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THE HISTORY OF THE CONTEMPT POWER*

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INTRODUCTION

Contempt can be generally defined as an act of disobedience or disrespect toward a judicial or legislative body, or interference with its orderly process, for which a summary punishment is usually exacted. In a grander view, it is a power assumed by governmental bodies to coerce cooperation, and punish criticism or interference, even of a causally indirect nature. In legal literature, it has been categorized, subclassified, and scholastically dignified by division into varying shades—each covering some particular aspect of the general power, respectively governed by a particular procedure. So, the texts separate retributive or criminal contempts from merely coercive or civil contempts—those directly offensive from those only constructively contemptuous—those affecting the judiciary and others the legislature. The implementation of this power has taken place predominantly in England and America, and has recently been accelerated into a continually greater role in the United States.

The legal literature of the common law is replete with references to the contempt power. It occupies so accepted a place in Anglo-American law that questions are less addressed to whether or not the power should exist than to what extent it can be exercised and what are its limitations. But indeed, to the non-common lawyer the contempt

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power is a legal technique which is not only unnecessary to a working legal system, but also violative of basic philosophical approaches to the relations between government bodies and people.¹ Neither Latin American nor European civil law legal systems use any device of the nature or proportions of our contempt power. While critics of these systems may make preferential comparisons, so long as these countries keep someplace within anarchy on the one hand and totalitarianism on the other, there is room to question whether indeed this power is as necessary and essential as our decision-makers suggest.

Cases in England and the United States which treat the contempt power all assume that the order of society's affairs dictates that this power is inherent in the very nature of governmental bodies, and that all individuals sacrifice some portion of their civil liberties to this needed expedient when they adopt their social contract. Civil lawyers have voiced the fear that such a concession would allow governmental arbitrariness. Though these countries recognize to some extent the propriety of punishment for past consequences (some criminal contempts), they recoil at the suggestion of punishment for the purpose of coercing an individual to act in a certain way in the future (civil contempt). Though criminal contempts are sometimes accepted in civil law systems (if limited and under different labels), these legal systems draw a distinction between punishment as a willed consequence of human behavior, and contempt as a means of coercing the commission of certain desired acts. This difference of approach in the use of a power like contempt underscores an anomalous difference in the recognition of individual values in the ideology of a system of law. For example, it has been pointed out that the magnitude of the coercive penalty in civil contempts is measured by the resistance to be overcome rather than the gravity of what has been done. Though all societies punish people for what they have done, only the common law punishes man "in order to do violence to his incoercible freedom to do or not to do something."² Moreover, the injury which caused the contempt proceedings (here again we deal with civil contempt) is often incapable of reparation, deterrence, repentance, or reformation, which goals are here secondary to personal punishment. The sanction is aimed at a resisting will.

Anglophiles will jump to the argument that theirs is not a system directed by ideologies of individuality. They are correct. Yet, it takes some straining of reason to include the contempt power within the best characteristics of Anglo-American, freedom-conscious law. And

1. For an interesting analysis of contempt as a comparative legal technique, see Pekelis. *Legal Techniques and Political Ideologies: A Comparative Study*, 41 Mich. L. Rev. 665, 671 (1943).

2. *Id.* at 674.

even assuming the value of this power device in a legal system such as ours, it is still another question whether it ought to be exercised either in the procedural manner or to the quantitative extent that it is now. The summary and comparatively unlimited exercise of the power compounds the danger to individual freedom which its mere existence implies. More subtle, intangible social results are likely to derive from this latter aspect.

This legal problem is then one with deep philosophical undertones, far-reaching political implications, and, as we shall see, historical inconsistencies. The fact that its status and value have been scantily and infrequently analyzed is but one of the purposes of this book. But because its position, if not its acceptance, as an American governmental power vehicle, raises these deep and probing problems, their exposure, if not their solution, must be still another goal.

The American ideology is one based upon recognition of the rights and liberties of the individual. This concept was ensured by the architects of our government when they created this republic, one in which all men are, at least philosophically, sovereign, while government is but the vehicle of their sovereignty. The manifestation of this dream was encouraged by bitter memories of monarchical experience—the hope for individual liberation. How can it then be that man can be contumacious to a sovereign which is, theoretically at least, the ultimate extension of himself; or inversely, should government, created by, of, and for man be allowed to punish the exercise of the will of its constituent self?³ And if so, is the summary contempt procedure, by which the contemnor is brought before and tried by the offended party, without jury, counsel, defense, and ordinary appeal, either right or reasonable? Is this scheme of governmental power consistent with our constitutional principles of jury trial, self-incrimination, non-excessive punishments, free press and speech, double jeopardy, fair trial?

Aside from contemporary, mid-twentieth century conflicts, can the contempt power be traced to a proper historical foundation? Or was the comment, some time ago made by one student of the problem, correct that this criminal, arbitrary power is less unassailable than unquestioned historically, though it is “foreign to the whole spirit of Anglo-American jurisprudence”⁴?

In dealing with legal problems, Americans are faced with what are often the paradoxes and anomalies of the common law. These rules of law, so long-stated and often expedient, seem to be ensconced in a sacrosanctity of age and prestige, which often fools its subjects, as

3. For an inverse application of this theory, see *Watson v. Williams*, 36 Miss. 331, 341 (1858).

4. Thomas, *Problems of Contempt of Court* 5 (1934).

the king's tailors did the people, in the funny tale by Andersen. Then is it when scholarship needs to combine with fortitude to focus a truer vision on contemporary values, as the young boy by his naive shout jolted the people into seeing the king's nudity. Historical research and pragmatic assessment cast serious doubts upon historical rationales for the contempt power, as we shall see.

Are the rationales, other than historical precedence, offered in defense of the contempt power, apropos of American political relationships? Need courts and congresses have this power in order to operate efficiently, or at all? If so, is there an alternative more suited to expedience, as well as political propriety?

Though the subject of contempt has occupied an increasingly more common role in the newspapers, and in the political comments and writings of recent times, the subject is one that has long been with students of Anglo-American law, and government. Its prestige has vacillated. Throughout different times in history, both in the United States and in England, it has been used in ways that have provoked great public interest. Depending upon the time and situation, its function as a manifestation of governmental power over individuals has provoked praise, and demands for its exercise, as it has condemnation and criticism. Both in Shakespeare's *Henry IV, Part 2*,⁵ and *The Lives of the Chief Justices of England*,⁶ one can read of the escapades of ruddy Prince Hal, later to become Henry V of England, and his notorious brush with the law of contempt. When Hal was the Prince of Wales, one of his servants was arrested for committing a felony. Upon his servant's arraignment at the King's Bench, the Prince appeared in a rage, and demanded that his man be let free. Chief Justice Gascoigne, delicately but firmly ruled that the laws of the realm must be met, and that if the Prince wished his servant to be pardoned he should secure this from the King, his father. The Prince tried physically to take the servant away, whereupon Gascoigne ordered him again to behave. When the Prince raged (and some say he even struck Gascoigne) the judge reminded his prince that he kept the peace of the King to whom even Hal owed allegiance, and suggested that Hal set a good example. When Hal did not heed this advice, he was sentenced for contempt, and committed to the King's Bench prison until the King's pleasure could be known. People speculated whether this would be the end of Gascoigne's career. It developed that the King was pleased, and rejoiced that he had both a judge who dared to minister justice to his son, and a son who obeyed him (if reluctantly).⁷

5. Shakespeare, *Henry IV, Part 2, Act 5, Scene 2*.

6. 1 Campbell, *The Lives of the Chief Justices of England 125-42* (1894).

