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Ex Parte Grossman

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Court : US Supreme Court

Decided On : Mar-02-1925

Appeal No. : 267 U.S. 87

Appellant : Ex Parte Grossman

Judgement :

Ex Parte Grossman - 267 U.S. 87 (1925)
U.S. Supreme Court Ex Parte Grossman, 267 U.S. 87 (1925)

Ex Parte Grossman

No. 24, Original

Argued December 1, 1924

Decided March 2, 1925

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

1. A criminal contempt, committed by disobedience of an injunction issued by the District Court to abate a nuisance in pursuance of

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the Prohibition Law, is an "offence against the United States," within the meaning of Article II, 2, Cl. 1 of the Constitution, and pardonable by the President thereunder. P. 267 U. S. 108 .

2. Before our Revolution, the King of England had always exercised the power to pardon criminal contempts, the pardon being efficatious insofar as punishment was imposed in the public interest, to vindicate the authority of the King and Court (criminal contempt), but not insofar as imposed to secure the rights of a suitor (civil contempt). P. 267 U. S. 110 .

3. The like distinction between criminal and civil contempts is clearly made in our law. P. 267 U. S. 111 .

4. The history of the pardon clause in the Constitutional Convention, *cited* to show that the words "offences against the United States" therein were intended, presumably, to distinguish between offences against the General Government and offences against the States, and not to narrow the scope of a pardon as known in the common law. P. 267 U. S. 112 .

5. There is no substantial difference in this matter between the executive power of pardon in our Government and the King's prerogative. P. 267 U. S. 113 .

6. Nor does the ruling of this Court in *United States v. Hudson,* 7 Cranch 32, limiting the exercise of ordinary federal criminal jurisdiction to crimes defined by Congress, afford reason for confining "offences against the United States," in the pardon clause to statutory crimes and misdemeanors. P. 267 U. S. 114 .

7. Construction of "offences against the United States" in the pardon clause as including criminal contempts accords with the ordinary meaning of the words, and is not inconsistent with other parts of the Constitution where the term "offence" and the narrower terms "crimes" and "criminal prosecutions" appear. Art. I, 8;

Amendments V and VI. P. 267 U. S. 115 .

8. The power of the President to pardon criminal contempts is sustained by long practice and acquiescence. P. 267 U. S. 118 .

9. The contention that to admit the power of the President to pardon criminal contempts (not to interfere with coercive measures of the courts to enforce the rights of suitors) would tend to destroy the independence of the Judiciary and would violate the principle of separation of the three departments of the Government is considered and rejected. P. 267 U. S. 119 .

Rule in habeas corpus made absolute, and prisoner discharged.

Habeas corpus, original in this Court, to try the constitutionality of petitioner's confinement notwithstanding a

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pardon granted by the President. The petitioner was found guilty by the District Court of having disobeyed a temporary injunction, issued under the Prohibition Act, forbidding illicit traffic in liquors on certain premises. He was sentenced by the District Court to pay a fine and to imprisonment for one year in the Chicago House of Correcting -- a judgment which was affirmed by the Circuit Court of Appeals. 280 Fed. 683. The President issued a pardon commuting the sentence to the fine upon condition that the fine were paid; which was done. Having been thereupon released from custody, the petitioner was again committed by the District Court, upon the ground that the pardon was ineffectual, 1 Fed.2d 941. He then sought this writ of habeas corpus, directed to Graham, the Superintendent of the House of Correction.

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MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an original petition in this Court for a writ of habeas corpus by Philip Grossman against Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Illinois. The respondent has answered the rule to show cause. The facts are not in dispute.

On November 24, 1920, the United States filed a bill in equity against Philip Grossman in the District Court of the United States for the Northern District of Illinois, under Section 22 of the National Prohibition Act (Ch. 85, 41 Stat. 305, 314), averring that Grossman was maintaining a nuisance at his place of business in Chicago by sales of liquor in violation of the Act and asking an injunction to abate the same. Two days later, the District Judge granted a temporary order. January 11, 1921, an information was filed against Grossman, charging that, after the restraining order had been served on him, he had sold to several persons liquor to be drunk on his premises. He was arrested, tried, found guilty of contempt and sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of $1,000 to the United States and costs. The decree was affirmed by the Circuit Court of Appeals, 280 Fed. 683. In December, 1923, the President issued a pardon in which he commuted the sentence of Grossman to the fine of $1,000 on condition that the fine be paid. The pardon was accepted, the fine was paid, and the defendant was released. In May, 1924, however, the District Court committed Grossman to the Chicago House of Correction to serve the sentence notwithstanding the pardon. 1 Fed.2d 941. The only

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question raised by the pleadings herein is that of the power of the President to grant the pardon.

