Vanderbilt Law Review

Volume 10
Issue 4 *Issue 4 - A Symposium on Arbitration*

Article 14

6-1957

The Federal Courts and Indirect Criminal Contempt

Philip L. Peeler

NOTES

THE FEDERAL COURTS AND INDIRECT CRIMINAL CONTEMPT

Judicial decisions which conflict with settled moral and ethnological convictions are not translated overnight into effective standards of acceptable behavior. The decisions, however, must be implemented.[1] The purpose of this note will be to deal with one method of implementation, *i.e.*, the use of the court's power to punish for criminal contempt particularly in regard to decrees, and the extent to which and under what circumstances persons not directly named in those decrees may be subjected to punishment for conduct of a criminal nature which interferes with the enforcement of those decrees.

CONTEMPT

It is impractical at this point to trace the power of courts to punish for contempt. That it does inhere in Anglo-American jurisprudence seems to be beyond dispute. It was exercised in England before our federal government was established, and came to us as a part of the common law. Whether the power was to be summarily exercised in all possible cases, or whether in some the alleged contemnor was entitled to a plenary trial, has been the subject of dispute.[2] Nevertheless, the general rule for the state courts is that a court has inherent power to punish contempt, whether the act of contempt be direct or indirect, civil or criminal. Contempt may consist of disobedience of an order of the court, insult, or other conduct or omission, whether or not the wrongful acts are also felonies or misdemeanors, and whether imprisonment or fine is imposed or indemnity of an adverse party is decreed.[3] The constitutional guaranty of trial by jury is not

1. See Brown v. Board of Education, 347 U.S. 483 (1954); Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956). One writ of attachment has been issued in a case certain to test some of the legal problems discussed in this article, originally styled McSwain v. Board of Education, Civil No. 1555 (E.D. Tenn. 1956), on motion of United States changed to United States v. Bullock, Civil No. 1555.

2. The authority usually cited is 4 BLACKSTONE, COMMENTARIES 283-84; however, this view has been criticized as historically unsound. *Compare* THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934); 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); Note, 27 VA. L. REV. 665 (1941).

3. Pass v. State, 181 Tenn. 613, 184 S.W.2d 1 (1944). The statute then in effect was substantially the same as TENN. CODE ANN. §§ 23-901 to -903 (1956). These statutes speak in terms of a specific limitation upon the exercise of the power and could be interpreted as abolishing the common-law inherent powers to punish for contempt. They do not provide for jury trials. In 1957 a bill was introduced in the 80th General Assembly of Tennessee (H.B. 877) to provide for jury trials in cases of indirect criminal contempt, but failed of passage. For similar holdings in other states, see McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); Rust v. Pratt, 151 Ore. 505, 72 P.2d 533 (1937). See also 12 AM. JUR., *Contempt* § 40 (1938); 17 C.J.S., *Contempt* § 43 (1939).

applicable.[4] In general, contempt is an act that interrupts or interferes with the orderly proceedings of a court, or disobedience of, resistance to, or interference with, the orders or agents of the court. The prosecution may be for either civil or criminal contempt, but the proceeding itself is neither criminal nor civil, but *sui generis*.[5] As a rule, if the punishment is in aid of the party seeking relief, it is for civil contempt. If designed to vindicate the court's authority, especially where prosecuted in the name of the government, and where the acts cited are criminal in themselves, the prosecution is normally for criminal contempt.[6] If the wrongful act is committed in the actual presence of the court, it is said to be a direct contempt.[7] Two terms are used to describe conduct occurring outside the court: *constructive* contempt and *indirect* contempt. Under the common law, there is probably no difference between the two, but at one time, as will be seen later, a distinction may have been made in the federal courts.

The proceedings at common law, invariably summary in cases of direct contempts,[8] are usually upon affidavit, notice, and hearing in cases of indirect contempts.[9] Jury trials rarely have been granted, and a number of state courts have held that state statutes granting jury trials in contempt cases were unconstitutional as an undue legislative infringement upon a judicial function.[10]

---

4. Eilenbecker v. Court of Plymouth County, 134 U.S. 31 (1890).

5. Bowles v. United States, 50 F.2d 848 (4th Cir. 1931); *In re* Paleais, 296 Fed. 403 (2d Cir. 1924); Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 Fed. 20 (8th Cir. 1912); Gretna v. Rossner, 154 La. 117, 97 So. 335 (1923); 12 AM. JUR., *Contempt* § 66; 17 C.J.S., *Contempt* § 7. *But see In re* Swan, 150 U.S. 637, 652 (1893); New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387, 392 (1874).

