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CONTEMPT–INJUNCTIONS—Federal Civil Contempt Decree Orders Deputy Sheriff To Resign From Office—*Lance v. Plummer**

During the summer of 1964, a federal district judge issued an injunction prohibiting various St. Augustine, Florida organizations and other persons with notice of the injunction from harassing or intimidating Negroes who were seeking motel or restaurant accommodations.[1] Appellant Lance, an unpaid volunteer deputy sheriff, was not a member of any of the enjoined organizations, but he had actual notice of the order. Nonetheless, six days after the injunction was issued, he engaged in activities designed to intimidate a Negro citizen.[2] In a subsequent civil contempt action arising from these activities, the federal district judge, asserting jurisdiction over him because of his actual knowledge of the injunction, found appellant in contempt. Appellant was not only ordered to pay a small compensatory fee to the complaining party, but, in addition, he was compelled to resign his position as deputy sheriff and to cease acting under color of authority as a law enforcement officer.[3] On appeal to the Fifth Circuit Court of Appeals, *held,* affirmed, except that the prohibition from acting as a deputy was modified so as to continue only until such time as appellant could satisfy the trial court that he would thereafter comply with the injunctive order.[4] The court noted that it could assert jurisdiction over a person acting in concert with a class of enjoined defendants and that it has the power to remove such a person from public office in order to secure compliance with the injunctive order. The Supreme Court denied appellant's

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* 353 F.2d 585 (5th Cir. 1965) [hereinafter cited as principal case], *cert. denied,* 384 U.S. 929 (1966) (Black and Harlan, JJ., dissenting in separate written opinions) [Mr. Justice Black's dissenting opinion is hereinafter cited as Black's dissent].

1. Effective immediately, . . . it is further ORDERED that [a named class of defendants] . . . *and any other persons to whom notice or knowledge of this Order may come,* shall not in any way interfere with, molest, threaten, intimidate, or coerce any persons of the Negro race with the purpose of interfering with such person's right to seek . . . accommodations.
Principal case at 587-88.

2. While a Negro was being served in a restaurant Lance commented in a loud voice, "You know I have to protect these black sons of bitches." The next day the Negro attempted to register in the adjoining motel, and on his departure Lance threateningly followed him around the city in his automobile. Principal case at 588-89.

3. Within twenty days of this order, he shall submit a verified report to this Court that he has resigned his position as deputy sheriff of St. Johns County, Florida, and surrendered his badge and other incidents of office and of police equipment to his superiors; and that he shall no longer act under any color, guise, or pretense of a law enforcement or peace officer.
Principal case at 590.

4. [S]ince sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself.
Principal case at 592.

petition for a writ of *certiorari*, Justices Black and Harlan dissenting in written opinions.

Appellant's initial objection to the contempt decree was that the district court lacked jurisdiction over him because he had not been a party to the injunction proceedings. At first glance this contention seems quite valid, for there is authority to the effect that an injunction can bind only those who are parties to the action in which the injunction is issued.[5] Indeed, Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction is binding only "upon the parties to the action." However, Rule 65(d) also provides that an injunction is binding on "those persons in active concert or participation with [the parties] . . . who receive actual notice of the order by personal service or otherwise."[6] In the principal case, the district court attempted to sustain jurisdiction simply on the basis of appellant's knowledge of the injunctive order,[7] but the court of appeals found ample evidence within the findings of the district court to establish that appellant was acting in concert with the enjoined parties.[8] Thus, the Fifth Circuit Court was legitimately able to sustain the exercise of jurisdiction over appellant even though he was not a party to the injunction proceeding.[9]

Of far greater importance than the jurisdictional question, however, is the court's decree ordering appellant to resign from public office. Such a decree appears to be unprecedented and is a significant expansion of the contempt power of the federal courts. As Mr. Justice Black pointed out in his dissenting opinion to the Court's

5. Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951); *accord*, Kean v. Hurley, 179 F.2d 888 (8th Cir. 1950); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930); see 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1437 (1958). It follows that the provision of the injunctive order in the principal case which attempted to bind all persons with knowledge of that order had no legal force. Chase Nat'l. Bank v. Norwalk, 291 U.S. 431, 437 (1934); *accord*, NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10th Cir. 1953); Chisolm v. Caines, 147 F. Supp. 188 (E.D.S.C., 1954); *cf.* Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945).

