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THE USE OF SUMMARY CONTEMPT POWERS BY ADMINISTRATIVE AGENCIES

By

R. JOHN TRESOLINI*

In recent years the American public has become more aware of the existence of summary contempt powers than ever before in our history. The contempt trials of John L. Lewis, the commitments for contempt at the trial of the eleven Communist party leaders, and other less publicized examples have focused national attention on the concept of summary contempt powers. Nevertheless, contempt procedure remains "one of the stepchildren of legal science."¹ Major problems concerning the proper use of summary contempt powers have been almost completely ignored by legal scholars.

The exercise of summary contempt powers raises fundamental questions in regard to our notions concerning the formal procedural safeguards which have been established to insure the just treatment of individuals. Our ideas of justice and fair play are associated with certain long-entrenched practices. In general, the ordinary requirements of due process of law, which include the right of fair trial, representation by counsel, adequate notice and an opportunity to be heard, form the basis of our conceptions of what is just and what is fair. In many respects the concept of summary contempt powers runs counter to these traditional beliefs.

The word "summary" means "short, concise, reduced to narrow compass or into few words."² The word "contempt" was originally used in England to denote an act committed in violation of an order or writ of the king or of any of his subordinate officers. Any such disobedience could result in the offender's summary attachment.³

Contempt of court is similar to contempt of the king. It is an extension of the concept that the king could punish individuals for disobedience. Conduct which interferes with the operation of the court while in session or which causes the court to try cases improperly and with loss of dignity is usually deemed contempt of court in its broadest sense.⁴ Although the type of contumacious act determines

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¹ Parker, R., *Contempt Procedure in the Enforcement of Administrative Orders*, 40 ILL. L. REV. 344, (1946).

² WORDS AND PHRASES, vol. 40, p. 723.

³ HOLDSWORTH, W., *A HISTORY OF ENGLISH LAW*, vol. 3, p. 391, (1923 ed.); see also BEAMES, J., *A TRANSLATION OF GLANVIL*, (1812), p. 36. ". . . When it happens that the Demandant and the Tenant are both absent, then the King or his Justices may at their pleasure, if so disposed, punish both parties, the one for his contempt of court, and the other for his false claim. . ."

⁴ RULING CASE LAW, Contempt, § 1; 31 A. L. R. 1225; 5 STANDARD PROC. 366.

the procedure which is to be used by the court, the legal distinctions are so confused that definite classification is almost impossible.⁶

The phrase "summary powers" has been utilized primarily to designate the application of administrative powers in place of, or as an alternative to, the judicial processes of the common law.⁶ Freund stated that "the term 'summary power' is used to designate administrative power to apply compulsion or force against person or property to effectuate a legal purpose, without a judicial warrant to authorize such action."⁷ In essence, however, the use of contempt powers by any branch of government involves an exercise of summary powers because any process which disregards well-established procedural safeguards may be said to be summary in nature. When considered in the light of traditional Anglo-American concepts, there is no doubt that the use of summary contempt powers constitutes an anomaly.

Judicial and Legislative Contempt Powers

It has been noted that although contempt powers are primarily associated with the judiciary, the roots of the power are found in the English executive.⁸ Contempt powers have been utilized by the judiciary on the ground that such powers are needed to enable courts to carry on their proceedings in an effective manner. Orderly administration of justice requires that those who persist in disturbing or slowing down judicial proceedings be punished without undue delay. The courts, on numerous occasions, have held that summary conviction and punishment by judicial officers is consistent with the guarantee of due process of law.⁹ Although legal scholars have shown that the use of contempt powers is

⁶ In general, contempts are divided into two basic classes, criminal and civil. In a criminal contempt the purpose of the fine or commitment is punitive in nature, while in civil contempt the purpose is remedial for benefit of the complainant. Contempts are also classified as direct or indirect. Contumacious acts which take place or are committed in the presence of the court or "so near thereto" as to interrupt its proceedings are said to be direct contempts. Indirect or constructive contempts do not take place in the presence of the court and the contumacious act usually results because of the refusal to comply with orders or decrees of the court which are to be carried out elsewhere. See THOMAS, C., PROBLEMS OF CONTEMPT OF COURT, (1934); RAPALJE, S. TREATISE ON CONTEMPT, (1884); *United States v. Pendergast*, 39 F. Supp. 189 (1941); *Ex Parte Sage*, 66 A.2d. 13, (Vt. 1949).