It would seem to follow that if contempts are specific crimes, the constitutional guaranty of trial by jury would apply and that no legislative act could make any contempt punishable without a jury trial. In Gompers v. United States, 233 U.S. 604, 610 (1914), Mr. Justice Holmes set up this same argument and dismissed it as a non sequitur. Instead, he explained it as a matter of case law, agreeing nevertheless that the Constitution did not guarantee a trial by jury in contempt proceedings.

The punishment for contempt has also been said to be sui generis. United States v. Sullens, 36 F.2d 230, 238 (S.D. Miss. 1929). It is subject to the provision of the eighth amendment against excessive fines or against cruel and unusual punishment. United States *ex rel.* Brown v. Lederer, 140 F.2d 136, 139 (7th Cir. 1944).

6. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); United States *ex rel.* West Virginia-Pittsburg Coal Co. v. Bittner, 11 F.2d 93, 95 (4th Cir. 1926); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 786 (1943).

7. See, *e.g.*, *Ex parte* Hudgings, 249 U.S. 378, 383 (1919); 9 VAND. L. REV. 93 (1955).

8. *Ex parte* Pugh, 30 Ariz. 129, 245 Pac. 273 (1926).

9. Craddock v. Oliver, 23 Ala. App. 183, 123 So. 87 (1929). *But see* Lyons v. Superior Court, 43 Cal. 2d 755, 278 P.2d 681, *cert. denied*, 350 U.S. 876 (1955), where the California court punished an attorney summarily for direct contempt for absence from court. In this case, the only "act" in the immediate presence of the court was the omission to be present on the part of the contemnor, and the dissenting judge construed this to be clearly an indirect contempt.

10. McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); THOMAS, *op. cit. supra* note 2, at 4.

The inherent power of the federal courts to punish for contempt is limited by statute.[11] However, the extent of the limitation depends upon the court decisions in effect in any given period of history. The Judiciary Act of 1789[12] provided in section 17 that "all the . . . courts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." This was interpreted as merely a recognition of the inherent power of the federal courts to punish for contempt.[13] Opposition to the exercise of this power developed early. It came to a head in the famous impeachment of Judge Peck, who punished a lawyer for criticizing one of the judge's opinions.[14] The impeachment failed, but public sentiment resulted in the passage of the Act of March 2, 1831. Section 1[15] of this Act served as the basis for subsequent legislation and is substantially the same as section 401 of the present Criminal Code, 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 other* 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;
> (3) Disobedience or *resistence* to its lawful writ, process, order, rule, decree, or command.[16] (Emphasis added.)

This act might have been interpreted as imposing a real limitation upon the power of the federal courts to punish for contempt, but it was not decided to be such for over a hundred years. Around the turn of the century, the Supreme Court was still speaking in terms of inherent power to punish for contempt,[17] and in 1918 it declared that the Act of 1831 had neither enlarged nor curtailed these powers.[18] That the Court believed this is not difficult to understand. From 1884[19] until 1941[20] the phrase "so near thereto" had been interpreted to include any act, whether committed in the immediate presence of the court or at a considerable distance, which was reasonably calcu-

11. 18 U.S.C.A. 401 (1950) is based on the first section of the Act of March 2, 1831, 4 STAT. 487, which had been re-enacted in 1875 as REV. STAT. § 725, and in the Judiciary Act of 1911 as 36 STAT. 1163.
12. 1 STAT. 83 (1789).
13. See United States v. Hudson, 11 U.S. (7 Cranch) 31, 34 (1812). This case did not mention the statute. It clearly viewed the power as being inherent in the courts.
14. For more details of this interesting case, see Nelles and King, *Contempt By Publication In The United States,* 28 COLUM. L. REV. 401, 423 (1928).
15. REV. STAT. § 725 (1875).
16. See note 10 *supra.*
17. Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).
18. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
19. United States v. Anonymous, 21 Fed. 761, 769 (W.D. Tenn. 1884).
20. Nye v. United States, 313 U.S. 33 (1941).

