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RECENT TRENDS CURTAILING THE SUMMARY CONTEMPT POWER IN THE FEDERAL COURTS

By CHARLES WILLIAM LUTHER

> "The law ought to be so clear, that every individual may be able to look to the statute book, and know whether, in any thing he may do, he acts within the law or not."[1]

These wistful words were spoken by Representative Joseph Draper of Virginia in the year 1830. In so speaking, he must have momentarily lapsed into a utopian fairyland far away from the realities of a government which of necessity must be administered "by men over men."[2] Representative Draper was referring specifically to the problems the courts were having in his time with criminal contempt. Notwithstanding Representative Draper's demand for laws whereby "every individual in the community should know what are the laws which he is bound to observe at the peril of his liberty,"[3] the problems arising from criminal contempts are still far from being solved.[4] The status of the present law with a view towards the dominant trends represented therein is the subject of this comment. With due respect to Representative Draper it is only fair to state that he did, with seemingly prophetic wisdom, forsee that " . . . there will be difficulty in defining contempts of court."[5] On this point there has as yet been no dissent from the legal authorities.

The Cammer *Case Introduces a Novel Doctrine*

The latest difficulty encountered is aptly exemplified in the Supreme Court case of *Cammer v. United States* decided in March, 1956.[6] In this case the alleged contemnor, Cammer, was attorney for one Gold. In August, 1953 the grand jury for the District of Columbia returned an indictment against Gold charging him with having falsely filed a non-communist affidavit in violation of 18 U. S. C. §1001. Subsequent to this indictment the grand jury subpoenaed two of Mr. Gold's associates, ordering them to also appear and produce specified documents. Cammer appeared in the District Court on behalf of Gold's associates and moved to quash and vacate the subpoenas served upon them. On this same day Cammer circulated from New York identical questionnaires and letters to fifteen members of the grand jury presently sitting who were also federal employees. In so doing,

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[1] 7 CONG. DEB. 560, 561 (1830).

[2] THE FEDERALIST No. 48, (Lodge ed. 1888) (Madison).

[3] See note 1 *supra.*

[4] See generally, THOMAS, PROBLEMS OF CONTEMPT OF COURT 85–9 (1934); Forer, *A Free Press and a Fair Trial,* 39 A.B.A.J. 800 (1955); Fox, *Summary Process to Punish Contempt,* 25 L.Q. REV. 238 (1909); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 HARV. L. REV. 1010 (1924); Comment, 57 YALE L.J. 83 (1948).

[5] See note 1 *supra.*

[6] 350 U.S. 399 (1956).

Cammer acted without the knowledge or the permission of the District Court. The questionnaires related generally to the effect of the government's loyalty program on the federal employee-jurors i. e., those members of the jury who were working for the United States government. The letter accompanying the questionnaires stated that it was being sent for their perusal "in the interest of the fair administration of justice."[7] The letter further explained that Cammer did not desire any information regarding the deliberations of the grand jury, but urged that it was the recipient's "duty as a citizen to help enlighten the court on an issue which affects the liberty of a citizen on trial in a criminal case."[8]

Ostensibly, all of the questions were related to the problem of ascertaining whether the federal employee-jurors were biased by prejudice or fear to indict anyone charged with having affiliations with the Communist Party. However, on closer examination the questions propounded reveal obviously the inescapable impact on the grand jurors which was to influence their deliberations.[9] Because Cammer sent these searching questionnaires at a time when the grand jury was in the midst of considering similar cases, the trial judge of the District Court ordered him to appear and show cause why he should not be adjudged guilty of contempt under 18 U. S. C. §401(2).[10] Cammer freely admitted the above facts but argued that his actions did not constitute contempt within the meaning of the Federal Contempt Statute, which provides:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none others, as

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) *Misbehavior of any of its officers in their official transactions;*

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[7] Cammer v. United States, 223 F.2d 322 (D.C. Cir. 1955).

[8] *Ibid.*

[9] *Id.* at n.3. Excerpts from some of the questions are as follows:

"Do you think it wise or safe for a government employee to express views on a controversial question different from the position of the Government?

* * *

"Are you involved in a loyalty proceeding? Have you ever been involved in such a proceeding?

"Are you concerned about possible involvement in a loyalty proceeding in the future?

"Do you believe that a government employee might some day have to explain his action in a loyalty proceeding if, as a juror, he voted to acquit or not to indict a person who was widely publicized as a past or present communist?

