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CONSTITUTIONAL LAW-DUE PROCESS OF LAW-FREEDOM OF THE PRESS TO CRITICIZE THE JUDICIARY-CLEAR AND PRESENT DANGER TEST

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FREEDOM OF THE PRESS TO CRITICIZE THE JUDICIARY—CLEAR AND PRESENT DANGER TEST—The editor and publisher of the *Miami Herald* published two editorials and a cartoon which inaccurately portrayed the local circuit court as willing to "accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarass and nullify prosecution" [1] in certain criminal cases then before the court. They were cited in contempt of the circuit court for tending to obstruct and interfere with the impartial administration of justice. Found guilty of the charges, the petitioners appealed to the Florida Supreme Court, which affirmed the decision declaring that the object of the publications was "to abase and destroy the efficiency of the court." [2] On certiorari to the United States Supreme Court, *held*, reversed. The publications did not constitute a clear and present danger to the fair administration of justice. Justice Reed delivered the opinion of the Court; Justices Frankfurter, Murphy, and Rutledge concurred in the result but delivered separate opinions. *Pennekamp v. Florida*, (U. S. 1946) 66 S. Ct. 1029.

The power of a court to punish as constructive contempt acts which occur beyond its presence and which are calculated to disturb the judicial process has had a questionable status both at common law [3] and under the Federal Constitution.[4] While the principal case adds little to the previously decided federal substantive law of constructive contempt, it should clarify several issues raised by

all these situations, the holder must have knowledge of the default." Chafee, "Acceleration Provisions in Time Paper," 32 HARV. L. REV. 747 at 769 (1919). See also BRITTON, BILLS AND NOTES, 454 et seq. (1943); and United States v. Capen, (D.C. Vt. 1944) 55 F. Supp. 81 (1944).

[1] MIAMI HERALD editorial, November 2, 1944, as quoted in principle case, at 1032, note 4.

[2] Pennekamp v. State, (Fla. 1945) 22 S. (2d) 875 at 883.

[3] The thesis of Sir John C. Fox that the "inherent power" of constructive contempt has no historical foundation but is based on the erroneous unpublished opinion of Wilmot, J., in The King v. Almon (1765) has been generally recognized. Wilmot's view was adopted by Blackstone and came to the United States by the unquestioned acceptance of BLACKSTONE'S COMMENTARIES. See FOX, THE HISTORY OF CONTEMPT OF COURT (1927); 4 BLACKS. COMM. *283 et seq.; Respublica v. Oswald, 1 Dallas (Pa.) 319 (1788); Nelles and King, "Contempt by Publication in the United States," 28 COL. L. REV. 401 et seq. (1928).

[4] As a result of the assumption made in the notorious Judge Peck impeachment proceedings in 1831 that federal courts possessed an inherent power to punish for constructive contempt, Congress attempted to restrict this power by the act of March 2, 1831, c. 98 [reenacted in 28 U. S. C. (1940), § 385]. This restriction was effectively disregarded in Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 S. Ct. 560 (1918), which was overruled in Nye v. United States, 313 U. S. 33, 61 S. Ct. 810 (1941), where the Court declared the Congressional restriction controlling. State courts have generally deemed themselves possessed of an inherent power to punish constructive contempt and until Bridges v. California, 314 U. S. 252, 62 S. Ct. 190 (1941), this power was seldom questioned as an invasion of the right of free speech. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833); Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 HARV. L. REV. 1010 (1924); 54 HARV. L. REV. 1397 (1941); cases cited infra, note 8.

the great mass of discussion which followed the Supreme Court's landmark decision in the *Bridges* case.[5] The Court reaffirms its position as the ultimate guardian of civil liberties as against both federal and state encroachment.[6] After conceding that the Florida Circuit Court's action was within the Florida statutes[7] and decisions,[8] the Supreme Court scrutinized the action in the light of its own evaluation of the prohibitions of the First and Fourteenth Amendments. The principal and concurring opinions make clear that no court has the power to punish as contempt, whether by summary procedure or otherwise, out-of-court criticism of the court, its personnel or proceedings, so long as the attack does not tend to influence a pending decision. No matter how erroneous, vicious, or intentionally calculated to bring the court into obloquy the comment may be, the court has no right to exercise its power of contempt merely to defend its dignity. Although the propriety of this position has been both upheld and denied by legal scholars,[9] the law is clear under the present decision. A judge who has been personally defamed may resort to a damage action for libel or slander, but like other public servants he must bear with fortitude legitimate public criticism directed against his bench and person. The power of constructive contempt can be exercised solely for the preservation of the right of litigants and accused persons presently before the tribunal to a fair and orderly trial. The effect of criticism on future cases through its influence on the temperament of judge or jury must be dismissed as too remote to be taken into account. It would appear to follow that not every criticism of a pending trial is contemptuous per se. Only when the rights of litigants are "clearly" and "presently" threatened does the critic become liable as a contemnor. This clear and present danger test, formulated by Justice Holmes in 1919,[10] seems destined to become the balance in which all civil rights are to be weighed against restrictive legisla-

