 731.

416 Id at 732.

417 Id.

418 *United States v Nixon*, 418 US 683, 706 (1974).

419 Articles of Impeachment, HR Rep 1305, 93d Cong, 2d Sess (Aug 20, 1974).

420 See Rosenberg and Tatelman, *Congress's Contempt Power* at 33 (cited in note 2) (noting twelve such contempt citations between 1975 and 2007).

421 This conflict is described in Olson, *OLC Memo* at 103–10 (cited in note 34). See also Rosenberg and Tatelman, *Congress's Contempt Power* at 27–28 (cited in note 2); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 NYU L Rev 563, 571–74 (1991); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims against Congress*, 71 Minn L Rev 461, 508–14 (1987).

sight served a subpoena on EPA Administrator Anne Gorsuch seeking a number of documents related to EPA's treatment of certain Superfund sites.[422] On President Ronald Reagan's instructions, Gorsuch withheld certain documents related to ongoing enforcement actions, asserting that they were privileged.[423] The committee referred the matter to the full House, which cited Gorsuch for contempt on December 16, 1982.[424] That same day, Gorsuch brought an action seeking a declaratory judgment that she had acted lawfully in withholding the documents.[425] The next day, the Speaker certified the matter to the United States Attorney for prosecution under the 1857 criminal contempt statute;[426] the United States Attorney refused to prosecute so long as the civil suit was pending.[427]

The district court opted for a course of judicial modesty and exercised its discretion under the Declaratory Judgment Act not to hear the case.[428] Arguing that "judicial intervention should be delayed until all possibilities for settlement have been exhausted,"[429] the court found that there was still an opportunity for the parties to compromise.[430] Shortly thereafter, the parties did just that: they reached an agreement under which the House withdrew the contempt citation and EPA granted the subcommittee limited access to the documents.[431] Thereafter, the United States Attorney presented the contempt citation to a grand jury, which unanimously returned a no bill.[432] Gorsuch resigned a little over a month after the district court's decision not to hear the civil case, and before the agreement with the subcommittee was reached.[433]

The Gorsuch controversy also occasioned the executive branch's most extensive meditations on the interplay between congressional contempt and executive privilege, in the form of two Office of Legal Counsel (OLC) memos. A 1984 memo authored by Theodore Olson

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422 The text of the subpoena is reprinted in *United States v United States House of Representatives*, 556 F Supp 150, 151 (DDC 1983).

423 Id; Olson, *OLC Memo* at 106–07 (cited in note 34).

424 *United States House of Representatives*, 556 F Supp at 151.

425 Id.

426 See Part IV.B.2.

427 Peterson, 66 NYU L Rev at 573 (cited in note 421).

428 *United States House of Representatives*, 556 F Supp at 153.

429 Id at 152.

430 Id at 153.

431 Olson, *OLC Memo* at 110 (cited in note 34).

432 Id.

433 The decision was handed down on February 3, 1983. *United States House of Representatives*, 556 F Supp at 150. Gorsuch resigned on March 9. Douglas Martin, *Anne Gorsuch Burford, 62, Reagan E.P.A. Chief, Dies*, NY Times C13 (July 22, 2004). The contempt citation was withdrawn August 3. Olson, *OLC Memo* at 110 (cited in note 34).

concluded that the executive branch could properly exercise its discretion not to prosecute under the criminal contempt statute;[434] it also concluded that the criminal contempt statute did not apply at all to executive branch officials asserting executive privilege.[435] In support of this latter proposition, it offered some brief snippets of evidence from the legislative history of the criminal contempt statute,[436] but it placed primary emphasis on a separation of powers argument: "[I]f executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties."[437] This is because it would put the president in the position of either placing one of his subordinates at risk of going to prison or surrendering his ability to make executive privilege arguments, even when he thought they were necessary to the performance of his constitutional role.[438] Olson, instead, argued that Congress should file civil suits to enforce its subpoenas.[439] He also insisted that Congress "has never arrested an executive official for contempt of Congress for failing to produce subpoenaed documents."[440] As we have seen, this is incorrect—the House arrested George Seward for precisely that reason[441]—but Olson is hardly the only commentator to have overlooked the Seward case.[442] A 1986 OLC memo, authored by Charles Cooper, concurred that the criminal contempt statute was inapplicable,[443] but went further in asserting that Congress's inherent contempt power might be inapplicable against an executive branch official, as well.[444] Aside from general claims about the unlikeliness of a house of Congress sending its sergeant-at-arms to arrest an executive branch official and the Supreme Court's recent skepticism about congressional power in other contexts, the memo offers very little reasoning for this point. According to the Cooper

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434 Olson, *OLC Memo* at 114–15, 118–28 (cited in note 34).