lated to obstruct the judicial process. *Toledo Newspaper Co. v. United States*[21] held that acts such as the publication of insulting newspaper articles or cartoons so interfered with the orderly administration of justice in the court as to be punishable under the provision of the Act of March 2, 1831[22] which relates to direct contempts. This interpretation effectively subjected a person committing almost any indirect or constructive interference with the exercise of the court's authority to prosecution for *direct* contempt. The first real limitation came in the form of the Clayton Act,[23] passed in 1914 for the purpose of supplementing existing anti-trust law. It contained certain sections relating specifically to contempt of court which, in essence, are now contained in sections 402 and 3691 of the Criminal Code.[24] Principally, it required a jury trial for all parties charged with contempt for committing any act which, independent of its contempt aspect, constituted a criminal offense under federal or state law, except direct contempts or acts in disobedience of an order issued in the course of a proceeding to which the United States was a party. The Court of Appeals for the Sixth Circuit held this statute to be an unconstitutional infringement on the inherent powers of the court.[25] Shortly after this, Mr. Justice Frankfurter, then Professor Frankfurter, published a lengthy article in the *Harvard Law Review* attacking this decision;[26] and in 1924 Mr. Justice Sutherland, speaking for the Court in reversing this case on appeal, declared that while the power to punish for contempt was inherent in the federal courts, and while the attributes

21. 247 U.S. 402 (1918).
22. Now 18 U.S.C.A. 401(1).
23. 38 STAT. 730 (1914).
24. "Any person . . . wilfully disobeying any lawful . . . order . . . of any district court of the United States . . . by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
"Such fine shall be paid to the United States or to the complainant or other party injured by the act . . . but in no case shall the fine to be paid to the United States exceed . . . the sum of $1,000, nor shall such imprisonment exceed the term of six months.
"This section shall not be construed to relate to contempts committed in the presence of the court, *or so near thereto* as to obstruct the administration of justice, nor to contempts committed in disobedience to any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." 18 U.S.C.A. § 402 (1950) (Emphasis added.)
". . . the accused, upon demand therefore, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases." *Id.* § 3691.
25. Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 291 Fed. 940, 946 (7th Cir. 1923).
26. 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).

which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative; nevertheless the power could be regulated within limits by Congress, including provisions for a jury trial in certain cases.[27] This decision would seem to have assured jury trials in cases within the purview of this Act, but such was not the case so long as the decision in *Toledo Newspaper Co. v. United States* remained the law as to "constructive" contempts. The Clayton Act exempted from the jury trial provision contempts committed in the presence of the court or *so near thereto* as to obstruct the orderly administration of justice, the same phrase contained in the Act of March 2, 1831. It remained for two later decisions to establish a right to trial by jury for all indirect contempts under the Clayton Act other than those specifically exempted. In 1937 the Court of Appeals for the Third Circuit held that all contempt prosecutions for acts of disobedience to court injunctions which were independent crimes must be tried as the Clayton Act provided.[28] This extended the effect of the contempt provisions of that Act beyond anti-trust proceedings. The case that actually stripped the federal courts of the power to punish for constructive or indirect contempt except for the limited areas covered by sections 401(2) and 401(3) of the Criminal Code was *Nye v. United States*[29] decided in 1941, in which Mr. Justice Douglas, speaking for a divided Court, introduced the principle of physical proximity into the Act of March 2, 1831. By construing "so near thereto" to require a physical or geographical nearness and repudiating the "reasonable tendency" doctrine of the *Toledo Newspaper* case, which had been followed as late as 1940,[30] the Court for all practical purposes eliminated prosecution for indirect contempts except those committed by officers of the court, or by others in *disobedience* or *resistance* to an order of the court. The Court seemed to agree at least in spirit with Mr. Justice Holmes' dissent in the *Toledo Newspaper* case, but came up with an entirely different test for applying "so near thereto." Holmes based his dissent primarily upon the "tendency" aspect of the rule applied by the majority opinion. He insisted that there must be a showing that the act would clearly interfere with the court proceedings. There is a very strong similarity between his opinion in the *Toledo Newspaper* case and his "clear and present danger" doctrine announced in *Schenck v. United States*,[31]

27. Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 66 (1924).

28. Hill v. United States *ex rel.* Weiner, 84 F.2d 27 (3d Cir. 1936), *rev'd on other grounds*, 300 U.S. 105 (1937).

29. 313 U.S. 33 (1941).

30. McCann v. New York Stock Exchange, 80 F.2d 211 (2d Cir. 1935); United States v. Pendergast, 35 F. Supp. 593 (W.D. Mo. 1940). This case makes reference to "order and decorum of court room," the same expression that was used in *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1873).