* * *

"Do you believe that a government employee's obligation to the Federal Government and to its program of fight communism would be consistent with his voting to acquit or refuse to indict a man officially charged by our Government with communist activity?

* * *

"Did you mention to or discuss the receipt of this questionnaire with any attorney or representative of the Department of Justice or with your superiors on your job? If so, with whom?"

[10] See Nye v. United States, 313 U.S. 33 (1941). Although this case involves a violation of 18 U.S.C. § 401(1), it presents valuable historical material.

> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." (Emphasis added.)[11]

Relying also on the Supreme Court's statement in *Dennis v. United States* that "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury"[12] Cammer said that this alone would justify his actions. To substantiate this position he cited the quotation in the Government's brief approved by the holding in *Emspak v. United States*.[13] It was to the effect that the defendant in that case was not entitled to a hearing regarding alleged bias of government employees as grand jurors because there was "nothing to prevent counsel, if he sees fit" to contact the members of the grand jury and find out "whether or not they had any . . . bias toward the defendant."[14]

Nevertheless, in the *Cammer* case, the trial judge held that Cammer's acts intolerably harassed the jurors and impinged upon their freedom of thought, although admitting that "there seems to be reason to believe respondent (Cammer) may have misconceived the proprieties."[15] Thus, Cammer was found guilty of contempt under §401(2) and fined $100.

On appeal to the United States Court of Appeals the judgment was affirmed with Fahy, J. dissenting. Justice Danaher pointed out for the majority that

> "If he had acted in good faith, he could have . . . sought judicial supervision, instead of which he went forward with his plan, kept it secret to himself, acted without advice from the court and . . . implied in his letter that it was the juror's 'duty' to the court to respond to the questionnaires."[16]

The Supreme Court of the United States, speaking through Mr. Justice Black, acknowledged that the proper construction of the statute in question raised important questions, and certiorari was granted. The Court, after tracing the historical background of the Federal Contempt Statute, concluded that it was unnecessary to decide the question of whether or not Cammer's acts constituted "an official transaction," since the Court held that a lawyer is not a court "officer" within the meaning of §401(2). Hence, the judgment of the Court of Appeals was reversed.

Legislative Background of Contempt Statutes

This decision with its somewhat unique reading of the term "officers of the court" is the latest development of a series of vexatious problems beginning about 1828 and as a result of which Representative Draper made the speech earlier quoted in part. Public attention was focused rather dra-

[11] 18 U.S.C. § 401.
[12] 339 U.S. 162, 171–72 (1950).
[13] 203 F.2d 54 (D.C. Cir. 1952).
[14] *Ibid.*
[15] *In re* Cammer, 122 F. Supp. 388, 389 (D.D.C. 1954).
[16] 223 F.2d 322, 327 (D.C. Cir. 1955).

matically upon the problem in the United States [17] immediately after the abortive impeachment proceedings against Federal Judge James H. Peck.[18] Judge Peck, acting under the power of the Judiciary Act of 1789,[19] had not only disbarred but also imprisoned an attorney for publishing a criticism of his opinion while a review was pending before a higher court. That Act in that case allowed Federal courts to punish by fine or imprisonment, at their discretion, all contempts of authority. Under the Act of 1789, Congress had not attempted to define what would constitute contempt but left this amorphous conception to the enlightened judicial discretion of the individual judge. Thus, with this "royal prerogative" vested in one judge acting out the roles of zealous District Attorney, impartial judge, objective juror, and obedient executioner the stage was early set for judicial indiscretion. Judge Peck, it appears, did not disappoint the legal audience. The repercussions of this case were loud and immediate and almost all the members of Congress who participated in the impeachment proceedings against Peck were instrumental in bringing about the passage of the Act of March 2, 1831.[20] That act, which is substantially the same act presently in effect, clearly attempted to curtail the previously undefined acts which the courts might punish for contempt.[21] Many optimistically hoped that some good would come from the drastic action of Judge Peck and the resultant legislation enacted. Just how effective the legislation actually was in defining the acts of contempt is still the subject of controversy in the courts and in the legal writings.[22]

To What Extent Has the Enacted Legislation Solved the Problem?

With the peculiar historical background involved here, it might be supposed that statutory enactments would have solved to a large extent the problems of the federal courts in regard to their contempt powers. Such has not been the fact. During the period from 1831 to the present time, the judicial pendulum has shifted from one extreme to the other in the interpretation of pertinent legislation. Beginning with a somewhat unnoticed decision in 1835 by a Federal Circuit Court,[23] the rule was laid down that the statute in question was to be narrowly construed. The court held that a trial judge had no "power" to punish a newspaper writer for contempt for publishing an allegedly offensive article regarding a pending case. The rationale for this holding was that the words in subsection 1 of §402,

[17] For discussion of English law see FOX, CONTEMPT OF COURT (Oxford Press 1927).