435 Id at 129–42.

436 Id at 129–32.

437 Id at 134.

438 Olson, *OLC Memo* at 136 (cited in note 34).

439 Id at 137.

440 Id at 141.

441 See text accompanying notes 378–393.

442 A database search suggests that only once has the Seward case been mentioned, and that was in the context of the extent of the privilege against self-incrimination in congressional testimony. See Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege against Compelled Self-incrimination*, 90 Georgetown L J 2445, 2497–2500 (2002).

443 Cooper, *OLC Memo* at 83–85 (cited in note 34).

444 Id at 86.

memo, then, Congress's *only* remedy for contempt by a member of the executive branch is a civil suit.[445]

We have, thus, seen all three branches weigh in with their interpretations of Congress's ability to hold executive branch officers in contempt. Congress itself has spoken through its various contempt proceedings, against both presidents themselves (Jackson, Tyler, and Nixon) and their subordinates (Fry, Seward, Marshall, and Gorsuch). The executive branch has spoken, both through its reaction to these proceedings and through its two OLC Memos. And finally, the courts have spoken, in cases arising out of the Marshall, Nixon, and Gorsuch controversies.

V. LESSONS LEARNED

To what, then, does all of this amount? In this Part, I first draw some general principles from the historical treatment presented above and then apply those lessons to the *Miers* case.

A. General Principles

1. Congressional findings of contempt against nonmembers.

Although there is no explicit textual basis for the authority of the houses of Congress to hold a nonmember in contempt of Congress or breach of privilege, this authority is amply justified on historical, structural, and precedential grounds. Historically, as we have seen, Anglo-American legislatures have exercised a power to punish nonmembers since the sixteenth century.[446] This power crossed the Atlantic and was widely used in the American colonies and states prior to the drafting of the federal Constitution. Perhaps most importantly, even in those states whose constitutions did not explicitly grant their legislatures the power to hold nonmembers in contempt, in fact, the legislatures did exercise this power.[447] It thus seems reasonable to conclude that such a power was considered inherent in what it meant to be a legislature—or, to give it a more concrete textual grounding, that such a power was understood to fall within each house's authority to "determine the Rules of its Proceedings."[448]

This feeds into the structural rationale: for Congress to be able effectively to perform any of its functions—ranging from legislating, to

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445 Id at 87–89.
446 See Part II.B.
447 See text accompanying notes 303–310.
448 See US Const Art I § 5, cl 2.

overseeing administrative agencies, to impeaching, to judging the elections, returns, and qualifications of its members—it must have access to information.[449] If those in possession of the necessary information could not be made to give it up, then Congress would have at its disposal only the information that witnesses wanted it to have—hardly an effective means of carrying out its functions. Indeed, if it is essential that courts have the power to compel testimony and evidence in order to render justice in particular cases, then it must be at least as essential for the houses of Congress to have this power when they are exercising their quasi-judicial functions (for example, impeachment and judging the elections, returns, and qualifications of members) and perhaps even more important when they seek to create laws to apply across the entire nation. Although "the public" in Lord Hardwicke's famous maxim that "the public . . . has a right to every man's evidence"[450] is frequently used to refer to courts,[451] it applies at least as well to Congress.[452] This was precisely the structural reasoning appealed to by Story[453] and Kent.[454]

Finally, there is the precedential rationale for this power. As we have seen, Congress itself has exercised the power from the earliest years of the Republic.[455] The judiciary has blessed the practice, as well.[456] And the executive branch has recognized the power in its two OLC

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449 As Senator J. William Fulbright put it, "The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function." J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U Chi L Rev 440, 441 (1951). See also James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv L Rev 153, 209 (1926) ("To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."); id at 205:

> [K]nowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge.

