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# Congress's (Less) Limited Power to Represent Itself in Court: A Comment on Grove and Devins

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CONGRESS’S (LESS) LIMITED POWER TO  
REPRESENT ITSELF IN COURT: A COMMENT ON  
GROVE AND DEVINS

*Jack M. Beermann*<sup>†</sup>

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INTRODUCTION

In their recent article, *Congress’s (Limited) Power to Represent Itself in Court*,<sup>1</sup> Tara Leigh Grove and Neal Devins make the case against congressional litigation in defense of the constitutionality of federal statutes. They conclude that Congress, or a single House of Congress, may not defend the constitutionality of federal statutes in court even when the executive branch has decided not to do so but may litigate only in furtherance of Congress’s investigatory and disciplinary powers.<sup>2</sup>

Grove and Devins claim that congressional litigation in support of the constitutionality of federal statutes violates two separate but related features of the Constitution. “First, the Constitution precludes Congress from having a direct role in the implementation of federal law, providing instead that the executive branch ‘shall take Care that the Laws be faithfully executed.’”<sup>3</sup> Second, “defense of federal statutes by the House or the Senate violates an additional

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<sup>1</sup> Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

<sup>2</sup> *Id.* at 576.

<sup>3</sup> *Id.* at 574 (quoting U.S. CONST. art. II, § 3).

constitutional norm: bicameralism.”<sup>4</sup>

Grove and Devins argue that bicameralism does not apply to litigation in support of congressional investigations, such as enforcement of subpoenas and punishment of contempt, because of the Constitution’s provision in Article I, section 5, clause 2, granting each House of Congress the power to determine its own rules and punish its members.<sup>5</sup> While I agree with Grove and Devins that Congress has the power to litigate in support of its investigations, I disagree with them over the basis for this power. The provision of Article I upon which they rely refers exclusively to internal congressional proceedings. Rather, as elaborated below, the power to investigate, enforce subpoenas and punish contempt derives from Congress’s core legislative power.<sup>6</sup>

Although I admire Grove and Devins’s article very much, I find the constitutional analysis that led to their conclusion against congressional litigation in support of the constitutionality of federal statutes unconvincing. Their focus on bicameralism and on Congress’s internal rulemaking disciplinary powers is misguided. This leads them to ignore fundamental principles concerning Congress’s investigative powers and American separation of powers.

While Grove and Devins present illuminating historical and institutional reasons for skepticism about congressional power and competence to defend federal statutes in court, the bulk of their analysis is not grounded in law. Rather, the bulk of the article comprises (potentially persuasive) normative political and historical analysis. Much as some of us would like it to be so, normative analysis is insufficient to establish constitutional doctrine, especially regarding structural and procedural matters. Just because a chamber or office is illsuited for a particular task does not mean that it is unconstitutional for that body or official to exercise the power. The

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<sup>4</sup> *Id.* Although they did not make the argument, an obvious corollary to the bicameralism argument is that litigation by Congress would also violate the Constitution’s Presentment Clause because everything that must be done bicamerally must also be presented to the President. *See* U.S. CONST. art. I, § 7, cl. 3 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States.”). This does not mean that everything that both Houses of Congress do must be presented to the President. Concurrent resolutions are not presented to the President because they do not have the force of law. By contrast, joint resolutions do have the force of law, and like bills, must be presented to the President. *See* JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49, at 5–8 (2007).

<sup>5</sup> Grove & Devins, *supra* note 1, at 576–77.

<sup>6</sup> *See generally* William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781 (2004). Marshall explains that the Supreme Court has affirmed Congress’s power to conduct investigations as “inherent in the legislative process.” *Id.* at 797. The power to investigate would be of no use if Congress could not go to court to enforce its subpoenas and punish contempt.

contrary conclusion would attribute a degree of perfection to the Framers' handiwork that is belied, for example, by the Constitution's support of slavery and its failure to grant women the right to vote or by the Framers' creation of the blatantly undemocratic Senate and method for selecting the President. The Framers did not achieve perfection as constitutional drafters.

