View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 59 | Issue 2 Article 9

1970

Constitutional Law--Sixth Amendment Confrontation Clause--Right of Defendant to Be Present at Criminal Trial

Donna H. Terry
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

 Part of the Constitutional Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Terry, Donna H. (1970) "Constitutional Law--Sixth Amendment Confrontation Clause--Right of Defendant to Be Present at Criminal Trial," *Kentucky Law Journal*: Vol. 59 : Iss. 2 , Article 9.
Available at: https://uknowledge.uky.edu/klj/vol59/iss2/9

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Comments

CONSTITUTIONAL LAW—SIXTH AMENDMENT CONFRONTATION CLAUSE—RIGHT OF DEFENDANT TO BE PRESENT AT CRIMINAL TRIAL—During his 1957 trial for armed robbery, defendant William Allen insisted upon conducting his own defense.[1] His abusive language on voir dire[2] led the trial judge to warn him that further outbursts would result in his exclusion from the courtroom. The defendant defiantly stated that "there's not going to be no trial," and that he would continue to disrupt the proceedings.[3] The trial judge then ordered him removed and selection of the jury was completed in his absence.

Before the jurors appeared for the trial, however, the defendant indicated that he wished to return and was allowed to do so contingent on his conduct. When he became unruly, the trial judge again ordered him excluded until he promised to conduct himself properly. Except for purposes of identification, he did not return during presentation of the prosecution's case, but was present for the remainder of the trial. His conviction was affirmed by the Supreme Court of Illinois.[4]

A federal district court denied Allen's petition for a writ of habeas corpus but the Court of Appeals for the Seventh Circuit reversed, holding that the sixth amendment right to be present and confront witnesses at a criminal trial was "absolute" and could not be waived by forced election between proper conduct and exclusion from the proceedings. Physical restraint of the defendant, the appellate court held, should be employed when necessary to maintain order.[5] Certio rari was granted by the United States Supreme Court. *Held:* Reversed. A defendant's continued disruption of court proceedings, after fair and adequate warning by the trial judge, may constitute a voluntary waiver of his right to be present at trial. Illinois v. Allen, 90 S. Ct. 1057 (1970).

---

[1] Counsel was appointed, however, to "protect the record." 413 F.2d 232 (7th Cir. 1969).

[2] When instructed by the trial judge to confine his questions to matters relating the juror's qualifications, Allen began to argue disrespectfully. Appointed counsel was asked to continue the examination of jurors. Allen then warned the judge "[w]hen I go out for lunchtime, you're going to be a corpse here," tore counsel's file, and threw the papers on the floor. *Id.* at 233-34.

[3] *Id.* at 234.

[4] Illinois v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1 (1967), *cert. denied*, 389 U.S. 907 (1967).

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

When considering the exclusionary power of a trial judge, it should be noted that from the time criminal proceedings began to take form in early Anglo-Saxon law, presence of the accused was deemed essential.[6] The common law right to be present has been recognized and preserved in the Constitution through the confrontation clause of the sixth amendment and applied to the states through the due process clause of the fourteenth amendment.[7] In addition, federal courts require presence of the accused under Rule 43 of the Federal Rules of Criminal Procedure[8] and every state grants the right to be present by constitutional provisions, statutes, or court decisions.[9]

On surface these gilt-edged guarantees would seem to conclusively bar removal of a defendant from his trial. However, certain common law exceptions to the right existed[10] and have been transferred into the twentieth century in many jurisdictions.[11] Thus, while the right to be present is granted in every jurisdiction, widespread disagreement exists as to whether it may be waived. The main distinction in waiver

---

[6] Early criminal proceedings were somewhat analogous to modern civil actions in personam, with one party seeking redress for the wrong committed by the accused. By its very nature, therefore, a valid judgment could not be rendered in the absence of the accused. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases,* 16 COLUM. L. REV. 18 (1916). *See also* Lewis v. United States, 146 U.S. 370 (1892); Hopt v. Utah, 110 U.S. 574 (1884); Echert v. United States, 188 F.2d 336 (8th Cir. 1951); People v. Isby, 30 Cal. 2d 879, 186 P.2d 405 (1947); State *ex rel.* Shetsky v. Utecht, 228 Minn. 44, 36 N.W.2d 126 (1949).

[7] Pointer v. Texas, 380 U.S. 400 (1965). *See also* United States v. Hayman, 342 U.S. 205 (1952); Snyder v. Massachusetts, 291 U.S. 97 (1934); Shields v. United States, 273 U.S. 583 (1927); Diaz v. United States, 223 U.S. 442 (1912); Hopt v. Utah, 110 U.S. 574 (1884). *Cf.* United States v. Johnson, 129 F.2d 954 (3d Cir. 1942), *aff'd,* 318 U.S. 189 (1943).

