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Federal Probationary Powers

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FEDERAL PROBATIONARY POWERS

The passage of an act authorizing United States district judges to suspend sentence for crimes not punishable by death or life imprisonment, when "it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby" put into the hands of federal judges a power that has been wielded by judges of the state courts for more than a century. It was the result of a struggle which has been going on ever since the decision in the so-called "Killits Case," in 1916.[1] This case held that federal courts did not have the power to suspend sentence and put prisoners on probation. The National Probation Association has sponsored the introduction of similar acts at every session of Congress since that decision, but it was not until March 3, 1925 that such a bill was finally signed by the President.

This act, however, did not mark the beginning of the practice in federal courts; it merely legalized a proceeding which in the past has been sanctioned only by custom and the mercy of the law. It was frequently indulged in by federal judges, and at the time of the decision in the case of Ex parte United States Petitioner, the "Killits Case," there were two thousand persons, who had been convicted of crime by the federal courts, at large on suspended sentences.

In several state courts the right to suspend sentence is recognized as one of the court's inherent powers, derived from the common law.[2] Investigation, however, discloses that the common law sanctioned the right of courts to suspend sentence for the purpose of allowing the defendant to obtain executive clemency, to prepare his case for appeal, and to prevent execution of a pregnant woman or an insane person, but that it no-

[1] *Ex Parte United States, Petitioner*, 242 U. S. 27, 61 L. Ed. 129, 37 S. C. R. 72.

[2] *Ex Parte Williams*, 26 Fla. 310, 8 South 425; *Daniel* v. *Parsons*, 137 Ga. 826, 74 S. E. 260; *Com.* v. *Dowdican*, 115 Mass. 133; *Macks* v. *Westworth*, 199 Mass. 44, 85 N. E. 81; *People* v. *Stickle*, 156 Mich. 557, 121 N. W. 497; *People* v. *Dudley*, 173 Mich. 389, 138 N. W. 1044; *State Ex Rel. Buckley* v. *Drew*, 75 N. H. 402, 72 Atl. 875; *State* v. *Clifford*, 84 N. J. L. 595, 87 Atl. 97; *People Ex Rel. Forsythe* v. *Court of Sessions*, 141 N. Y. 288, 36 N. E. 386; *State* v. *Hilton*, 151 N. C. 687, 65 N. E. 1011.

where gives the court power to suspend sentence indefinitely. In *Snodgrass* v. *Texas*[3] the Court of Appeals discusses the history of the question at length and declares that the courts have no such inherent power. Professor Bruce, in an illuminating article in the Minnesota Law Review,[4] also reaches the conclusion that the courts did not possess the power inherently, and in the only two federal cases directly on the point ever considered by that court,[5] it was decided that in the absence of statute no such power resided in the federal courts. In the latest of these two cases, Ex parte United States, Petitioner, Chief Justice White declared:

"So far as the courts of the United States are concerned, it suffices to say that we have been referred to no opinion maintaining the asserted power, and, on the contrary, in the opinion in the only case in which the subject was considered, it was expressly decided the power was wanting. *United States* v. *Wilson*, 46 Fed. 748 (1891)."[6]

The result of this decision was that, had not the two thousand persons who were at that time at large on suspended sentences been given a blanket pardon by President Wilson, they would have been returned to court to finish the terms of their

[3] 67 Tex Ct. App. 615, 15 S. W. 162.

[4] 6 Minn. Law Rev. 363.

[5] *Ex Parte United States, Petitioner*, 242 U. S. 52, and *United States* v. *Wilson*, 46 Fed. 748.

[6] "Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power and, so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative minds may devise, to such judicial discretion as may be adequate to enable courts to meet, by the exercise of an enlarged discretion, the infinite variations which may be presented to them for judgment, recourse must be had to Congress, whose legislative power on the subject is, in the very nature of things, adequately complete."

sentences. The present statute was an outgrowth of the decision and was, indeed, recommended by Chief Justice White in his opinion as the only possible remedy for the situation.[7]

The act is based on the probation laws which are in force in the states, and it is similar to the statutes of New York and Massachusetts. Briefly, it provides that, " . . . the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendants, will be subserved thereby, shall have power, after conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; . . . "

The act excepts the District of Columbia because a special law enacted by Congress in 1910 gave probationary powers to the judges in that jurisdiction.

Section 2, article 2 of the Federal Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

It now becomes pertinent to inquire, "Is this statute constitutional? Does it encroach upon the power of the President to grant reprieves and pardons?"

There has not yet been decided in the federal court any case to which we can look for help in determining this question, so it is necessary to turn to the reports of the state courts. But a majority of these decisions are based on the assumption that the right to suspend the sentence is inherent in the court, and that the enactment of a statute to that effect is but a mere reaffirmance of the power. This class of cases is best illustrated by the opinion in *People, ex rel., Sullivan* v. *Flynn*,[8] which declares;

"This power of suspending sentence is resident within such courts as that of the General Sessions as an inherent right (*People ex rel. Forsythe* v. *Court of Sessions*, 141 N. Y. 288, 36 N. E. 386), and statutes

[7] See ante note 6.
[8] 106 N. Y. Supp. 925.

which by precise terms confer the power upon courts of record having criminal jurisdiction are to be regarded as not invasive of or trespassing upon the pardoning power, which in this state is vested solely in the Governor, and are, therefore, when enacted, valid and legitimate exercises of legislative power under the Constitution."