[5] Bridges v. California, 314 U. S. 252, 62 S. Ct. 190 (1941), discussed in 30 ILL. B. J. 330 (1942); 27 IOWA L. REV. 467 (1942); 26 MINN. L. REV. 552 (1942); 19 N. Y. UNIV. L. Q. 307 (1942); 90 UNIV. PA. L. REV. 617 (1942); 15 So. CAL. L. REV. 367 (1942), and articles cited infra, note 9.

[6] Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625 (1925); Whitney v. California, 274 U. S. 357, 47 S. Ct. 641 (1927); Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625 (1931).

[7] Fla. Stat. Ann. (1943) §§ 38.22, 38.23, 932.03.

[8] In re Hayes, 72 Fla. 558, 73 S. 362 (1916); Cormack v. Coleman, 120 Fla. 1, 161 S. 844 (1935).

[9] Upheld: Hanson, "The Supreme Court on Freedom of the Press and Contempt by Publication," 27 CORN. L. Q. 165 (1942); Deutsch, "Liberty of Expression and Contempt of Court," 27 MINN. L. REV. 296 (1943); Fraenkel, "Civil Liberties Decisions of the Supreme Court, 1941 Term," 91 UNIV. PA. L. REV. 1 at 13 (1942); Swancara, "The Los Angeles Times Contempt Decision: A Reply," 14 ROCKY MT. L. REV. 315 (1942). Denied: Berger, "Constructive Contempt: A Post-Mortem," 9 UNIV. CHI. L. REV. 602 (1942); Crosman, "The Los Angeles Times Contempt Decision: A Dangerous Holding," 14 ROCKY MT. L. REV. 193 (1942).

[10] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U. S. 47 at 52, 39 S. Ct. 247 (1919).

tion.[11] The court warns that the test cannot be regarded as an absolute criterion in determining when censure of judicial action transcends the boundaries of free speech to become punishable contempt. But the opinion of Justice Reed offers no adequate analysis of the problem and leaves the lower courts to apply the yardstick at their peril. The concurring opinion of Justice Frankfurter, who dissented in the *Bridges* case,[12] discusses the factors involved, ventures the opinion that even judges may be swayed by extraneous influences, and concludes with the dictum that the utterance is contempt if it "is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court." [13] While agreeing that the danger line is not crossed under the present facts, the justices express rather widely divergent views on the probable location of that line.[14] It is submitted that no judge is likely to admit he was influenced by extraneous comment in order to justify his punishing it as a constructive contempt. Therefore, the principal case seems to reaffirm the death blow dealt in the *Bridges* case [15] to the use of the power of contempt to punish out-of-court criticism of pending non-jury actions.

Merrill N. Johnson

[11] Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247 (1919) (Federal Espionage Act); Whitney v. California, 274 U. S. 357, 47 S. Ct. 641 (1927) (state anti-syndicalism statute); Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732 (1937) (anti-rebellion statute); Schneider v. State, 308 U. S. 147, 60 S. Ct. 146 (1939) (city ordinances regulating public assembly and dissemination of political and religious publications); Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736 (1940) (state picketing legislation).

[12] Bridges v. California, 314 U. S. 252, 62 S. Ct. 190 (1941).

[13] Principal case, 66 S. Ct. 1029 at 1041 (1946).

[14] Compare Justice Murphy's comment, "To talk of a clear and present danger . . . is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice," at 1048 with Justice Frankfurter's observation that ". . . the delicate task of administering justice ought not to be made unduly difficult by irresponsible print." Principal case at 1042.

[15] Bridges v. California, 314 U. S. 252, 62 S. Ct. 190 (1941).