SUPREME COURT OF THE UNITED STATES

LYDXIA ET AL. *v.* HOUSE OF REPRESENTATIVES ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–26. Decided July 21, 2019

The motion to issue a temporary injunction pending disposition of this review is denied.

Statement of JUSTICE BORK respecting the denial of an injunction.

In my view, an injunction against the contested subpoena would have been entirely unnecessary. Some of my colleagues think it likely the House will "accommodate" petitioner pending resolution of this case; I think it certain. While our cases make clear that legislative committees can issue subpoenas which are "related to, and in furtherance of, a legitimate task of Congress,"[1] it does not follow that all means of effecting compliance with those subpoenas are constitutional.

There are three known avenues for Congress to enforce a valid subpoena—the first two are beyond reproach. Option one involves referring a noncompliant subpoena recipient to the Department of Justice for prosecution. Federal law makes it a "misdemeanor" for any person "summoned as a witness by the authority of either House of Congress to give testimony . . . [to] willfully mak[e] default."[2] The second approach consists of "initiat[ing] a civil action in federal district court, seeking a court-ordered injunction to compel compliance."[3] Finally, Congress could "[t]heoretically" "invoke its inherent contempt power . . . to

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[1] *Watkins* v. *United States*, 354 U. S. 178, 187 (1957).

[2] 2 U. S. C. §192.

[3] McIntosh, Gitenstein & McDonnell, Understanding Your Rights 5 (2014).

arrest [and imprison] the noncompliant party."[4]

If the House chooses to attempt enforcement of the contested subpoena in light of our refusal of an injunction, it realistically would have only one option. Neither of the first two options listed above would be plausible because they both require judicial involvement and the district court would not enforce a subpoena while its legality is under review in this Court. That leaves the House with only the inherent contempt route.

If the House is inclined to attempt charting this path, it should recognize it as a constitutionally infirm one. As I am about to explain, the notion of inherent contempt is difficult to reconcile with the text of the Constitution and its original meaning. If that is not enough to give the House pause and if inherent contempt is used against petitioner anyways, petitioner may wish to challenge the basis for their confinement.

I

The framers of the Constitution sought to protect Americans from "grand inquest[s] of the state."[5] Although fearful of all excessive government power, the framers believed that the legislative power was the "most to be feared."[6] It was their prescient worry that the legislative branch, unless carefully limited, would "dra[w] all power into its impetuous vortex."[7] As a result, they spelled out in excruciating detail the powers to be granted to Congress and placed definite limits on the use of those powers.[8]

It is notable that the framers did not grant Congress the power to issue subpoenas in so many words; "there is no

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[4] *Id.*, at 4–5.

[5] The Works of James Wilson 415 (1967 ed.).

[6] Carey & McClellan, Reader's Guide to the Federalist lxx (2001).

[7] The Federalist No. 48, p. 257 (Gideon ed. 2001).

[8] Cf. *Gibbons* v. *Ogden*, 9 Wheat. 186, 195 (1824) (stating that "[t]he enumeration [of powers] presupposes something not enumerated.").

provision expressly investing either house with power to make investigations and exact testimony."[9] This Court has instead deemed that power "incidental to the legislative function."[10] It exists to the extent its use furthers legitimate legislative purposes and does not otherwise conflict with real constitutional texts.

The power to unilaterally punish *noncompliance* with those legislative subpoenas however does not appear to be of a legislative character. Additionally, the rationale upholding the implied power to issue subpoenas cannot support inherent contempt. Inherent contempt may be *helpful* in "secur[ing] needed information"[11] but not all helpful powers are necessary incidents of the power to legislate. Moreover, the subpoenas themselves are allowed because they do the legwork when it comes to obtaining information; inherent contempt does not obtain information. Inherent contempt can only be defended on the ground that it gives subpoenas teeth and is therefore an incident of the power to issue subpoenas but that layers implication on implication and has no logical endpoint or any basis in the Constitution's text. That aside, even without inherent contempt subpoenas are not toothless. Congress can always secure compliance with its subpoenas by invoking the aid of the courts or requesting criminal prosecution.

The defenders of inherent contempt sometimes point to *Anderson* v. *Dunn*[12] for the proposition that inherent contempt is based in the Constitution as originally understood, but even that case—the broadest endorsement of inherent contempt to date—did not adopt that far reaching premise. On the contrary, the Court stated that "there is no power given by the [C]onstitution to either House to punish for contempts, except when committed by their own

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[9] *McGrain* v. *Daugherty*, 273 U. S. 135, 161 (1927).
[10] *Ibid.*
[11] *Ibid.*
[12] 6 Wheat. 204.

members."[13] The Court also expressed that the "genius and spirit of our institutions are hostile to the exercise of implied powers."[14] Therefore in lieu of resting the power of inherent contempt on the Constitution or implication, the *Anderson* Court allowed it on the basis of necessity. The Court reasoned that the "practical application of government" required permitting Congress to exercise inherent contempt because without it Congress would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[15] It was also relevant that the power of inherent contempt was one legislatures possessed at common law.

Having found a basis (however tenuous it may have been) to conclude Congress possessed the power of inherent contempt, the Court rejected the petitioner's claim that Congress acted *ultra vires*—this happened to be the only claim the petitioner had raised. The petitioner was so certain there was no chance the Court would uphold Congress' action against the *ultra vires* charge that he did not bother to contest the contempt finding on other grounds. He did not assert that Congress violated the Bill of Attainders Clause or the Due Process Clause and the Court accordingly did not address those possibilities.

