COMMENTS

CONTEMPT—ATTORNEYS NOT "OFFICERS OF THE COURT" WITHIN FEDERAL CONTEMPT STATUTE—EFFECT UPON AVAILABILITY OF CONTEMPT SANCTION AGAINST ATTORNEYS IMPROPERLY CONTACTING GRAND JURORS

Cammer v. United States, 350 U.S. 399 (1956)

A federal grand jury indicted petitioner's client for filing a false non-communist affidavit. Without the knowledge or permission of the court, petitioner mailed identical letters and questionnaires to those grand jurors who were employees of the federal government in an attempt to determine whether their relationship with the government would influence their decision. Petitioner was cited for contempt under section 401(2) of the federal contempt statute, which empowers a federal court to punish as contempt "misbehavior of any of its officers in their official transactions":[1] it was held that petitioner was an "officer of the court" and that sending the questionnaires constituted misbehavior in an official transaction.[2] The Supreme Court reversed, construing section 401(2) as including only conventional court officers such as marshals, bailiffs, court clerks, and judges, and held that an attorney is not an "officer of the court" within the meaning of the section.[3]

While section 401(2) has seldom been invoked against attorneys,[4]

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1. 18 U.S.C. § 401(2) (1952). Section 401 in its entirety provides:
   A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
   (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
   (2) Misbehavior of any of its officers in their official transactions;
   (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The statute, originally adopted in 1831 (4 STAT. 487 (1831)), has been construed as a drastic limitation upon the original common-law power of the federal courts to punish for contempt. In the Matter of Michael, 326 U.S. 224, 227 (1945); Nye v. United States, 313 U.S. 33, 45 (1941). For a discussion of the events leading to its passage, see Nelles & King, *Contempt by Publication*, 28 COLUM. L. REV. 401, 423-30 (1928). Whether this limitation applies to the Supreme Court, the existence and powers of which are derived from the Constitution, is still an open question. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1873).

2. Cammer v. United States, 233 F.2d 322 (D.C. Cir. 1955), *affirming* 122 F. Supp. 388 (1954).

3. Cammer v. United States, 350 U.S. 399 (1956).

4. The only decisions which have been found applying § 401(2) to attorneys are United States v. Zavelo, 177 Fed. 536 (C.C.N.D. Ala. 1910) (causing privileged witnesses to be served with civil process) and *Ex parte* Davis, 112 Fed. 139 (C.C.D. Fla. 1901) (maliciously securing issuance of a summons in ejectment against judge in case involving land which was subject of suit). For cases in which it was stated in dicta that attorneys were "officers of the court" under § 401(2), see United States *ex rel.* Hallett v. Green, 85 Fed. 857, 859 (C.C.D. Colo. 1898); Bogart v. Electric Supply Co., 27 Fed. 722, 723 (C.C.S.D.N.Y. 1886).

The great majority of cases in which attorneys were cited for contempt have

no case prior to the instant decision has been found in which it has been held or even suggested that attorneys were not officers of the court for the purposes of that section. When there has arisen the question whether the attorney's conduct fell within section 401(2), the issue has generally been whether the conduct constituted an "official transaction."[5] Recent decisions had indicated that, in the instant case, the necessity of construing the term "officers of the court" could have been avoided by reversing on the ground that petitioner's conduct was not an "official transaction."[6] While the Court did not consider this as the crucial issue, it is submitted that had it done so and held that petitioner's conduct was an "official transaction," it would have been plausible for the Court to conclude further that attorneys are "officers of the court" under section 401(2),[7] and

been based on violations of § 401(1). See, *e.g.*, United States v. Sanders, 97 F.2d 378 (2d Cir. 1938) (misconduct in the courtroom); United States v. Frank, 53 F.2d 128 (D.N.J. 1931) (knowingly presenting false answers).

For an example of the application of § 401(3), see Bogart v. Electric Supply Co., 27 Fed. 722 (C.C.S.D.N.Y. 1886), where an attorney was cited for refusal to obey a court order.

5. Farese v. United States, 209 F.2d 312 (1st Cir. 1954); Cammer v. United States, 223 F.2d 322, 330 (D.C. Cir. 1955) (dissenting opinion).

