from which the assured or his representatives could reasonably imply such purpose or intent. The claim of estoppel or waiver is not supported by the facts shown and the questioned judgment must be

Affirmed.

JURNEY v. MacCRACKEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 339. Argued January 7, 8, 1935.—Decided February 4, 1935.

1. The power of a House of Congress to punish a private citizen who obstructs the performance of its legislative duties, is not limited to the removal of an existing obstruction but continues after the obstruction has ceased or its removal has become impossible. P. 147.

   Held in this case that the Senate had power to cite for contempt a witness charged with having permitted the removal and destruction of papers which he had been subpoenaed to produce.
2. The Act making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor (R. S. § 102) did not impair but supplemented the power of the House affected to punish for such contempt. P. 151.
3. Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. P. 151.
4. Where a proceeding for contempt is within the jurisdiction of a House of Congress, the questions whether the person arrested is guilty or has so far purged himself that he does not deserve punishment, are questions for that House to decide and which can not be inquired into by a court by a writ of *habeas corpus*. P. 152.

63 App. D. C. 342; 72 F. (2d) 560, reversed.
Supreme Court, D. C., affirmed.

CERTIORARI, 293 U. S. 543, to review the reversal of a judgment discharging a writ of *habeas corpus* by which the above-named respondent sought to gain his release from the custody of the above-named petitioner, the Sergeant-at-Arms of the Senate.

Mr. Leslie C. Garnett, United States Attorney for the District of Columbia, with whom *Mr. H. L. Underwood,* Assistant United States Attorney, was on the brief, for petitioner.

There can be no question of the power of the Senate to require the production of the documents subpoenaed in this case. *McGrain* v. *Daugherty,* 273 U. S. 135. It is undisputed that the respondent did not produce all the papers covered by the subpoena and in his possession or subject to his control at the time the subpoena was served upon him. In clear violation of its mandate, he permitted relevant papers to be taken away, secreted, and destroyed. This was a contempt of the Senate. The fact that respondent put it out of his power to produce the documents does not affect the right of the Senate to punish him for this contempt—indeed, it adds to the contempt—and the fact that some of the papers were thereafter secured by the Senate from other persons does not purge respondent of his contempt.

The power of the Senate to punish does not cease because the act complained of has been committed. This power of the Senate is necessary to enable it to perform its legislative function. To assert that it ceases when the act of contempt is complete is to withdraw the admitted power at the very time when its exercise is necessary. *Marshall* v. *Gordon,* 243 U. S. 521.

Any facts or arguments presented on behalf of the respondent going to show that he attempted to purge himself of his contempt must be presented to the Senate, which is the tribunal having jurisdiction of this contempt; they have no place in the *habeas corpus* proceedings. *Henry* v. *Henkel,* 235 U. S. 219, 229; *Marshall* v. *Gordon, supra; Anderson* v. *Dunn,* 6 Wheat. 204; *Kilbourn* v. *Thompson,* 103 U. S. 168; *Re Chapman,* 166 U. S. 661; *Kielley* v. *Carson,* 4 Moore P. C. 63.

The power of the Senate to punish summarily for contempt is governed by the same principles as the power of the judiciary to punish for contempt. The test is the character of the act done and its direct tendency to prevent and obstruct the discharge, in the one case of a legislative, and in the other of a judicial, duty and function. *Marshall* v. *Gordon, supra; Toledo Newspaper Co.* v. *United States,* 247 U. S. 402. Since this power is inherent in the courts and in the Senate (and House of Representatives), the Senate may entertain a proceeding to vindicate its authority and to deter other like derelictions. *Ex parte Grossman,* 267 U. S. 87, 111, 117-118. It is not limited to the statutory remedy provided (U. S. C., Title 2, § 194). Both may be availed of. *Re Chapman,* 166 U. S. 661.

The documents taken by Mr. Brittin from the files in the office of respondent were not all presented to the Senate. Such of them as were recovered after being torn up by Brittin were made available by the efforts of investigators of the Post Office Department. See Sen. Doc. No. 162, pp. 106 to 116, 73d Congress, 2d Sess.