7. Campbell, *op. cit. supra* note 6, referred to several amusing and in some cases contradictory chronicles of this event.

Centuries later another historical *cause celebre* involved the use of the contempt power.⁸ Major General Andrew Jackson, in command of the city of New Orleans in 1814, heard rumors that the state legislature was thinking of capitulating to the British. Not knowing that the war was actually over, and that peace had been declared by treaty, Jackson was suspicious of the French volunteer troops who had been leaving the ranks. He ordered them out of the city. Lewis Louallier wrote an article in the local press critical of General Jackson's conduct. Jackson ordered his arrest and imprisonment. Louallier then brought habeas corpus proceedings before Judge Hall of the district court. The judge granted his release. Jackson went into another rage, and arrested Hall. Then, United States Attorney Dick brought habeas corpus proceedings for release of Judge Hall, and it was granted. He joined Hall and Louallier in prison. After many judicial and political machinations all parties were released, and Jackson learned that the war was over. United States Attorney Dick then appeared before Judge Hall and moved for General Jackson's punishment for contempt. Jackson, shifting tactics, and under the good advisement of his attorney, argued the inequities of contempt. He asserted that the summary power of contempt violated his rights under the fifth and sixth amendments. He ingeniously argued that the necessity which allowed circumvention of constitutional privileges in contempt cases was a lesser one than the necessity which prompted his conduct. He had ordered martial law because it was necessary for the preservation of the whole country. Nonetheless he was found guilty of contempt and fined \$1,000. It has been reported that the memory of this incident plagued Jackson until long after his later ascendancy to the presidency.⁹ Finally, a year before his death, he successfully implored a congressional representative to bring a bill before Congress to repay the \$1,000 to him, and vindicate his honor. This was eventually done.

More recently, the press has abounded with details of vexed officials and assertive individuals, and their battles with the contempt power. The era of the congressional committees, more than anything else, has brought pervasive application of the contempt power. The conflicts which have been aroused as a consequence of this have been many and severe. How far government can go has been one of the most vital questions of our middle twentieth century. Arthur Miller, better than lawyers such as I, articulated this deep conflict in his statement before a congressional committee, in which he unsuccessfully challenged the right of government to pry. Yet, many liberals who deplored Miller's

8. For a more extensive and annotated treatment of this incident, see Deutsch, *The United States Versus Major General Andrew Jackson*, 46 A.B.A.J. 966 (1960).

9. *Id.* at 972.

conviction for contempt, applauded the contempt conviction of John Kaspar, anti-integrationist leader in the Tennessee school riots. Perhaps, this accommodating nature of the contempt power, by which it can be used in ways which appeal emotionally to large groups, yet boomerang against its appreciators to the satisfaction of their critics, has been one of the reasons for its long acceptance in the face of arduous attack.

Because of the ramifications which these problems provoke, and their seeming conflict with the basic American ideology of individual freedom, some analysis and study was forthcoming. The purpose of this book is to examine the history, varieties, and implications of the power of contempt of court and Congress, to describe its birth, growth, and maturation, and its conflicts with American notions of civil liberties.

I. CONTEMPT OF COURT

The power of courts to punish contempts is one which wends historically back to the early days of England and the crown. A product of the days of kingly rule, it began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign. Viewed as a legal doctrine which was articulated and immersed in the common law, it is generally a product of Anglo-American society.

Whatever informal groups ruled, the primitive associations of men undoubtedly looked to some pagan, religious, or divine and natural right to enforce their systems. There is some evidence that schemes akin to contempt were at least thought of in more antiquated societies. One author reported that the Theodosian Code considered the subject of contempt of a governmental authority, and concluded that it should not be punishable; "for if it arose from madness, it was to be pitied; if from levity, to be despised; and if from malice, to be forgiven."¹⁰ Such Taoistic reasoning, if not practical in the complex societies of our age, at least recognizes that respect by compulsion is a contradiction in terms, and the least ideal means to a free, libertarian government.¹¹ Respect can be more firmly based upon moral rightness than artificial might.¹²

With the multi-millenary growth of organized societies, the sophistication of governing systems, and the inter-complexity of the relationships between sovereigns and men, some power force within a rule-of-law scheme became necessary to replace the caveman's club as a means

10. Patterson, *On Liberty of Speech and Press* 18 (1939).

11. In the dissent to *Green v. United States*, 356 U.S. 165, 218 (1958), it was opined that respect and obedience in this country are not engendered by arbitrary and automatic procedures, but that in the end such procedures yield only contempt to the courts and the law.

12. Thomas, *The Law of Constructive Contempt* (1934).

of enforcing obedience and respect. Though centuries later men were to accept the self-righting process, recommended by the writings of men like Locke and Milton, as the more democratic way to resolve individual-governmental conflict,¹³ the contempt power was more suited to the early English rulers and their style of government. And the law of contempt is not the law of men, it is the law of kings. It is not law which representative legislators, responsibly reflecting the *vox populi* originally wrote, but is rather evolved from the divine law of kings, and its aspects of obedience, cooperation, and respect toward government bodies. Though this is not the only source of the power, it is the seed from which the power grew, if later adopted and cultivated by men not adverse to its exercise. These later institutions agreeably accepted it, less as adjuncts of the King than to protect their own dignity and supremacy.

The idea that the headman must be obeyed, at the risk of committing unnatural and punishable offense, cannot be traced with scientific exactness to precise moment and place. It is agreed though that authority for that premise can be traced in part to concepts of government, both secular and religious. The idea that obedience to divine commands was good, and disobedience sinful, has been traced to the assertions of the early Popes, as well as the emperors.¹⁴ It was probably not new with them. In enjoining obedience to civil government, resort was often had to the Scripture. The king was called, early in English history, the Vicar of God.¹⁵ With the rise of the feudal system in England, accompanying the pre-eminence of royal power after the Norman Conquest, there developed manifestations of the idea of the complete ownership, authority, and power of the king.¹⁶ This was but another, though not different, step from the sanctity of the medicine-man, the priestly character of primitive royalty, and the Christian concepts of obedience—starting in Christian history with papal obedience and bridging Middle Age centuries of monarchistic, secular governments.¹⁷

The contempt power is understandable when seen through the perspectives of its age of inception, an age of alleged divinely-ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God. Under any circumstances resistance to the king was a sin which would bring damnation.¹⁸

As society became more diverse and extensive, the English kings

13. Siebert, Peterson & Schramm, *Four Theories of the Press* 44-51 (1956).

14. Figgis, *The Divine Right of Kings* 38-65 (2d ed. 1922).

15. *Id.* at 19.

16. Scott, *Twilight of the King* (1938).

17. Figgis, *op. cit.* supra note 14, at 15.

18. *Id.* at 6.

found it necessary to have their kingly governmental powers exercised by representatives. The courts, then, of early England acted for the king throughout the realm. And their exercise of contempt powers derived from a presumed contempt of the king's authority.¹⁹ Violation of their writ, or disobedience to their officers, violated the peace and flouted the king they represented. The contempt power of the equity courts had a similar origin. The equity Chancellor dispensed justice in the place of the king, and his orders obtained their validity because of the use of the Great Seal, disobedience of which was considered a grievous contempt of the king.²⁰ This engraftment, from a power of the courts as adjuncts of the king to one inherent in the courts themselves, was described in the decision of an Irish judge in 1813.²¹ The process of attachment, he reported, was one used by the judges of the *Aula Regis*, by which those who interfered with the king's peace were brought before the court and punished. Derived from Norman law, it was resorted to "because disobedience of their orders was a contempt of the King himself whose ministers they were. . . . By the Norman law it was established that nothing could be done but by the King's writ."²² So, the origin of attachments was from this prerogative process derived from a presumed contempt of the king's authority. Under the Norman kings, an offender's personal property was forfeited to the king's mercy. Later, this was changed to a fine, which in turn was later refined into a procedure whereby the offender was imprisoned until the fine was paid.²³ This is akin to the current practices with contempt. For civil contempt, the offender is imprisoned until he purges his act of contempt. Originally, contempt of Congress was used merely to coerce cooperation, at which time the imprisonment ended. For criminal contempt, the offender of today may be fined, imprisoned, or both, and non-conditionally.

