

1943

# Liberty of Expression and Contempt of Court

Eberhard P. Deutsch

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Deutsch, Eberhard P, "Liberty of Expression and Contempt of Court" (1943). *Minnesota Law Review*. 1182.  
<https://scholarship.law.umn.edu/mlr/1182>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## LIBERTY OF EXPRESSION AND CONTEMPT OF COURT

By EBERHARD P. DEUTSCH\*

TWO recent decisions of the Supreme Court of the United States<sup>1</sup> have brought into sharp focus the point of conflict between the constitutional guaranties of unhampered and equitable judicial process on the one hand, and of free speech and press on the other. In order, however, to be able to grasp and understand the full import of these decisions, as well as to explore the justifiable recesses beyond the door not tightly closed by the court, one must review the devious history of this conflict from its early inception to its present status. And, strangely enough, the end of the path leads close to its beginning.<sup>2</sup>

Contempt of court, as a punishable offense, is as old as are courts themselves,<sup>3</sup> but the original concept involved only punishment by criminal process as for any other offense.<sup>4</sup> Even in cases of contempt in *facie curiae*, the judge merely ordered detention of the offender for indictment and trial by ordinary criminal pro-

\*Of the New Orleans Bar.

<sup>1</sup>*Nye v. United States*, (1941) 313 U. S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172; and *Bridges v. California*, (1941) 62 Sup. Ct. 190.

<sup>2</sup>"Modern legal scholars have made an extended study of the principles upon which the law of contempt by publication rests and conclude that much of what has been judicially relied upon as authority to punish for such an act is fiction. . . . In short, it now appears that in this branch of the law, the courts have built a structure of judicial reasoning upon the sands of precedents which do not exist." Mr. Justice Edmonds, dissenting in *Bridges v. Superior Court*, (1939) 14 Cal. (2d) 464, 495; majority opinion reversed, *Bridges v. California*, (1941) 62 Sup. Ct. 190.

<sup>3</sup>"A power therefore in the supreme courts of justice to suppress such contempts . . . results from the first principles of judicial establishments . . ." 4 Bl. Comm. 284. The first statute on the subject was one relative to resisting judicial process. (1285) 13 Ed. I, ch. 39.

<sup>4</sup>With the exception of the Star Chamber, all of the early prosecutions for contempt were by indictment, presentment and arraignment, with a right of trial by jury. Solly-Flood, "Prince Henry and Chief Justice Cascoigne," *Transactions of the Royal Historical Society*, vol. 3, ns p. 47. See Fox, *History of Contempt of Court* (1927). In *Davis's Case*, (1560) 2 Dyer 188 b, "John Davis struck one in the face with his right fist in the great hall of Westminster all the king's court sitting there, and threatened him to hang him if he should give evidence against a felon then to be arraigned . . . for which act he was indicted there, and arraigned and confessed the indictment; and for judgment he had perpetual imprisonment during his life, and forfeited all his lands, tenements, goods, and chattels, and that his right hand should be cut off at the standard in Cheap. And this execution was done accordingly." See several similar decrees reported in note to *Davis's Case*, all proceedings by indictment.

ceedings.<sup>5</sup> Summary punishment of constructive contempts, or contempt by publications, words or acts out of the presence of the court, was unknown before Blackstone's day.<sup>6</sup>

But by one of those queer errors of recordation in history on which doctrinairism is so often founded, a false premise sanctified by Blackstone gave rise to a false doctrine which has permeated the judicial record of the United States in the law of constructive contempts. Blackstone refers to "the method, immemorially used by the superior courts of justice, of punishing contempts by attachment;"<sup>7</sup> and lists among the various classes of contempts, those "by speaking or writing contemptuously of the court or judges, acting in their judicial capacity."<sup>8</sup>

It has been demonstrated, however, not only that Blackstone's premise and conclusion were false, but that they were based on an opinion written, but never actually rendered, by Mr. Justice Wilmot, Lord Chief Justice of the Court of Common Pleas, a member of the Privy Council, and a contemporary and friend of Blackstone. Blackstone's Commentaries first appeared in November, 1765. Earlier during that same year, one Almon, a bookseller, had been attached for contempt of Lord Mansfield and the Court of King's Bench, by the publication and distribution of a pamphlet condemning the conduct of the Chief Justice in the denial of certain writs in the course of the famous prosecution of John Wilkes.

