

BACKPAGE CONTEMPT BACKGROUND

Q: What's a civil enforcement resolution?

Congress enacted a civil enforcement procedure for the Senate in 1978. The statute gives the U.S. District Court for the District of Columbia jurisdiction over a civil action to enforce compliance with a subpoena or order issued by the Senate or a committee or subcommittee. Unlike criminal contempt, the civil contempt procedure aims to secure compliance with a subpoena by imposing sanctions until the subpoenaed party agrees to comply. Since 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a subpoena for documents or testimony at least 6 times; the Senate last employed civil enforcement in 1995 in connection with the Whitewater investigation.

Q: How did you get to this point?

The Subcommittee launched its bipartisan investigation of Backpage in April 2015. On June 19, 2015, after nearly two months of extensive communication with Backpage's outside counsel regarding the specific topics that the Subcommittee wished to discuss, the Subcommittee conducted an interview with Backpage general counsel Liz McDougall. Following the interview, Backpage refused to submit answers in response to basic follow-up questions from the Subcommittee.

On July 7, 2015, the Subcommittee issued a subpoena to Backpage requesting documents related to Backpage's basic corporate structure, the steps it takes to review advertisements for illegal activity, its interaction with law enforcement, and its data retention policies, among other subjects. On August 6, Backpage informed the Subcommittee by letter that it would not produce *any* documents in response to the subpoena. It contended that the subpoena violated the First Amendment, on the ground that it is a publisher of protected speech (*i.e.*, commercial advertising). After carefully considering Backpage's position, the Chairman and Ranking Member sent a letter to Backpage explaining that the First Amendment cases on which Backpage relied were not applicable.

On October 1, 2015, the Subcommittee withdrew its original subpoena and issued a new, more targeted subpoena focused on its areas of principal interest. This subpoena requested, among other items, documents concerning Backpage's moderation efforts, including information related to editing or modifying ads before publishing. The subpoena also required Backpage CEO Carl Ferrer to produce the documents named in the subpoena or appear personally by October 23, 2015.

On October 23, 2015, Backpage produced 21 pages of publicly available documents and submitted a letter objecting to certain document requests in the subpoena on the grounds that they violated the First Amendment and were not pertinent to a proper legislative investigation. On November 3, on behalf of the Subcommittee, the Chairman and Ranking Member overruled Backpage's objections.

The Subcommittee ordered and directed Backpage to comply with the subpoena by November 12, 2015. Mr. Ferrer's personal appearance was continued until the hearing date of November 19, 2015 at 10:00 a.m. Mr. Ferrer refused to appear at the November 19 hearing.

Q: Why aren't you pursuing criminal contempt?

The second subpoena of October 1, 2015, was specifically directed at Carl Ferrer, CEO of Backpage, which raises the possibility that Ferrer could incur personal responsibility for the company's non-compliance. Under 2 U.S.C. §192, an individual who has failed to testify or produce documents in response to a duly issued subpoena is guilty of a misdemeanor punishable by a fine of up to \$100,000 and imprisonment for up to one year. Criminal contempt proceedings also require full Committee approval, and the resolution voted on by the Senate would authorize the President of the Senate to certify the contempt and refer the matter to the U.S. Attorney for the District of Columbia for criminal prosecution.

For the moment, however, the Subcommittee has decided to reserve the option of criminal contempt and focus on furthering its investigation and compelling documents from Backpage. Civil enforcement is generally a more attractive option for securing compliance with a subpoena because of its accelerated court procedure and sanctions that lift when a party complies. Because sanctions under criminal contempt apply regardless of whether a party later complies with a subpoena, this procedure is punitive in nature and generally would not provide an incentive for a witness to cooperate with the Subcommittee.

Q: What happens next?

Under the statute Congress enacted in 1978, once the civil enforcement resolution passes on the Senate floor, Senate Legal Counsel can bring a suit in the U.S. District Court for the District of Columbia to "ask a court to directly order compliance with [a] subpoena or order."

In considering a contempt suit, a court will consider whether the investigation at issue falls within the Subcommittee's jurisdiction and scope of authority, serves a legislative purpose, and poses requests that are "pertinent to the question under inquiry." In considering this last factor, the court will look to whether the Subcommittee specifically ruled on pertinence objections from Backpage, overruled the objections, and informed Backpage of this fact before directing the company to comply. The Subcommittee complied with this requirement in its letter to Backpage of November 3, 2015.