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established. It is no respector of a certainty of error, and true social advances have nothing to fear from it.

If accepted, the principles of the Natural Law may cleanse from our Jurisprudence the concepts of positivism which seem to have crept in over the years, and which well might have destroyed the basis of our constitutional processes. Likewise, these ideas will have little comfort for the legal tortoises who seek, as has been said, to use the Natural Law as a sanction for the dead hand of perpetual legal status quo. They will on the other hand encourage those who, while they feel the need for social advance, are fearful that methods which savor of positivism, pragmatism, and materialism will in the end destroy the safeguards which protect our basic liberty. They will also encourage those who see in the Natural Law the only rationale for the maintenance of personal rights which, in a given instance, may seem to impede what appears to be progress; those who realize that the human person is of Divine making, endowed with rights of Divine origin, which cannot be invaded by any human agency, purely because of its roots in the eternal law.

The proceedings of the Second Institute, tracing, as they did, the development of the idea of Natural Law from Ancient Greece to our own day, have helped immeasurably in an understanding of the true principles which are embodied in the Natural Law. They have shown that the Natural Law has been grasped, at least in its rudiments, by the eldest of civilizations as well as by our own contemporaries and the great minds of the Middle Ages. They prove that the Natural Law is indeed "writ in the hearts of men". It remains only for it to be clearly written in the moving philosophy of our own Jurisprudence and that is the aim of the Institutes. It is not too much to hope that we shall soon see some concrete evidence of the fruition of the first two Institutes.

NOTES

ADMINISTRATIVE PROCEDURE—JUDICIAL REVIEW OF DEPORTATION ORDERS UNDER THE ADMINISTRATIVE PROCEDURE ACT. Prior to the passage of the Administrative Procedure Act,[1] the only avenue of appeal from Immigration Board orders for deportation of aliens was by way of habeas corpus proceedings. Deportation proceedings and orders for deportation are provided for by the Immigration Act of 1917.[2] With the

1 60 STAT. 243 (1946), 5 U. S. C. § 1009 (1946).

2 39 STAT. 889 (1917), 8 U. S. C. § 155 (1946).

advent of the Administrative Procedure Act, certain problems arose concerning the availability of appeal from Immigration Board decisions under Section 10 of the Act, which deals with judicial review of administrative agencies' decisions. The specific question involved in recent deportation cases is whether the Administrative Procedure Act provides another method of judicial review of Immigration Board deportation orders. The writ of habeas corpus, of course, could not be resorted to until the alien had been taken into custody in preparation for deportation. Thus no remedy was available to the deportee between the time the deportation order was issued and the time he was actually taken into custody. Does the Administrative Procedure Act provide a suitable bridge over this period during which no remedy formerly existed?

Section 10 (c) of the Act provides:

> Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . .

This section certainly seems to imply that the Administrative Procedure Act has supplied the necessary bridge, and that an alien placed in such an unfortunate circumstance as heretofore mentioned, not previously having had an adequate legal remedy, may now be entitled to judicial review under this Act. However, the question has not been placed before the Supreme Court of the United States, and the inferior federal courts are still in a state of indetermination.

The basic issues involved may, perhaps, be best observed in the case of *United States* ex rel. *Trinler v. Carusi.*[3] Trinler, the petitioner in an action for review of an order issued by the Commissioner of Immigration and Naturalization, had not as yet been taken into custody pursuant to the order. The district court dismissed his bill, but upon appeal the circuit court of appeals reversed this decision, stating: [4]

> . . . the act did enlarge the rights of people against whom deportation orders have been issued and that they are now entitled to judicial review after the issuing of a deportation order . . . under the Administrative Procedure Act of 1946 he is entitled to have judicial review as one adversely affected by the deportation order after its promulgation but before he has been taken into custody.

Although the district court held that habeas corpus was an adequate remedy for the petitioner, the circuit court took the more equitable view that an opportunity for review should be allowed before the alien must relinquish his American property and suffer loss of his personal

[3] 72 F. Supp. 193 (E. D. Pa. 1947), *reversed,* 166 F. (2d) 457 (C. C. A. 3rd 1948).

