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COMMENTS

FREE SPEECH, DUE PROCESS — AND CONTEMPT

GORDON L. WALGREN

The power of a court to punish summarily for contempt has been likened to be "the nearest [thing] akin to despotic power of any power existing under our form of government."[1] On the other hand, it has been praised as an inherent necessity if the courts are to exercise their functions properly.[2] The balancing of these two considerations has perplexed the courts which have dealt with the contempt cases as they have come up through the years; that is, whether to limit the power, thereby possibly sacrificing judicial decorum and standing, or to allow it to remain unlimited as an assurance of continuing dignity in all judicial proceedings. A recent decision of the Supreme Court of Wyoming, *Application of Stone*,[3] seems certain to raise a storm of comment across the country. The facts are extremely interesting and raise several problems which may be of constitutional importance.

J. Norman "Stoney" Stone petitioned the Wyoming Supreme Court for admission to the bar without examination. His petition was referred to the State Board of Law Examiners and a finding was made to the effect that the applicant was not possessed of the requisite character attributes necessary to become a member of the Wyoming bar. This finding was affirmed by the Wyoming Supreme Court.[4] During the pendency of these proceedings the applicant sent copies of a letter to Attorney General Herbert T. Brownell, to the Wyoming court and to each member of the court individually. The applicant stated: "I indict the . . . Supreme Court of Wyoming with having fomented a conspiracy in concert to deprive me of my livelihood, wilfully, knowingly, maliciously. . . ." Also, the applicant sent a letter to the clerk of the Wyoming court in which he said: "I accuse the Wyoming Supreme Court of being unfair, prejudiced, partial and biased and am sure that I will not get a fair hearing. . . ."

On the basis of the above two letters the Attorney General of Wyoming brought an action of criminal contempt against the applicant. While the contempt action was pending the defendant sent several

[1] EDWARD M. DANGEL, NATIONAL LAWYERS'S MANUAL, "CONTEMPT" § 41 (1939).
[2] CROMWELL HOLMES THOMAS, PROBLEMS OF CONTEMPT OF COURT, 7 (1934).
[3] ....Wyo........, 305 P.2d 777 (1957), *cert. denied* 17 C.C.H. U.S. Sup. Ct. Bull. 699 (March 4, 1957).
[4] Application of Stone, 74 Wyo. 389, 288 P.2d 767, *cert. denied* 352 U.S. 815 (1955), 71, 1 L.Ed.2d 68 (1955).

other statements and letters to the court, some of them having been published previously in his newspaper, "Stone's Shooting Star." In addition, certain motions were filed by the defendant. In a motion for jury trial and disqualification of certain supreme court judges, the defendant cited letters he had received saying: "I know that bunch of Legal Shysters in Wyoming who are also in the Supreme Court...." In a motion for additional time in which to answer the contempt charge, the defendant stated: "Defendant is busily engaged in a one-man truth squad campaign for the defeat of Judge Glenn Parker of the Wyoming Supreme Court who is a prejudiced individual.... He believes in justice for the privileged few. If Judge Parker votes not to permit this extension of 30 days the voters will be able to judge for himself [sic] that he wants to jail defendant and shut him up as quickly as possible so that he will not be able to tell the people the truth of what is going on."

Defendant published in his paper and forwarded copies to the court the following: "J. Norman Stone will present evidence of deceit, fraud, libel, defamation of character, collusion, conspiracy and outright falsehoods by the... Wyoming Supreme Court...." Another statement published by defendant and sent to the court indicated his feeling that, "There is no doubt that the minds of the judges are poisoned and that I have been found guilty of contempt long ago. This trial is a mere formality.... The... judges of the Wyoming Supreme Court are dangerous men and so long as they remain in power the freedom and even the lives of Wyoming citizens are not safe from jeopardy. They do not respect the Bill of Rights of the U.S. Constitution and the Wyoming Constitution and are ignorant of God's natural laws. They are a disgrace to our way of life...."