Gradually, any questions about the right of the judiciary to punish disobedience, obstruction, or disrespect (and they were few) were answered with the claim that this was an inherent right of English courts. Necessity then became with maturity the mother of this claimed innate, natural right of courts. The natural inclination to claim this power as one innate in judicial institutions was but one step

19. Beale, *Contempt of Court, Criminal and Civil*, 21 *Harv. L. Rev.* 161 (1908).

20. Langdell, *Summary of Equity Pleading* 38 (1877).

21. Fox, *The King v. Almon*, 24 *L.Q. Rev.* 184, 194 (1908). The decision referred to is that by Fletcher, J., in *Taaffe v. Downes* which is out of print, but reported in 24 *L.Q. Rev.* 194 (1908).

22. Fox, *supra* note 21, at 195.

23. Fox, *The Summary Process to Punish Contempt*, 25 *L.Q. Rev.* 238, 241 (1909).

in the rise in power of the courts, and later the Parliament, in England. The King had pointed the way.

The roots of English law, from which the contemporary contempt doctrine sprouts, are thin but deep in history. Sir John Fox trod through the complex and voluminous writings appropriate to this subject, and presented his results in a series of articles in the *Law Quarterly Reviews* of 1908, 1909, 1920, 1921, 1922 and 1924.²⁴ Citing Pollock and Maitland, he probed the histories of English law to find that contempt was extant as far back as the 10th century in England.²⁵ The theory then offered for its being was that the law became irritated by contumacy, and instead of saying to the contumner "I don't care," it set its will against his will, and ordered him. This theory was rationalized in Bracton's *De Legibus* on the ground that there is no greater crime than contempt because all within the realm ought to obey the King and be part of his peace.²⁶ Here we see the true assumption by courts of a power originally based upon their peculiar position as adjuncts to the King, and administrators of his will. This is a characteristic no longer prevalent in England, and never accepted in America. Yet, this assumption seeped into a court frame-of-reference, and has welled and risen, not as a force rooted in kingly relations, but as a necessary, and inherent, characteristic of courts independently. He wrote:

Thus from the earliest laws of the kingdom, through the records of the Curia Regis and the Parliament, the Year Books, and the first treatises on law, the development of "contempt" in the legal sense can be traced until by the fourteenth century the principles upon which punishment is inflicted to restrain disobedience to the commands of the King and his courts as well as other acts which tend to obstruct the course of justice, have become firmly established.²⁷

Paring the facts from the legend, Sir John further particularized that the idea that every contempt of court was considered indirectly a contempt of the King is corroborated even by the wording of the writ applied in contempt cases. It read that a contempt had been "committed against us"—us being the court and its King. More particularization would border on the picayune.

24. Fox, *Eccentricities of the Law of Contempt of Court*, 36 *L.Q. Rev.* 394 (1920); Fox, *The King v. Almon*, 24 *L.Q. Rev.* 184, 266 (1908); Fox, *The Nature of Contempt of Court*, 37 *L.Q. Rev.* 191 (1921); Fox, *The Practice in Contempt of Court Cases*, 38 *L.Q. Rev.* 185 (1922); Fox, *The Summary Process to Punish Contempt*, 25 *L.Q. Rev.* 238, 354 (1909); Fox, *The Writ of Attachment*, 40 *L.Q. Rev.* 43 (1924). See also Fox, *Contempt of Court* (1927).

25. Fox, *The Nature of Contempt of Court*, 37 *L.Q. Rev.* 191, 194 (1921).

26. *Id.* at 195.

27. *Id.* at 201.

In the 13th century, contempt action was taken for such acts as default or misfeasance of parties, assaults and disturbances in court, insults to judges and misconduct by officers of the law. However, in all of the cases reported, contempt was treated procedurally "in the ordinary course of the law."²⁸ Summary punishment was meted out only where the accused person confessed his guilt. Then a jury trial was unnecessary. Further collating the cases, he reported that until the 15th century innumerable contempts "which would have been dealt with by summary process in the 18th century were being tried . . . in the ordinary course of law."²⁹ A Scottish jurist traced the cases up to the time of Henry V, and concluded that criminal contempt cases in the King's Bench until that time were dealt with by procedures not summary.³⁰ With the Star Chamber came non-jury procedures, and the treatment of contempt by interrogatories of the court. This latter procedure was cited by Justice Wilmot in the *Almon* case as the nub of due process, far better than capricious juries. Yet with the abolition of the Star Chamber,³¹ it was legislated that all matters theretofore handled by that court would be treated "by the common law of the land and in the ordinary course of justice. . . ."³² Summary process was exercised to enforce the King's writs or to preserve discipline among the officers of the court. The summary procedures in these cases were deemed appropriate because of their immediacy and physical relation to the courts. It was said that such misconduct must be summarily punished by courts because without this power of compulsion they could not perform, and the kingdom would stand still if "justice" was not immediate—and of course, custom and necessity called for it. Other contempts were punishable, but only in the ordinary non-summary course of the law. It was not until the time of Blackstone and the 18th century writers that contempt was summarily punished, without question as to where it was committed. Before then, those contempts which were summarily punished were committed in the face of the court (in *facie curiae*). The very view of the court was considered to supply the conviction.³³

Blackstone was a friend of Justice Wilmot, the author of the *Almon* case; and an analysis of this case explains the sudden change in the then current law of contempt, and its impact on the future. The legal status of contempt of court was given not only enunciation, but also

28. *Id.* at 199.

29. Fox, *supra* note 23, at 244.

30. Solly-Flood, *The Story of Prince Henry of Monmouth and Chief-Justice Gascoigne*, *Transactions of the Royal Hist. Society* 47 (1886).

31. *The Habeas Corpus Act, 1640*, 16 Car. 1, c. 10.

32. Fox, *The King v. Almon* 24 L.Q. Rev. 266, 273 (1908).

33. *Stroudis' Case*, 3 How. St. Tr. 267 (1629).

an authoritative and pervasive application in this much criticized, but more quoted, decision which, though decided in 1764, was not published except posthumously in the notes of Justice Wilmot, the author of the opinion, in 1802.³⁴ Before this case, it was accepted that orders of a court were not to be disobeyed, and that acts hindering the administration of justice were punishable. Statutes were extant which allowed private redress for the scandalizing of governmental figures—*scandalum magnatum*.³⁵ But Justice Wilmot, in *Rex v. Almon*, extended the then contemporary contempt doctrine, and gave the world an opinion full of dicta which was later seized upon, requoted, and made sacrosanct, until years later when discerning scholars found and pointed out his error.³⁶ His doctrine now lives, a venerable product of stare decisis and years of acceptance, though somewhat limp from recent criticism.

