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Legal Sidebar

The Bannon Indictment and Prosecution

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The Department of Justice (DOJ) announced on November 12, 2021, that a federal grand jury in Washington, DC, had indicted Stephen K. Bannon on two counts of contempt of Congress. The indictment follows as a consequence of Bannon's noncompliance with subpoenas issued by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Select Committee) for deposition testimony and documents related to his role in and around the events of January 6, 2021. Bannon, a longtime adviser to former President Donald Trump, has pleaded not guilty to the charges.

This Sidebar briefly describes the statutory criminal contempt of Congress process and DOJ's recent treatment of contempt referrals received from the House. It then addresses various aspects of the federal criminal statute under which Bannon has been charged.

The Statutory Criminal Contempt Process

2 U.S.C. § 192 (Section 192) makes it a crime for any person to fail to comply with a valid congressional subpoena. As with other federal criminal offenses, DOJ has the discretion to prosecute possible violations of the law. Unlike most other criminal statutes, however, the contempt statutes not only establish the basic offense, but also provide a process by which either chamber of Congress can refer violations of Section 192 to DOJ for enforcement. Once either chamber approves a contempt resolution, the matter is certified to "the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." Consistent with this process, the House voted to hold Bannon in contempt of Congress on October 21, 2021, and the Speaker later certified the matter to the U.S. Attorney for the District of Columbia.

The Decision to Seek an Indictment

Following the House vote, there was some public uncertainty as to how, and whether, DOJ would proceed with the Bannon contempt. As a historical matter, criminal contempt of Congress indictments and convictions are relatively rare. There has been some reporting suggesting that DOJ has not brought a criminal contempt of Congress charge since 1983 and not obtained a conviction since the 1970s. However, there are more recent examples in which DOJ has obtained convictions under Section 192, generally as part of a plea deal. For example, DOJ charged Scott Bloch, a former head of the Office of Special Counsel, with criminal contempt in 2010 and Elliott Abrams, a former Assistant Secretary of State involved in the Iran Contra affair, with the same offense in 1988. Both pleaded guilty to the charges.

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One of the reasons there are not more examples of indictments and convictions for violations of Section 192 is that despite the mandatory language of the contempt statutes, DOJ has long asserted that it retains the discretion to decide whether to seek an indictment following receipt of a contempt referral from Congress. As a result, there are numerous recent examples in which the House held a witness in contempt and certified the matter to the U.S. Attorney, only to have DOJ determine that it would not present the matter to a grand jury. Prior to Bannon, that had been the result for the last six individuals held in criminal contempt by the House since 2008, involving both Democratic and Republican administrations. Five of these instances involved assertions of executive privilege, with DOJ repeatedly concluding that the contempt statutes cannot "constitutionally be applied to an [e]xecutive [b]ranch official who asserts the President's claim of privilege."

Further, DOJ has also asserted similar discretion even absent a claim of privilege by the President, so long as it determines "no violation of the law has occurred." In 2014, for example, DOJ informed the House that it would not pursue a criminal contempt indictment against former Internal Revenue Service official Lois Lerner, who had refused to provide testimony to a House committee pursuant to her Fifth Amendment privilege against self-incrimination.

For all these reasons, the decision by DOJ to seek an indictment against Bannon has been characterized by some observers as "complicated," involving a sensitive balancing of the institutional interests of both Congress and the Executive. By seeking an indictment, DOJ likely determined that Bannon's situation was distinguishable from the declination decisions highlighted above. In the previous contempt determinations involving executive privilege, there had been a claim of privilege by the sitting President, and the communications at issue occurred while the witness was a government official. Additionally, in the Lerner example, the witness had asserted an individual constitutional right as justification for noncompliance with the subpoena.

In Bannon's case, the committee was not seeking testimony relating to his time as a government official, Bannon had not asserted any individual constitutional right in response to the subpoena, and the sitting President (President Biden) had made no claim of executive privilege. (According to Bannon's attorneys, however, his noncompliance with the Select Committee's subpoena request was directed by former President Trump on the ground that the subpoena sought "privileged" information.)

The Statutory Offense of Contempt of Congress

Bannon has been charged with two counts of violating 2 U.S.C. § 192. In relevant part, Section 192 provides:

> Every person who having been summoned as a witness by the authority of . . . any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor . . . .

Violations of Section 192 are punishable by fines of up to $100,000 and imprisonment "for not less than one month nor more than twelve months." Though the statutory text thus appears to establish a mandatory minimum sentence of imprisonment, whether probation is an available penalty appears to have been the subject of some uncertainty.

Nature of the Offense

At the outset, the text of the statute, and some early dictum from the Supreme Court, appears to establish two alternative means of violation: (1) "willfully" making default, or (2) appearing and refusing to answer a question pertinent to the matter of inquiry. The line between the two forms of the offense may be murky, however, as the latter form of violation could also be considered the former. In *Bryan v. United States*, the Supreme Court stated that "default" is "a failure to comply with [a] summons," and "it is unimportant

whether the subpoenaed person proclaims his refusal to respond before the full committee, sends a telegram to the chairman, or simply stays away from the hearing on the return day." It appears that the charges against Bannon rest on the concept of willful default, which is expressly referenced in both counts of the indictment.