This Comment proceeds as follows. Part I addresses the question whether Congress may litigate in defense of the constitutionality of federal statutes. Part I.A refutes the argument that congressional litigation to support the constitutionality of federal statutes violates the Take Care Clause. Part I.B similarly refutes the argument that such litigation by Congress violates the Constitution's requirement of bicameralism. Part I.C raises, and rejects, the possibility that congressional litigation violates the Appointments Clause. Part II addresses Grove and Devins's arguments in favor of congressional power to litigate in support of its investigatory power. While agreeing with Grove and Devins's conclusion in favor of such power, I disagree in this Part with the constitutional basis they present.

## I

### LITIGATION IN SUPPORT OF THE CONSTITUTIONALITY OF FEDERAL STATUTES

Contrary to Grove and Devins's view, there is no constitutional provision that can fairly be interpreted to prohibit Congress or one House of Congress from defending the constitutionality of a duly enacted federal statute. The Constitution's assignment to the President of the duty to "take Care that the Laws be faithfully executed" says nothing about Congress's role in ensuring that duly enacted laws are enforced by the executive branch or evaluated fairly by the federal courts for constitutionality.<sup>7</sup> In fact, because it imposes a duty on the President and is not a grant of power, it cannot be read to support any limitation on Congress. Second, the Constitution's bicameralism (and presentment) requirements apply only to legislative action, and litigation in support of the constitutionality of federal statutes is not legislative action. While these points may not prove that Congress may engage in litigation, they refute Grove and Devins's constitutional bases for rejecting it. For reasons elaborated below, although it is a close case whether Congress has the constitutional power to defend federal statutes in court, ultimately the constitutional arguments in favor of congressional power are stronger than the arguments against.

An additional comment on Grove and Devins's historical analysis is necessary at this point. They present persuasive evidence that

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<sup>7</sup> See U.S. CONST. art. II, § 3.

historically, Congress did not assert the power to litigate the constitutionality of federal statutes until 1983, when the Supreme Court “with virtually no explanation”<sup>8</sup> allowed Congress to intervene in support of the legislative veto at issue in *INS v. Chadha*.<sup>9</sup> How important is this history to understanding the separation of powers implications of congressional litigation in support of the constitutionality of statutes? It is certainly true that historical practice can illuminate the meaning of constitutional text, and Grove and Devins’s evidence establishes that Congress did not attempt to become a party to such litigation between 1789 and 1983 and passed laws during this period that imply a belief that only the executive branch had authority to do so.<sup>10</sup>

This history is not conclusive in this case for the simple reason that the history does not appear to be sufficiently connected to the constitutional provisions upon which Grove and Devins rely. There is no evidence that the reason Congress did not assert litigating authority in the first 194 years under the Constitution was because of its understanding of the meaning of the Take Care Clause or the requirement of bicameralism. It may have reflected Congress’s general understanding of separation of powers, but as the analysis below explains, general principles of separation of powers are not sufficient to prevent Congress from litigating the constitutionality of a federal statute when the executive branch declines to do so.

#### A. The Take Care Clause, the Vesting Clause, and General Principles of Separation of Powers

Grove and Devins initially rely on the Take Care Clause to reject congressional power to litigate in support of federal statutes.<sup>11</sup> This is an *expressio unius* argument—since the Take Care Clause grants the President the power to execute the laws, Congress may not engage in such activity. Their argument is somewhat ironic because the necessity for congressional litigation arises from the President’s decision *not* to take care that a particular law is faithfully executed.<sup>12</sup>

The problem with this aspect of Grove and Devins’s analysis is that the Take Care Clause is not a grant of power to the President

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<sup>8</sup> Grove & Devins, *supra* note 1, at 575.

<sup>9</sup> *See id.* at 583–93 (discussing *INS v. Chadha*, 462 U.S. 919 (1983)).

<sup>10</sup> *See id.* at 578.

<sup>11</sup> *See id.* at 574.

<sup>12</sup> Grove and Devins wisely avoid the thorny issues surrounding whether the President should veto any bill that contains even a single provision that, in the opinion of the President, is unconstitutional, and whether the Take Care Clause must be read in light of the President’s oath to “preserve, protect and defend” the Constitution so that the President also has a duty to not execute unconstitutional laws. U.S. CONST. art. II, § 1, cl. 8. But this controversy is obviously lurking in the background.