Special counsel, employed by the Department of Justice, appear for the respondent to uphold the legality of the detention. The Attorney General of the United States, as *amicus curiae,* maintains the validity and effectiveness of the President's action. The petitioner, by his counsel, urges his discharge from imprisonment.

Article II, Section 2, clause one, of the Constitution, dealing with the powers and duties of the President, closes with these words:

". . . and he shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

The argument for the respondent is that the President's power extends only to offenses against the United States, and a contempt of Court is not such an offense, that offenses against the United States are not common law offenses, but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name; that the context of the Constitution shows that the word "offences" is used in that instrument only to include crimes and misdemeanors triable by jury, and not contempts of the dignity and authority of the federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to

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British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily

understood.

In a case presenting the question whether a pardon should be pleaded in bar to be effective, Chief Justice Marshall said of the power of pardon (*United States v. Wilson,* 7 Peters, 150, 32 U. S. 160):

"As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In *Ex parte William Wells,* 18 Howard, 307, 59 U. S. 311 , the question was whether the President, under his power to pardon could commute a death sentence to life imprisonment by granting a pardon of the capital punishment on condition that the convict be imprisoned during his natural life. This Court, speaking through Mr. Justice Wayne, after quoting the above language of the Chief Justice, said:

"We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning

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at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the chief executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives

in the colonies. At that time, both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment."

The King of England, before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crime and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century, the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. *Thomas of Chartham v. Benet of Stamford* (1313), 24 Selden Society 185; *Fulwood v. Fulwood* (1585), Toothill, 46; *Rex v. Buckenham* (1665), 1 Keble 751, 787, 852; *Anonymous* (1674), Cases in Chancery, 238; *King and Codrington v. Rodman* (1630), Cro.Car.198; *Bartram v. Dannett* (1676), Finch, 253; *Phipps v. Earl of Angelsea* (1721), 1 Peere Williams, 696.

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These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law. *In the Matter of a Special Reference from Bahama Islands,* Appeal Cases [1893], 138; *Wellesley v. Duke of Beaufort,* 2 Russell & Mylne, 639, 667, (where it is shown in the effect of a privilege from arrest of members of Parliament analogous in its operation to a pardon); *In re Freston,* 11 Q.B.D. 545, 552; *Queen v. Barnardo,* 23 Q.B.D. 305; *O'Shea v. O'Shea and*

Parnell, 15 P. & D. 59, 62, 63, 65; Lord Chancellor Selborne, in the House of Lords, 276 Hansard, 1714, commenting on *Greene's Case,* 6 Appeal Cases, 657.

In our own law, the same distinction clearly appears. *Gompers v. Bucks Stove & Range Company,* 221 U. S. 418 ; *Doyle v. London Guarantee Company,* 204 U. S. 599 , 204 U. S. 607 ; *Bessette v. Conkey Co.,* 194 U. S. 324 ; *Alexander v. United States,* 201 U. S. 117 ; *Union Tool Co. v. Wilson,* 259 U. S. 107 , 259 U. S. 109 . In the *Gompers* case, this Court points out that it is not the fact of punishment, but rather its character and purpose, that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts, the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.

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With this authoritative background of the common law and English history before the American Revolution to show that criminal contempts were within the understood scope of the pardoning power of the Executive, we come now to the history of the clause in the Constitutional Convention of 1787. The proceedings of the Convention from June 19, 1787, to July 23rd were, by resolution, referred to a Committee on Detail for report of the Constitution (II Farrand's Records of Constitutional Convention, 128, 129) and contained the following (II Farrand, 146): "The power of pardoning vested in the Executive (which) his pardon shall not, however, be pleadable to an impeachment." On August 6th, Mr. Rutledge of the Committee on Detail (II Farrand, 185) reported the provision as follows: "He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of impeachment." This is exactly what the King's pardon was at common law, with the same limitation. IV Blackstone, 399. On August 25th (II Farrand, 411), the words "except in cases of impeachment" were added after "pardons" and the succeeding words were stricken out. On Saturday, September 8th (II Farrand, 547), a committee of five to revise the style of and arrange the articles was agreed to by the House. As referred to the Committee on Style, the clause read (II

Farrand, 575): "He shall have power to grant reprieves and pardons except in cases of impeachment." The Committee on Style reported this clause as it now is: "and he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment." There seems to have been no discussion over the substance of the clause save that a motion to except cases of treason was referred to the Committee on Style, September 10th (II Farrand, 564), was not approved by the Committee, and, after discussion, was defeated in the Convention September 15th (II Farrand, 626, 627).

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We have given the history of the clause to show that the words "for offences against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States, as distinguished from offenses against the States. It cannot be supposed that the Committee on Revision, by adding these words, or the Convention, by accepting them, intended *sub silentio* to narrow the scope of a pardon from one at common law, or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution.

