California State Senate versus Enron Corp.:
An Analysis of Legal Issues Involving
The Power of Legislative Contempt

by

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August 30, 2001

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Chapter 1.
Executive Summary

A dispute has arisen between the California Senate and a major energy producer over the legality of subpoenas issued by a Senate committee and the appropriateness of a finding of contempt for non-compliance with such subpoenas. Because of the importance of the issues, the Capital Center for Government Law and Policy has undertaken an analysis of the major legal issues presented by this dispute.

The Capital Center, housed at the University of the Pacific McGeorge School of Law in Sacramento, sponsors symposiums, speakers and seminars on critical topics confronting the State. The Capital Center also publishes independent, non-partisan analyses of significant public policy issues pending before the California Legislature. As a matter of policy, the Capital Center neither supports nor opposes specific legislation. The views expressed in this publication are solely the views of the authors and do not represent the opinion of the University of the Pacific McGeorge School of Law.

As part of its hearings into the causes and possible solutions of the energy crisis in California, the Senate Select Committee to Investigate Price Manipulation of the Wholesale Energy Market (the “Select Committee”) has issued subpoenas to several energy producers to compel the production of documents and information pertaining to bidding data and strategies, energy capacity and availability, information access and exchange, coordinated, antitrust and/or collusive conduct, the exercise of market power through economic and physical withholding and marketing and trading practices.

One of the recipients of a subpoena, Enron Corp. ("Enron"), has refused to produce the requested documents. In response to Enron’s continuing refusal to produce the requested documents, the Select Committee has recommended to the full Senate that Enron be found in contempt and that the Senate impose a coercive fine on Enron in the amount of $1,000 on the first day following the Senate order, with a progressive fine that doubles for each subsequent day of non-compliance. The purpose of the fine is to coerce Enron’s compliance with the subpoena.

Enron has objected to the subpoena on a variety of grounds and has filed an action in the Superior Court for the County of Sacramento (Case No. 01AS04141) seeking to quash the subpoena. In its action, Enron challenges the validity and enforceability of the subpoena and the recommendation for a finding of contempt. Enron’s challenges fall roughly into three categories: first, alleged technical and procedural violations; second, substantive arguments about the scope of the Legislature’s authority; and third, the appropriateness of the recommended coercive punishment for the contempt violation.

Based on a review of Enron’s complaint filed in the Superior Court, the letter from the Select Committee to the full Senate recommending a finding of contempt, and the applicable legal authorities, we conclude that Enron’s technical and procedural arguments, and its contention that the subpoena is outside of the scope of the Legislature’s authority, are unlikely to prevail. In short, the court is likely to defer to the
Select Committee’s and Legislature’s exercise of their broad authority to conduct legislative inquiries into a matter of great public importance.

With respect to the contempt sanction, we recommend that the full Senate consider modifying the suggestion of the Select Committee in order to avoid the possibility of imposing upon Enron an unlawful fine of “unreasonable proportions.” The progressive sanction suggested by the Select Committee (where the fine doubles each day of non-compliance) would result in a fine of over $1 billion after only 20 more days of non-compliance (with additional doubling of the fine for each additional day).

As a general matter, a coercive contempt sanction should reflect the amount reasonably necessary to secure compliance. In determining what amount is necessary to secure compliance, it is appropriate to consider, among other things, the amount of the defendant’s financial resources and the seriousness of this offense to the California legislature’s authority. We recommend that, if the Senate votes to impose a contempt sanction upon Enron, the sanction be in the amount of $1,000 for the first day of non-compliance, with the fine doubling each subsequent day for the first 13 days of non-compliance and the fine increasing $5 million per day for each subsequent day of non-compliance after the 13th day. Capping the per diem fine at $5 million per day will ensure that the coercive sanction does not reach “unreasonable proportions” while still creating a very significant incentive for Enron to comply with the subpoena.
Chapter 2.
Analysis of Select Issues

The following observations and conclusions are based on a review of the Report of the Senate Select Committee to Investigate Price Manipulation of the Wholesale Energy Market (the “Select Committee”) and the First Amended Complaint of Enron Corp. (“Enron”) filed in Case No. 01AS04141 in Sacramento County, Superior Court of the State of California (the “Complaint”). Although the full record in this matter encompasses several thousand pages of material, the Report of the Select Committee and the Complaint crystallize the legal issues that have been raised by Enron in opposition to the subpoena and to the possibility of a contempt finding by the California Senate.