Almon was a bookseller who was tried in 1765 for publishing an alleged libel about Lord Mansfield. Justice Wilmot, who wrote an opinion which held Almon in contempt for the article, had been elevated to his position by a Cabinet which was under the strong influence of Lord Mansfield. It is reported that he deemed criticism of the Lord as bordering on sacrilege.³⁷ One of the charges Almon had made against Lord Mansfield related to a court action involving a person named Wilkes. When Justice Wilmot's judgment granting an attachment against Almon was about to be delivered, it was discovered that it referred, by some error or confusion, to *The King v. Wilkes*, instead of *The King v. Almon*. Then, it has been written: "Mr. Justice Wilmot urged the defendant's counsel, Sergeant Glynn, 'as a gentleman' to consent to an amendment, to which Sergeant replied that as 'a man of honor' he could not."³⁸

The action was abandoned and the opinion was never delivered. In 1802, Justice Wilmot's son published the notes of his father which included the still-born, misnomered opinion, *The King v. Wilkes*.³⁹ In this opinion was the language which has been so controversially referred to ever since:

The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to

34. Wilmot's Notes (Wilmot ed. 1802).

35. Oswald, Contempt of Court (3d ed. 1910).

36. Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924).

37. Fox, *The King v. Almon*, 24 L.Q. Rev. 184 (1908).

38. Fox, Contempt of Court 1 (1927).

39. *Id.* at 5-6.

the court, acted in the face of it, I Ventris I, and the issuing attachments by the supreme courts of justice in Westminster Hall for *contempts out of court stands upon the same immemorial usage* as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of *Magna Charta* as the issuing [sic] any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore (it) cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trial by jury, yet truth compels me to say that the mode of *proceeding by attachment stands upon the very same foundation and basis as trial by juries do—immemorial usage and practice.*⁴⁰

Sir John Fox, in his classic treatise on the subject, has pointed out that though the early common law deemed disobedience to the king's writ a contempt, and the courts eventually used the king's seal to make their process effective, what started out as contempt of the Lord of the court became contempt of the administration of justice instead, when the *Almon* case extended concepts of contempt as it did. He pointed out that the summary power to punish, which Justice Wilmot condoned, was beyond the embrace of previous contempt practice. It had been suggested that the power to commit for contempt derived from a statute which empowered sheriffs to commit persons who resisted their process.⁴¹ But this was after trial in the customary fashion. Justice Wilmot reasoned "that if resistance to a minister of the court is punishable" in this way, "*a fortiori* libelling a judge in his judicial capacity is so punishable." Rationalizing the power of judicial contempt as a product of the divine right of kings, Sir John Fox reports Wilmot's reasoning thusly:

[B]y our constitution the King is the fountain of justice and . . . he delegates the power to the Judges . . . arraignment of the justice of the Judges is arraigning the King's justice; . . . it is an impeachment of his wisdom in the choice of his Judges; . . . it excites dissatisfaction with judicial determinations and indisposes the minds of people to obey them; . . . this is a most fatal obstruction of justice, and calls for a more immediate redress than any other. . . .⁴²

40. Wilmot's Notes 254, (Wilmot ed. 1802), as cited in Fox, Contempt of Court 7-8 (1927). (Emphasis added.)

41. Fox, op. cit. supra note 38, at 8-9, citing for opposing argument, Chief Baron Gilbert, History of the Common Pleas 20 (1737), where this summary power was traced to the Statute of Westminster II, c. 39, noting however that after attachment the trial was in the ordinary course of law.

42. Wilmot's Notes 255 (Wilmot ed. 1802), as cited in Fox, Contempt of Court 9 (1927).

His dream was to keep a blaze of glory around the court, that it would never be contemptible in the eyes of the public.

Justice Wilmot's proof of the supreme fairness of this contempt procedure lay in his reasoning that in the summary procedure before the court the party could acquit himself by his own oath, whereas a jury might improperly convict him upon false evidence. Such logic, by its mere specious statement, lacks convincing certitude.

The analysis of the *Almon* case is as long and complicated as it is interesting. Suffice it to note the circumstances, that one may evaluate its influence upon the articulation of the law of contempt of court, as well as the propriety of its departure from previous confines of the power.

For years, the situation remained static. Until the nineteenth century there were only two other cases of contempt of the court which arose out of the courts, and which were treated by summary procedures.⁴³ Interestingly, both involved libels of Lord Mansfield. However, in writing his famous legal treatise, Blackstone consulted his friend Justice Wilmot concerning the law of contempt. He reported then that the law was such as Wilmot had reasoned, but cited no authorities to support the conclusion. So, it has been accurately concluded:

The present law of contempt in this country has been founded . . . upon the statements of Blackstone in his Commentaries and Sir John Eardley-Wilmot in *King v. Almon* which concerned a contempt by publication. Oddly enough, neither of these authorities forms a legal precedent, for the opinion of Justice . . . Wilmot was never delivered, as the case was dismissed because of technical difficulties. It also appears that in all probability the statements made by Blackstone merely represented the views of Judge Wilmot, and that it may be said that the present scope of the summary power is due almost exclusively to the opinion of one man.⁴⁴

By the twentieth century, the law of Wilmot had, like fine wine, aged to the point of unquestioning respect. English courts adopted the *Almon* decision, cited it, and extended it beyond even Wilmot's probable intent.

The sometimes blind inheritance of common law in American legal attitudes bore this *Almon*-phenomenon of England to the United States, where it was early inculcated as a rule of law. The sanctity given by Blackstone's approval of Justice Wilmot's opinion added to its prestige in the United States. Since the American colonists were by and large a product of the common law environment of England, it was natural that their courts were endowed with procedures copied from mother England. Though these settlers consciously went about

43. Fox, *Contempt of Court* 16 (1927).

44. Thomas, *Problems of Contempt of Court* 5 (1934).

ameliorating many of the harsher aspects of English governmental practice, the general contempt of court power was not amongst the changes. This was probably due to the minor civil implications of the exercise of this power at that time, and the seemingly natural claim for the power by the courts themselves.

The first American federal legislation dealing with the contempt of court power was the Judiciary Act of 1789, which by its words gave federal courts "the power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same. . . ."⁴⁵ Impliedly, this included whatever the extent of the power of contempt of court was at common law. The first state legislation in America was passed in Pennsylvania, and it condemned as contempt official misconduct of court officers, disobedience to process, and misbehavior in the presence of the court.⁴⁶ (This excluded the vicarious kind of constructive contempt to the administration of justice which was approved by Justice Wilmot in the *Almon* case.) New York followed with similar legislation which was finally passed in 1829, also excluding the contempt, *Almon-Wilmot* species, but accepting without question the power of contempt of court in general.⁴⁷ The courts considered that the right to punish for contempt was one adopted from long precedent and essential to judicial efficiency. These statutes were followed in theme and extent by federal legislation in 1821, which aimed at alleviating both the uncertainties and the harshness of the original federal rule. This change was provoked by a heated controversy which arose out of the famous *Peck* impeachment case.

