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# CRIMINAL LAW

## THE CASE OF THE DISRUPTIVE DEFENDANT: *ILLINOIS v. ALLEN*

JOEL M. FLAUM* AND JAMES R. THOMPSON†

On August 12, 1956, William Allen entered a Chicago tavern and, after ordering a drink, took $200 from the bartender at gunpoint. He was later arrested and identified by the bartender. Allen was subsequently indicted, convicted of armed robbery, and was sentenced to serve ten to thirty years in the Illinois State Penitentiary.

Prior to his trial in 1957, at which the defense was insanity, the defendant expressed dissatisfaction with the public defender, and, after refusing court-appointed counsel, did not retain private counsel as he stated he would. Thereafter, Allen was offered the choice of the public defender or an attorney from the bar association defense committee. He refused both and requested the appointment of one from a list of attorneys he presented. The trial judge denied this request and informed defendant that a lawyer from the bar association would be appointed. Thereupon Allen became adamant in his request that he be allowed to represent himself despite the repeatedly expressed concern of the court about his ability to defend himself. The court finally acceded to Allen's demand, but, in addition, appointed a bar association attorney to assist and advise the defendant.

During the *voir dire* examination of the first prospective juror by the defendant—throughout which Allen had asked many irrelevant questions and indicated a lack of knowledge of the law and procedure—the trial judge instructed Allen to confine his questions solely to juror qualifications.

Thereafter, when the court suggested that counsel take over the examination, Allen proceeded to argue with the judge in a "... most abusive and disrespectful manner."[1] Subsequently, the defendant repeated his obstreperous conduct and the judge admonished him by warning that he would be permitted to remain present only if he conducted himself properly.

The defendant continued to talk and terminated his remarks by stating: "When I go out for lunch time, you're [the judge] going to be a corpse here." Allen then tore his attorney's file and threw the papers on the floor. A second warning followed, but Allen persisted in his unruly conduct and contemptuous remarks and threatened to disrupt the trial. The court finally ordered the defendant removed from the courtroom and directed the appointed counsel to proceed in Allen's behalf.

After the selection of the jury the defendant was invited to return and, although he refused to offer a commitment of proper conduct, he was allowed to remain in the courtroom.

Immediately upon commencement of the trial the defendant provoked another clash with the court and his second removal occurred. After this exclusion he remained out of the court during the presentation of the state's case in chief, except when brought in for purposes of identification.

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Mr. Flaum argued the Allen case before the Supreme Court. He and Mr. Thompson authored the State of Illinois' brief.

[1] United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 233 (7th Cir. 1969).

During one of these latter appearances Allen swore at the court while demanding his right to be present at trial.

Before the beginning of the defense the trial judge again offered Allen the opportunity to remain in the courtroom. Despite only limited assurances of proper conduct, Allen was permitted to be present through the remainder of the trial.

Allen's conviction was affirmed by the Supreme Court of Illinois;[2] and the Supreme Court of the United States denied *certiorari*.[3] Allen's subsequent habeas corpus petition was denied.[4] The Court of Appeals for the Seventh Circuit reversed that judgment with one judge dissenting, concluding that "A defendant in a criminal proceeding has the unqualified right to be personally present at all stages of his trial" and that "No conditions may be imposed on [that] absolute right." [5]

The Supreme Court of the United States, in an opinion written by Mr. Justice Black, reversed the decision of the Court of Appeals:

> "[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the Court that his trial cannot be carried on with him in the courtroom".[6]

The confrontation clause of the sixth amendment[7] ensures the defendant the right to be present through all stages of his trial. To understand the pre-*Allen* scope and application of this guarantee, however, it is necessary to understand the right as it existed at common law, for:

> "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision . . . is to continue and preserve that right, and not to broaden it or disturb the exceptions." [8]

The genesis of the right is to be found in the early common law requirement that no trial for felony could be had in the absence of the defendant. At that time, the rule was cast in jurisdictional terms—the defendant's presence was necessary to the case and could not be waived.[9]

The early rule was also described in terms of recognizing interests of the state in the presence of the accused at trial. Thus, an early commentator on criminal procedure stated:

> ". . . subject to exceptions and qualifications, . . . an indicted person must be present in court whenever any essential thing is done against him. The reasons are two; first, to enable the prosecuting power to identify him, and to inflict on him the pronounced punishment; secondly, to secure to him full facilities for defense. The one reason is in the interest of the State, the other, of the defendant. And these differing reasons, we shall see, are sometimes dissimilar in their effects upon a particular argument or question." [10]

As the rule developed, exceptions came to be recognized, both before and after the adoption of the sixth amendment. Thus, defendant's right to "confront" the witnesses against him did not bar the admission of dying declarations,[11] documentary evidence,[12] or the affidavits of witnesses whose absence from the trial had been wrongly procured by the defendant.[13]

More importantly, whether or not the confrontation clause guaranteed the right to physical presence at trial, two trends in the decisional law can be clearly noted.

First, the rule of presence lost its jurisdictional character. Most courts began to hold that a

[2] 37 Ill. 2d 167, 226 N.E. 2d 1 (1967).

[3] 389 U.S. 907 (1967).

[4] United States District Court for the Northern District of Illinois, May 24, 1968 (no reported opinion).

[5] United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 234, 235 (7th Cir. 1969) (2-1 Decision).

[6] Illinois v. Allen, 397 U.S. 337, 343 (1970).

[7] U.S. CONST., Amend. VI:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, *to be confronted with the witnesses against him:* to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added).

[8] Salinger v. United States, 272 U.S. 542, 548 (1926).

[9] Noell v. Commonwealth, 135 Va. 600, 608–9, 115 S.E. 679, 681 (1923); State v. Greer, 22 W. Va. 800, 811 (1883). The rule was less strict as to misdemeanors. *E.g.*, People v. Beck, 305 Ill. 593, 599, 137 N.E. 454, 457 (1922); State v. Rabens, 79 S.C. 542, 549, 60 S.E. 442 445 (1908).