There is some earlier authority to the effect that any person knowing of an injunction and in violation of it can be found guilty of contempt, even if he is not named in the injunctive order. These cases have probably been overruled by implication, Swetland v. Curry, *supra* at 843; Alemite Mfg. Corp. v. Staff, *supra* at 833, but, assuming *arguendo* that they are still good law, they apparently allow only criminal, and not civil, contempt actions, Union Tool Co. v. Wilson, 259 U.S. 107, 112 (1922); *accord*, *In re* Lennon, 166 U.S. 548, 554 (1897); Chisolm v. Caines, 121 Fed. 397 (C.C.D. S.C. 1903); *In re* Reese, 107 Fed. 942 (8th Cir. 1901). See generally Moskovitz, *Contempt of Injunction, Civil and Criminal*, 43 COLUM. L. REV. 780, 813-14 (1943).

6. FED. R. CIV. P. 65(d).

7. Principal case at 590.

8. On each occasion, when the Negro appeared to assert his rights, appellant also appeared, and the trial court found, that he was acting in response to signals from the motel manager. Principal case at 588.

9. Principal case at 591. Mr. Justice Black seems to have overlooked this shift of jurisdictional basis, for he states: "There was no finding below that Lance was in any way an agent or was acting in concert with any of the defendants who were ordered not to intimidate or coerce Negroes." Black's dissent at 930 n.1.

refusal to grant a writ of *certiorari*, such an expansion, with its potentially dangerous impact on the rights of individual public officials and on the federal system of checks and balances, should not be permitted to stand unless the Supreme Court first reviews the expansion and defines its scope.[10]

First of all, as Mr. Justice Black noted, the decision in the principal case raises serious constitutional questions, for it extends the equity powers of the federal courts into an area in which the federal courts generally have not interfered. Federal courts sitting in equity have traditionally declined to remove state officials,[11] and even, in certain situations, federal administrative officials,[12] regardless of the seriousness of their misconduct. This is because removal of officials has been considered a matter within the realm of political action, a realm into which the federal courts should not enter out of respect for the other branches of government.[13] In dealing with the reapportionment problem, the Supreme Court, in order to insure that constitutional requirements of representative government are not abused, seems to have modified this phase of the political question doctrine so as to allow judicial inquiry into the legislative branch of government.[14] However, in *Baker v. Carr*, the Court explicitly declined to overrule the doctrine that a federal court in equity should *not* interfere with the appointment or removal process itself.[15] Since the court in the principal case forced appellant to resign his position, its decree would appear to be inconsistent with this line of authority.

Moreover, federal courts have been reluctant to interfere with

10. This examination of the principal case will not attempt to deal with the problem of classifying this as a civil, rather than criminal, contempt action. Notice, however, that since one of the principal factors used by a lower court in classifying a given action is the nature of the relief asked, Penfield Co. v. SEC, 330 U.S. 585, 590 (1947), the plaintiff himself makes the initial determination whether the action will be treated as civil or criminal contempt. In the principal case, the action was brought as one for civil contempt probably because of a provision in the Civil Rights Act of 1964, tit. XI, § 1101, 78 Stat. 268, 42 U.S.C. § 2000(h) (1964), requiring jury trial in criminal contempt actions arising under the Act and preserving summary non-jury proceedings in civil contempt actions.

Moreover, a trial court's classification of a given action appears to be conclusive, and not subject to adequate review, due to the line of authority holding that "it is the purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for civil or criminal contempt." Lamb v. Cramer, 285 U.S. 217, 220-21 (1932); *accord*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911). This practice is criticized in Moskovitz, *supra* note 5. For a more comprehensive treatment of the whole problem of classification, see generally GOLDFARB, THE CONTEMPT POWER 49-67 (1963); Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120 (1965).

11. Walton v. House of Representatives of Oklahoma, 265 U.S. 487 (1924); *accord*, Taylor v. Beckham (No. 1), 178 U.S. 548 (1900); *In re* Sawyer, 124 U.S. 200 (1888); see cases cited Annot., 34 A.L.R.2d 558 (1954).