[4] United States *ex rel.* Trinler v. Carusi, 166 F. (2d) 457 (C. C. A. 3rd 1948).

liberty. The circuit court also held that the deportation proceedings did not fall within the first exception to Section 10 of the Act, which provides that actions expressly precluded from judicial review by statute are exempt from said section. The basis of this ruling was the well established practice of allowing habeas corpus proceedings by deportees after issuance of the order by the Commissioner of Immigration and Naturalization. Habeas corpus proceedings were considered by the majority of the court to be in the nature of judicial review. The dissenting opinion, however, held that these proceedings did not constitute judicial review, but rather a new suit brought to enforce an asserted civil right. Thus the dissenting judge held that Immigration Board decisions never had been subject to judicial review and therefore were within the exception.

Subsequently the action was abated because of petitioner's failure to substitute the name of the new Commissioner, Miller, in place of Carusi, who had resigned nine months earlier.[5] The Solicitor General expressed his reluctance to make the motion for abatement, as he desired to appeal the ruling to the Supreme Court of the United States. Petitioner naturally opposed the motion which would result in the destruction of his asserted remedy under the Administrative Procedure Act. It is unfortunate that a procedural technicality prevented adjudication of the basic issue by the Supreme Court at that time.

Subsequent developments have been promising, if not too decisive. A district court decision made soon after the original circuit court ruling in the *Trinler* case relied upon that case in holding that the Act is applicable to deportation proceedings.[6] Appeal of this case would result in a comparatively early settlement of the question. Additional support for the view that Section 10 applies where a bill is brought for review of deportation proceedings was found by the court in dicta in a case decided earlier in the same district.[7] Notwithstanding the view expressed in these two cases, a later case decided in the same district embodied dicta indicating a contrary view.[8]

Further confirmation of the view that Section 10 is applicable is supplied by analogous situations involving the reviewability of selective

[5] United States *ex rel.* Trinler v. Carusi, 168 F. (2d) 1014 (C. C. A. 3rd 1948). In such cases motions for substitution must be made within six months after the resignation of the officer. This rule of procedure is based on Section 11 of the Act of February 13, 1925, 43 STAT. 941 (1925), 28 U. S. C. § 780 (1946).

[6] United States *ex rel.* Cammarata v. Miller et al., 79 F. Supp. 643 (S. D. N. Y. 1948).

[7] United States *ex rel.* Lindenau et al. v. Watkins, 73 F. Supp. 216 (S. D. N. Y. 1947).

[8] Azzollini v. Watkins, U. S. D. C., S. D. N. Y., Civil No. 47-420, October 18, 1948, 17 L. W. 2201. "In my opinion the Administrative Procedure Act has no application to such proceedings. But, assuming that it has, the petitions fail to allege facts showing that the petitioners are 'suffering legal wrong' because of the proceedings." 17 L. W. 2201.

service board orders and Immigration Board orders for exclusion of aliens. One of the earliest cases decided with regard to judicial review as provided for in the Act, held that where a conscientious objector had exhausted his administrative remedies, the mere formality of reporting to the camp was not a part of the administrative process and that he was entitled to review upon being prosecuted for failure to report as ordered.[9] The formality of being taken into custody in the one instance is not foreign to the formality of reporting to a military camp in the other. Formalities should be disregarded in both procedures if insistence upon their observance serves no helpful purpose. In a recent controversy before the Court of Appeals for the Ninth Circuit, the court, in deciding that a maritime seaman subject to an exclusion order was entitled to judicial review, expressed the opinion that the asserted distinction in procedure between a deportation and an exclusion case is a "mere matter of nomenclature . . . of no moment in so far as concerns the constitutional guarantee of due process of law".[10] It appears from the cases considered herein that the courts may logically apply Section 10 of the Administrative Procedure Act without doing violence to established rules of procedure.

Although the Administrative Procedure Act as passed by Congress does not attempt to alleviate all of the procedural problems involved in such a vast network of agencies as is employed by our government, it is a great step forward towards a more simplified method of administrative procedure. The express words of the Act, coupled with the legislative intent,[11] would seem to justify extension of judicial review to deportation orders. In the absence of any substantial reason, the beneficial effects of the Act should not be hamstrung by judicial reluctance to depart from precedent.

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9 Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946).

