



**Written Statement**

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**"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"**

**Committee on Science, Space & Technology**

**U.S. House of Representatives**

**September 14, 2016**

Chairman Smith, Ranking Member Johnson, and members of the Committee, thank you for the opportunity to discuss congressional subpoena authority and the means by which it may be enforced. I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice in the areas of constitutional law, appellate law, and food and drug law.

In July 2016, the Committee issued subpoenas to New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey and nine environmental organizations. The subpoenas requested documents and communications aimed at determining whether investigatory actions initiated by the New York and Massachusetts AGs offices are part of a coordinated attempt to deprive companies, non-profit organizations and scientists of their First Amendment rights, and whether or how such investigatory actions may adversely impact federally-funded scientific research. The recipients of the Committee's subpoenas have refused to comply, citing several bases for their non-compliance, including objections based on federalism concerns, the Committee's jurisdiction, and the First Amendment.

This hearing of the Committee is designed to explore both the nature and extent of the Committee's subpoena authority, and its legal recourse for the failure to comply with its lawfully issued subpoenas. Accordingly, I will proceed to discuss these two issues.

## **I. The Nature and Extent of Congressional Subpoena Authority**

While the Constitution does not expressly mention a "power of inquiry" of Congress, the courts have long accepted that such power—with the concomitant power of enforcement via contempt—is a necessary part of Congress's exclusive power to legislate.<sup>1</sup> Without such a power, Congress could not "wisely or effectively" evaluate "the conditions which legislation is intended to affect or change" and "some means of compulsion are essential to obtain what is needed" to conduct such legislative investigation.<sup>2</sup>

The Supreme Court has repeatedly stated that Congress's investigatory power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."<sup>3</sup> Because the power to investigate is a necessary derivative of the power of making laws, it "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social economic or political system for the purpose of enabling the Congress to remedy them."<sup>4</sup> If a matter is within the legitimate sphere of legislative activity—i.e., if "legislation could be had"<sup>5</sup> on the subject matter of the investigation—the inquiry is constitutionally valid as an exercise of Congress's legislative power under Article I, section one. Investigations into how federal taxpayer dollars are being spent, administered, affected, and similar matters relating to congressional appropriations, are certainly within the legitimate scope of congressional inquiry.<sup>6</sup>

It should also be noted at the outset that the Supreme Court, in *Eastland v. United States Servicemen's Fund* (1975),<sup>7</sup> held that the Speech and Debate Clause of Article I, section six<sup>8</sup> absolutely immunizes Members of Congress and their staffs from any civil lawsuits seeking injunctive or declaratory relief to ward off the imposition of a congressional contempt citation. In *Eastland*, the plaintiffs were a servicemen's organization and two members who initiated a civil lawsuit against the chair and various members of a Senate subcommittee and the subcommittee's chief counsel, seeking declaratory and injunctive relief to prevent the organization's bank from having to comply with a subpoena to produce the organization's banking records.

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<sup>1</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *accord* *Watkins v. United States*, 354 U.S. 178, 187 (1957) (power to investigate is "inherent in the legislative process"); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (power to investigate and do so through compulsory process is inherent in the power to make laws).

<sup>2</sup> *McGrain*, 273 U.S. at 175.

<sup>3</sup> *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).

<sup>4</sup> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>5</sup> *McGrain*, 273 U.S. at 177; *accord* *Eastland*, 421 U.S. at 506.

<sup>6</sup> *Id.* (matters relating to how the Department of Justice "is maintained and its [how] its activities are carried on under such appropriations" is within the congressional power of inquiry).

<sup>7</sup> 421 U.S. 491 (1975).

<sup>8</sup> The Speech and Debate Clause declares that Senators and Representatives "for any speech or debate in either House, they shall not be questioned in any other place." U.S. CONST. art. I, § 6.

The *Eastland* Court concluded that the sweeping language of the Speech and Debate Clause imposed an absolute bar to the exercise of judicial jurisdiction over action challenging action taken "within the sphere of legitimate legislative activity."<sup>9</sup> The Court then inquired as to whether the Senate subcommittee's investigation into the servicemen's organization bank account was part of a legitimate legislative investigation. The Court observed that the Senate resolution had authorized it to broadly investigate the "administration, operation, and enforcement of the Internal Security Act" and that the investigation into the sources of the organization's funding was relevant to its investigation into activities that "have a potential for undermining the morale of the Armed Forces."<sup>10</sup> That the activities of the organization had not violated any existing laws as "not relevant" because the "inquiry was intended to inform Congress in an area where legislation may be had."<sup>11</sup> The Speech and Debate Clause thus insulated the Members and its "alter ego" staff from the civil lawsuit.<sup>12</sup>

The *Eastland* Court also rejected a First Amendment objection to the subcommittee's investigation, concluding that the absolute immunity provided by the Speech and Debate Clause was not amenable to a First Amendment exception.

The Speech and Debate Clause will not, however, prevent challenges to congressional subpoenas initiated in the context of petitions for a writ of habeas corpus to challenge an exercise of inherent contempt power, or in the context of criminal or civil contempt proceedings initiated by the U.S. Department of Justice (in the case of a criminal contempt prosecution) or specific congressional committee/subcommittee (in the case of a civil contempt proceeding).

The jurisdiction of the House Committee on Science, Space and Technology is defined by House Rule X as follows:

(p) Committee on Science, Space, and Technology.

- (1) All energy research, development, projects therefor, and all federally owned or operated nonmilitary energy laboratories.
- (2) Astronautical research and development, including resources, personnel, equipment, and facilities.
- (3) Civil aviation research and development.
- (4) Environmental research and development.
- (5) Marine research.
- (6) Commercial application of energy technology.
- (7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.
- (8) National Aeronautics and Space Administration.
- (9) National Space Council.
- (10) National Science Foundation.

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<sup>9</sup> *Id.* at 503.

<sup>10</sup> *Id.* at 506.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 507.

- (11) National Weather Service.
- (12) Outer space, including exploration and control thereof.
- (13) Science scholarships.
- (14) Scientific research, development, and demonstration, and projects therefor.<sup>13</sup>

Rule X further provides that the Committee "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."<sup>14</sup> Under Rule 5(a)(1) of the Science Committee, the Committee may issue subpoenas *duces tecum* or *ad testificandum* "when authorized by majority vote of the Committee or Subcommittee (as the case may be), a majority of the Committee or Subcommittee being present."

The Committee has stated that its legislative purpose behind the subpoenas issued to State AGs and environmental groups is "ensuring that scientists are free to pursue research and intellectual inquiry in accordance with scientific principles without fear of reprisal, harassment, or undue burden" so that "the American scientific enterprise [can] remain successful" and also "for federal funding of scientific research to be most effective."<sup>15</sup>

Congress has broad remedial authority under section five of the Fourteenth Amendment<sup>16</sup> to enact legislation designed to enforce the guarantees of the Amendment's provisions, including the Due Process Clause. Pursuant to its power under section five, Congress enacted a well-known statute, codified at 42 U.S.C. § 1983, that provides a private right of action for anyone whose federal constitutional rights—including First Amendment rights—have been deprived under color of state law.<sup>17</sup> Section 1983 actions are a concrete statutory manifestation of Congress's broad power to authorize investigations of, and concomitant interference with, all state officers' actions, including the actions of State AGs, that may violate federal constitutional rights.

The Committee has articulated that its investigation is aimed at State AGs possible violations of the First Amendment rights of corporations, scientists and other groups who have been targeted with state subpoenas based upon their views on the issue of climate change. The Committee has broad authority to investigate matters relating to scientific research, and legislation may be had, under section five of the Fourteenth Amendment, the appropriations process, or otherwise, that could deter or otherwise remedy any First Amendment abuses committed by the State AGs.

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<sup>13</sup> Rule X, Rules of the House of Representatives, 114<sup>th</sup> Cong. (Jan. 6, 2015).

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.*, Letter from Lamar Smith, Chair, House Comm. on Science, Space & Tech. to Eric Schneiderman, Atty. Gen., State of New York, p. 2 (Aug. 23, 2016).