12. White v. Berry, 171 U.S. 366 (1898).

13. See cases cited note 11 *supra*.

14. Baker v. Carr, 369 U.S. 186 (1962).

15. *Id.* at 231.

state governmental operations because of our federalist structure of government.[16] To be sure, the fourteenth amendment prohibits state action which abridges the privileges and immunities of American citizenship, and this has been construed to mean that the federal courts have jurisdiction over states' agents and officials,[17] the doctrine of sovereign immunity of the states notwithstanding.[18] Under this constitutional provision, Congress has authorized the bringing of civil suits against state government officials who deprive citizens of their privileges and immunities,[19] as well as the imposition of criminal fines and federal imprisonment for violations of the fourteenth amendment prohibitions.[20] Even in the absence of specific legislative authorization, the courts, in order to preserve fourteenth amendment rights, have employed their powers at law or in equity: enjoining state officials from taking certain actions;[21] overturning state action already taken;[22] and enjoining court proceedings in some instances.[23] But Congress has never authorized the removal of state officials from their offices, and the courts have never before done so on their own initiative. It might be argued that the difference between imprisoning a police officer and compelling him to resign is insignificant, for in either situation, by rendering the officer totally unavailable to act for the state, the courts interfere with state exercise of its police power. Yet the difference in form is not so insignificant as it may seem. Congress has prescribed the sanction of imprisonment for certain illegal actions, whereas it has not authorized this additional sanction of removal from office. Furthermore, in the interest of maintaining our system of federalism, the federal government has sought to limit its interference in state affairs as much as possible;[24] actually removing a state official from his position may certainly be deemed interference, and in the principal case, it was

16. Educational Films Corp. v. Ward, 282 U.S. 379, 392 (1931); *accord*, Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

17. Williams v. United States, 341 U.S. 97, 100 (1951); *accord*, *Ex parte* Virginia, 100 U.S. 339 (1880).

18. Dombrowski v. Pfister, 380 U.S. 479 (1965); *accord*, *Ex parte* Young, 209 U.S. 123 (1908).

19. REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964); Monroe v. Pape, 365 U.S. 167 (1961).

20. 18 U.S.C. § 242 (1964); Screws v. United States, 325 U.S. 91 (1945).

21. Bowles v. Willingham, 321 U.S. 503 (1944); *accord*, *Ex parte* Young, 209 U.S. 123 (1908). *But see* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944). See generally Isseks, *Jurisdiction of the Lower Federal Courts To Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969 (1927).

22. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

23. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). *But see* Douglas v. City of Jeanette, 319 U.S. 157 (1943). See generally Taylor & Willis, *The Power of Federal Courts To Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933).

24. "[E]ach government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926); *accord*, Educational Films Corp. v. Ward, 282 U.S. 379, 392 (1931); *cf.* South Carolina v. United States, 199 U.S. 437 (1905).

not demonstrated that such interference was necessary.[25] Finally, the extent of this new remedy pattern is undefined, something which is not true with respect to the older remedies, since a considerable body of law has been developed to prevent their abusive use.[26]

In addition to its potentially adverse impact on federal-state relations, the decision in the principal case presents difficulties insofar as the court has gone beyond the traditional sanctions imposed for civil contempt without a showing that these sanctions were inadequate, with the result that the court has seriously impinged upon the rights of the individual involved. One of the principal functions of a civil contempt decree is to compel compliance with a prior court order.[27] The courts will normally insure such compliance by one of the following: imprisoning the contemner until he has demonstrated a willingness to comply;[28] ordering the contemner to publish notice to the injured party, the general public, or both that he has been found guilty of contempt of court but that he will comply with the court order in the future;[29] or by threatening the contemner with heavy economic sanctions if he should again fail to comply.[30] It may be significant that the court in the principal case did not indicate why any one of these sanctions could not have been effectively used in this situation.

