

The Proud and the Profane: Courts Condemn Cursing Contemptors

By Fred A. Simpson¹ and Deborah J. Selden²

Critics of contemporary literature and mass media decry the rise of profanity and the liberal use of four-letter vulgarities. The federal judiciary shares this disapproval. Federal courts employ established rules and contempt statutes to punish vulgar language and inappropriate courtroom conduct.³ A recent Fifth Circuit case shows how an attorney's use of profanity during trial was criminal "misbehavior" that obstructed the administration of justice. The Fifth Circuit had no problem upholding the trial court's finding of contempt and conviction for the contumacious conduct involved.

In *United States v. Ortlieb*,⁴ the U. S. District Court for the Middle District of Louisiana convicted the defendant's attorney, Michael S. Fawer (Fawer),⁵ for three specific acts of criminal contempt. During the six-week criminal trial, Fawer repeatedly made vulgar and inappropriate comments to the Assistant U. S. Attorney, Michael Reese Davis (Davis), and to the judge, Ralph E. Tyson (Judge Tyson). Fawer was charged with five contemptuous acts, but was convicted for only the following three "specifications":

- 1) During a bench conference, Fawer told Davis to "Go kiss my ass. Okay?" The judge asked Fawer to apologize to the court and to Davis. Fawer apologized to the court, but repeatedly refused to apologize to Davis. To address the situation, the judge eventually had the jury withdraw. The judge warned Fawer that he would hold Fawer in

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³ 18 U.S.C.A. §§ 401(1) and (2), formerly found at 28 U.S.C.A. § 385. This modern federal statute originated in 1911 and has been used by federal courts regularly throughout the years.

⁴ *United States of America v. Ortlieb*, ___ F.3d ___, 2001 WL 1512093 (5th Cir. (La.)).

⁵ This seasoned lawyer, "AV" rated in Martindale, Hubbell, had a previous criminal contempt conviction reversed. *United States v. West*, 21 F3d 607 (5th Cir. 1994). Years earlier, a federal judge in Mississippi had this to say when that judge wrongfully denied the lawyer *pro hac vice* admission, "I know he is an able fellow but he can't behave himself, he don't have any ethics about him, don't have any respect for counsel or the court or anybody else and that's what I object to." *In re Evans*, 524 F.2d 1004, 1006 (5th Cir. 1975).

contempt if he did not apologize to Davis. Fawer responded, "That is fine," and continued to defend his refusal to apologize.

- 2) During another bench conference, the two attorneys and the judge were discussing an objection raised during Fawer's cross-examination of a witness. Fawer was emphatically referring to Davis when he declared, "Judge, I don't want to deal with this idiot." When the judge told Fawer to apologize for this comment. Fawer responded "No way." The judge then admonished Fawer "You've gone again," [sic], to which Fawer replied, "I don't care." The court did not recess, nor was the jury retired during this incident.
- 3) During Davis's final argument, Fawer raised an objection the judge decided to resolve at the bench. The judge overruled Fawer's objection during the bench conference, to which Fawer responded "Ah, shit." When the judge questioned Fawer about the comment, Fawer replied "I was angry at you because--." He followed this statement by saying that he was not directing the "Ah, shit" comment to the judge, but that the ruling was improper and that the judge knew it was improper. There was no formal recess in the proceedings, and the jury was not retired.⁶

Throughout the history of common law, judges have been deemed to possess inherent powers to control proceedings in their courtrooms and to punish contempt of court. Congress codified this common law power as 18 U.S.C.A. § 401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

⁶ *Ortlieb*, ___ F.3d at n.7, 2001 WL 1512093 at n.7.

The procedure for a federal court to exercise its inherent contempt powers is set forth in Rule 42 (Criminal Contempt) of the Federal Rules of Criminal Procedure:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing, except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Judge Tyson could have used his power under section (a) of Rule 42⁷ to summarily punish Fawer for his contumacious conduct. However, in deference to the jury's convenience he waited until trial conclusion before he conducted contempt proceedings under section (b) of Rule 42: a show cause hearing to examine the alleged misconduct. However, because all relevant facts were memorialized in the trial record, no further evidence was taken by Judge Tyson at the hearing.⁸

The court prosecuted Mr. Fawer under 18 U.S.C.A. § 401 (1). This section requires proof beyond reasonable doubt that the accused attorney engaged in conduct that he knew would interrupt or obstruct the orderly process of the administration of justice.⁹ To convict an individual of contempt, the following four elements have to be proven: (1)

⁷ FED. R. CRIM. P. 42(a).

⁸ *Ortlieb*, ___ F.3d at n.4, 2001 WL 1512093 at n.4.