10 Carmichael v. Delaney, 170 F. (2d) 239, 245 (C. C. A. 9th 1948).

11 See ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY, SEN. DOC. No. 248, 79th Cong., 2d Sess. (1946). The following extracts are especially pertinent:

"Mr. McKellar. . . . 'Do I correctly understand that the principal purpose of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?'

Mr. McCarran. 'Yes'. ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY *supra* at 318.

"Mr. Austin. 'In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth?'

Mr. McCarran. 'My answer is in the affirmative. That is true'." ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY *supra* at 325.

POLITICAL QUESTIONS AS DISTINGUISHED FROM JUDICIAL QUESTIONS. —Recognizing that certain matters are beyond the effective or permitted scope of the judicial function, the Supreme Court has frequently refused to act in cases involving a "political question," even where that refusal results in gross injustice, as it did in *The Cherokee Nation v. Georgia*,[1] where the Court declined to interfere with a threatened seizure by legislative enactment of the lands of the much-abused Cherokee tribe. Nothwithstanding such injustice, however, the wisdom of the Court's policy in refusing to consider such questions cannot be doubted. It is only necessary to recall the attempt of Chief Justice Taney in the *Dred Scott* case [2] to decide in a courtroom what could only be resolved on the field of honor, to afford rather dramatic illustration of the inability of the judicial machinery to deal with "political questions."

The term "political question" is not, however, wholly unambiguous. Certainly its meaning is far broader than the words themselves imply, probably because of its use by the Supreme Court as a term of exclusion, rather than as one of positive definition. Hence the common characteristic of these so-called "political questions" seems to be principally that they are "non-judicial," i.e. they have been considered by the Supreme Court to be beyond the competence of the judicial function. It is for this reason that the term political, when used in its broader meaning, will be put in quotation marks in this note.

The problem of the "political question" concerns principally the concept of separation of powers, both as a practical political theory, and as an American constitutional doctrine. Thus the Supreme Court, in considering the "political" nature of an issue before it, has regard not only to the specific constitutional delineations between the branches of government, but also the inherent competency of the judicial function to decide that issue effectively without encroachment on the "equal, but separate" powers of the other branches of government. Thus, while the fundamental reason for disavowing jurisdiction has been the limitations on the Supreme Court contained in Article III,[3] the Court has seemed often impressed with practical considerations of efficient government, as is illustrated by the following quotation: [4]

> In determining whether a question falls in that category, [political questions] the appropriateness under our system of government of attributing finality to the actions of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations.

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1 5 Pet. 1, 8 L. Ed. 25 (1831).

2 Scott v. Sandford, 19 How. 393, 15 L. Ed. 691 (1857).

3 U. S. CONST. Art. III, § 2.

4 Coleman et al. v. Miller et al., 307 U. S. 433, 454, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

This statement would hardly be complete, however, if it were not observed that the problem of the "political question" cannot be resolved wholly by consideration of the principles of the separation of powers. As has been observed: [5]

> . . . when a tribunal approaches a question, where on one horn of the dilemma is the trained moral sentiment of the judge, and on the other the "hypersensitive nerve of public opinion," it will "shy off" and throw the burden of decision on other shoulders.

The cases in which the Supreme Court has declined jurisdiction because of the presence of a "political" question are capable of at least general classification. Of these classifications, perhaps none is more important than that of foreign affairs. The attitude of the Supreme Court toward federal control of foreign affairs is perhaps most succinctly stated in the following quotation: [6]

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

In regard to the treaty making power, the latitude conceded by the Court has been great, as it is hoped will be illustrated by the following cases. *United States v. Reynes* [7] involved a dispute over the title to land purported to have been included in a tract ceded by Spain to France and ultimately acquired by the United States. In an action based on a later grant from Spain, the Court held the congressional interpretation of the French-Spanish treaty as including the land in question to be binding upon it and refused to hear the claim. For the same reason, the Court held itself incompetent to review actions taken in the Bering Sea pursuant to a treaty between Russia and the United States extending the jurisdiction of both beyond the customary three-mile limit for the purpose of regulating the seal trade. This same principle has been held to allow the Federal Government, by treaty, to re-examine the validity of private rights which had become vested according to the terms of a previous treaty. Thus, the Court assumed jurisdiction to determine whether an arbitration award had been ob-

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5 Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338, 339 (1923).