Nor is there any substance in the contention that there is any substantial difference in this matter between the executive power of pardon in our Government and the King's prerogative. The courts of Great Britain were called the King's Courts, as indeed they were; but, for years before our Constitution, they were as independent of the King's interference as they are today. The extent of the King's pardon was clearly circumscribed by law and the British Constitution, as the cases cited above show. The framers of our Constitution had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures, save by excepting cases of impeachment, and even in that regard, as already pointed out, the common law forbade the pleading a pardon in bar to an impeachment. The suggestion that the President's power of pardon should be regarded as necessarily less than that of the King was pressed

upon this Court and was agreed to by Mr. Justice McLean, one of the dissenting Judges, in *Ex parte William Wells,* 18 Howard, 307, 59 U. S. 321 , but it did not prevail with the majority.

It is said that "Offences against the United States," in the pardon clause can include only crimes and misdemeanors

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defined and denounced by Congressional Act, because of the decision of this Court in *United States v. Hudson,* 7 Cranch 32. This was a criminal case certified from the District Court upon a demurrer to an indictment for criminal libel at common law. The Court sustained the demurrer on the ground that indictments in federal courts could only be brought for statutory offenses. The reasoning of the Court was that the inferior courts of the United States must be created by Congress, that their jurisdiction, though limited by the Constitution, was in its nature very indefinite, applicable to a great variety of subjects, varying in every State in the Union, so that the courts could not assume to exercise it without legislative definition. The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense. The Court admitted that

"certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt -- imprison for contumacy -- enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all the others, and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers."

The decision was by a majority of the Court, and among the dissenting members was Mr. Justice Story, who expressed himself with vigor to the contrary in *United States v. Coolidge,* 1 Gall. 488; Fed. Case No. 14,857, which was reversed by a

majority of the Court in 1 Wheat. 415. The *Hudson* decision was made in 1812. It is not too much to say that, immediately after the ratification of the Constitution, the power and jurisdiction of federal courts to indict and prosecute common law

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crimes within the scope of federal judicial power was thought to exist by most of the then members of this Court. The charge of Chief Justice Jay to the Grand Jury in the United States Circuit Court at Richmond in May, 1793, and the ruling by the United States Circuit Court in *Henfield's Case,* Fed. Case No. 6,360; Wharton's State Trials, 49, in which Mr. Justice Wilson and Mr. Justice Iredell constituted the court, sustained this view. Mr. Warren, in his valuable history of this Court, Vol. I, p. 433, says that, in the early years of the Court, Chief Justice Ellsworth and Justices Cushing, Paterson, and Washington had also delivered opinions or charges of the same tenor. Justices Wilson and Paterson were members of the Constitutional Convention, and the former was one of the five on the Committee on Style which introduced the words "offences against the United States" into the pardon clause. We can hardly assume under these circumstances that the words of the pardon clause were then used to include only statutory offenses against the United States and to exclude therefrom common law offenses in the nature of contempts against the dignity and authority of United States courts, merely because this Court, more than twenty years later, held that federal courts could only indict for statutory crimes, though they might punish for common law contempts.

Nothing in the ordinary meaning of the words "offences against the United States" excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (*In re Neale,* 135 U. S. 1 , 135 U. S. 59 , *et seq.*), and so must be an offense against the United States. Moreover, this Court has held that the general statute of limitation, which forbids prosecutions "for any offense unless instituted within three years next after such offense shall have been committed," applies to criminal contempts.

Gompers v. United States, 233 U. S. 604 . In that case, this Court said (p. 233 U. S. 610):

"It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury &c.; to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Baldwin,* 165 U. S. 275 , 165 U. S. 281 , 165 U. S. 282 . It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury, as it has been gradually worked out and fought out, has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that, in the early law, they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N.S., p. 147 (1885), and that, at least in England, it seems that they still may be, and preferably are, tried in that way. *See* 7 Halsbury, Laws of England, 280, sub. *v.* Contempt of Court (604); *Re Clements v. Erlanger,* 46 L.J. N. S., pp. 375, 383. *Matter of Macleod,* 6 Jur. 461. *Schreiber v. Lateward,* 2 Dick. 592. *Wellesley's Case,* 2 Russ. & M. 639, 667. *In re Pollard,* L.R. 2 P.C. 106, 120. *Ex parte Kearney,* 7 Wheat. 38, 20 U. S. 43 . *Bessette v. W. B. Conkey Co.,* 194 U. S. 324 , 194 U. S. 328 , 194 U. S. 331 , 194 U. S. 332 . *Gompers v. Bucks Stove & Range Co.,* 221 U. S. 418 , 221 U. S. 441 . "

The recent case of *Michaelson v. United States* fully bears out the same view. 266 U. S. 42 , 266 U. S. 66 , 266 U. S. 67 .

