

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1925

### Pardoning Power of Executive in Contempt Cases. [United States v. Grossman, 1 F (2nd) 941]

James Parker Hall

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

James Parker Hall, "Pardoning Power of Executive in Contempt Cases. [United States v. Grossman, 1 F (2nd) 941]," 13 Georgetown Law Journal 286 (1925).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## NOTES AND COMMENTS

### PARDONING POWER OF EXECUTIVE IN CONTEMPT CASES

An interesting and important question in constitutional law is involved in the conflict of opinion regarding the power of the Executive to pardon in cases of criminal contempt. This controverted question, in the main, is based upon the interpretation of the meaning of the word "offense" as used in the pardoning power clause in the Constitution of the United States or of the various states.

In the case of the *United States vs. Philip Grossman*, decided May 15, 1924, in the United States District Court for the Northern District of Illinois, a restraining order had been served upon the defendant prohibiting him from maintaining a liquor nuisance. He was subsequently prosecuted under an information, and an order issued for him to appear and show cause why he should not be punished for contempt of court. After a hearing he was found guilty of contempt, ordered to the House of Correction for one year and to pay a fine of \$1,000. This order was subsequently affirmed by the Circuit Court of Appeals for the Seventh Circuit.

Thereafter the defendant filed a petition and on the hearing there was offered in his behalf a pardon of the jail sentence from the President of the United States. The court held that the President was usurping the pardoning power as invested upon him by the Constitution in granting a pardon to one committed to jail for criminal contempt. District Judge Carpenter, in giving the opinion, defined criminal contempt as "an act or refusal to act which, by detracting from the dignity or authority of a court, tends to interfere with the administration of justice." In support of the decision he cited the cases of *United States vs. Hudson*, 7 Cranch 32, and *Ex parte Wall*, 107 U. S. 265, as establishing the fact that the power to punish for contempt is inherent in every court of justice.

The pardoning power of the President is derived from Article 2, Section 2 (1) of the Constitution which provides: "The President \* \* \* shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." As to the word "offenses" within the meaning of this clause, the following extract from Judge Carpenter's opinion in the Grossman case gives the majority of the Justices' view thereon:

"The word 'offense' in Article 2, Section 2, referring to the pardoning power of the President, embraces only those offenses declared to be such by the solemn action of the legislative body. Contempt of court, although a crime at common law, is not an indictable offense under the acts of Congress because it is not expressly set forth in the Criminal Code and is not in violation of any criminal statute of the Federal Government. Only those offenses are to be proceeded against by information or are indictable in the Federal courts which are specifically made so by acts of Congress, since the common law

crime, of itself, has no existence in the Federal jurisdiction." (*United States vs. Hudson*, 11 U. S. 32; *United States vs. Eaton*, 144 U. S. 677.)

Supporting this view he cited with approval the cases of *In re Nevitt*, 117 Fed. 448, and *State ex rel Rodd vs. Verage*, 187 N. W. (Wis.) 830, in which the problem here involved was discussed, although by way of dictum. The case of *Taylor vs. Goodrich*, 25 Texas Civ. App. 109, was referred to; there the plaintiff published an article concerning the defendant, a judge, reflecting upon his integrity in making a decision. He was committed to jail for contempt but pardoned by the governor. The sheriff refused to release him, and after appropriate action the court held that it was a criminal contempt of court and that the governor had no right of pardon, assigning as its reasons that the sentencing court had the exclusive power to remit or change its orders; that the executive had no prerogative to substitute its opinion for that of the court's solely because of an apprehension that judicial power might be abused; that the governor is not the representative of the sovereignty, as was the British King.

In the *Verage* case, *supra*, appears the following: "It was quite appropriate that the King should exercise the power of pardon in such cases, because in the early history of England the King was the repository of all sovereign power. He was the government. He established his own courts, and at times presided over them, dispensing justice in person. Formerly all writs and processes of the court were issued under the King's seal, and contempt of the King's courts was therefore an affront to the King himself. It followed as a logical consequence that he might forgive all offenses of a public nature, including offenses to his process, his seal, and his courts. As the fiction of the 'ubiquitous presence of the King' still exists, the power to pardon offenses in the nature of contempt of court also obtains.

"But here we have a different idea of sovereignty. No one person possesses all sovereign power. A contempt of court is an offense against a department of government entirely distinct and separate from the executive department, and just as supreme in its field as the Executive is in his. The power to punish for contempt must be regarded as a power conferred upon the courts by the people, for the reason that it has from the earliest times been regarded as an essential attribute of a court. It is the power which more than any other distinguishes a court from a mere board of arbitration. It is a power which springs into existence coincident with the establishment of the institution."

In the case of *State vs. Magee Publishing Co. et al.*, decided February 1, 1924, by the Supreme Court of New Mexico, the defendant was convicted of criminal libel. Magee was owner and publisher of a daily newspaper and during the pendency of his case he wrote certain articles discussing the case and criticizing the presiding judge of the judicial district. Information was filed by the state charging

him with contempt of court. Upon conviction Magee was sentenced to serve one year in jail and to pay nominal fines. Appeals were granted and before the time to perfect them had expired the governor granted to the defendant complete pardons.