[10] J. BISHOP, NEW CRIMINAL PROCEDURE 174 (4th ed. 1895). *See also* McCorkle v. State, 14 Ind. 39 (1859).

[11] State v. Betha, 241 S.C. 16, 23, 126 S.E. 2d 846, 849 (1962).

[12] Tucker v. People, 122 Ill. 583, 593, 13 N.E. 809, 812 (1887); People v. Jones, 24 Mich. 214, 225 (1872).

[13] Reynolds v. United States, 98 U.S. 145, 158 (1878).

defendant could waive his right to be present at the trial of a felony case.[14] Waiver was found not only in cases where a defendant simply refused to participate further in the trial, and said so,[15] but also in those cases where it could be inferred from his *conduct*.[16]

An extensive examination of the principle of waiver was undertaken by the Supreme Court in *Diaz* v. *United States*,[17] a case which was to gain reaffirmation in *Allen*.[18] In *Diaz*, a homicide case tried in the Philippine Islands, the accused left the court in the middle of trial and sent back a message that he expressly consented to the continuation of the trial in his absence. After conviction, it was contended:

> ". . . not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence." [19]

The answer to this contention was to be determined by the meaning of a governing statute[20] securing "to the accused in all criminal prosecutions 'the right to be heard by himself and counsel'" which, the Court said, was the "substantial equivalent" of the sixth amendment.[21]

In construing the scope of the confrontation clause, the *Diaz* Court agreed with the great weight of state and federal authority which had held that:

> ". . . the prevailing rule has been, that if, after the trial has begun in his presence, he [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." [22]

The Court felt that without the rule "there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered".[23] If such activity were sanctioned, the accused would be permitted to profit by his own wrong.[24]

Lastly, the Court found no bar to such a holding despite earlier, and seemingly contrary, language in *Hopt* v. *Utah*,[25] and *Lewis* v. *United States*.[26] In both of those cases, the Court noted, "the accused was in custody, charged with a capital offense, and was sentenced to death." In *Hopt*, the Court construed a territorial statute which declared that he "*must* be personally present." The *Diaz* Court read the *Hopt* opinion as holding that the defendant could not, therefore, waive what was in effect a jurisdictional bar to the continuation of a trial in the absence of the defendant. The holding of *Lewis*, according to the *Diaz* Court, was simply that error resulted when a defendant was excluded during the time when challenges were made to the seating of jurors and the defendant had properly and timely objected to proceeding in his absence.[27]

[14] Diaz v. United States, 223 U.S. 442, 455–58 (1912); Scruggs v. State, 131 Ark. 320, 325–26, 198 S.W. 694, 696 (1917); People v. Harris, 302 Ill. 590, 592–93, 135 N.E. 75, 76–77 (1922).

[15] Diaz v. United States, 223 U.S. 442 (1912).

[16] Examples of conduct from which a waiver of the right to confrontation could be inferred are where a bailed defendant abandons the cause or a prisoner escapes from custody during trial. *See e.g.*, United States v. Noble, 294 F. 689, 692 (D. Mont. 1923), *aff'd*, Noble v. United States, 300 F. 689, 692 (9th Cir. 1924); Falk v. United States, 15 App. D.C. 446, 455–61 (1899); United States v. Loughery, 26 Fed. Cas. 998 (No. 15, 631) (C.C.E.D.N.Y. 1876); Sahlinger v. People, 102 Ill. 241, 247 (1882).

[17] 223 U.S. 442 (1912).

[18] 397 U.S. at 342.

[19] Diaz v. United States, 223 U.S. 442, 453 (1912).

[20] Phillipine Act of July 1, 1902, 32 STAT. 691, c. 1369, §5.

[21] 223 U.S. at 454–58.

[22] *Id.* at 455. *See e.g.*, United States v. Loughery, 26 Fed. Cas. 998 (No. 15,631) (C.C.E.D.N.Y. 1876); United States v. Davis, 25 Fed. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1835); Barton v. State, 67 Ga. 653 (1818); Sahlinger v. People, 102 Ill. 241 (1881); Hill v. State, 17 Wis. 675 (1864).

[23] 223 U.S. at 456, quoting with approval from Barton v. State, 67 Ga. 653 (1881).

[24] 223 U.S. at 458, quoting from Falk v. United States, 15 App. D.C. 446, 460 (1899):

"Neither in criminal nor in civil cases will the law allow a person to take advantage of his wrong . . . yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."

[25] 110 U.S. 574 (1884).

[26] 146 U.S. 370 (1892).

[27] 223 U.S. at 458. The force of the *Hopt* and *Lewis* holdings had been further diminished by Mr. Justice Cardozo, writing for the court in Snyder v. Massachusetts, 291 U.S. 97 (1934), who said that:

"*Hopt* v. *Utah* . . . has been distinguished and limited" [and] "What was said in *Hopt* v. *Utah* . . . on the subject of the presence of a defendant was dictum, and no more . . . We may say the same of *Lewis* v. *United States* . . . with the added observation that it deals with the rule at common law and not with constitutional restraints."

The failure to recognize the defects of *Hopt* and *Lewis* led the Seventh Circuit into error in voiding Allen's conviction. 413 F.2d 232 (1969). The Court reversed the district court's refusal to grant a writ of habeas

Any further doubt as to the authoritative value of the *Hopt* and *Lewis* decisions, subject to their interpretation in *Diaz*, was laid to rest by *Allen:* "the broad *dicta* in *Hopt* v. *Utah* ... and *Lewis* v. *United States* ... that a trial can never continue in the defendant's absence has been expressly rejected [by] *Diaz* v. *United States*. . . ." [28]

The pre-*Allen* historical perspective of confrontation insofar as that right is guaranteed by the sixth amendment[29] or as it existed at common law, both before and after the amendment's adoption, indicates, therefore, that: (1) the presence of a defendant was once a jurisdictional requisite to the trial of all felony cases; (2) this strict rule is now followed only in capital cases;[30] (3) a defendant could waive, by word or deed, his right to be present in all other felony cases; and (4) such waiver could be expressed or implied.[31]

The principle directly at issue in *Allen* was whether a defendant in a noncapital felony case could lose his right to be present during portions of his trial when his contumacious conduct compelled the trial judge to expel him in order to facilitate the orderly proceeding of the trial.