<sup>16</sup> Section 5 declares, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

<sup>17</sup> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

With these basic principles in mind, I will proceed to discuss the three distinct means of enforcing congressional investigatory subpoenas: (1) Congress's inherent contempt power; (2) the criminal contempt statutes; and (3) civil contempt proceedings.

### *A. Inherent Contempt Power*

Because a criminal contempt statute was not enacted until 1857, the early history of Congress's invocation and use of contempt power relied solely upon its "inherent" power of contempt. The first assertion of congressional contempt authority occurred in 1795, just seven years after ratification of the Constitution. On December 28, 1795, the House of Representatives passed a resolution ordering the arrest and detention of two men, Robert Randall and Charles Whitney, pending further House consideration of charges that the two men had attempted to bribe several members of the House.<sup>18</sup> The following day, the Sergeant-at-Arms arrested the two men and detained them pending further action by the House.<sup>19</sup> The House then authorized and appointed a special committee to "report a mode of proceeding," which recommended that the men be brought before the bar of the House to be interrogated via written interrogatories proposed by Members of the House.<sup>20</sup> Following such procedure, on January 5, 1796, the House voted 78-17 to adopt a resolution that Mr. Randall be found guilty of contempt, reprimanded by the Speaker, and held in custody by the Sergeant-at-Arms until further House determination.<sup>21</sup> On January 12, 1796, Randall petitioned the House for release from custody; the House granted his petition on January 13—after eight days of detention.<sup>22</sup>

Similar exercises of inherent contempt power occurred in the Senate's detention (of several weeks' duration) in 1800 of newspaper editor William Duane for his failure to appear as ordered by the Senate investigating an allegedly libelous article,<sup>23</sup> and the House's 1812 resolution holding Nathaniel Rounsavell in contempt for failure to answer a committee's questions.<sup>24</sup> Following the passage of the House contempt resolution, Mr. Rounsavell provided the information sought by the chamber and he was accordingly not detained.<sup>25</sup>

#### *1. Anderson v. Dunn (1921)*

The Supreme Court has issued opinions in five main cases explicating the metes and bounds of Congress's inherent contempt power. The first case, *Anderson v. Dunn* (1921), involved the attempted bribe of a member of the House by John Anderson.<sup>26</sup> The House adopted a resolution ordering the Sergeant-at-Arms to arrest Mr. Anderson to appear before the bar of the House and show cause why he should not be held in contempt for the alleged attempted bribery. Mr. Anderson was accordingly arrested, appeared before the House with the benefit of counsel, and

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<sup>18</sup> 2 ASHER C. HINDS, 2 PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1599 (1907).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at § 1600.

<sup>21</sup> *Id.* at §§ 1601-03.

<sup>22</sup> *Id.* at § 1603.

<sup>23</sup> *Id.* at § 1604.

<sup>24</sup> CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1957 192 (1959)

<sup>25</sup> *Id.*

<sup>26</sup> 19 U.S. 204 (1821).

was consequently reprimanded by the Speaker and detained. Anderson then filed a lawsuit alleging various tort theories such as assault, battery and false imprisonment against the Sergeant-at-Arms, Mr. Thomas Dunn.<sup>27</sup> Anderson argued that Congress possessed no inherent contempt power, because such power belongs exclusively to the judicial, not legislative, branch.<sup>28</sup> The Supreme Court rejected this argument, concluding that Congress possesses a power to punish contempt that is necessarily implied as part of its power to legislate, lest its powers be destroyed by refusals to cooperate:

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them . . . . that such an assembly should not possess the power to suppress rudeness, or rebel insult, is a supposition too wild to be suggested.<sup>29</sup>

The *Anderson* Court then concluded that the "principle of self-preservation"<sup>30</sup> justified the recognition of an inherent contempt power. The *Anderson* Court further recognized that the inherent contempt power was not boundless, but was limited to preserving/defending the legitimate power of the legislative body, and suggested that any resulting imprisonment of the contemnor "must terminate with [Congress's] adjournment."<sup>31</sup> Such limitations, said the Court, helped reduce the risk that the inherent contempt power would be abused by "strong passions or wicked leaders."<sup>32</sup>

The Court also noted that, in exercising its inherent contempt power, "the distance to which the process might reach" was not confined to the District of Columbia, but instead knew "no bounds that can be prescribed to its range but those of the United States," since the legislative powers of Congress extend nationwide, and the inhabitants in Louisiana or Maine are as likely to engage in contemptuous behavior as residents of the District of Columbia.<sup>33</sup>

## 2. *Kilbourn v. Thompson* (1880)

The second Supreme Court case addressing inherent contempt power is *Kilbourn v. Thompson* (1880), a case involving the investigation by a House select committee into the collapse of a real estate pool, Jay Cooke & Company, which had gone into bankruptcy, leaving various creditors—including the United States—to suffer significant losses.<sup>34</sup> Kilbourn was summoned to appear before the committee to testify and bring certain documents with him. Kilbourn appeared but during his examination by the committee, he was asked: "Will you state where each of the five

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<sup>27</sup> *Id.* at 213.

<sup>28</sup> *Id.* at 214.

<sup>29</sup> *Id.* at 228-29.

<sup>30</sup> *Id.* at 230.

<sup>31</sup> *Id.* at 234.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 103 U.S. 168 (1880).

members [of the real estate pool] reside, and will you please state their names?" Kilbourn refused to answer or produce the requested documents.

Following his refusal, the House adopted a resolution ordering the Sergeant-at-Arms to take him into custody to appear before the House and show cause as to why he should not be punished for contempt. Kilbourn was accordingly brought to appear before the House, examined through questions posed by the Speaker, and continued to refuse to answer the question or produce any of the requested documents. The House then passed another resolution adjudging Kilbourn in contempt and committing him to indefinite detention in the common jail of the District of Columbia until such time as he complied with the chamber's request.

Kilbourn filed a petition for a writ of habeas corpus in the D.C. court, contending that Congress possessed no inherent contempt power. He also argued that even if Congress initially possessed an inherent contempt power, the enactment of a criminal contempt statute in 1857<sup>35</sup> supplanted the inherent power, rendering it moribund.

The Supreme Court disagreed that the inherent contempt power no longer existed, but agreed with Mr. Kilbourn that exercising such power was improper in his particular case. Specifically, the *Kilbourn* Court concluded that the House's investigation into the bankruptcy of the real estate pool was "judicial, not legislative"<sup>36</sup> in nature because while the U.S. was one of several jilted creditors of the pool, the only appropriate remedy for creditors was via an ongoing bankruptcy proceeding pending in the Eastern District of Pennsylvania.<sup>37</sup> Because the "matter was still pending in a court" the Supreme Court believed that Congress had no right "to interfere with a suit pending in a court of competent jurisdiction" and could offer no redress beyond that available in the court.<sup>38</sup> The case was accordingly "one of a judicial nature, for which the power of the courts usually afford the only remedy," and there was "no suggestion . . . of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States."<sup>39</sup> The House investigation was accordingly a "fruitless investigation into the personal affairs" of individual members of the pool because "it could result in no valid legislation on the subject to which the inquiry referred."<sup>40</sup>

From *Kilbourn*, therefore, it is clear that an inquiry of Congress that "could result in no valid legislation" is beyond the reach of congressional power. To be valid, a congressional subpoena must inquire into matters within the legislative competence of Congress and be capable of resulting in legislation (though no actual legislation must actually ensue).

### 3. *Marshall v. Gordon (1917)*

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<sup>35</sup> The criminal contempt statute is now located at 2 U.S.C. §§ 192, 194. These statutes will be discussed in detail in the section discussing criminal contempt.

<sup>36</sup> *Kilbourn*, 103 U.S. at 193.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 194-95.

<sup>40</sup> *Id.* at 195.