6. Admittedly there is plausibility in the argument that "if lawyers are covered by this section of the Act they are engaged in official transactions whenever engaged in the 'practice of the profession.'" 350 U.S. at 404. On the other hand, while consideration of this point may be academic in relation to the instant case, it is felt that the tenor of prior recent decisions had indicated that the phrase, "official transactions" under § 401(2) was to be severely limited and would not have encompassed appellant's conduct. See In the Matter of Michael, 326 U.S. 224, 227 (1945); Nye v. United States, 313 U.S. 33, 44-48 (1941); Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954); Schmidt v. United States, 124 F.2d 177 (6th Cir. 1941), *overruling* Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940). Moreover, it was held in the *Michael* case that a court-appointed trustee, an officer of the court, was not engaging in an official transaction when he perjured himself before a grand jury conducting a general inquiry. This would appear to indicate that it would not have been sufficient to constitute an "official transaction" merely that a communication concerning a matter under the court's consideration passed between two officers of the court, as strongly suggested by the court of appeals in the instant case. Cammer v. United States, 223 F.2d 322, 325 (D.C. Cir. 1955).

Furthermore, when considering the term "official" as it is commonly understood, it is difficult to conclude that appellant's conduct could have been held to be "official." An act is "official," as distinguished from the act of any individual, if it is done by an officer under color and by virtue of his office. Lammon v. Feusier, 111 U.S. 17 (1884); Alford v. McConnell, 27 F. Supp. 176 (N.D. Okla. 1939). If a person's office gives him authority to act, he is acting by virtue of his office even though he improperly exercises his authority. Greenius v. American Surety Co., 92 Wash. 401, 404, 159 Pac. 384, 385 (1916). It is that which is "derived from the proper office or officer, or from the proper authority; made or communicated by virtue of authority; authorized; authoritative. . . ." MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1954). It is submitted that the office of attorney at law grants no special authority to its holder to communicate with grand jurors as it does to give legal advice or draft legal documents, and if an attorney so acts he is not acting "officially" but rather is in the same position as any other individual.

7. The proponent of the resolution of 1831 directing the Committee on the Judiciary to inquire into the expediency of defining by statute offenses which might be punished as contempts, stated that while it might be difficult to define contempts, it should not be difficult to define what were not contempts so that anyone looking at the statute could inform himself as to whether he was acting within the

thereby affirm the contempt citation. On the other hand, the decision realistically recognizes the difficulty of defining an "official transaction."[8] Moreover, it encourages the independence of the bar by removing any fear on the part of attorneys that, if they are considered to be officers of the court for purposes of the contempt statute, the phrase "official transaction" might be used to bring all aspects of the legal profession relating to federal practice within the scope of the contempt power of the federal courts.[9] Finally, the decision prevents the use of the contempt power to fine or imprison an attorney, *as an attorney,* without a trial[10] in a situation similar to that in the principal case where the use of such power is unnecessary—unnecessary because the damage had already been completed[11] and also be-

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law. 7 CONG. DEB. 560, 561 (1831). Therefore, with this expression of legislative intent in mind, if Congress did not intend that attorneys be considered "officers of the court," it would appear that Congress simply would have specifically excluded attorneys from § 401(2).

Furthermore, the construction of the phrase "officers of the court" in the principal case was based partly on Congressman Buchanan's statements in regard to the independence of the bar made at the impeachment trial of Judge Peck who was being tried for his alleged abuse in exercising the contempt powers of the federal courts. 350 U.S. at 405-07. The Court stressed the fact that Buchanan reported the 1831 Act to the House of Representatives. *Id.* at 407. But is it not then plausible to conclude that if Buchanan felt that attorneys should not be considered "officers of the court" within the contempt statute, he would have argued this point in Congress?

8. 350 U.S. at 404. See note 6 *supra.*

9. *Ibid.,* where it is declared that an "official transaction" plausibly could include any activity of an attorney when engaged in the practice of the profession. See also Congressman Buchanan's statements advocating the need to maintain the independence of the bar. *Id.* at 406-07 quoting from STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 445, 455 (1833).

10. Contempts are classified as civil and criminal. A civil contempt consists of failure to obey a court order; the sanctions applied are remedial and serve only the purposes of the complainant. A criminal contempt, on the other hand, exists where the acts are considered an injury to the court; the sanctions imposed are solely for the purpose of punishment, thereby serving as a deterrent against similar future conduct. BLACK, LAW DICTIONARY (4th ed. 1951). See McCrone v. United States, 307 U.S. 61, 64 (1939).