The assertion that full compliance with the subpoena has been made ignores the facts. Immunity from contempt of the Senate cannot be claimed because an agency of the Government has frustrated the attempted total destruction of the papers and saved what otherwise would have been lost, a result in no wise due to respondent. He cannot thereby escape the consequences of this additional contempt of the Senate and its process.

The respondent concedes, as he must, that the Senate had the power to require the production of the documents subpoenaed, and that the inquiry which the Senate, through its committee, was conducting was one which it was empowered to make. Also, necessarily conceded is the power of the Senate to punish for the refusal to

produce. These things were settled by this Court in *McGrain* v. *Daugherty,* 273 U. S. 135.

By leave of Court, *Hon. Hatton W. Sumners,* Chairman of the House Committee on the Judiciary, argued the cause on behalf of the House of Representatives, as *amicus curiae.**

A challenge to the existence of any power in the Houses of Congress summarily to punish for a completed act interfering with the effectiveness of their inquisitorial power, goes deep into the structure of the Government. If Congress is indeed dependent upon the other branches for the facts necessary to guide its legislative judgment, then Congress is not in fact a responsible coördinate branch of the Government. But the denial goes farther. It is a denial of all summary power from any source to punish for a completed act interfering with legislative processes. If respondent's theory were sustained, such power would not only be withheld from the legislative branch; no other agency of government could exercise summary power in behalf of that branch. Whether or not even the slow, uncertain criminal procedure would be put in operation to support the Houses of Congress, seeking to discharge a constitutional duty, would depend entirely upon the other two branches of the Government. Under such an arrangement, it could not be held that Congress is a responsible, coördinate branch of the Government. Congress cannot be held responsible for not doing properly that which it does not have the power properly to do.

Punishment for interference with governmental processes is not punishment for a crime in the ordinary sense. It is a sort of consolidated power of government; of

* The substance of Mr. Sumners' oral argument is taken from a copy which was kindly furnished by him at the request of the Reporter.

quick, direct action, originating out of necessity, which goes with certain duties assigned to the judicial and legislative branches of government as a protective and effectuating agency. If contempt were a crime in the ordinary sense, the individual proceeded against would be entitled under his constitutional guaranty to trial by jury. The legislative branch could not proceed at all; courts could not proceed except in the ordinary way.

The sole concern of this extraordinary governmental power is for governmental efficiency. Necessity initiates it, justifies it, and fixes its limits. This Court has provided the yard-stick. In *Anderson* v. *Dunn,* 6 Wheat. 204, 232, it says: "Analogy, and the nature of the case, furnish the answer—'the least possible power adequate to the end proposed.'" So measured, when there is an equality of need among the branches of the Government, there must be allowed an equality of power. To hold that a branch of the Government, manned by a personnel chosen directly by the people, answerable directly to the people, and removable directly by the people, may not be intrusted with enough power of itself properly to protect itself and properly to discharge its constitutional responsibility, is an indictment of the scheme of representative government.

The House of Commons was never a part of the English judiciary. It drew no power or privilege of Parliament from that source. The House of Lords, when exercising judicial functions, did not do so as a part of the legislature. It is true that during the confusion of powers and the shifting of power back and forth among the King and Lords and Commons, each when powerful enough moved across the line of its natural jurisdiction. In isolated instances during those times the House of Commons attempted to exercise at least quasi judicial power; but suitors never resorted to the House of Commons. It was never recognized as a judicial tribunal and

its attempts in that direction were always challenged, and were abandoned more than a century before we wrote our Constitution. Even the judicial power of the House of Lords had practically ceased to exist at that time; it passed to the great law officers of the Government. Even the power to impeach had fallen into disuse. Since 1715 there have been only two cases of impeachment, according to the great English authority, Sir Erskine May. The development of Cabinet Government directly responsible to the House of Commons, the removal of judges by joint address, and the subjecting of all public officials to the jurisdiction of ordinary courts, removed the necessity for this power and with it went the power.