In the third case involving inherent contempt power, *Marshall v. Gordon* (1917), the Supreme Court once again ruled in favor of the contemnor.<sup>41</sup> Specifically, in *Marshall*, the defendant, Snowden Marshall, was the U.S. Attorney for the Southern District of New York. The Sergeant-at-Arms, Robert Gordon, arrested Mr. Marshall after the House concluded that Mr. Marshall was guilty of contempt by writing a letter to a subcommittee chair that insulted the honor and dignity of the House.<sup>42</sup>

The *Marshall* Court concluded that because inherent contempt power was necessary to Congress's "right of self-preservation, that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed,"<sup>43</sup> Marshall's writing of an "irritating" letter to a subcommittee chair could not be the proper object of the inherent contempt power.<sup>44</sup> While the accusatory and uncomplimentary letter may have produced untoward effects on the public mind or caused a sense of indignation by Members of the House, such effects were "not intrinsic to the right of the House to preserve the means of discharging its legislative duties but [were] extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have in the public mind and the indignation naturally felt by members of the committee on the subject."<sup>45</sup> As such, using inherent power to punish him for contempt, based upon such a letter, was not appropriate; the letter did not impair or impede Congress's legislative function.

#### 4. *McGrain v. Daugherty* (1927)

The fourth inherent contempt case, *McGrain v. Daugherty* (1927)<sup>46</sup>, upheld contempt against a former U.S. Attorney General, Harry Daugherty, who had resigned in 1924 amid charges of misfeasance and nonfeasance in the Department of Justice.<sup>47</sup> The Senate created a select committee to investigate possible corruption at the DOJ, centering on the Department's failure to prosecute monopolies and restraints of trade under the Sherman and Clayton Acts.<sup>48</sup> The select committee subpoenaed the AG's brother, Mally Daugherty, who was the President of an Ohio bank, seeking both his testimony and documents relating to bank deposit; he refused to appear or turn over such documents.<sup>49</sup>

The Senate consequently passed a resolution directing the Sergeant-at-Arms to arrest Daugherty and bring him before the bar of the Senate to show cause why he should not be held in contempt.<sup>50</sup> The deputy Sergeant-at-Arms arrested Daugherty in Cincinnati and Daugherty promptly filed a petition for a writ of habeas corpus in the federal district court in Cincinnati.<sup>51</sup>

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<sup>41</sup> 243 U.S. 521 (1917).

<sup>42</sup> *Id.* at 531-32.

<sup>43</sup> *Id.* at 542.

<sup>44</sup> *Id.* at 545-46.

<sup>45</sup> *Id.* at 546.

<sup>46</sup> 273 U.S. 135 (1927).

<sup>47</sup> *Id.* at 150-51.

<sup>48</sup> *Id.* at 151.

<sup>49</sup> *Id.* at 152.

<sup>50</sup> *Id.* at 153.

<sup>51</sup> *Id.* at 154.



The Supreme Court in *McGrain* reaffirmed that "the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function"<sup>52</sup> because a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change . . . ."<sup>53</sup> While acknowledging *Kilbourn's* limitation that the matter being investigated by Congress must be within the legitimate sphere of legislative competency and the information sought must be pertinent to such legislative investigation,<sup>54</sup> the *McGrain* Court concluded that the Senate's investigation into the proper administration of the Department of Justice was "[p]lainly" a "subject . . . on which legislation could be had"—including appropriations for the DOJ—and accordingly was within the proper scope of inherent contempt power.<sup>55</sup>

The *McGrain* Court also interestingly rejected a mootness argument made by Daugherty, concluding that although the 68<sup>th</sup> Congress that authorized the select committee's initial investigation had since expired, the Senate had not discharged the committee, and the Senate's status as a "continuing body" (unlike the House, which completely turns over every Congress) lead to the conclusion that the committee's authority was still active, and the case consequently not moot.<sup>56</sup>

#### 5. *Jurney v. MacCracken* (1935)

The last time Congress relied upon its inherent contempt power was in 1934, when the Senate used its inherent power to hold William MacCracken in contempt. MacCracken's objection to being held in contempt was reviewed by the Supreme Court in *Jurney v. MacCracken* (1935), which upheld the Senate's use of inherent contempt power against MacCracken.<sup>57</sup>

MacCracken was issued a subpoena *duces tecum* by a Senate select committee on January 31, 1934. He appeared before the committee but refused to produce the requested documents, citing attorney-client privilege and stating that he would first need to obtain his client's assent to waive such privilege.<sup>58</sup> On February 1, MacCracken produced documents relating to business of clients who had consented to such turnover. On February 2, MacCracken again appeared before the committee, stating that some clients had taken back the relevant documents, some with MacCracken's permission. The committee then concluded that the documents could not be withheld under the privilege claim<sup>59</sup> and MacCracken subsequently obtain waivers of privilege from all relevant clients, producing the requested documents on February 3.<sup>60</sup> On February 5, the Senate adopted a resolution ordering MacCracken to show cause why he should not be held in

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<sup>52</sup> *Id.* at 174.

<sup>53</sup> *Id.* at 174-75.

<sup>54</sup> *Id.* at 176.

<sup>55</sup> *Id.* at 177-78.

<sup>56</sup> *Id.* at 181-82.

<sup>57</sup> 294 U.S. 125 (1935).

<sup>58</sup> *Id.* at 145.

<sup>59</sup> As will be discussed in the relevant section *infra* relating to privileges, congressional committees are not obligated to honor non-constitutional privileges such as the attorney-client or work product privileges.

<sup>60</sup> *MacCracken*, 273 U.S. at 146-47.

contempt of the chamber.<sup>61</sup> MacCracken refused to appear before the bar of the Senate and a warrant was issued for his arrest by the Sergeant-at-Arms on February 9. MacCracken was arrested by the Sergeant-at-Arms on February 12 and promptly filed a petition for writ of habeas corpus in the D.C. courts.<sup>62</sup>

MacCracken's argument before the Supreme Court was that the Senate lacked power to use its inherent contempt authority over him because his turnover of all the relevant documents prior to issuance of the Senate's contempt finding meant that his refusal/recalcitrance did not obstruct the Senate's legislative duties. Because MacCracken had voluntarily "removed" any obstruction to the Senate's investigation by voluntarily turning the documents over, he asserted, the chamber could not "punish" him under its inherent power.<sup>63</sup>

The Supreme Court rejected MacCracken's argument, first noting that it was true that Congress's inherent power of contempt was designed to prevent obstruction of its legislative power, including its power of investigation.<sup>64</sup> The Court concluded, however, that "where the offending act was of a nature to obstruct the legislative process the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance."<sup>65</sup> The *MacCracken* Court noted that its earlier decision in *Marshall v. Gordon* (1917) was not to the contrary, and that "the only jurisdictional test to be applied by the court is the character of the offense; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment."<sup>66</sup>

The *MacCracken* Court also agreed with the *Kilbourn* Court that enactment of the 1857 criminal contempt statute did not impair or supersede Congress's inherent contempt power: "The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute making refusal to answer or produce papers before either House, or one of its committees, a misdemeanor."<sup>67</sup> The criminal contempt statute, it stated, was designed "merely to supplement the power of contempt by providing for additional punishment" via the criminal court process.<sup>68</sup>

#### 6. *Cunningham v. Neagle* (1890)

A sixth Supreme Court case, *Cunningham v. Neagle*,<sup>69</sup> may provide a unique method by which Congress may exercise its inherent contempt power, by harnessing the executive branch's constitutional duty to "take care that the laws be faithfully executed."<sup>70</sup> In *Neagle*, the sheriff of a California county appealed the judgment of a federal circuit court discharging David Neagle

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<sup>61</sup> *Id.* at 143-44.

<sup>62</sup> *Id.* at 143.

<sup>63</sup> *Id.* at 147.

<sup>64</sup> *Id.* at 147-48.

<sup>65</sup> *Id.* at 148.

<sup>66</sup> *Id.* at 149.

<sup>67</sup> *Id.* at 151 (internal citation omitted).

<sup>68</sup> *Id.*

<sup>69</sup> 135 U.S. 1 (1890).

<sup>70</sup> U.S. CONST. art. II, § 3.

from the sheriff's custody, where Neagle was being held on murder charges relating to the death of David Terry.