On June 11, 2001, the Select Committee issued to Enron a subpoena seeking documents and information pertaining to bidding data and strategies, energy capacity and availability, information access and exchange, coordinated, antitrust and/or collusive conduct, the exercise of market power through economic and physical withholding and marketing and trading practices. The subpoena was issued pursuant to the Select Committee’s inquiry into legislative solutions for spiraling prices in the wholesale electricity market in California—the thus-termed “energy crisis.”

Enron has objected to the disclosure of the requested documents, and the Select Committee found Enron in contempt on June 28, 2001. After providing Enron with an opportunity to purge that finding of contempt by then complying with the terms of the subpoena, the Select Committee again found Enron in contempt on July 11, 2001. On July 21, 2001, Senator Joseph L. Dunn, Chair of the Select Committee, authored a letter on behalf of the Select Committee, to members of the California State Senate. That letter contains a recommendation that the full Senate find Enron in contempt and impose a coercive fine therefor in the amount of $1,000 on the first day following the Senate order, with a progressive fine that doubles for each subsequent day of non-compliance.

By filing its Complaint in the Superior Court for the County of Sacramento, Enron has challenged the validity and enforceability of the legislative subpoena issued by the Select Committee and the recommendation for a finding of contempt. Enron’s challenges fall roughly into three categories: first, alleged technical and procedural violations; second, substantive arguments about the scope of the legislature’s authority; and third, the appropriateness of the recommended coercive punishment for the contempt violation.
A. Analysis of Alleged Technical and Procedural Violations

Enron asserts that certain technical or procedural violations by the Select Committee invalidated the legislative subpoena. The three main arguments are as follows: (1) That the subpoena calls for documents that are located outside the State of California; (2) That the declaration accompanying the subpoena was “wholly conclusory” and was not served properly; and (3) That Enron has received no written response to its objections. In our opinion, these arguments are not likely to succeed.

Enron’s argument that the subpoena calls for documents that, Enron alleges, are located outside the State of California is unlikely to be sufficient grounds to quash. The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person or corporation ordered to produce them.\(^1\) Accordingly, because Enron is subject to jurisdiction within the State of California, the test is simply whether Enron controls the documents at issue; the location of those documents is irrelevant to the validity of the subpoena. Indeed, under similar circumstances, courts have held that it would “torture the meaning of [document subpoenas] to hold that it requires the plaintiffs to serve upon the [defendant] in every federal judicial district where the requested documents might be located a separate subpoena duces tecum for their production.”\(^2\) Here, various branches of Enron Corp. would have to be subpoenaed successively (and, presumably, with recourse to various state courts) until the Select Committee discerned which branch controlled the subpoenaed documents. This would be especially absurd since the various local custodians may lack knowledge of, or be unable to produce on their own authority, the subpoenaed documents that are located outside the forum district.\(^3\) Further, documents could be moved from one branch to another in an attempt to avoid jurisdiction.

Enron’s argument that the declaration accompanying the subpoena was “wholly conclusory” and was served on Enron’s registered agent rather than an Enron custodian of records also is unlikely to be sufficient grounds to quash. The subpoena surely meets the four requirements for a legislative subpoena set forth in the Code.\(^4\) And Enron’s reliance on technical provisions of the Code of Civil Procedure may be tenuous, since those provisions expressly pertain to the issuance of judicial (not legislative) subpoenas.\(^5\) Moreover, it is important to note that the California legislature has both an inherent and a statutory power to issue an order of contempt. The power of inquiry—with process to enforce it—has long been considered an essential and appropriate auxiliary to the

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\(^1\) See 5A Moore’s Federal Practice ¶ 45.05[2] at 45-29.


\(^4\) See Cal. Gov’t Code § 9402 (“A subpena [sic] is sufficient if it: (a) States whether the proceeding is before the Senate, Assembly, or a committee; (b) Is addressed to the witness; (c) Requires the attendance of the witness at a time and place certain; and (d) Is signed by the President of the Senate, Speaker of the Assembly, or chairman of the committee before whom attendance of the witness is desired.”)

\(^5\) Although the legislature may routinely follow the procedures required of judicial subpoenas in the Code of Civil Procedure when issuing legislative subpoenas, many of the procedures outlined for the former are inapplicable—even nonsensical—in the context of legislative subpoenas.
legislative function.\textsuperscript{6} The state’s Government Code reinforces that authority with a statutory schema that contemplates the issuance of subpoenas in furtherance of legislative inquiries and also contempt citations for failure to comply.\textsuperscript{7} But even if there are “technical” violations of the statutory scheme, these may be irrelevant if the subpoenas (and the contempt citation) nevertheless are consistent with the \textit{implied} authority of the legislature.