(that can then be read to negate power in Congress).<sup>13</sup> Rather, it is phrased as a constitutional duty and is understood as such even by strong advocates of the unitary executive theory.<sup>14</sup> Grove and Devins might have done better to rely on the Vesting Clause of Article II, which vests the executive power in the President.<sup>15</sup> If the Vesting Clause is understood as granting the President the exclusive power to execute the law, the next question would be whether litigation in support of the constitutionality of a federal statute is “execution” of the law. Grove and Devins do not mention Article II’s Vesting Clause in their article and thus ignore substantial constitutional arguments in favor of their position.

Even if they had relied upon the Vesting Clause, Grove and Devins would have been unable to make their case based on the law of separation of powers in the United States. Although advocates of broad executive power would like it to be so understood, the Vesting Clause of Article II has not been relied upon in the case law to deny Congress power to engage in what might be viewed as meddling in executive affairs. Further, under current understandings of the constitutional demarcation of the executive power, there is reason to doubt that defending the constitutionality of a statute is an executive function reserved exclusively to the President.

In order to understand why neither the Take Care Clause nor the Vesting Clause establishes that Congress may not litigate in support of federal statutes, a brief explanation of the general principles of American separation of powers is necessary.<sup>16</sup> The general principle of separation of powers as legal doctrine is very weak in federal law. Rather, separation of powers constraints are contained by and large in the numerous particular structural and procedural provisions of the Constitution. While many of the Constitution’s procedural and structural provisions, such as the Appointments Clause<sup>17</sup> and the Bicameralism and Presentment

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<sup>13</sup> Although Grove and Devins do not mention it, their analysis is similar to dormant or negative Commerce Clause analysis. The Commerce Clause, a grant of power to Congress, is understood as taking power away from the states. Grove and Devins (mis)interpret the Take Care Clause as a grant of power to the President, implying a diminution of the power of Congress.

<sup>14</sup> See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992). They attribute this view to a conversation with my colleague Gary Lawson. See also Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994) (arguing that the Vesting Clause, not the Take Care Clause, is the source of the President’s power but that the Take Care Clause confirms that the executive power has been vested in the President).

<sup>15</sup> Calabresi & Prakash, *supra* note 14, at 583.

<sup>16</sup> The analysis that follows is drawn from Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011).

<sup>17</sup> U.S. CONST. art. II, § 2, cl. 2.

Clauses,<sup>18</sup> are strictly enforced by the federal courts, if no procedural or structural provision applies, the inquiry shifts to a relatively lenient standard asking whether a branch has been unduly hampered in its ability to carry out its constitutionally assigned functions.

The Constitution's Vesting Clauses have not been treated as procedural or structural provisions to be strictly enforced.<sup>19</sup> The only cases in which a Vesting Clause has figured prominently are those involving judicial power under Article III, but even then, protection of Article III jurisdiction pursuant to Article III's Vesting Clause has not been very strict.<sup>20</sup> The Vesting Clause of Article II, which reserves the federal executive power to the President of the United States, is too general and open-ended for the sort of enforcement that characterizes American separation of powers doctrine.<sup>21</sup> There is simply no clear constitutional boundary between the powers of the legislative branch and the powers of the executive branch.

Strict enforcement of the Vesting Clauses of Articles I and II would require courts to determine the nature of each exercise of federal power and then to prohibit the wrong branch from exercising it. This would transform American separation of powers doctrine into a judicial hammer for invalidating all manner of congressional and executive action that appears to belong to the other branch. If the Constitution's Vesting Clauses were important to separation of powers analysis, congressional litigation would be subject to the charge that because litigation is executive by nature, Congress may not litigate. While this sort of analysis may be attractive to those who do not like the administrative state or believe that Congress meddles too much in executive affairs, it does not represent the law of separation of powers in the United States.

Under a proper understanding of separation of powers doctrine in American law, the first question should be whether congressional litigation in support of the constitutionality of federal statutes violates a specific procedural or structural provision of the Constitution. Because there is no such provision, the next question would be whether Congress's action "violates the principle of separation of powers by unduly interfering with the role of the Executive

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<sup>18</sup> U.S. CONST. art. I, § 7, cls. 2 & 3.

<sup>19</sup> See Beermann, *supra* note 16, at 491–94.

<sup>20</sup> See *CFTC v. Schor*, 478 U.S. 833, 857 (1986) (allowing non–Article III adjudication of federal statutory private rights dispute between commodities broker and customer).