Criminal contempts are punishable summarily by the federal courts if the judge knows of the contumacious conduct from his own personal knowledge. In all other alleged criminal contempts the defendant is entitled at least to notice and hearing except in those cases where Congress has specifically guaranteed the right to a jury trial. FED. R. CRIM. P. 42. See 18 U.S.C. § 3691 (1952), which provides for a jury trial in cases where the conduct also constitutes a criminal offense under an act of Congress or under the laws of the state in which the conduct occurred. This section, however, does not apply to contempts falling within § 401(1) of the federal contempt statute. See text supported by note 12 *infra.* Apparently it is felt that in the latter situation, a court must be empowered to punish the contempt quickly—not only to maintain the respect due the court but also to be able to proceed with the orderly conduct of its business.

11. The passage of the act of 1831 was intended to safeguard constitutional procedures by limiting the contempt powers of federal courts to "the least possible power adequate to the end proposed." In the Matter of Michael, 326 U.S. 224, 227 (1945). In Offutt v. United States, 348 U.S. 11, 14 (1954), it was stated that "the pith of this extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require it." It was said in Farese v. United States, 209 F.2d 312, 315 (1st Cir. 1954), that the cases In the Matter of

cause such misconduct could be as effectively discouraged through the prophylactics of suspension or disbarment.

Insofar as the federal contempt statute is concerned, the principal case, by excluding attorneys from *section 401(2)*, in effect places them in the same category as laymen whose conduct is governed by *section 401(1)*. The latter section empowers federal courts to punish as contempt "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[12] Therefore, in order to determine when an attorney's improper contact with grand jurors will be considered a contempt in the future, it is necessary to inquire into the judicial interpretations given the phrases "in the presence of" and "so near thereto."

The leading authority construing "in the presence of" is the case of *Savin, Petitioner*,[13] in which appellant was cited for contempt for approaching a witness in a temporary witness room of the courthouse in an attempt to deter the witness from testifying for the government. It was stated that "the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court."[14] This geographical construction of the phrase has since been closely observed by the courts. For example, it has been held to be contempt to assault a marshal in the courtroom,[15] to send a contumacious letter to a judge in his chambers during a short recess,[16] to falsely represent vis-a-vis the court that one is a practicing attorney of another jurisdiction,[17] to knowingly file false answers,[18] or to give contumacious answers to

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Michael, *supra*, and Nye v. United States, 313 U.S. 33 (1941), teach that the grant of summary power ought to be narrowly construed so that denials of the right to a jury trial will be narrowly restricted to those "bedrock" cases where exercise of the power is necessary to enable the courts to preserve their authority and insure the maintenance of order and decorum of the courtroom. In the principal case, since any harmful effect of the questionnaires was complete when the jurors received them in the mail, the invocation of the contempt power was unnecessary.

As the Court in the principal case pointed out, 350 U.S. at 407, if petitioner had been charged with violating 18 U.S.C. § 1503 (1952), he would have been entitled to a jury trial after indictment by a grand jury. See note 33 *infra*.

12. See note 1 *supra*.

13. 131 U.S. 267 (1889).

14. *Id.* at 277. The Court pointed out that this view rendered it unnecessary to construe the words "so near thereto as to obstruct the administration of justice." *Id.* at 278. See Cuddy, Petitioner, 131 U.S. 280 (1889) (petition for habeas corpus by one cited for contempt for attempting to influence a prospective juror denied on the ground that both the petition and the record were silent as to the location of the alleged contempt).

15. *Ex parte* Terry, 128 U.S. 289 (1888).

16. Cooke v. United States, 295 Fed. 292 (5th Cir. 1923), *rev'd on procedural grounds*, 267 U.S. 517 (1925).

17. Bowles v. United States, 50 F.2d 848 (4th Cir. 1931).

18. United States v. Frank, 53 F.2d 128 (D.N.J. 1931). See also Laughlin v. United States, 151 F.2d 281 (D.C. Cir. 1945). Where individuals secured court approval of a fictitious settlement of pending litigation by means of misrepresentations through innocent counsel in open court, it was held to be contempt in the

a grand jury and to attempt to influence a witness in a hall adjacent to a grand-jury room while the grand jury was in session.[19] On the other hand, where the wife of a chief witness in a criminal trial was threatened in the corridors of a courthouse after the day's proceedings were concluded, it was held that no contempt was committed. Since the wife was not connected with the court in any official capacity and since there was nothing shown to indicate that the court was not adjourned, it was concluded that it would unduly stretch the concept of presence to hold the court present in the corridors.[20]