Until then, there were only a few federal cases in the lower federal courts arising under the 1789 statute, and they followed the common law rule with respect to constructive contempts.⁴⁸ There was no question that the exercise by courts of the direct contempt power (disobedience to process, or disrespect in the presence of the courts) was inherent, and proper. Then, Lawless, an attorney from Missouri, provoked Congress into initiating impeachment proceedings against Judge Peck for willful oppression. Peck was a federal judge who punished Lawless summarily under his assumed contempt power, for publishing a critical article about his conduct of a series of pending proceedings, which concerned the adjudication of land grants from the old Spanish-American authorities, and in which the Judge had ruled

45. Judiciary Act of 1789 § 17, 1 Stat. 83.

46. Pa. Acts 1809, P.L. 146, 5 Sm. L. 55.

47. N.Y. Rev. Stat. c. 3, § 10 (1829).

48. Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 410, 422-23 (1928).

unfavorably to the interests of Lawless.⁴⁹ Congressional hearings lasted almost a year, when the Judge was finally acquitted by a vote of 22-21. One of the arguments made at these hearings was that the power of judicial contempt was not inherent but a product of the common law; ergo since *Almon's* case was not common law (it never having been officially published), its effect was void. The Judge claimed innocent and fair interpretation of the common law power of contempt of court, basing his conclusions upon the English decisions that preceded his.⁵⁰ Yet the strong feelings about freedom of the press at the time of the Peck debates precipitated against this oppressive judicial power. One month after Judge Peck's acquittal, later-to-become President Buchanan, then Chairman of the Judiciary Committee and active in the impeachment debates, presented a bill to Congress which followed the New York-Pennsylvania trend and omitted summary contempt power in cases where the act was not obstructive of the physical administration of justice. It was passed in 1831,⁵¹ and covered misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, disobedience of process, and discipline of court officers. By 1860, 23 of the then 33 states had enacted legislation implementing the federal policy concerning constructive contempts, and only a few states applied the rule of *Almon's* case. The current federal statute reads much the same as the 1831 statute,⁵² though the Supreme Court cases have varied at different times in their interpretations of it, and are currently closely split as to allegiance to or departure from the English rule, the latter group currently prevailing. The rule has since pendulated both in the federal and state courts with respect to the interpretation of the statute's coverage of the constructive contempt power. This treatment will be thoroughly detailed in a later chapter.

When intrepid souls have dared to question the right of the courts' mighty contempt power, and at times in prefatory apologies to their decisions, judges have proffered several pat *raison d'être*. One rationale has been necessity.⁵³ Without such a power, what would deter obstruction to the administration of justice? Would courts be merely

49. This incident is thoroughly and urbanely discussed by Nelles & King, *supra* note 48, at 423-30.

50. See Frankfurter & Landis, *supra* note 36, at 1025.

51. Rev. Stat. § 725 (1875), 18 U.S.C. § 401 (1948).

52. 18 U.S.C. § 401 defines the power of the United States courts as covering misbehavior of court officers in their official transactions, disobedience of writs, and misbehavior of anyone in the court's presence or so near thereto as to obstruct the administration of justice.

53. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); cases cited in 17 C.J.S. Contempt § 43 nn. 75-77 (1939); 1 Kent, Commentaries 236 (2d ed. 1882).

impotent boards of arbitration without any control or effect?⁵⁴ This is not necessarily a matter of speculative conjecture. Our Supreme Court has never exercised the contempt power, and it has been as effective, powerful, and dignified a court as one could ever hope for. Is this not an example of respect and efficacy predicated upon and resulting from qualities and powers more ideally suited to a democratic society than coercive contempt powers? And what of other countries which do not have similar powers, or which have them only in limited and circumscribed instances? Is justice chaotic elsewhere than in America? And is it so necessary for control and order to have such a power as contempt? Do courts not have other disciplinary and punitive sanctions equally effective, yet better procedurally dedicated to an ordered liberty? We will see in later chapters that they do, and that the contempt power is not the only moat to separate the crass or mundane public from the majestic castle of the judiciary.

Another rationale, or the same one reduced one level, is expediency⁵⁵ and self-protection.⁵⁶ And expedient it unquestionably is. But is expedience a good reason in the face of injustice, and is this not another way of saying it is necessary—more euphemistic, though intellectually equally unsatisfactory?

And the same necessity argument, elevated one level, has been offered in the name of inherence.⁵⁷ Most cases, in fact, have considered it axiomatic that the power of contempt is inherent in courts, and automatically exists by its very nature. This is easier to say than to disprove. However, the contempt power has been uniformly reserved to superior courts both in England and the United States.⁵⁸ If the power is inherent in courts, how can it be that some courts are without it? This anomaly of reason, especially if supplemented by the historical inconsistencies supporting the reasons for courts' contempt powers, weakens the claim that the power is innate in judicial bodies.

All of these reasons seem no more than rationalizations which cannot withstand the insights of critical evaluation, or historical consistency.

However, the general power of courts to punish for contempt was little questioned during these early days in the United States. In one reported case, Justice Field of the Supreme Court wrote that:

The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial pro-

54. The Supreme Court prophesied that this would happen in *Gompers v. Bucks Stove & Range Co.*, *supra* note 53.

55. 17 C.J.S. Contempt § 43 nn. 75-77 (1939).

56. 17 C.J.S. Contempt § 43 & n. 72 (1939).

57. See Note, 11 Va. L. Rev. 639 (1925), which questions the necessity rationale.

58. Oswald, *op. cit.* *supra* note 35, at 8; Rapalje, Contempt § 4 (1890).

ceedings, and to the . . . due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power (contempt of court).⁵⁹

Whether it was deemed beyond dispute, or so natural and necessary as to be without question, or whether the arguments about the extension of the power (in constructive contempt cases) shifted the focus of legal opposition away from the attack upon the general power itself and concentrated against its specific extension, is open to conjecture. Yet it has been said, and repeated of late, that the power of contempt itself "is, perhaps, nearest akin to despotic power of any power existing under our form of government."⁶⁰ Justice Black, less impressed by 170 years of *Almon* precedent, has written about the contempt power that "the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent courts from correcting their own errors."⁶¹ Yet even the vigorous critics of the summary contempt power, who have recently sounded the call for change, impliedly go along with maintaining at least some contempt power for the courts.

Legal scholars have more recently, and after thorough historical study, raised serious doubts about Justice Wilmot's conclusions. Messrs. Frankfurter and Landis have written about the implications of the *Almon* case, that:

It has bedeviled the law of contempt both in England and this country ever since. Wilmot's opinion influenced the course of decisions during the nineteenth century, partly because he spoke with an air of great authority, and partly because the power which he claimed is not unappealing even to high-minded judges bent upon the quick dispatch of business.⁶²

As late as 1958, Justice Black is recorded as having said that "the myth of immemorial usage has been exploded by recent scholarship as a mere fiction," but that the decision in the *Almon* case has "nevertheless exerted a baleful influence on the law of contempt both in this country and in England."⁶³ Nevertheless, Wilmot's "immemorial usage" became our law of the land, and the exercise of the contempt power in general now occupies so embedded a position of acceptance that, though modification in light of contemporary legal and governmental interests is possible, change will be difficult to bring about,

59. *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

60. *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8, 72 N.W. 193, 194-95 (1897).

61. *Green v. United States*, 356 U.S. 165, 195 (1958) (dissenting opinion).

62. See Frankfurter & Landis, *supra* note 36, at 1047.

63. See *Green v. United States*, 356 U.S. 165, 202, 203 (1958).

and revocation of the practice nigh-impossible. The law of contempt of court is very much with us today. Every state court has authorizedly acted against contempts; all federal courts, except the Supreme Court, have equally done so; and with the increasing business in the courts and the not occasional employment of the courtrooms as arenas for political, as well as private legal disputes, the use of this contempt power has caused far-reaching ripples in the pond of social consequence.

II. CONTEMPT OF CONGRESS

As the American power of judicial contempt is the product of the transplantation of English common law (whether with good reason or not), so the use of the contempt power by our Congress harkens back to Anglican beginnings. But though the historical arena was the same, the participating power forces which provoked, and the path of precedent which led to its acceptance, were not. Nor was the unquestioning readiness with which the American legal climate accepted contempt of court concepts, the environment into which it was to be planted, though the future was to see the doctrine flourish.