To be sure, there is authority which indicates that in contempt actions a court may use whatever power is necessary,[31] but while

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25. And no one claims that this new federal judge power to remove state officers is necessary to enforce the salutary provisions of the Civil Rights Act of 1964. It is clear that the judge's order here provides complete protection to the plaintiff's rights without that part compelling the State's deputy sheriff to hold his job at the pleasure of the United States judges.
Black's dissent at 932.

26. See generally KAUPER, PRIVATE AND GOVERNMENTAL ACTIONS: FLUID CONCEPTS IN CIVIL LIBERTIES AND THE CONSTITUTION (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

27. Bessette v. W. B. Conkley Co., 194 U.S. 324, 328 (1904); see 17 AM. JUR. 2D *Contempt* § 105 (1964) and cases cited therein. The other primary function is to provide a remedy specifically for a party who may or has suffered damages as a consequence of the contempt. Thus, in the principal case, appellant was also required to pay a small compensatory fee to the complaining party. Principal case at 590.

28. Release is contingent upon compliance with the previously violated order, and thus it is often said that contemners "carry the keys of their prison in their own pockets." *In re* Nevitt, 117 Fed. 448, 461 (8th Cir. 1902). For a criticism of this indefinite imprisonment, see generally Politano v. Politano, 146 Misc. 792, 262 N.Y. Supp. 802 (Sup. Ct. 1933); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); Comment, 33 U. CHI. L. REV. 120 (1965).

29. NLRB v. Vander Wal, 316 F.2d 631 (9th Cir. 1963); West Texas Util. Co. v. NLRB, 206 F.2d 442 (D.C. Cir.), *cert. denied*, 346 U.S. 855 (1953).

30. United States v. UMW, 330 U.S. 258 (1947) ($2,800,000 conditional fine); Meredith v. Fair, 313 F.2d 532 (5th Cir.), *cert. denied*, 372 U.S. 916 (1962) (conditional fine of $10,000 per day levied on Gov. Ross Barnett of Mississippi).

31. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of various acts . . . ." McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949); *accord*, NLRB v. Vander Wal, 316 F.2d 631 (9th Cir. 1963).

these cases seem to lend some legitimacy to the court's action, they are distinguishable since they involve the power of a court to compensate fully the victim of the contemptuous act, rather than the power to coerce compliance with an injunctive order, as in the principal case.[32] The argument that contempt power should be treated as *sui generis* is of no greater support;[33] this is merely a way to avoid having to face the difficult question of how much contempt power a judge ought to have and how he ought to use it. If the office appellant was forced to resign was the principal source of his livelihood rather than merely a volunteer part-time position, the decree would seem rather harsh indeed, and yet the court has made no effort to restrict its future use of the power to force resignations. Moreover, there may be some question whether the sanction imposed by the court in the principal case is as effective as are the traditional sanctions. While the court's action will prevent appellant from intimidating Negroes by "riding his badge" again, it would seem that a jail sentence or heavy economic sanction is more apt to prevent or discourage appellant from further contemptuous acts.

Finally, one must consider that in indirect contempt actions—actions arising from conduct outside the presence of the court—a judge must necessarily rely on the testimony of the litigants or other witnesses.[34] Yet all civil contempt actions, including indirect contempts, are normally heard in summary proceedings in which pleading rules, procedural formalities, and even rules of evidence are suspended.[35] In such proceedings, the rights of an accused contemner are dangerously curtailed; hence any expansion of the power available to a judge in these proceedings, such as is represented by the decree rendered in the principal case, would appear to be unwise.[36] Similarly, the right to jury trial occupies an important place in our constitutional heritage, and as long as this right is denied to contemners,[37] the power which a judge may wield ought to be carefully

32. In McComb v. Jacksonville Paper Co., *supra* note 31, appellee violated an injunctive order regarding minimum wage restrictions, and was ordered to give employees back pay in accordance with a prescribed formula. In NLRB v. Vander Wal, *supra* note 31, the court ordered appellee to pay legal fees, court costs, and all other expenses caused by his refusal to arbitrate grievances.

33. Blackmer v. United States, 284 U.S. 421, 440 (1932); *accord*, Bessette v. W. B. Conkley Co., 194 U.S. 324, 326 (1904).

34. See GOLDFARB, THE CONTEMPT POWER ch. 1 (1963). This is in contrast to direct contempt actions which arise out of acts committed within the presence of the court.