For each of these outbursts the defendant was found guilty of a direct contempt of the court after he had been allowed to obtain counsel and have a hearing presided over by the same judges against whom his comments were directed. The court sentenced him to six months in the county jail and fined him $1000 with a provision that if the fine were not paid an additional prison sentence of three months would be imposed.[5]

DEFINITION OF TERMS

To understand fully the problems involved in the *Stone* case, as in any contempt case, it is necessary to be familiar with the terms used

[5] 305 P.2d at 799.

by the courts, and the significance that the courts attach to those terms. First, a distinction must be made between *criminal* contempt and *civil* contempt. A criminal contempt is prosecuted to preserve the power of the court and to punish the offender. It consists of conduct that is directed against the dignity and authority of the court. The punishment in such a contempt is punitive and is meant to vindicate the court's authority.[6] It is a contempt that involves the public interest as opposed to civil contempt which involves a private interest only.[7]

A *civil* contempt consists of failing to do something which the contemnor is ordered to do by the court. The punishment in this type of contempt is remedial, being for the benefit of a private complainant.[8] The proceeding in the *Stone* case was to punish the defendant, and the contempt citation was criminal in its nature. It is settled that trial by jury does not extend to criminal contempts.[9]

Second, a more important distinction is found in the terms *direct* and *constructive* contempts. Whether a contempt is designated to be one or the other will have seriously constitutional implications, as will be pointed out below. It should be noted that the court in the *Stone* case expressly found that the defendant's statements amounted to a direct contempt.[10]

Direct contempts properly embrace only those acts of which the court itself has personal knowledge, which take place in the presence of the court or so near thereto as to interrupt the proceedings.[11] Conduct in the presence of the court which tends to embarrass or obstruct the court in administration of justice, or which tends to bring the administration of law into disrespect, constitutes a direct contempt.[12] Also, direct contempt has been defined as an insult committed in the presence of the court, or of a judge when acting as such, or a resistance of, or interference with, the lawful authority of a court or judge in his presence, or improper conduct so near to the court or judge acting judicially as to interrupt or hinder judicial proceedings.[13] *Constructive* contempts, on the other hand, are acts done, not in the presence of the court or

[6] *In re* Kahn, 204 Fed. 581 (2nd Cir. 1913); Tucker v. State, 35 Wyo. 430, 251 Pac. 460 (1926).

[7] Edward M. Dangel, National Lawyer's Manual, "Contempt" § 12 (1939).

[8] *Id.* § 12.

[9] *In re* Terry, 128 U.S. 289 (1888); Cooke v. U.S., 267 U.S. 517 (1925); Fisher v. Pace, 336 U.S. 155 (1949); Doss v. Lindsley, 53 F. Supp. 427 (E.D. Ill. 1944) *affd.* 148 F.2d 22 (7th Cir. 1944).

[10] 305 P.2d at 786.

[11] Cromwell, *op. cit. supra* note 2, at 3.

[12] Dangle, *op. cit. supra* note 7, § 198 at 96.

[13] *Id.* § 7.

judge, which tend to obstruct the administration of justice, or bring the court or judge or the administration of justice into disrespect.[14]

THE BASIC ISSUE — DIRECT OR CONSTRUCTIVE?

Whether a particular contempt is direct or constructive will have immediate constitutional consequences. It is well settled that the courts have the inherent power to punish summarily for direct contempts,[15] and such procedure accords with the requirements of due process.[16] But, in order for a court to punish for a constructive contempt, it must meet other requirements if the defendant is to be afforded due process of law. He must be given notice, opportunity to obtain counsel, and an impartial hearing.[17]