⁶ FREUND, E., ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY, (1928), p. 176.

⁷ *Idem.*,

⁸ See note 3, *supra*.

⁹ See, for instance, *United States v. Wilson*, 11 U. S. (7 Cranch) 32 (1812); *United States v. Coolidge*, Fed. Cases no. 14,858 (1815); *Ex Parte Terry*, 128 U. S. 289 (1885); *Toledo Newspaper Co. v. United States*, 313 U. S. 33 (1941).

based largely on an erroneous opinion which constituted no legal precedent,¹⁰ the American courts have described the power as "inherent" in order to prevent obstructions to the administration of justice and because of the courts' necessity for self-preservation.¹¹

The doctrine that courts of record possess "inherent" contempt powers seldom has been seriously challenged in the United States, but it is significant that the limitations placed on the use of summary contempt powers have never been defined clearly. The lines as to where due process in a summary action ends and the fine or commitment becomes arbitrary and unreasonable are blurred and cloudy. That there still exists serious disagreement is indicated by a recent Supreme Court decision.¹² Five of the justices held that a lawyer in a workman's compensation proceeding was not denied due process of law under the Fourteenth Amendment upon being fined and jailed for contempt. The majority opinion upheld a judge's action in progressively increasing an original fine of twenty-five dollars to one hundred dollars and a three day jail sentence because Fisher, the lawyer, persisted in his attempts to tell the jury something which the judge had ruled to be improper. Counsel for Fisher maintained that he had not disregarded the judge's instruction but had merely presented information on a different subject to which no objection had been taken by the judge. The four dissenting justices felt that the judge had abused his powers and acted in an arbitrary manner. Mr. Justice Douglas stated that the lawyer was "the victim of the pique and hot-headedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd. That is as much a perversion of the judicial function as if the judge who sat had a pecuniary interest in the outcome of the litigation."¹³ Also dissenting, Mr. Justice Murphy clearly pointed out the dangers inherent in the use of summary contempt powers.

. . . "But the summary nature of contempt proceedings, the risk of imprisonment without jury, trial, or full hearing, make this the most drastic weapon entrusted to the trial judge. To sanction the procedure when it is patent that there has been no substantial interference with the trial, where a judge has used his position and power to successively in-

¹⁰ The law of contempt in both England and the United States has been based primarily on the opinion of Sir John Wilmot in *Rex v. Almon*, (1765), Wilm. 243, 97 Eng. Rep. The case did not actually create any legal precedent because it was dismissed before the opinion of Justice Wilmot was delivered. Footnote (a) to *Rex v. Almon* reads as follows: This opinion was not delivered in court, the prosecution having been dropped in consequence, it is supposed, of the resignation of the then Attorney General. . . ; but it was thought to contain so much legal knowledge on an important subject as to be worthy of being preserved. Wilmot contended that the power of a court to punish for contempt was based upon "immemorial usage." Sir John Charles Fox has clearly shown that before the eighteenth century, contempt cases in the common law courts of England were tried by a jury unless the offender confessed or the offense was committed in the direct presence of the court. Fox traced the common-law history of contempts in a series of essays. See especially, *The King v. Almon*, 24 LAW Q. REV. 184, 266, (1908); *The Summary Process to Punish Contempt*, 25 LAW Q. REV. 238, 354, (1909); *The Nature of Contempts of Court*, 37 LAW Q. REV. 191, (1921).

¹¹ *Michaelson v. United States*, 266 U. S. 42 (1924).

¹² *Fisher v. Pace*, 336 U. S. 155 (1948), rehearing denied March 7, 1949.