Considered this way, *Anderson* stands for little more than this: While Congress is not granted the power of inherent contempt by the Constitution and while it cannot be derived from implication like the subpoena power, necessity and the common law ensure Congress has that power unless its use would fall under a specific prohibition of the Constitution. This is far from a resounding endorsement of the power of inherent contempt.[16]

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[13] *Id.*, at 225.

[14] *Ibid.*

[15] *Id.*, at 226, 228.

[16] See *id.*, at 234 (emphasizing the ways the Court's decision was limited by the particular record before the Court).

With our cases and the framers' vision now arrayed against them, the proponents of inherent contempt might try to shore up their case by invoking historical practice. They might insist that the first use of inherent contempt to punish contumacy by a private citizen came as early as 1800, indicating that the power was established during the founding generation. But this is an isolated case and such slim evidence of founding-era practice is not so easily given determinative weight.[17] Even were this isolated example creditable it would do more harm than good to the argument for inherent contempt.

The 1800 use of inherent contempt was hotly contested and met sweeping public outcry, nearly comparable to that triggered by this Court's decision in *Chisholm*.[18] It was considered so legally dubious at the time that no arrest was ever successfully made pursuant to the inherent contempt order.[19] This cannot be the mighty rock on which the law of inherent contempt rests.

II

It should now be clear that neither the evidence from the founding era nor this Court's cases endorse an unconditional view of inherent contempt. On the contrary, they unanimously reject the idea that inherent contempt is elevated outside the realm of specific constitutional prohibitions. Inherent contempt can only be used in a manner that comports with the Bill of Attainders Clause and the Due Process Clause.

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[17] See, *e.g.*, *Chisholm* v. *Georgia*, 2 Dall. 419 (1793); see also 1 J. Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States 734, 737 (1971); *id.*, at 734–741; *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___, ___ (2019) (slip op., at 11) (counting responsive "furor and uproar" as minus-factors when evaluating the weight given to a founding-era decision).

[18] See Edwin, Chronology of Congress 112 (1983).

[19] United States Senate, Senate Holds Editor in Contempt (2015).

A

The Bill of Attainders Clause was meant by the framers to prohibit precisely what the inherent contempt doctrine was fashioned to allow: "legislative exercise of the judicial function, or more simply—trial by legislature."[20] Inherent contempt involves legislative invocation of a power which is not of a "legislative character."[21] *Anderson* openly mused that the power embodied by inherent contempt is one which more closely resembles an "inciden[t] to . . . judicial power."[22] Nevertheless *Anderson* allowed Congress to exercise inherent contempt because no Bill of Attainders Clause claim was raised in that case and, ignoring the concerns raised by that Clause, inherent contempt would promote efficiency in government.

The Bill of Attainders Clause, however, was "intended . . . as an implementation of the separation of powers."[23] And the "separation of powers was obviously not instituted with the idea that it would promote governmental efficiency."[24] It was meant as a bulwark against tyranny. Strictly dividing the powers of government across three branches would protect liberty because, as the framers saw it, "ambition" would be made to "counteract ambition."[25] The way James Madison put it was this: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[26] The framers felt that while in some forms of government the Executive is the most likely to "forget the bounds of its authority,"[27] "in a representative

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[20] *United States* v. *Brown*, 381 U. S. 437, 442 (1965).
[21] *Supra*, at 3.
[22] 6 Wheat., at 227.
[23] *Brown*, *supra*.
[24] *Id.*, at 443 (quotation marks omitted).
[25] The Federalist No. 51, p. 268 (Gideon ed. 2001).
[26] The Federalist No. 47, p. 249 (Gideon ed. 2001).
[27] *Brown*, *supra*, at 443.

republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions," "barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of other departments."[28]

The Clause "also reflected" the framers' well-founded understanding that the "Legislative Branch [was] not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."[29] They thought legislatures "peculiarly susceptible to popular clamor" and did not think they could try "with coolness, caution, and impartiality" a charge with criminal punishment.[30]

The system of inherent contempt calls upon Congress to do exactly this. That system cannot be squared with the Bill of Attainders Clause.

B

While it is unnecessary to consider the propriety of the inherent contempt system under the Due Process Clause, doing so underscores that it is incompatible with the Constitution.

The Clause protects against deprivations of "life, liberty, and property" without the protections afforded by "due process of law."[31] The system of inherent contempt implicates the Clause's "liberty" component because the Clause's framers understood it to encompass freedom from physical

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[28] The Federalist No. 48, p. 257 (Gideon ed. 2001); *Brown*, *supra*, at 444.

[29] *Id.*, at 445.

[30] 1 Cooley, Constitutional Limitations, pp. 536–537 (8th ed. 1927); *Calder* v. *Bull*, 3 Dall. 386, 389 (1798); *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946).

[31] U. S. Const., amend. V.

restraint and imprisonment undoubtedly involves that type of restraint.[32] The framers understood that the due process needed to allow this type of restraint involved some sort of criminal proceeding. As already explained, this type of proceeding cannot be conducted by a legislative entity,[33] which leads to the conclusion that the Due Process Clause is violated by inherent contempt proceedings.

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Inherent contempt is almost certainly unconstitutional under the Constitution as originally understood and our cases do not counsel otherwise. That fact makes an injunction unnecessary in this case. The House cannot turn to the district court to enforce its subpoena until this review is complete and if the House decides to use our denial of an injunction as an excuse to attempt punishing petitioner's noncompliance through inherent contempt while this case is still ongoing, petitioner may wish to challenge the basis for their confinement.

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[32] See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926); Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890).

[33] *Supra*, at 5–7.