If the defendant in the *Stone* case was in direct contempt of the court under the definitions as set out above, there is little doubt but that he was afforded his constitutional rights of due process of law and freedom of speech. The finding by the court that the statements of the defendant which were "filed" with the Wyoming court constituted a direct contempt is certainly open to question. It must be remembered that the power to punish for direct contempt must rest on the importance of protecting the judiciary from attacks which disrupt the proceedings of the court and interfere with the orderly processes of justice. Only such an obstruction can justify a court in summarily punishing a person for his conduct. Also, it should be noted that this power completely disregards what are thought of as being fundamental requisites of a free society; that is, trial by jury, notice, impartial hearing, and freedom of speech and press. To justify the exercise of the power the act must take place within the personal knowledge of the judge so that there will be no necessity to have a hearing and introduction of evidence.[18] It is generally believed that the act complained of as being a direct contempt must have the character of immediately disrupting the orderly processes of justice or be likely to do so. While the words of the defendant in the present case were certainly intemperate, it is clear that the vehemance of words does not determine whether a contempt is subject to summary process.[19] The crucial question in the *Stone* case therefore,

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[14] *Id.* § 5.

[15] See Frankfurter dissent in Bridges v. State of California, 314 U.S. 252, 279 (1941); *Ex parte* Robinson, 86 U.S. 505 (1874); Cooke v. U.S., and Fisher v. Pace, *supra* note 9; State v. Bland, 189 Mo. 197, 88 S.W. 28 (1905).

[16] Cooke v. U.S., Fisher v. Pace, *supra* note 9. See Sacher v. U.S., 343 U.S. 1 (1952) (Frankfurter dissenting opinion).

[17] *In re* Oliver, 333 U.S. 257 (1948); *In re* Murchison, 349 U.S. 133 (1955).

[18] Cooke v. U.S., *supra*, note 9; *In re* Oliver, *supra* note 17.

[19] Craig v. Harney, 331 U.S. 367 (1947).

is whether the acts done by the defendant were within the presence of the court and were of a character which were likely to disrupt the orderly proceedings of justice, thereby requiring the exercise of this summary process of punishment.

The vast majority of the cases dealing with the direct contempt process concern acts done by the defendant in the *actual* presence of the court and during proceedings of a case in *open* court. In the *Stone* case the defendant was never physically present at the time the purported acts of misconduct constituting direct contempt took place. Also, it might be questioned whether, even if it be found that the misconduct was within the presence of the court, that misconduct reasonably would have been likely to disrupt the orderly process of justice.

Before deciding whether the filed statements of the defendant in the *Stone* case amounted to a direct or a constructive contempt, let us assume the latter is the correct determination, and investigate the likely consequences from such a finding.

FREE SPEECH AND THE "CLEAR AND PRESENT DANGER TEST"

The "clear and present danger test" is a restriction on absolute freedom of speech and was first adopted by the Supreme Court in 1919 in *Schenck* v. *United States*,[20] an espionage case. Although the test had been applied in other types of cases involving the freedom of speech it was not until the case of *Bridges* v. *California* and its companion case, *Times-Mirror Company* v. *Superior Court of State of California*,[21] that the court considered its application in a criminal contempt proceeding. In both cases the contempts committed were clearly constructive. In the *Times-Mirror* case the acts complained of constituted publication of adverse editorials regarding certain actions pending before a California state court. The United States Supreme Court found that the power as exercised by the California court was not justified, and that only when the acts complained of constituted a "clear and present danger" to the orderly workings of the judiciary would the court be justified in punishing them as constructive contempts. Justice Frankfurter wrote a vigorous dissent in which he stated:

> Since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The

[20] 249 U.S. 47 (1919).
[21] 314 U.S. 252 (1941).

need is great that the courts be criticized but just as great that they be allowed to do their duty.[22]