¹³ *Ibid.*, at 166.

crease the penalty for simple objections, is, I believe, a denial of due process of law. The contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings. Its use should be carefully restricted to cases of actual obstruction. . . .¹⁴

The doctrine that the contempt power is exclusively "inherent" in the judiciary has been weakened by the fact that legislative bodies have been allowed the use of the power. Neither House of Congress possesses express powers under the Constitution to punish for contempt except for disorderly conduct¹⁵ or failure to attend sessions on the part of members.¹⁶ However, it has been recognized that Congress possesses implied summary contempt powers over other individuals under limited circumstances¹⁷ in order to insure the effectiveness of its legislative authority.¹⁸

Administrative Contempt Powers

The problem is now presented as to whether this drastic power should be utilized by administrative agencies.¹⁹ It is a matter of common knowledge that the period of the last fifty years has been marked by an unparalleled increase in governmental activities. With increasing frequency, Congress has seen fit to create additional administrative agencies and to expand the scope of powers already possessed by these bodies in order that complex modern problems may be solved efficiently.²⁰ Wide powers have been delegated to administrative agencies largely because of the "inadequacy of a simple tripartite form of government to deal with modern problems."²¹ Administrative agencies must be provided with adequate means of compulsion to secure compliance with their orders and to facilitate the examination of witnesses and the production of testimony. If adequate sanctions are unavailable, effective action will be prevented and the administrative process will lose one of its primary values. Although it is recognized that summary contempt proceedings constitute a single method of compulsion,²²

¹⁴ *Ibid.*, at 167.

¹⁵ Art. II, § 5, cl. 2.

¹⁶ Art. II, § 5, cl. 1; see also, *Anderson v. Dunn*, 6 Wheat. 204 (U. S. 1821).

¹⁷ For instance, a person cannot be punished for contempt by either House of Congress for refusing to give testimony in a matter in which neither House has a right of inquiry. See also, *Kilbourn v. Thompson*, 103 U. S. 168, 389 (1880).

¹⁸ *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Sinclair v. United States*, 279 U. S. 263 (1929); *Jurney v. McCracken*, 294 U. S. 125 (1935); see also, for a sound analysis of legislative contempt powers, Potts, C. S., *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691 (1926).

¹⁹ As used in this study, the term "administrative agency" includes an officer or tribunal of the executive branch of government.

²⁰ United States Attorney General's Committee on Administrative Procedure, Final Report, Chapter 1, (1941).

²¹ LANDIS, J. M. *THE ADMINISTRATIVE PROCESS*, p. 1., (1938).

²² The methods of compulsion range from the withdrawal of privileges or service to the imposition of a fine or penal sentence for non-compliance with the order of an administrative officer. See, for example, *Walker v. Dallas Independent School District*, 75 F. Supp. 553 (1948); *Furbush v. Connally*, 318 Mass. 513 (1945); *Rodgers v. United States*, 332 U. S. 376 (1947); *Donaldson v. Read*, 333 U. S. 178 (1948); *Lloyd Sabauda Society v. Elting*, 287 U. S. 329 (1932); see also, White, L. D., *INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION*, c. 35, (1939), BEYLE, H. C., *OUR WAYS OF GOVERNANCE*, c. 2. (1948).

a large number of administrative orders may be enforced only by the utilization of such a process.²³

Probably a major reason why administrative contempt proceedings have been given so little attention is due to the fact that federal administrative agencies have never been allowed the full use of summary contempt powers. Federal administrative agencies are usually empowered to bring contempt proceedings for the violation of their orders but the enforcement or execution of such orders must be accomplished through court action. On numerous occasions this practice has caused serious delay in carrying out the declared policy of Congress.²⁴

This practice began in the latter part of the nineteenth century when the doctrine of separation of powers was still considered inflexible. The earliest case which was primarily concerned with the power of administrative agencies to punish for contempt was that of *Langenberg v. Decker*.²⁵ It was decided by the Supreme Court of Indiana in 1892. Relying primarily on the doctrine of separation of powers, the court ruled that the General Assembly could not confer the power to fine and imprison for contempt upon the Indiana Board of Tax Appeals. The court reasoned that the power to punish for contempt belonged exclusively to the courts and that the power could be exercised by other bodies only when the constitution of a state expressly conferred such authority.