When we wrote our Constitution, most of these powers and privileges of Parliament had lost the support of necessity and fallen away, leaving the fiction instead of the fact of their existence. The privilege of judging of the election of its own members has since passed from the House of Commons to the judiciary. But this is significant: This power summarily to proceed against those who interfered with the discharge of legislative duties was as completely possessed and exercised by the Houses of Parliament at the time we wrote our Constitution as it had ever been. Not only was that true, but as the scope and difficulty of governmental responsibilities had increased, the importance and the frequency of exercise of the inquisitorial powers of Parliament had continued to increase. Those parliamentary powers and privileges which had ceased to be sustained by necessity fell away, while the powers, including this summary power, which were sustained by an increasing necessity, became more vigorous and more frequently exercised in proportion to that increasing necessity. That tendency has continued since our separation from Great Britain. As the affairs of government become more complex and as the forces with which government must deal in protecting the gen-

eral public interest become stronger, better organized and more shrewdly advised, the necessity for a strong inquisitorial agency of government must increase. Access to documents is indispensable.

This power of the House of Commons to punish for a completed act which interfered with the effectiveness of its process came attached to the legislative branch into our Constitution, by adoption of that to which it was attached. The contemporaneous practices of Congress recognize this; and this Court, in *Anderson* v. *Dunn,* held to the limitation of judicial interference which obtained under the unwritten constitution. The effect of *Kilbourn* v. *Thompson* and subsequent opinions, leaves the former judicial and practical construction undisturbed insofar as the inquisitorial powers of Congress are concerned.

Did the writing of our Constitution make any material change in the general line of cleavage formerly established under our unwritten Constitution between the legislative and judicial branches of our government? The great struggles of English constitutional history had been to bring about a governmental arrangement under which these branches would possess each for itself an independent power adequate for the discharge of its duties and with the incidental purpose of fixing inescapable responsibility for their discharge. The facts of history leave no doubt on that point, nor do they leave any doubt that it was our purpose to preserve that arrangement. Did we succeed in doing so? Parliament enacted bills of divorce and attainder and some others which are semi-judicial. These powers were not denied to Congress under the written Constitution. They were denied to the Federal Government.

The Houses of Parliament passed private bills semi-judicial in their nature, but each session of Congress we pass many private bills. Evidence is taken, witnesses are

examined, argument had, judgment given, and money paid out of the Treasury. Yet the passage of these bills does not make the Houses of Congress part of the judiciary. The enactment of this character of legislation makes neither the Parliament nor the Congress a part of the judiciary.

Powers may be delegated to this Court to appoint inferior officers. The exercise of that power would not make this Court a part of the Executive branch of the Government.

The Senate sits in the trial of impeachment. That does not make it a part of the judiciary. The Senate sits in conference with the President on the appointment of executive and other officers. That does not make the Senate a part of the Executive.

We did not create a new Constitution as a result of the Revolution. All the pre-Declaration-of-Independence conventions and resolutions show, whether from small groups or from such sources as the Boston Convention and the Continental Congress, the demand of the Colonies was not for a new Government or for a new Constitution. The complaint was that King George and his Parliament were violating our Constitution which had come down to us through the centuries as our heritage from our ancestors. We fought not to free ourselves from a Constitution, but to preserve it. Ours was not a true revolution. It was a territorial secession and a resort to arms to preserve our existing Constitution. When we wrote our Constitution we naturally brought forward in the main our former unwritten Constitution. On this point an analytical comparison of the unwritten and the written Constitutions, the facts of our history and the weight of probabilities agree.

Whether the test of necessity laid down by this Court is to be applied for the Houses of Congress by the courts,

or by the Houses of Congress for themselves, and answer given by them to the people for the method of exercise, may sometime become important; but in either case, it ought to be agreed that exercise of summary power by any branch of the Government ought always to fall within the limitations of necessity as laid down by this Court in *Anderson* v. *Dunn.*

With respect to making effective their procedure in getting facts upon which to base official action, the necessities of the legislative and judicial branches of the Government in all respects are identical. Their procedure is identical. Their need for protective and effectuating power is identical. If it be true that Congress is a responsible coördinate branch of the Government, it is difficult to conceive upon what political philosophy or notion of our system one of the coördinate branches, the judiciary, should be asked to deny to another coördinate branch a power to aid in doing its work, which power the branch of the Government of which the request is made finds necessary in the doing of an identical thing, of an identical importance, in exactly the same way, and by the same methods.