In the defense of Almon, his counsel insisted<sup>9</sup> that "the court ought not to proceed by way of attachment, but leave the offense to be prosecuted and punished by indictment and information," while conceding that attachment was "proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt to the authority of the court . . . and that attachments ought not to be extended to libels of this nature; because judges would be determining in their own cause."

---

<sup>5</sup>Richardson Ch. Just. de C. Banc al Assizes at Salisbury in Summer 1631 fuit assault per prisoner la condamne pur felony; que puis son condemnation ject un brickbat a le dit Justice, que narrowly mist; et pur ceo immediatly fuit indictment drawn per Noy envers le prisoner et son dexter manus ampute & affix al gibbet, sur que luy mesme immediatement hange in presence de Court." (1560) 2 Dyer 188 b, note. See also, supra, note 4, and Regina v. Rogers, (1702) Holt 331; 2 Ld. Raym. 777, 2 Salk. 425, 7 Md. Rep. 208.

<sup>6</sup>Fox, History of Contempt of Court (1927) 21.

<sup>7</sup>4 Bl. Comm. 283.

<sup>8</sup>4 Bl. Comm. 285.

<sup>9</sup>The King v. Almon, (1765) Wilm. 243. Quotations hereunder are taken from the opinion, *passim*.

While the cause was under advisement, and before it had been decided, there was a change of ministry, and for obvious political reasons, the case was dismissed by the Crown. Accordingly:

"this opinion was never delivered in Court, the prosecution having been dropped, in consequence, it is supposed, of the resignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved."<sup>10</sup>

In order to obtain a proper perspective of Mr. Justice Wilmot's philosophy, as opposed to every fundamental democratic principle embedded in the American bills of rights, the entirety of his opinion must be read in its setting. For present purposes, however, this precarious foundation-stone on which the structure of contempt by publication rested for many years in the United States, may be appraised from the following quotations, somewhat lengthy, but eloquent both in and between their lines:

"The power which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident for a contempt to the Court, acted in the face of it. And the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the 'lex terrae,' and within the exception of Magna Charta, as the issuing any other legal process whatsoever."<sup>11</sup>

"I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do,—immemorial usage and practice; it is a constitutional remedy in particular cases, and the judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. . . .

"By our constitution, the King is the fountain of every species

<sup>10</sup>Ibid., note.

<sup>11</sup>See Blackstone's paraphrase of the same language: "The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. . . . A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." 4 Bl. Comm. 286.

of justice, which is administered in this kingdom. . . . The King is 'de jure' to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath, and sit in the seat of the King 'concerning his justice.'

"The arraignment of the justice of the judges, is arraignment the King's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving of justice that free, open, and uninterrupted current, which it has, for many years, found all over his kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth. . . .

"As to leaving such libels to be prosecuted by indictment or information, that juries may judge 'quo animo' they were written or published; I am as great a friend to trials of facts by a jury, and would step as far to support them as any judge who ever did, or now does, sit in Westminster Hall; but if to deter men from offering any indignities to courts of justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the court should call upon the delinquents to answer for such indignities, in a summary manner by attachment, we are as much bound to execute this part of the system as any other. . . ."<sup>12</sup>

And Mr. Justice Wilmot concluded with a reiteration that "the principle on which attachments issue for libels upon courts . . . is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public." And finally again, that

"a libel upon a court is a reflection upon the King, and telling the people that the administration of justice is in weak or corrupt hands; that the fountain of justice itself is tainted, and, consequently, that judgments, which stream out of that fountain, must be impure and contaminated . . . which is imputing to the King a

<sup>12</sup>Compare the diametrically opposite thought of Mr. Justice Holmes, dissenting in *Toledo Newspaper Co. v. United States*, (1918) 247 U. S. 402, 426, 38 Sup. Ct. 560, 62 L. Ed. 1186: "I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts."

breach of that oath, which he takes at the coronation, to 'administer justice to his people.'"<sup>13</sup>

Wilmot and Blackstone, as friends, unquestionably discussed this opinion, and the latter, full of Tory enthusiasm for its pronouncements, was undoubtedly responsible for its publication.<sup>14</sup> And while the earlier authorities were directly to the contrary, as already demonstrated, it was on the basis of this "opinion," never even rendered, that Blackstone referred, in his Commentaries, published later in the same year, to "the method, immemorially used by the superior courts of justice, of punishing contempts by attachment."<sup>15</sup>

As stated by Charles Warren, in his History of the American Bar,<sup>16</sup> "The meagreness of American law libraries contributed, of course, to account for the almost scriptural authority of Blackstone in our early law." But the battles of the Revolution left an imprint on the minds of American laymen which a judiciary, steeped in Blackstone, could not erase. Freedom of speech and of the press were tangible every-day liberties, not to be displaced by abstract doctrinal judicial tyranny, insistent on an enforced respect for the bench.

