SCOPE OF THE CONTEMPT POWER: CONSTITUTION PROTECTS SHERIFF'S NEWSPAPER RELEASE DECRYING GRAND JURY INVESTIGATION

Wood v. Georgia
370 U.S. 375 (1962)

During a local political campaign, the Superior Court of Bibb County, Georgia, instructed a state grand jury to investigate an alleged "inane and inexplicable pattern of Negro bloc voting"[1] in the county and to recommend appropriate legislation or prosecution. To publicize the investigation the judge requested that reporters for local news media be present in the courtroom when the charge was delivered. Petitioner, an elected sheriff of Bibb County and an announced candidate for re-election, questioned the propriety of the investigation and was subsequently convicted by the Superior Court on three counts of contempt. The first count was based on a press release in which petitioner urged citizens to note that the jury charge constituted "race agitation" and "a crude attempt at judicial intimidation of Negro voters and leaders" and was comparable to "intimidation by physical demonstration such as used by the K.K.K."[2] The second count was based on a letter given to the court bailiff and made available to the grand jury at petitioner's request. In the letter petitioner criticized the court's charge and advised an investigation of the Bibb County Democratic Executive Committee. One month thereafter, petitioner was cited for contempt on the ground that the press release and the letter interfered with the investigation and constituted an obstruction to the administration of justice.[3] Petitioner responded to the contempt citation with a second press release in which he repeated the charges of the first press release and asserted that his defense to the contempt citation would be the truth of those charges. The third contempt citation was based on this second press release. The Georgia Court of Appeals affirmed the convictions on the first and third counts and reversed on the second count.[4]

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[1] Wood v. Georgia, 370 U.S. 375, 377 n.2 (1962).

[2] *Id.* at 379.

[3] Ga. Const. art. 1, § 1, ¶ XX, provides: "The power of the Courts to punish for contempt shall be limited by legislative acts."

Ga. Code Ann. § 24-105, provides:

> The power of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts . . . .

The Georgia Supreme Court has repeatedly held that courts created by the Georiga Constitution have inherent power to define and punish contempts, and this power is not limited by Ga. Code Ann. § 24-105. See Atlanta Newspapers, Inc. v. State, 216 Ga. 399, 402-403, 116 S.E.2d 580, 583 (1960).

[4] Wood v. State, 103 Ga. App. 305, 119 S.E.2d 261 (1961).

The Georgia Supreme Court, without opinion, declined to review the decision of the court of appeals. On a writ of certiorari the United States Supreme Court reversed the convictions on the first and third counts.[5] In the opinion of the Court, delivered by Mr. Chief Justice Warren, the convictions abridged petitioner's right of freedom of speech as protected by the first and fourteenth amendments to the United States Constitution. Mr. Justice Harlan, with whom Mr. Justice Clark joined, wrote a dissenting opinion. Justices Frankfurter and White took no part in the decision of the case.

The scope of the contempt power available to the state judiciaries is at issue in *Wood v. Georgia*; in this respect the issue in *Wood* is similar to that faced by the Court in *Bridges v. California*,[6] *Pennekamp v. Florida*,[7] and *Craig v. Harney*.[8] The problem in each of these cases has been to determine the extent to which the courts may inhibit freedom of speech and of the press in order to protect the orderly and fair administration of justice. In the *Bridges*, *Pennekamp*, and *Craig* cases, the Court considered only the problem of comment on cases pending before a court and awaiting disposition.[9] Again in *Wood* no attempt is made to delimit the full socpe of the contempt power;[10] the decision is restricted to grand juries, and the Court expressly declines "to consider the variant factors that would be present in a case involving a petit jury."[11]

Wood is like *Craig*, and unlike *Bridges* and *Pennekamp*, in that the court below judged petitioner's conduct to be contemptuous in terms of a constitutionally accepted standard. The Georgia courts found that petitioner's acts "constituted a clear, present, or imminent danger or serious threat to the administration of justice . . . ."[12] This finding conforms to the standard which was developed by the Supreme Court in sedition cases[13] and which has been applied to the conflict between free speech and the fair administration of justice since the *Bridges* case. The majority and the dissenters in *Wood* agree that the clear and present danger standard should be applied to petitioner's statements; they disagree as to whether the danger exists.