Decisions addressing Section 192 have primarily focused on requirements related to Congress's authority in general and the relationship between the information sought and the subject of the congressional inquiry. Any violation of Section 192 depends on Congress having "the constitutional power to investigate the matter in issue or to make the particular inquiry." Congress's constitutional power of inquiry is broad but not without limits: principally, the Supreme Court has required that compulsory committee investigative actions such as subpoenas serve a valid "legislative purpose." The legislative purpose requirement is generous, though in a recent case the Supreme Court announced certain "special considerations" when subpoenas seek a President's personal records. The Select Committee has asserted that Bannon's "multi-faceted role in the events of January 6th" makes his testimony "directly relevant to its report and recommendations for legislative and other action."

By the same token, a Section 192 conviction cannot be sustained unless the committee that issued the relevant subpoena "was duly empowered to conduct the investigation, and . . . the inquiry was within the scope of the grant of authority." The Supreme Court has also stated that the particular subject of Congress's inquiry is "central to every prosecution under the statute," as the "very core" of the offense includes the pertinence of the information sought to that subject. Although it might seem from the text of the statute that the issue of pertinence arises only where a witness has appeared and refused to answer a particular question, some statements from the Supreme Court could be read as suggesting that pertinence is an element of the offense under Section 192 even when a witness has refused to comply with a congressional subpoena altogether.

Regardless, in the case of wholesale default, any requirement of pertinence may flow from the constitutional imperative that Congress's exercise of investigative authority serve a valid legislative purpose and the inquiry into the scope of a committee's authority. The Supreme Court has recognized that the concept of statutory pertinence is related to "the nature of a congressional committee's source of authority," as "[n]o witness can be compelled to make disclosures on matters outside that area." In *McPhaul v. United States*, the Court concluded that particular subpoena requests for documents were pertinent by essentially applying a standard of "reasonable relevance" that is used to assess whether subpoena requests are overbroad. In the Bannon case, the Select Committee has been authorized by House Resolution 503 to, among other things, "investigate and report upon the facts, circumstances, and causes" relating to the unrest at the U.S. Capitol on January 6, 2021.

Section 192 makes clear that default must be "willful." What is not clear from the text of the statute, however, is whether the term applies as well to refusal to answer a pertinent question. Nevertheless, courts appear to have viewed the intent required for violation of the statute as similar regardless of whether default or refusal is at issue. Although in certain contexts, the term "willful" has been held to require actual knowledge that one's conduct was unlawful, the Supreme Court has appeared to treat the requirement under Section 192 as synonymous with "deliberate and intentional" conduct, meaning that the defendant must simply have been "confronted with a clear-cut choice between compliance and noncompliance" and chosen the latter. One federal court of appeals has noted that willfulness under Section 192 does not require "evil intent"; rather, "a deliberate and conscious intent to disobey the subpoena is all that is needed."

Other Considerations

On occasion, defendants charged with violations of Section 192 have attempted to argue that their reliance on advice of counsel as to the legality of their default or refusal effectively negates the intent

required for commission of the offense. However, it does not appear that reliance on the advice of counsel itself constitutes a defense in light of the standards described above. In the context of the aforementioned pertinence requirement, the Supreme Court has explained that an "erroneous determination" that a question is not pertinent, "even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry." In *Braden v. United States*, the Court found "no merit" in the defendant's contention that he could not be guilty of the offense if he refused to answer particular questions "in good faith on the advi[c]e of competent counsel." Because, in the Court's view, all that was required was a deliberate and intentional refusal to answer, the defendant's mistaken understanding of the legality of his refusal was no defense. In *Licavoli v. United States*, the D.C. Circuit reached the same conclusion where the defendant entirely failed to appear in response to a subpoena commanding his presence. According to the D.C. Circuit, just as reliance on the advice of counsel was not a defense to a Section 192 charge based on refusing to answer a question, it was likewise not a defense "to a charge of failure to respond," i.e., willful default, as the "elements of intent are the same in both cases." In the D.C. Circuit's view, "[a]dvice of counsel cannot immunize a deliberate, intentional failure to appear pursuant to a lawful subpoena lawfully served."

Various defenses may be raised by a defendant charged with criminal contempt of Congress, however. The Supreme Court has repeatedly held, for example, that the Fifth Amendment privilege against self-incrimination (subject to waiver or a potential grant of immunity) acts as a defense to a prosecution under Section 192. Though never directly addressed by a court, the executive branch has also previously taken the position that criminal contempt of Congress cannot constitutionally be used to punish an executive branch official claiming executive privilege at the direction of the President. According to Bannon's attorneys, former President Trump has instructed Bannon not to provide any documents or testimony "concerning privileged material" and, therefore, his noncompliance is primarily based on a decision to "honor" the former President's "intention to assert" executive privilege.

The Select Committee, however, has noted that it is seeking information from Bannon on a "broad range of subjects that are not covered by executive privilege" and that it "has not received any assertion, formal or otherwise, of any privilege from Mr. Trump." Executive privilege and its application to former Presidents is explored more fully in other CRS products, including here and here.

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