Other cases have considered the application of the "clear and present danger test" to contempt prosecutions. In *Pennekamp* v. *Florida*,[23] the United States Supreme Court reversed the Florida Supreme Court when it affirmed a lower state court finding of contempt. The contempt involved there was constructive. The importance of the *Pennekamp* case is in the Court's indication that it will look into the facts to determine whether there actually was a clear and present danger as the Court sees the matter and will not be bound by such a finding by a state court.[24] The court in the *Stone* case is, it seems, anticipating a possible determination by the United States Supreme Court that the contempt was constructive, and to insure against a reversal, has made an express finding that "... the statements and utterances ... constituted a clear and present danger to the administration of justice in the State of Wyoming."[25] The *Pennekamp* case makes it clear that the insurance may not be adequate.[26]

Craig v. *Harney*[27] was another constructive contempt case wherein the Court applied the clear and present danger test. It was there held that a publication, while a motion for a new trial was pending, of an unfair report of the facts of a civil case, accompanied by intemperate criticism of the judge's conduct was protected by the Constitution.

From these three cases—the *Bridges* case, the *Pennekamp* case, and the *Craig* case—it is clear that the power of a court (state or federal) to punish for constructive contempt is limited by the Constitutional right of freedom of speech and press. To override this right it must be shown that the statements complained of are such as would constitute a "clear and present danger" to the orderly administration of justice.

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[22] 314 U.S. at p. 284.

[23] 328 U.S. 331 (1946).

[24] "...we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, protect. When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final." 328 U.S. at p. 335.

[25] 305 P.2d at p. 792.

[26] There are some intimations that under the right of free speech the right to criticize judicial action has a greater scope where the judiciary is elective. See Pennekamp v. Florida (concurring opinion per Rutledge), 328 U.S. at p. 370.

[27] 331 U.S. 367 (1947).

Other Due Process Arguments

A court's finding that there is a "clear and present danger" to the orderly administration of justice as a justification for punishment for constructive contempts may not insure a conviction for reasons apart from the independent investigation of the facts by the Supreme Court. Where a constructive contempt is being prosecuted, due process of law requires notice, opportunity to obtain counsel and an impartial hearing.[28] In the *Stone* case the defendant had the first two of these. He was also given a hearing, but whether the defendant could have obtained a fair and impartial hearing before the very judges to whom he directed his contemptuous remarks is highly improbable. The Supreme Court has made it unequivocally clear that in constructive contempts the hearing must be an impartial one before a judge different from the one against whom the contempt was committed.[29]

The importance of the distinction between constructive contempt and direct contempt should be quite apparent. The punishment inflicted upon the defendant in the *Stone* case must rest alone on the finding of direct contempt. The express finding by the Wyoming court that the filed statements of the defendant constituted a ". . . clear and present danger to the administration of justice in the State of Wyoming,"[30] does not alone sustain the court in punishing on the basis of a constructive contempt. That determination is always open to review by the Supreme Court and, even if that fact were true, the defendant was not afforded due process of law because he probably could not have been given the required impartial hearing.

Because of the significant constitutional differences between direct contempt and constructive contempt, it becomes imperative to the Wyoming court's position in the *Stone* case to determine whether its finding of a direct contempt was accurate. The closest United States Supreme Court case on its facts to the *Stone* case is *Cooke* v. *United States*.[31] A lower federal court found the defendant, Cooke, guilty of contempt in sending a contemptuous personal letter to the judge in his chambers, and summarily punished him. The Tenth Circuit Court affirmed, but the Supreme Court reversed on the ground that the defendant had been denied due process of law. There was in effect at this time a federal statute setting out the power of a lower federal court to

[28] *In re* Murchison, 349 U.S. 133 (1955).
[29] See note 28, *supra*.
[30] 305 P.2d at p. 792.
[31] 267 U.S. 517 (1925).

punish for contempt.[32] That statute stated 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 Court found that though the letter was contemptuous it was not within the presence of the court which was necessary to allow summary punishment. In other words, the Court found that a contemptuous letter sent to a judge in his chambers was not a direct contempt permitting the summary process, and that a due process hearing must be had before the defendant could be punished for the contempt.