[18] For the detailed history of this famous episode, see STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); Frankfurter and Landis, *supra* note 4; Nelles and King, *Contempt by Publication*, 28 COLUM. L. REV. 401, 423–31 (1928).

[19] 1 Stat. 83 (1789).

[20] 4 Stat. 487 (1831).

[21] See note 10 *supra*.

[22] FRANKFURTER AND LANDIS, *supra* note 4; Comments, 2 STAN. L. REV. 763 (1950), 58 W. VA. L. REV. 88 (1955); Note, 7 HAST. L.J. 312 (1955–56).

[23] 14 Fed. Cas. 380, No. 11,350 (C.C. Pa. 1835).

"so near thereto," plainly referred to physical proximity. Under this test the question is whether the acts were committed near the court in a *geographical sense;* and the fact that the acts were connected *causally* with the functioning of the court was deemed of no consequence. The Supreme Court in 1918 took an entirely different view of subsection 1. In the landmark case of *Toledo Newspaper Co. v. United States*[24] it was held that a *reasonable tendency* to obstruct justice irrespective of geographical nearness was sufficient to support the federal contempt power. This rule announced in the *Toledo* case remained unaltered for twenty-two years until the court decided *Nye v. United States*.[25] In this case the Supreme Court completely reversed its position, confessed to historical inaccuracies in the *Toledo* case, and stated that legal scholars[26] had plainly demonstrated that the court was there mistaken. Hence, the rule of "physical proximity" in construing subsection 1, and by implication the rule of narrowly construing the complete statute, was re-established.

Since the *Toledo* case the Supreme Court has staunchly adhered to its strict interpretation of the contempt power.[27] And now that the *Cammer* case has been decided, one might well wonder if the Supreme Court has gone the limit in its zeal to restrict federal contempt power.

Is an Attorney an "Officer of the Court" Historically?

In analyzing the *Cammer* decision, it is readily seen that Justice Black saw no reason for hesitating to state that "a lawyer is not a court officer within the meaning of §401(2)."[28] In so deciding, however, Justice Black ventured no opinion as to whether or not the conduct was "an official transaction" within the meaning of the statute. Nor was the Court called upon to decide whether Cammer's conduct was actually misbehavior. In his opinion, Justice Black limited the word "officer" to mean the "group of persons who serve as conventional court officers and are regularly treated as such in the laws."[29] The latter statement undoubtedly caused raised eyebrows from legal-minded grammarians. Conspicuously omitted by Justice Black was any further explanation of what was meant thereby. Only Mr. Justice Reed, in concurring, admitted that the court had somewhat of a "unique reading"[30] of the term "officers of the court."

Whether or not the Court's interpretation of "officers of the court" is entirely correct is a question of no small doubt. Beginning as early as 1866 in *Ex parte Garland*[31] the Supreme Court has referred to attorneys as

[24] 247 U.S. 402 (1918).
[25] 313 U.S. 33 (1941).
[26] The Court was here referring to the article by Frankfurter and Landis, *supra* note 4.
[27] See, *e.g.*, *In re* Bradley, 318 U.S. 50 (1943); Pendergast v. United States, 317 U.S. 412 (1943).
[28] 399 U.S. at 405.
[29] *Ibid.*
[30] *Id.* at 408.
[31] 71 U.S. (4 Wall.) 333 (1866).

being officers of the court. In *Ex parte Wall*[32] Justice Bradley, in a disbarment proceedings where the lawyer allegedly took part in a lynching during the court's lunch hour, indignantly stated in the opinion:

> "What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the *officers of his own court* was a leader in . . . such an outrage?" (Emphasis supplied.)[33]

In *Booth v. Fletcher*[34] Justice Miller, in discussing the action of disbarring an attorney, stated:

> "The lawyer is an officer of the court of whose bar he is a member."[35]

To support this contention he cited as precedents the *Garland* and *Wall* cases.

In *Ex parte Davis*,[36] the Circuit Court of the United States was dealing with Section 725 of the Revised Statutes of the United States which read:

> "The said courts shall have power to impose and administer all necessary oaths, to punish, by fine or imprisonment, at the discretion of the court, contempts for their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, *the misbehavior of any of the officers of said courts in their official transactions,* and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person . . . ." (Emphasis supplied.)