The principal feature which distinguishes *Wood* from either *Bridges*,

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[5] Wood v. Georgia, 370 U.S. 375 (1962).

[6] 314 U.S. 252 (1941).

[7] 328 U.S. 331 (1946).

[8] 331 U.S. 367 (1947).

[9] *Id.* at 373.

[10] Wood, *supra* note 5, 385 n.8.

[11] *Id.* at 389. A similar case involving a petit jury has not yet been decided by the Court, *but see* the opinion of Mr. Justice Frankfurter respecting the denial of a petition for a writ of certiorari in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).

[12] Wood v. State, *supra* note 4, at 321, 119 S.E.2d at 273.

[13] The "clear and present danger" doctrine was originated by Mr. Justice Holmes in Schenck v. United States, 249 U.S. 47, at 52 (1919). See also Abrams v. United States, 250 U.S. 616, at 630 (1919) (Brandeis, J., dissenting); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting); and Whitney v. California, 274 U.S. 357, at 378-79 (1927) (Brandeis, J., concurring).

Pennekamp, or *Craig* is the nature of the judicial proceeding involved. In the latter three cases the allegedly contemptuous out-of-court statements were directed at a judge; in each case the state court held that the statements interfered with the judge in his administration of justice, and in each case the Supreme Court found that the judge ought not to have been unduly influenced enough to justify curtailment of freedom of speech and of the press. In *Wood* the state court found petitioner in contempt for interfering with the deliberations of a grand jury. This distinguishing point provides what the dissenters feel is the most compelling reason for affirming the contempt convictions. While the minority treats the Bibb County grand jury investigation as if it were a pending judicial proceeding, it is unclear just what sort of proceeding the majority felt was pending. It is the majority analysis that "there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding,"[14] but at no point does the majority attempt affirmatively to characterize what was pending in the Bibb County grand jury room; and it seems that a decision as to what the proceeding was should be a necessary antecedent to any determination of whether petitioner's statements constituted a clear and present danger to the administration of justice.

The dissenters argue that "the grand jury is an integral part of the judicial process,"[15] and the grand jury proceeding was a trial inasmuch as "the state as well as the individual is entitled to a day in court."[16] The minority concluded that " 'political interest' cannot be used as an excuse for affecting the result of a judicial inquiry."[17] If the minority analysis is correct, perhaps contempt should lie against petitioner for his out-of-court statements. The State's day in court was before a jury of laymen rather than the independent judges found in *Bridges*, *Pennekamp*, and *Craig*—judges described in *Craig* as "men of fortitude, able to thrive in a hardy climate."[18] The dissenters suggest an analogy between the attitude of the Georgia courts in the principal case and the protection from extrajudicial communications accorded by statute to federal grand jurors.[19] If the Bibb County grand jury investigation may accurately be characterized as a "trial," it may also be proper to characterize petitioner's statements as a clear and present

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14 Wood, *supra* note 5, at 389.

15 Wood, *supra* note 5, at 397 (Harlan, J., dissenting).

16 *Id.* at 398.

17 *Id.* at 404.

18 Craig, *supra* note 8, at 376.

19 15 U.S.C. § 1504, "Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both. Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury." See Duke v. United States, 90 F.2d 840 (4th Cir. 1937).

danger to the administration of justice and, therefore, contemptuous of the court. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[20]

What is the function of a grand jury? The historical function of the grand jury was "to stand between the prosecutor and the accused and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."[21] This was clearly a judicial function. But the function of the grand jury has been, and still is, changing. Widespread use of the preliminary examination has led to the decline of the grand jury; the preliminary examination is less expensive and more expeditious and affords potentially a greater protection for the accused.[22] The grand jury has emerged in a new role as an investigatory body searching generally into matters of public corruption and immorality.[23] The present-day function of the grand jury has been compared to the function of a legislative investigating committee.[24] If the Bibb County grand jury investigation may be equated with a legislative committee investigation, it ought not to be characterized as a pending judicial proceeding; but the majority in *Wood* does not specifically make this equation.