The Wyoming court disposes of the *Cooke* case quite summarily and possibly without adequate consideration of its importance. In referring to the *Cooke* decision, it says: "Mr. Chief Justice Taft . . . held the letter was contemptuous and the offense had been committed in the *presence of the court*, although not 'in open court' so as to permit summary punishment *without a hearing*." (Emphasis by the Wyoming court.) The Wyoming court emphasizes the words "without a hearing" when it cites the *Cooke* decision.[33] This evidently is the basis upon which the court distinguishes the *Cooke* decision from their case; that is, Stone was given a hearing while Cooke was not. But the court overlooks one vital factor; namely, that a *prejudicial hearing* is no hearing at all, and as has been pointed out above, a defendant in a criminal proceeding for constructive contempt is not afforded due process of law where the same judges against whom the contempt was directed sit as judges of that proceeding.[34]

If the *Cooke* decision is to be dismissed as not controlling the *Stone* case, it must be done on other grounds. It might be suggested that a distinction lies in the fact that the *Cooke* case involved federal courts alone and a limiting federal statute, while the *Stone* case concerns the power of a state court with no limiting statute. This, of course, raises the question of whether the requirements for due process in a contempt

[32] The statute as it then read is as follows:

"Title 28 USC 385 (Judicial Code 268) Administration of Oaths; Contempts—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. 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 resistence by any such officers or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

For the present day language of this statute see Title 18 USCA § 401.

[33] 305 P.2d at p. 785.

[34] See *supra* note 28.

proceeding are less strict in a state court than they are in a federal court. The *Bridges* case seems to put this question at rest. The Court carefully pointed out in that case:

> To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press' forbids it, we are necessarily measuring a power of all American courts, both state and federal . . .[35]

The Wyoming court cites the case of *Owens* v. *Dancy*[36] wherein the Tenth Circuit Court affirmed a lower federal court decision of summary punishment for contempt consisting of remarks made by the defendant in a pleading. Certiorari was denied by the Supreme Court. The *Cooke* decision is substantially ignored. But the *Owens* case might be distinguished from the *Cooke* case in the same manner that the *Stone* case can be distinguished from the *Cooke* case as set out below.

In both the *Owens* case and the *Stone* case the contemptuous remarks are made in statements or pleadings filed with the court. In the *Cooke* case, however, there was a personal letter sent, not to the court, but to the judge in his chambers. This could be a valid basis for distinction. The *Cooke* case found a constructive contempt which requires a due process hearing, while in the *Owens* and the *Stone* cases there were direct contempts which could be punished summarily without regard for the usual requisites of due process of law.

Just as the Supreme Court will make an independent examination of the issues underlying an application of the "clear and present danger" doctrine, so too will it make an independent examination to see that the facts actually support a finding of direct contempt. In *Fisher* v. *Pace*,[37] a case involving a direct contempt, the Court stated that in order to accord with due process, a summary conviction for contempt must be supported by adequate facts.[38] Generally, it can be said that a finding of a direct contempt which results in summary punishment rests in the sound discretion of the court, and a reversal will be occasioned only for gross abuse of that discretion. But, as the *Fisher* case illustrates, due process considerations cannot be completely avoided merely because the state or lower federal court finds that the contempt committed was direct as was the finding in the *Stone* case.

[35] 314 U.S. at p. 260. *But cf.* State v. Gussman, 34 N.J. Super. 408, 112 A.2d 565 (1955).
[36] 36 F.2d 882 (10th Cir. 1929).
[37] 336 U.S. 155 (1949).
[38] 336 U.S. at p. 160.

However, the possibility of obtaining a reversal of a determination of guilt for direct contempt because of due process reasons (other than that of freedom of speech and press) is a much more difficult task than where the contempt punished is a constructive one.