6 United States v. Curtiss-Wright Export Corp. et al., 299 U. S. 304, 318, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

7 9 How. 127, 13 L. Ed. 74 (1850).

tained by fraud, on the basis of statutory authority to do so pursuant to an agreement with Mexico that these cases be reopened and examined.[8]

In addition, the treaty making power has been held to foreclose judicial inquiry in the following situations:

a) The termination or continuance of a treaty.[9]
b) The time when the sovereignty of a nation ceases.[10]
c) The time of the ending of a war.[11]
d) Whether a diplomat is an accredited representative of his country.[12]
e) Determination of which is the *de facto* or *de jure* government of a nation.[13]
f) The time when a new nation comes into existence.[14]

It might be well to note at this point the primacy of the President in foreign affairs, as a mere matter of separation of powers. As the Court stated in *United States v. Curtiss-Wright Export Corporation et al.*:[15]

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates.

The scope of this control does not seem to be limited, however, to situations involving purely diplomatic relations. Presidential approval of a CAB order refusing a request for a certificate of convenience and necessity for an overseas airline was recently held to preclude any judicial inquiry into the otherwise reviewable order, on the basis of the President's control over foreign affairs.[16]

Certain questions besides those involving foreign affairs are also held to be not justiciable because to do so would constitute an invasion of express or properly implied powers of the other branches of govern-

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8 La Albra Silver Mining Co. v. United States, 12 Wheat. 599, 42 L. Ed. 223 (1899).

9 Terlinden v. Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1901).

10 United States v. Yorba, 1 Wall. 412, 17 L. Ed. 635 (1864).

11 United States v. Anderson, 9 Wall. 56, 19 L. Ed. 615 (1870).

12 *In Re* Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222 (1890).

13 Jones v. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890).

14 Kennett v. Chambers, 14 How. 38, 14 L. Ed. 316 (1852). See also Clark v. Allen, 331 U. S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947); United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

15 299 U. S. 304, 319, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

16 Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103, 68 S. Ct. 431 (1948).

ment. Typical of these are questions involving amendment of the Constitution such as that involved in *Coleman v. Miller*.[17] That case involved the proposed Child Labor Amendment, rejected by the Kansas legislature in 1925, but ratified by a later resolution in 1937. In affirming, on certiorari, a denial of a writ of mandamus brought to prevent this subsequent ratification from being communicated to Congress, the Court considered only the previous practice of Congress, stating:[18]

> We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

A similar attitude was taken in an early case involving, among other things, the question whether Rhode Island had ratified the Constitution.[19] Other affirmative grants to Congress, such as the power over land and naval forces, have been held to be beyond the purview of the judiciary.[20] Congressional jurisdiction over the appellate power of the Supreme Court is a somewhat similar problem, but is, of course, distinguishable in that it involves the bare question of the separation of powers by the express words of the Constitution.[21]

Not all the cases that are said to involve "political" questions concern the division of power between the branches of the Federal Government, however. The Court has also declined jurisdiction in cases where any remedy which the Court might grant would be incapable of enforcement without infringement on the political aspects of state government. Thus, as Chief Justice Marshall stated in deciding, on other grounds, the previously mentioned case of *The Cherokee Nation v. Georgia*:[22]

> The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department.

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17 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1938).

18 307 U. S. 433, 450, 59 S.Ct. 972, 83 L.Ed. 1385 (1938).

19 Luther v. Borden et al., 7 How. 1, 12 L.Ed. 581 (1849).

20 Quackenbush v. United States, 177 U. S. 20, 20 S.Ct. 530, 44 L.Ed. 654 (1900).

21 *Ex Parte* McCardle, 7 Wall. 506, 19 L.Ed. 264 (1869).

22 5 Pet. 1, 20, 8 L. Ed. 25 (1831).

