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Constitutional Law-Contempt of Senate

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Constitutional Law—Contempt of Senate. Certiorari to the United States Court of Appeals for the District of Columbia to review a judgment reversing a judgment of the Supreme Court of the District of Columbia dismissing a petition for a writ of habeas corpus by one who had been arrested by the Sergeant-at-Arms of the Senate of the United States. The petitioner, William P. MacCracken, Jr., was summoned to appear before the Special Committee of the Senate for the investigation of all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail, and to bring all books and papers relating thereto. He appeared but refused to produce some of the papers under the claim of privileged communications between clients and himself. The Committee decided that all papers should be produced despite the claims of privilege, but meanwhile one of the clients with the permission, and another client without the permission of the petitioner, but with the permission of his partner, took some of the papers relating to the contracts and destroyed part of them. The petitioner was then cited for contempt. The petitioner contends that the Senate is without power to arrest him with a view to punishing him, because the act complained of was the "past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which had been undone long before the arrest". Held, the Senate may punish for past contempt in failing to produce evidence, notwithstanding the evidence was thereafter produced or its production has become impossible.¹

The power of Congress to punish for contempt is primarily a matter of historical development rather than one of Constitutional interpretation. The Constitution of the United States is silent upon the subject of punishment for contempt except as it gives each house power "to punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member", but Congress has in numerous instances acted upon the theory that it has such an auxiliary power.²

The English House of Commons set the example by first exerting the contempt power and the Colonial Assemblies which were modeled thereon instituted the practice in America. Through legislative custom the contempt power came to be recognized as an auxiliary of the legislative power, and was conferred without specific provision as a matter of course on all legislative bodies created in early American history. The practice of the Continental Congress and the State and National Legislative Assemblies fully demonstrate this growth.³

¹ *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 405.

² Willis, *Power of Legislative Bodies to Punish for Contempt* (1927), 2 Ind. L. J. 615.

³ Potts, *Power of Legislative Bodies to Punish for Contempt* (1926), 74 U. Pa. L. Rev. 828; Willis, *Power of Legislative Bodies to Punish for Contempt* (1927), 2 Ind. L. J. 615.

Prior to 1927 there were four decisions of the United States Supreme Court upon the question of the contempt powers of Congress,⁴ namely, *Anderson v. Dunn*,⁵ *Kilbourn v. Thompson*,⁶ *In re Chapman*,⁷ and *Marshall v. Gordon*.⁸ By these decisions the Supreme Court "prior to 1927 had upheld the contempt powers of Congress so far as they related to keeping order among its own members, compelling their attendance, and protecting them from the assaults or disturbances of others by physical means, although apparently not if by slander or libel, and so far as they related to the discharge of such judicial-like functions as the determination of election cases and impeachment charges".⁹

In 1927, in the case of *McGrain v. Daugherty*,¹⁰ the Supreme Court recognized and upheld the power of Congress to punish for contempt in relation to the law-making function. Although Congress does not possess any general power to inquire into private affairs and to compel disclosures, it does possess the power to exact information in aid of the legislative function, with process to enforce it as an essential and appropriate auxiliary to the legislative function.¹¹ Thus, at the present time the Supreme Court has sustained the contempt power of Congress not only with respect to its members but with relation to investigation as the basis of intelligent law-making.

Founded upon necessity, and being an inherent part of the legislative power, the contempt power was unaffected by the introduction of written constitutions recognizing separation of powers and dual form of government. The legislative bodies of each government could use freely the contempt power as an aid to the proper performance of such powers as were assigned it by constitutional arrangement, and where the legislature has jurisdiction the courts will not interfere. The contempt power can be used to aid any function of the legislature, defensive, judicial, legislative, or inquisitorial.¹² But, having the power to punish for contempt, the legislature must have jurisdiction. As the Court said in the principal case, "No act is so (for contempt) punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be a lack of power, because, as in *Kilbourn v. Thompson*,¹³ there is no legislative duty to be performed; or because, as in *Marshall v. Gordon*,¹⁴ the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has been removed, or that its removal has become impossible is without legal significance".¹⁵

The petitioner in the principal case makes three contentions which question the jurisdiction of the Senate to punish him for contempt. His first contention is that the power to punish for contempt may never be exerted, in the case of a private citizen, solely for punishment. His second is that the

⁴ Willis, *Power of Legislative Bodies to Punish for Contempt* (1927), 2 Ind. L. J. 616.