The power of the national legislature to guard and make respected and effective its own processes and the power of the judiciary by its intervention to stop the exercise of that power are directly in issue in this case. The possession of power by each of these branches to punish summarily those who interfere with its efforts to get the facts necessary to discharge a governmental duty, is not a blending or confusion of powers, but their separation. Such an arrangement gives to each the necessary power efficiently to do its work and thereby fastens upon each inescapable responsibilty for properly doing its work. Such an arrangement also tends to the preservation of interdepartmental harmony and mutual respect and helpful-

ness. Without such an arrangement there cannot be responsibility. Without responsibility, there cannot be efficiency.

If the respondent's contention is sustained, a witness summoned *duces tecum* before the Senate, for instance, could assault the process server. That would be a completed act. He could not only refuse to respect the summons, but he could destroy the documents summoned, after service. He could bring them into the presence of the Senate and in its presence destroy the documents, and that destruction, being a completed act, would relieve him from all power of the Senate, coercive or otherwise. The Senate could only go to the other branches of the Government and tell them about it.

If the same limitation rested upon the power of this Court which respondent asks the court to declare with respect to the Houses of Congress, a document vital to a litigation could be destroyed after service of subpoena, possibly in the court room, and yet the Court could do nothing but appeal to the District Attorney. And if he were persuaded to act, punishment would still depend upon persuading the Judge, the grand jury, and each of 12 petty jurors. Doubtless there are many interests in this country that would like to see that limitation put upon the power of the courts, as well as upon the Houses of Congress.

It is necessary to protect the interests of the private citizen against governmental oppression, and it is also necessary to preserve a sufficient strength in government to protect the interests of the people. Government, in order to be respected and to be able to protect the weak, must be strong enough to compel respect for its mandates.

In a definite sense, under the test of necessity provided by the Court, this is a fact case. The Houses of Parliament, before the Constitution was written, insisted upon this power as a matter of necessity, and public

opinion agreed. They were experts on the question of need. The same is true with reference to the judiciary during that period. Since the writing of our Constitution, our judges, our members of Congress, British judges, and members of the British Parliament, by practice and formal action give their testimony that this power is a necessity.

Consider the place of the Senate in our Government, its relation to the people and the vast powers intrusted to it by the Constitution. And yet this Court is asked to hold that in a matter, however important, when the examination of documents is necessary, an individual who could help the Senate if he would, may be guilty of every conceivable act of contempt and interference, may paralyze its inquisitorial machinery, and that there is no power by certain and speedy punishment to establish respect and compel obedience and coöperation. If that were to be held, upon what basis could the Congress claim to be a responsible coördinate branch of the Government, or upon what foundation of fact could the people hold it to that responsibility?

Mr. Frank J. Hogan, with whom *Messrs. Edmund L. Jones,* and *Duke M. Patrick* were on the brief, for respondent.

The acts complained of were past and completed acts.

The resolution and warrant and the other proceeding in the Senate, including the debate leading to the adoption of "the mode of procedure and rules" for the trial of the case, reveal the intention of the Senate to try a private citizen for a completed (alleged) offense, for the sole purpose of inflicting punishment as such.

The administration of punishment as such for a past and completed act is criminal rather than civil in character. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441.

Not only is punishment for crime a judicial function; not only, under our Constitution, is the judicial power sharply separated from the legislative and executive; but it is contrary to the spirit of our institutions to treat anything as a crime unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed, as punishment, by any branch of the Government except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law, unbiased as to facts, and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment. He is not to be indicted, tried, judged and sentenced by a purely political body of our Government, where, after hearing the same evidence and being, presumably, governed by the same rules of law, partisan reasons may result in a division on the questions of guilt, and infliction of punishment based almost entirely on party lines; a body responsible to no higher authority for its ignoring of evidence or its disregard of settled law; from which, if the Senate's present position be sound, there is no appeal; against which no bill of impeachment can be brought.