When the Supreme Court of Illinois affirmed Allen's conviction on direct appeal, it did so on the basis of its prior opinion in *People* v. *De Simone*.[32] The *De Simone* opinion, upholding the exclusion of a contumacious defendant, relied upon past Illinois cases which, although clearly consistent with the past decisions of the Supreme Court,[33] dealt only with the voluntary absence of a defendant.

Following the filing of a petition for writ of habeas corpus in the federal district court, the case was collaterally examined. Since there appeared to be no direct precedent, the majority of the appellate court, as well as the dissenting judge reached their decisions on the bases of reason and analogy.[34]

However, long recognized and respected precedent did exist. From early days, *and without dissent*, the right of a defendant to be present at all stages of his trial was qualified by the exception that such right was lost when the courtroom behavior of the defendant was so disturbing as to compel his removal and the continuation of the trial in his absence.

This qualification was first recognized by the famous English authority on criminal law, Sir James Fitzjames Stephen, who said:

> "If a prisoner so misconducts himself as to make it impossible to try him with decency, the Court, it seems, may order him to be removed and proceed in his absence." [35]

This view was constantly reiterated by both the English and American commentators who unanimously recognized such a power in the trial court.[36]

corpus "in light of" these decision and that of Shields v. United States, 273 U.S. 583 (1927). *Shields* merely held that "the rule of orderly conduct of jury trial" entitles a defendant to be present when additional instructions are given to the jury. The sixth amendment was in no way involved, or even discussed, in *Shields* and the court cited only a civil case in support of its holding. See 273 U.S. at 588–89.

[28] 397 U.S. at 342.

[29] The sixth amendment is enforcible against the states through the vehicle of the due process clause of the fourteenth amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

[30] *But see* People v. DeSimone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956).

[31] Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

[32] 9 Ill. 2d 522, 138 N.E. 2d 556 (1956).

[33] For example, Sahlinger v. People, 102 Ill. 241 (1882), upon which the *DeSimone* court relied (9 Ill. 2d at 533), was cited with approval by the Supreme Court in Diaz v. United States, 223 U.S. 442, 455 (1912).

[34] The precedents of People v. Allen, 37 Ill. 2d 167, 226 N.E. 2d 1 (1967) and People v. DeSimone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956) aside. However, Circuit Judge Hastings, dissenting, agreed with the disposition of *Allen* by the Illinois Supreme Court. 413 F.2d at 236.

[35] J. Stephens, Digest Of The Law Of Criminal Procedure, Art. 302 (1883).

[36] *See e.g.*, W. Clark, Criminal Procedure 495 (Mikell ed. 1918):

> In cases where the defendant may waive his right to be present, if his conduct is such that it is necessary to remove him temporarily from the courtroom, such temporary absence will not affect the validity of the trial.

J. Archibald, Criminal Pleading, Evidence, And Practice 179 (28th ed. 1931):

> No trial for felony may be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried. . . . If he creates a disturbance it is said that the trial may go on without his presence.

S. Harris And A. Wilshere, Criminal Law 396 (14th ed. 1933):

> In cases of felony the prisoner must be in the dock during the whole of the trial unless he is so violent as to render a trial in his presence impossible.

1 J. Bishop, New Criminal Procedure 179 (4th ed. 1895):

> Disorderly conduct of the prisoner at the trial, such in degree that it cannot go on, has been held to justify the court in removing him, and proceeding in his absence.

D. Fellman, Defendant's Rights Under English Law 68 (1966):

> It is perfectly clear that the accused has a right to be present in court throughout his trial although there is some authority for the proposition that the defendant may be excluded from the court-

Moreover, there were English and American cases which were precisely on point and which were unanimous in upholding the power of a trial court to expel an unruly defendant if his conduct precluded the possibility of an orderly trial.

The principle was apparently first propounded in a reported case in *United States* v. *Davis*.[37] In *Davis*, the defendant, a prisoner in custody, had been indicted for perjury and, after selection of the jury, repeatedly interrupted the opening statement of the district attorney despite admonitions from the court. When he persisted in such conduct, he was ordered removed from the courtroom over the objection of counsel and the trial resumed. On the next day, "the defendant having become composed", the case concluded. On a motion for a new trial the defendant urged his involuntary removal from the courtroom as error. In denying the motion, the District Judge held:

> "This statement [of the facts] seems sufficient to dispose of the point in question. The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empanelled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance." [38]

The question was next raised in *Regina* v. *Berry*[39], an English case, where the court removed a defendant, on trial for burglary, who tore off his clothing, struggled with the wardens, and uttered "loud cries, which, so far as they were understood, were totally irrelevant to the charge."

In *Rex* v. *Browne*[40] the defendant, accused of obtaining property by false pretenses, screamed and shouted in the dock after being warned that the trial would proceed in her absence if she persisted. She did persist, was removed from the courtroom and the trial continued. The trial judge held that there was "quite sufficient authority for this course," relying upon the authority of *Regina* v. *Berry* and an earlier unreported case before Lord Blackburn on the Western Circuit.