It must be remembered, however, that however controlling is the argument that such action would be outside the scope of the judicial function, it cannot be doubted that the practical difficulties involved in enforcing such a decree have also been of great force. It was at least partially because of this latter consideration that the Court was led to deny equitable relief to a Negro seeking an order requiring his registration as a qualified voter.[23] Failure to meet other fundamental requirements for the jurisdiction of the Supreme Court has also at times given the Court reason to decline jurisdiction in cases involving a "political" question. Thus in *Clough v. Curtis*,[24] the Court refused to determine whether a legislative body had been validly constituted on the ground that a determination of the point was not necessary to a settlement of any valid controversy between private parties before it.

The constitutional guarantee of a "Republican Form of Government" [25] has been held to be one not supported by judicial remedy, since to afford judicial relief would require an invasion of the political sphere.[26] For this reason, the Supreme Court has refused to consider the proposition that laws passed by means of the "initiative" system are unconstitutional because enacted through a system of pure democracy.[27] The Court has also considered the question of the separation of powers between the branches of state governments to be at least outside the province of the Supreme Court, if not beyond the purview of the Federal Government altogether.[28] The recent case of *Colegrove et al. v. Green et al.*,[29] in which the Court held itself to be without jurisdiction to affect Illinois' grossly unfair system of voting districts, presents an interesting aspect of the situation considered here. While holding, of course, that the Court could not assume the task of redistricting Illinois to secure a more equitable apportionment, the majority was also of the view that the Court was incompetent to invalidate the apportionment system, since to do so would infringe upon the exclusive power of Congress and the states to control the

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23 Giles v. Harris et al., 189 U. S. 475, 23 S. Ct. 639, 47 L. Ed. 909 (1903). An action at law is, however, provided by statute. REV. STAT. § 1979 (1875), 8 U. S. C. 43 (1946). See Lane v. Wilson, 307 U. S. 208, 59 S. Ct. 872, 83 L. Ed. 1281 (1939).

24 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945 (1890).

25 U. S. CONST. Art. IV, § 4.

26 Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L.Ed. 685 (1917); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912); Luther v. Borden et al., 7 How. 1, 12 L. Ed. 581 (1849).

27 Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912).

28 Highland Farm Dairy, Inc., et al. v. Agnew et al., 300 U. S. 608, 57 S.Ct. 549, 81 L. Ed. 835 (1937).

29 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946).

election of congressmen.[30] As Mr. Justice Frankfurter stated in delivering the opinion of the Court:[31]

> The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

The extent to which the guarantees of the Constitution were intended to be protected only by "the vigilance of the people" may well be questioned. As Mr. Justice Black stated in dissenting:[32]

> . . . it is a mere "play on words" to refer to a controversy such as this as "political" in the sense that courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot.

One glance at the varied and dissimilar classifications of the cases in which the Supreme Court has declined jurisdiction because of the presence of a "political" question seems sufficient to prove the inability of the term itself to imply all its applications. It is, as has been stated previously, a residual term, comprehensible only in terms of the particular facts which give rise to its application. It is not for that reason, however, any less efficient in performing its laudable purpose of restricting the judiciary to its proper scope. Its usually prudent use in the past has done much to increase the dignity and effectiveness of the American judiciary. It is only hoped that its use in the future will not result in judicial abnegation of the duty to provide judicial remedy for governmental invasions of private political rights.

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INDIRECT CONTEMPT BY PUBLICATION—JEOPARDIZING THE ADMINISTRATION OF JUSTICE.—Judicial power to punish summarily contempts committed outside the physical presence of the court has been much disputed, not only because of its questionable historical origin, but also because, both in theory and in practice, it seems alien to American concepts of liberty. Although it is well settled that the claim that this power existed from "time immemorial" rests upon an unfounded assumption of Blackstone [1] derived from an undelivered opinion of Wilmot in

30 U. S. CONST. Art. I, § 4.

31 Colegrove et al. v. Green et al., 328 U. S. 549, 556, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946).

32 *Id.* at 573.

1 4 BL. COMM. 152.

King v. Almon,[2] it cannot be disputed that the frequent exercise of this power, both in America and in England, has made it an historical reality.[3] That the exercise of this power has not been undisputed, however, is evidenced by the large volume of legislation which has attempted, generally without success, to regulate or abolish it.

