2 Little Words May Shackle Congress Contempt Power

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By Irving Brant

Distinguished biographer of James Madison

HARDLY ANY ATTENTION was paid to the action of the Supreme Court, just before its June adjournment, in reversing the conviction of labor leader John T. Gojack for contempt of Congress. The decision turned on one of the commonest failings of the House Committee on Un-American Activities—improper procedure in connection with an investigation. In that respect the case involved nothing new or surprising except, perhaps, the unanimity of the nine justices.

Yet it may turn out that a single sentence in the *Gojack* opinion of Justice Abe Fortas—a sentence quoted in news reports for its seeming support of the House committee — foreshadows the sharpest restriction on the contempt powers of Congress in all American history. This is the sentence:

"We do not question the authority of the committee appropriately to delegate functions to a subcommittee of its members, nor do we doubt the availability of statutory law for punishment of contempt before such a committee in proper cases."

Why did the Court say "statutory law?" To the average citizen there is no other kind. A law is a statute. A statute is a law.

Lawyers, when they hear the phrase "statutory law," contrast it with the nonstatutory, unwritten, common law of England, which still prevails to a great extent in American state courts. But there is no Federal common law in the United States. That was declared nonexistent by the Supreme Court in 1811 and 1816. Those momentous decisions, which still stand, protect the American people against Federal invasion of virtually the entire field of criminal law without the aid of statutes.

Why then, if the Federal Government has no constitutional power to inflict punishment under unwritten law, should the Supreme Court think it necessary to use the term "statutory law" as the source of power to punish persons for contempt? Because, throughout its history, Congress has claimed to possess a contempt power unsupported by statute, resting by analogy upon the privileges of an omnipotent British Parliament.

Specifically, Congress has claimed that the "Law and Custom of Parliament" was automatically transferred to the House and Senate, either by indirect inheritance through Colonial assemblies, or by natural or divine law. That claim is made even though it conflicts with the clear limitations of privilege in the United States Constitution.

Can Try Offenders

IN ACCORD WITH this reasoning, Congress contends that it has two options in dealing with contempt. One is to summon offenders before the House or Senate, try them and send them to prison or free them by majority vote—something neither house has done since 1935. The other course is to define offenses by statute and authorize the Federal courts to decide guilt or innocence. Congress first gave the courts that power in 1857.

In late years the second method has become so well established (although grievously misused part of the time) that direct punishment has passed out of nearly everybody's thoughts. But not out of the thoughts of all members of Congress. To measure the significance of the Court's remark in *Gojack*, hark back to what Sen. Eastland of Mississippi said a few years ago, when the Supreme Court angered him by reversing the conviction of a witness before one of the congressional committees. He made a public threat that, if reversals continued, the Senate would revert to its historic right to punish offenders by direct action, without judicial trial.

It was not by accident or inadvertence that Sen. Eastland got his answer in the *Gojack* case. Those two words, statutory law, may have involved as much thought and study as the

Court devoted to any decision during the whole year. The words could not have been used without full recognition of their significance.

What really gives life to this question of power is the fact that the Supreme Court still has a lot of the judicial by-products of McCarthyism, McCarranism and Eastlandism to get rid of. Nobody should interpret the unanimity of the Court, but it strongly suggests a disposition to be guided by the Constitution, rather than by ancient and discredited British custom, as a measure of the rightful privileges of Congress.

Challenged in 1796

ALTHOUGH congressional majorities have uniformly affirmed the power to enforce privilege by direct action, that power has been vigorously challenged in Congress itself from the day it was first asserted. In 1796 a land speculator named Robert Randall was found guilty of contempt by slander. He had told certain House members that 30 others, unnamed, had promised to join a scheme to exploit 20 million acres of public lands. Chairman William Smith (S.C.) of the Land Office Committee laid down the source of power to punish the lying miscreant:

"As every jurisdiction had certain powers necessary for its preservation, so the Legislature possessed certain privileges incident to its nature, and essential for its very existence. This is called in England the parliamentary law . . ."

To which Rep. John S. Sherburne of New Hampshire replied:

"When we speak of privileges of the House, it seems a word of cabalistic meaning. Will any gentleman define or point out those privileges? In what book of the laws are they written? If they are indefinite, we may come to be hereafter as irregular as a Convention, and our sentences as dreadful as those of a revolutionary tribunal."

Rep. James Madison denied the existence of any such power and exclaimed to Thomas Jefferson after Randall's conviction: "What an engine may such a privilege become, in the hands of a body once corrupted, for protecting its corruptions against public animadversion, under the pretext of maintaining its dignity and preserving the necessary confidence of the public!"

Issue Arises Again

THE SUBJECT was debated more thoroughly in 1800, when William Duane of the Philadelphia Aurora was charged with violating the privileges of Congress. His crime was publishing the text of a pending bill (thus killing it) designed to assure the re-election of President John Adams by setting up a congressional committee to decide on the legality of votes cast in the Electoral College.

Sen. Charles Pinckey of South Carolina, one of the framers of the Constitution, denied that it empowered Congress to try Duane. He read the two clauses defining the privileges of members. One clause authorizes each House to punish its members for disorderly behavior and expel them for misconduct. The other protects members against arrest, under certain limitations, and forbids action against them, outside of Congress, for utterances in debate.

"That is all," said Pinckney, "that is said on the subject of privilege; and surely no words can be more explicit, nor any subject more clearly defined." The Senate, he agreed, was following the practice of the British Parliament, "but it was because the doctrines there held are utterly inadmissible in a free government . . . that this limitation of the privileges of Congress was here purposely introduced."

In 1823 the Supreme Court upheld the power of Congress as something inherent in that body, though ungranted, unlimited and undefined, subject only to a moral restraint. But in 1880 the Court totally rejected the prior reasoning.

So here is the situation. The Constitution defines the privileges of Congress. Nobody pretends that these privileges include the rights that Congress claims. The claim of Congress to punish for contempt by its own vote is based on British court decisions of 1771 and 1811 that were overruled in 1839 and 1841.

To be sure, congressional defenders of this power have not based it wholly on British analogy. It is "nonstatutory law," natural or divine, rising above the Constitution. Nothing, in fact, more thoroughly discredits the power claimed than the expressions used to support it. Here is a list of them, taken from the speeches of Senators and Representatives between 1796 and 1861, in which latter year John Brown's raid on Harper's Ferry sent the Senate into an orgy of illegal investigation:

The Law and Custom of Parliament;

The common law of England;

The hardy English law;

The *leges non scriptae* of the French Revolutionary Convention;

The usages of state legislatures based on parliamentary law;

Analogy with the power of judges to punish for contempt of court;

Possession by Congress of judicial functions, as in impeachments;

The inherent and indispensable power of self-preservation;

Protecting ourselves against defamation and calumny;

The organic law of vitality, yes, sir, the vitality of resentment;

A principle of universal law.

The one source from which no such power has ever been claimed is the definition of congressional privilege in the Constitution. If the words of the Supreme Court in *United States* v. *Gojack* are ever put to the test and transformed into a judicial decision, that decision need do no more than echo the words spoken in Congress by John Page of Virginia in 1796:

"[He] did not think parliamentary precedents respecting breach of privilege by any means applicable to the situation or powers of Congress. The Constitution had defined those powers, and he hoped never to exceed them."

The protection of Congress from insult, said Page, should be afforded by passage of laws establishing uniform rules for proceeding against offenders. It was not right for members "in their own cause, to be prosecutors, witnesses, judges, and jurors." There, spoken 172 years ago, is a full precedent for the dictum of the Supreme Court in the *Gojack* case.