As with contempt of court, the rationale for punishing contempt of legislative bodies was a carry-over from days of divine and kingly rule. The king could not only do no wrong; he would not tolerate being questioned or impeded, much less flouted or insulted.⁶⁴ The attitude of political subservience by individuals to government was inculcated into popular perspectives of state relationships. And as critics of the king were punished and pilloried, so were critics of the courts, original administrators of the King's will. But the Parliament was not always in the powerful and prestigious position it occupies today. Nor was it so much a collaborative power of the royalty as were the courts. In fact, the Parliament rose as a popular governmental representative body only after years of power struggle in England with the King, and its position in government has, at least periodically, been one of antagonism toward the King and kingly powers.⁶⁵

American courts, and American legal historians, have often referred to the history of the English Parliament in support of their theories about contemporary congressional contempt powers.⁶⁶ The frequency of their resort has been almost equaled by the variety of their conclusions. The fact that secondary sources are all that can be resorted to

64. See 2 Tenn. L. Rev. 215 (1924).

65. See generally Jane, *The Coming of Parliament* (1905); McIlwain, *High Court of Parliament* (1910).

66. *Watkins v. United States*, 354 U.S. 178 (1957); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691 (1926).

in resolving some of these academic arguments compounds both the variety and the intensity of these differences. However, proponents of our congressional contempt power agree in pointing to the parliamentary exercise of the power as the authoritative example of its use by legislative bodies. The arguments arise about the historical nature of the Parliament's power. Concededly, Parliament was once, long ago, a body which discharged both judicial and legislative functions. It was the high court of Parliament, a body of bishops, lords, knights, and burgesses who "exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king. . . ."⁶⁷ As such, they rendered judgments, as well as enacting laws. When this organization was changed, and the Parliament more akin to what we recognize structurally today was created, the original body divided into the House of Commons and the House of Lords. The latter group continued to exercise appellate judicial functions, while the former was made a legislative branch, with only a very limited number of judicial powers. It has been considered that this original judicial capacity, which the House of Commons once had, supplied the true grounds for its exercise of the contempt power forevermore. At least, since disputes with the judicial contempt power were few, this was both an expedient argument, and one which followed with perfect logical, if not syllogistic, reasoning. Courts can punish for contempts, as kings could, and Parliament was once a court, so it too cannot be precluded from exercising the power, though now the House of Commons is a legislative body.

Other defenders of the legislative contempt power, while agreeing that the power exists, see it founded for far different reasons, and criticize the conclusion that it all goes back to days of kings and courts.⁶⁸ One legal historian criticized the view that the English legislature's contempt power derived from its judicial days, and pointed out that "the first instance in which the House of Commons vindicated any power of privilege by imprisoning for contempt occurred in 1543, nearly three hundred years after the Commons had become a separate body."⁶⁹ Indeed, English historians themselves have reported different attitudes within the House of Commons as to its one-time judicial power.⁷⁰ The point which these men failed to consider in their search for mathematical, historic logic is that even though the cases which interpreted the power of the House of Commons to punish for contempt arose after the merger into the present Parliament and the abdication of its phantasmal judicial power, it is not clear whether the

67. *Kilbourn v. Thompson*, *supra* note 66, at 183.

68. *Jurney v. MacCracken*, 294 U.S. 125, 129 (1935).

69. *Potts*, *supra* note 66, at 697.

70. *Id.* at 694.

power was upheld on the basis of legislative necessity, usage, or because of the analogy with the former judicial character of the House. There is as much reason to believe that the courts which upheld the power of legislative contempt did so on the theory that the House once had that former judicial capacity, than as not. In other words, though the cases arose after the House of Commons concededly lost its judicial character, the cases may well have been decided with that original capacity in mind. There is legal language which leads to this conclusion. Thus, the use of contempt by the legislature would be a carry-over from days when it was a judicial body. This point is nowhere satisfactorily answered.

Another rationale claimed for the exercise of this power by the Congress, and the courts as well, has been necessity.⁷¹ The cases often have reasoned that without such a power, the legislative body could not function. The power of the legislature was said to be governed by the same principles as was that of the judiciary. In other cases this necessity has been labelled self-defense.⁷² Without the power to punish contempt, there would be no way to deter disrespect, or encourage cooperation. Still another ground urged in defense of the exercise of the contempt power has been expedience.⁷³ This is, if more euphemistic, less than satisfying intellectually; and essentially no more than another way of saying it is necessary.

This necessity argument has also circuitously been developed into one of inherency.⁷⁴ Certain cases have advanced the argument that the power of contempt is not only expedient, and necessary, but is also so essential that it must be a natural, innate power of any legislature. I suggest that all of these arguments, necessity, expediency, inherency—are but full circle around the same ground. The courts have, to one degree or another, recognized that the power is helpful to the completion of legislative tasks. And this it certainly is. To acknowledge the loud claims for the power by legislatures, courts have been wont to articulate some rationalization for its condonation. But other than this merry circle of need—usefulness—natural, there has been an un-

71. *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); 1 Kent, Commentaries 236 (2d ed. 1832).

72. *Marshall v. Gordon*, 243 U.S. 521 (1917).

73. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821).

74. The language that the contempt power is an inherent one, both of courts and Congress, seeped into rationales either through loose language, or a subtle extension of accepted doctrine. It followed naturally from rationales of expediency, then necessity. See, e.g., *Quinn v. United States*, 349 U.S. 155, 160-61 (1955); *McGrain v. Dougherty*, 273 U.S. 135, 175 (1927); *In re Chapman*, 166 U.S. 661, 671-72 (1897); *Ex parte Robinson*, 86 U.S. 505, 510 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 232 (1821).

satisfactory explanation of the purpose and value of legislative contempt powers in these cases. The trouble here is compounded by the realization that most instances of what is now treated as contempt are usually covered by other legal sanctions, without the use of summary procedures. This will be discussed more thoroughly in later chapters.

In any event, the Parliament emerged as a powerful legislature during the end of the seventeenth century, and to insure its position, claimed and exercised the privileges and procedures thought befitting of its post, among which was the summary contempt power.⁷⁵ Here again, historical origins played only a convenient part in the adoption of the contempt power by Parliament. Undoubtedly, this institution, in its ascendancy to power, realized the effectiveness of such a tool, and adopted it only coincidentally noting their atavistic judicial nature.

The original American colonies adopted many procedures akin to the motherland's common law methods. Their assemblies exercised the contempt power in defense of privilege, to compel testimony, and to protect their dignity and position.⁷⁶ The cases were many, and though their reasoning was not often questioned, they rationalized their power as one of inherent and necessary right—auxiliary to their legislative natures.⁷⁷ What was claimed to be inherent in the courts, also became inherent in the legislature.⁷⁸ Strangely, only a few states included this right in their constitutions. Defenders of the right of the legislature to punish for contempt attribute this silence to its supposed axiomatic, or inferred implication within the grant of legislative powers in general.⁷⁹

The federal constitution is also silent with respect to the power of Congress to punish non-members for contempt. It has been reported that "A proposal at the Constitutional Convention of 1787 to incorporate an explicit grant to the Congress for the exercise of these powers [to conduct investigations and punish for contempt] died in the meetings of the committee on style."⁸⁰ The reverse argument was made by critics of the congressional contempt power in response to this silence; that is, since it was not granted, while other specific punitive powers were,⁸¹ the intent, they claimed, was to deny the power.⁸² For some time, the exercise of the power by the legislature went un-

75. Beck, *Contempt of Congress* 2 (1959).

76. *Ibid.*

77. See Potts, *supra* note 66, at 700-12.

78. *Jurney v. MacCracken*, 294 U.S. 125 (1935).