The principal objection to the exercise of the power in punishing contemptuous publications is, of course, that it is open to grave abuse since it provides an unscrupulous judge with a summary method of dealing with those who have offended him by their critical writings. While it is not denied that the power to punish summarily for contempt is vital when the contempt is direct, i. e. consisting of acts done within the physical presence of the court so as to disturb the administration of justice, it is seriously contended by many that this power either should not extend to critical or libelous writings concerning the administration of justice, or the contemnor should be insured a jury trial, as in criminal cases. While recent United States Supreme Court cases have robbed this controversy of some of its force, the law of indirect contempt by publication has by no means been interred.

The liability for the publication of contemptuous writings is almost absolute. Truth is no defense,[4] but an absence of intent to offend the dignity of the court can be shown where the publication is contemptuous only by innuendo.[5] Where, however, in the opinion of the court, there is no doubt as to the meaning, a contemnor cannot purge himself of the contempt by affirming his good intentions.[6] While it is generally held that the publication must relate to the merits of a pending case,[7] it need not relate to it specifically by name.[8] In a much-quoted case in New Hampshire, an attorney was held guilty of contempt for the publication of an article concerning a pending case where he did not know the case was pending and where he had not intended to influence the court.[9] In Indiana, a publisher was held liable for a contemptuous article published without his knowledge on the basis of his duty to avoid printing contemptuous matter.[10]

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2 Wilm. 243, 97 Eng. Rep. 94 (K. B. 1765). See Nelles and King, *Contempt by Publication in the United States Before the Federal Contempt Statute*, 28 COL. L. REV. 401 (1928), outlining the work of Sir John C. Fox. FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

3 ". . . the conclusion as to the nature of the power to punish for contempt clearly declared and frequently reiterated is not to be regarded as overthrown by reason of a possible misapprehension of the law of England with respect to the exercise of this power." *In re* Opinions of the Justices, 314 Mass. 767, 49 N. E. (2d) 252, 259 (1943).

4 Dale v. State, 198 Ind. 110, 150 N. E. 781 (1926).

5 Fishback v. State, 131 Ind. 304, 30 N. E. 1088 (1892).

6 Dale v. State, 198 Ind. 110, 150 N. E. 781 (1926).

7 Cheadle v. State, 110 Ind. 301, 11 N. E. 426 (1887).

8 *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927).

9 In the Matter of Sturoc, 48 N. H. 428 (1869).

10 Kilgallen v. State, 192 Ind. 531, 132 N. E. 682, 137 N. E. 178 (1922).

The gist of contempt is the interference with the administration of justice, and thus it is almost [11] universally held that if the publication refers to cases no longer pending, no statement, no matter how libelous, can constitute contempt by publication. The courts have not been consistent, however, in determining at what point a case is to be considered no longer pending. There is a division of opinion as to whether a case may be considered ended after the verdict has been rendered, but before the time to file for retrial or rehearing has elapsed.[12] It has been held, however, that the fact that an appeal has been taken does not make a publication about the lower court's decision contemptuous.[13] Comments on the conduct of a receiver have been held contemptuous where the acts and reports of such receiver awaited approval by the court,[14] but a contrary result was reached in Indiana on similar facts.[15] The United States Supreme Court has refused to consider it a constitutional issue in itself, regarding it as a question ". . . which local law can settle as it pleases without interference from the Constitution of the United States." [16]

A determination of pendency is, however, but a preliminary. It is ultimately but one factor to be considered in determining whether the

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11 In America, contempt convictions for "scandalizing the court", i. e. degrading the court or embarrassing its members, have long been recognized as inconsistent with constitutional guarantees of freedom of speech and the press, *Ex parte* McLeod, 120 Fed. 130 (N. D. Ala. 1903), and are even obsolete in England. McLeod v. St. Aubyn, (1899) A. C. 549.

There are cases reasoning that a derogatory article, even though directed only at a decided case, tends to influence the disposition of all future cases, at least of all those of the same type. While the logic of this position is unassailable, most courts have felt this danger too remote to warrant the suspension of civil liberties. The position of the United States Supreme Court as regards the constitutional questions involved have made these decisions of little practical value. Shumaker et al. v. State, 200 Ind. 623, 157 N. E. 769, 162 N. E. 441, 163 N. E. 272 (1927); Boorde v. Comm., 134 Va. 625, 114 S. E. 731 (1922). *Contra:* State *ex rel.* Pul. Pub. Co. v. Coleman, 347 Mo. 1239, 152 S. W. (2d) 640 (1941) (another case then pending).