31. 249 U.S. 47, 52 (1919).

a prosecution for circulating pamphlets alleged to undermine the war effort under the Espionage Act of 1917.[32] This same doctrine has since been used to overturn a state conviction for a contumacious publication on the theory that, when there was a failure to show a clear and present danger to interrupt the administration of justice, the conviction violated the first amendment guaranty of freedom of speech.[33]

In reaching their decision that "so near thereto" meant a geographical nearness, the Court relied heavily on the fact that section 2 of the Act of March 2, 1831[34] made "obstruction of justice" an independently indictable offense, a true crime which automatically falls within the trial by jury provision of the sixth amendment to the Constitution; and concluded that this provision was meant to exclude from prosecution for contempt those activities which were "causally" related to the interference with court proceedings. *In re Savin*[35] had held in 1889 that certain criminal conduct might be prosecuted either as criminal contempt[36] or as an "obstruction of justice."[37] That case could still be law since it involved the bribing of a juror in the corridor of the court, which may well be sufficiently close to the "presence of the court" to satisfy the geographical nearness test of the *Nye* case.

The *Nye* case was reaffirmed in the later case of *In re Michael*.[38] Mr. Justice Black declared that the intention of Congress in the Act of March 2, 1831, was to provide the federal courts with ample power to protect themselves in the administration of justice against *immediate* interruption of their business, and to safeguard constitutional procedures. When activities such as those involved in the preceding cases are viewed as crimes, and the *Nye* decision necessarily classifies them as such, the last statement is correct; but if viewed as contempts it would seem to be misleading, because the sixth amendment guarantees trial by jury *only* in prosecutions for true crimes. It may be that the Court has surrendered its most effective weapon for protecting the civil liberties of minority groups. It is interesting to note that it took the Court a period of 110 years after the passage of the Act of March 2, 1831, to discover so "clear" a congressional intent.[39] Furthermore Congress did not move to clarify the Act during

32. 40 STAT. 219. (1917).
33. Craig v. Harney, 331 U.S. 367 (1947).
34. Presently combined with other enactments in 18 U.S.C.A. § 1503 (1950). See note 37 *infra*.
35. 131 U.S. 267 (1889).
36. Section 1 of the Act of March 2, 1831 was re-enacted as REV. STAT. 725.
37. Section 2 of the Act of March 2, 1831 was re-enacted as REV. STAT. 5399.
38. 326 U.S. 224, 227 (1945).
39. See, *e.g.*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); *In re* Debs, 158 U.S. 564 (1895). A few cases, particularly *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873), and *Ex parte* Poulson, 19 Fed. Cas. 1205, 1207, No. 11,350 (C.C.E.D. Pa. 1835), did indicate that the act was intended to restrict the courts power, but that view did not become controlling in the courts.

its numerous re-enactments over that period, even though the contempt power was used extensively during the early labor cases and the liquor injunction violations of the prohibition era.

It would seem clear, however, that the conduct we are considering may not be punished as contempt unless it falls within the scope of sections 401 (2) or 401 (3) of the Criminal Code. Otherwise, these acts must be prosecuted as true crimes under sections 1503 or 241 of that code.

INJUNCTIONS

Since the federal courts do have the power to punish violations of injunctions as indirect criminal contempts under section 401 (3) of the Criminal Code, it becomes important to discover how this statute may be applied to the type of conduct we have in mind. Most of these acts presently will arise as reaction to court injunctions in the field of racial relations. There are three ways the court might deal with the problem.

The Supreme Court might retreat somewhat from the strict geographic test of the "so near thereto" provision in the direct contempt statute, substituting something like the "clear and present danger" doctrine, allowing punishment for *constructive* contempts once more. However, this would appear unlikely.

The courts might attempt to make the general public in that community parties to the injunction, so that anyone committing the acts alleged to constitute contempt would be violating the injunction. This would be done by having the injunction run to certain named parties and all other parties having notice of the injunction. The scope of injunctions issued by federal courts is defined by rule 65 (d) of the Federal Rules of Civil Procedure. It prescribes that the order must be specific in terms and shall describe in reasonable terms the act or acts sought to be restrained, and that it is binding only upon the parties to the action, their agents, and upon those persons in *active concert or participation with them*[40] who receive actual notice of the order by personal service or *otherwise*. The general interpretation of rule 65 (d) has been that an order may not bind the public at large. *Alemite Mfg. Corp. v. Staff*[41] held that an order restraining a party from committing a patent infringement did not bind a former employee of the enjoined party, even though he had knowledge of the injunction, since his rights had not been adjudicated in the principal suit. Judge Learned Hand, speaking for the Court of Appeals for the Second Circuit, went on to add in rather pungent terms that an equity court cannot make a decree binding on one not a party to the suit,