450 William Cobbett, 12 *Parliamentary History of England: From the Norman Conquest in 1066, to the Year 1803* 693 (Hansard 1812).

451 See *Branzburg v Hayes*, 408 US 665, 688 (1972); *Kastigar v United States*, 406 US 441, 443 (1972).

452 See *United States v Bryan*, 339 US 323, 331 (1950) (reasoning that if a witness were required to testify "only if cornered at the end of [a] chase," the "great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity").

453 See text accompanying notes 314–317.

454 See text accompanying note 318.

455 See Part IV.B.1.

456 See text accompanying notes 339–345.

memos.[457] The right of each house of Congress to hold nonmembers in contempt has thus been recognized by all three branches of the federal government.

2. Contempt findings against executive branch officials.

The case for an inherent contempt authority is, if anything, stronger in the case of executive branch officials than in that of ordinary citizens. As we have seen, parliaments used contempt and breach of privilege findings against monarchs to assert their authority as early as Elizabeth's reign.[458] When Charles I tried to dispense with Parliament and rule by royal prerogative alone, it was, among other things, a claim of breach of privilege and contempt of Parliament that drove him from his throne.[459] It was, in many cases, such claims that the American colonists used to keep their royal governors in line,[460] and that the states used to cabin executive power in the early Republic.[461] With these precedents in mind, and with no available evidence to the contrary, it seems reasonable to assume that the Founders understood Congress to have the authority to hold executive branch officers in contempt. And this understanding is further buttressed by the use of contempt proceedings against executive branch officials—including presidents themselves—numerous times in our nation's history.[462]

This historical evidence is underscored by structural considerations. First, Congress has special oversight authority over the workings of the executive branch. The entire federal budget, after all, flows from Congress, and specific congressional committees are charged with oversight of specific departments and administrative agencies. At the extreme, Congress has the power to impeach executive branch officers. This special oversight power makes it all the more important that Congress have access to accurate information about the workings of the executive branch. And in order for this oversight power to be effective in rooting out executive branch malevolence and incompetence, Congress must have access to precisely that information that the executive does not wish to turn over—that is, it must have the power to hold executive branch officials in contempt.

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457 See Cooper, *OLC Memo* at 86 (cited in note 34); Olson, *OLC Memo* at 124 (cited in note 34).

458 See Part II.C.

459 See Part II.D.

460 See Part III.A.

461 See Part III.B.

462 See Part IV.B.3.

Moreover, this contempt authority must be distinct from the criminal law. As we have seen, the executive branch cannot constitutionally be compelled to prosecute.[463] As the president is unlikely to authorize one of his subordinates (the United States Attorney) to file charges against another of his subordinates who was acting according to his orders, it is safe to assume that the executive branch will generally decline to prosecute an executive branch official for criminal contempt of Congress. It is thus all the more necessary that Congress have an inherent contempt power against executive branch officers.

3. Defiance of a congressional subpoena as contempt of Congress.

Whatever the limits of Congress's contempt power, it should be clear that defiance of a subpoena qualifies as contempt. If the contempt power is justified by the structural necessity of Congress's effective functioning, and if the effective functioning of Congress requires that Congress be able to acquire information, even from unwilling sources, then it is clear that refusing to turn over information subpoenaed by Congress is appropriately punishable as contempt. Although the analogy between contempt of Congress and contempt of court is not perfect, it is, of course, the case that an unexcused failure to comply with a subpoena is grounds for a finding of contempt of court.[464]

4. Enforcement of a congressional contempt citation against an executive branch official.

If Congress may use its inherent contempt power to hold an executive branch officer in contempt, and if defiance of a subpoena may properly be treated as contempt, then how should Congress proceed against that official? We have already seen that criminal proceedings are unlikely to be available. Should Congress file a civil suit, or should it use other means? The question is one of institutional power: executive branch officials are likely to make a defense to contempt charges—for example, that their refusal to produce documents should be excused because it was pursuant to a proper invocation of executive privilege. Who, then, is the final judge of whether the invocation of executive privilege was proper: the house of Congress, or the courts?

Until the late twentieth century, the answer was clear: the legislative house is the final judge of legislative contempts. Certainly, neither the houses of Parliament nor the British monarchs ever considered

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463 See Part IV.B.2.