The court said that there was no doubt that " . . . the attorney . . . is one of the officers of the court, within the intent and meaning of the above statute."[37]

Numerous state decisions are readily found which support the contention that lawyers are officers of the court. In the case of *In re Chappel*,[38] the court stated that:

> "The power to discipline attorneys who are 'officers of the court' is an inherent power in courts . . . and one which is essential to an orderly discharge of judicial functions."[39]

In various opinions by the American Bar Association Committee and the Canons of Professional Ethics, the statement is found that an attorney is " . . . an officer of the court."[40]

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[32] 107 U.S. 265 (1882).
[33] *Id.* at 274.
[34] 101 F.2d 676 (D.C. Cir. 1938), *cert. denied,* 307 U.S. 628 (1938).
[35] *Id.* at 680,
[36] 112 F. 139 (C.C. Fla. 1901).
[37] *Id.* at 140.
[38] 33 N.E.2d 393 (1938).
[39] *Id.* at 395. See also West v. Field, 181 Ga. 152, 181 S.E. 661 (1935); Schlitz v. Meyer, 61 Wis. 418, 21 N.W. 243 (1884). *But see* Bailey v. Williams, 6 Or. 71, 38 Pac. 71 (1876).
[40] CANONS OF PROFESSIONAL ETHICS, No. 22. See generally, DRINKER, LEGAL ETHICS (1953).

The traditional definitions found in the law dictionaries is to the effect that an attorney is "an officer in a court of justice."[41]

Cummings,[42] in discussing the philosophy of disbarment and contempt, says:

> "The power of the court to impose fine or imprisonment for contempt should be distinguished from disbarment proceedings. The primary object of the former is to punish the offender; the purpose of the latter is to protect the courts, the bars, and the public. . . . The exercise of both powers can be effectively sustained upon the principle that the *attorney is an officer of the court* . . . . "[43]

These collected authorities without a doubt have been judicially tossed to the wayside by the Supreme Court, thus reaffirming what the late Chief Justice Hughes said in 1928, *viz.*, "a federal statute finally means what the (Supreme) Court says it means."[44]

What Is the Future of Summary Contempt Power?

Even though it is conceded that the Supreme Court has not followed the traditional definitions as to who is an officer of the court, the *Cammer* case raises still much broader implications. The most important is that the Supreme Court is apparently going to continue to interpret the statutory regulation of contempt as a definite limitation upon judicial power. The reasons in favor of this curtailment are obvious: In the summary contempt proceedings as provided for under §401, the attorney in question is completely without the safeguards of a jury trial and the other normal court procedures. The Supreme Court gave advance warning that this result would be reached in decisions preceding the *Cammer* case, where they repeatedly stressed that the contempt power of the federal courts should be strictly construed to avoid undue inroads into the procedural safeguards of the Bill of Rights.[45]

The *Cammer* decision also dispelled the fatuous dreams of the drafters of the early contempt legislation, *i.e.*, that legal certainty can eliminate, via codification, all judicial law-making. The Supreme Court in the past has only too well demonstrated to us that courts in their interpretation of statutes cannot avoid some judicial-law making.[46]

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[41] BLACK, LAW DICTIONARY (4th ed. 1951).

[42] Cummings, *The Lawyer Criminal,* 20 A.B.A.J. 82 (1934). See also STONE, LAW AND ITS ADMINISTRATION at 163 (1915).

[43] CUMMINGS, *supra* note 42, at 83.

[44] Quoted by Justice Frank in Guiseppi v. Walling, 144 F.2d 608, 621 (2d Cir. 1944).

[45] *In re* Mitchell, 326 U.S. 224 (1945). See cases cited in Farese v. United States, 209 F.2d 312 (1st Cir. 1954).

[46] A most amazing example of this is found in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) construing away a legislative victory labor had won in the Clayton Act of 1914. In 1941 the Supreme Court, in referring to the Duplex case, said: "It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove." United States v. Hutcheson, 312 U.S. 219, 230 (1941).

Fortunately or unfortunately, depending upon the view one takes of the case, the *Cammer* decision plainly shows that judicial law making is not always modest in scope. While legal uncertainty to the extent of putting entirely new meanings into well-settled legal definitions is to be deplored, it is submitted that the grave possibility of abuse which is so inherent in such a drastic power as summary contempt was ample justification for the Supreme Court's striking interpretation of "an officer of the court."