12 *In re* Nelson, 103 Mont. 43, 60 P. (2d) 365 (1936); State v. Tugwell, 19 Wash. 238, 52 Pac. 1056 (1898); Bates v. State, 210 Ark. 652, 197 S. W. (2d) 45 (1946) (dictum). That such a case is not pending: Metzler v. Gounod, 30 L. T. N. S. 264 (1874). *See* Fishback v. State, 131 Ind. 304, 30 N. E. 1088 (1892); State *ex rel.* Haskell v. Faulds, 17 Mont. 140, 42 Pac. 285 (1895) (remittitur).

13 *Re* Dalton, 46 Kan. 253, 26 Pac. 673 (1891); Dunham v. State, 6 Iowa 245 (1858).

14 United States v. Craig, 266 Fed. 230 (S. D. N. Y. 1920), 279 Fed. 900 (S. D. N. Y. 1921), *habeas corpus granted, Ex parte* Craig, 274 Fed. 177 (C. C. A. 2d 1921), *rev'd,* 282 Fed. 138 (C. C. A. 2d 1921), *cert. denied,* Craig v. McCarthy, 258 U. S. 617, 42 S. Ct. 272, 66 L. Ed. 793 (1922), *cert. granted,* Craig v. Hecht, 260 U. S. 714, 43 S. Ct. 90, 67 L. Ed. 477 (1922), 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293 (1923); Bloom v. People, 23 Colo. 416, 48 Pac. 519 (1897).

15 Nixon v. State, 207 Ind. 426, 193 N. E. 591 (1935).

16 Patterson v. Colorado, 205 U. S. 459, 460, 27 S. Ct. 556, 51 L. Ed. 879 (1907).

particular publication presents a danger to the administration of justice of sufficient gravity to justify a suspension of civil liberties. This problem transcends the law of contempt; it is a matter of great constitutional importance about which the Supreme Court has not been silent.

The present view of the Supreme Court toward convictions in state courts for comments about litigation then pending is perhaps best expressed in the following words of Mr. Justice Douglas in delivering the opinion of the court in *Craig v. Harney:*[17]

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

The "clear and present danger" rule defies exact definition. Since Mr. Justice Holmes first coined the phrase in *Schenck v. United States,*[18] upholding a conviction under the Federal Espionage Act [19] for discouraging enlistment in the Army, it has had varied uses, among the more recent being its application to the law of contempt in *Bridges v. California.*[20] Previous to the *Bridges* case, the Court had held that state contempt convictions were not to be disturbed where the publication in question had a "reasonable tendency" to obstruct the administration of justice.[21]

In the two decisions subsequent to the *Bridges* case, the Court has pointed out the fact that the phrase is not to be taken too literally. As Mr. Justice Reed stated in *Pennekamp v. Florida:*[22]

> Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct, or one which disturbs the court's sense of fairness, depends upon a choice of words.

Mr. Justice Frankfurter, in a concurring opinion, writes: [23]

> "Clear and present danger" was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context.

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17 331 U. S. 367, 376, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947).

18 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

19 40 STAT. 217 (1917), 50 U. S. C. § 31 (1946).

20 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

21 Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186 (1918).

22 328 U. S. 331, 336. 66 S. Ct. 1029, 90 L. Ed. 1295 (1946).

23 *Id.* at 353.

Thus it appears that the present Supreme Court considers the "clear and present danger" rule merely a convenient phrase to adorn a decision in reality grounded on what is termed, "a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." [24] The Supreme Court has not been too informative as regards the nature of this balance, other than to state that judges must be "men of fortitude, able to thrive in a hardy climate." [25]

As was mentioned previously, there have been many attempts to restrict the power of the judiciary to punish indirect contempts by requiring a jury trial, or by abolishing the power altogether, but these attempts have been largely unsuccessful. With exceptions, state courts have generally [26] frustrated legislative attempts to curb their contempt power either by declaring such statutes unconstitutional, or by construing them to be merely "declaratory" [27] of some of the contempt powers.