Although all of the reported case authority was decided by trial courts, two propositions added weight to their force as precedent. First, there were no contrary cases on point. No court, trial or appellate, had ever held the involuntary expulsion of an unruly defendant to be error, constitutional or otherwise. Secondly, the validity of the case authority and the views of the commentators had been explicitly sanctioned by the Supreme Court. In *Diaz* v. *United States*,[41] the Court approvingly cited *Davis* v. *United States*[42] for the proposition that if a defendant "voluntarily absents himself, this . . . operates as a waiver of his right to be present and leaves the court free to proceed. . . ." [43] Since the principle of voluntary absence was neither involved nor discussed in *Davis*, the *Diaz* Court must have concluded that *involuntary* absence for contumacious conduct was the equivalent of voluntary absence insofar as the reach of the sixth amendment was concerned.[44]

The validity of this reasoning was substantiated by Mr. Justice Cardozo, writing for the Court in *Snyder* v. *Massachusetts*.[45] Prefacing his discussion of whether a jury view of the scene of the crime in the absence of the defendant, and over his objection, violated the confrontation clause, Justice Cardozo declared that although the right of confrontation was guaranteed by both the federal and state constitutions, there was *"no doubt* the privilege may be lost by consent *or at times even by misconduct*." [46] The exactitude of Mr. Justice Cardozo's analysis was totally accepted in

room, and the trial may go on without him, if he persistently creates disturbances and disrupts the trial.

*See also* E. Bowen-Rolands, Criminal Proceedings On Indictment And Information (2nd ed. 1910); Murray, *The Power to Expel a Criminal Defendant from His Own Trial; A Comparative View*, 36 U. Colo. L. Rev. 171 (1964). The only contrary suggestion is found in L. Orfield, Criminal Procedure From Arrest To Appeal 414 (1947):

> [P]ossibly the better course, even in such a case, is to put the defendant under whatever restraint is necessary to allow the trial to continue.

Orfield, however, noted that the precedent of expulsion was also recognized.

[37] 25 Fed. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1869).

[38] *Id.* at 774.

[39] 104 L.T.J. 110 (Northhampton Assizes 1897).

[40] 70 J.P. 472 (London Cent. Crim. Ct. 1906).

[41] 223 U.S. 442 (1912).

[42] 25 Fed. Cas. 773 (1835).

[43] 223 U.S. at 455–56.

[44] This, of course, was precisely the reasoning and holding of People v. DeSimone, 9 Ill. 2d 522, 533, 138 N.E. 2d 556 (1956), the precursor of *Allen*. See text accompanying note 32 *supra*.

[45] 291 U.S. 97 (1934).

[46] *Id.* at 106 (emphasis added).

*Allen* when the Court specifically endorsed and incorporated this very statement into its opinion.[47] The legal effect of exclusion for misconduct was an "imputed waiver" of the sixth amendment right to be present throughout the trial.[48]

Hence, throughout the course of Anglo-American criminal jurisprudence, case law and commentators alike have held that neither the sixth amendment nor the common law precluded the involuntary removal of a defendant who, by his conduct in the courtroom, asserted a right to destroy the orderly pursuit of justice. However, not until *Allen* did the issue come squarely before the Supreme Court.

Simply stated, the Supreme Court held in *Allen:*

> ". . . that a defendant can lose his right to be present at trial, if after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." [49]

At the same time, in *dicta*, the Court upheld the constitutional validity of other methods of dealing with the unruly defendant, namely, contempt and shackling.[50]

Recent experience suggests that the number of criminal defendants who for one reason or another engage in disruptive conduct may be on the increase.[51] *Allen* has now invested state and federal trial judges with extraordinary power to deal with contumacy in the courtroom. However, though wide-ranging as to the available sanctions, the opinion does not speak to some of the problems that will arise in the employment of such sanctions. These problems and their possible solutions, therefore, will constitute the final thrust of this commentary.

*Allen* sanctions at least four possible techniques which may be used by trial judges to end disruption by the defendant: (1) criminal contempt; (2) recess of the trial with the defendant remanded to custody; (3) binding and gagging, and (4) expulsion.[52]

One is tempted to assume that these measures may be placed across a scale—that they express a definitive range of sanctions which escalate to match the nature and degree of the defendant's conduct. If it could be said with some assurance, for example, that mildly disruptive conduct would warrant only the imposition of a contempt sentence, while the most outrageous conduct automatically brought expulsion, the task of trial judges in the application of *Allen* standards would not be difficult. Alternatively, the approved sanctions could be regarded as equal in force and left to the discretion of the court.

The resolution of these conflicting theories is somewhat difficult. Clearly, the opinion was meant to provide maximum *power* to trial judges with the authority to impose it in the broadest exercise of *discretion*. Explicit care was taken, in a case which involved only expulsion, to define all other sanctions available. One reason for this, of course, was simply to present all possible and acceptable solutions. The other, arguably, was to head off claims from other litigants, in past or pending cases, that expulsion was the only proper remedy when they had already been cited for contempt or bound and gagged.

As a result, the Court's technique of opting for a "neutral" description of alternatives prevents any assured conclusion that the penalties range from mild to severe. For example, in approving the use of contempt sentences, the Court said:

> ". . . citing or threatening to cite a contumacious defendant for criminal contempt might in itself be sufficient to make a defendant stop interrupting a trial . . . the contempt remedy *should be borne in mind* by a judge in the circumstances of this case." [53]

Speaking to the use of coercive contempt while recessing the trial, the Court said, "[T]his procedure is consistent with the defendant's right to be present at trial, and yet it avoids the serious shortcomings of the use of shackles and gags." [54] The Court warned, however, that where a defendant might strategically elect to delay the trial, even though it meant confinement in the meantime, a trial judge "must guard against allowing

[47] 397 U.S. at 342.
[48] See Diaz v. United States, 223 U.S. 442, 455–56; J. Stephens, Digest Of The Law Of Criminal Procedure Art. 302 (1883).
[49] 397 U.S. at 343.
[50] *Id.* at 343–44.
[51] It is fair to assume that the Court was not unaware of such occurrences and sought to deal with them as quickly and firmly as possible. Both briefs and oral argument were advanced and the opinion was delivered only five weeks after argument.
[52] 397 U.S. at 343–46.
[53] *Id.* at 345 (emphasis added).
[54] *Id.*

a defendant to profit from his own wrong in this way." [55]

As for binding and gagging, the Court concluded its discussion of the "serious shortcomings" with the open-ended observation that "... in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here." [56]

Finally, the Court held that as to expulsion, "we find nothing unconstitutional about this procedure. Allen's behavior was clearly of such an extreme and aggravated nature as to justify *either* his removal from the courtroom or his total physical restraint." [57]

At least some tentative conclusions may be safely drawn from these *dicta*.

