

“Wanted Dead or Alive”: William P. MacCracken, Jr. and Contempt of Congress

After a game of cat and mouse in February 1934 that kept the entire country amused, the first federal aviation regulator, William P. MacCracken, Jr., became the last person in the United States to be imprisoned for contempt of Congress.



William P.
MacCracken, Jr.

After leaving office as the first Assistant Secretary of Commerce for Aeronautics in October 1929, MacCracken returned to private law practice where he represented several of the major airlines as a private attorney. He also served as the secretary of the American Bar Association from 1925-1936.

In April 1930, Congress passed the McNary-Watres Act, which gave the Postmaster General broad regulatory control over the award of contract mail routes. Postmaster General Walter Brown asked MacCracken to chair a series of meetings, popularly known as the Spoils Conference, to decide which airlines would be awarded air mail routes. The majority of the airmail contracts went to the three major airlines at the time: Boeing Air Transport; Transcontinental Air Transport; and Robertson Aircraft Corporation.

Many of the smaller operators complained the contracts had been unjustly awarded to the larger airlines. To address those concerns, Senator Hugo Black (D-AL, later served as a U.S. Supreme Court Justice) led an investigation committee that called into question the legality of Brown's decisions. On Thursday, February 1, 1934, Black's committee issued a subpoena for MacCracken's records regarding the air mail contracts. MacCracken refused to produce files, citing attorney-client privilege unless his clients waived the privilege. Black argued that MacCracken represented the airline industry more as a lobbyist, not an attorney, and therefore he could not claim attorney-client privilege. When MacCracken did not turn over the documents,

Black held him in contempt of Congress and ordered Senate sergeant at arm Chesley Journey to arrest him.



Chesley Journey, right, reads Senate arrest warrant to William MacCracken, Jr., while the press looks on.
Courtesy: George Mason University Archives

Journey arrested MacCracken in his office in the National Press Building the following day. He took his prisoner back to the Senate and read the order of arrest with the press in attendance.

MacCracken remained free on the personal bond of his attorney, Frank J. Hogan, but was required to appear before the Senate on Monday, February 5. In the meantime, MacCracken's law office had

contacted their clients and asked for waivers to provide pertinent files to the committee. All provided those waivers within a week.

While Black's committee continued its hearing over the weekend, MacCracken sat in a private Senate gallery watching the proceedings. On Sunday, Northwest Airways Vice President L. C. Brittin, Western Air Express President Harris Hanshue and his secretary Gilbert Given testified before the committee. Brittin admitted he had gone to MacCracken's office with the permission of MacCracken's partner, Frederic Lee, and had destroyed some of his papers. (Lee would later serve as Civil Aeronautics Administration administrator from April 27, 1953 - December 10, 1955.) Gilbert Givvin, secretary to Western Air Express President Harris Hanshue also admitted to removing "personal" correspondence from MacCracken's files.

Fearing more files would be taken from MacCracken's law office, Black ordered Chesley Journey to take into custody all of the files in MacCracken's office relating to the mail contracts. Journey removed five file cabinets from MacCracken's office and placed them under guard by

Department of Justice agents in the Senate Caucus room. In a search of the building's trash room Journey discovered a bag of trash from MacCracken's office with torn up correspondence. As it turned out, Brittin tore up 47 documents while in MacCracken's office and threw them in the office wastebasket. Pieced back together by committee staffers, 43 of those documents dealt directly with aviation matters and/or airmail subsidies.



Senator Hugo Black

On Monday, February 5, the Senate ordered a postponement of MacCracken's appearance until Friday, since the Senate needed to debate an important appropriations bill. When Black's committee reconvened on Friday, February 9, Vice President Garner received a letter from MacCracken. MacCracken wrote that he would not appear on the grounds that the Senate's functions were legislative and not judicial. The court, he said "has held that punishment for completed acts is a judicial function . . . To appear at the bar of the Senate would be to give assent to the powers that do not constitutionally belong to it." He continued that appearing at the senate trial would be a "violation of the rights guaranteed to me by the constitution."