The question remains what function the Bibb County grand jury was impaneled to fulfill. The dissenters cite a portion of the jury charge:

> Now, gentlemen, it is your duty to develop the facts of this situation and if there is sufficient evidence of unlawful acts, then all parties participating, white and colored, candidates or non-candidates, should be indicted by this Grand Jury so that the guilty parties, if there are any, may be brought to trial.[25]

With respect to this portion of the charge the investigation appears to be a judicial proceeding and the state is about to have its day in court. Neither the majority nor the minority discuss the next ensuing portion of the jury charge which is as follows:

> Furthermore, it is your duty to bring to light those practices which, while not technically in violation of any law, are yet so immoral or corrupt as to be destructive of the purposes of our systems of elections. It is further your right and duty to determine what additional laws, or amendments to existing laws, are needed to adequately deal with the situation with which we are faced and to recommend enactment thereof by the Legislature.[26]

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20 Bridges, *supra* note 6, at 271.

21 Hale v. Hinkle, 210 U.S. 43, at 59 (1906).

22 Harno, "Some Significant Developments in Criminal Law and Procedure in the Last Century," 42 J. Crim. L., C & P.S. 427, 450-51 (1951).

23 *Ibid.* See also Orfield, Criminal Procedure from Arrest to Appeal 146 (1947), and National Commission on Law Observation and Enforcement (The Wickersham Commission), Report on Prosecution 37 (1937).

24 Note, "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590 (1961).

25 Wood, *supra* note 5, 378 n.2.

26 *Ibid.*

This latter portion of the charge clearly gives to the grand jury a function akin to that of the legislative investigating committee. The substantive evil to be prevented by the use of the contempt power, the disorderly and unfair administration of justice, is no longer a potential evil when the grand jury is fulfilling a non-judicial function. The non-judicial responsibilities of the Bibb County grand jury become more significant where, as here, the charge impliedly authorizes the jury to issue a public report without returning any indictments.[27] If a grand jury is permitted to investigate and report on matters of corruption and immorality in the community, it is functioning as an agency for the transmission of public opinion into law, and in this capacity it ought not to be shielded from the ideas and opinions of the members of the community.[28] The scope of the contempt power available to protect a grand jury conducting a quasi-legislative investigation should decrease markedly; except with respect to judicial process to compel disclosure of testimony, the contempt power should disappear altogether. The desirability of maintaining free expression in matters vital to the community is stressed in the majority opinion in *Wood.*

While the nature of the proceeding in *Wood* reasonably calls for freer speech, the interest in protecting the particular spokesman may at the same time be less than in previous cases of contempt by publication decided by the Court. In the *Bridges* case the alleged contemner was acting as spokesman for some twelve thousand members of a C.I.O. union.[29] In *Times-Mirror Co. v. Superior Court of California,*[30] decided together with the *Bridges* case, the alleged contemners were the managing editor and the corporate publisher of a newspaper.[31] In the *Pennekamp* case the alleged contemners were the associate editor and the corporate publisher of a newspaper.[32] In the *Craig* case the alleged contemners were a news reporter, an editorial writer, and a publisher—all connected with newspapers.[33] In the *Wood* case the petitioner, the alleged contemner, spoke only in his capacity as a private citizen.[34] The inhibition of the occasional utterances of one

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[27] Diligent research failed to disclose any controlling Georgia statutes or court decisions. "The majority of courts considering the question have disallowed reports unaccompanied by an indictment." Note, "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590, 595 (1961). A federal grand jury could not return a report without an indictment, because its jurisdiction is coextensive with that of the court of which it is an appendage, and if there were not enough evidence to return an indictment, there would be no "case or controversy." Application of United Elec. Workers, 111 F. Supp. 858, 864 (S.D.N.Y. 1953).