In 1788 one Eleazar Oswald was brought, by attachment, before the supreme court of Pennsylvania, for having published, in his Independent Gazetteer, an article complaining that a pending action for libel was brought by "the handmaid of some of my enemies among the federalists; and in this class I must rank his great patron, Dr. Rush (whose brother is a judge of the supreme

<sup>13</sup>As stated, this opinion was written in 1765, the year in which "the (American) revolution really began" (*Grosjean v. American Press Co.*, (1936) 297 U. S. 233, 246, 58 Sup. Ct. 444, 80 L. Ed. 660). George III was then on the throne of England. No more conclusive evidence of the renunciation by the American people of the doctrine expounded in this opinion, could be cited than that set forth in their Declaration of Independence a decade later: "The history of the present King of Great Britain is a history of repeated injuries and usurpations. . . . He has obstructed the administration of justice. . . . He has made judges dependent on his will alone. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution. . . . For depriving us in many cases, of the benefits of trial by jury."

<sup>14</sup>Fox, *History of Contempt of Court* (1927) 21. Not until 1821, fifty-six long years after it was written, was the case of the *King v. Almon* cited by any English court. The *King v. Clement*, (1821) 4 B. & Ald. 218, 233; The *King v. Davison*, (1821) 4 B. & Ald. 329, 338. In the latter case, Mr. Justice Holroyd said: "All the cases on this subject with respect to the power of courts of record to fine and imprison for contempt, are collected together very ably by Mr. Justice Wilmot, *with a view to a judicial opinion* in the *King v. Almon*." (Italics by the present writer.) But Mr. Justice Wilmot had not cited a single judicial precedent in support of the process by attachment for constructive contempt.

<sup>15</sup>4 Bl. Comm. 283.

<sup>16</sup>Pp. 187, et seq.; and see p. 174.

court);" further, "that my situation as a printer, and the rights of the press and of freemen, are fundamentally struck at;" and finally, that "if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empanelled, a jury of freemen and independent citizens, I must rest the suit."

Oswald was convicted,<sup>17</sup> and the proceeding by attachment was maintained on the authority of Blackstone's "immemorial usage," despite vigorous assertions of the provisions of the Pennsylvania constitution guaranteeing a free press and trial by jury; although Mr. Justice Bryan "observed . . . that he had always entertained a doubt with respect to the legality of the process by attachment, in such cases, under the constitution of Pennsylvania." After his release from prison, Oswald memorialized the legislature for impeachment of the judges. The memorial was opposed by the attorney who had obtained Oswald's conviction for contempt, and his speech on the floor was simply a reiteration of Blackstone as justifying the procedure which had been carried out by the court.

Much abler was the address of William Findley<sup>18</sup> in support of the memorial. He said quite simply,

"The rights and immunities which formed the great object of the revolution . . . were capable of an easy and unequivocal definition; they were not of such a remote antiquity as to be lost even to the feelings of the people; and the constitution of the state was the only proper criterion by which they could be judged and ascertained."

And he defied all the sophistry of the schools and the jargon of the law. The federalists were still in power, however, and the motion for impeachment was lost by a vote of 34 to 23. But the fact remains that in 1788, there were twenty-three members of the Pennsylvania legislature who felt strongly that supreme court judges who dared to punish, by summary proceedings, a constructive contempt by publication, ought to be impeached.

This case was followed in Pennsylvania by another of a very similar nature.<sup>19</sup> Again there was conviction, and again a memorial to the legislature whose house this time voted 57 to 24 to impeach; but the justices escaped conviction by the narrow vote of 13 to 11 in the senate.<sup>20</sup> However, as stated by McMaster, in

<sup>17</sup>*Respublica v. Oswald*, (1788) 1 Dall. 319, 1 L. Ed. 155. Quotations are from the report, *passim*.