464 FRCP 45(e); FRCrP 17(g).

submitting their disputes to the courts. The same was true of the colonial and early state legislatures, and, indeed, of the houses of Congress in their disputes with Jackson, Tyler, Fry, and Seward. The reason is both very simple and very important: these were disputes over the relative balance of executive and legislative power. Each side was contending for more power vis-à-vis the other. To invoke the aid of a third party is to admit weakness—to admit that one's own authority is insufficient to get what one wants. This is why it is so important to view the disputes between executive authority and legislative contempt powers in their broader historical and political context: these disputes are, at their heart, about the basic contours of the constitutional division of powers.

When Elizabeth and James I ordered Parliament not to discuss certain topics, they were asserting that there were areas of national policy in which Parliament could have no say. In asserting a privilege of unfettered speech and debate—and then asserting that the monarch had breached that privilege—Parliament reasserted its institutional authority. When Charles I attempted to collect taxes despite Parliament's refusal to grant them to him, when he attempted to withhold royal records and officials from Parliament, when he refused to justify his imprisonment of Arundel, when he seized John Rolle's goods and attempted to extort a grant of supply in exchange for their return, and when, after governing without Parliament for over a decade, he accused members of treason and brought an armed guard into the House of Commons to arrest them, he was asserting in the most strident terms an absolutist constitutional vision. When the houses reacted against this vision with repeated findings that he breached privilege, when they refused to proceed to other business until he redressed their grievances, when they authorized armed disobedience to breaches of privilege, and when, ultimately, they rebelled, deposed, tried, and executed Charles, the houses insisted upon a different understanding of the constitutional division of powers. And this insistence came in the language of breach of privilege and contempt of Parliament.

These clashes, of course, were not limited to the Old World. When the colonial legislatures wanted to ensure that governors and other officials appointed in London paid attention to the local concerns that the legislatures represented, they were not shy about using their contempt powers. And they had a number of means at their disposal for enforcing their contempt findings, ranging from censure to arrest to the withholding of salary. Recognizing the importance of this tool, a number of state constitutions written in the years between independence and the drafting of the federal Constitution explicitly provided

the legislature with the power to hold executive officials in contempt. But even in those states whose constitutions did not explicitly provide for such a power, the legislature understood the power to exist, and made use of it.

And, finally, we have seen the houses of Congress make use of the contempt power in the context of disputes with the executive branch. The Senate used it in the context of a dispute with Andrew Jackson—our first "imperial president"[465]—and the House used it in the context of disputes with John Tyler, James Fry, George Seward, and H. Snowden Marshall. Until Watergate, the courts never inquired into a contempt judgment against an executive branch official that the house of Congress was jurisdictionally competent to make.

It is true that the Supreme Court held that the House had improperly imprisoned Marshall.[466] But that is best thought of as a ruling on the scope of the House's *jurisdiction* rather than a ruling on the *merits*. That is, the House could punish Marshall for obstructing its proceedings, and the Court never suggested that it would review a determination by the House that someone had, in fact, obstructed its proceedings. But the House did not purport to make that claim; rather, it punished Marshall for a mere dignitary offense, and that, the Court said, was outside of the House's power to punish for contempt. (In this regard, *Marshall* may be thought of as analogous to *Powell v McCormack*,[467] in which the Court held that the House could not add qualifications for a member of Congress[468] but never suggested that it would review a determination by the House on the merits—for example, a determination that a claimant was, in fact, under twenty-five years of age.[469])

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465 See Amar, *America's Constitution* at 175 (cited in note 288) (reprinting an 1833 cartoon referring to Jackson as "King Andrew the First" and showing him trampling on the Constitution while holding a veto message in his hand).

466 *Marshall v Gordon*, 243 US 521, 548 (1917) (granting Marshall's habeas petition and ordering his discharge from custody). See also text accompanying notes 403–404.

467 395 US 486 (1969).

468 Id at 521–48.

469 See id at 521 n 42 ("[F]ederal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution."); id at 548 ("Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution.") (citation omitted). For an argument that a judgment by a house of Congress on the merits of a qualifications claim would be nonjusticiable, see Chafetz, *Democracy's Privileged Few* at 55–56 (cited in note 53) ("The Court nowhere suggests [in *Powell*] that it could review the *content* of an exclusion decision."); Akhil Reed Amar and Josh Chafetz, *How the Senate Can Stop Blagojevich*, Slate (Dec 31, 2008), online at http://www.slate.com/id/2207754 (visited Sept 1, 2009).