<sup>21</sup> Unless a specific structural or procedural provision of the Constitution is involved, restrictions on presidential power are rarely found to violate the separation of powers. A recent exception is *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3147 (2010), in which restrictions on the President's ability to remove members of the Public Company Accounting Oversight Board were held to violate separation of powers.

Branch.”<sup>22</sup> In slightly different language, the correct doctrinal question is whether congressional litigation in support of the constitutionality of federal statutes unduly hampers another branch from performing its constitutional function.

The general separation of powers principle of the Constitution points strongly in favor of congressional litigation in support of the constitutionality of federal law. It does not remotely hamper the executive branch from fulfilling its constitutional function. If anything, presidential refusal to defend the constitutionality of a federal statute hampers Congress’s ability to perform its legislative function. Congress depends on the President to enforce the statutes it passes. The only constitutionally specified remedy Congress has for presidential refusal to enforce or defend its laws is impeachment and removal, a tool that, until the impeachment of President Clinton, has been used only in extremis.

Congressional litigation in support of the constitutionality of a federal statute does not intrude at all on, much less “unduly hamper,” any presidential function. It does not limit the President’s veto power—even if Congress chooses to defend a statute that was passed over a veto, the President lacks the power to again veto a bill that has been repassed by the required two-thirds majority. It does not prevent the President from taking care that the laws are faithfully executed since it occurs only when the President has decided not to defend (or sometimes, not to enforce) a law. It does not prevent the President from honoring the oath of office since it is Congress, not the President, that is defending the law that the President believes is unconstitutional. In fact, the Obama administration’s strategy regarding the Defense of Marriage Act (DOMA), which was the episode that apparently motivated Grove and Devins to write, may have been the worst of both worlds—violating the oath by enforcing an unconstitutional law and violating the Take Care Clause by acquiescing in judicial invalidation without putting up a fight.

Congress’s role in litigating in support of the constitutionality of enacted statutes might be analogized to citizen standing under the False Claims Act, which was approved by the Supreme Court almost fifteen years ago.<sup>23</sup> The analogy is not perfect, but when Congress litigates the constitutionality of a statute, it is advancing a government interest that undoubtedly could be pursued by the executive branch, just as False Claims Act litigants were found to have standing to assert claims that belonged to the federal government. Congress is not attempting to create new legal rights or duties but rather to ensure

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<sup>22</sup> Beermann, *supra* note 16, at 482 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

<sup>23</sup> *See* *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (1999).



that those already on the books are validated against constitutional challenge.

### B. Bicameralism

Grove and Devins almost follow the separation of powers framework spelled out above when they invoke the Constitution's bicameralism requirement as applied in *Chadha*.<sup>24</sup> Citing and quoting *Chadha*, they argue that:

[U]nilateral defense by the House or Senate counsel is deeply problematic. The bicameral structure of Congress is a crucial part of our constitutional scheme of separated powers. As the Supreme Court stated in *INS v. Chadha*, “[W]hen the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action.” “These exceptions are narrow, explicit, and separately justified . . . .”<sup>25</sup>

Because it relies on a particular structural provision of the Constitution, this argument is a step in the right direction. The problem is that Grove and Devins never analyze whether the Constitution's bicameralism requirement applies to congressional litigation. As the *Chadha* Court recognized, bicameralism (and presentment) apply only when Congress takes legislative action. The *Chadha* Court defined legislative action as “action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch.”<sup>26</sup> This is a practical definition, requiring Congress to follow the Constitution's legislative procedures whenever it takes action with legal effects.

Congressional litigation is not legislative action because it does not have the purpose or effect of altering anyone's legal rights either inside or outside the legislative branch. The law was altered when Congress passed the bill and it was either signed into law by the President or repassed by the required two-thirds majority after a presidential veto. The alteration of legal rights and duties occurred when the legislative process was completed. A judgment by a federal court on the constitutionality of a federal statute would also alter legal rights, which the federal courts may do if they meet the procedural and structural constitutional provisions that apply to them,<sup>27</sup> but the mere process of engaging in litigation has no legal effect.

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<sup>24</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>25</sup> Grove & Devins, *supra* note 1, at 627.

<sup>26</sup> *Chadha*, 462 U.S. at 952.