<sup>18</sup>The debate is reported in a note to the decision.

<sup>19</sup>*Respublica v. Passmore*, (1802) 3 Yeates Pa. 438, 441.

<sup>20</sup>Hamilton, William, Report of the Trial of Shippen, C. J. and Yeates and Smith, J. J. (1805) 9, 12.

his History of the United States,<sup>21</sup> a great popular furore now arose:

"For years past no event had occurred which so aroused the people. The cry for reform which now went up was such as had not been heard since the days of the Alien and Sedition laws. British common law, it was said, had triumphed. The sovereignty of the people, the rights of man, the constitution and laws of Pennsylvania, were henceforth to be subject to the customs and usages of British courts."

And the legislature, before long, enacted a law<sup>22</sup> prohibiting "attachment and summary punishment" for any "publications out of court;" and the act is still on the statute books of the state, its validity having never even been challenged.

The experience of Pennsylvania was soon paralleled in New York. An extended controversy,<sup>23</sup> involving primarily the extent of judicial power in commitments for contempt, release under habeas corpus, and the scope of judicial review, found its way finally into the court for trial of impeachments and correction of errors. This tribunal was composed of the president pro tem of the state senate, the chancellor, the judges of the supreme court of the state, and the members of the senate.

It is impossible, within the scope of this article, to review the entire case.<sup>24</sup> Suffice it to say, that the judicial members of the court, relying on Blackstone, were strongly opposed to any interference in the proceedings in which the finding and sentence for contempt by attachment were entered and imposed; and the lay members, in the majority, voted for review, reversal and acquittal. Senator Clinton, in behalf of the majority group, stated "that summary convictions are against the genius and spirit of our constitution, and in derogation of civil liberty." And then, in much the same words as were used by Findley in Pennsylvania a few years before, he decried the judicial resort to stilted precedents as opposed to new-world ideas and ideals of constitutional liberty.<sup>25</sup>

The prosecution of Yates did not give direct rise to legislation limiting the power of courts to impose punishment for contempt.

<sup>21</sup>Vol. 2, p. 159. See Warren, *History of the American Bar* (1913) 221.

<sup>22</sup>Pennsylvania, Acts (1808-09), ch. 78, p. 146.

<sup>23</sup>*Yates v. People*, (1810) 6 Johns. N. Y. 335.

<sup>24</sup>The official report of the proceeding occupies nearly 200 printed pages.

<sup>25</sup>"With the most profound veneration, and the most exalted respect, to the great landmarks of our law, which define the rights of the citizen, and the powers of the ruler; for those elementary principles which compose the essence of all justice, and constitute the substance of all right, I entertain a correspondent contempt for all technical jargon, that metaphysical subtlety, and that legal chicanery, which would entangle justice in the nets of form, and sacrifice the essential interests of our country to the formulas of special pleading, and the scruples of legal sophistry." *Ibid.*, at p. 472.



But not long thereafter, attention was drawn to the proposed model "System of Penal Law" prepared by New York's Edward Livingston for his adopted state of Louisiana.<sup>26</sup> Livingston had been counsel for Andrew Jackson when the latter was haled before Judge Hall of the United States district court for Louisiana in 1815, for contempt in refusing to comply with a writ of habeas corpus, and in arresting and imprisoning the judge and the district attorney who sought to effect the judge's release.<sup>27</sup>

When the contempt proceeding was called, Livingston, in Jackson's behalf, filed an elaborate plea in defense, in which he contended that "this court has no right to issue an attachment for any contempt whatever," and that "the mode of proceeding is both unconstitutional and illegal," primarily on the ground that Jackson was entitled, under the sixth amendment, to "a speedy trial, by an impartial jury."<sup>28</sup> The court overruled the plea, ordered the marshal to attach the general, and on Jackson's refusing to respond to interrogatories, found him guilty and fined him \$1,000.<sup>29</sup>

In the setting of this experience, and with it as his background, Livingston drafted the provisions of his model criminal code, defining contempts and providing punishment therefor. Contempts thereunder consisted only of direct interference with judicial proceedings by clamor in a court room, indecorous expressions in pleadings, or by violence or threats of violence to judges, jurors, witnesses, parties or attorneys. The final (fourth) article of the code on this subject provided:

"Courts of justice have no power to inflict any punishment for offences committed against their authority, other than those specifically provided. . . . All proceedings for offences, heretofore denominated contempts, are abolished. All offences created by this chapter, shall be tried on indictment, or information in the usual form."<sup>30</sup>

<sup>26</sup>1st ed., New Orleans, 1824.