Indeed, it was not until Watergate that the courts purported to determine the merits of a contempt claim against an executive branch official,[470] and those cases illustrate all of the reasons why the courts should not involve themselves in such disputes. Courts are (unsurprisingly) inclined to take a court-centric view of the world. Thus, although courts were happy to order Nixon to turn the tapes over to courts,[471] they found that congressional committees had a lesser interest in the tapes, an interest that was outweighed by the president's privilege claims.[472] Indeed, both the district court and the court of appeals thought that Congress had less need for the tapes than the courts did,[473] and the district court even worried that turning the tapes over to Congress might harm ongoing grand jury investigations[474]—as if no higher interest than protecting the integrity of grand jury proceedings was conceivable. The court of appeals suggested that its understanding of congressional procedure was superior to that of the committee, dismissing the committee's need for the tapes as "merely cumulative," since another congressional committee already had the tapes.[475] The court of appeals did not consider the issue of justiciability at all, and the district court simply held that, because a claim of executive privilege in resistance to a grand jury subpoena is justiciable, so must be a claim of executive privilege in resistance to a congressional subpoena.[476] This is fatuous—in holding that an executive privilege claim in defiance of a grand jury subpoena is justiciable, a court is essentially saying, "We, the branch that issued the subpoena, will not give you, the executive branch, carte blanche to defy it, but we will hear you out as to your reasons for defying it." The analogue in the

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470 In *Kilbourn v Thompson*, 103 US 168 (1881), the Supreme Court did undertake a probing and skeptical review of a congressional contempt citation against a *private citizen*. Even there, however, the Court phrased its holding in jurisdictional language. See id at 190 (holding that the House of Representatives had no jurisdiction to inquire into Kilbourn's "private affairs"). The Court soon moved away from this narrow interpretation. See Chafetz, *Democracy's Privileged Few* at 231–33 (cited in note 53). Elsewhere, I have criticized the *Kilbourn* holding as overly narrow. See id at 229–30. Even within the *Kilbourn* framework, however, it is clear that Congress would be jurisdictionally competent to hold executive branch officials in contempt for defying subpoenas related to their official duties.

471 See *United States v Nixon*, 418 US 683, 712 (1974); *Nixon v Sirica*, 487 F2d 700, 712 (DC Cir 1973).

472 *Senate Select Committee on Presidential Campaign Activities v Nixon*, 498 F2d 725, 732 (DC Cir 1974); *Senate Select Committee on Presidential Campaign Activities v Nixon*, 370 F Supp 521, 522–23 (DDC 1974).

473 *Senate Select Committee*, 498 F2d at 732; *Senate Select Committee*, 370 F Supp at 523–24.

474 *Senate Select Committee*, 370 F Supp at 523–24.

475 *Senate Select Committee*, 498 F2d at 732.

476 *Senate Select Committee*, 370 F Supp at 522, citing *Nixon*, 487 F2d at 700.

case of a congressional subpoena would, of course, be a willingness on the part of the congressional committee to hear out the executive's privilege claim. But this distinction was lost on a court accustomed to seeing everything through judicially tinted glasses.

(Indeed, this distinction also provides a rejoinder to those who might argue that the judiciary ought to have a role in such disputes not because it is superior to the other branches, but rather because, in a dispute between two coequal branches, it is good to have the third coequal branch serve as a neutral arbiter. If this were true, then it should be the case that executive privilege claims raised in response to judicial proceedings—for example, the *Nixon Tapes Case*—should be submitted to Congress for neutral arbitration. If courts are the proper adjudicatory body for charges of executive branch contempt of court, then a claim that Congress is not the proper adjudicatory body for charges of executive branch contempt of Congress cannot be based on an appeal to the desirability of a third party arbiter.)

