

## **More Legal Experts Find Defects in Issa Contempt Proceedings**

[Joshua Levy](#) is a partner in the firm of Cunningham and Levy and an Adjunct Professor of Law at the Georgetown University Law Center who teaches Congressional Investigations:

**“Contempt cannot be born from a game of gotcha.** Supreme Court precedents that helped put an end to the McCarthy era ruled that Congress cannot initiate contempt proceedings without first giving the witness due process. For example, Congress cannot hold a witness in contempt without directing her to answer the questions being asked, overruling her objections and informing her, in clear terms, that her refusal to answer the questions will result in contempt. None of that occurred here.”

[Julie Rose O’Sullivan](#) is a former federal prosecutor and law clerk to Supreme Court Justice Sandra Day O’Connor, and she is currently a Professor at the Georgetown University Law Center:

**“The Supreme Court has spoken—repeatedly—on point.** Before a witness may be held in contempt under 18 U.S.C. sec. 192, the government bears the burden of showing ‘criminal intent—in this instance, a deliberate, intentional refusal to answer.’ *Quinn v. United States*, 349 U.S. 155, 165 (1955). This intent is lacking where the witness is not faced with an order to comply or face the consequences. Thus, the government must show that the Committee ‘clearly apprised [the witness] that the committee demands his answer notwithstanding his objections’ or ‘there can be no conviction under [sec.] 192 for refusal to answer that question.’ *Id.* at 166. Here, the Committee at no point directed the witness to answer; accordingly, no prosecution will lie. This is a result demanded by common sense as well as the case law. ‘Contempt’ citations are generally reserved for violations of court or congressional orders. One cannot commit contempt without a qualifying ‘order.’”

[Samuel W. Buell](#) is a former federal prosecutor who is currently a Professor of Law at Duke University Law School:

**“[T]he real issue for me is the pointlessness and narrow-mindedness of proceeding in this way.** Contempt sanctions exist for the purpose of overcoming recalcitrance to testify. One would rarely if ever see this kind of procedural Javert-ism from a federal prosecutor and, if one did, one would expect it to be condemned by any federal judge before whom such a motion were made.

In federal court practice, contempt is not sought against grand jury witnesses as a kind of gotcha penalty for invocations of the Fifth Amendment privilege that might turn out to contain some arguable formal flaw. Contempt is used to compel witnesses who have asserted the privilege and then continued to refuse to testify after having been granted immunity. Skirmishing over the form of a privilege invocation is a wasteful sideshow. The only question that matters, and that would genuinely interest a judge, is whether the witness is in fact intending to assert the privilege and in fact has a legitimate basis to do so. The only questions of the witness that therefore need asking are the kind of questions

(and a sufficient number of them) that will make the record clear that the witness is not going to testify. Usually even that process is not necessary and a representation from the witness's counsel will do.

Again, contempt sanctions are on the books to serve a simple and necessary function in the operation of legal engines for finding the truth, and not for anything other purpose. Any fair and level-headed judge is going to approach the problem from that perspective. **Seeking contempt now on this record thus could accomplish nothing but making the Committee look petty and uninterested in getting to the merits of the matter under investigation."**