Nor will it alter the character of the transaction to say that, even though designed and intended as a punitive measure, it would also have remedial effects. In the first place, the primary and not the incidental object is the one which controls the nature of the punishment. *Gompers* v. *Bucks Stove & Range Co., supra.* In the second place, the record shows that under the circumstances it could not have had a remedial effect. The offense with which respondent was charged, when tested by any standard, constituted a criminal contempt.

In vain do we search the Constitution for any provision authorizing either House of Congress to try and imprison a private citizen for any offense.

By § 5 of Art. I, a House may punish its own members for violating its rules or disturbing its proceedings; and that is all. But there are other provisions which vest the entire judicial power of the United States in the federal courts exclusively (Art. III, § 1; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 328); and others which command that the trial of crimes, except in cases of impeachment, shall be by jury; that in all criminal prosecutions the accused shall enjoy the right of a trial by an impartial jury; and that no person shall be deprived of life, liberty or property without due process of law.

In *Anderson* v. *Dunn,* 6 Wheat. 204, the first case on the subject, the sole question presented was whether the House of Representatives could take cognizance of contempts committed against themselves *under any circumstances.* This Court answered that question in the affirmative; but the case is no authority for the existence of a broad power, which, when formally exercised, cannot be the subject of judicial inquiry. The extent of the implied power, when any exists, was declared to be "the least possible power adequate to the end proposed," (6 Wheat. 231), which, said Chief Justice White in *Marshall* v. *Gordon,* 243 U. S. 521, "was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify."

The opinion in *Anderson* v. *Dunn* was criticized and limited in the next case on the subject, *Kilbourn* v. *Thompson,* 103 U. S. 168. There the contention was again made that the power of Congress or either House to punish a person not a member for contempt was a broad and unreviewable power. The Court noticed that the argument in favor of the existence of such a power rested, first, on its exercise by the House of Commons of England, from which it was said we derived our system of parlia-

mentary law; and, secondly, upon the necessity of such a power to enable the two Houses of Congress to perform their duties and exercise their express powers under the Constitution.

In answering these arguments, this Court pointed out that such power could not possibly be implied from the powers which the Constitution confers expressly without doing violence to the letter and spirit of the Constitution itself, the source of all federal power whatsoever. Among other things, the Court discussed the difference between our legislative system and the English Parliament, observing that that difference had been judicially noticed and applied by the English Courts themselves in *Kielley* v. *Carson,* 4 Moore (P. C.) 63. The conclusion was that while, under certain circumstances, either House of Congress has power to deal with a contempt committed by a person not a member, the exercise of the power is limited to cases where it is necessary to the proper performance of constitutional functions, and that judicial inquiry into the circumstances is contemplated by our constitutional form of Government and necessary for its preservation.

The Court there characterized the division of our Government into three grand departments—executive, legislative, and judicial—as one of the chief merits of our system, and declared it essential to the working of the system that persons entrusted with power in one of the branches shall not be permitted to encroach upon the powers confided to the others. It pointed out that the power of Congress itself, when acting through the concurrence of both branches, is a power dependent solely on the Constitution, and that such powers as are not conferred by that instrument, either by express grant or by fair implication from such grant, are reserved to the States or the people; that no general power of inflicting punishment was conferred upon Congress by that instrument, and that any such implication was repugnant to other

express provisions, such as the due process clause of the Fifth Amendment, which had repeatedly been construed by this Court and others of the highest authority as requiring in such cases a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. To make what the Court evidently regarded as a manifestly clear proposition doubly so, it was observed that of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in response to an express constitutional provision to that effect; and, in declaring that the judicial power shall be vested in the Supreme Court and the inferior courts to be ordained by Congress, the Constitution in effect declares that no judicial power is vested in Congress or either branch of it, save in the cases specifically enumerated.