Finally, it must be noted that courts tend to move at a pace that is poorly suited to Congress's need for timely information: even if, at the end of the day, the courts ordered the executive branch official to turn over information to Congress, it might well come too late for Congress's purposes.[477]

The result of the suite of executive privilege cases arising out of Watergate, then, was an assertion that executive privilege claims are stronger against Congress than they are against criminal process—despite the facts that (a) the president is the federal prosecutor-in-chief and should therefore be able to structure prosecutions as he sees fit;[478] and (b) Congress has constitutionally assigned roles in overseeing, including impeaching, executive branch officials.[479] The consequences of this assertion of power by the judiciary are far-reaching. There is significant public benefit in being governed by those who are—and are seen to be—capable of transcending narrow personal and partisan interest and pursuing a broader public interest.[480] As Robert

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477 See Stanley M. Brand and Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands against Executive Branch Officials*, 36 Cath U L Rev 71, 81, 84 (1986) (noting the effect of delay in the Gorsuch case).

478 See Akhil Reed Amar, Nixon*'s Shadow*, 83 Minn L Rev 1405, 1405–06 (1999) (arguing that the Court was wrong to order Nixon to turn the tapes over to the Watergate special prosecutor, who, constitutionally, could only be an inferior executive branch officer).

479 See Part V.A.2.

480 I have defended this republican vision of public service at greater length in Chafetz, 58 Duke L J at 182–83, 224–36 (cited in note 52); Josh Chafetz, *Curing Congress's Ills: Criminal Law*

Burt has noted, the House of Representatives' conduct in the Nixon impeachment inquiry was meant to reinforce this republican conception of service, which the president's actions had badly tarnished:

> In the conduct of its deliberations, the [House Judiciary] Committee worked assiduously to avoid the actuality or the appearance of partisan divisions. In its decision to subpoena the Nixon tapes on its own authority, without recourse to judicial enforcement proceedings, the Committee signified that it would not admit that the judiciary had become the sole institutional repository of impartial judgment.[481]

But "[t]he Supreme Court's intervention in the *Nixon Tapes* case aborted this redemptive process,"[482] by hastily and immodestly swooping in and demanding that the tapes be turned over to the courts. Although Burt does not discuss the *Senate Select Committee* case, it makes his argument that much stronger—not only did the courts demand that the tapes be turned over to themselves, but they denied that Congress had a right to them, as well. In insisting that they, and only they, could stand up to Nixon, the courts reinforced the notion that Congress was impotent at best, corrupt at worst—that, in Gerald Gunther's words, "somehow it is the Court's special obligation to save the nation in episodes of constitutional crisis."[483] The courts thus made themselves the heroes of the Watergate story, but only by acting in such a way as to suggest that Congress was not up to the task. The more frequently such suggestions are made and absorbed by the public, of course, the lower Congress's reserve of institutional legitimacy falls, and the less able it is to assert a strong institutional role in the future. This, in turn, only reinforces a conception of politics as inherently debased, a conception that is deeply inimical to self-government.[484]

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as the Wrong Paradigm for Congressional Ethics, 117 Yale L J Pocket Part 238, 239–42 (2008), online at http://thepocketpart.org/2008/04/17/chafetz.html (visited Apr 20, 2009) (arguing that congressional ethics enforcement should be understood as aimed primarily at the maintenance of public trust, not at the detection and punishment of wrongdoing); Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 Yale L J 165, 171–72 (2007) (recommending the creation of Congressional Commissioners for Standards, who would be tasked with enforcing each house's ethics rules); Josh Chafetz, *Politician, Police Thyself*, NY Times A15 (Dec 2, 2006) (arguing that the houses of Congress should use their inherent power to arrest and imprison their own members when those members break house rules).

481 Robert A. Burt, *The Constitution in Conflict* 325 (Harvard 1992).

482 Id.

483 Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L Rev 30, 33 (1974).

484 See Chafetz, 58 Duke L J at 182–83, 224–36 (cited in note 52) (arguing that congressional procedure should reinforce our aspirational conception of politics).

If these disputes should not be in the courts, then what can Congress do when an executive branch officer refuses to comply with a subpoena? First, and most crudely, each house has a sergeant-at-arms, and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends. Indeed, we have seen that a house of Congress has twice arrested and held executive branch officials—Seward and Marshall. Undoubtedly, the contemnor would then seek habeas relief from a court, but such relief should be narrowly circumscribed. The court, like the *Marshall* and *Powell* courts,[485] could inquire into whether the house was jurisdictionally competent to hold the contemnor—that is, whether he was, in fact, accused of something that properly qualifies as a contempt of Congress—but it could not inquire into the merits. As noted above, defiance of a congressional subpoena is clearly within Congress's contempt power;[486] the house of Congress itself, then, and not a court on collateral review, is the proper tribunal to adjudicate an executive privilege defense.