40. In general, this involves action according to an agreement or scheme, perhaps even planned in advance. See 8 WORDS & PHRASES 507 (1951).
41. 42 F.2d 832 (2d Cir. 1930).

and that an alleged contemnor must either abet the named party or be legally identified with him. He added that words such as "agents, associates, and confederates" add nothing to the scope of an injunction, but that anyone knowingly doing what the court has properly enjoined is guilty of contempt. *Regal Knitwear Co. v. NLRB*[42] also indicated that the use of the words "successors and assigns" does not broaden the scope of an injunction, in that case a labor injunction. *NLRB v. Express Publishing Co.*[43] held that a labor injunction must not "blanket cover" acts which no party has threatened to commit. These cases leave room for contempt prosecutions where a party procures someone to violate the injunction in his behalf, or where persons not parties to the injunction join with the party bound, with knowledge of the decree and its terms, and proceed to aid or abet him in violating the order. There is at least one decision to the effect that the named party must be a principal actor in the violation,[44] and all the cases seem to adhere strictly to the *actual* knowledge requirement.

The third method, which perhaps has the most support from case decisions, is to punish not for *disobedience* but for *resistance* to an order of the court. The theory here is that no person, even though a stranger to the original action and order itself, should be allowed deliberately to prevent its execution. The case which seems to furnish the basis of a contempt prosecution for resistance to an injunction granted by a federal court is *In re Reese.*[45] That doctrine was later affirmed in *Garrigan v. United States*[46] holding that a party charged with resisting an injunction must be prosecuted for criminal contempt. The *Alemite* case disapproved the *Reese* case to some extent, but distinguished the *Garrigan* case. It is not clear that Judge Hand would have held that under no circumstances could a prosecution be maintained for contempt for *resisting* an injunction; rather it may be inferred that he believed the *Reese* decision would have made an injunction directed to "any citizen of Kansas" binding and would have allowed a prosecution to be maintained for *disobedience* to it. The *Reese* and *Garrigan* cases are fairly old, but neither has been specifically overruled. They were decided when the Act of March 2, 1831, was being construed more broadly than it is today. A number of cases seem to require some sort of legal "privity" between the party named in the order and the party cited for contempt,[47] and there is

42. 324 U.S. 9 (1945).

43. 312 U.S. 426 (1941).

44. Eighth Regional War Labor Board v. Humble Oil & Refining Co., 145 F.2d 462, 464 (5th Cir. 1945).

45. 107 Fed. 942, 945 (8th Cir. 1901).

46. 163 Fed. 16, 20 (7th Cir. 1908), *cert. denied,* 214 U.S. 514 (1909).

47. Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 436 (1934); United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96, 98 (W.D. Mo. 1946).

some question as to just how effective this method may be as a practical matter. These cases, it must be remembered, require elements that are very difficult to prove, that is, actual knowledge of the order and its terms and a wilful and intentional resistance to the order.[48] In summary, it is very doubtful that any prosecution for constructive contempt based on disobedience of or resistance to an injunction may be maintained under section 401 (1) of the Criminal Code. It is only slightly more probable that a prosecution, based on the theory that a party may be bound by the injunction under a general description and prosecuted for *disobedience* under section 401 (3) would be allowed. There is a fair chance, however, that a prosecution under section 401 (3) for *resisting* the injunction may be permitted. If so, the next question is whether the parties must be given a jury trial.

Trial by Jury

At this point it must be assumed that the acts involved are indictable as indirect criminal contempt and that the district court may punish the parties for disobedience of or resistance to an injunction issued by the court. The last major question is whether the alleged contemnors are entitled to be tried by a jury, or whether they may be tried by the court on notice and hearing. We begin with rule 42 (b) of the Federal Rules of Criminal Procedure which applies to prosecutions for indirect criminal contempt. It provides for notice to be given the defendant in open court including time and place of hearing, a statement of the essential facts constituting the contempt, and allowance of reasonable time to prepare a defense. Most important, it specifies that "the defendant is entitled to a trial by jury in any case in which an act of Congress so provides." The Clayton Act, although entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," contains provisions that require trial by jury in prosecutions for contempt for acts of such character as to constitute criminal offenses under any statute of the United States or under the laws of any state in which the act is committed. It also contains two exceptions to this provision: where the acts are committed in the actual presence of the court, or are in *disobedience* of any lawful decree entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.[49] These provisions are now enacted in section 402 of the Criminal Code

