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# Constitutional Law - Legislative Contempt Power-Procedure Against Witness for Conduct Before Commission Composed of Legislators and Others

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CONSTITUTIONAL LAW — LEGISLATIVE CONTEMPT POWER — PROCEDURE AGAINST WITNESS FOR CONDUCT BEFORE COMMISSION COMPOSED OF LEGISLATORS AND OTHERS—The Massachusetts General Court,[1] for the purpose of

[1] The Massachusetts legislature is so designated.

investigating communism and subversive activities within the Commonwealth, established by joint resolution a "special commission" composed of two members of the Senate, three members of the House, and two persons to be appointed by the governor.[2] When the commission summoned Otis A. Hood[3] to appear before it, he refused to be sworn as a witness without first receiving witness fees, and flippantly expressed his demand for payment.[4] The general court requested an advisory opinion of the Supreme Judicial Court of Massachusetts, propounding three questions: (1) whether the special commission was a committee of the legislature so that contempt before it constituted contempt of the general court within the meaning of specified articles of the Massachusetts Constitution;[5] (2) whether the general court could adjudicate in contempt and punish a person guilty of disrespectful behavior before such a commission; and (3) whether, if there were such a power, a hearing before the bar of the general court was required before commitment. *Held:* "No" to questions 1 and 2, and question 3 consequently inapplicable. Because a committee composed of legislators and others is not a working part of the House, contemptuous behavior before such a commission cannot be said to be directed against the House as a whole, and therefore is not subject to the legislative contempt power. *Opinion of the Justices,* (Mass. 1954) 119 N.E. (2d) 385.

The constitutional provision that in certain specified instances of contemptuous conduct the general court may punish by imprisonment should not mean that other acts equally obstructive or disrespectful cannot be found contemptuous. Indeed, the court conceded that contumacy before a committee composed entirely of legislators, although not occurring in the presence of the House and not otherwise within the constitutional provision, does constitute contempt of the appointing body. But the court believed that this is true only because of the identity of such a committee as a working part of the House.[6] Therefore, the court reasoned, if a committee is diluted with non-legislators, this identity

[2] Mass. Acts and Resolves (1953), Resolves, c. 89.

[3] Hood, the ex-state leader of the Communist party in Massachusetts, was subsequently indicted under a 1951 Massachusetts act [Mass. Laws Ann. (Supp. 1954) c. 264, §19] outlawing membership in subversive organizations. N.Y. TIMES, April 9, 1954, p. 16:5.

[4] Hood's remarks: " 'I think it would be preferable if you pay the fee as you are supposed to. . . . You are asking for eighteen thousand dollars for more funds. What are you doing with it, padding your expense accounts? . . . I will not take the oath without the money. Why don't some of you loan it out of your pocket? You have plenty. . . .' " Principal case at 385.

[5] "The house of representatives . . . shall have authority to punish by imprisonment, every person, not a member, who shall be guilty of disrespect to the house, by any disorderly, or contemptuous behavior, in its presence; or who . . . shall threaten harm to the body or estate of any of its members . . . or who shall assault, or arrest, any witness, or other person, ordered to attend the house . . . or who shall rescue any person arrested by the order of the house. . . .

"The senate shall have the same powers. . . . Provided that no imprisonment on the warrant or order of the . . . senate, or house of representatives . . . be for a term exceeding thirty days." MASS. CONST., Part II, c. 1, §3, arts. X and XI.

[6] For this proposition the court cites McGrain v. Daugherty, 273 U.S. 135 at 156, 47 S.Ct. 319 (1927), where, however, language emphasizing the fact that all committee members were senators was directed to the specific issue of whether the oath of legislative office would suffice as a warrant of the committee report.

is lost, and disrespect before it ceases to be an affront to the legislature. However, the reason generally given for exercising the contempt power is that a legislature must be able to deal directly with obstructions to its legitimate functions.[7] This suggests that the proper inquiry in determining if conduct before a committee constitutes contempt of the appointing body should be whether the legislative process has been impaired. If it is found that certain conduct not included within the constitutional provision nevertheless is obstructive of legislative functions, while the legislature may not be authorized to proceed against it by summary imprisonment, it does not follow that all power to deal directly with the offender is precluded. For instance, if the legislature could authorize the commission to summon witnesses, it certainly could require one who refused to testify before the commission to appear before the House and there to account for his noncompliance.[8] If before the open session the witness should fail to justify his conduct and persist in his refusal to testify, this would constitute a separate act of contempt,[9] for which the legislature could punish by imprisonment.[10] This analysis would avoid the mechanical limitation imposed upon the legislative contempt power in the principal case. Yet it would not result in an unconstitutional or improvident extension of the power to imprison for contempts, because only those persons would be affected who, by remaining noncompliant or disrespectful when called before the House, would bring upon themselves the full consequences of contemptuous conduct in its presence.

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[7] Marshall v. Gordon, 243 U.S. 521, 37 S.Ct. 448 (1917). See generally: Potts, "Power of Legislative Bodies to Punish for Contempt," 74 UNIV. PA. L. REV. 691 (1926); Herwitz and Mulligan, "The Legislative Investigating Committee," 33 COL. L. REV. 1 (1933); Driver, "Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees," 38 VA. L. REV. 887, 1011 (1952). Federal and state cases are collected in 50 A.L.R. 21 (1927) and 65 A.L.R. 1518 (1930).

[8] The power to so proceed against a recusant committee witness was upheld in Burnham v. Morrissey, 14 Gray (80 Mass.) 226 (1859), and also upheld under similar constitutional language in Lowe v. Summers, 60 Mo. App. 637 (1897). That such an appearance is a required step in direct contempt proceedings for conduct before federal legislative committees, see EBERLING, CONGRESSIONAL INVESTIGATIONS 179 (1928). In 1857, Congress by statute made contempt of the legislature or its committees a misdemeanor subject to prosecution in federal courts. 11 Stat. L. 155 (1857), as amended by 52 Stat. L. 942 (1938), 2 U.S.C. (1952) §192.

[9] Lowe v. Summers, note 8 supra.

[10] Burnham v. Morrissey, note 8 supra.