[28] See Application of United Elec. Workers, *supra* note 27, at 864-65, in which it is argued that a grand jury ought not to have any quasi-legislative or quasi-executive functions. The contrary view is expressed in: Note, "The Grand Jury as an Investigatory Body," 74 Harv. L. Rev. 590 (1961).

[29] Bridges, *supra* note 6, at 275.

[30] 314 U.S. 252 (1941).

[31] *Id.* at 271.

[32] Pennekamp, *supra* note 7, at 333.

[33] Craig, *supra* note 8, at 369.

[34] Wood, *supra* note 5, at 382.

man speaking only for himself would result in less social harm in terms of the total dissemination of ideas and opinions than would result from the inhibition of either a spokesman for a large organization or a newspaper of daily circulation. The value to the community of the speech protected in the *Wood* case is arguably less than the value of the speech protected in the *Bridges*, *Times-Mirror*, *Pennekamp*, and *Craig* cases.

An unexpressed factor in the *Wood* case may have contributed to the majority decision to protect the accused individual contemner. In *Green v. United States*[35] the Supreme Court reaffirmed the non-applicability of the guarantees of the fifth and sixth amendments to summary proceedings for criminal contempt. Mr. Justice Black, in a dissenting opinion joined by the Chief Justice and Mr. Justice Douglas, argued that the precedents for the majority decision were error, that summary contempt proceedings ought to be abolished, and that contempt proceedings ought to be governed by the procedural safeguards required by the Constitution.[36] Mr. Justice Black further observed that:

> Within the past few years there has been a tendency on the part of this Court to restrict the substantive scope of the contempt power to narrower bounds than had been formerly thought to exist. . . . In substantial part this is attributable to a deeply felt antipathy toward the arbitrary procedures now used to punish contempts.[37]

The Court has, indeed, applied the "clear and present danger" test so as to restrict the substantive scope of the contempt power. In cases outside of the contempt area the Court has adopted a restatement of the "clear and present danger" test. The restatement, as formulated by Judge Learned Hand, emphasizes the probability and the gravity of the substantive evil to be prevented.[38] The emphasis in the contempt cases remains on the *imminence* rather than the *probability* of the threat to the administration of justice.[39] The dissenters in *Wood* suggest that the majority might be making the test even more stringent by requiring that for a contempt to be punishable the threatened substantive evil must actually materialize rather than just be imminent.[40]

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[35] 356 U.S. 165 (1958).

[36] Green v. United States, 356 U.S. 165, at 194-95 (1958) (Black, J., dissenting).

[37] *Id.* at 196 n.5.

[38] Dennis v. United States, 341 U.S. 494, at 510 (1950): "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is neceseary to avoid the danger."

[39] Craig, *supra* note 8, at 376: "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." This language from *Craig* was quoted approvingly in *Wood, supra* note 5, at 385.

For a discussion of the relation between this test and the "clear and present danger" test to be applied in non-contempt cases see Goldfarb & Donnelly, "Contempt by Publication in the United States," 24 Modern L. Rev. 239, at 243 (1961).

[40] Wood, *supra* note 5, at 400 (Harlan, J., dissenting).

It has been suggested that the administration of justice might best be protected by a narrowly drawn contempt statute which simultaneously "provided certain procedural safeguards for the defendant such as a right of appeal, a jury trial, a trial before a different judge, and a limitation on the amount of fine or term of imprisonment that could be imposed for violations."[41] Regardless of whether the absence of such procedural safeguards was a factor in the *Wood* case, it was not expressed as a basis for the decision. The Court did find that the petitioner's statements did not so endanger the fair and orderly administration of justice as to reqiure inhibition of the free play of ideas and opinions guaranteed by the first and fourteenth amendments.

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[41] Goldfarb & Donnelly, *supra* note 39, at 254-55.