Neagle was a deputy U.S. Marshal who had been assigned by the U.S. Marshal to protect Supreme Court Justice Stephen Field after Field had been threatened by David Terry.<sup>71</sup> When Justice Field rode circuit in California, Neagle accompanied Field for protection. While in California at a restaurant, Terry struck Justice Field on the face repeatedly.<sup>72</sup> Neagle arose to defend Justice Field and killed Terry with his revolver.<sup>73</sup> Neagle was arrested by the local sheriff and charged with Terry's murder. Neagle filed a writ of habeas corpus in the federal courts, arguing that under the words of the federal habeas statute, he was held "in custody for an act done in pursuance of a law of the United States."<sup>74</sup>

The question before the Court in *Neagle*, therefore, was whether Neagle's shooting of Terry was an "act done in pursuance of the United States" because Neagle shot Terry while serving as a U.S. Marshall assigned to protect a Supreme Court Justice.<sup>75</sup> The Court noted that Congress had not passed a specific statute to authorize U.S. Marshals—officers of the executive branch—to guard federal judges.<sup>76</sup> Nonetheless, the *Neagle* Court found that the President's constitutional duty under the Take Care Clause required the President not only to take care that congressional statutes be faithfully executed, but that the "laws" of the U.S. be faithfully executed—a word that encompassed duties and obligations "growing out of the constitution itself."<sup>77</sup>

Thus, the Court observed that no one could doubt the authority of the President or other delegated executive branch officer to make an order to protect the mail or protect public lands, even though Congress had not enacted specific statutes ordering such protection.<sup>78</sup> The President's authority to provide such protection derived from the Take Care Clause because the mails and public lands were creatures of Congress's constitutional authority under Article I, section eight. Similarly, the Court concluded, "We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death."<sup>79</sup>

The possible relevance of *Neagle* is this: If the President's duty under the Take Care Clause includes a duty to employ executive branch officers (e.g., U.S. Marshals) to ensure that federal judges may carry out their constitutional authority under Article III, it arguably includes a corollary duty to employ executive branch officers to ensure that *Congress* may carry out its constitutional authority under Article I. If the President's duty under the Take Care Clause includes a duty to protect the mails and public lands—as the *Neagle* Court stated that it did—then the Clause should also include a duty to protect Congress's broad investigatory power,

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<sup>71</sup> *Neagle*, 135 U.S. at 5.

<sup>72</sup> *Id.* at 52-53.

<sup>73</sup> *Id.* at 53.

<sup>74</sup> *Id.* at 40-41.

<sup>75</sup> *Id.* at 58.

<sup>76</sup> *Id.* at 63.

<sup>77</sup> *Id.* at 64.

<sup>78</sup> *Id.* at 65.

<sup>79</sup> *Id.* at 67.

including its inherent contempt power, which are both necessarily derived from Article I, section one's grant of legislative power. Congress, in other words, may assert that, in carrying out its inherent contempt power, it may choose to employ the Sergeant-at-Arms, but it may also call upon the President to "faithfully execute" Congress's inherent constitutional authority to enforce contempt.

*Neagle* thus offers a "hybrid" enforcement option, whereby Congress exercises its inherent contempt authority—without resorting to the judicial branch—but asks the executive branch, pursuant to its Take Care Clause duty, to arrest (and potentially detain) the contemnor. This approach would have the advantage of relative expedition (compared to resort to judicial proceedings) and cooperation of the other political branch. While the executive branch may refuse such cooperation on the ground that its Take Care Clause duty does not extend so far, it would be required to articulate why *Neagle* is distinguishable, thus shifting the burden onto the executive branch to justify its refusal to execute the exercise of congressional authority.

### ***B. Criminal Contempt Statutes***

There are three statutes, enacted in 1857, that relate to contempt and which are now codified at 2 U.S.C. §§ 192-194. As just stated in the previous section, the Supreme Court has made it clear that these criminal contempt statutes are supplements, or alternatives, to Congress's inherent contempt power, but do not replace such inherent power.<sup>80</sup> The main concern motivating enactment of the criminal contempt statute appears to be the concern that, pursuant to *Anderson v. Dunn*, inherent contempt power only allowed incarceration until the expiration of the Congress that passed the contempt resolution<sup>81</sup>, which may not be sufficient punishment in instances where the contumacy occurred near adjournment.<sup>82</sup>

Section 192 of Title 2 makes any "willful" default of any person summoned to testify or produce papers a misdemeanor, punishable by a fine of not more than \$100,000 and imprisonment of not more than twelve months.<sup>83</sup> Section 193 then proclaims, "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him

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<sup>80</sup> See *id.* at 151; In re Chapman, 166 U.S. 661, 671-72 (1897).

<sup>81</sup> *Anderson*, 19 U.S. at 231.

<sup>82</sup> See 42 CONG. GLOBE, 34<sup>th</sup> Cong., 3d Sess. 404 (1857) (statement of Mr. Orr) ("Suppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of this House by corrupt means of any description; then the power of this House extends only to those two days. Is that an adequate punishment? Ought we not then, to pass a law which will make the authority of the House respected . . .").

<sup>83</sup> Section 192 states *in toto*:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192.

or otherwise render him infamous."<sup>84</sup> Section 194 then sets forth the specific process for pursuing criminal contempt sanctions, necessitating a "statement of fact constituting such failure" to testify/produce that is reported to the President of the Senate/Speaker of the House. The President of the Senate/Speaker of the House then "shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, *whose duty it shall be to bring the matter before the grand jury* for its action."<sup>85</sup>

The Supreme Court has decided numerous cases under the criminal contempt statutes, and one of the most prominent distinctions between criminal contempt and inherent contempt is the availability in criminal contempt proceedings of "pertinency" objections. The pertinency objection emanates from the specific language of Section 192, which states that if any person "refuses to answer any question *pertinent to the question under inquiry*," he commits a misdemeanor. The Supreme Court has interpreted this statutory language as placing the burden of proof and persuasion upon the U.S. Attorney, in a criminal contempt prosecution, to establish that the question being posed to a congressional witness "pertained to some matter under investigation."<sup>86</sup> The question of pertinency, moreover, is akin to relevancy, and is a question of law to be resolved by the court, not the jury.<sup>87</sup>

When the pertinency of a question propounded to a congressional witness is not clear in a criminal contempt proceeding, conviction cannot be had because the lack of pertinency creates a vagueness problem that violates the Fifth Amendment's Due Process Clause.<sup>88</sup> Thus, in *Watkins v. United States* (1957), the Supreme Court found that questions posed to a witness before the House Un-American Activities Committee were not "pertinent" to that Committee's investigation of communist activities in labor because the questions asked the witness to divulge whether third parties he knew may have engaged in communist activities in the past.<sup>89</sup> The questions accordingly did not involve any activities of Watkins himself (but rather third parties whom he knew), and it did not involve any present communist activities of those third parties (but rather past activities).

The *Watkins* Court concluded that the precise questions that Watkins was charged with refusing to answer were therefore not "pertinent" to the Committee's investigation of present communist infiltration in labor.<sup>90</sup> Moreover, because the investigation was broadly announced as an investigation of "subversion" and not subversion of labor specifically—and because six out of nine of the witnesses at the hearing had no connection to labor—the Court believed that Watkins, as a witness, was not properly apprised of the pertinency of questions regarding past Communist associations of third parties involved in the labor movement.<sup>91</sup> The vagueness of the Committee's jurisdiction, the vagueness of its hearing agenda, and the lack of clarity regarding the relationship of the questions asked of Watkins to the Committee's investigation all combined to create a lack of "fair opportunity" for Watkins to "determine whether he was within his rights in refusing to

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<sup>84</sup> 2 U.S.C. § 193.

<sup>85</sup> *Id.* at § 194 (emphasis added).

<sup>86</sup> *Sinclair v. United States*, 279 U.S. 263, 296-97(1929).

<sup>87</sup> *Id.* at 298-99.

<sup>88</sup> *Watkins v. United States*, 354 U.S. 178, 215 (1957).