<sup>27</sup> The main procedural and structural provisions that apply to the federal courts are proper appointment of the courts' judges and a case or controversy within Article III jurisdiction.

The *Chadha* Court understood that non-legislative action does not require bicameralism and presentment. In an exceedingly important footnote, the Court rejected the argument that the Attorney General was required to use bicameralism and presentment to alter Chadha's legal rights—when the Attorney General enforces the law, it is not legislation, and bicameralism and presentment simply do not apply.<sup>28</sup> To be sure, this footnote refers to action by the executive branch, not Congress, but the principle remains the same—bicameralism and presentment apply only to legislative action by Congress, not to non-legislative action by anyone.<sup>29</sup>

In sum, bicameralism does not support Grove and Devins's conclusion that Congress may not litigate in support of the constitutionality of federal statutes.

### C. The Appointments Clause

A plausible argument against congressional litigation to defend the constitutionality of federal statutes lies in the Appointments Clause as understood by the Supreme Court in decisions like *Buckley v. Valeo*<sup>30</sup> and *Freitag v. Commissioner*.<sup>31</sup> In those decisions, the Court held that only officers of the United States may exercise significant authority pursuant to the laws of the United States.<sup>32</sup> Members of Congress are not, and cannot constitutionally be, officers of the United States.<sup>33</sup>

If litigation in support of statutory constitutionality involves the exercise of significant authority pursuant to the laws of the United

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<sup>28</sup> *Chadha*, 462 U.S. at 954 n.16. The separation of powers provisions that apply to action by the Attorney General are two: the executive branch must act pursuant to a valid delegation of power by Congress and the officials enforcing the law must be appointed properly, i.e. pursuant to procedures of the Appointments Clause.

<sup>29</sup> Properly understood, this footnote in *Chadha*, combined with nondelegation principles, leaves open the possibility that litigation by the executive branch is an executive function while litigation by Congress is a legislative function, requiring bicameralism and presentment. But that reasoning applies only when the action by Congress meets the definition of legislation. Litigation in support of the constitutionality of federal statutes (or in furtherance of legislative information gathering) does not, by any stretch of the imagination, meet that definition. This is not like rulemaking, where Congress could pass a statute with the very same text as an agency rule, and Congress would be legislating while the agency promulgating the rule would have been executing the law delegating the power to the agency to make the rule. Justice John Paul Stevens's dissent in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), depended on the contrary view, that the nature of governmental action, and not the identity of those taking the action, determine what power is being exercised. *See id.* at 488–89 (Stevens, J. dissenting).

<sup>30</sup> 424 U.S. 1 (1976).

<sup>31</sup> 501 U.S. 868 (1991).

<sup>32</sup> *See Buckley*, 424 U.S. at 143; *Freitag*, 501 U.S. at 919–20.

<sup>33</sup> U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

States, then such litigation by Congress or any subset of Congress is unconstitutional. Bicameralism is irrelevant to this analysis—even if both Houses of Congress agreed to litigate in support of the constitutionality of a federal statute and present their resolution to the President, and even if for some strange reason the President signed such a resolution, if litigation is the exercise of significant authority pursuant to the law, Congress could not do it because the power would be reserved to officers of the United States. This is a stronger constitutional argument against congressional power to litigate than the ones Grove and Devins make.

While I recognize that there are strong arguments to the contrary, in my view, litigation in support of the constitutionality of a statute is not among those activities that can be performed only by officers of the United States. It would be different if Congress initiated litigation by bringing a civil enforcement action or seeking an indictment under a federal statute that the President had decided not to enforce. These are the quintessential functions that may be performed only by officers of the United States. However, even in the context of a particular case, merely arguing in favor of the constitutionality of a statute does not have the sort of effect on private parties that requires action by an officer of the United States. Rather, litigating the constitutionality of a statute is more like the function of providing recommendations without actual legal effect that has been found not to require officer status by the D.C. Circuit.<sup>34</sup> Nothing that Congress does when it briefs and argues a case involves the exercise of significant authority pursuant to the law. If the D.C. Circuit is correct that administrative law judges with the power to issue recommended decisions need not be officers of the United States,<sup>35</sup> then arguing to a court on behalf of the constitutionality of a federal statute clearly does not require officer status.