<sup>27</sup>Proceeding No. 791 of the Docket of that court, still extant. The record is incomplete, however, and contains only the minute entries.

<sup>28</sup>5 Louisiana Historical Quarterly, No. 1; Arts. III and IV of answer. See also: Goodwin, Biography of Andrew Jackson, Hartford, Silas Andrus & Son, 1850, 179-189.

<sup>29</sup>Jackson paid the fine, but never forgave its imposition. Thirty years later, after he had been president, and only a few months before his death, Congress refunded the penalty, with interest at 6% compounded semi-annually. Act of February 16, 1844, ch. 1.

<sup>30</sup>Livingston, System of Penal Law prepared for the State of Louisiana (1824) Title V, ch. XI, 51-52. Louisiana, in 1823, had adopted a somewhat similar provision, but strangely enough, granted its immunities only to attorneys at law. La. Act of March 27, 1823. Its provisions are still in effect. La. Rev. Stat., secs. 124 and 125.

New York did not go all the way with Livingston, but by a statute of 1827-28,<sup>31</sup> did adopt much of what Livingston proposed; and the legislation has remained on the statute books of that state, where the courts have interpreted it, by and large, in the spirit in which it was enacted.<sup>32</sup>

Space does not permit, and it is, in any event, needless, to trace the history of similar legislation in various states. Suffice it to say, that before the civil war, twenty-three out of thirty-three states<sup>33</sup> had followed the lead of Pennsylvania and New York, on the wave of a popular resentment against judicial invasion of liberty of expression, guaranteed under the American constitutions in opposition to English principles.<sup>34</sup>

In the meantime, a veritable tempest, greater than that of Pennsylvania, had arisen as to contempts of federal courts by publication. In 1826, Judge James H. Peck of the United States district court of Missouri had imposed a sentence of a day's imprisonment and eighteen months suspension from practice, on a lawyer named Luke Lawless, for publishing an unfair criticism of the judge's opinion against Lawless in a land grant case, then being appealed. Lawless promptly memorialized Congress for Judge Peck's impeachment, but his memorial received scant attention, because of political alignments, until 1829, when it was referred to the judiciary committee of which James Buchanan was chairman; and on April 23, 1830, the House, on receipt of the committee's report, voted 123 to 49 to present articles of impeachment.<sup>35</sup>

Judge Peck was acquitted in the senate by 22 votes to 21. It may be that the vote was not a fair reflection of impartial opinion, but was colored by political considerations. But Buchanan's argument had been based, in large measure, on the Pennsylvania episode, and on the conflict between judicial authority and freedom of speech. Summary punishment for contempt by publication, he had insisted, "is equally at war with the spirit and the letter of

---

<sup>31</sup>New York Rev. Stat. 1829, part iii, ch. iii, tit. 2, sec. 10.

<sup>32</sup>See *Rutherford v. Holmes*, (1875) 5 Hun. 317, 319, aff'd, (1876) 60 N. Y. 367.

<sup>33</sup>*Nelles and King, Contempt by Publication in the United States*, (1928) 28 Col. L. Rev. 401, 525, 533.

<sup>34</sup>Blackstone's error did not become generally known until 1927 with the publication of Sir John Fox's book on *The History of Contempt of Court*. For an interesting comparative study of the English practice with reference to contempts by publication, see Goodhart, *Newspapers and Contempt of Court in English Law*, (1935) 48 Harv. L. Rev. 885.

<sup>35</sup>For a complete report of the case, see: Stansbury, *Report of the Trial of James H. Peck* (1833).

the constitution."<sup>36</sup> And among the members of the Senate who voted to convict Judge Peck was Edward Livingston, who had long before expressed himself so forcibly on the subject.