After the return day of the appeals had expired the state presented transcripts in the cases and moved that they be docketed and affirmed. Defendants thereupon appeared and resisted the affirmance of the judgments, contending that the pardons relieved and absolved them from all liability to serve either the jail sentence or pay the fines.

Judge Bratton delivered the opinion of the court, holding that the motion of the state praying an affirmance of the several judgments, must be denied; and that the motion of the Attorney General, praying that they be dismissed because the pardons were valid and effective, and barred any further prosecution, must be sustained.

In the opinion he quoted with approval *Gompers vs. United States*, 233 U. S. 604, where the proceedings were in the nature of a criminal contempt. The defendant pleaded the statute of limitations and the Supreme Court dismissed the case, saying "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 within the early law they were punished only by the usual criminal procedure, and that at least in England it seems that they still may be and preferably are tried in that way."

The pardoning power is granted to the Governor of New Mexico by Section 6, Article 5, of the State Constitution which provides: "Subject to such regulations as may be prescribed by law, the Governor shall have power to grant reprieves and pardons, after conviction, for all offenses except treason and in cases of impeachment."

Supporting his decision, Judge Bratton referred to 20 R. C. L. 537, where this rule is laid down: "That the offense arising from the contempt of the authority of a court is one which, from its nature, should be summarily punished to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. But a contempt of court is an offense against the state and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender. And the generally accepted rule is that the pardoning power extends to cases of imprisonment for contempt of court.

In the case of *Ex parte Hickey*, 4 Smedes & M. (Miss.) 751, the relator was editor of a newspaper, in which he published and circulated an article wherein the acts and conduct of the presiding judge of the court then in session, with reference to a murder case then pending, was discussed and criticized. He was cited for contempt, convicted and sentenced to serve a term in jail and pay a fine. He received a pardon and was released. He was subsequently taken into custody by authority of a bench warrant issued by the court, and he sought a writ of habeas corpus.

It was held that criminal contempt was a crime within the contemplation of the constitution of the state, which was the same as that of the New Mexico Constitution. Hence they held that it was within the range of the pardoning power.

The judge in the Magee case further pointed out that in three different instances the Attorneys General of the United States held that the President has the power, derived from the Constitution, to pardon for criminal contempt. (3 Op. Attys. Gen. 622; 4 Op. Attys. Gen. 317; and 4 Op. Attys. Gen. 458.)

The following is a further quotation from the opinion in the Magee case:

"We have reached the conclusion that criminal contempt is an offense arising from a contumacious act against the authority of the court and is not one against the presiding judge personally. In such an instance the judge merely represents the sovereignty in the realm of its judicial department of government. The offense is therefore one against the community when considered as a social entity—it is one against the state, and the state, being the offended party, has the power to extend grace or forgiveness. That power is exercised through another department of the government, namely, the Executive, and when he has granted the same, the subject is freed and the incident closed. In the first instance the sovereign state is represented by its judicial department, acting through the particular court against which the contumacy is directed, and in the second instance by the executive department, acting through the Governor."

In the Supreme Court of the United States, October Term, 1924, Philip Grossman petitioned for a writ of habeas corpus against the superintendent of the Chicago House of Correction, because of his detention therein under the ruling of the court in the case of the *United States vs. Grossman, supra*. On March 2, 1925, the rule was made absolute and the petitioner discharged, under the decision of the Supreme Court rendered by Chief Justice Taft. He included in his opinion this quotation from Chief Justice Marshall's opinion in the case of *United States vs. Wilson*, 7 Peters 150, 160, in which he said of the pardoning power in England: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bares 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."

The Supreme Court, speaking through Chief Justice Taft, said: "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 crimes 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 trials for contempts were had.

"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, in so far 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.

"The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law.

"In our law the same distinction clearly appears. (*Gompers vs. Bucks Stove & Range Co.*, 221 U. S. 418.) In this case the court points out that for civil contempts the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it.

"In the case of *In re Neagle*, 135 U. S. 1, page 59, it was said that nothing in the ordinary meaning of the words 'offenses 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."

Further quoting from Chief Justice Taft's decision, in which he said: "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."

Thus the Supreme Court have definitely decided once and for all that the Executive has the power to pardon one cited for criminal contempt. The holding clearly seems to be the best side of the question because of the historical argument of a like power in the King of England, from which country our forefathers derived many of our principles of government and upon which American jurisprudence is based.

As to whether an "offense" includes a criminal contempt within its scope, the argument that such a contempt is an offense against the court, and not the individual judge thereof, and that the court is merely one of the departments of the sovereign, and thus it is an offense against the sovereign, seems conclusive. As the pardoning power of the Executive extends to all offenses against the sovereign, and as a criminal contempt is an offense against a court created by the sovereign, and thus against the sovereign itself, it is clear that it falls within the extent of the pardoning power.

This does not seem to be an usurpation of power, because the pardoning power in the Executive is more in the nature of a check upon arbitrary judgments and convictions which might be rendered by the courts than a power to be used as a hindrance to the proper administration of justice. It is more in the nature of the power, in the legislative department, of impeachment, to be used in extreme cases or were warranted by the circumstances in furtherance of justice and good government.

C. S. M.