35. See Sacher v. United States, 343 U.S. 1, 9 (1952). A summary proceeding was used at the trial of appellant in the principal case. Black's dissent at 931.

36. See SWAYZEE, CONTEMPT OF COURT IN LABOR INJUNCTION CASES (1935); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); *cf.* Sacher v. United States, 343 U.S. 1, 14 (1952) (Black, J., dissenting).

37. United States v. Barnett, 376 U.S. 681 (1964). Although the case is distinguishable by virtue of being a criminal, rather than civil, contempt action, the denial of the right to a jury trial probably applies equally to civil contempt cases, since the argument in *favor* of that right ought to be stronger in the criminal contempt context.

circumscribed rather than expanded.[38] Not surprisingly, in an earlier decision, Mr. Justice Black discerned "a congressional plan to limit the contempt power to '*the least possible power adequate to the end proposed,*' "[39] and another federal judge has urged that "the grant of summary contempt power . . . is to be grudgingly construed [and] . . . restricted to the bedrock cases . . . ."[40] The principal case runs directly counter to these policies.[41]

Despite the objections discussed above, one may argue that there were some utilitarian reasons for having fashioned this strong sanction. The situation in St. Augustine was explosive, with tempers high and racial sensitivity keen. Faced with a contemptuous act, the court may have found its action necessary in order to show unequivocally to the contemner and others who shared his views that it would not sit by idly and let its orders be violated. However, it does appear in retrospect that such an unprecedented sanction would not have been necessary. A judge would only have needed to demonstrate that he would act rapidly and directly to curb contemptuous acts, and this could have been accomplished without exceeding the scope of the traditional contempt remedies.

Thus, the court could have and should have restricted itself to the use of one of the traditional sanctions, and in the event that they proved to be insufficient to coerce general compliance, then a criminal contempt action should have been the next step, complete with jury trial as guaranteed in the 1964 Civil Rights Act.[42] Congress apparently intended that criminal contempt actions be used in extreme cases, or its inclusion of this provision in the Act was mere sur-

38. Mr. Justice Goldberg dissented from the *Barnett* opinion, arguing that since the decrees rendered in contempt actions are more severe now than they were at the time the Constitution was written, the right to a jury trial ought to be extended to contemners. United States v. Barnett, *supra* note 37, at 728. See also Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting); Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962).

39. Cammer v. United States, 350 U.S. 399, 404 (1956), citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); *accord*, Ballantyne v. United States, 237 F.2d 657, 667 (5th Cir. 1965); *cf.* GOLDFARB, THE CONTEMPT POWER 167 (1963).

40. Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954).

41. Although summary contempt proceedings have long been employed in direct contempt actions, their application to indirect contempt actions dates from a 1765 case in which Judge Wilmot utilized them, for political reasons, by distorting prior authority to rationalize his actions. Blackstone accepted Judge Wilmot's interpretation of the cases and incorporated it into his Commentaries. 4 BLACKSTONE, COMMENTARIES *282-83. This is apparently the origin of the American application of summary proceedings to indirect contempts. See generally GOLDFARB, THE CONTEMPT POWER ch. 1 (1963); Fox, *The King v. Almon.* (pts. 1 & 2), 24 L.Q. REV. 184, 266 (1908); Fox, *The Summary Process to Punish Contempt.* (pts. 1 & 2), 25 L.Q. REV. 238, 354 (1909). Mr. Justice Black rested on his belief that Blackstone was in error as one basis for arguing that the law of contempt should be changed, Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting), but without success, for the American practice has become firmly established.

42. Civil Rights Act of 1964, tit. XI, § 1101, 78 Stat. 268, 42 U.S.C. § 2000(h) (1964).

plusage. It is unfortunate that the federal courts chose instead to expand the power and discretion available to a judge in a summary civil contempt proceeding, and to do so in a manner which is subject to criticism on so many different grounds. It is equally unfortunate that the Supreme Court permitted such a decree to stand without review.[43]

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43. "I regret that the Court refuses to review this case in order to make it clear to all the people just how far this new contempt power of federal judges goes." Black's dissent at 932.