



## Contempt vote would put Eric Holder, US Attorney in uncharted territory

By Joshua Rhett Miller

The all-but-certain contempt of Congress charge against U.S. Attorney General Eric Holder could put one of his own employees in the awkward position of dragging his boss in front of a grand jury, but experts doubt it will happen.

Holder faces a House vote on the charge today after the GOP-led body determined he stonewalled it on turning over documents relating to the Fast and Furious probe. Typically, such a finding by the legislative branch prompts the local U.S. Attorney to move the case forward as a criminal matter. But it is unclear if that duty is required or left to the discretion of the federal prosecutor, and no attorney general has ever been held in contempt by the full House.

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- Roger Pilon, Cato Institute

That puts U.S. Attorney for the District of Columbia Ronald Machen in uncharted territory, according to Roger Pilon, vice president for legal studies at the Cato Institute, a Washington-based libertarian think tank. Does he have a choice about whether to put Holder before a grand jury, and if he chooses to, can his boss — Eric Holder — overrule him?

"[Machen] is obviously under the Department of Justice, therefore it's a discretionary matter," said Pilon. "And if Holder wants to exercise his discretion, he can do so and face the political wrath."

Under the statute governing contempt of Congress findings, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action," according to "Congress' Contempt Power: A Sketch," a 2008 Congressional Research Service report on the issue. But since prosecutors, who serve in the executive branch, don't take their orders from the legislative branch, "it remains unclear" whether this "duty" of the U.S. Attorney is mandatory or discretionary," the report continues. That jibes with previous findings that also upheld prosecutorial discretion.

New York University Law professor Stephen Gillers said the discretion of federal prosecutors is protected by the separation of powers, and notes Ted Olsen, legal counsel to the Reagan Justice Department, concluded as much in a 1984 paper.

"If the U.S. Attorney believes the assertion of executive privilege is well-taken — meaning he thinks that there is no contempt because Holder had a privilege not to comply with the subpoena — he has no duty to present the matter to the grand jury," Gillers said.

The contempt vote is expected to take place sometime on Thursday afternoon. House Speaker John Boehner is pressing ahead with a floor vote that is almost certain to pass, with the majority Republicans expected to get the backing of some Democrats. At least five Democrats thus far have said they plan to vote to hold Holder in contempt, and sources tell Fox News as many as 11 appear ready to break ranks.

But Congress is not completely out of options. It could move to appoint a special prosecutor or it could seek to enforce its subpoena through an action in civil contempt. That would leave it up to a court to determine whether the invocation of executive privilege was valid.

Louis Fisher, the scholar in residence at the nonprofit Constitution Project, said he doesn't expect Holder to get involved in the process, saying it would appear "too cozy, too contrived" and politically risky.

"Politically and legally, it doesn't look attractive," Fisher told FoxNews.com. "Obviously Holder's been under pressure for more than a year, but I think there will be an argument by the Justice Department that anytime a president authorizes something, that whomever follows the president's orders cannot be prosecuted."

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