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Constitutional Law - Due Process - Power of Michigan One-Man Grand Jury to Punish Contempt

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RECENT DECISIONS

CONSTITUTIONAL LAW — DUE PROCESS — POWER OF MICHIGAN ONE-MAN GRAND JURY TO PUNISH CONTEMPT — Petitioners were two witnesses called before a Detroit Recorder's Court judge sitting as a Michigan one-man grand jury to investigate suspected police corruption. During the hearings both petitioners were cited for contempt. An order to show cause why they should not be punished was issued by the judge. Subsequently, in open hearings, the same judge convicted and sentenced petitioners. The Michigan Supreme Court affirmed.[1] On certiorari to the United States Supreme Court, *held,* reversed. To allow a judge who sat as a one-man grand jury to preside at a contempt hearing regarding the same witnesses violates due process. *In re Murchison,* (U.S. 1955) 75 S.Ct. 623.

Michigan's popularly-termed one-man grand jury is not a grand jury in the common law sense.[2] The principal differences between it and the common law grand jury are (1) the investigation is performed by one judge instead of sixteen to twenty-three grand jurors; (2) the judge issues no indictment but offers a "presentment" of findings. The system has been particularly effective in dealing with corruption among public officials,[3] and past attacks upon it as an unconstitutional delegation of executive functions to the judiciary have been unsuccessful.[4] The principal weapon of the judge-investigator has been the power to punish recalcitrant witnesses for contempt.[5] Traditionally, there are two types of criminal contempt. The first, direct contempt, permits summary punishment. This punishment is consistent with due process only if the misconduct occurs in open court, is observed by the judge, and disrupts pending proceedings.[6] Summary punishment is said to be essential to preserve authority and prevent the obstruc-

1 Two separate cases were combined in the appeal to the Supreme Court. In re White, 340 Mich. 140, 65 N.W. (2d) 296 (1954); In re Murchison, 340 Mich. 151, 65 N.W. (2d) 301 (1954).

2 By Mich. Comp. Laws (1948) §§767.3 to 767.6b, Michigan judges of courts of record have wide power to investigate suspected crime in their jurisdictions, including the power to subpoena and punish witnesses for contempt.

3 Winters, "The Michigan One-Man Grand Jury," 28 J. AM. JUD. SOC. 137 (1945). Critical of its methods is Gallagher, "The One-Man Grand Jury—A Reply," 29 J. AM. JUD. SOC. 21 (1945).

4 In re Slattery, 310 Mich. 458, 17 N.W. (2d) 251 (1945); Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921); People v. Doe, 226 Mich. 5, 196 N.W. 757 (1924); People v. Wolfson, 264 Mich. 409, 250 N.W. 260 (1933).

5 The principal case arose because of the Michigan Supreme Court's view that the judge-grand juror functions with the full complement of judicial powers. Mich. Comp. Laws (1948; Supp. 1952) §767.4, directed at preventing a judge-grand juror from hearing a contempt charge arising from his investigation, was declared unconstitutional in In re White, note 1 supra, on the ground that the law was a legislative interference with inherent judicial power.

6 In re Oliver, 333 U.S. 257, 68 S.Ct., 499 (1948); Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77 (1888). See also RAPALJE, CONTEMPT (1890); 39 J. CRIM. L. 359 (1948); 26 N. D. B. BRIEFS 402 (1950).

tion of justice.[7] The second type, constructive contempt, occurs other than in the court's personal presence.[8] Here, due process requires that the contemnor be given notice, right to counsel and a full hearing.[9] In both types, the contemned judge sits in judgment. Because of possible abuse of this power, restrictions have been placed on its exercise. A judge who cites for contempt will be restricted from punishing the contempt if he has become personally embroiled with the contemnor to the extent that he may hold a personal bias.[10] In the principal case, however, the Court precludes the judge from presiding at the contempt hearing without any such finding, but simply because he has an "interest" in the outcome. However, all contemned judges can be said to have an "interest" in seeing a contemnor punished for obstructing justice.[11] Therefore, the decision cannot be explained on the ground that this use of the contempt power is more unfair than is its use in traditional contempt cases. The explanation lies in the fact that the attempted use in Michigan extends beyond the normal contempt procedure. In *In re Oliver,* it was held that contempt of a Michigan judge-grand jury is not the type of contempt which justifies summary punishment.[12] Thereafter, Michigan was forced to deal with contempts of the judge-grand jury as cases of constructive contempt. This placed a judge with personal knowledge of prejudicial facts on a bench historically reserved, in constructive contempt hearings, for a judge who did not witness the contempt. Since the judge's personal knowledge is an essential element only in direct contempt cases, no valid argument can be made that the judge-grand juror *must* preside at the hearing.[13] In the principal case, the Supreme Court goes further by saying that, under the due process clause, this judge *cannot* preside over the contempt hearing. The Court will not allow the power to punish for constructive contempt to be extended as a personal club of a judge-investigator, although the judge of a court to which a lay grand jury is attached can punish a contemptuous grand jury witness.[14] The reason for the refusal to extend this power seems to be based on the view, implicit in the *Oliver* opinion, that the person contemned was not at the

[7] Fisher v. Pace, 336 U.S. 155, 69 S.Ct. 425 (1949).

[8] Bridges v. California, 314 U.S. 252, 62 S.Ct., 190 (1941) (newspaper publication); Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390 (1925) (letter sent to judge in chambers).

[9] Ex parte Savin, 131 U.S. 267, 9 S.Ct. 699 (1889). See 48 COL. L. REV. 813 (1948).

[10] Cf. Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11 (1954). See also the dissents in Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451 (1952); Craig v. Hecht, 263 U.S. 255, 44 S.Ct. 103 (1923); Fisher v. Pace, note 7 supra.

[11] This is pointed out by the dissent in the principal case at 627.

[12] 333 U.S. 257 at 276, 68 S.Ct. 499 (1948). An open trial with notice and counsel was said to be required because misconduct occurring in grand jury secrecy could not result in demoralization of the court's authority before the public, and hence did not justify summary action.

[13] Possession by the judge of knowledge not appearing on the record and not subject to cross-examination is said to result in a fatal "influence" on the judge. Principal case at 626.

[14] See Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540 (1940).

time a "judge," but rather an investigator.[15] The principal case simply follows this idea, and refuses to allow this accuser to sit on his own case.[16]

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[15] "In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge. . . ." In re Oliver, note 6 supra, at 272.

[16] No other case involving this same "accusatorial" interest in a judge was cited as precedent by petitioners or found by the writer. But to the effect that a judge's financial interest in securing conviction violates due process, see Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927).