And finally, Enron’s argument that, it alleges, it has received no written response to its objections is unlikely to be sufficient grounds to quash the subpoena. To be sure, Enron is entitled to notice and the right to be heard prior to a finding of contempt.\textsuperscript{8} However, even if one assumes that such a finding has been made here,\textsuperscript{9} the filing of the objections for which Enron seeks a written response suggests that the company has, in fact, been accorded due process.\textsuperscript{10}

\textbf{B. Analysis of Scope of Legislative Authority}

Enron contends that the California legislature is without the authority to obtain the documents sought in the legislative subpoena because the subpoena was not issued pursuant to a valid legislative purpose. We conclude that this argument is not likely to succeed.

A legislature may exercise its contempt power only within the scope of its constitutional power; and if a legislature engages in a proceeding in a matter beyond its legitimate cognizance, courts may intervene.\textsuperscript{11} However, courts are loath to do so.\textsuperscript{12} In fact, in California, courts

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begin with the proposition that a court’s authority to second-guess the legislative determinations of a legislative body is extremely limited. It is a well-settled
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\textsuperscript{7} See Cal. Gov’t Code § 9405.


\textsuperscript{9} Although Enron was repeatedly found “in contempt” by the Select Committee, Enron has had the opportunity to purge the contempt finding through compliance, but has neglected to do so. Presently before the full Senate is a \textit{Recommendation} of the Select Committee to find Enron in contempt for its failure to comply with the legislative subpoena served upon it on June 11, 2001, and a \textit{recommended} progressive fine. Accordingly, it may be premature to speak here of a meaningful \textit{finding} of contempt.

\textsuperscript{10} Due process protections in the context of contempt proceedings are intended to further two principles: (1) to give the contemnor the opportunity to establish mistaken identity, mental incompetency as a defense, or other matters mitigation; and (2) when immediate action is taken, the contemnor is present, no question of identity arises, and he has an opportunity to speak, in the nature of the right of allocution of a criminal defendant. \textit{Groppi v. Leslie}, 404 U.S. 496, 92 S. Ct. 582, 587 (1972). Both of these principles were fulfilled by the opportunity to appear and to file objections; moreover, neither of these principles would be furthered by requiring the Select Committee to provide Enron, at this stage, with a statement in response to Enron’s objections.


\textsuperscript{12} \textit{See}, \textit{e.g.}, \textit{Jurney v. MacCracken}, 294 U.S. 125 (1935) (limited scope of judicial review); \textit{Marshall v. Gordon}, 243 U.S. 521 545 (1917) (same).
principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers. It also is hornbook law that courts are not authorized to second-guess the motives of a legislative body and that, if reasonable, legislation will not be disturbed.\textsuperscript{13}

The various purposes of the legislative investigation set forth by the Select Committee are facially legitimate—\textit{e.g.}, “to determine whether new legislation or statutory revision is needed or whether other appropriate legislative action is called for so that California can emerge from the energy crisis and prevent any future energy crises.”\textsuperscript{14} The subject matter of the investigation, a public “crisis” by any measure, is obviously an area over which the state legislature has at least some authority—indeed, some responsibility—both to legislate and to regulate.\textsuperscript{15}

It is, of course, possible that the documents that are the subject of the subpoena may also be relevant to pending lawsuits and other governmental investigations. Case law makes clear, however, that such relevance (to other proceedings) does not render the issuance of this subpoena invalid. In fact, a unanimous opinion of the California Supreme Court held that the issuer of the subpoena may \textit{itself} “put some of the information it seeks to a second use, namely in future litigation” against the disclosing party.\textsuperscript{16} Enron attempts to discredit the Select Committee’s stated legislative purposes and to divine instead the “true” and sole purpose. However, “it is well-established that courts generally do not engage in such second-guessing of legislative motive.”\textsuperscript{17}

C. Analysis of Contempt Sanction

The Select Committee recommends that Enron be sanctioned for its contempt with a fine in the amount of $1,000 for the first day with a progressive fine for each subsequent day in an amount double that of the preceding day. We conclude that the sanction should be modified to include a cap in the amount of $5,000,000 per day beginning on the 14\textsuperscript{th} day after the Senate approves the contempt sanction and for every subsequent day of noncompliance.