48. McCauley v. First Trust & Savings Bank, 276 Fed. 117, 118 (7th Cir. 1921).

49. While 18 U.S.C.A. § 401 (3) specifies that both disobedience and resistance to an order of the court constitute contempt, neither § 402 nor § 3691 list resistance in the second exception to the jury trial provision.

and we may assume have lost their anti-trust character.[50] Since the *Nye* decision has fixed the definition of "so near thereto" as geographical rather than causal, we may also assume that in the absence of a decision repudiating that definition, or of some enactment by Congress, the conduct under consideration may not be punished under section 401(1), but must be punished as indirect contempt under section 401(3), to which the Clayton Act applies. The next problem is whether they fall within the second exception to the jury trial provision, *i.e., disobedience* to a lawful order entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, which turns on whether the United States will be or may be a party to the suits.

As to the contempt proceeding itself, it is generally accepted that in the case of a criminal contempt the government is the real party in interest, whether it arises out of an action to which the government was originally a party or one between private litigants. The purpose of the proceeding is to vindicate the court's authority; this is true even though the court may appoint the attorney for the party who sought the relief to prosecute the case and the proceeding be styled as if between the original parties.[51] Normally the government may intervene to prosecute the contempt proceedings in its own name.[52] *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*[53] states that this prosecution is a new and independent proceeding and no part of the original cause. Since the act states that it excepts cases of disobedience to an order entered in any suit brought or prosecuted in the name of or on behalf of the United States, it would seem that the character of the original suit and not that of the contempt proceeding is controlling on the question of the right to a jury trial. *Hill v. United States ex rel. Weiner*[54] holds specifically that the exception was designed to limit the jury trial provision to

50. Hill v. United States *ex rel.* Weiner, 84 F.2d 27 (3d Cir. 1936). A very similar section of the Norris-LaGuardia Act, c. 90, § 11, 47 STAT. 72 (1932), controlled the prosecution of contempts of injunctions issued in labor disputes, and required jury trials whether the act of contempt was an independent crime or not, and made no specific exception of those cases in which the government was a primary party. Such exception was put in by judicial decision in United States v. United Mine Workers, 330 U.S. 258 (1947). When brought over to the Criminal Code in 1948 as § 3692 of title 18, following § 3691 which was based on the Clayton Act, it retained its limitation to labor injunctions.

51. Hill v. United States *ex rel.* Weiner, 84 F.2d 27 (3d Cir. 1936); United States *ex rel.* West Virginia-Pittsburg Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926); The Navemar, 17 F. Supp. 495 (E.D.N.Y. 1936).

52. Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924); United States *ex rel.* West Virginia-Pittsburg Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926).

53. 266 U.S. 42 (1924).

54. 84 F.2d 27 (3d Cir. 1936). This case holds that the Clayton Act actually enlarges the federal courts' power to punish for contempt, so as to permit threatened crimes to be enjoined. *Id.* at 30.

prosecutions for contempt arising out of cases instituted by private litigants. If the original suit is not controlling, a question of the propriety of allowing the Government to intervene arises. Normally it is said that the Government should not be allowed to intervene in a case where the intervention will unduly delay or prejudice the adjudication of the rights of the original parties;[55] the right to a trial by jury is a substantial right, which might be said to have accrued to the defendants at this stage of the proceedings.

The last question under this aspect of the problem is whether the Government may become a party to the original suit so as to defeat any future defendant's right to a trial by jury. Section 2403 of the Civil Code permits the Government to intervene in suits in which the constitutionality of a statute is drawn in question. It may also intervene if it has a "proprietary interest" in the suit. Rule 24(b) of the Federal Rules of Civil Procedure grants a permissive right to any party to intervene wherever there is a statute granting that right, or where the parties have a common question of law or fact in two separate claims or defenses. While the United States may prosecute criminal acts which deprive parties of their civil rights under the Civil Rights Act,[56] there does not seem to be any provision or precedent for enjoining threatened deprivations of the type we are considering. The central issue in controversy over the proposed Civil Rights Bills now before Congress is a provision which would permit the Government to become a party to or bring original suits to enjoin threatened violations of civil rights. Evidently the sponsors of the bills and their opponents do not believe that the United States may be a party to these suits under existing law. Should the bills pass in their present form, the issue of jury trials would be foreclosed whenever the Government chose to intervene at the outset of the equity suits.