First, there is no requirement that a trial judge threaten to cite, or actually cite, for contempt before imposing the sanctions of shackles and gag or expulsion. If such a requirement existed, the trial court's decision in *Allen* would have been overturned since the threat of contempt proceedings was never voiced by the judge from the beginning of the contretemps to the moment of expulsion. Judge Niemeyer first warned Allen that he would lose the right to defend himself if he persisted in *voir dire* questions beyond the bounds of propriety. Immediately thereafter the judge invoked the possibility of exclusion upon further disruption. Therefore, the Court's injunction to trial judges that the contempt remedy should be "borne in mind" means just that and no more.

Secondly, *Allen* must be read as upholding the right of a trial judge to expel an unruly defendant in the circumstances of all past cases where shackling and gagging has been employed.[58] An examination of earlier cases where convictions were upheld despite the use of shackles has disclosed none where a defendant's conduct was less aggravated than that of Allen. Since the Court would have upheld shackling in *Allen*, it follows that the circumstances of prior binding and gagging cases may be safely used as precedent for expulsion in future trials.

Thirdly, despite the Court's willingness to endorse the use of shackling under the *Allen* facts, and its assumption that under circumstances "which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way," [59] binding and gagging will, inevitably decline in use as a remedy to end disruption and its passing from the judicial scene will not be mourned.

There are several reasons justifying this conclusion. The majority and concurring opinions in *Allen* appear to be a signal to trial courts that binding and gagging is the least preferable remedy. Mr. Justice Black's majority opinion says so directly,[60] and Mr. Justice Brennan's concurring opinion agrees.[61] Furthermore, it is difficult to conceive of a situation where binding and gagging would be "the fairest and most reasonable way" to the exclusion of contempt or expulsion. Moreover, recent experience demonstrates that binding, even to the point of immobility, and gagging will not necessarily end the disruption.[62] Certainly it will not end the distraction of the jury from the issue of guilt or innocence.

Finally, and perhaps most importantly, expulsion quickly ends disruption and distraction and, because of its consequences, promises to bring the most recalcitrant defendant into adherence with proper standards of conduct in the shortest possible time. Doubtless, too, a sanction which is the easiest to administer and is, at the same time the most effective, will be adopted more often by most judges faced with the problem of the unruly defendant. This is, of course, as it should be.

The *Allen* holding is firmly and specifically structured upon the requirement that expulsion may not be employed as a sanction unless it is preceded by warnings which direct the attention of the defendant to his conduct and to the consequences of any continued disruption and defiance. Thus, the Court said:

> "... we explicitly hold today that a defendant can lose his right to be present at trial if ... *he has been*

[55] *Id.*

[56] *Id.* at 344.

[57] *Id.* at 346 (emphasis added).

[58] *E.g.*, Loux v. United States, 389 F.2d 911 (9th Cif. 1968), *cert. denied*, 393 U.S. 867 (1969); Dennis v. Dees, 278 F. Supp. 354 (D.C. La. 1968).

[59] 397 U.S. at 344.

[60] "... no person should be tried while shackled and gagged except as a last resort." 397 U.S. at 344.

[61] "... I also agree with the Court that these three methods are not equally acceptable. In particular, shackling and gagging is surely the least of them." 397 U.S. at 350 (Brennan, J., concurring).

[62] In the "Chicago Conspiracy Eight," later "Conspiracy Seven"trial, United States v. Dellinger No. 69-CR-180 (N.D. Ill. 1970), defendant Bobby Seale had to be severed from the trial because, while bound, he could still move his chair and, while gagged, he could, and did, whimper and moan through the gags and the reinforcing hands of a Deputy United States Marshal.

*warned by the judge that he will be removed if he continues his disruptive behavior. . . .*" [63]

This requirement was reemphasized by Mr. Justice Brennan in his concurring opinion:

> "Of course, *no action* against an unruly defendant is permissible except *after* he has been *fully and fairly* informed that his conduct *is wrong* and *intolerable*, and warned of the *possible consequences* of continued misbehavior." [64]

Accordingly, standards by which to judge the efficacy of the warning must be created. The warning should meet at least an eightfold requirement:

(1) Following disruptive behavior which, if continued, would justify expulsion or behavior which, while perhaps not alone justifying expulsion, is combined with the expressed intention of the defendant to engage in future conduct that is more severe, the trial court must
(2) warn the defendant that his conduct, or expressed intentions, are
(3) wrong and violate the dignity and respect for judicial proceedings which must be enforced;
(4) will not be tolerated during the course of the trial, and that
(5) future occurrences of a like nature will result in expulsion from the trial for as long as his disruptive posture is maintained, that
(6) the trial will continue in his absence, that
(7) he will lose his right to see and hear the witnesses testify and the evidence introduced, and will lose his right to observe all other proceedings of the trial, and that
(8) he will not be readmitted to the courtroom until he indicates expressly, and for the record, that he will cease disruption.

The trial court should, of course, punctuate each warning with questions to make sure that the defendant understands the meaning of the court's remarks.

This approach is one with which trial judges are already familiar because it has long been required in analogous contexts such as the waiver of a jury trial,[65] the taking of a guilty plea,[66] and the waiver of the right to counsel.[67] The language implemented by trial judges may vary; there should be no fixed formula. The essential point is that the warning follow intolerable conduct, that it direct the attention of the defendant to the existence of his conduct, that it indicate the wrongfulness of the conduct, and that it inform the defendant of the court's intention to expel him for repeated misbehavior and of the consequences of such expulsion. When this is accomplished, the court need only assure that the record reflects the warning and the defendant's response before employing the sanction upon further violation.