If the issue raised by the defendant in a direct contempt proceeding is that he was deprived of his first amendment freedoms, the possibility of a reversal would appear, at this time, to be perceptibly more unlikely than the case where the contempt is constructive. The question is not settled by any means. There is only one Supreme Court case that has considered the challenge that in a direct contempt proceeding the defendant was denied his constitutional right of freedom of speech, *Fisher v. Pace.*[39] The court held that where the contempt was readily observable by the presiding judge, and where it constituted an open and immediate threat to orderly judicial procedure and to the court's authority, the offended tribunal was constitutionally empowered to punish summarily. It should be noted that this was a 5-4 decision. The court in the *Fisher* case concerned itself primarily with a determination of whether the defendant had been afforded due process of law where he had been found guilty of a direct contempt without a formal hearing. As has been noted above,[40] the court decided that such a hearing was not necessary.

All other Supreme Court cases raising the question of denial of a constitutional right to freedom of speech and press have involved constructive contempts. The *Bridges* case, which is the leading case in the application of the "clear and present danger" doctrine to constructive contempts, was a 5-4 decision. The dissent, led by Justice Frankfurter, felt that the first amendment freedoms should not outweigh the power of a court to punish for a constructive contempt. The decision of the majority in this case did not go so far as to restrict the power of a court to punish for direct contempts. The court stated that both the state and the federal courts have the power to protect themselves from disturbances and disorders in the courtroom by use of contempt proceedings, and that power cannot be challenged as conflicting with constitutionally secured guarantees of liberty. The *Pennekamp* decision reiterates this view, and Mr. Justice Frankfurter, a dissenter in the *Bridges* case, wrote a concurring opinion in the *Pennekamp* case which serves to strengthen further the court's authority in this regard.[41]

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[39] *Supra*, note 37.
[40] *Supra*, note 9.
[41] 328 U.S. at p. 350.

CONCLUSION

The problems involved in the *Stone* case are difficult. A decision cannot be based on legal precedent alone. The underlying policy considerations must be given weight as well. It is submitted that the Wyoming court's finding—that the motion filed by the defendant for additional time to answer the contempt charge constituted a direct contempt—was a correct determination under the holding of the *Owens* case,[42] and was properly punished summarily.

The constitutional rights of a defendant must be balanced with the necessity of preserving order and dignity of the judicial process. The statements of the defendant in the *Stone* case were uncalled for, to say the least. He was, as the Wyoming court said in their affirmance of the Board of Law Examiners' decision, "... evidently disposed to improperly try [sic] the matter pending in this court before the public."[43] The motion that was filed requesting the additional time restricts and interferes with the orderly disposition of justice in that it places upon the judges, who are to decide the propriety of that motion, considerations which should not be a part of a fair and impartial disposition.[44] As Justice Frankfurter so aptly put it in his concurring opinion in the *Pennekamp* case, "A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of rewards or the menace of disfavor."[45]

> The purpose ... is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal.[46]

If the judiciary of this country is to remain independent of thought and free from coerced opinion and to continue as the guardian of all

[42] Owens v. Dancy, 36 F.2d 882 (10th Cir. 1929). The contemptuous remarks made by the defendant in this case were contained in a "motion for leave to file ... a petition for rehearing." It was there alleged "that to determine this case ... without judicial consideration ... and without the knowledge on the part of the justices participating in said decision ... was a legal fraud against the rights of these movants,".

[43] 74 Wyo. 389, 393, 288 P.2d 767, 771 (1955).

[44] The defendant included in his motion for an additional thirty days in which to answer, the following language:

"If Judge Parker votes not to permit this extension of 30 days the voters will be able to judge for himself [sic] that he wants to jail defendant and shut him up as quickly as possible so that he will not be able to tell the people the truth of what is going on."

[45] 328 U.S. at p. 355.

[46] 314 U.S. at p. 291 (dissenting opinion per Frankfurter).

our constitutional rights, the power of summary punishment for contempt as exercised by the Wyoming Supreme Court in the *Stone* case should not be limited. The best assurance of a sound discretionary use of that power without abuse is to guard carefully against all attacks on the independence of the judiciary from whatever source; any recourse remaining in the hands of a free and informed electorate.