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Congress

Congressional Investigations

Veteran congressional investigations counsel James Hamilton of Morgan Lewis doubts whether the House could enforce a subpoena of former Secretary of State Hillary Clinton's personal e-mail server, as it has suggested it would like to do in probing the 2012 attack on U.S. facilities in Benghazi, Libya.

Enforcement would depend on gaining the approval of a federal court, Hamilton and Morgan Lewis associate Raechel Anglin write. But faced with Clinton's attorneys' assertion that they personally have read every e-mail to ensure that all government-related documents have been produced, it seems unlikely a court in a civil action would find that the House can demonstrate a legitimate legislative purpose, the authors conclude.

Benghazi-Related House Subpoena of Clinton E-Mail Server Would Likely Fail

By James Hamilton and Raechel Anglin

The House Select Committee on Benghazi, led by Rep. Trey Gowdy (R-S.C.), is the current iteration in a series of congressional committees investigating the 2012 attack on U.S. diplomatic compounds in Benghazi, Libya. The House Select Committee's investigation follows on investigations by the Senate Intelligence Committee and House Committees on Armed Services, Foreign Affairs, Intelligence, Judiciary, and Oversight and Government Reform.

Rep. Gowdy has stated that his Benghazi committee lacks authority to subpoena Hillary Clinton's personal e-mail server, but that it is ''an open constitutional question'' whether the U.S. House of Representatives ''as a whole has that legal authority to obtain her private property.'' He also observed (correctly) that ''the power to subpoena is only as good as the power to compel compliance.''

So there are two key, related legal questions: Can the House lawfully subpoena private property? And would a House subpoena demanding Hillary Clinton's private e-mail server be enforced?

In *Watkins v. U.S.*, the Supreme Court said that ''there is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.'' Thus, a congressional investigation into purely private matters lacks a legitimate legislative purpose. In *McSurley v. McClellan*, the U.S. Court of Appeals for the District of Columbia Circuit held that reviewing the details of personal relationships was an exercise that could not ''fall under the mantle of necessary legislative conduct.''

Secretary Clinton has stated that her private e-mails addressed, for example, the details of her daughter's wedding and the funeral arrangements for her mother.

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The need for a legitimate legislative purpose seemingly would apply to protect such private communications from compelled disclosure.

The House, however, might argue that, because e-mails relating to government business might be still found on the server, there would be a legitimate legislative purpose in seeking to obtain the server by subpoena.

"There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."

SUPREME COURT IN *WATKINS V. U.S.*

Ms. Clinton's attorney, the respected David Kendall, recently said that all e-mails have been erased from the server and thus are no longer accessible on it.

Historically, there have been three ways to enforce a congressional subpoena. However, the chances of a House subpoena for Clinton's private server being enforced are slight.

First, if Clinton were to resist compliance, the House of Representatives theoretically could use its inherent authority to order its Sergeant at Arms to arrest and imprison Clinton for contempt. If arrested, Clinton could challenge her imprisonment through a habeas corpus action or a suit for damages against the Sergeant at Arms and likely would rely, at least in part, on the legislative purpose doctrine.

However, Congress's use of its inherent authority dropped off following the enactment of a statutory remedy for contempt of Congress in 1857. In fact, Congress has not exercised its inherent contempt power since 1934. Because Congress hasn't used this power in over 80 years, it is unlikely to do so here. Certainly, everyone should want to avoid the spectacle that would ensue.

Prosecutorial Discretion. *Second*, the House could seek to hold Clinton in criminal contempt, pursuant to 2 U.S.C. Sections 192 and 194. However, after the House voted for contempt, the matter would be sent to a U.S. Attorney for prosecution. Federal prosecutors are part of the Executive Branch of government and answer to the President. The Supreme Court has said that the Executive Branch has absolute discretion over whether to prosecute. It is highly unlikely that the Obama administration would prosecute Clinton for criminal contempt.

Remember that the House cited Attorney General Eric Holder for contempt for failure to produce documents concerning ''Operation Fast and Furious.'' Unsurprisingly, he was not prosecuted.

Third, the House of Representatives could initiate a civil action seeking compliance with the subpoena. In *Committee on Judiciary, US House of Representatives v. Miers*, the District Court for the District of Columbia found that it had jurisdiction over an action to enforce a House subpoena brought against two officials in the second Bush administration. Thus, a House subpoena against present or former government officials might be enforced in proper circumstances by a court. But any such lawsuit would be judged by the fundamental principle governing congressional investigations discussed above: Congress must have a valid legislative purpose to justify its actions.

Attorney Review. Secretary Clinton has said that she has turned over to the State Department all government-related e-mails. In response, Rep. Gowdy has stated that Clinton does not ''get to grade [her] own papers in life,'' and that a third party should review the e-mails on the server to determine whether they are public or private. But Clinton could counter that, not only did her lawyers use reasonable and appropriate search terms to select the e-mails to turn over to State, they personally read every e-mail to ensure that all government-related documents were produced.

Were the Select Committee to seek to enforce a subpoena in a civil action, Clinton's attorneys might offer affidavits attesting to their review process. The court then would consider the credibility of the affidavits in deciding whether to compel further third party review. Clinton also presumably would seek to demonstrate that these e-mails no longer exist on the server, thus making its production irrelevant.

Faced with evidence of this sort, a court in a civil action might well find that the House could not demonstrate a legitimate legislative purpose that would justify requiring Secretary Clinton to produce her personal server.

For all the above reasons, it seems unlikely that a subpoena for the e-mail server would be enforced in any fashion.

The views expressed herein are solely those of the authors and do not reflect the views of the law firm with which they are associated.

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