<sup>89</sup> *Id.* at 185, 213-15.

<sup>90</sup> *Id.* at 213.

<sup>91</sup> *Id.* at 213-15.

answer" the Committee's questions, causing a due process defect deriving from the lack of pertinency.<sup>92</sup> As Justice Frankfurter's separate concurrence in *Watkins* emphasized, the decision to invoke the criminal contempt statute—rather than inherent contempt authority—"necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function."<sup>93</sup> The aspects of the Fifth Amendment's Due Process Clause relating to criminal trials—including vagueness prohibitions—are an unavoidable consequence of opting to pursue criminal contempt sanctions.

A similar case decided two years after *Watkins*, *Barenblatt v. United States* (1959),<sup>94</sup> reached the opposite conclusion regarding a pertinency objection filed by a defendant being prosecuted under the criminal contempt statute. Specifically, Barenblatt was a witness before a subcommittee of the House Un-American Activities Committee and was asked questions regarding his own Communist activities while at the University of Michigan.<sup>95</sup> The Supreme Court concluded that, unlike the questions posed in *Watkins*, the questions posed to Barenblatt were "pertinent" to the subcommittee's investigation of Communist infiltration in education.<sup>96</sup> The *Barenblatt* Court observed that the history of the committee's activities showed that the committee had investigated Communist activity in the specific field of education on many occasions.<sup>97</sup> Moreover, the Court found that the subject matter of the subcommittee's investigation had been identified at the commencement of its investigation and that the questions posed to Barenblatt related directly to his own involvement in such Communist activities.<sup>98</sup> Accordingly, there was no "vagueness" problem regarding the scope of the Committee's inquiry, as there had been in *Watkins*.

The *Barenblatt* Court also directly addressed a First Amendment objection raised by Barenblatt. Specifically, Barenblatt argued that the questions posed to him regarding his potential Communist activities infringed his First Amendment rights.<sup>99</sup> The Court disposed of this objection in two short paragraphs, noting that it had found that the Committee's inquiry was in pursuance of a legitimate legislative investigation and "the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state."<sup>100</sup> It then elaborated on what sort of "individual interests" in the context of the First Amendment might trump Congress's legitimate investigative inquiry:

There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information

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<sup>92</sup> *Id.* at 215.

<sup>93</sup> *Id.* at 216 (Frankfurter, J., concurring).

<sup>94</sup> 360 U.S. 109 (1959).

<sup>95</sup> *Id.* at 114.

<sup>96</sup> *Id.* at 124.

<sup>97</sup> *Id.* at 121.

<sup>98</sup> *Id.* at 124-25.

<sup>99</sup> *Id.* at 116.

<sup>100</sup> *Id.* at 134.

which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.<sup>101</sup>

The Court then stated, "We conclude that the balance between the individual and the government interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."<sup>102</sup>

Under *Barenblatt*, therefore, there is no First Amendment "right" to refuse to answer a question that is pertinent to Congress's legitimate investigation. While the First Amendment may place some broad outer limits on such investigations—such as prohibiting the pillorying (public ridicule) of witnesses, calling witnesses without probable cause that they possess useful information, and the requirement of pertinency (relevancy) of questions posed—that can, in the right circumstances, outweigh Congress's/the public's interests in the inquiry, the First Amendment does not provide a full-throated, much less absolute, bar to an otherwise legitimate congressional inquiry. Assuming Congress has a legitimate legislative purpose for its investigation, the public interest will be weighty, and it will be outweighed by First Amendment concerns only in the sort of egregious examples provided by the Court in *Barenblatt*. Mr. Barenblatt's possible First Amendment right to associate with Communist organizations or sympathizers, therefore, was not a sufficiently weighty private interest to outweigh Congress's substantial public interest motivating its investigative inquiry.

The Court's rationale in *Barenblatt* were essentially echoed verbatim in its decision two years later in *Wilkinson v. United States* (1961), in which the Court again rejected pertinency and First Amendment objections to a criminal contempt proceeding initiated at the best of a subcommittee of the House Un-American Activities Committee.<sup>103</sup> With regard to Mr. Wilkinson's First Amendment objections, the Court stated, "The subcommittee had reasonable ground to suppose the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved . . . that establishes the Government's overbalancing interest."<sup>104</sup> Because the subcommittee's investigation was a legitimate one and the questions posed pertinent to its legitimate investigation, the defendant's First Amendment objection could not be sustained.

Criminal contempt proceedings under the relevant authorizing statutes inherently require that Congress rely upon the executive branch—namely, the U.S. Attorney—to initiate a grand jury proceeding pursuant to 2 U.S.C. § 194. While the statute declares it the "duty" of the U.S. Attorney "to bring the matter before the grand jury," there is no clear court decision holding that referral to the grand jury is non-discretionary. There is dicta in a 1940 decision of the Federal District Court for the District of Columbia, *Ex Parte Frankfeld*, that declares the duty non-discretionary, but it is merely dicta; the holding in the case is limited to declaring the contempt warrant invalid because it was issued by an employee of the committee and not the committee

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 365 U.S. 399 (1961).

<sup>104</sup> *Id.* at 414.

itself, as required by the statute.<sup>105</sup> Similar dicta is found in another D.D.C. case from 1983, *United States v. United States House of Representatives*.<sup>106</sup>

Moreover, the experience in the *Miers* and *Holder* civil contempt proceedings, discussed *infra*, confirms that, despite the seemingly mandatory nature of the language of the criminal contempt statute, the U.S. Attorney is unlikely to refer a matter to a grand jury, citing prosecutorial discretion. Given the availability of other remedies (besides criminal contempt) and the ubiquity of prosecutorial discretion in various other criminal statutory contexts, courts would be unlikely to deny the existence of such prosecutorial discretion in the particular context of the congressional criminal contempt statute.

### C. Civil Contempt Proceedings

The Senate has statutory authority to pursue civil contempt actions<sup>107</sup>, but the House does not. Nonetheless, the lower courts have recognized that the House may pursue civil contempt provided the chamber has provided an authorizing resolution. For example, in *Committee on Judiciary v. Miers*, the House Judiciary Committee sought a declaratory judgment in the Federal District Court for the District of Columbia that the White House counsel, Harriet Miers, and the President's Chief of Staff, Joshua Bolten, were required to comply with the Committee's subpoena to testify and produce documents relating to its investigation into the forced resignation of none U.S. Attorneys.<sup>108</sup> Both Ms. Miers and Mr. Bolton invoked Executive Privilege and refused to comply with the Committee's subpoena.<sup>109</sup> Consequently, the House passed a resolution declaring them both in contempt and authorizing Judiciary Chairman Conyers to initiate a civil action in federal court to seek declaratory and injunctive relief "affirming the duty of any individual to comply with any subpoena."<sup>110</sup>

The parties in *Miers* conceded that the district court had subject matter jurisdiction under the federal question statute, 28 U.S.C. § 1331, to adjudicate the claims in the suit.<sup>111</sup> The court then concluded that the House had institutional standing to assert injury based on the loss of information to which it is entitled and the institutional diminution of its subpoena power, which is a necessary part of its legislative power.<sup>112</sup> The court noted that a civil action to enforce a congressional subpoena was the least controversial way for Congress to vindicate its investigative authority, as it does not involve the use of the Sergeant-at-Arms (as does inherent contempt) nor require reliance on prosecution by the executive branch (as does criminal contempt).<sup>113</sup> It also rejected the argument that the existence of specific statutory authorization for civil contempt proceedings in the Senate implied the non-existence of such authority in the House, concluding that the Senate-specific statutes were merely a "more specific application" of

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<sup>105</sup> 32 F. Supp. 915 (D.D.C. 1940).

<sup>106</sup> 556 F. Supp. 150, 151 (D.D.C. 1983).

<sup>107</sup> 2 U.S.C. §§ 288b(b), 288d.

<sup>108</sup> 558 F. Supp.2d 53 (D.D.C. 2008).

<sup>109</sup> *Id.* at 62.