Once the remedy of expulsion has been employed, the question as to how, and under what circumstances, the expelled defendant may regain his right to be present at trial arises. The majority opinion in *Allen* sets forth a guide:

> "Once lost, the right to be present can, of course, be *reclaimed* as soon as the defendant is willing to conduct himself consistently with the decorum of courts and judicial proceedings." [68]

The opinion does not settle the matter of whether the *burden of inquiry* concerning the future conduct of the expelled defendant lies with him or with the court. Thus, a problem arises as to who has the duty to initiate the process by which the defendant re-enters the courtroom on a promise of future adherence to the "decorum and respect" of the proceedings.

[63] 397 U.S. at 343 (emphasis added). Prior to his removal Allen was repeatedly warned by the trial judge that he would be removed from the courtroom if his disruptive conduct persisted.

[64] *Id.* at 350 (Brennan, J., concurring) (emphasis added). The Brennan dictum can be broadly read to require a warning before any sanction, including contempt and binding and gagging, may be employed. There is an obvious difference between the kind of "warning" which may be required before a finding of contempt is entered and that which is required before a "sanction" forfeiting the right of trial presence is employed. The former is more nearly akin to a substantive criminal offense and the promulgation and publication of the contempt statute will serve as the "warning." It is clear, however, that, at least as to expulsion, the warning is required.

[65] The defendant must be warned of his right to a jury trial and that his waiver will permit the judge, siting alone, to decide his guilt. *E.g.*, Boles v. Stevenson, 379 U.S. 43 (1964); Patton v. United States, 281 U.S. 276 (1930); People v. Lyons, 250 N.E.2d 133, 42 Ill. 2d 431 (1969).

[66] The defendant must be told that a plea of guilty waives all necessity for trial, for the presentation of evidence, and he must be informed of the sentence that will be imposed. *E.g.*, McCarthy v. United States, 394 U.S. 459 (1969).

[67] The defendant must be told that he has a right to counsel, either appointed or retained, and that he will be obliged to defend himself without other assistance if he waives counsel. *E.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 605 (1943); Johnson v. Zerbst, 304 U.S. 458 (1938).

[68] 397 U.S. at 343 (emphasis added).

It might be argued that the duty lies with the defendant to petition the court for readmittance and that, failing such an initiative on his part, there is no duty on the part of the trial judge, for the balance of the trial, to inquire whether the expelled defendant is ready to return. Such a rule may be implied from the language that the accused can "reclaim" the right.

On the other hand, the language of "reclaim," read less literally in the context of the *Allen* facts, may have no guiding significance. In *Allen*, the trial judge recalled the defendant to the courtroom on three occasions after his initial expulsion and sought to obtain a pledge of proper behavior if he was allowed to return. Not until the third appearance did Allen respond to these inquiries and thereafter remain within the bounds of decorum. "Allen," said the Court, "was *constantly informed* that he could return to the trial when he would agree to conduct himself in an orderly manner. *Under these circumstances* we hold that Allen lost his right guaranteed by the Sixth and Fourteenth amendments to be present throughout his trial." [69]

Even in the absence of a clear signal in the opinion, however, the proper rule demands that the *burden of inquiry*, the duty of initiating the process leading to return, rests with the court and remains a continuing burden.

This burden should remain with the trial judge because the remedy of expulsion is a drastic measure involving significant consequences for the defendant. Although the Court did not shrink from a forthright holding that this sanction could be employed, even under circumstances less compelling than in previous cases where the only sanctions ever suggested were restraint and contempt,[70] and although both the majority and concurring opinions expressed greater repugnance for the use of shackles as a remedy under any circumstances,[71] approval of expulsion did not come easily.[72]

The burden of inquiry, moreover, is more easily assumed by the trial court because the custody and movements of the jailed or bailed defendant are subject to the court's control. As a practical matter, it is easier for the trial judge to order that the jailed defendant be brought before him than it is for the defendant to send word to the court, through counsel or court attaches, requesting the opportunity to appear and "reclaim" his lost right. Such a procedure will also ensure that the right to again be present is not lost through a misunderstanding of the order of expulsion, its duration or effect. Such misunderstanding is, of course, conceivable —even given a proper warning and continued defiance which would justify expulsion as an original matter.

Finally, the burden ought to be regarded as a continuing one. Contumacy may die by degrees. A defendant, such as Allen, may be defiant at the beginning of the trial and repentant only after repeated inquiries and continuing expulsion. Whether this serves his own ends, strategic or otherwise, is, of course, irrelevant. Then, too, the relative importance of the defendant's presence may increase as the trial progresses. Not only is it harder to recapture each day lost, despite the assistance of such aids as may be provided to keep him, "apprised of the progress of his trial," [73] but as the case shifts from the prosecution to the defense, the defendant's presence may then be more aptly characterized as critical rather than useful.

The choice of remedy may also be affected if the case is one which involves multiple defendants. In this situation, the expulsion of the unruly defendant may be compelled under factual circumstances where, if the trial involved but a single defendant, binding and gagging would suffice. The reason is clear. If the right of presence is not absolute, and the court may weigh the disadvantages of expulsion against the evil of disruption, then the formula may rightly be expanded to include the likelihood of prejudice which might flow to the cause of co-defendants forced to proceed through trial on the same side of the table as one who has defied the court and its processes (including a jury), and whose continued presence is a mute, but nonetheless compelling, reminder of

[69] *Id.* at 346 (emphasis added).

[70] *Compare*, United States v. Bentevna, 319 F.2d 16 (2nd Cir. 1963).

[71] "But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort."
397 U.S. at 344.
"However, I also agree with the court that these three measures are not equally acceptable. In particular, shackling and gagging a defendant is surely the least of them. It offends not only judicial dignity and decorum, but also that respect for the individual that is the lifeblood of the law."
*Id.* at 355–56 (Brennan, J., concurring).

[72] "It is not pleasant to hold that respondent Allen was properly banished from the court for a part of his own trial." 397 U.S. at 346; "Deplorable as it is to remove a man from his own trial, even for a short time. . ." *Id.* at 347. Thus, expulsion was sanctioned only through the employment of painstaking language.