To be contrasted with the consistent restrictive interpretation placed upon "in the presence of" is the gamut which has been run by the phrase "so near thereto." Prior to *Nye v. United States,*[21] "so near thereto" was broadly construed in accordance with *Toledo Newspaper Co. v. United States,*[22] in which it was held that the test of includibility of acts within section 401(1) was their "reasonable tendency" to obstruct the administration of justice.[23] Under this decision the phrase was not geographically construed, but rather, embraced acts occurring far from the courtroom.[24] *Toledo,* however, was overruled by the *Nye* case, which drastically limited the concept of "so near thereto": the exercise of improper influence on an administrator of an estate one hundred miles away from the courthouse was held not to be a contempt. The Court stated that the phrase must be given a geographical connotation rather than a causal one, *i.e.,* to be punishable as an obstruction to the administration of justice under section 401(1), the misbehavior must be in such proximity to the court as to

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presence of the court, the theory being that although the conspiracy to commit the contempt occurred outside the presence of the court, it was *consummated* in the court's presence. United States v. Pendergast, 39 F. Supp. 189 (W.D. Mo. 1941), *aff'd sub nom.* O'Malley v. United States, 128 F.2d 676 (8th Cir. 1942), *rev'd holding that even if the conduct were a contempt any action was barred by the statute of limitations sub nom.* Pendergast v. United States, 317 U.S. 412 (1943).

Perjury, however, even though committed in court is not alone sufficient to sustain a contempt citation. Matusow v. United States, 229 F.2d 335 (5th Cir. 1956). See also In the Matter of Michael, 326 U.S. 224 (1945); *Ex parte* Hudgings, 249 U.S. 378 (1919) (to uphold contempt citation for perjury would mean that any judge in any case could imprison a man merely because judge thought witness untruthful). *But see* Clark v. United States, 289 U.S. 1 (1932) (perjury by prospective juror on *voir dire* examination held to be contempt, the theory being that while perjury by witness is not alone sufficient obstruction to judicial power since obstruction is only that inherent in testifying falsely and can be appropriately remedied by indictment, perjury resulting in acceptance of prejudicial juror sterilizes trial *ab initio*).

19. *In re* Presentment by Grand Jury of Ellison, 44 F. Supp. 375 (D. Del. 1942), *aff'd,* 133 F.2d 903 (3rd Cir.), *cert. denied,* 318 U.S. 791 (1943).

20. Farese v. United States, 209 F.2d 312 (1st Cir. 1954).

21. 313 U.S. 33 (1941).

22. 247 U.S. 402 (1918).

23. *Id.* at 421.

24. See, *e.g.,* Sinclair v. United States, 279 U.S. 749 (1929); McCann v. New York Stock Exchange, 80 F.2d 211 (2d Cir. 1935) (dictum).

disrupt the order and decorum of the courtroom.[25] Thus, pursuant to the *Nye* doctrine, it has been held that the following conduct fell within neither the concept of "so near thereto" nor that of "in the presence of": attempt to influence petit juror sixty miles from the courthouse,[26] and, in another case, two or three blocks from the courthouse:[27] unauthorized examination of prospective jurors fourteen miles from the courthouse;[28] filing affidavits improperly obtained from grand jurors away from the courthouse;[29] and circulating advertisements among prospective jurors for the purpose of improperly influencing them.[30]

The result of the *Nye* case was to bring the meaning of "so near thereto" closely in line with the meaning of "in the presence of." Oddly enough, however, it appears that the latter phrase has emerged with a somewhat broader construction than the former. That is, in order for misbehavior which obstructs the administration of justice to be considered within the "presence of" the court, it need not disrupt the order and decorum of an official court proceeding as required within the meaning of "so near thereto," but need only occur somewhere in the courthouse while the court is in session, or if not in session, occur in relation to an appendage of the court, such as a grand jury, which is transacting business pertaining to the court.[31] But conceivably the more restrictive *Nye* construction of "so near thereto" could be applied so as to encroach upon the concept of "in the presence of,"[32] thus limiting the latter to conduct vis-a-vis the court or one of its organs.