<sup>110</sup> *Id.* at 63.

<sup>111</sup> *Id.* at 64.

<sup>112</sup> *Id.* at 71.

<sup>113</sup> *Id.* at 76-76 (discussing opinions in 1984 and 1986 by the Office of Legal Counsel, both of which confirmed congressional power to pursue civil contempt).



the general relief allowed by the Declaratory Judgment Act.<sup>114</sup> The *Miers* court concluded that the claim of executive privilege was limited to a qualified privilege for presidential advisors in the particular context of the case and that Ms. Miers was accordingly required to appear before the committee and could raise specific assertions of executive privilege in response to specific questions at that time.<sup>115</sup> Likewise, both Ms. Miers and Mr. Bolten were directed to "produce a detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege sufficient to enable [court] resolution of any privilege claims."<sup>116</sup>

Miers and Bolton subsequently filed an appeal with the D.C. Circuit and moved for a stay pending disposition of the appeal. On October 6, 2008, the D.C. Circuit granted the stay and denied the House's motion for expedited consideration of the appeal.<sup>117</sup> The House that authorized the contempt citations of Miers and Bolton—the 110<sup>th</sup> Congress—ended just three months later, on January 3, 2009, and the D.C. Circuit noted that the subpoenas would consequently expire on that date and the case would become moot.<sup>118</sup> Miers and Bolton moved for voluntary dismissal of their appeal several days later and it was granted.<sup>119</sup>

The Federal District Court for the District of Columbia similarly exercised subject matter jurisdiction to entertain a civil contempt proceeding initiated by the House Oversight and Government Reform Committee against Attorney General Eric Holder, who had refused to produce documents, on grounds of executive privilege, relating to the committee's investigation of the Operation Fast and Furious, a law enforcement operation conducted by the Bureau of Alcohol, Tobacco and Firearms and the U.S. Attorney's office in Phoenix, Arizona.<sup>120</sup> The House had authorized the civil contempt proceeding pursuant to passage of a specific House Resolution, after an earlier resolution held the Attorney General in Contempt and the U.S. Attorney refused to refer the matter to a grand jury for criminal contempt prosecution.<sup>121</sup> Following the expiration of the 112<sup>th</sup> Congress in January 2013, the new 113<sup>th</sup> Congress then authorized the Committee to act as successor in interest to the 112<sup>th</sup> Congress Committee and the Committee re-issued the subpoena to Holder.<sup>122</sup>

Like the district court in *Miers*, the *Holder* court held that it had subject matter jurisdiction, that the House had institutional standing to enforce its subpoena by civil process, and denied to dismiss the case pursuant to the political question doctrine and accordingly denied the Attorney General's motion to dismiss for want of subject matter jurisdiction (12(b)(1)) or failure to state a claim upon which relief may be granted (12(b)(6)).<sup>123</sup> It did not reach the claims of executive privilege on the motion to dismiss. The Attorney General subsequently sought interlocutory

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<sup>114</sup> *Id.* at 86.

<sup>115</sup> *Id.* at 106.

<sup>116</sup> *Id.*

<sup>117</sup> *Comm. on the Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008) (per curiam).

<sup>118</sup> *Id.* at 911.

<sup>119</sup> 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009).

<sup>120</sup> *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp.2d 1 (D.D.C. 2013).

<sup>121</sup> *Id.* at 7.

<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 1, 26.

appeal to the D.C. Circuit via certification pursuant to 28 U.S.C. § 1292(b), but such certification was denied by the district court.<sup>124</sup> There is no subsequent history on the case.

The *Miers* and *Holder* decisions appear to confirm the power of the House to pursue civil contempt proceedings if it so chooses, provided there is an explicit authorization for such a lawsuit via passage of a House resolution. Such a resolution ensures House standing to vindicate its investigatory power, and the usual rules relating to the enforcement of congressional subpoenas—e.g., the subpoena must seek information relevant to a legitimate legislative investigation—will apply to the civil proceeding. Such a civil proceeding has the advantage of not requiring resort to use of the Sergeant-at-Arms (as with inherent contempt), and it also does not require either adherence to constitutional rights associated with criminal prosecutions, or cooperation by the executive branch (as with criminal contempt). Civil contempt proceedings do, however, require resort to the judicial branch for ultimate resolution, and they are potentially (as with criminal contempt) quite time consuming and expensive.

I will now proceed to discuss the specific objections to the Committee's subpoenas that have been raised by the New York and Massachusetts Attorneys General and private organizations.

### III. Federalism Objections to a Congressional Subpoena

Both the New York and Massachusetts AGs have objected to the Committee's subpoenas on grounds of federalism. The Massachusetts AG, for example, states that the subpoenas are an "affront to states' rights" and a "violation of states' rights and constitutional principles of federalism."<sup>125</sup> Similarly, the New York AG states that the Committee's subpoena "raises grave federalism concerns" because, under the Tenth Amendment, "Congress's authority ends where States' sovereign rights begin."<sup>126</sup> Both the New York and Massachusetts AGs, for example, cite the Supreme Court's decision in *New York v. United States* (1992)<sup>127</sup> as supporting their federalism objections to the Committee's subpoenas.

It should be noted at the outset that the *New York* Court made it clear that the principle of federalism, which is evidenced in numerous constitutional provisions, is not about protecting the states *qua* states, but instead about dividing the power of government between the federal and state governments to better protect individual liberty.<sup>128</sup> In *Garcia v. San Antonio Metropolitan Transit Authority* (1985),<sup>129</sup> the Supreme Court rejected its holding from only nine years earlier

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<sup>124</sup> 2013 WL 11241275 (D.D.C. Nov. 18, 2013).

<sup>125</sup> Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Mass., Office of the Atty. Gen. to Chairman Lamar Smith, House Comm. on Science, Space & Tech. 1, 13 (July 26, 2016) [hereinafter *Mass. AG Subpoena Response*].

<sup>126</sup> Letter from Leslie B. Dubeck, Counsel, State of N.Y., Office of the Atty. Gen. to Chairman Lamar Smith, House Comm. on Science, Space & Tech. 1, 2 (July 26, 2016) [hereinafter *N.Y. AG Subpoena Response*].

<sup>127</sup> 505 U.S. 144 (1992).

<sup>128</sup> *Id.* at 181 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); *accord* *Bond v. United States*, 564 U.S. 211, 221-22 (2011) ("Federalism secures the freedom of the individual. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

<sup>129</sup> 469 U.S. 528 (1985).

in *National League of Cities v. Usery* (1976),<sup>130</sup> in which the Tenth Amendment protected "areas of traditional [state] governmental functions" from federal encroachment.<sup>131</sup>

Specifically, the *Garcia* Court held that "the structure" of the federal government as a whole—including the Electoral College, the Senate, and House apportionment—is adequate to protect so-called "states' rights."<sup>132</sup> The Tenth Amendment's declaration that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," according to *Garcia*, "offers no guidance about where the frontier between state and federal power lies" and hence the courts "have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."<sup>133</sup>

*Garcia* has not been overruled. The basic proposition that the Tenth Amendment itself has no enforceable substance remains. If Congress exercises one of its enumerated powers—e.g., the commerce power—the Tenth Amendment can provide no limit on such power. The Supreme Court has, however, recognized that the principle of federalism offers two substantive limits on the exercise of an otherwise legitimate exercise of congressional power: (1) the anti-commandeering doctrine; and (2) the anti-coercion doctrine. As the state AGs do not raise the applicability of the anti-coercion doctrine (nor could they),<sup>134</sup> I will focus solely on the anti-commandeering doctrine.

The anti-commandeering doctrine is reflected in a pair of cases, *New York v. United States* (1992) and *Printz v. United States* (1997). In *New York*, the Court held that Congress could not exercise its commerce in such a way as to "commandeer" a state's legislative branch to carry out a federal regulatory regime.<sup>135</sup> While Congress could preempt state action altogether and carry out its own regulatory regime, it is not free to command that a state legislature carry out the federal government's regulatory regime<sup>136</sup>; doing so creates distortions in political accountability among the federal and state governments.<sup>137</sup>

Similarly, in *Printz*, the Court invalidated a provision of the federal Brady Handgun Violence Prevention Act under the anti-commandeering principle because the Act forced state executive officers to carry out federally mandated criminal background checks on handgun purchasers.<sup>138</sup> Similar distortions of political accountability motivated the decision in *Printz*: "By forcing state

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<sup>130</sup> 426 U.S. 833 (1976).