[73] 397 U.S. at 351 (Brennan, J., concurring).

that defiance. Since the law attempts to shield defendants from prejudice arising from the actions or trial postures of co-defendants in a variety of related circumstances,[74] the likelihood of prejudice to co-defendants arising from the disruption of one defendant should be taken into account in considering the interests involved in a choice of sanctions.[75]

Once the sanction of expulsion has been imposed, there remains a problem as to the requirement of keeping the defendant apprised of the progress of his trial.[76] The idea that such a requirement would be desirable, let alone that it exists, is not discussed in the Court's opinion, but is suggested in the concurrence of Mr. Justice Brennan:

> "I would add only that when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances." [77]

Some accommodation should therefore be made to ameliorate the condition of ignorance attaching to the defendant after expulsion. To do so does not imply "weakness" on the part of the trial judge. How best to accomplish this goal presents another question.

At the minimum, the schedule of the trial ought to be adjusted so that defendant's counsel has greater opportunity to confer with his client during its course. Since the burden upon the lawyer to recapitulate and translate the day's proceedings for the absent defendant is greater than that normally imposed upon the lawyer with a client at his side, additional time ought to be allotted to the traditional periods of recess and adjournment.

This procedure will serve two ends. It will enable the absent defendant to retain some of the benefits derived from the right of presence at trial and, at the same time, afford an opportunity for the defense attorney to counsel with his client with a view to ending the disruption and returning to the courtroom.[78]

There remains the possibility that "technological aids" may also be employed in assistance to the absent defendant. It is clear, however, that the Brennan opinion suggests a lighter burden in this regard. As to counsel, the requirement was to "make reasonable efforts to enable him to communicate with his attorney."[79] Regarding the possible devices for keeping a defendant apprised of the trial, the suggestion was to "make reasonable efforts to enable him ... *if possible* to keep apprised of the progress of his trial [and] ... to mitigate the disadvantages of his expulsion as far as technologically *possible in the circumstances*."[80]

Several procedures may be suggested. Providing

[74] The threat of prejudice arising from the introduction, in a joint trial, of evidence admissible only as to a single defendant may warrant a severance, United States v. Bruton, 391 U.S. 123 (1968); a severance may be required where one co-defendant wishes to call the other as a witness, United States v. Echeles, 352 F.2d 892 (7th Cir. 1965); defendants with antagonistic defenses resulting in prejudice are entitled to a severance, first discussed by Justice Story in United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827).

[75] There are, of course, cases where claims of prejudice resulting from the misbehavior of co-defendants have been held not to warrant a severance or reversal. Brown v. United States, 375 F.2d 310 (D.C. Cir. 1966) (co-defendant claiming insanity "threw a fit" in court); United States v. Hoffa, 367 F.2d 698 (7th Cir. 1966) (antagonistic personality of co-defendant); United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963) (co-defendants disrupted trial and were bound and gagged); McDondald v. United States, 89 F.2d 128 (8th Cir. 1937) (co-defendant handcuffed). Though these holdings may well be correct in the context of the relief requested, nothing in their rationale would preclude a court from taking into account the *possibility* of prejudice arising from the retention in court of a bound and gagged co-defendent as one factor in deciding whether to employ the sanction of expulsion.

[76] This issue is not the same as the topic much debated by the court and counsel during the *Allen* oral argument. That discussion revolved around the employment of technological devices such as a soundproof booth and closed circuit television or radio as a *substitute* for, or alternative to, incommunicado expulsion. Concern for retaining some benefits of the right to be present, however, runs through both concepts.

[77] 397 U.S. at 351 (Brennan, J., concurring). This concluding reference to "weakness" is undoubtedly a response to the oral argument of counsel for the State of Illinois that the sixth amendment right to be present at trial was not so absolute that the forms of judicial administration had to be bent to the extremes of installing glass booths or closed circuit television systems merely to preserve the appearance of the right for one who insisted on abusing it through disruptive conduct while present.

[78] It would be better practice for the trial judge to inquire of defense counsel, after such consultations at recess and adjournment, whether he has discussed with the defendant his current attitude toward adherence to order and decorum in the courtroom and his wish, if any, to return. This inquiry should be undertaken, of course, in addition to the previously suggested practice of calling the defendant personally into the courtroom at regular intervals for the same inquiry.

[79] 397 U.S. at 351 (Brennan, J., concurring). This phrase should be read to mean *in addition* to the opportunity normally commanded by the sixth amendment right to counsel afforded to every defendent in custody.

[80] 397 U.S. at 351 (Brennan, J., concurring) (emphasis added).

the absent defendant with "daily copy" of the transcript is a possibility. The cost of providing such a transcript may be heavy, however, and the trial court would be justified in taking this factor into account if such relief is requested.[81] If the facilities of the court reporting system in a particular jurisdiction are not adequate to allow the providing of daily copy, then, of course, no such assistance is "possible" within the Brennan *dictum*.

The use of closed circuit television or radio facilities is also "technologically possible," but that again is a different question than whether it is "possible in the circumstances." The expense of such facilities are an important consideration, particularly in small or rural counties where the court's budget may already be inadequate for minimally required services and facilities. And it should be emphasized, in connection with the decision as to whether such an expense is justified, that the facility is being sought not by a defendant who is trying to enforce a right, but by one who has forfeited a right by his contemptuous disregard for the order and decorum inherent in the judicial process.[82]

The notion was quickly advanced by some members of the defense bar that the *Allen* opinion does *not* purport to deal with the defendant whose unruly conduct is "provoked" by rulings of the trial court to which he takes exception.[83]

This notion, of course, is specious. As a matter of fact such a defense *was* advanced by Allen in justification of his conduct at the trial. Following early pre-trial skirmishes with the judge over Allen's dissatisfaction with the denial of an appointment of counsel from a list he had prepared,[84] Allen became his own counsel and began questioning prospective jurors on *voir dire* examination. When the questions ranged far afield from those ordinarily deemed permissible,[85] the trial judge ruled that:

> "You've asked a lot of immaterial questions, which were personal, which I don't think the juror should be called upon to answer, and you will confine youself solely to questions relating to their qualifications as jurors. . . ."