Short of sending its sergeant out trolling the streets, the House of Representatives can always begin impeachment proceedings to vindicate its contempt finding.[487] Even former executive branch officials may be impeached,[488] and the punishment may encompass "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."[489] The Senate may always refuse to confirm the president's nominees to positions in the administration[490]—for example, stalling any new Justice Department appointments until its concerns about the running of the Department are addressed. Congress also has the power of the purse—like the colonial legislatures,[491] Congress can simply zero-out the salary of a specific official.[492] Finally, Congress can, like

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485 See text accompanying notes 466–469.

486 See Part V.A.3.

487 See US Const Art I, § 2, cl 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

488 See generally Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex Rev L & Pol 13 (2001).

489 US Const Art I, § 3, cl 7.

490 See US Const Art II § 2, cl 2 (requiring the "Advice and Consent of the Senate" for the appointment of principal officers).

491 See text accompanying notes 283–285.

492 See L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J Legis 221, 223 (2000) ("Legislative efforts to halt the pay of executive branch officials are not uncommon. Their most familiar form is a restriction on the use of appro-

the House of Lords during the Arundel controversy, simply refuse to turn to matters that the president cares about until its concerns are addressed. In its most extreme form, Congress can shut down the federal government by refusing to pass a budget.[493] Importantly, none of these options requires cooperation from another branch. None of them constitutes a concession by Congress that it is unable to carry out its constitutional role without help.

B. *Miers*, Redux

From this vantage, the problem in *Miers* is that every actor *except Congress* is being institutionally supremacist. The executive branch has made wide-ranging assertions of privilege and announced that it will exercise its own independent legal judgment in refusing to prosecute Miers and Bolten for criminal contempt. The court has referred to itself as the "ultimate arbiter" of executive privilege claims *in all contexts* and has treated its own hearing of the case as unproblematic. Only Congress has proven unsure of its own powers by seeking a judicial declaration that Miers and Bolten must comply with its subpoenas. As we have seen, the houses of Congress undoubtedly have the right to issue subpoenas, and they undoubtedly have the right to hold anyone in contempt who defies those subpoenas. They also have enforcement options at their disposal. By going to court, instead of using their own enforcement mechanisms, they further ratify the notions that only the courts act in a principled manner and that the courts must therefore watch over the actions of the political branches. By seeking judicial approval of their actions, they implicitly acknowledge that the judiciary has the final word. But why should it? This is a matter between the legislative and executive branches. The Constitution does not set the judiciary up as a parent figure, ready to solve disputes between fractious political siblings.

And what of the court's repeated insistence that it is the "ultimate arbiter" of executive privilege claims?[494] It is worth noting that the Supreme Court referred to itself as the "ultimate arbiter" of any-

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priated funds to pay the salary of an identified position or, in one notorious instance, three specifically named officials.").

[493] See Peter M. Shane, *When Inter-branch Norms Break Down: Of Arms-for-hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 Cornell J L & Pub Policy 503, 516–21 (2003) (describing two shutdowns of the federal government in 1995 resulting from congressional refusal to pass a budget unless President Bill Clinton relented on certain policy matters).

[494] *Committee on the Judiciary v Miers*, 558 F Supp 2d 53, 56, 76, 96, 103, 107 (DDC 2008) (referring to the judiciary as the "ultimate arbiter").

thing only once before the twentieth century—and that was in the context of denying a claim that state courts could have the final say as to the extent of federal jurisdiction.[495] In matters that are properly before a federal court, that court may well be the ultimate arbiter of the law.[496] But this principle cannot give us a theory of which matters are properly before a federal court.[497] The courts have never offered a persuasive reason why a congressional subpoena to an executive branch official is a matter of which the judiciary can properly take notice. Meanwhile, while the judiciary took its time considering the case, concerns about the pace of judicial proceedings were largely borne out. Although a settlement was eventually reached, the Congress that originally issued the subpoenas had ended, as had the administration that the subpoenas were intended to help Congress oversee.[498] To the extent that enforcement of congressional subpoenas is left to the courts, future administrations now know that they can delay compliance for years.