The leading decision concerning the now prevalent practice was delivered by the Supreme Court in *Brimson v. Interstate Commerce Commission*.²⁶ The main question before the Court was whether or not an appeal to the Court for the enforcement of an administrative order or decree constituted a case or controversy.²⁷ In a five to four decision it was ruled that courts could be called upon to enforce the powers granted to administrative agencies in compelling testimony, and that in the enforcement of such powers before a judicial tribunal there existed a case or controversy. However, Justice Harlan emphatically declared that federal administrative agencies could not punish for contempt.²⁸

²³ Parker, R., *supra*, note 1.

²⁴ *Ibid.*, p. 346. "However, to say that administrative decisions are to be 'enforced' and 'executed' by the courts sounds easier than it is. Any plaintiff, including the United States, who has a judgment against his adversary, may attack the latter's property upon a simple petition. . ." See also, *Federal Trade Commission v. Millers' Nat. Fed.*, 47 F.2d 428 (1931).

²⁵ 131 Ind. 471 (1892).

²⁶ 154 U. S. 447 (1884).

²⁷ Under sect. 12 of the Act of February 4, 1887, 24 Stat. 998, (Act to Regulate Commerce) the Interstate Commerce Commission was authorized to appeal to the proper court for the ". . . enforcement of the provisions of this Chapter and for the punishment of all violations thereof. . ." Previously it had been ruled that an appeal to the courts to force the president of a railroad company to answer questions did not constitute a case or controversy as defined by the courts. In re *Pacific Railway Commission*, 32 Fed. 241 (1887).

²⁸ ". . . Such a body could not, under our system of government, and consistently with due process of law be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution. . . the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. . ." *supra*, note 26 at 385.

Since the decision in the *Brimson* case the practice of enforcing administrative orders or decrees through court action has become strongly entrenched.²⁹ That this procedure will perhaps prevail for some time to come is indicated by the fact that the Administrative Procedure Act of 1946 provides that federal administrative agencies must invoke the aid of the courts in the enforcement of their subpoenas.³⁰

Although federal administrative bodies have been denied the power to punish for contempt, some of the states have conferred this power on administrative agencies. A few states have sought to avert legal objections to the administrative exercise of contempt powers by granting such authority by express constitutional provision. The Constitution of California specifically grants the power to punish for contempt to the Railroad Commission as follows:

"The (Railroad Commission) shall have the further power to examine books, records and papers of all railroads and other transportation companies; to hear and determine complaints. . . to issue subpoenas and all necessary process and send for persons and papers; and the Commission and each of the Commissioners shall have the power to administer oaths, take testimony, and *punish for contempt in the same extent as a court of law.*"³¹

The California Constitution also grants the contempt power to the Workmen's Compensation Commission,³² and the courts have held that in punishing for contempt the Commission is in legal effect a court.³³

²⁹ In the earlier cases decided after *Brimson v. Interstate Commerce Commission* the courts placed certain restrictions upon the subpoena powers of administrative agencies. See *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908); *Ellis v. Interstate Commerce Commission*, 237 U. S. 434 (1915); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 (1923); *Jones v. Securities and Exchange Commission*, 298 U. S. 1 (1936). In more recent years the scope of judicial review has been curtailed in a number of instances. See, for example, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 40 (1938); *Gray v. Powell*, 314 U. S. 402 (1941); *Endicott-Johnson Corp. v. Perkin*, 317 U. S. 501 (1943); *McGarry v. Securities and Exchange Commission*, 147 F.2d. 389 (1945).

³⁰ Act of June 11, 1946 (Administrative Procedure Act), U. S. C. A., §§ 1001-1011. Section 1005 (c) provides as follows. "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding the appearance of the witness or the production of the evidence or date within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." For an exhaustive review of the use of administrative subpoenas see *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946).

