Should Courts Punish Government Officials for Contempt?

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Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 **Harv. L. Rev.** 1055 (2018).

What happens when a federal court issues a definitive order to a federal agency and the agency takes a how-many-divisions-does-the-Pope-have position in response? The answer that comes to mind is that the court can find the agency or its officials in civil or criminal contempt. But when is that finding available, how often is it used, what sanctions are attached to it, and what is their effect?

Nicholas Parrillo answers those questions in this comprehensive and carefully reasoned article. He collects (using a methodology described in an on-line appendix) all the records of federal court opinions "in which contempt against a federal agency was considered at all seriously" and all the records of district court docket sheets "in which a contempt motion was made…against a federal agency." (P. 696.) After analyzing the results, Professor Parrillo concludes that while district courts are willing to issue contempt findings against federal agencies and officials, appellate courts almost invariably reverse any sanctions attached to such findings. But he also finds that the appellate courts reverse on case-specific grounds that do not challenge the authority of courts to impose sanctions for contempt, and that findings of contempt, even without sanctions, can operate effectively through a shaming mechanism. This article provides unique and valuable documentation about contempt, the "endgame of administrative law" and an obviously important element of our legal system. In addition, it contains major implications about the nature of the appellate process and about the normative force of law itself.

While Professor Parrillo does not explicitly identify the interpretive theory that appellate courts employ in reviewing trial court imposition of contempt sanctions, he strongly indicates that it is *de novo* review, followed by a sort of strict scrutiny regarding the conclusion. The reason, his research reveals, is the obverse of the reason why appellate courts review trial court findings of fact with a deferential standard.

The deference standard is based on the recognition that the trial judge has heard the witnesses, examined the physical evidence in detail, and reached her conclusion based on this experiential and intensive interaction with the litigating parties and the facts at issue. The de novo review and strict scrutiny that appellate courts apply to contempt sanctions are based on the sense that the trial judge has had this same experiential and intensive interaction and gotten angry at the agency.

Recognizing the truth of Aesop's adage that "familiarity breeds contempt," appellate courts, on the basis of their greater distance from the incompetent or recalcitrant agency, seem to employ stringent review of contempt sanctions to counter the trial judge's ire. Their opinions indicate that they are concerned about the disruption of the agency's mission and the impact on the public fisc that would result from imposition of the sanction. This constitutes an important insight into the nature of appellate review, one linked to the emerging literature on law and emotions. In addition to correcting legal errors, the appellate courts make use of their distance from the tumult of trial and of the abstract, discursive character of their own procedures to correct errors of excessive emotional engagement and thus increase the perceived rationality of the law.

Although sanctions for contempt are rarely imposed by trial courts and almost never upheld at the

appellate level, Professor Parrillo does not conclude that findings of contempt are without effect. Rather, both the agency and its individual officials regularly make intense and sustained efforts to avoid being subject to such findings. The reason, Professor Parrillo suggests, on the basis of the language in judicial opinions and statements by agency officials, is that contempt has a powerful shaming function. "Federal agency officials," he writes "inhabit an overlapping cluster of communities…[that] recognize a strong norm in favor of compliance with court orders." (P. 777.)

He thus provides, in the somewhat technical context of administrative law, specific confirmation of Max Weber's sociological insight that government authority is derived from its normative force, an insight echoed in jurisprudence by H.L.A. Hart and in democratic theory by Robert Dahl. Stalin, from a position of absolute power and amoral cynicism, may have thought the Pope's power resided only in any military force that he possessed, but both the leaders and members of a democratic society must accept and rely upon shared norms of legality in order for such a society to function.

This raises the question of civil disobedience; as Professor Parrillo points out at the end of the article, such disobedience is generally based on a countervailing norm. Federal officials, whose position is defined by law, are not likely to believe in any norm that would justify disobedience to law. A number of President Trump's actions, however, suggest that he sees himself outside this legal context, not on the basis of a countervailing norm but as a cynical assertion of power. Professor Parrillo's article serves as a reminder of the crucial role that norms of legality play in our system of government, and the need for all public officials to sustain them absent a convincing and deeply felt countervailing norm that they are willing to assert and defend.

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