It would accordingly seem a fair and logical conclusion that the majority of the Senate, responsive to popular feeling which, for a quarter of a century had swept the country, felt that freedom of expression must not be deprived of its constitutional integrity by judicial autocracy; but failed to remove Judge Peck from the bench because, if he had erred, he had done so "in company with judicial characters with whom any judge may be proud to associate." The strong feeling of Congress and the nation, independently of the specific case of Judge Peck, was evidenced by the introduction, within twenty-four hours after Judge Peck's acquittal, and the prompt passage, of a statute prohibiting the summary punishment, by attachment, in federal courts, of contempts not committed "in the presence of said courts, or so near thereto as to obstruct the administration of justice."<sup>37</sup>

With one or two notable exceptions,<sup>38</sup> legislation curbing the power of courts to inflict summary punishment for constructive contempts, was recognized by the courts, until after the Civil War, in the libertarian spirit which impelled its enactment. Toward the close of the Nineteenth Century, however, there was a marked recession, away from the lessons of recent American history, and back to the judicial untouchableness of McKean and the erroneous doctrines of Wilmot and Blackstone. By 1904 the courts of at least fifteen states had entered the reactionary column.<sup>39</sup>

The spirit which had given rise to the enactment of legislation curbing the power of the American courts to inflict summary punishment for contempt committed out of the physical presence of the court, had simply been forgotten by the judiciary. The statutes were construed in such a way, either as not to limit judicial power on the theory that such utterances had a direct or reasonable tendency to obstruct the administration of justice.<sup>40</sup>

<sup>36</sup>Stansbury, Report of the Trial of James H. Peck (1833) 431-434.

<sup>37</sup>Act of March 2, 1831, ch. 98, 4 Stat. at L. 487. For a complete legislative history of the statute, see: Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts, (1924) 37 Harv. L. Rev. 1010, 1026n.

<sup>38</sup>State v. Morrill, (1855) 16 Ark. 384. See also: Tenney's Case, (1851) 23 N. H. 162, not, however, involving a statute, and simply relying on Blackstone, in complete disregard of the American historical repudiation of his contempt doctrine.

<sup>39</sup>Nelles and King, Contempt by Publication, (1928) 28 Col. L. Rev. 525, 537.

<sup>40</sup>See *Cheadle v. State*, (1887) 110 Ind. 301, 309, 312.

or they were held to be unconstitutional as legislative infringements on "inherent" judicial power.<sup>41</sup>

Finally, even the Supreme Court of the United States<sup>42</sup> fell into the reactionary group, in disregard of the clear historical precedent set in the case of Judge Peck. In *Toledo Newspaper Co. v. United States*,<sup>43</sup> a federal district judge had, in a summary proceeding, imposed punishment on a publisher and editor, for contempt by publication of a series of articles, editorials and cartoons, concerning a pending proceeding for injunctive relief in a traction-fare case. The summary contempt proceedings were defended on the primary ground that the publications were protected by the federal contempt statute of 1831, as well as by the guaranty of a free press under the first amendment.

The majority of the Supreme Court, speaking through Mr Chief Justice White, held that the statutory provision, "conformably to the whole history of the country"<sup>44</sup> . . . by necessary implication recognized and sanctioned . . . the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly."

The test is stated to be found in "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty," but even this test is rendered extremely elastic by a subsequent observation to the effect that the criterion is "the reasonable tendency of the acts done to influence or bring about the baleful result."<sup>45</sup>

<sup>41</sup>See *Carter v. Commonwealth*, (1899) 96 Va. 791, 811, 816.

<sup>42</sup>*Patterson v. Colorado*, (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, involved contempt of the state supreme court, but was considered only on questions of adjective law on certiorari to the federal supreme court; but the court did say that "the necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

<sup>43</sup>(1918) 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186.

<sup>44</sup>The "history" to which the learned justice referred, seems to have been a decision rendered during the preceding year involving Congressional power to punish for contempt. His rather startling notions of "history" are aptly illustrated by his anachronistic reference to "the express provision found in a statute enacted in Pennsylvania in 1809 following the impeachment proceedings against Judge Peck." Mr. Justice White's unfamiliarity with this significant historical episode is the more inexcusable because his own father, then Congressman from Louisiana, had been a member of the Buchanan committee which recommended the impeachment of Judge Peck in 1830, and drafted the federal act of 1831.

<sup>45</sup>The suggestion that summary punishment for contempt by publication infringes the freedom of the press was itself brushed aside summarily with the statement that the argument "implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends."