³¹ Cal. Const., Art. XII, s. 22; italics supplied. In *Van Hoeser v. Railroad Commission*, 189 Cal. 228, 207 Pac. 903 (1922), it was ruled that the petitioner could not be punished for contempt because he had shown inability to pay the fine levied by the Commission. See also *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466 (1918).

³² Art. XII, § 15.

³³ *Pacific Coast Casualty Co. v. Pillsbury*, 171 Cal. 319, 153 Pac. 24 (1915). In *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, 493, (1916), it was stated that a judgment of the Commission did not differ from that of a judge who directs the entry of judgment by the clerk of the court. ". . . No judicial action on the part of a superior court or a judge thereof is required to give to the Commission's award the full force and effect of the judgment. . ."

In Louisiana the power to punish for contempt is granted to the Public Service Commission by express constitutional provision.³⁴ It has been ruled that after the Commission has passed sentence for contempt, the courts may review only the legality of the proceedings preliminary to final sentence and that no appeal lies from a sentence for contempt imposed by the Commission.³⁵

The Oklahoma Corporation Commission possesses power to punish for contempt "any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements."³⁶ In litigation concerning the use of contempt powers by the Commission the state courts have, for the most part, compared the exercise of this power with that of the ordinary courts.³⁷ A somewhat different view was taken in the recent case of *Vogel v. Corporation Commission*.³⁸ In this case the court termed the Corporation Commission an administrative agency but stated that it could exercise contempt powers to carry out its quasi-judicial functions.

As indicated above, express constitutional provisions conferring summary contempt powers on administrative agencies are found only in a few states. A perusal of state statutes seems to indicate that in recent years an increasing number of administrative officers have been granted the use of summary contempt powers as a result of statutory enactments.

A substantial number of states grant the contempt power to labor arbitrators.³⁹ The language of the statutes providing for the use of this power by labor arbitrators does not differ to any great degree from state to state. The Kentucky statute is a typical example.

... "Each arbitrator shall take an oath to fairly and impartially decide the controversy according to law, justice and equity of the whole case. . . They shall hear all testimony offered by either party relative to all matters in controversy, and may summon witnesses and compel their attendance and punish for contempt by fine or imprisonment as justices of the peace may do."⁴⁰

³⁴ La. Const., Art. VI, § 4, "The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of books and papers, take testimony and punish for contempt as fully as is provided by law for the district courts."

³⁵ *Louisiana v. Meyers*, 171 La. 313, 131 So. 31 (1931). See also *State ex rel Milling v. Louisiana*, 154 La. 751, 98 So. 175 (1921).

³⁶ Okla. Const., Art. IX, § 19. The Constitution of Virginia also provides for the exercise of contempt powers by the Corporation Commission. Art. XII, § 15; see also *Reynolds v. Alexandria Motor Bus Co.*, 141 Va. 213, 126 S. E. 201 (1925).

³⁷ *St. Louis and Santa Fe Railroad Co. v. State*, 116 Okla. 95, 244 Pac. 440 (1926); *Ex Parte Sales*, 108 Okla. 29, Pac. 186 (1924).

³⁸ 190 Okla. 110, 121 P.2d 586 (1942).

³⁹ Ky. Rev. Stat., (Baldwin, 1943), c. 417, § 417; Ill. Stat. Ann., (Jones, 1935), c. 109, § 004; N. J. Stat. Ann., (Perm. ed. 1940), c. 40, Art. 19; Mo. Rev. Stat., (1944), c. 6, § 12148; R. I. Gen. Laws, (1938), c. 6, § 478; Wash. Rev. Stat., (Remington, 1932), c. 5, § 428; La. Gen. Stat. Ann., (Dart. 1939), Title 5, c. 1, § 410; Ga. Code Ann., c. 93, § 506.

⁴⁰ *Idem*.