In *Marshall* v. *Gordon,* 243 U. S. 521, this Court applied these controlling principles to a situation essentially like the case at bar. In that case, decided as one of first impression, the Court said that the power of the House of Commons to punish directly for a variety of contempts rested upon an assumed blending of legislative and judicial powers which would be destructively incompatible with our tripartite form of Government. It declined to accept the argument that either House of Congress had such authority. The implied power "rests solely upon the right of self-preservation to enable the public powers given to be executed." The power "does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to *prevent* acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to *compel* in order that legislative functions

may be performed." Reviewing the history of the subject since the adoption of the Constitution, this Court in that case was unable to discover a single instance where, in the exertion of the power to compel testimony, restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty of punishment for the refusal remaining controlled by the general criminal law, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration.

In the present case it is patent that the Senate now asserts on the ground of necessity the existence of practically the full power belonging to the House of Lords, though this Court has distinctly held that it has no such power by express grant or by analogy to that body.

We submit that the decision in *Marshall* v. *Gordon, supra,* a decision neither weakened nor destroyed in any subsequent case, clearly holds that while each House of Congress may have all power, by removal from its halls, and by coercive imprisonment, necessary to enable it to perform its constitutional duties, it is absolutely without power itself to impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offenses, punishments must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

This is not to say that there is no power to continue to deal with contemptuous conduct to prevent its continuance or immediate obstructive recurrence. The power so to deal, and the limitation thereof, are made crystal clear in the Chief Justice's opinion in the *Marshall* case. In *Kilbourn* v. *Thompson,* 103 U. S. 168, 182 *et seq.,* this Court gave emphatic and unqualified approval to the

decision of the Privy Council in the English case of *Kielley* v. *Carson,* 4 Moore (P. C.) 63. In *Marshall* v. *Gordon, supra,* this Court again refers at length to *Kielley* v. *Carson,* and gives unqualified approval to the principal point there decided, namely, that the ancient power of the British Houses of Parliament to inflict punishment, as such, for contempts or other offenses, did not exist in such legislative bodies as the Houses of Congress of the United States.

The opinion in the *Marshall* case concedes that "when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority," "jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power." But no tenable argument can be made to uphold the contention that, after the papers which had been taken from respondent's office by Givven had been returned and produced before and delivered to the Committee, the Senate, or any one else, could legitimately and fairly conclude that there was "necessity," in proceedings to punish in order to prevent immediate recurrence of respondent's act.

Congress has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder; to keep order in the halls of Congress, and to that end to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law; and, as to witnesses, to

force a witness to attend before either House, or any committee thereof, and to testify, or produce, under proper subpoena, material documents, and, as a means to that end, to coerce him by imprisoning him until he does attend and testify or produce.

For the offense committed by the past refusal to testify or produce, the penalty or punishment remains controlled by the general criminal law (see 243 U. S., p. 544).

Existing law (§§ 102–104 and 859, Rev. Stats.), enacted by both Houses, and approved by the Executive, would seem ample to provide for protection. But if anything be lacking, Congress may supply it by law. See *Marshall* v. *Gordon, supra,* p. 548.

McGrain v. *Daugherty,* 273 U. S. 135, solely concerned the power to arrest a citizen and bring him before the bar of the Senate to answer questions pertinent to an inquiry being properly conducted by the Senate. In it the principles established in the *Kilbourn* and *Marshall* cases were in no sense qualified.

The cases involving proceedings under the general criminal law to punish for conduct amounting to contempt, do not controvert, but admit, the accuracy of the rule contended for by respondent. *In re Chapman,* 166 U. S. 661; *Sinclair* v. *United States,* 279 U. S. 263. The *Chapman* case particularly recognizes and applies the basic difference between punishment as such and punishment which is merely an incident to a coercive measure. And this is twice pointed out in *Marshall* v. *Gordon,* 243 U. S. 521, at pages 542 and 547.

If, as petitioner contends, the Senate has the power to administer punishment as such, then, we ask, Why is this punishment confined (as petitioner concedes) to imprisonment only? Why has not the Senate the power to punish by fine or by both fine and imprisonment? If the Senate may impose a sentence for the definite period of ten days, why can it not impose one of ten months or two

years? And lastly, why may not the imprisonment extend beyond the session? The answer is: Because the power is remedial and coercive only.