<sup>131</sup> *Id.* at 852.

<sup>132</sup> *Garcia*, 469 U.S. at 551.

<sup>133</sup> *Id.* at 550.

<sup>134</sup> The coercion doctrine is grounded in dicta from the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). The Supreme Court's recent decision in *NFIB v. Sebelius*, ruled that the Medicaid expansion provision of the Affordable Care Act violated the coercion doctrine because it withheld a substantial portion of federal matching funds and was accordingly tantamount to a "gun to the head" of States in which they had no real choice as to whether to continue operating a Medicaid program. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012). Because the Committee's issuance of a subpoena does not involve an exercise of the federal spending power—and hence, the withholding of federal funds—there is no reasonable argument that the subpoenas violate the anti-coercion doctrine.

<sup>135</sup> *New York*, 505 U.S. at 175-76.

<sup>136</sup> *Id.* at 178.

<sup>137</sup> *Id.* at 168-69.

<sup>138</sup> *Printz v. United States*, 521 U.S. 898, 932 (1997).

governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and its defects."<sup>139</sup>

The anti-commandeering doctrine of *New York* and *Printz* do not support the federalism objections voiced by the Massachusetts and New York AGs to the Committee's subpoenas. As a general matter, *Garcia* still stands for the proposition that "states' rights" under the Tenth Amendment are not capable of judicial ascertainment and enforcement, and such "states' rights" are adequately protected by the national political process, including the nature of the composition of Congress itself. As such, if Congress is exercising one of its constitutional powers, any "states' rights" objection is, pursuant to *Garcia*, at an end. *New York* and *Printz* hold only that Congress, in exercising its constitutional powers, cannot "commandeer" a state's legislative or executive branches and force them to carry out a federal regulatory regime. If Congress wishes to exercise its powers, it must do so directly via its preemption (Supremacy Clause) power, and not employ state legislatures or executive officials as "agents" of the federal government.

If the Committee's subpoena is relevant to a subject over which the Committee has jurisdiction and on which "legislation may be had," Congress's supreme legislative power trumps any "states' rights" objection voiced by Massachusetts and New York. The states, in other words, simply have no basis for impeding an otherwise legitimate exercise of congressional power; indeed, this is the essence and meaning of the Supremacy Clause. A legitimate congressional subpoena would not "commandeer" the Attorneys General of Massachusetts or New York to carry out a federal regulatory regime; it would direct them to comply with a superior federal investigatory command. There is no distortion of political accountability with a congressional subpoena: If the state AGs comply with the subpoena, the citizens of Massachusetts and New York can clearly see and understand that acts taken pursuant to the subpoena's command—and the political responsibility therefor—lies with Congress, and Congress alone. Indeed, because a congressional subpoena is an inherent manifestation of Congress's power of legislation, it is no different from a "states' rights" perspective than an exercise of any other legislative power such as the commerce power which, when exercised, would be entitled the preemptive effect of the Supremacy Clause.

The one additional case cited by the state AGs—other than *New York* and *Printz*—as supporting their federalism objection is an obscure 1962 case from the D.C. Circuit, *Tobin v. United States*.<sup>140</sup> *Tobin* involved the prosecution for criminal contempt of Congress by the Executive Director of the Port of New York Authority, who refused to comply with a subpoena *duces tecum* of a subcommittee of the House Judiciary Committee. The D.C. Circuit acknowledged that the subcommittee had broad jurisdiction to investigate matters relating to interstate compacts, and that the Port of New York Authority was the creature of an interstate compact between New York and New Jersey.<sup>141</sup>

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<sup>139</sup> *Id.* at 930.

<sup>140</sup> 306 F.2d 270 (D.C. Cir. 1962).

<sup>141</sup> *Id.* at 271.

Mr. Tobin objected to the Committee's subpoena pursuant to the instruction of the Governor of New York, who stated that the subpoena was "too broad" to be valid.<sup>142</sup> After the district court convicted Mr. Tobin of the criminal contempt charge, the D.C. Circuit was presented with two constitutional objections to the subcommittee's subpoena: (1) because Congress had already approved the interstate compact that created the Port of New York Authority, it had no constitutional power to "alter, amend or repeal" its consent thereto; and (2) because the subpoena requested documents relating to the internal administration of the Port Authority, it was an unconstitutional invasion of the powers reserved to the States under the Tenth Amendment.<sup>143</sup>

The *Tobin* court did not rule on the Tenth Amendment objection, instead basing its decision on the first objection relating to the subcommittee's power to investigate pursuant to its authority to "alter, amend or repeal" interstate compacts. The Compact Clause of Article I, section ten of the Constitution declares "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . . ." The *Tobin* court acknowledged that the Clause does not specifically confer upon Congress the power to alter, amend or repeal interstate compacts that have already been approved by Congress.<sup>144</sup> It further acknowledged that it had "no way of knowing what ramifications would result" from holding that Congress has the power to alter, amend or repeal existing interstate compacts, of which there were many in effect.<sup>145</sup>

The D.C. Circuit concluded that because the case was a criminal contempt prosecution, it needed to bear in mind that Tobin was "entitled to all of the safeguards" of the criminal justice system, including the hesitation to decide matters collateral to the crime for which the accused stands trial, particularly broad constitutional questions such as the power of Congress to alter, amend or repeal existing interstate compacts.<sup>146</sup> It decided to construe the House subcommittee's jurisdiction narrowly to avoid this constitutional question relating to the Compact Clause, stating that "if Congress had intended the Judiciary Committee to conduct such a novel investigation [of the need to repeal, amend or alter an existing compact], it would have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions under consideration."<sup>147</sup> The court accordingly approved the subpoena, but narrowly construed its scope to encompass only information relating to actual activities of the Port Authority and not documents relating to "why" the Authority engaged in such activities.<sup>148</sup>

The *Tobin* case does not stand for the proposition that a lawful congressional subpoena may be refused by a state official on Tenth Amendment grounds. Indeed, the D.C. Circuit in *Tobin* did not base its opinion on the Tenth Amendment, but instead on its concerns about the constitutional objection relating to Congress's power under the Compact Clause. Even if the *Tobin* decision *had*, arguendo, ruled on the basis of Tobin's Tenth Amendment objection to the congressional subpoena, any such ruling would have long predated the Supreme Court's decision in *Garcia*, which made it clear that "states' rights" arguments under the Tenth Amendment are not justiciable because "states' rights" are adequately protected by the national political process.

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<sup>142</sup> *Id.* at 271-72.

<sup>143</sup> *Id.* at 272.

<sup>144</sup> *Id.* at 273.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 274.

<sup>147</sup> *Id.* at 275.

<sup>148</sup> *Id.* at 276.

As such, under *Garcia*, the very structure of Congress—comprised of two Senators representing each State and Representatives apportioned according to each State's population—ensures that the Congress can be trusted to adequately consider "states' rights" in the course of exercising its constitutional powers.

*Tobin* also did not address either the anti-commandeering or anti-coercion doctrines that have developed post-*Garcia*, but as already discussed, neither doctrine would apply to bar the enforcement of a legitimate congressional subpoena.