Summarizing this issue, we may say generally that so long as the rule of the *Nye* case exists, limiting direct or constructive contempts which may be prosecuted as contempts to those committed in the geographic presence of the court, and in the absence of positive legislative enactment authorizing the United States to join as a party in these cases, the Supreme Court will very probably hold that parties prosecuted for indirect criminal contempt as a result of misconduct arising from *resistance* to or *disobedience* of injunctions issued in suits between private litigants are entitled to a jury trial. This right, however, is one created by statute and court decision and not a constitutional guaranty. It is possible that the Clayton Act might be construed to permit the United States to intervene in the

55. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1135 (1953); Note, 65 HARV. L. REV. 319 (1951).
56. 18 U.S.C.A. § 241 (1950).

contempt proceedings in such a way as to control the nature of the entire suit and thus bring it within the second exception to the jury trial provision.[57]

CONCLUSION

The Supreme Court normally presumes that state courts and officials will abide by and enforce the laws of the land, and it would logically follow that qualified jurors from any region should be presumed to do their duty without allowing local sentiment to sway their regard for that duty. Nevertheless, it seems to have been taken for granted from the early days of the republic that federal officials and instrumentalities would be exposed in certain instances to hostile action, particularly legal action, in state tribunals, and legislative action. Mr. Justice Story first indicated in *Martin v. Hunter's Lessee*[58] that the federal government through its agents was not subject to being thwarted in its function by the will of any individual member-state. *Tennessee v. Davis*[59] held that a federal agent might remove a criminal prosecution instituted in a state court to the federal courts for trial. Ten years later the Supreme Court held that this same power could be used to bar prosecution of a federal officer in a state court for an alleged offense committed while in the line of duty.[60] Likewise, an assumption that citizens of a given state may be biased in favor of the local party is commonly given as the basis for the grant of jurisdiction to the federal courts of cases between parties of different states. It must certainly be conceded at this late date that the federal government has the power to protect its agencies, of which the courts are one, against hostile *state* action. It would seem to follow logically that the federal government can protect this same agency against hostile action by *individuals*. Indeed, while the former conclusion was reached over serious contentions that such "protection" invaded traditional states' rights to enforce punishment for offenses against their peace and dignity, hostile individual action, being completely unsupported by any official authority, would seem to be so clearly within the power of federal control as not to admit of argument. The power which may be exercised to effectuate and protect the authority of these courts as federal agencies is the power to punish for contempt. Herein lies the policy argument for adhering to the common-law concept of the contempt power. The purpose of this power traditionally has been to en-

57. The Justice Department in a recent press release stated that it interpreted these statutes to require a jury trial in such cases.

58. 14 U.S. (1 Wheat.) 304, 346 (1816). A good summary of the general attitude of the Court is expressed by Mr. Justice Harlan in his dissent in *Ex parte* Young, 209 U.S. 123, 168 (1908).

59. 100 U.S. 257 (1879). See also Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

60. *In re* Neagle, 135 U.S. 1 (1890) (federal marshall).

force the authority of the court. Punishment for disrespect or disobedience to the court has always been an incident of the exercise of the court's authority, and not an original proceeding to punish offenses against the public peace in general or to punish indignities suffered by a judge in an individual capacity. Here lies the reason for saying that contempt proceedings are neither civil nor criminal actions, but sui generis. Contempt proceedings are always ancillary to another judicial proceeding.[61] The offense, if it may properly be called such, lies not in the nature of the act itself, but in the intentional effect it has upon the proceeding or order.

The need for some method to assure the effective exercise of the court's authority does not seem to be open to dispute. However, prosecutions for indirect contempt of court without jury trials have been criticized frequently by writers. It is reasonable to say that any act that could be punished as contempt of court can also be made a criminal offense and punished as such, whether a traditionally direct or indirect contempt.[62] There are two reasons which probably explain the failure to do so in most cases in those jurisdictions which still punish all contempts without a jury. First, as to direct contempts, there does not seem to be any logical reason for requiring a separate proceeding and fact finding body where the act is committed in the court itself and the only question to be determined is the applicable law and the punishment to be awarded. No particular right of the contemnor is likely to be prejudiced. Second, since the power to punish for contempt is older than the constitutional guaranty of trial by jury and is not interpreted as falling within that guaranty, inertia probably accounts for a failure to change as much as any other reason.