Judicial review of coercive fines imposed as remedial punishments for legislative contempt is very narrow. The nature of the punishment required as remedial action is within the discretion of the legislature and will not be altered by a court unless there is “an absolute disregard of discretion and a mere exertion of arbitrary power.”\textsuperscript{18} The Select Committee has recommended that the Senate impose a fine of “$1,000 on the first day of

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\item \textsuperscript{13} Conn. Indem. Co., 23 Cal.4\textsuperscript{th} at 813-14 (quoting Western States Petroleum Assn. v. Superior Court, 9 Cal.4\textsuperscript{th} 559, 572, 38 Cal. Rptr. 2d 139 (1995) and Lockard v. City of Los Angeles, 33 Cal.2d 453, 462, 202 P.2d 38 (1949) (quotation marks omitted)).
\item \textsuperscript{14} Report of the Select Committee at 3.
\item \textsuperscript{15} For this reason, too, Enron’s argument that the Federal Energy Regulatory Commission has exclusive jurisdiction “to regulate, administer and adjudicate any issues concerning the wholesale electricity market, including the wholesale prices” is an overstatement.
\item \textsuperscript{16} See Conn. Indem. Co., 23 Cal.4\textsuperscript{th} at 815.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Marshall v. Gordon, 243 U.S. 521, 545 (1917).
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following the Senate order, with a progressive fine for each subsequent day in an amount double that of the day preceding.” [19] Enron complains that the Senate “seeks to impose unconstitutional fines on Plaintiff of billions of dollars,” [20] but this presupposes, of course, that Enron will continue to defy the subpoena until the Senate finds Enron in contempt and imposes the fine—and thereafter for an additional three weeks. [21] With regard to that punishment, then, Enron “carries the keys of his prison in his own pocket.” [22] 

The fact that a coercive monetary sanction requires payment of a large daily fine does not necessarily render that sanction an abuse of discretion. Indeed, the Supreme Court itself selected as an appropriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days. [23] Nor is a coercive civil contempt fine subject to the Excessive Fines Clause of the United States Constitution. [24] The Due Process Clause may provide some limitation, but one can easily argue that a person has not been "deprived" of property within the meaning of the Fifth Amendment when that person always has the option of complying with the order of the court and thereby terminating the obligation to pay the coercive fine. [25] It may be that fines levied upon an individual who lacked access to any funds would be considered punitive because they could not coerce, [26] but Enron surely does not fit that description. [27] 

The Supreme Court has held that the punishment for criminal contempt should be the “least possible power adequate to the end proposed.” [28] Here, the end proposed is the production of certain documents. And from a range of possible penalties that would include the imposition of fines upon and/or the imprisonment of certain officers of Enron, [29] the Select Committee recommended that the corporation be fined on a per diem

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[20] Complaint ¶ 140.
[21] The cumulative fine after 20 days would be $1,048,575,000; the cumulative fine after 21 days would be $2,048,575,000.
[28] Spallone v. United States, 493, U.S. 265, 272 (1990) (quoting Anderson v. Dunn, 6 Wheat. 204, 231 (1821)). This standard for criminal contempt violations may be inapplicable in cases for coercive civil contempt, but there nevertheless remains some limit on the “wide discretion” of courts and legislatures to fashion appropriate remedies to secure compliance with its lawful orders.
[29] See, e.g., U.S. v. Patterson, 219 F.2d 659, 660 (2nd Cir. 1955) (no individual may refuse to surrender existing corporate documents within their control); Wilson, 221 U.S. at 376, 384-86 (extending request of production to a corporate officer against whom indictments were pending); U.S. v. Voss, 82 F.3d 1521, 1526 (2nd Cir.) (unequivocal direction by a subpoena to produce an organization’s records requires persons
basis for each day that the company is in violation of the subpoena. The nature of the penalty seems very reasonable. The doubling feature, however, means that the fine might, at some point, reach truly “unreasonable proportions.” In *United States v. City of Yonkers*, the U.S. Court of Appeals reviewed a progressive fine imposed against a city council for failing to enact a public housing ordinance that it was obliged to do pursuant to an earlier consent decree. The fine started at $100 and doubled each day thereafter. Upon review, the Court of Appeals, relying on its general supervisory authority, imposed a cap of $1 million per day.

In order to avoid a fine of “unreasonable proportions,” we recommend that the progressive fine imposed by the Senate be subject to a maximum *per diem* amount. The amount securing future compliance should be based on the amount of defendant’s financial resources and the seriousness of this offense to the California legislature’s authority. The present schedule calls for a fine of more than $4 million on day 13. The contempt sanction should be modified to provide that the fine shall be $5 million per day on day 14 and for every subsequent day of noncompliance.

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31 *Id.* at 460.
32 *Id.*