⁵ 6 Wheat. 204 (1821).

⁶ 103 U. S. 168 (1880).

⁷ 166 U. S. 661 (1896).

⁸ 243 U. S. 521 (1917).

⁹ Willis, *Power of Legislative Bodies to Punish for Contempt* (1927), 2 Ind. L. J. 617.

¹⁰ 273 U. S. 135 (1927).

¹¹ Willis, *Power of Legislative Bodies to Punish for Contempt* (1927), 2 Ind. L. J. 618.

¹² Potts, *Power of Legislative Bodies to Punish for Contempt* (1926), 74 U. Pa. L. Rev. 828.

¹³ 103 U. S. 168 (1880).

¹⁴ 243 U. S. 521 (1917).

¹⁵ *Jurney v. MacCracken*, Jr. (1935), 79 L. Ed. 408.

enactment in 1857 of a statute making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor divested Congress of the power to punish for such. His third is that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted.

The first contention is disproved by the history of the legislative exercise of the contempt power; the many cases wherein Congress punished for contempt because of bribery or assault are all examples of the fact that Congress has the power to punish a private citizen for a past and completed act solely for punishment.¹⁶ The second contention is refuted by *In re Chapman*,¹⁷ wherein it was recognized that the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment, and by the fact that Samuel Houston was indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House.¹⁸ The third contention is briefly disposed of by the Court on the ground that it does not affect the question of jurisdiction or power of the Senate to punish for contempt, but is merely a factor to be considered with respect to the guilt or innocence of the petitioner and as such is within the province of the Senate.¹⁹

The most important phase of the principal case and that with which the Court was most concerned is the power of the Senate (and of legislative bodies) to punish for contempt as punishment and not for the purpose of removing an obstruction to the legislative process. As said heretofore, the contempt power is a necessary and inherent part of the legislative power²⁰ and may be exercised whenever some function of the legislature has been obstructed. The fact that the obstruction no longer exists is without legal significance.²¹ The House of Commons has punished contumacious witnesses under circumstances indicating that punishment was the sole object.²² In view of its historical derivation of the contempt power from that body, it is only logical that Congress may exercise it to the same extent as the House of Commons. Further, there is a well established presumption in favor of the legality and regularity of official action, especially where such action is that of a coordinate branch of the government. This presumption is usually recognized by the courts with respect to the exercise of the contempt powers of legislative bodies.²³ Thus, the decision in the principal case is a recognition and an endorsement by the Supreme Court of the exercise of the legislative power to punish for contempt even though the contumacious act is completed and the legislative function no longer obstructed.

H. P. C.

Embezzlement—Required Application of Section More Specifically Applying to the Accused. Appellant was president of a retail music house and contracted with the H. Sales Co. for it to consign pianos to appellant's com-

¹⁶ Willis, Power of Legislative Bodies to Punish for Contempt (1927), 2 Ind. L. J. 615; *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 408, Notes 4, 5.

¹⁷ 166 U. S. 661 (1896).

¹⁸ *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 410, Note 10.

¹⁹ *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 410.

²⁰ Potts, Power of Legislative Bodies to Punish for Contempt (1926), 74 U. Pa. L. Rev. 828.

²¹ *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 408.

²² *Jurney v. MacCracken, Jr.* (1935), 79 L. Ed. 409, Note 7.

²³ Potts, Power of Legislative Bodies to Punish for Contempt (1926), 74 U. Pa. L. Rev. 815.