The Senate quickly adopted a resolution ordering MacCracken to be arrested and brought before the bar of the Senate for trial. The bench warrant for his arrest, signed by Vice President John N. Garner, called for MacCracken's appearance "dead or alive." Journey left immediately to arrest MacCracken at his home, but did not find him at his home, in his office, or in his attorney's office. After an overnight pause, the hunt for MacCracken continued Saturday morning. On Saturday morning, with reporters camped on her lawn, MacCracken's wife said she did not know the whereabouts of her husband. When asked if he had been home Friday night, she responded "I haven't any idea."

MacCracken had gone into hiding while his attorney, Frank Hogan, sought a means to protect his client. Hogan wanted to have MacCracken arrested in the District of Columbia Supreme Court so that a writ of habeas corpus could be signed before MacCracken could be taken before the Senate. Such a writ would require MacCracken be brought before a judge or court before being detained or imprisoned by the Senate. With the location of McCracken unknown, the Senate postponed a decision in the contempt proceedings until Tuesday.

Once the Senate adjourned for the weekend, MacCracken appeared at Journey's apartment on Saturday evening and tried to turn himself in. Journey's maid allowed MacCracken into the apartment where a surprised Journey informed MacCracken he did not have the Senate's arrest warrant in his possession. He would not have it until Monday at noon when he went back into his office. MacCracken refused to leave the residence.

Apparently not knowing Journey did not have the writ with him, Hogan immediately went to the home of Justice Daniel O'Donoghue, a justice of the District of Columbia Supreme Court, and said his client had been placed under arrest by the Senate. In applying for the writ, Hogan explained the Senate, by attempting to bring his client before its bar to punish him, was an invasion by the executive branch of judicial functions and was an infringement on the rights of MacCracken as a citizen. Hogan obtained the writ returnable Monday at 10 am in the District of Columbia Supreme Court.

O'Donoghue sent Deputy Marshal John Clarkson to Journey's home with the writ. Clarkson demanded Journey release McCracken to his custody. Journey replied he could not hand McCracken over because he had not arrested him. He did not plan to do that until the Senate was back in session on Monday. McCracken, however, told Clarkson he believed he was indeed in custody and planned to stay with Journey as his prisoner. As one reporter explained, "The Senate

wanted MacCracken to surrender while it was in session so that he could be hurried to trial.

MacCracken wanted to surrender when the Senate was not in session so that he could be freed upon a writ of habeas corpus.”

MacCracken, insisting he was under arrest refused to leave the Journey apartment. As one journalist reported a “flabbergasted Mrs. Journey . . . excitedly put her five room apartment in order for her unexpected week-end guest . . . MacCracken in a dark blue business suit said he was sorry to bother her but since her husband had arrested him he felt honor bound to stay their tonight, tomorrow, and . . . until 10 o’clock Monday morning” when Journey returned to his Senate office for the writ. Journey later reported “I said nothing about kicking him out, because I thought that was not the dignified thing to do.” Journey and MacCracken, long-time friends, posed for press photographs before retiring for the night.

On Sunday Journey informed MacCracken he needed to meet with Senator Black and United States Attorney Leslie Garnett in the Senate Office Building. Still claiming his was Journey’s prisoner, MacCracken walked to the office building with Journey. MacCracken waited outside the office while Journey attended his meeting. Afterwards, MacCracken left the building with his “jailer.” They made small talk for a while on the sidewalk. Gurney said, “Well Bill as you know you are not under arrest. I have never read the warrant to you and your appearance at my apartment last night, while we were glad to see you, did not constitute a surrender to arrest.” Journey suddenly jumped into Garnett’s car and locked the doors as the car sped off leaving MacCracken on the sidewalk. Once home, Journey locked his apartment door and instructed his maid not to let anyone in. As a reporter explained tongue in cheek, “MacCracken disappeared into the night and all hands refused to say where he had gone. It was deemed likely that he might be prowling through Capitol Park, looking and looking for the fugitive jailer.”

At 10 am on Monday, Garnett asked Judge O'Donoghue to withdraw the writ of habeas corpus. He argued that the writ was invalid because McCracken had not been legally arrested when he issued it. Hogan argued that MacCracken had presented himself for arrest in good faith and said the judge's decision "would make it unsafe for any citizen to bring a question of law before the court." The judge agreed with Garnett and ordered McCracken pay a fine of \$100 for contempt of district court, or serve 24 hours in jail. MacCracken paid the fine, after which Journey pulled out the Senate arrest warrant, took him into custody, and escorted him to the Senate bar accompanied by several capitol police officers. With MacCracken officially under Senate arrest, O'Donoghue immediately issued a second writ of habeas corpus. As long as MacCracken was in the Senate chamber, however, the writ could not be delivered.

