AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Separation of Powers

Anderson v. Dunn, 19 U.S. 204 (1821)

Congressman Lewis Williams informed the House of Representatives that he had been approached by a Colonel John Anderson and offered $500 in exchange for certain favors. The House issued a warrant instructing the Sergeant at Arms to take Anderson into custody. While in custody Anderson was interrogated by Speaker of the House Henry Clay and eventually was declared guilty of contempt of the "dignity and authority" of the House and of a breach of the privileges of the House. Anderson was reprimanded and released from custody. A lawsuit developed when Anderson subsequently sued the Sergeant of Arms, Thomas Dunn, for assault and battery and false imprisonment. At issue before the Supreme Court were a number of important questions relating to the scope of legislative power and to the separation of powers. Did the House have the authority to issue a warrant, or was the authority to issue warrants an exclusive judicial power, meaning that the House would have to request a warrant from a court rather than issue on one its own authority? Could the House impose punishments on its own authority? If so, were there any constitutional limits on the kinds of punishments that could be imposed? If the House wanted to impose a punishment, did the Constitution require a jury trial, or could the House simply declare the punishment? As you read the Court's opinion consider the constitutional sources of the powers being recognized; also, pay special attention to the Court's discussion of the mechanisms that would prevent the abuse of these powers.

Mr. HALL, for the plaintiff in error, made three points.

1. That the House of Representatives had no authority to issue the warrant.
2. That the warrant is illegal on the face of it.
3. That in either case, it is no justification to the officer who executed it.

1. If the house had authority, it must be either in virtue of the Constitution of the United States, of usage and precedent, or as inherent in, and incidental to, legislative bodies. In the Constitution there are but two clauses which can be made to serve the purpose. The first article, section eight, enables Congress to make all laws which may be necessary and proper to effectuate the powers expressly given. But it is obvious, that this merely authorizes the Legislature collectively, not one House separately, to pass certain laws, not mere occasional sentences. And the powers delegated to the United States, being in derogation of the rights of sovereign States, must be construed strictly. For the same reasons, the authority to determine the rules of its proceedings, (art. 1., sec. 5.) cannot be construed to operate beyond the walls of the House, except on its own members, and its officers. It is observable, also, that this authority is coupled with an authority to punish its members for misbehavior, and to expel a member. It is a rule of construction, that the text should be considered in connection with the context; but the context, viz. the power to punish and to expel, relates solely to the internal polity and economy of the House. The authority is to determine the rules of its proceedings, not the proceedings themselves, for these are determined by the Constitution itself in the first article. The fifth section of the first article, authorizes the House to punish its members; *et enumeratio unius est exclusio alterius* [the enumeration of one thing excludes all others]. The power of issuing warrants is manifestly judicial. This may be assumed as an axiom. The Constitution ordains, that the judicial power (which is equivalent to all the judicial power) shall be vested in one Supreme Court, and other inferior Courts, (art. 3. sec. 1.) Thus, the right of the Courts to exercise such a power, is exclusive, and an assumption of it by any other department, is an usurpation. … [T]he Constitution of the United States, (art. 1. sec. 8.) when regulating the incidental

powers of Congress, authorizes it to make such law only as may be "necessary" to effectuate the express powers. Necessity, then, is the criterion of incident. But is a power to punish the offer of a bribe beyond the verge of the House necessary to enable Congress to perform its duties? The impunity of the offence being the only possible reason of the necessity, if the offender may be adequately punished by the Courts of justice in the ordinary mode of proceeding, the supposed necessity ceases….

2. The warrant is illegal on the face of it. By the fourth article of the amendments to the Constitution, it is provided, that "no warrant shall issue but on probable cause, supported by oath or affirmation." Thus, are prohibited, all warrants which do not rest on oath, and on probable cause. But it is no less necessary, that the warrant should recite the cause in special and the oath. The Constitution is not satisfied with "a cause" so vague and indefinite, as "high contempt and breach of privilege." …

JUSTICE JOHNSON delivered the opinion of the Court.

It is certainly true, that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end, is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation….

It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended, that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. 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. And, accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress within this District, enables them to provide by law against all other insults against which there is any necessity for providing….

The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

Analogy, and the nature of the case, furnish the answer -- "the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since 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. It follows, that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

But the American legislative bodies have never possessed, or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the House of Representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? The reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the House of Representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members.

This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

In reply to the suggestion that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. Even corruption any where else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious: there is no difficulty in observing that respectful deportment which will render all apprehension chimerical.

Judgment *affirmed*.