Marshall v. *Gordon, supra,* and *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, are clear illustrations of the fundamental difference between the legislative and judicial power to inflict punishment, as punishment, for contempt. *Ex parte Grossman,* 260 U. S. 87, recognizes and applies the difference between civil contempt and criminal contempt as pointed out in the case of *Gompers* v. *Bucks Stove & Range Co., supra.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition for a writ of *habeas corpus* was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District with directions to discharge the prisoner from custody. 63 App. D. C. 342; 72 F. (2d) 560. This Court granted certiorari because of the importance of the question presented.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The Resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an enquiry which it had the constitutional power to make; that the Committee[1] had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain* v. *Daugherty,* 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena *duces tecum,* or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional aver-

[1] Pursuant to Senate Resolution 349, 72nd Congress, Second Session.

ments essential to the decision of the question presented are, in substance, these: The Senate had appointed the Special Committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail." MacCracken had been served, on January 31, 1934, with a subpoena *duces tecum* to appear "instanter" before the Committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he was a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the Committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the Committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the Committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1, he personally permitted Givven, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized

him to take therefrom papers which did not relate to air mail contracts. Givven, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice-president of Northwest Airways, Inc., without MacCracken's knowledge, requested and received from his partner, Lee, permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the Committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a wastepaper basket.

Upon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege.[2] Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the Committee all the papers then remaining in the files. On February 3, (after a request therefor by MacCracken) Givven restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by

[2] Upon the conclusion of the hearing on February 2, the Committee made to the Senate a report (No. 254) setting forth the facts elicited. Thereupon the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant-at-Arms to take MacCracken into custody before the bar of the Senate; "to bring with him the correspondence . . . referred to and then and there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound. . . ." The warrant was served on February 2, 1934; MacCracken was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On that day (in view of Resolution No. 172) he was released from custody under Resolution No. 169; and the proceedings under Resolution No. 169 are not here involved.

Brittin were later produced.[3] It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States "to the best of his ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 . . . all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punish-

[3] But the brief for MacCracken, the respondent, states: "By February 6th every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate." The reference in the brief is to the fact (to which attention was called by counsel for Jurney) that, after MacCracken and Brittin had testified, post office inspectors, acting for the Committee, searched the sacks of waste papers taken from Brittin's office; and succeeded in collecting most of the pieces of the papers which Brittin destroyed. By pasting these pieces together they were able to restore for the Committee most of the papers removed from the Northwest Airways, Inc., files. (Senate Document No. 162, 73rd Cong., 2nd Sess., pp. 106–116.)

able unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn* v. *Thompson,* 103 U. S. 168, there was no legislative duty to be performed; or because, as in *Marshall* v. *Gordon,* 243 U. S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795;[4] and since then it has been exercised on several occasions.[5] It was asserted, before the Revolution, by the colonial

[4] Robert Randall and Charles Whitney were taken into custody by the House of Representatives, on December 28, 1795, on charges of attempting to bribe some of its members. Whitney was discharged on January 7, 1796, before trial. Randall, however, on January 6, was found guilty of a contempt and of a breach of the privileges of the House, was reprimanded by the Speaker, and was committed to the custody of the Sergeant-at-Arms until further order of the House. On January 13, his petition to be discharged from custody was granted, upon payment of fees. 5 Annals, 4th Cong., 1st Sess., 166–195, 232, 200–229, 237, 243.

[5] In 1832, Samuel Houston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees. 8 Debates, 22nd Cong., 1st Sess., 2512–2620, 2810–3022. In 1865, A. P. Field was taken into custody for assaulting a member and was reprimanded by the Speaker. 70 Globe, 38th Cong., 2nd Sess., 991. So too, Charles C. Glover, in 1913. Cong. Rec., 63rd Cong., 1st Sess., 281–283, 499–503, 1431–1453. In 1870, Patrick Wood, for a similar offence, was imprisoned for three months by order of the House. 94 & 95 Globe, 41st Cong., 2nd Sess., 4316–17, 4847, 5253, 5301. In 1795, Sen. James Gunn, whose challenge of a member of the House was considered a breach of privilege, escaped with an apology. 5 Annals, 4th Cong., 1st Sess., 786–790, 795–798. See Shull, Legislative Contempt—An Auxiliary Power of Congress (1934) 8 Temple L. Quart. 198.

assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.[6] In *Anderson* v. *Dunn,* 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall* v. *Gordon, supra,* upon which MacCracken relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offence; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the estab-

[6] See Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691, 700–719; Clarke, Parliamentary Privilege in the American Colonies, Essays in Colonial History Presented to Charles McLean Andrews (1931), pp. 124, *et seq.;* May, Law and Usage of Parliament (5th ed., 1863), pp. 83–97. Since the American Revolution, it has been held that colonial assemblies of the British Empire, have, in the absence of express grant, and "without any usage, any acquiescence, or any sanction of the Courts of Law," no power to adjudicate upon, or punish for, contempts, *Kielley* v. *Carson,* 4 Moore P. C. 63; even when the contempt is committed in the presence of the Assembly by one of its own members. *Doyle* v. *Falconer,* L. R. 1 P. C. 328; *Barton* v. *Taylor,* 11 App. Cas. 197; compare *Whitcomb's Case,* 120 Mass. 118, 122. But upon some colonial assemblies contempt powers as broad as those of the British House of Commons have been conferred. Compare *Dill* v. *Murphy,* 1 Moore P. C. (N. S.) 487; *The Speaker of the Legislative Assembly of Victoria* v. *Glass,* L. R. 3 P. C. 560; *Fielding* v. *Thomas,* (1896) App. Cas. 600.

lished and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means.[7] Compare *Ex parte Nugent,* Fed. Cas. No. 10,375; *Stewart* v. *Blaine,* 1 MacArthur 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power.[8] The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn* v. *Thompson, supra;* and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes. *Marshall* v. *Gordon, supra.*

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[7] The many instances in which the Houses of Congress have punished contumacious witnesses for contempt are collected and discussed in Eberling, Congressional Investigations (1928). See, too, Dimock, Congressional Investigating Committees (1929); Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; compare May, *op. cit., supra,* pp. 407, 408. Witnesses found guilty of prevaricating before investigating committees have been imprisoned by the House of Commons under circumstances indicating that there was no thought of inducing further testimony, but only of punishing for the past offence. See case of Charles Woolfen, 112 Comm. Jour. 354, 372, 377; of Acton, Sheriff of London, Petyt, Miscellanea Parliamentaria (1680) p. 108; of Randolph Davenport, *Id.,* p. 120.

[8] See remarks of Sen. Charles Pinckney in the case of the Editor of the Aurora, 10 Annals, 6th Cong., 1st Sess., 69; of Rep. Barbour and Rep. Poindexter in the case of Colonel Anderson, 32 Annals, 15th Cong., 1st Sess., 624, 654; of Rep. Polk in the case of Samuel Houston, 8 Debates, 22nd Cong., 1st Sess., 2512; of Sen. Sumner in the case of Thaddeus Hyatt, 53 Globe, 36th Cong., 1st Sess., 1100; see, too, Jefferson's Manual, §§ 293–299.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, R. S. § 102, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair* v. *United States,* 279 U. S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.[9] That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman,* 166 U. S. 661, 671–672: "We grant that Congress could not divest itself or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compare *Ex parte Hudgings,* 249 U. S. 378, 382.[10] As was said in *In re Chapman, supra,* "the same act may be an offence against one jurisdiction and an offence against another; and indictable statutory offences may be punished as such while the offenders may likewise be sub-

[9] See remarks of Rep. Orr, 43 Globe, 34th Cong., 3rd Sess., 404, 405.

[10] Samuel Houston was in fact indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. See 2 Ops. Atty. Gen. 655.

jected to punishment for the same acts as contempts, the two being *diverso intuito* and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for *habeas corpus* that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of *habeas corpus* is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597; *Henry* v. *Henkel,* 235 U. S. 219; *Matter of Gregory,* 219 U. S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.