For these reasons, the Constitution does not support Grove and Devins's conclusion that Congress may not litigate the constitutionality of a federal statute. Disallowing Congress from defending the constitutionality of federal statutes would also be terrible policy because it would allow the executive branch to defy Congress and would authorize the President in effect to unilaterally amend or repeal duly enacted federal laws that depend on executive action for enforcement. As a functional matter, allowing Congress to litigate is, if anything, restorative of the separation of powers. It prevents the President from shirking the duties imposed by the Take Care Clause and it confines the President's veto power to the parameters spelled out in the Constitution.

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<sup>34</sup> *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

<sup>35</sup> *Landry*, 204 F.3d at 1143.

As tempting as it is to rely on this normative line of argument in support of my conclusion that Congress may litigate the constitutionality of federal statutes, it would be improper to do so. This was Justice Byron White's argument in dissent in *Chadha* in support of the legislative veto: the legislative veto restores the proper balance because it allows Congress to control delegations of legislative power to the executive branch and ensures that Congress and the President agree to exercises of delegated power.<sup>36</sup> One lesson of *Chadha* and subsequent decisions is that this form of argument is not consistent with the law of separation of powers under the United States Constitution. When a particular procedural or structural provision of the Constitution applies, the balance among the branches created by alternative arrangements is irrelevant.

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In sum, neither the Take Care Clause nor the Constitution's bicameralism and presentment requirements render unconstitutional congressional litigation in support of the constitutionality of a federal statute. Further, Article II's Vesting Clause and the Appointments Clause do not alter this conclusion, and congressional litigation does not violate general separation of powers norms. Moreover, in a purely normative sense, allowing Congress to litigate the constitutionality of a federal statute when the President has decided not to do so is consistent with separation of powers because it prevents the President from, in effect, vetoing a law that has already become valid and because it supports the President's duty to take care that the laws are faithfully executed.

## II

### LITIGATION IN SUPPORT OF THE LEGISLATIVE PROCESS

Grove and Devins are correct that Congress has the power to go to federal court to enforce its subpoenas and punish contempt of Congress, although they have not accurately explained why that does not violate the separation of powers. The case against this power may at times appear stronger than the argument against congressional power to litigate in support of federal statutes because congressional exercise of this power, in some circumstances, threatens the functioning of the executive branch. Nevertheless, I agree with Grove and Devins that Congress may litigate to enforce its subpoenas and punish contempt, and it may do so unilaterally without presenting any resolution to the President.

Grove and Devins rely primarily upon Congress's rulemaking and disciplinary powers for their conclusion that each House of Congress may independently litigate in support of congressional

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<sup>36</sup> *INS v. Chadha*, 462 U.S. 919, 972-73 (1983) (White, J., dissenting).

investigations. Article I, section 5, clause 2 provides: “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>37</sup> In their view, under this provision of Article I:

Each chamber may even hold nonmembers in contempt for failing to cooperate with an investigation. . . . Article I expressly allows each chamber to act unilaterally in this context. To make this Article I power effective, each chamber must have the authority to litigate any matters arising out of its investigations, including by enforcing subpoenas. . . .

. . . .

The power of Congress to seek and enforce informational demands, including the power to punish for contempt, arises out of the power of Congress to investigate.<sup>38</sup>

The problem for Grove and Devins here is that the provision of Article I upon which they rely refers exclusively to internal congressional matters. Article I makes clear that each House of Congress may independently make internal rules (without bicameralism or presentment) and that Congress may punish or expel its members without going to court. If this provision grants “each chamber” the power to “hold nonmembers in contempt for failing to cooperate with an investigation,” as Grove and Devins claim, it is only with regard to disciplinary investigations of members of Congress, not in support of investigations in aid of legislation. The power to investigate and punish the misconduct of its members does not give Congress the power to litigate to enforce subpoenas against executive branch officials or private parties when the investigation is not related to internal discipline.

Each House’s power to investigate matters not related to internal discipline and to litigate in support of such investigations derives not from the power of each House to make and enforce rules but rather from Congress’s core legislative power.<sup>39</sup> Congress’s power to legislate would be seriously hampered if it had to depend on the executive branch to gather the information necessary to make

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<sup>37</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>38</sup> Grove & Devins, *supra* note 1, at 574–75, 597–98 (footnotes omitted).