The Board of Tax Appeals in New Jersey has been granted the contempt power. The statute provides that "the board when satisfied that a person or officer has failed to obey its judgment although fully apprised thereof, shall have power, upon procedure and rules to be adopted by it, to attach the delinquent for contempt and to punish accordingly."⁴¹

In North Carolina the contempt power is conferred upon the Board of County Commissioners for the purpose of compelling the attendance of witnesses before the board and the production of papers relating to the affairs of the county.⁴²

A number of states authorize coroners to punish for contempt in order to facilitate the obtaining of evidence in the performance of their duties.⁴³

Legislation which grants the contempt power to public service, railroad, and utilities commissions has been enacted in a number of states.⁴⁴ The contempt power is granted in such instances primarily for the purpose of aiding the administrative agency in the enforcement of its subpoenas. For example, the North Carolina statute states that the Utilities Commission "shall have the same power to compel the attendance of witnesses, require the examination of persons and parties and compel the production of books and papers, and punish for contempt as by law is conferred upon the superior courts."⁴⁵

The statutes discussed above are by no means the only ones which grant the summary contempt power to administrative agencies. The various states provide for the exercise of this power by other administrative agencies of many different types.⁴⁶

It is noteworthy that the constitutionality of many of the statutory enactments discussed above has never been contested before the courts. The ques-

⁴¹ N. J. Stat. Ann., (Perm. ed., 1940), Title 54, Chapt. 2, § 15. The contempt power has been conferred upon the Missouri Board of Tax Appeals in similar language. Mo. Rev. Stat., (1944), c. 33, § 5123.

⁴² N. C. Gen. Stat., (1943), c. 153, § 30. The states of Washington and Indiana have also conferred the contempt power upon their respective boards of county commissioners. Wash. Rev. Stat., (1932), c. 9, § 4071; Ind. Stat. Ann., (1933), Title 26, § 619.

⁴³ Conn. Gen. Stat., (1930 Rev.) § 255; Cal. Stat. Ann., (1935), c. 45, § 124; Kans. Gen. Stat., C. 32, § 456.

⁴⁴ N. C. Gen. Stat., (1943), c. 62, § 13, (Utilities Commission); Vt. Public Laws, (1933), Title 28, § 6068, (Public Service Commission); Ariz. Code, (1939), c. 72, § 103, (Public Service Commission); Ga. Code Ann., c. 93, § 506, (26-36), (Public Service Commission); Tenn. Public Act, (1937), c. 23, § 408, (3059a32), (Railroad and Public Utilities Commission); Tex. Rev. Civil Stat. Ann., (1937), Title 102, Art. 6024, (Railroad Commission); Cal. Gen. Stat., (1944), c. 115, § 54, (Utilities Commission); Mo. Rev. Stat. Ann., (1944), c. 128, § 15346, (Public Utilities Commission).

⁴⁵ *Idem*.

⁴⁶ State Marketing Commission in Oklahoma, Okla. Stat. Ann., (1936), Title 2, § 637; Superintendent of Liquor Licenses and Control in Arizona, Ariz. Code, (1939), c. 69, § 2611; Superintendent of Public Works in New York, McKinney's Consolidated Laws of New York Ann., (1943), Art. 13, § 134; Commissioner of Labor Statistics in Ohio, Ohio Gen. Code, (1946), c. 10, § 885; Board of Pardons in Connecticut, Conn. Gen. Stat., (1930), § 2000; County Boards of Education in North Carolina, N. C. Gen. Stat., (1943), c. 38, § 20; Crime Commission in Tennessee, Tenn. Public Acts, (1937), c. 13, § 4; Board of Police Commissioners in Connecticut, Conn. Gen. Stat., (1930), § 490.

tion as to how often the power is exercised, therefore, is difficult to ascertain. In a number of instances when litigation arising under the statutes has come before the courts the constitutional issue has been sidestepped.⁴⁷