The extension of the power to cover acts of such numerous kinds committed outside the court requires the judge to determine close questions of fact as well as law; and since the punishment is similar in nature (though rarely as severe) to that meted out for criminal acts, many writers over the years have felt that the proper vindication of the court's authority should take the form of a criminal proceeding complete with jury trial. Some of these writers connected the possible abuses of the contempt power with other *causes,* notably freedom of the press and the use of the injunction coupled with summary contempt proceedings to stifle the labor movement. It may be argued that these particular *causes* may be more appropriately protected by strict application of the first amendment guaranty of freedom of speech, and legislative action such as the Norris-LaGuardia anti-injunction labor

61. Contempt of Congress is another use of power to punish for contempt and is similar in nature and purpose to contempt of court. English law probably retains power to punish for contempt in all three branches of government, including the executive branch. See 12 AM. JUR., *Contempt* § 3 (1938).

62. Very probably the purpose of § 1503 of the Criminal Code.

bill,[63] leaving the basic powers of the court unhampered by patchwork court decisions rendered under one set of conditions, but extending beyond those conditions in a fashion perhaps not anticipated. On the other hand, a party proceeded against for contempt certainly does run some risk of having a biased judge find facts to be contrary to the alleged contemnor's contentions on the basis of personal prejudice, particularly since the proceeding stems from his supposed flaunting of the same judge's authority. However, in light of the unusually high calibre of personnel occupying federal district court judgeships, the dangers involved would seem to be more a matter of theory than practice.

Arguments against the broad use of the contempt power are strong and deserve much respect and consideration. They do, however, fail to answer one important question. May not a blanket requirement of the use of criminal procedure prevent the accomplishment of the basic purpose of the contempt power; that is, the enforcement of obedience to or the prevention of interference with the court's authority in deciding and applying all laws, the unpopular ones as well as the popular? This is particularly true where the unpopularity of the particular law is so widespread as to reflect the prevailing public opinion of the entire community included in the court's jurisdiction. It may well be that the effect of attempting to enforce such law that encounters resistance on the part of the general public through the use of criminal proceedings will be tantamount to rendering the decree or order of the court of no effect. Prejudiced or not, a judge must have had authority to act within the field of law embracing the original proceedings, and must determine and apply the law as he interprets it. Parties who disagree with these decisions might well be relegated to intervening in the judicial proceedings and having any mistakes of the judge eradicated on appeal, rather than being allowed to take direct action to prevent the enforcement of those decisions. If such a result is reached, it may be presumed that local law enforcement officials will not be anxious to assist the federal courts in extricating themselves from this dilemma brought on by a situation very probably unpleasant and distasteful to both. The use of the contempt power in these cases revolving around the segregation issue has one particular feature that may be commendable from a policy view. Wherever a majority of the population agitates for a particular result in the law and finds its will frustrated in attempting to use the existing tools of the law, the usual result is an attempt to create new tools, often in the form of legislative "force" bills. It may well be that the use of the flexible punishment of the contempt power as applied by judges who are themselves members of the community and sensitive to public opinion could result in

63. 29 U.S.C.A. §§ 101-110, 113-115 (1956); 47 STAT. 70 (1932).

a much fairer and more acceptable way of enforcing obedience to these laws than the possible alternative legal tools that might be fashioned to replace the use of the contempt power.[64]

It is to be hoped that the Supreme Court will soon resolve the various legal issues that arise in this confused field of the law. It is to be assumed that the Court will give very serious and thoughtful consideration to the confiicting policy questions. In the last quarter of a century the Court has shown great concern for civil liberties, and the trend has definitely been in the direction of limiting the use of the contempt power, both as to federal[65] and state courts.[66] In the absence of the competing interests created by civil rights litigation, it might well be assumed that the trend would continue in that direction. However, the Court may conclude that in the case of contemptuous activity composed of open hostility and violence, the courts must retain an effective means of assuring the respect and execution of their orders, even at the risk that some defendants will have some desirable safeguards withheld from them, as a counterbalance to having those orders lose all effect at the hands of an unsympathetic populace. In the meantime, it will be well for lawyers to caution the people that several different decisions can be reached both on logic and precedent, and to counsel *actively* against the "injudicious use of brickbat and dynamite" by those who might be relying on misinterpretation of a supposed *constitutional* right to be tried for their acts by a jury sympathetic to their cause.

PHILIP L. PEELER

64. A recent well written comment discusses various legal procedures which might be used in the segregation cases. Note, 65 YALE L.J. 630 (1956). It dealt with those cases in which public reception would be unfavorable, but not openly and actively hostile. Each procedure suggested requires some degree of public cooperation with the courts.

65. Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 66 (1924).

66. Craig v. Harney, 331 U.S. 367 (1947).