<sup>39</sup> See Marshall, *supra* note 6, at 797 (citing, *inter alia*, *Watkins v. United States*, 354 U.S. 178, 187 (1957)); see also TODD GARVEY & ALISSA M. DOLAN, CONG. RESEARCH SERV., RL34097, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 4 (2014) (“The inherent contempt power is not specified in a statute or constitutional provision, but has been deemed implicit in the Constitution’s grant to Congress of all legislative powers.”).

informed legislative decisions. This helps explain, as Bill Marshall reports, why the British Parliament's power to investigate government operations was well established by 1689, and was mimicked by the Massachusetts legislature by 1722.<sup>40</sup> While this history cannot establish the meaning of the Constitution of the United States, it illuminates the general understanding of the powers of legislatures in the British tradition.<sup>41</sup>

When a congressional investigation is directed against the executive branch, the case against this congressional power is stronger than the case against congressional power to litigate in support of the constitutionality of federal statutes. Congress's power to enforce its subpoenas and punish contempt is likely to present a much more serious threat to general separation of powers norms than congressional litigation in defense of the constitutionality of duly enacted federal statutes. Congress's use of its subpoena power to investigate the executive branch, as Justice Antonin Scalia so eloquently explained in his 1988 dissent in *Morrison v. Olson* (the independent counsel case),<sup>42</sup> threatens the ability of the President to resist congressional overreaching. The saving grace in this process is that a federal court can deny enforcement if the executive presents a valid legal basis for non-enforcement (or a court can grant a petition for a writ of habeas corpus if Congress seeks to punish contempt without going to court<sup>43</sup>). Although the threat to the executive branch remains strong when the President has good, but not legally sufficient, reasons to resist, a judicial determination that the President's reasons are not legally sufficient is likely to reflect a judgment that, in the particular case, the President's interest in preserving confidentiality is outweighed by Congress's legitimate interest in information gathering for legislative purposes (or for the potential exercise of its impeachment and removal powers). This should be a sufficient safeguard against congressional litigation that might "unduly hamper" the operation of the Executive Branch.

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<sup>40</sup> See Marshall, *supra* note 6, at 785–86.

<sup>41</sup> In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the Supreme Court explicitly rejected Parliament's powers as the model for the powers of Congress to investigate and punish contempt. It did, however, recognize such powers as "necessary to enable either House of Congress to exercise successfully their function of legislation." *Id.* at 189. This power is limited to matters that might conceivably lead to the enactment of legislation and cannot be used merely to pry into people's private affairs. *Kilbourn* may no longer be good law for some of its points, but "the case continues to be cited for the proposition that the House has no power to probe into private affairs." See GARVEY & DOLAN, *supra* note 39, at 10.

<sup>42</sup> See *Morrison v. Olson*, 487 U.S. 654, 712–15 (1988) (Scalia, J., dissenting).

<sup>43</sup> See GARVEY & DOLAN, *supra* note 39, at 11 & n.83 (citing *Marshall v. Gordon*, 243 U.S. 521 (1917); *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970); Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399, 400 n.3 (1962)).

Congressional investigation of private parties presents less of a separation of powers problem because it does not threaten the integrity of the executive branch. The argument against congressional action aimed at private parties depends instead on the argument that subpoena- and contempt enforcement constitutes the exercise of significant authority pursuant to the law and thus may be conducted only by officers of the United States. This argument does not succeed because Congress is not enforcing any federal law but rather is acting in furtherance of its core constitutional legislative function. It would cripple Congress's ability to legislate effectively if it had to depend on the executive branch for information gathering concerning private activities.

I recognize that a powerful argument against this conclusion may be made based on *Chadha* and the Appointments Clause principles discussed above. When Congress seeks to enforce a subpoena or punish contempt, it is certainly affecting the legal rights and duties of persons outside of the legislative branch, which is the *Chadha* Court's definition of legislative action. It may also appear to be exercising significant authority pursuant to the laws of the United States, especially where contempt of Congress is statutorily defined. Information must be turned over and imprisonment or fines may be imposed as penalties for contempt. While Congress could probably not impose penalties legislatively, because such action would violate the prohibition against bills of attainder, *Chadha* counsels against unilateral congressional action with effects outside of the legislative branch.