The cases, therefore, cannot be followed in determining the question when applied to the federal courts, as we have already seen by the case of Ex parte United States, Petitioner, that such power is not inherent in federal courts. Indeed, we can give little weight to these cases in examining the state decisions, since most of them set out no better reason than that the power is inherent in their courts. The premises being, to say the least, questionable, we cannot base upon it a sound conclusion.

A Texas case[9] holding a similar statute unconstitutional says:

"This, in effect, is an unconditional pardon, and leaves the accused in the attitude of being as if he had never been convicted. So, then, to sum up this act of the legislature, it clothes the district judge, first, with the power to grant conditional pardons upon conditions mentioned; and, second, to declare a breach of the conditions and annul the suspension; and, third, to make that pardon final and unconditional upon a compliance by the convicted person with the conditions for double the length of time of punishment assessed by the conviction."

The Texas statute, however, provided that the judge, upon performance of the conditions by the probationer, for double the length of time prescribed by the court, might bring him into court, set aside the former judgment, and discharge him from all responsibility.

While *Snodgrass* v. *State* is squarely against the constitutionality of the Texas act, it is overruled by later cases,[10] and one of these cases, *King* v. *State*, draws a distinction between the suspension of sentence and suspension of its execution, "the suspension of the sentence and that which suspends the judgment or its execution or which intervenes and prevents the passing of the sentence. The first would interfere with the pardoning power, the other may not, inasmuch as the pardoning power does not attach or become operative until after the final judgment or sentence."

People, ex rel., Forsythe v. *Court of Sessions*,[11] holds that such statutes are valid.

[9] 150 S. W. 178.

"As this power (the pardon power) was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to its own judgment, that criminal courts had so long maintained. The two, so distinct and different in their nature and character, were still left separate and distinct, the one to be exercised by the executive, and the other by the judicial, department. . . . It does not encroach, in any just sense, upon the powers of the executive, as they have been understood and practiced from the earliest times. The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment, and freed from the power of the court to pass sentence, is open to more doubt. The legislature cannot authorize the courts to abrogate their own power and duties, or to tie their own hands in such a way that, after sentence has been suspended, they cannot, when deemed proper and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammeled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes."

This decision, it will be seen, is based wholly upon the ground that the court has inherent power to suspend sentence. *People* v. *Stickle*[12] cites the Forsythe case and re-states what is there set out. It also bases the decision on the assumption that the courts have inherent power to suspend sentence.

In accordance with the Forsythe case is *State* v. *Smith*,[13] which holds, that an order to suspend judgment after final judgment is invalid, but that sentence may be suspended before the final entrance of the judgment.

The above cited cases overlook the real solution of the problem, which seems to be that the suspended sentence must be considered a part of the sentence. It must be inflicted as would a jail sentence or fine. However, the judge must determine the proper case for its imposition. It is a remedy which is to be applied only in certain cases, *i. e.*, "where it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby."

The prisoner serves his sentence, but he serves it on probation, a violation of the terms of which will terminate the period

[12] 141 N. Y. 286, 36 N. E. 386.
[13] 156 Mich. 557, 121 N. W. 497.
[13] 173 Ind. 388, 90 N. E. 607.

of suspension and cause the court to impose the sentence of imprisonment which might in the first place have been inflicted.

The doctrine is a merciful one. It contemplates the unfortunate circumstances which surround the lawbreaker, who for the first time has made a misstep, and gives another chance to that one before throwing him into prison to become a hardened criminal, which association with confirmed thieves and murderers will make of him.

Judge C. R. Bradford, of the Juvenile Court of Salt Lake City in an address in Washington, D. C., makes the following statement:

> "It is safe to say that if any of the thousands of federal inmates of state, county and federal institutions were given any diagnostic study before they went through the cell doors. Each was imprisoned because he had committed a crime, not because he was a criminal. All who commit crimes are not criminals. A cursory examination will reveal the fact that many who were torn from their families, and the families left to starve or hustle for themselves, could have been saved to useful citizenship, and left to perform the normal functions of free citizens, by the restraining and helpful hand of a probation officer."

We have, from our review of the above cited cases, arrived at no conclusion, but it is not the purpose of this note to arrive at a conclusion. Its only purpose is to present the problem to which the enactment of this law gives rise. The solving of the problem is left to the bar.

But the examination has proved that the system of probate has operated successfully in the courts of the majority of the states, and that it can be made to operate successfully in the courts of the United States; that the policy of the states has been to uphold such statutes as the one before us, and that it is necessary only that a true construction be put upon this statute to uphold it in the Federal Courts. Looked at from the standpoint of public policy, it is apparent that the law is not contrary to, but very much in harmony with the spirit of the constitution.

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