79. Potts, *supra* note 66.

80. Beck, *op. cit. supra* note 75, at 3.

81. U.S. Const. art. I, § 5.

82. *Burnham v. Morrissey*, 80 Mass. (14 Gray) 226 (1859).

questioned, a situation which has been construed as popular, silent acquiescence, and evidence, of a sort, of its propriety.⁸³ By congressional action, then, the problem was resolved, though after much debate within the Congress about whether or not it could cite for contempt. In 1795, a House committee investigating an alleged bribery of a member of the House cited one Randall, a non-member, for contempt and imprisoned him for nine days.⁸⁴ This was the first recorded instance of congressional contempt by a non-member for violating the dignity of the legislature in America. During the next fifty years, both the House and the Senate cited individuals for contempt of their august selves. Though the procedures were summary, all who were cited were given the opportunity to present a defense and to be represented, to a limited extent, by counsel.

Finally, in 1821, the first American case to discuss the power of the legislature to punish for contempt was decided. An examination of this case, and another early decision of the United States Supreme Court, will illustrate the political misgivings toward application of the English contempt rule to Congress, as well as the reasons advanced in support of adopting this legislative power, which prevailed at that time.

The case, *Anderson v. Dunn*,⁸⁵ arose out of an order by the then Speaker of the House, Henry Clay, to the Clerk, and thence to the Sergeant-at-Arms of the House, Dunn, "to take into custody the body of the said John [Anderson], wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer the said charge. . . ."⁸⁶ This was done. Anderson was charged with abuse of the House and contempt of its dignity. The particular nature of his offense is not clear from the report of the decision, though a later opinion, based upon inference from the record, stated that the delinquency was an attempt to bribe a member of the House.⁸⁷ It has been reported that Anderson sent Lewis, a member of the House, \$500 for any "extra trouble" gone to in furtherance of a claim in which Anderson was interested.⁸⁸ The House, in debate, decided that it had the contempt power irrespective of any constitutional provision, in order to protect itself and to operate efficiently. After being taken into custody, Anderson was brought before the House and allowed to present a defense to the charges of misconduct against him. The House was adjourned each day, and Anderson was

83. Potts, *supra* note 66, at 713.

84. Beck, *op. cit.* *supra* note 75, at 191.

85. 19 U.S. (6 Wheat.) 204 (1821).

86. *Id.* at 208.

87. *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880).

88. Beck, *op. cit.* *supra* note 75, at 4.

kept in custody during the adjournments, until the matter was finally closed, and he was judged guilty, reprimanded, and discharged from custody. Later, Anderson sued Dunn in trespass for assault and battery and false imprisonment. Dunn's defense was the warrant by, and the authority of, Congress. There was little American authority to guide the Supreme Court, and both parties argued in consideration of the English practice, and the more settled theory of contempt of court. The Attorney General argued for the government that the power of Congress to punish contempts is a "principle of universal law growing out of the natural right of self-defence belonging to all persons," and that the "necessity of self-defence is as incidental to legislative, as to judicial authority."⁸⁹ Counsel for Anderson argued that whatever powers, akin to contempt, which Congress had, were inapplicable to Anderson, who was not an official of Congress. Their argument was that article I, section 5 of the Constitution gave Congress the power to determine its own rules of procedure within its walls and over its members. This implied the power to punish its delinquent members, if necessary. However, the power to punish "relates solely to the internal polity and economy of the House," and not to non-members like Anderson.

Supreme Court Justice Johnson affirmed the lower federal court's approval of Dunn's defense. His opinion included a philosophical discussion of the power of Congress, of facile erudition but less than satisfying reason.

First, the court reasoned that if Congress had no power to punish Anderson it had no power to compel his appearance, because the latter is an initiating process issued in the assertion of the former (punishing power). It followed by agreeing that there was no express congressional power to punish except over its own members. Consequently, if the power existed to punish non-members, it was one to be implied, though "the genius and spirit of our institutions are hostile to the exercise of implied powers."⁹⁰

Leaving the genius and spirit of our institutions, Justice Johnson then verbally embarked upon a social compact theory, and wrote that power, properly delegated and responsibly exercised, is for the good of all, as it is for the governmental body exercising that power. With this point made, he skipped to the power of contempt of court, about which he said:

Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful man-

89. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 219 (1821).

90. *Id.* at 225.

dates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.⁹¹

Enforced with this principle, he next switched to and displayed his supreme faith in the ideal of the legislature, thusly:

That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.⁹²

The decision continued with a discussion of the fact that the offense by Anderson was committed in the House and was, therefore, within the express powers of Congress, and that the commitment was limited because "the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution."⁹³ Thus, the principle arose that imprisonment for contempt of Congress terminates upon adjournment of that body.

With an admission that American legislative bodies do not have the omnipotence of the English legislative assembly (the only true precedent for the authority of Congress to punish for contempt, and, it could be argued, a fatal concession), a plea for moral self-restraint by the legislators in whose hands he had placed this power, and a paternal epilogue—"respectful deportment. . . will render all apprehension chimerical,"⁹⁴ the first American case was concluded. The power of congressional contempt was upheld, upon reasons that the future would extend, and ideals it would ignore.

In 1874, the contempt power of Congress was again questioned,⁹⁵ under circumstances similiar to those in *Anderson v. Dunn*. The Supreme Court of the District of Columbia followed the *Dunn* decision, and ruled that the power to commit for contempt existed in Congress, and so long as the Speaker of the House has jurisdiction over the premises, his ministerial function of committal was proper. The

91. *Id.* at 227.

92. *Id.* at 228.

93. *Id.* at 231.

94. *Id.* at 235.

95. *Stewart v. Blaine*, 8 D.C. (1 MacArth.) 453 (1874).

decision was brief, and relied upon *stare decisis*,⁹⁶ not questioning the reason or authority of Justice Johnson. In deference to the decision in *Dunn*, the court wrote that the issue had been decided after "stout contest and upon thorough deliberation,"⁹⁷ and should have the respect of half a century of undisturbed age.

However, this situation was soon changed by the decision of Justice Miller in *Kilbourn v. Thompson*.⁹⁸ There, the United States Supreme Court was called upon to review a lower federal court ruling which dismissed an action by Kilbourn on the same grounds as in *Anderson v. Dunn*.

The United States government had been a creditor of a company which was in the midst of bankruptcy proceedings. After a legislative investigating committee was appointed to inquire into the matter of the government's interest, the committee called Kilbourn and subpoenaed certain documents in his possession. He refused to answer certain questions, or to produce the documents, for which he was imprisoned in the District of Columbia jail. On his release after bringing habeas corpus proceedings, a plea of justification was made by the Sergeant-at-Arms, on the basis of his Congressional authority. The Supreme Court upheld Kilbourn, and he later recovered \$20,000.

In curtailing the punishing power of Congress, the court relied on the separation-of-powers doctrine, and pointed out that except in limited instances, where Congress was expressly given the power to punish by the Constitution, its exercise of such a power was an improper assumption of judicial functions.

In support of this conclusion, the court traced the history of contempt of the English Parliament, pointing out what it considered to be the misconceived impressions expressed in the *Dunn* case, and the correct source of the legislative contempt power.

Noting in his opinion that analogy with the English legislature and its practice⁹⁹ failed because of its hybrid history of judicial as well as legislative powers, Justice Miller wrote:

[T]he powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rests on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States,—a body which is in no sense a court, which exercises no functions derived from its once having been a part

96. The only other case at that time was *Ex parte Nugent*, 18 Fed. Cas. 487 (No. 10375) (C.C.D.C. 1848).

97. *Stewart v. Blaine*, 8 D.C. (1 MacArth.) 453, 472 (1874).

98. 103 U.S. 168 (1880).