Despite the power of these arguments, Congress's need for information in furtherance of its legislative function counsels against reading *Chadha* or the Appointments Clause this way. In *Chadha*, the House of Representatives was attempting to unilaterally alter *Chadha*'s legal rights under federal statutes.<sup>44</sup> When a subpoena is enforced or contempt is punished, it is pursuant to the general legislative powers of Congress, not part of an attempt to alter subjects' legal rights. Further, any penalty imposed by Congress can be tested in federal court, for example by a petition for a writ of habeas corpus if the subject of an investigation is physically detained.<sup>45</sup> Subpoena enforcement and contempt punishment should thus not be viewed as among those congressional actions to which bicameralism and presentment apply. As far as subpoena enforcement is concerned, the long history of legislative enforcement of its information-gathering tools and the availability of a judicial check counsel against reading the Appointments Clause to prohibit

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<sup>44</sup> *INS v. Chadha*, 462 U.S. 919, 956–57 (1983).

<sup>45</sup> *See Sky*, *supra* note 43, at 400 n.3; GARVEY & DOLAN, *supra* note 39, at 11.

congressional enforcement litigation.<sup>46</sup>

In sum, while Grove and Devins are correct that Congress has the power, without bicameralism and presentment, to litigate in support of congressional investigations, their focus on bicameralism leads them astray. This power is not derived from Congress's unicameral power to make its own rules and punish its members. Rather, it is derived from Congress's core legislative power, the fact that no procedural or structural provision of the Constitution prohibits congressional litigation to enforce subpoenas and punish contempt and the fact that congressional enforcement does not threaten to "unduly hamper" the functioning of any other branch of government.

#### CONCLUSION

Grove and Devins have presented powerful normative and historical arguments against congressional litigation to defend the constitutionality of federal statutes, but they have not provided sufficient support for their conclusions in the Constitution itself. Bicameralism simply does not apply to litigation in support of the constitutionality of federal statutes because such litigation is not an exercise of the legislative function as defined in *Chadha*. Because bicameralism or any other procedural or structural provision of the Constitution does not apply, the primary separation of powers standard that applies to this issue is whether congressional litigation in defense of the constitutionality of federal statutes threatens the ability of another branch to fulfill its constitutional function. Here the answer is easy—litigation does not threaten any of the executive branch's powers, and arises only when the executive branch shirks its duty to take care that the laws are faithfully executed. Any threat to the executive branch is further minimized by the fact that Congress cannot do anything unilaterally. Rather, only a court judgment can preserve the constitutionality of a federal statute.

Grove and Devins correctly conclude that Congress has the power to litigate to support its subpoenas and punish contempt of Congress but not because, as they argue, Article I grants each House unilateral power to make rules and discipline members. Rather, this power is derived from Congress's core legislative function, which would be crippled if it had to rely upon the executive branch to litigate disputes concerning information gathering and contempt. Again, because no structural or procedural provision directly addresses Congress's powers here, the question becomes whether congressional action unduly hampers the ability of another branch to

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<sup>46</sup> See Marshall, *supra* note 6, at 785–88 (recounting history of legislative investigatory powers dating back to 1689 in Parliament).



function. Although when the subject of Congress's investigation is the executive branch the case here is closer than whether Congress may litigate in support of constitutionality, ultimately Congress's interest in effective information gathering for legislative purposes outweighs the threat to the executive branch posed by enforcement of subpoenas and contempt penalties against executive branch officials. Here again, judicial involvement is reassuring. When Congress litigates to enforce a subpoena or punish contempt, the executive branch or other subject can turn to a federal court for protection against overreaching.

Happily, constitutional law coincides with the most normatively desirable outcome. Disabling Congress from litigating in support of the constitutionality of federal legislation would in effect greatly expand the scope of the President's veto power to include all laws ever passed, and it would shield that power from a two-thirds congressional override. Congress's only remedy would be impeachment and removal, which is not a process the country should go through too often. Rather, allowing Congress to step in when the President decides not to defend the constitutionality of a federal law allows the President to remain true to the presidential oath of office while enabling an appropriate process for determining whether the President's constitutional concerns are well-founded.

Finally, allowing Congress to litigate to enforce its information gathering tools is vital to maintaining an effective legislative process. It could cripple Congress's ability to produce well-informed legislation if it had to depend on a potentially hostile executive branch to gather information. A court should not stretch to read the Constitution to provide the contrary result.