In conclusion, since an attorney's conduct will not be regarded as contemptuous unless it falls within section 401(1), the present construction of the phrases "in the presence of" and "so near thereto" indicates that an attorney's improper contact with a grand juror away from the courthouse will not constitute a contempt. Furthermore, if

25. 313 U.S. at 48-49, 52.
26. Wimberly v. United States, 119 F.2d 713 (5th Cir. 1941).
27. McKee v. United States, 126 F.2d 470 (6th Cir. 1942). See also Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954).
28. United States v. Welch, 154 F.2d 705 (3d Cir. 1946).
29. Schmidt v. United States, 124 F.2d 177 (6th Cir. 1941), *overruling* Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940).
30. United States *ex rel.* May v. American Mach. Co., 116 F. Supp. 160 (E.D. Wash. 1953).
31. This distinction was recognized in *In re* Presentment by Grand Jury of Ellison, 44 F. Supp. 375 (D. Del. 1942), *aff'd*, 133 F.2d 903 (3d Cir.), *cert. denied*, 318 U.S. 791 (1943); Farese v. United States, 209 F.2d 312 (1st Cir. 1954); Carlson v. United States, 209 F.2d 209 (1st Cir. 1954) (dictum); United States v. Pendergast, 39 F. Supp. 189 (W.D. Mo. 1941), *aff'd sub nom.* O'Malley v. United States, 128 F.2d 676 (8th Cir. 1942), *rev'd, holding that even if the conduct was a contempt any action was barred by the statute of limitations sub nom.* Pendergast v. United States, 317 U.S. 412 (1943). See Nye v. United States, 313 U.S. 33, 48 (1941).
32. See Nye v. United States, 313 U.S. 33, 48, 52 (1941) (*semble*).

the conduct is not indictable,[33] the only sanctions available would be suspension or disbarment.

TRADE REGULATION—RESALE PRICE MAINTENANCE—CONTRACTS BETWEEN PARTIALLY INTEGRATED CORPORATIONS AND COMPETING WHOLESALERS

United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)

Defendant corporation, in addition to wholesaling the drug products of various manufacturers, manufactures similar commodities which are distributed through its wholesale outlets and through independent wholesale outlets.[1] Defendant executed contracts with independent wholesalers establishing stipulated resale prices for its products. The Justice Department instituted a civil suit based upon the allegation that since these "fair trade" agreements were executed with persons with whom defendant competed, section one of the Sherman Antitrust Act[2] had been violated. Defendant maintained that the contracts were lawful under amendments which created specific statutory exceptions[3] to the Sherman Act. The Supreme Court, reversing the lower court,[4] held that the contracts were "illegal per se" under section one of the act.[5]

Section one of the Sherman Act proscribes "every contract, combination . . . or conspiracy, in restraint of trade . . . ."[6] In two early cases construing this section the Supreme Court evolved two important doctrines. In *Standard Oil Co. v. United States*[7] the Court stated that only *unreasonable* restraints of trade were proscribed; but in *Dr. Miles Medical Co. v. John D. Park & Sons*,[8] it was held that price fixing agreements affecting interstate commerce were per se restraints of trade under section one.[9] Shortly after the *Miles* case fair trade

33. 18 U.S.C. § 1503 (1952) provides that any person is liable to prosecution by indictment if he corruptly or by threats or force endeavors to influence, intimidate, or impede any juror, witness, or officer in the discharge of his duty, or obstruct the due administration of justice.

1. Defendant corporation consists of a single manufacturing division and 74 wholesale outlets. Its total sales for the fiscal year ending March 31, 1954, were $338,000,000. The self-manufactured products furnished only $11,000,000, or slightly more than 3% of the total sales. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

2. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952). See text supported by note 6 *infra* for the pertinent provision of this section.

3. Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952); McGuire Act, 66 STAT. 632, 15 U.S.C. § 45 (1952).

4. United States v. McKesson & Robbins, Inc., 122 F. Supp. 333 (S.D.N.Y. 1954).

5. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

6. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1952).

7. 221 U.S. 1 (1911).

8. 220 U.S. 373 (1911).

9. The illegal per se rule was rigidly adhered to by the Court. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (price fixing illegal