The Senate immediately began the trial of MacCracken and his co-defendants on Monday afternoon. Black, however, soon postponed the trial until the next morning, because the senators were needed on the Senate floor. Once Journey left the Senate chambers with MacCracken, two deputy marshals, John Clarkson and Stephen Callahan, forced their way through a throng of spectators, newspaper reporters, and photographers, and served the new writ of habeas corpus in Journey's office.

The habeas corpus writ required Journey to bring MacCracken back to O'Donoghue's chambers. Journey complied and when he and his prisoner arrived, O'Donoghue said he would rule on the legality of MacCracken's arrest, giving each side 15 minutes to prepare their cases. Mr. Hogan's defense lasted approximately an hour. District Attorney Garnett, representing the Senate, laid out his case in 15 minutes. The judge ruled immediately the arrest was legal and dismissed his writ. Journey then took MacCracken, under arrest, to the Willard Hotel for the night.

As the *Chicago Tribune* reported on the day's events "William P. MacCracken slept tonight in senate custody – slept in the watchful care of his trusty bunkmate, sergeant at arms Chesley W. Jurney, following a day of such legal and legislative burlesque as seldom, if ever, has graced the pages of congressional or court records."

As the country waited for MacCracken's trial to begin on Tuesday, February 14, many contemplated what the outcome might be. Reporters pointed out that MacCracken's case "is complicated by the fact that resentment among the senators is high as the result of tactics on the part of himself and Frank J. Hogan, his counsel. The whirligig of the last few days' events, which found MacCracken in and out of arrest and playing tag with the sergeant at arms, had caused more than one senator to favor making an example of MacCracken."

When the trial resumed on February 14, Hogan argued that the charges against his client be dropped. He claimed the Senate did not have jurisdiction to try and convict his client because MacCracken had purged himself of all charges when he turned over the required documents to Congress. The Senate went into closed session to deliberate the contempt charges against MacCracken and his co-defendants, Harris Hanshue, Gilbert Givvin, and L. C. Brittin. The Senate adjourned for the day without a decision. Jurney took MacCracken back to the Willard Hotel for the night. The other defendants were allowed to return home until the Senate met again the following day.

The Senate handed down its decision in open session on February 15. It found MacCracken and Brittin guilty of contempt of Congress and acquitted Hanshue and Givvin. The votes to convict MacCracken and Brittin followed party lines with most republicans voting in favor of convictions and all Democrats and progressive Republicans voting against. The Senate sentenced MacCracken and Brittin to 10 days in the District of Columbia jail.

Brittin opted not to appeal and began serving his ten-day jail sentence, saying he had lost his job with the airline company and did not have the money to post bond. MacCracken was released on a \$5,000 bond pending appeal. MacCracken appealed his conviction to the District of Columbia Court of Appeals who, on July 9, 1934, reversed the earlier decision of the District of Columbia Supreme Court. The appeals court ruled “the United States Senate has no power to sentence anyone for a past contempt.”

On September 1, 1934, U.S. Attorney Garnett asked the U.S. Supreme Court to review the court of appeals decision. In his petition, Garnett said “the case involves a question of much importance affecting the power and authority of the senate of the United States to deal with a contumacious witness.” On February 4, 1935, the Supreme Court ruled in the Senate’s favor stating Congress had the right to punish for contempt. In its unanimous decision the justices gave MacCracken 25-days to appeal its decision. It confirmed the right of Congress to investigate, subpoena witnesses and evidence, and punish anyone who willfully thwarts a congressional committee’s search for facts. Deciding not to ask for a review of the case, on February 26, 1936, MacCracken began serving his 10-day sentence in the District of Columbia jail.

For information on MacCracken’s tenure as the Assistant Secretary of Commerce for Aeronautics see: https://www.faa.gov/about/history/milestones/media/The_First_Federal_Regulator_for_Aviation.pdf