#### IV. Privilege Objections to a Congressional Subpoena

Both the Massachusetts and New York AGs object to the Committee's subpoenas on the basis of the attorney-client and work product privileges, and the common interest doctrine that is derived from the attorney-client privilege.<sup>149</sup>

##### A. State Common or Statutory Law Privileges

Congress is not obligated to recognize privileges grounded in state common or statutory law, such as the attorney-client or work product privileges, as state law privileges are not binding on the federal sovereign and, when there is a federal law analog, it is a creature of federal judicial, not legislative, process. The question often arises in the context of federal grand jury proceedings, and even there, federal courts routinely rule that such state law privileges are not binding on the federal government.<sup>150</sup>

Congress has power under Article I, section 5 to "determine the rules of its proceedings" and its power to investigate is grounded in Article I, section one of the Constitution (giving Congress sole legislative power). This rulemaking authority, combined with the Supremacy Clause of Article VI,<sup>151</sup> suggests that Congress has the power to decide for itself whether to honor state law judicial privileges, as its constitutional powers are supreme to any state law, including state statutory or common law privileges. Moreover, any rule requiring congressional recognition of privileges created for use in judicial adversarial proceedings would raise significant separation of powers issues: "Indeed, the suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules developed by the judicial branch

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<sup>149</sup> *N.Y. AG Subpoena Response*, at p. 9; *Mass. AG Subpoena Response*, at p. 12.

<sup>150</sup> *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (claims of First Lady of attorney-client and work-product privilege with respect notes taken by White House Counsel Office attorneys rejected); *In re Lindsey* (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998) (White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); *In re Sealed Case* (Espy), 121 F.3d 729 (D.C. Cir. 1997) (deliberative process privilege is a common law agency privilege which is easily overcome by showing of need by an investigating body); *In re A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002) (attorney-client privilege not applicable to communications between state government counsel and state office holder).

<sup>151</sup> The Supremacy Clause states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules. Moreover, importation of the privileges and procedures of the judicial forum is likely to have a paralyzing effect on the investigatory process of the legislature. Such judicialization is antithetical to the consensus, interest oriented approach to policy development of the legislative process."<sup>152</sup>

In practice, however, congressional committees have used their discretion to accept claims of privilege grounded in state law, such as the attorney-client privilege, by weighing Congress's need for disclosure against any possible injury to the party invoking the privilege.<sup>153</sup> In the *MacCracken* case discussed *supra*, for example, the Senate committee denied MacCracken's invocation of attorney-client privilege and ordered his compliance with its subpoena *duces tecum*.<sup>154</sup>

### B. Federal Constitutional Privileges

The Fifth Amendment's privilege against self-incrimination states that "No person shall . . . be compelled in any criminal case to be a witness against himself."<sup>155</sup> Despite the amendment's textual application to "criminal cases[s]," the Supreme Court has suggested that it applies to congressional investigations result in criminal contempt proceedings.<sup>156</sup> While the privilege generally protects only against being compelled to testify (subpoena *ad testificandum*), it may also apply in situations where compulsion to produce certain documents (subpoena *duces tecum*) could constitute implicit testimonial authentication of the documents produced.<sup>157</sup>

The refusal of several of the private environmental groups subpoenaed by the Committee is based, in part, on objections grounded in the First Amendment. For example, the letter dated July 26, 2015 to Chairman Smith from counsel for the Union of Concerned Scientists states that the subpoena "makes no allegation of wrong doing on the part of UCS and UCS is determined to defend its constitutional rights to peaceful assembly with like-minded groups, to petition the government, and to free speech on the issue of climate change and other matters."<sup>158</sup> Likewise, counsel for the Pawa Law Group and the Global Warming Legal Action Project object to the Committee's subpoenas on the basis of the First Amendment, citing *Hentoff v. Ichord* (D.D.C. 1970).<sup>159</sup>

As discussed in the preceding section discussing criminal statutory contempt proceedings, the First Amendment offers no general privilege against congressional inquiry, and are generally denied because the public need for the information being sought by Congress will outweigh any

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<sup>152</sup> Morton Rosenberg, Cong. Research Service Rep. No. 95-464, *Investigative Oversight: An Introduction to the Law, Practice & Procedure of Congressional Inquiry* 36 (Apr. 7, 1995).

<sup>153</sup> *Id.* at 32.

<sup>154</sup> *MacCracken*, 294 U.S. at 145-46.

<sup>155</sup> U.S. CONST. amend. V.

<sup>156</sup> *Watkins*, 354 U.S. at 195-96; *Quinn v. United States*, 394 U.S. 155 (1955).

<sup>157</sup> *United States v. Coe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

<sup>158</sup> Letter from Neil Quinter to Chairman Lamar Smith, Comm. on Science, Space & Tech., July 26, 2016.

<sup>159</sup> Letter from Catherine S. Duval to Chairman Lamar Smith, Comm. on Science, Space & Tech., July 26, 2016.

individual, private interest in preventing disclosure of association or communications with others.<sup>160</sup> The Supreme Court has, however, narrowly construed the scope of a committee's authority to avoid reaching a First Amendment issue.<sup>161</sup> So long as the matter inquired into is pertinent to a legitimate legislative investigation, the government's interest in effective inquiry will generally trump any private interest based upon free speech or association rights; to hold otherwise would create a gaping hole in Congress's investigatory power.

The D.D.C. case cited by counsel for the Pawa Law Group and Global Warming Legal Action Project, *Hentoff v. Ichord*,<sup>162</sup> is unavailing. In *Hentoff*, the plaintiffs brought a class action seeking declaratory and injunctive relief to stop publication and distribution of a Report of the House Committee on Internal Security, listing names of college speakers whom the Committee suspected of being affiliated with radical leftist groups. The plaintiffs' contended that the publication of such names did not further any legitimate legislative purpose, and the district court began its analysis of this contention with recognition that the judiciary owes "great deference" to Congress on this question.<sup>163</sup>

The *Hentoff* court concluded that the Committee's report itself "fails to indicate any legitimate legislative purpose" and that the report "on its face contradicts any assertion of such a purpose."<sup>164</sup> The report appealed to college administrators, alumni and parents in an attempt to "inhibit further speech on college campuses by those listed individuals and others whose political persuasion is not in accord with that of members of the Committee."<sup>165</sup> The report did not purport to investigate the financing of subversive organizations or whether the honoraria paid to such speakers was being funneled to such organizations.<sup>166</sup> Accordingly the court concluded, "If a report has no relationship to any existing or future proper legislative purpose and is issued solely for the sake of exposure or intimidation, then it exceeds the legislative function of Congress; and where publication will inhibit free speech and assembly, publication and distribution in official form at government expense may be enjoined. This is such a report."<sup>167</sup>

The *Hentoff* decision did not involve the use of Congress's subpoena power (no subpoena had been issued to the plaintiffs). Instead, it was a prophylactic civil suit to prevent publication of a House report, brought against members of the relevant House Committee, its Chief Counsel, the Public Printer and Superintendent of Documents.<sup>168</sup> The district court, unlike the Supreme Court in *Eastland*,<sup>169</sup> ruled that the Speech and Debate Clause did not apply to the printing of a committee report for public distribution, and therefore the committee's report could be enjoined.<sup>170</sup> More importantly for present cases, the *Hentoff* decision has no relevance where: (1) Congress has exercised its subpoena power; (2) the subpoena seeks information that is relevant

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<sup>160</sup> See *Wilkinson*, 365 U.S. at 414; *Barenblatt*, 360 U.S. at 112; *Watkins*, 354 U.S. at 198.

<sup>161</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>162</sup> 318 F. Supp. 1175 (D.D.C. 1970).

<sup>163</sup> *Id.* at 1181.

<sup>164</sup> *Id.* at 1182.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1176.

<sup>169</sup> 421 U.S. 491 (1975). The *Eastland* case is discussed in detail *infra* section I.

<sup>170</sup> *Id.* at 1180-81.



to a legitimate legislative inquiry. *Hentoff* certainly does not stand for the proposition that the recipient of a congressional subpoena may refuse to comply with a legitimate legislative inquiry on First Amendment grounds. If such a legitimate legislative inquiry exists, the balancing of interests set forth in cases such as *Wilkinson*, *Barenblatt* and *Watson* would apply, with the government's interests in obtaining information necessary to conduct its inquiry being given strong weight.<sup>171</sup>

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<sup>171</sup> See *Wilkinson*, 365 U.S. at 414; *Barenblatt*, 360 U.S. at 112; *Watkins*, 354 U.S. at 198.