99. *Id.* at 184-85. Several English cases were cited where the power of the legislature was upheld based upon its judicial character.

of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members. . . .¹⁰⁰

The *Kilbourn* case cited an earlier English case, which in discussing the contempt power of the House of Commons made an argument which Justice Miller undoubtedly looked to as authority for his decision. That case was *Kielley v. Carson*,¹⁰¹ decided in Newfoundland in 1842, just thirty-eight years before. In that case, Kielley was held in contempt of the House Assembly of Newfoundland, a British colony. He claimed that the Assembly had no contempt power. In opposition to this claim it was said that the Assembly is analogous to the House of Commons and therefore did have the power. The court, in holding that there was no contempt power, distinguished the House of Commons as sui generis with respect to the contempt power of a legislature.

The House of Commons has this power, . . . not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the House of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. . . .

[A]ll those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have *judicial functions*, . . . except only the House of Commons, whose authority, in this respect, rests upon ancient usage.¹⁰²

The *Kilbourn* decision has been criticized for its historical conclusions.¹⁰³ Yet, even amidst the fuzzy haze of history, there is unanimity in the opinion that the American power of contempt of Congress is derived from English Parliamentary powers of contempt. History also supports the finding in the *Kilbourn* case that this Parliament was once a holder of judicial as well as legislative powers. Whether the English decisions upholding Parliament's power of contempt are rationalized on the basis of that body's former judicial nature, or upon the necessity or usage of Parliament qua legislature, is the issue around which revolves the logical problem of precedent. However, no matter how one concludes in this debate, the fact nonetheless remains that Congress is not Parliament, that the power has been exercised for over a century, and that there are other rationales for its having the contempt power than the claimed parliamentary basis.

100. *Id.* at 189.

101. 4 Moore 63, 13 Eng. Rep. 225 (P.C. 1842).

102. *Id.* at 89-90, 13 Eng. Rep. at 235. (Emphasis added.)

103. Potts, *supra* note 66, at 692-97.

The perfection of the precedential syllogism is important only in understanding the climate of the birth of the power, and its original *raison d'être*, and of course in weighing its position for the purpose of reappraisal.

The Court also discussed the *Dunn* decision, pointing out that it was consistent, at least historically logical, even with this decision. At the time of the *Dunn* case, said the Court, English decisions, interpreting the power of the House of Commons to punish for contempt, rationalized the exercise of the power upon the past use by that House of the power when it was also a judicial body. At the time of the *Kilbourn* case, however, the English decisions had changed, holding that the House of Commons was no longer a judicial body, and could not consequently exercise any but legislative powers, which does not include the power of contempt of the legislature.

By dicta, if not strong implication, this case can be considered as holding that there is no congressional contempt power, other than as specifically granted to Congress by the Constitution. By actual decision, the case seems to hold that even if there is a congressional contempt power, the courts may still inquire into the jurisdictional basis of its exercise. Its more academic value lies in the historical discussion of the subject.

In 1857, a federal statute was enacted authorizing punishment for contempt of Congress.¹⁰⁴ Prior to that time, the contempt power was exercised under a claimed, inherent right. The contumacious individual was brought before the Bar of the offended House by the Sergeant-at-Arms, at the behest of the officer of the House, and summarily dealt with. His imprisonment at the House, if any, concluded with the end of the congressional session. The procedure under the statute requires the President of the Senate or the Speaker of the House, after deciding to punish an individual for contempt, to send the case to the United States attorney for the district where the contempt was committed. He in turn, presents the case to a Grand Jury, which decides whether or not to indict the contemnor. If he is indicted, he stands trial in federal court as any other accused criminal. At least one writer has urged that the application of this statute and its later counterparts ideologically changed the purpose, if not the effect, of the contempt power to one of punishment instead of coercion.¹⁰⁵ He pointed out that in the majority of cases before the statute, the action of the particular house of Congress often changed the recalcitrant witness' attitude to one of co-operation. In many cases, the contemnor purged himself by co-operating with the Congress. Perhaps for this

104. 11 Stat. 155 (1857), 2 U.S.C. § 192 (1958).

105. Beck, *op. cit.* supra note 75, at 6, 7.

reason, if not from habit, the Congress at first was hesitant to act under the statute. It has been reported that "until the twentieth century Congress was reluctant to use the statutory provisions of 1857 and continued to punish persons summarily."¹⁰⁶ More recently, all contempt citations have been pursuant to the statute. The statute was upheld formally by the Supreme Court in 1897.¹⁰⁷ Interestingly, punishment through the older practice is not precluded by reason of the fact that the same act is equally a statutory offense. Both powers are available. Since the 1857 statute, the focus of judicial review of congressional contempt cases has changed from one of inquiring whether or not the power existed, to what the extent of its application may properly be.

Yet, even in cases presupposing the propriety of Congress' use of the contempt power, the melody of historical debate about the source and nature of the power lingered on. In 1917, the Supreme Court though recognizing the existence of the contempt power of Congress, if properly employed, harkened back to the situation in England long ago, thusly:

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain it is that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one and continued to operate after the division of the Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist.¹⁰⁸

During the period of English history notorious for the emergence of an active and powerful Parliament, and typified by a broad use of the contempt power in asserting its authority, there were abuses and misuses at the expense of those not then in favor.¹⁰⁹ Yet, in more modern times there has been a shift toward restraint in the use of the contempt vehicle by Parliament.¹¹⁰ The Royal Commissions more fre-

106. *Id.* at 7.

107. *In re Chapman*, 166 U.S. 661 (1897).

108. *Marshall v. Gordon*, 243 U.S. 521, 533 (1917).

109. *Watkins v. United States*, 354 U.S. 178 (1957).

110. *Kecton, Trial by Tribunal* (1960).

quently have conducted the fact-finding investigations which legislative groups have been wont to handle, and they have generally done so without coercive powers.¹¹¹ Now, these Royal Commissions are the principal source of investigative work in England. They are composed of specialists; have no enforcing power except in specific and unusual cases where Parliament granted it in creating the Commission; and have been responsible for many of the recent great social reforms. Withal, their hallmark has been fairness, as much as efficiency. On the other hand, the inverse is so of the situation in the United States. Originally, the power was used where it was necessary to urge compliance which, once given, dispelled the need for further action. The procedures, though summary, included some hearing with counsel. Nowadays, the contempt vehicle is more freely used than ever, and in an attitude of retributive punishment.¹¹² Crime, subversion, and insecurity are investigated by the legislature, whereas they are not in the English political arena.¹¹³ The number of investigations has greatly multiplied in recent years,¹¹⁴ and the use of the contempt power in those cases has become more a weapon against individuals, than a shield of the government.¹¹⁵ Individual rights, more and more, have been subjugated to the passionate political pressures of the moment—with the contempt power being the sword which the legislature, more and more seeks and uses.¹¹⁶ The coin has been turned, yet it looks to history as authority for its new face.

It can be fairly concluded that the powers of contempt which are now exercised in the United States originally were adopted from English common law. The inconsistencies and inappropriatenesses came too as part of the inherited common law package. Though times have changed, as have political climates, the power has remained, in fact increased. Paradoxically, the legislative contempt power has played a lesser role in modern English practice, though the American offspring has grown to proportions considered by some as monstrous. This blind heritage, in the hands of power seekers, has created an anomalous result of kingliness in a government which was conceived to establish the sovereignty of men.

111. Galloway, *Congress and Parliament* (1955).

112. Taylor, *Grand Inquest* (1955).

113. Galloway, *op. cit. supra* note 111.

114. Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 *Colum. L. Rev.* 839 (1954).

115. Carr, *The House Committee on Un-American Activities* (1952).

116. Barth, *Government by Investigation* (1955); O'Brian, *National Security and Individual Liberty* (1955).