It was in response to this ruling, and to the judge's refusal to allow Allen to intertwine his questions with assertions about his treatment by the court and counsel, that Allen was "provoked" into a violent demonstration which included a threat to the life of the judge, the destruction of his attorney's file, and his outbursts to the potential jurors. He was thereupon removed from the courtroom.

More fundamentally, however, there is no warrant in our law or in the entire scope of our con-

[81] This situation is clearly different from those in which an indigent defendant is entitled to a free copy of transcript for the purposes of impeachment, appeal or collateral proceedings. In these cases, the cost to the government *cannot* be taken into account, except, perhaps, if less expensive means to enable the indigent defendant to proceed as adequately as the affluent defendant are available. *See* Roberts v. LaVallee, 389 U.S. 40 (1967); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[82] The suggestion that glass, sound-proof booths should be installed in the courtroom to enable the unruly defendant to see and hear the trial, but not to be heard himself, should be rejected. Such an installation is an affront to the dignity of the American courtroom. The spectacle it would afford is little different from the spectacle of the bound and gagged defendant, characterized by the Court as "an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." And the use of such a technique would present the very same problems of distraction of the jury who would constantly be confronted not only with the sight of the defendant (imagine Marcel Marceau in a glass booth), but also his cage.

[83] *See e.g.*, the remarks of attorney William Kunstler, counsel for Bobby Seale at the "Conspiracy 7" trial, in Chicago, *supra* note 62:

"My position is that I don't think the case applicable to any of the contempt situations growing out of the Chicago trial or to the Panther case [in New York City]. . . ." In each trial, Kuntsler said, 'the provocation was based on the asserted claim of violation of a constitutional right.' 'In Chicago,' Kuntsler said, 'Bobby Seale . . . was attempting to continue his defense of himself when the judge ruled he couldn't. The others were protesting the Seale treatment and objecting to other things the judge was doing.' The New York Panthers were protesting denial of reasonable bail, Kuntsler said. Each situation, he said, 'was different—totally different—from . . . Allen, who was irrational' ".

Chicago Daily News, April 1, 1970 at 3, Col. 1-3.

Richard Moore, a defendant in the New York Black Panther trial, said that "he and the other 12 Panther defendants would continue 'to speak out when our constitutional rights are violated' ", New York Daily News, April 1, 1970, at 3, Col. 4.

*But see*, the comment of H. Reed Harris, a Chicago attorney who represented Allen in the Supreme Court, that the decision "*deprived* the people of a fundamental right to protest any irregularity that may take place in the courtroom" Chicago Daily News, April 1, 1970, at 1, Col. 4, and at 4, Col. 6.

[84] Including William Scott Stewart, Adlai Stevenson, Jerry Giesler and Earle Stanley Gardner.

[85] "Did the State's Attorney try to bribe you, or anything?"; "Do you use narcotics?"; "How much do you drink?"; "Why didn't they take you in the army?"; "Do you have a garden in your yard, around your house?"; "Is [your car] paid for?".

stitutionally ordered judicial history for the "appeal by violence and disruption" which this view advances. Decisions of the Supreme Court[86] and legislative reforms ensure that all defendants will be represented by counsel at trial and that all will have equal access to appellate courts for the review of alleged trial errors. It simply goes against the grain of our entire system to even contemplate the idea that a litigant may respond to a judicial ruling which he views as unfavorable by unleashing pandemonium in the courtroom. Edmund Burke's famous *dictum* was meant for the court of public opin·on and not for the court of law.[87]

There is no doubt that the defense of "provocation" was firmly rejected by the majority of the Court who wrote in *Allen*. Speaking for six Justices, Mr. Justice Black said:

> "Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case." [88]

Concurring, Mr. Justice Brennan said:

> "It [the nation] cannot endure if in individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mututally resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it will be reached elsewhere and by other means, and there will be grave danger that liberty, equality, and the order essential to both will be lost.
>
> "The constitutional right of an accused to be present at his trial must be considered in this context. Thus there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward. ... The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes which the Constitution itself prescribes." [89]

Those who sanction disruptive conduct in the courtroom do grave disservice, not only to the causes of their clients and to their fellow members of the bar, but also to the American public, whose respect for and belief in the judicial system constitutes the only foundation upon which the system may survive.

[86] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[87] Edmund Burke, Speech, Powers of Juries in Prosecution for Libel: "I like a clamor whenever there is an abuse. The fireball at midnight disturbs your sleep, but it keeps you from being burned in your bed."

[88] 397 U.S. at 346-47.

[89] *Id.* at 348 (Brennan, J., concurring). In a separate concurring opinion, Mr. Justice Douglas asked:

> "Would we tolerate removal of a defendant from the courtroom because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?"

397 U.S. at 355 (Douglas, J., concurring).

There is at least some doubt that even this statement endorses the notion that defendants reacting to "constitutional error" are entitled to do so by disrupting the trial. First, the comment was directed at "political trials", "political indictments" and "political judges", which were not further defined. Secondly, Mr. Justice Douglas distinguished what he called "trials used by minorities to destroy the existing constitutional system and bring on repressive measures." As to such cases, he said:

> "The Constitution was not designed as an instrument for that form of rough and tumble contest. The social compact has room for tolerance, patience, and restraint but not for sabotage and violence. Trials involving that spectacle strike at the very heart of constitutional government."

*Id.* at 356. Thirdly, there is some question as to whether Justice Douglas would equate the *tactics* by Allen, and defended by those approving of their use in current trials, with "vociferous insistence" on constitutional rights. For he prefaced his opinion with the observation that:

> "I agree with the Court that a criminal trial, in the constitutional sense, cannot take place where the courtroom is a bedlam and either the accused or the judge is hurling epithets at the other. A courtroom is a hallowed placed where trials must proceed with dignity...."

*Id* at 351. In any event, Justice Douglas' observation offers small comfort to the advocates of the "provocation" theory in light of its explicit rejection by the seven Justice majority in *Allen*.