Although summary contempt powers have been traditionally exercised by the judiciary, it has been ruled in a limited number of state cases that administrative agencies possess "inherent" contempt powers. One of the leading state cases on this matter is that of *In re Hayes*.⁴⁸ In the *Hayes* case a physician was confined to the county jail for a ten day period because he refused to testify, without pay, before the state industrial commission. The commission had summoned the physician during an investigation arising as the result of a claim under the North Carolina Workman's Compensation Act. The court ruled that although the power to punish for contempt was not expressly granted to the commission by statute, the power was to be inferred from the statute so that the commission could carry out its functions in a proper manner. The court stated that "if a witness in attendance at a hearing, after having been duly sworn, can refuse to answer a question propounded to him which is pertinent to the matters in dispute between the parties with impunity, then it is manifest that the North Carolina Industrial Commission. . . is without adequate power to perform its duties prescribed by statute."⁴⁹

A novel approach to the problem is found in a decision of the Supreme Court of Connecticut.⁵⁰ After making an exhaustive analysis of the contempt powers of administrative agencies, the court stated that the right to examine witnesses and to compel testimony could be exercised by administrative as well as judicial officers and *that the power is distinctly administrative in nature*. Said the court:

"The principle on which the power rests is that when immediate enforcement of law is essential to its execution, the state cannot permit a citizen to obstruct, by his disobedience, such immediate execution of law, and has the power to invest the officer charged with the adminis-

⁴⁷ See, for instance, *Rushing v. Tennessee Crime Commission*, 173 Tenn. 308, 317 S. W. 2d 781 (1938). In the *Rushing* case the court declared that it would not pass on the question as to whether or not the Tennessee Crime Commission possessed the contempt power. See also, *Jersey City v. Board of Equalization*, 74 N. J. L. 753, 67 Atl. 38 (1907).

⁴⁸ 200 N. C. 133, 156 S. E.2d 791 (1931).

⁴⁹ *Ibid.*, at 794. For other state cases which have held that administrative agencies possess inherent contempt powers see *In re Sanford*, 236 Mo. 665, 139 S. W. 376 (1911), in which it was held that the Missouri Board of Equalization could enforce obedience to its lawful orders by the use of the contempt power even without express statutory authority. See also *State ex rel Farber v. Shot*, 304 Mo. 523, 263 S. W. 894 (1934). In this case it was held that the contempt power could not be conferred on an administrative agency. In *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911), it was ruled that the Georgia Board of Police Commissioners possessed all the powers which were granted to courts of record. See also *Branks v. Sturdivant*, 177 Ga. 460, 170 S. E. 369 (1933); *State ex rel Dysart v. Cameron*, 140 Wash. 101, 248 Pac. 408 (1926). It has also been held in a number of cases that a public notary may punish for contempt. See, especially, *In re Merkle*, 40 Kans. 27, 19 Pac. 401; *Noell v. Bender*, 317 Mo. 394, 295 S. W. 532 (1927).

⁵⁰ *In re Application of Clark*, 65 Conn. 17, 31 A. 522 (1894).

tration of law, whether he be a judicial or administrative officer, with authority to compel, in such case of emergency, immediate obedience in the manner prescribed by law."⁶¹

However, the approach to the problem which characterizes the *Clark* case has, to date, never been utilized by any other court.

Some Conclusions

Despite the fact that summary contempt powers have been denied to federal administrative agencies, the states have been granting the power to their respective administrative bodies with increasing frequency. In a number of instances state legislative bodies and state courts have shown little respect for the doctrine that summary contempt powers belong exclusively to the judiciary. The grants of administrative contempt powers also seem to indicate that there is a growing need to vest administrative agencies with adequate powers in order that they may function in a more effective manner.