It is said, however, that whatever may be the scope of the word "offenses" in the particular statute construed in the *Gompers* case, its association in the Constitution is such as to show a narrower meaning. The word "offences" is only used twice in the original Constitution, once in the pardon clause, and once in Article I, Section 8, among the powers of Congress "to define and punish Piracies and Felonies committed on the high seas and offences against the Law of Nations." In the amendments, "offence" occurs but once, and that in the Fifth Amendment in the clause forbidding double jeopardy. We do not see how these other two uses of the word can be said to limit the meaning of "offences" in the pardon clause.

The argument is that the word "offences" is used in the Constitution interchangeably with crimes and criminal prosecutions. But as has been pointed out in *Shick v. United States,* 195 U. S. 65 , the term "offences" is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecutions." In *Myers v. United States,* 264 U. S. 95 , 264 U. S. 104 , 264 U. S. 105 , we have but recently held that

"while contempt may be an offense against the law and subject to appropriate punishment, certain it is that, since the foundation of our Government, proceedings to punish such offenses have been regarded as *sui generis,* and not criminal prosecutions within the Sixth Amendment or common understanding."

Bessette v. Conkey Co, 194 U. S. 324 , 194 U. S. 326 . Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that, for years before the American Constitution, courts had been held to be inherently empowered

to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the Fifth and Sixth Amendments and of other cited parts of the Constitution are not of significance in determining the scope of pardons of "offences against the United States" in Article II, Section 2, clause 1, of the enumerated powers of the President. We think the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing.

Moreover, criminal contempts of a federal court have been pardoned for eighty-five years. In that time, the power has been exercised twenty-seven times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or contempts, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress. In 1841, Attorney General Gilpin approved the pardon of a contempt on the ground that the principles of the common law embraced such a case and this Court had held that we should follow them as to pardons. (3 Op.A.G. 622.) Attorney General Nelson in 1844 (4 Op.A.G. 317), Attorney General Mason in 1845 (4 Op.A.G. 458), and Attorney General Miller in 1890 (19 Op.A.G. 476), rendered similar opinions. Similar views were expressed, though the opinions were not reported, by Attorney General Knox in 1901 and by Attorney General Daugherty in 1923. Such long practice under the pardoning power and acquiescence in it strongly

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sustains the construction it is based on. *Stuart v. Laird,* 1 Cranch 299, 5 U. S. 308 ; *Cooley v. Board of Wardens,* 12 How. 299, 53 U. S. 315 ; *Lithographic Company v. Sarony,* 111 U. S. 53 , 111 U. S. 57 ; *The Laura,* 114 U. S. 411 , 114 U. S. 416 .

Finally, it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers. This argument influenced the two district judges below. (1 Fed.2d 941.) The Circuit Court of Appeals of the Eighth Circuit sustained it in a discussion, though not necessary to the case, in *In re Nevitt,* 117 Fed. 448. The Supreme Court of Wisconsin, by a majority, upheld it in *State ex rel. Rodd v. Verage,* 177 Wis., 295, in remarks which were also *obiter. Taylor v. Goodrich,* 25 Texas Civil App. 109, is the only direct authority, and that deals with a clause a little differently worded. The opposite conclusion was reached in *In re Mullee,* 7 Blatchford, 23; *Ex parte Hickey,* 12 Miss. 751; *Louisiana v. Sauvinet,* 24 La.Ann. 119; *Sharp v. State,* 102 Tenn. 9; *State v. Magee Publishing Company,* 29 New Mexico 455.

The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The Judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it

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easily demonstrate. By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the Judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. *Ex parte Garland,* 4 Wall. 333, 71 U. S. 380 . Negatively, one House of Congress can withhold all appropriations and stop the operations of

Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the others is qualified, and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction. The fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the cooperation of the other two, that government may go on. Indeed, while the Constitution has made the Judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary cooperation in the possible reluctance of either of the other branches to the force of public opinion.

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate

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guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal

contempts, why not a President ordering a general jail delivery? A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common law origin and long years of practice and acquiescence.

If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment, rather than to a narrow and strained construction of the general powers of the President.

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The power of a court to protect itself and its usefulness by punishing contemnors is, of course, necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that, in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity.

It goes without saying that nowhere is there a more earnest will to maintain the independence of federal courts and the preservation of every legitimate safeguard of their effectiveness afforded by the Constitution than in this Court. But the qualified independence which they fortunately enjoy is not likely to be permanently strengthened by ignoring precedent and practice and minimizing the importance of the coordinating checks and balances of the Constitution.

The rule is made absolute, and the petitioner is discharged.

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