⁹ *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at *2.

misbehavior, (2) in or near the presence of the court, (3) with *criminal intent*, and (4) the behavior resulted in an obstruction of the administration of justice.¹⁰

No “evil motive” is necessary to establish criminal intent.¹¹ The test for criminal intent requires only that the contemnor commit a volitional act that he knows or should know was wrongful. To establish the “obstruction” element, it must be shown that defendant’s acts (1) delayed the proceedings, (2) made more work for the judge, (3) induced error, or (4) imposed unnecessary costs on the other parties. When measuring the amount of time court proceedings were delayed, the court should exclude any time consumed by the contempt investigation itself.¹² In *Ortlieb*, Judge Tyson had to retire the jury to address Fawer’s first “specification.” Judge Tyson expended additional time and effort to address Mr. Fawer’s inappropriate behavior during the second and third bench conferences.¹³

Judge Tyson fined Mr. Fawer a total of \$5,000 and suspended him from practicing in the federal district courts for one year. On appeal, the Fifth Circuit reversed Mr. Fawer’s suspension because the trial court did not give him proper notice that the court was invoking its inherent power to disbar unruly court officers.¹⁴

Under 18 U.S.C.A. § 401, a court may impose a fine or a prison sentence, but may not impose both penalties for a single act of contempt.¹⁵ However, when a contemnor commits multiple contemptuous acts, he may be fined *and* imprisoned.¹⁶

¹⁰ *Id.*

¹¹ *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at * 3, citing to *United States v. Warlick*, 742 F.2d 113 (4th Cir. 1984).

¹² *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at *4.

¹³ *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at *4.

¹⁴ *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at * 4. However, the Fifth Circuit did not foreclose the possibility that this remedy could be assessed in this case after the giving of proper notice. *Id.*

¹⁵ *Ortlieb*, ___ F.3d at ___, 2001 WL 1512093 at *8. *See also In re Bradley*, 63 S.Ct. 470, 318 U.S. 50, 87 L.Ed. 608 (1943).

¹⁶ The trial judge has more leeway in cases of coercive (a/k/a civil) contempt where a fine and imprisonment may both be assessed. The fine is criminal punishment for refusing to comply with the court’s order and falls under the restrictions of 18 U. S. C.A. §410. The imprisonment is coercive in nature, not punitive. The contemnor “holds the keys to the jailhouse in his pocket,” and by merely complying with the court’s order, he may regain his freedom at anytime. *See, e.g., Gompers v. Buck’s Stove & Range Co.*, 31 S.Ct. 492, 221 U.S. 418, 55 L.Ed. 797 (1911).

Federal court fines of \$5,000 for contempt are not uncommon.¹⁷ Fines of \$500,000 to \$600,000 have been found not to be excessive,¹⁸ although fines of \$3.5 million may be.¹⁹ Federal courts also have the discretion to assess varying periods of incarceration,²⁰ and sentences of confinement for a year and a day are also not uncommon punishments.²¹

In contrast, the Texas Constitution²² provides a limited range of punishment for acts of criminal²³ contempt in state court. The maximum punishment for an act of criminal contempt is confinement for six (6) months and a \$500.²⁴ The contempt powers of justice and municipal courts are even more limited and those courts may only impose fines of not more than \$100 and up to 3 days in jail for each act of contempt.²⁵

Had Mr. Fawer committed the acts described above in a Texas state court, the trial judge could have fined him a total of \$1,500, and also could have sentenced him to as much as 18 months in jail. The possible punishment inflicted by a state court is still rather mild in contrast to what Judge Tyson could have assessed Mr. Fawer. The next time somebody tells you that a federal judge is much closer to God than a state judge, consider the relative powers of each jurist to punish acts of criminal contempt. You may agree on those grounds alone.

¹⁷ See, e.g., *Downey v. Clauder*, 30 F.3d 681, 685 (6th Cir. 1994).

¹⁸ See *League of Voluntary Hospitals and Homes of N.Y. v. Local 1199, Drug & Hosp. Union*, 490 F.2d 1399, 1404 (1973); *United States v. Greyhound Corp.*, 508 F.2d 519, 541 (7th Cir. 1974).

¹⁹ See *United States v. United Mine Workers of America*, 67 S.Ct. 677, 701-02, 330 U.S. 258, 304, 91 L.Ed. 884 (1947).

²⁰ See *United States v. Seavers*, 472 F.2d 607, 611 (6th Cir. 1973).

²¹ See, e.g., *Nilva v. United States*, 228 F.2d 134 (8th Cir. 1955), judgment aff'd in part, sentence vacated on other grnds. 77 S.Ct. 431, 352 U.S. 385, 1 L.Ed.2d 415 (1956).

²² TEX. CONST. art. V, § 8.

²³ See *Ex parte Scott*, 123 S.W.2d 306, 311 (Tex. 1939).

²⁴ GOV'T CODE ANN. § 21.002 (b)

²⁵ GOV'T CODE ANN. § 21.002 (c).