The federal situation is equally interesting. In *Toledo Newspaper Co. v. United States,*[28] the Supreme Court departed from its previous interpretation [29] of the Contempt Act of 1831 [30] and ruled that the phrase, ". . . in their presence, or so near thereto as to obstruct the administration of justice . . .", purporting to limit the power of the lower federal courts to punish for contempt to those cases arising within the physical presence of the court, actually had a causal, and not a geographical meaning, and thus extended the power of the federal courts to

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24 *Id.* at 336.

25 Craig v. Harney, 331 U. S. 367, 376, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947). An interesting example of what "fortitude" might require is found in the reasoning in Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L.Ed. 192 (1941), to the effect that editorials in the Los Angeles Times concededly attempting to influence a judge in his decision in a pending case did not present a "clear and present danger" since a judge in that area would know the stand the Los Angeles Times would take in the matter and thus the editorials had no more effect than would the expectation of such an outburst after the case had been decided.

26 The following are at least some of the states which allow legislative restriction of the contempt power: Kentucky: KY. REV. STAT. § 432.240 (Baldwin, 1943) upheld in Talbott v. Comm., 207 Ky. 749, 270 S. W. 32 (1925). New York: JUD. LAW §§ 750 *et seq.* PEN. LAW § 600, upheld in Rutherford v. Holmes, 5 Hun 317 (1875), *aff'd* 66 N. Y. 368 (1876) (court created by statute); *see* Peo. *ex rel.* Webster v. Van Tassel, 64 Hun 444, 19 N. Y. S. 643 (1892). Pennsylvania: PENN. STAT. ANN., tit. 17, § 2041 (Purdon), Appeal of Marks, 144 Pa. Super. 556, 20 A. (2d) 242 (1941).

A complete discussion of this point may be found in Nelles and King, *Contempt by Publication in the United States Since the Federal Contempt Statute,* 28 COL. L. REV. 525 (1928).

27 Jones v. State, 39 Ga. App. 1, 145 S. E. 914 (1928); *see* Hale v. State, 55 Ohio St. 210, 45 N. E. 199 (1896).

28 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186 (1918).

29 *Ex parte* Robinson, 19 Wall. 505, 22 L. Ed. 205 (1874).

30 36 STAT. 1163 (1911), 28 U. S. C. 385 (1946).

cases of indirect contempt. This interpretation was greatly criticized, principally because the legislative history of the Act shows clearly that it was intended to prevent the sort of summary punishment for contempt by publication that led to the celebrated trial of Judge Peck.[31] In 1941, this holding was overruled in *Nye v. United States*,[32] the Court returning to the view that the lower federal courts may only punish for contempts committed within the physical presence of the court.

Where the court is constitutional in origin, the argument against the constitutionality of such legislation seems strong. Assuming that the power to punish for indirect contempt is implied in the power to exercise judicial functions, it follows that the constitution which creates the court, without limitation, must necessarily imply that that court is to have "inherent" contempt power. Legislative action limiting the power to punish for contempt would then be attempting to deny a power which that constitution had granted. Where, however, the court in question is statutory in origin, a question arises to perplex those who call the contempt power inherent. Does this contempt power inhere in a court because of it existence, or because it exercises judicial power? Where a court has been created by statute, it would seem to follow that a statute could alter its nature, and thus its "inherent power" would appear to depend on a fair construction of the statute. Certainly a clear prohibition would defeat any implication that a grant of that contempt power was intended.

If, however, the contempt power inheres in a court because of its very existence as a part of the judicial branch of the government, such legislative prohibitions would be fruitless for the reasons which are perhaps most strongly expressed in the following quotation: [33]

> The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments and draw to itself all the powers of government, and thereby destroy the admirable system of checks and balances to be found in the organic framework of both the Federal and state constitutions . . .

If the power to punish for indirect contempt is such an indispensable aspect of the judicial function as to require the protection of the prin-

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31 Nelles and King, *Contempt by Publication in the United States Before the Federal Contempt Statute*, 28 COL. L. REV. 401 (1928).

32 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172 (1941).

33 State v. Morrill, 16 Ark. 384 (1885). For an argument that such legislation does not violate the "separation of powers" principle, see 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 (1923).