Mr. Justice Holmes, in a dissenting opinion in which Mr. Justice Brandeis concurred, stated that "the words of the statute . . . point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity;" and he concluded by expressing his conviction that "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with any other illegal acts."<sup>46</sup>

For twenty-three years this decision remained the rule of power in the federal courts with reference to summary punishment of contempt by publication. But in 1941,<sup>47</sup> the Supreme Court had an opportunity to review "the 'reasonable tendency' rule of *Toledo Newspaper Co. v. United States*," and to hold that "that decision must be overruled."<sup>48</sup> The case involved a contempt on the part of certain persons to effect the dismissal of a pending action, by persuading the plaintiff therein by admittedly reprehensible means, to write his attorney directing the dismissal, and the district judge advising him of his desire in that regard. The acts complained of took place a hundred miles from the court, but resulted in conviction of, and the imposition of fines for, contempt, in summary proceedings.

The Supreme Court held that the words "so near thereto" in the federal statute, limiting the power of the federal courts to inflict summary punishment for contempt to "misbehavior . . . in the presence of the said courts, or so near thereto as to obstruct the administration of justice," "have a geographical" rather than "a causal connotation."<sup>49</sup> And relying directly on the true historical background of the federal legislation, the Court found that

"the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have.

<sup>46</sup>That constructive contempts should be treated like any other offenses seems, somehow, not to admit of doubt. Mr. Justice Holmes' dissent was expressly approved in the recent decision of the Supreme Court in *Nye v. United States*, (1941) 313 U. S. 33, 51, 53, 61 Sup. Ct. 810, 85 L. Ed. 1172, where Mr. Justice Douglas refers to the offense as one which should "be dealt with as the law deals with the run of illegal acts," in criminal proceedings in which offenders "will be afforded the normal safeguards surrounding criminal prosecutions."

<sup>47</sup>*Nye v. United States*, (1941) 313 U. S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172.

<sup>48</sup>*Nye v. United States*, (1941) 313 U. S. 33, 52, 61 Sup. Ct. 810, 85 L. Ed. 1172.

<sup>49</sup>*Nye v. United States*, (1941) 313 U. S. 33, 48, 61 Sup. Ct. 810, 85 L. Ed. 1172.

Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings admonish us not to give renewed vitality to the doctrine of *Toledo Newspaper Co. v. United States*, but to recognize the substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode.<sup>50</sup>

This decision, however, still left unanswered the "question as to the constitutionally permissible scope of the contempt power."<sup>51</sup> But not for long, since the court then actually had under advisement two cases involving the direct point. The Los Angeles Times and a Pacific Coast labor leader had been found guilty, in summary proceedings, of contempts by publication of the superior court of Los Angeles County, California. Their convictions were affirmed by the supreme court of California, and the Supreme Court of the United States granted certiorari, heard argument, and called for reargument.<sup>52</sup> On December 8, 1941, the Court laid down the broad principle of the supremacy of the constitutional guaranties of free speech and press over the judicial power to punish constructive contempts by summary proceedings, in a revitalization of the correct constitutional doctrines which had given rise to the legislation of the early nineteenth century.<sup>53</sup>

The Court at once swept away the contention that the right "to punish by contempt out-of-court publications," should be governed by the practice "deeply rooted in English common law at the time the constitution was adopted," with the statement that "to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the first amendment cannot reasonably be taken as approving prevalent English practices."

The majority of the Court next discarded the much-abused former tests of direct or reasonable tendency to obstruct the ad-

<sup>50</sup>*Nye v. United States*, (1941) 313 U. S. 33, 51, 61 Sup. Ct. 810, 85 L. Ed. 1172. The dissenting opinion of Mr. Justice Stone seems primarily merely to question the expediency of giving the words "so near thereto" a purely geographical sense.

<sup>51</sup>*Nye v. United States*, (1941) 313 U. S. 33, 50, 61 Sup. Ct. 810, 85 L. Ed. 1172.

<sup>52</sup>*Bridges v. California*, (1941) 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 149; *Times-Mirror Co. v. Superior Court of California*, (1941) 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 149.

<sup>53</sup>*Bridges v. California*, (1941) 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 149. The quotations hereunder are taken from the opinion, *passim*. This case was followed in a similar proceeding in Louisiana. See *Graham v. Jones*, (1942) 200 La. 137, 7 So. (2d) 688 and 200 La. 171, 7 So. (2d) 699.

ministration of justice, for determination as to whether a summarily punishable contempt by publication has been committed. In its place, the Court substituted "the criteria applicable under the Constitution to other types of utterances . . . to out-of-court publications pertaining to a pending case," in contempt proceedings.

