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CONSTITUTIONAL LAW - POWER OF CONGRESS TO PUNISH FOR CONTEMPT - POWER TO PUNISH FOR COMPLETED ACTS

CONSTITUTIONAL LAW — POWER OF CONGRESS TO PUNISH FOR CONTEMPT — POWER TO PUNISH FOR COMPLETED ACTS — Petitioner was attorney for certain air lines and during the course of the "Air Mail" contracts investigation in the Senate in 1934 was ordered to produce certain correspondence. He delayed, claiming an attorney's privileges, and either he or his partner allowed clients to remove certain of the papers asked for from his files. Some of the papers were later returned by the clients, and others were destroyed. Petitioner was committed for contempt of the Senate and brought habeas corpus proceedings. *Held*, (1) neither the fact that an obstruction of legislative process has been removed or that its removal has become impossible, (2) nor the fact that the same act was also a misdemeanor punishable in the courts, will prevent commitment for contempt; (3) whether under the facts petitioner was actually guilty or had purged himself of contempt, is for the Senate, not the courts, to determine. *Jurney v. MacCracken*, (U. S. 1935) 55 Sup. Ct. 375; reversing *MacCracken v. Jurney*, (App. D. C. 1934) 72 F. (2d) 560.[1]

As the Court itself seemingly acknowledges,[2] this decision apparently runs counter to previous dicta on the point, particularly the language in *Marshall v. Gordon*.[3] Under the decision in that case the general theory of the law of legislative contempt appeared to be that the power existed only for the protection of Congress or to remove an existing obstruction to the legislative process, and there was no power whatsoever in Congress to inflict punishment as such.[4] Thus, the power to commit till the end of the session for disorder in the Houses, or attempts to bribe members is clearly sustainable under the protection theory, the purpose being to prevent immediate repetitions of such occurrences by the same individual.[5] And where Congress is conducting a legitimate investigation, it clearly has the power to remand a recalcitrant witness to jail in order to compel him to testify or produce papers.[6] It is difficult to understand, however, how the

[1] For another note on this case, substantially in accord with the writer's views, see 48 HARV. L. REV. 848 (1935).

[2] 55 Sup. Ct. 375 at 379.

[3] 243 U. S. 521, 37 Sup. Ct. 448, L. R. A. 1917F 279, Ann. Cas. 1918B 371 (1917).

[4] 243 U. S. 521 at 542.

[5] See Potts, "Power of Legislative Bodies to Punish for Contempt," 74 UNIV. PA. L. REV. 691, 780 at 781-782 (1926); Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 159 (1926); Marshall v. Gordon, 243 U. S. 521 at 545, 37 Sup. Ct. 448 (1917). Anderson v. Dunn, 6 Wheat. (19 U. S.) 204, 5 L. ed. 242 (1821), the earliest pronouncement in the United States Supreme Court on the subject, is thought to have been a case of an attempt to bribe a member. See EBERLING, CONGRESSIONAL INVESTIGATIONS 234 (1928).

[6] See Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377 (1880); McGrain v. Daugherty, 273 U. S. 135, 47 Sup. Ct. 319, 50 A. L. R. 1 (1927); Shull, "Legislative Contempt — an Auxiliary Power of Congress," 8 TEMPLE L. Q. 198 (1934).

present case can be fitted into either of these categories. It certainly cannot be justified as an attempt to coerce a recalcitrant witness, for as to certain papers which petitioner had at first refused to produce, he later produced them; and as to the remaining papers, they were out of his control so that it was impossible for him to produce them, and no amount of coercion could bring about the desired result.[7] The Court, however, seems to place its decision on the ground that such a power as was here exercised is necessary for the protection of the legislature, apparently drawing an analogy from the cases of disorder in the Houses and assaults on and attempts to bribe members. It is submitted, however, that the only justifiable basis for commitment in such cases is not the punishment of the offender — under our system of government that task belongs to the courts [8] — but the prevention of a similar disturbance in the immediate future. This is made more apparent when it is remembered that courts usually recognize that such commitments cannot extend beyond the life of the session.[9] But in the present case there was no likelihood of a recurrence of the obstruction. Before the commitment took place, the defendant had produced all the papers required of him which he could possibly produce, and his usefulness to the Senate for this purpose had ceased. It thus appears that the commitment was pure punishment, savoring neither of coercion of the witness nor protection against future violations of the dignity of the Senate. In view of the manner in which the investigating power of Congress is often abused for partisan purposes or to gain publicity for certain members, it is submitted that in cases such as this the courts should demand that the offender be turned over to them for punishment if the occasion demands it.

W. W. K.

[7] The opinion of the Court of Appeals of the District of Columbia in the present case contains a good exposition of this point. MacCracken v. Jurney, (App. D. C. 1934) 72 F. (2d) 560.

[8] Marshall v. Gordon, 243 U. S. 521 at 546-548, 37 Sup. Ct. 448 (1917); EBERLING, CONGRESSIONAL INVESTIGATIONS 318 (1928); Potts, "Power of Legislative Bodies to Punish for Contempt," 74 UNIV. PA. L. REV. 781 (1926).

[9] Anderson v. Dunn, 6 Wheat. (19 U. S.) 204 at 231, 5 L. ed. 242 (1821); Marshall v. Gordon, 243 U. S. 521 at 542, 37 Sup. Ct. 448 (1917). See EBERLING, CONGRESSIONAL INVESTIGATIONS 341 *et seq.* (1928).