The experience of the state governments may, in time, affect the attitude of the national legislature concerning the grant of summary contempt powers to administrative agencies. A few legal scholars already have advanced potent arguments for the granting of summary contempt powers to a limited number of federal administrative agencies.⁶²

Nevertheless, at the federal level and in a majority of the states, the constitutional arguments against the granting of summary contempt powers to administrative agencies are still being used. The doctrine of separation of powers and the dictum of the *Brimson* case that due process of law would be violated if administrative agencies possessed summary contempt powers have usually been relied upon by the courts in denying contempt powers to administrative agencies. These constitutional objections may be easily dispensed with, however, by simply terming an administrative agency a "court" or an "arm" of the legislature. It seems obvious, therefore, that a realistic consideration of the problem should not involve discussion of constitutional provisions which, depending on the peculiar circumstances at hand, can be used to either grant or deny the use of summary contempt powers to administrative agencies.

⁶¹ *Ibid.*, at 524, 525.

⁶² See especially Albertsworth, E., *Administrative Contempt Powers, A Problem in Technique*, 25 A. B. A. J. 954 (1939). The author states that the Interstate Commerce Commission should be granted the power to punish for contempt in the enforcement of their subpoenas on the grounds that the older administrative agencies of proven abilities will exercise the power without abuse of individual rights and privileges in the public interest. And see Pillsbury, W., *Administrative Tribunals*, 36 HARV. L. R. 591 (1936). Pillsbury's main thesis is that the power to enforce the attendance of witnesses and the giving of testimony does not belong to any one of the three branches of government. It is rather an incidental power which is deemed necessary for properly carrying on the functions of each department. For the judiciary to exercise the contempt power exclusively upsets the equal balance of the three departments. Because the legislative department may exercise the contempt power to a limited degree, then, by legislative delegation, with proper statutory limitations, it could be exercised by the executive department. Compare *In re Application of Clark*, *supra*, note 50.

A more realistic approach to the problem would be concerned with the balancing of public right with private right. Summary contempt powers should be made available to administrative officers only in those instances when delay in the prohibition or performance of specific acts of private individuals will directly or indirectly endanger public rights. However, we must not lose sight of the fact that the expertness of an administrator is substantive rather than procedural in nature. In most instances he has been placed in his job because of specialized knowledge of a particular business or industry. In the great majority of cases he must be loyal to the political powers because he is directly responsible to the political forces. Although administrative officials are usually men of high integrity, they tend to exalt "administrative convenience and the national advantage at the expense of the individual and his freedom. The official in his zeal to achieve a desirable result may impose an unreasonable burden upon the subject."⁵³ Nevertheless, it is necessary that administrative officers possess adequate powers in order that public rights may be protected.

The logical question appears to be: Will the advantages obtained from the granting of summary contempt powers to administrative agencies outnumber the dangers to individual rights which may result from the use of the power? Probably an unqualified answer to the question cannot be given because of the many diverse types of administrative agencies. In almost every instance in which administrative agencies have used the contempt power the occasion for its exercise involved the refusal of a witness to appear and testify or to produce certain documents. The practice of invoking the aid of the courts has proved very cumbersome and ineffective notwithstanding the fact that the courts, in recent years, have shown a tendency to allow administrative action more freedom from court interference. Although there should be no unqualified grant of contempt powers to administrative agencies, a beginning might be made by allowing a few agencies at the federal level to punish for contempt upon refusal to testify on the part of a witness. In granting such a power, however, Congress should give the maximum possible procedural guidance to the administrative official in order to minimize the abuses which might result. In this regard, state statutes which confer the contempt power on administrative agencies and federal statutory enactments providing for the use of other *ex parte* powers⁵⁴ could be utilized to advantage.

⁵³ MOLSON, H., *DELEGATED LEGISLATION*, p. 12 (1947).

⁵⁴ In most statutes which provide for the use of summary powers Congress has failed to give maximum procedural guidance. There has been no real guidance when it is provided that an administrator must act with good judgment on "evidence satisfactory to him" or "on becoming satisfied" that certain conditions exist. See, for example, 18 U. S. C. A., § 1461, which prescribes no procedures whatsoever for the exclusion of injurious matter from the mails by the Postmaster General. However, federal statutes involving the summary disposition of property as the result of non-payment of taxes provide a maximum of procedural guidance. See 26 U. S. C. A., §§ 3693, 3701, 3312.