The *Miers* court was also concerned about the possibility of

> a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion.[499]

Note carefully the unstated premise here: the executive might resist the House sergeant, but it would never dare resist a court order. Why risk political "mischief" when everything can be handled in a nice, neat, orderly, "civil," judicial manner? The *Miers* court was apparently unaware that the executive branch sometimes disobeys even the judiciary.[500] Presumably such disobedience would be met with a finding of

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495 *Freeman v Howe*, 65 US 450, 459–60 (1860).

496 See William Baude, *The Judgment Power*, 96 Georgetown L J 1807, 1809 (2008) ("[T]he judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch *so long as those courts have jurisdiction over the case*.") (emphasis added).

497 Id at 1810 ("[I]f the controversy is not one that the court is authorized to resolve, the judgment binds nobody.").

498 See text accompanying notes 49–50 (describing the settlement of the *Miers* case).

499 *Miers*, 558 F Supp 2d at 92 (citation omitted).

500 President Jefferson defied, on executive privilege grounds, a subpoena issued by Chief Justice John Marshall, riding circuit, in the treason trial of Aaron Burr, *United States v Burr*, 25 F Cas 187, 189 (CC Va 1807). See John C. Yoo, *The First Claim: The Burr Trial*, United States v. Nixon*, and Presidential Power*, 83 Minn L Rev 1435, 1446–63 (1999). In response to *Worcester v Georgia*, 31 US (6 Pet) 515 (1832), President Jackson is reported to have exclaimed, "John Marshall has made his decision, now let him enforce it." (Although the quotation is quite likely apo-

contempt of court—followed, perhaps, by a "stand-off between [judicial marshals] and executive branch law enforcement officials."[501] But even if, as an empirical matter, the executive branch was more likely to obey a court order than a congressional one, the court erred in treating this fact as somehow exogenous to its ruling. If the courts are treated as the only institutions that make reasoned, principled judgments, then it stands to reason that people will come to accord greater legitimacy to those judgments. But that does not mean that the courts *are* the only institutions that make such judgments. Nonjudicial institutions can still behave judiciously, and, as we have seen, the congressional committees investigating Nixon were careful to behave in such a manner.[502] Indeed, so were the congressional committees investigating the United States Attorneys firings, holding numerous hearings and making repeated attempts at negotiation before issuing the contempt citations. The court, in sweeping aside the results of that process, once again projected an air of legitimacy at the expense of Congress. And Congress not only let the court do it; it *asked* the court to do it.

CONCLUSION

For centuries, the contempt power has served Anglo-American legislatures well in their clashes with executive authorities. For nearly all of that time, legislative houses themselves have enforced their contempt power, using either their sergeants or any of the other political weapons at their disposal. Since the 1970s, however, the courts have entered into the fray, claiming the right to determine the merits of disputes between the political branches over the extent of the contempt power. Congress has, shortsightedly, been an enthusiastic supporter of the courts' arrogation of this power. This has had short-term deleterious consequences for Congress, as when the courts ruled that Nixon did not have to turn tapes over to the Senate Select Committee. Less apparent but more insidious are the long-term consequences. In abdicating such matters to the courts, Congress has furthered the perception that the courts are the sole repository of the republican virtue of reasoned and impartial judgment. As the executive continues to

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cryphal, the dismissiveness toward judicial authority that it expresses was quite real.) See Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* 49 (Kansas 2007). President Abraham Lincoln famously ignored Chief Justice Roger Taney's ruling in *Ex parte Merryman*, 17 F Cas 144, 153 (CCD Md 1861) (ordering that "the civil process of the United States"—in particular, the writ of habeas corpus—"be respected and enforced"). See Baude, 96 Georgetown L J at 1853–61 (cited in note 496).

501 See text accompanying note 499.

502 See text accompanying note 481.

make expansive claims for its powers and privileges, and as courts continue to position themselves as the "ultimate arbiters" of inter-branch conflicts, Congress has ceded ground to both. Given that Congress is the most broadly representative branch, and given that a strong Congress would help check an increasingly strong executive branch, this development is unfortunate for the body politic.