These criteria the Court found in the "clear and present danger" doctrine evolved in the espionage-act and criminal syndicalism cases. Even this, however, said the Court, "does not comprehend the whole problem;" but it "has afforded practical guidance in a great variety of cases." And the Court pointed out carefully that "the first amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

The Court conceded that the evil of "unfair administration of justice" is "plausibly associated with restricting publications which touch upon pending litigation;" but held that the "clear and present danger" test establishes "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." And the Court concluded that it is not "necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." Finally, the Court held that, judged by the clear-and-present danger test, so applied, the publications under consideration could not be punished summarily as contempts without infringing the guaranties of a free press in the fourteenth amendment.<sup>54</sup>

---

<sup>54</sup>In the dissenting opinion, Mr. Justice Frankfurter complains that the majority does not cite the specific provisions of the fourteenth amendment which curb state power to infringe liberty of the press, pointing to the difficulties, under the due process and privileges and immunities clauses, as between citizens and aliens, natural persons and corporations, personal and property rights, all involved in the case. But then, entirely forgetful of this complaint, he proceeds to agree with the majority that the supreme court of California should be reversed as to two of the publications involved, these being "not close threats to the judicial function which a state should be able to restrain;" and bases this concurrence expressly on the ground that "the due process clause of the fourteenth amendment protects the right to comment on a judicial proceeding, so long as this is not done in a manner interfering with the impartial disposition of a litigation." Equally fallacious, for the same reason, would seem to be his complaint that, "We are, after all, sitting over three thousand miles away from a great state without intimate knowledge of its habits and its needs in a matter which does not cut across the affirmative powers of the national government." Besides, is it conceivable that the learned justice intended to imply that he might have reached a different conclusion in a case arising from Maryland or Virginia?

An analysis of the opinions of the Court, however, reveals that while the effect of the decisions is unquestionably to bring the modern law of constructive contempt in America close to its constitutional beginnings, it has not gone the entire way.

No point was raised in the case as to the right of trial by criminal process for constructive contempts. This is stressed in the concluding paragraph of the dissenting opinion, where it is pointed out that the cases were originally tried by judges other than those allegedly contemned, and that the federal constitution "does not require a state to furnish jury trials, and states have discretion in fashioning criminal remedies."

This cannot, however, be a fair conclusion, as a generalization in any event. Many states do afford trials by jury in all criminal prosecutions.<sup>55</sup> Further, in the trial of crimes, an accused is entitled to certain safeguards, such as the presumption of innocence beyond reasonable doubt. The very difference of opinion among the nine justices of the Supreme Court as to the punishable character of the publications involved in the case there at bar, clearly evidences the "reasonable doubt" which would have demanded acquittal of contempt in a criminal proceeding.

It is accordingly submitted that while this latest pronouncement of the Supreme Court of the United States has gone far to return the American law of constructive contempt to its constitutional genesis in its conflict with liberty of expression, it has still further to go to reach the fundamentals of its historical inception. It is to be hoped that some early occasion will be found for an authoritative holding that contempts by utterance or publication out of the physical presence of a court, may, in the words of Mr. Justice Douglas,<sup>56</sup> "be dealt with as the law deals with the run of illegal acts" under "the normal safeguards surrounding criminal prosecutions."

---

<sup>55</sup>California herself, in her constitution, provides that "the right of trial by jury shall be secured to all and remain inviolate." Sec. 7, art. I. This applies to criminal as well as to civil proceedings. California, Penal Code, sec. 1042. And the courts of that state have held that this right may not even be waived except by a formal agreement between the parties in open court, in the case of the defendant by expressed concurrence with his counsel. *People v. Garcia*, (1929) 98 Cal. App. 702, 277 Pac. 747; *People v. Woods*, (1932) 126 Cal. App. 158, 14 P. (2d) 313. While the report of the case does indicate that no direct point was made of a denial of trial by criminal process, and it is true that the United States "Constitution does not require a state to furnish jury trials," there is clearly no justification whatever for Mr. Justice Frankfurter's concluding dissenting dictum that "the situation here is the same as though a state had made it a crime to publish utterance having a 'reasonable tendency' to interfere with the orderly administration of justice in pending actions."

<sup>56</sup>See note 46 *supra*.