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Republican Senators May Back Contempt Charge

By Elana Schor
The Hill

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As Democrats tangle with the White House over executive privilege, Senate Republicans must decide whether to block a criminal contempt charge against the administration or allow it and thus bring the constitutional clash before a federal judge.

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Both chambers' judiciary committee chairmen have given the White House a July 9 deadline to explain in detail its executive-privilege claim to withhold subpoenaed documents on the mass firing of U.S. attorneys. If their deadline is not met, Sen. Patrick Leahy (D-Vt.) and Rep. John Conyers Jr. (D-Mich.) likely will pursue a contempt citation - and some Republicans are unlikely to bail out President Bush.

Sen. John Cornyn (Texas), vice chairman of the GOP conference, told The Hill on Friday that he thinks Republican cooperation with a criminal contempt finding will be required.

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"It's just a formal process that sets up a legal challenge," Cornyn said. "We've got to cut out some of the politics and get this to the courts."

One Senate GOP aide, requesting anonymity, agreed that Republicans might approve a contempt finding as a procedural step. Should the White House continue to resist the subpoenas, only one of the two chambers has to approve a criminal citation before the U.S. attorney for the District of Columbia can empanel a grand jury.

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Yet the spectacle of Republicans turning on President Bush by finding his advisers in contempt could rub salt in the wounds of an already riven GOP. Senators who have blasted the U.S. attorneys investigation as a partisan charade would have an especially difficult time staying silent on a resolution of contempt.

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"There isn't a Republican in Congress who's not thinking long and hard about how they can be a loyal member of the party and at the same time be faithful to their oath of office as a member of Congress," said Douglas W. Kmiec, professor of constitutional law at Pepperdine Law School and head of the Office of Legal Counsel under President Reagan.

Complicating the dilemma, several Senate Republicans have suggested letting the judiciary resolve the executive privilege dispute, setting themselves up for a Democratic campaign to support a criminal contempt finding.

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"At the end of the day, this will be settled by the courts," Sen. Bob Corker (R-Tenn.) said.

"I think this is an issue that's going to be handled by the courts," agreed Sen. John Thune (R-S.D.).

"In the end, the courts will decide this anyway," said Sen. Norm Coleman (R-Minn.), who has called for Attorney General Alberto Gonzales's resignation in response to the firings.

"We can't have a Congress that's constantly bringing administration officials in to harass them,"

said Sen. Jim DeMint (R-S.C.). "But it's a matter for the courts."

Sen. Lindsey Graham (R-S.C.) called a contempt vote "the last thing the country needs," but advised lawmakers to "let the courts fight this out."

In fact, two equally difficult options exist for Democrats to enforce the subpoenas without a chamber-wide contempt vote, according to former House general counsel Stan Brand. Senators can either pass a jurisdictional bill to send the dispute to court or ask the sergeant at arms to arrest White House officials named in the subpoenas and use a habeas corpus motion to bring the case before a judge.

Citing the precedent of a 1982 contempt citation, however, Brand noted another problem: "The U.S. attorney won't necessarily bring this matter to a grand jury. So it could be an act of futility."

In 1982, during current White House Counsel Fred Fielding's first stint in the position, the U.S. attorney declined to bring a contempt charge against a Reagan administration official, instead seeking an injunction against the House. But Leahy has predicted that the capital's sitting U.S. attorney would be hard-pressed this year to ignore a criminal finding.

The U.S. attorneys probe, which hinges upon Democratic allegations of improper politicization at the Department of Justice, has played out largely on the committee level up to this point. In addition, the complex legal questions surrounding the subpoenas are prompting many Republican senators to keep their powder dry, criticizing neither Democrats nor the Bush White House.

There is also the issue of timing: If the matter goes to the courts, it is unlikely to be resolved soon, perhaps winding down past the 2008 election.

"It's only theoretical at this point, so I wouldn't opine one way or the other," Sen. Lisa Murkowski (R-Alaska) said. Sen. Mel Martinez (Fla.), who is also chief of the Republican National Committee, called the investigation "all politics," but added, "I'm not sure how I'll deal with this."

Sen. John Warner (R-Va.) similarly declined to discuss his approach to the contempt vote, calling it "too big a leap to take at this time. I'm not ready to jump to conclusions."

Sen. Sam Brownback (R-Kan.) said he is unlikely to support a contempt finding but added that he would need to look more closely at the situation.

Meanwhile, a second subpoena standoff may be in store for the Senate as Leahy awaits a July 18 deadline for documents relating to the National Security Agency's warrantless wiretapping program. But Kmiec, the former Reagan administration counsel, sees a possible Republican endgame: support contempt in the U.S. attorneys inquiry, but defend White House prerogatives on the eavesdropping summonses.

"While it's true that the [attorneys] subpoenas relate to a core executive power ... the executive has not done a good and sufficient job of explain[ing] why the dismissals were undertaken," Kmiec said.

By contrast, said Kmiec, the wiretapping inquiry may run into a stronger case for executive privilege due to the wartime and national-security context. By showing some "reasonableness" on the attorneys issue, Republicans could convince a few Democrats to join them in shunning a contempt finding for the second round of subpoenas, he added.

The White House did not return a request for comment on Fielding's response to next week's deadline. A senior administration official, briefing reporters last Thursday, declined to address the scenario of a contempt citation.



Ilan Wurman contributed to this report.

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