[8] A concise summary of procedural stages at which presence of the accused is required under FED. R. CRIM. P. 43 is contained in L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 43.3-43.7 (1967).

[9] A majority of states require presence of the accused at *every* stage in the proceedings. *See, e.g.,* Schwab v. Bergren, 143 U.S. 442 (1892); Harris v. Indiana, 231 N.E.2d 800 (1967); Thomas v. Commonwealth, 437 S.W.2d 512 (Ky. 1968).

A substantial minority, however, deem it essential only at certain stages, including voir dire, Lewis v. United States, 146 U.S. 370 (1892); cross-examination, Pointer v. Texas, 380 U.S. 400 (1965); instructions to the jury, Shields v. United States, 273 U.S. 583 (1927); United States v. Noble, 155 F.2d 315 (3d Cir. 1946); and verdict, Temple v. Commonwealth, 77 Ky. 769 (14 Bush) (1879).

For a comprehensive survey of state constitutional and statutory provisions, see Murray, *The Power to Expel a Criminal Defendant From His Own Trial,* 36 U. COLO. L. REV. 171 (1964).

[10] The most common exceptions involved the defendant who absconded or who failed to appear while on bail. *See, e.g.,* Diaz v. United States, 223 U.S. 442 (1912); United States v. Switzer, 252 F.2d 139 (2d Cir. 1958); Noble v. United States, 300 F. 689 (9th Cir. 1924).

[11] The Supreme Court, for example, has held:

> 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 its exceptions. Salinger v. United States, 272 U.S. 542, 548 (1926).

cases concerns the nature of the offense, *i.e.*, whether the defendant has been charged with a capital or noncapital felony.[12] The majority of jurisdictions, including the federal courts, forbid waiver in capital offense trials.[13] In noncapital trials, on the other hand, most courts allow waiver if the accused has been present and voluntarily waived the right.[14] A few jurisdictions refuse to distinguish between capital and noncapital cases and allow waiver in both.[15] A few others have no provision for waiver for either type of offense.[16]

Waiver in all jurisdictions must be "voluntary",[17] which has been defined by the Supreme Court as the "intentional relinquishment of a

---

[12] In misdemeanor cases, defendants are almost universally allowed to waive the right to be present at trial. *See, e.g.*, FED. R. CRIM. P. 43 (by written consent). KY. R. CRIM. P. 8.28(3) states in part: "In prosecutions for misdemeanors, the courts may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." *Cf.* Yates v. Commonwealth, 215 Ky. 725, 286 S.W. 1046 (1926).

[13] *See, e.g.*, Diaz v. United States, 223 U.S. 442 (1912); Hopt v. Utah, 110 U.S. 574 (1884); Glouser v. United States, 296 F.2d 853 (8th Cir. 1961); Lee v. State, 244 Ala. 401, 13 So. 2d 590 (1943); State v. Vanella, 40 Mont. 326, 106 P. 364 (1910); State v. Hartsfield, 188 N.C. 357, 124 S.E. 629 (1924).

[14] The federal courts' waiver provision is contained in FED. R. CRIM. P. 43:

> . . . [i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

See also Diaz v. United States, 223 U.S. 442 (1912); Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); Echert v. United States, 188 F.2d 336 (8th Cir. 1951); Parker v. United States, 184 F.2d 488 (4th Cir. 1950); United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942); United States v. Vassalo, 52 F.2d 699 (E.D. Mich. 1931); United States v. Noble, 294 F. 689 (D. Mont. 1923); State cases include Berness v. State, 263 Ala. 641, 83 So. 2d 607 (1953); State *ex rel.* Shetsky v. Utecht, 228 Minn. 44, 36 N.W.2d 126 (1949); Scott v. State, 113 Neb. 657, 204 N.W. 381 (1925); Trombley v. Langlois, 91 R.I. 328, 163 A.2d 25 (1960).

[15] The Kentucky Court of Appeals has adopted this view. In a 1928 case, *Boreing v. Beard*, 226 Ky. 47, 10 S.W.2d 447, the Court stated:

> Some courts make a distinction between felonies that are capital and other felonies, apparently with the distinction that the public is interested in preserving the life of one innocent of crime, but we are unable to perceive such a distinction. *Id.* at –, 10 S.W.2d at 450.

See also Davidson v. State, 108 Ark. 191, 158 S.W. 1103 (1913); Miles v. State, 222 Ind. 312, 53 N.E.2d 779 (1949).

[16] Jurisdictions prohibiting waiver in all trials offer two rationales for their position. The first is that the requirement of presence of the defendant is for the benefit of the state as well as the accused, and thus cannot be waived by the accused. *See* Booze v. State, 390 P.2d 261 (Okla. Crim. 1964); Blagg v. State, 36 Okla. Crim. 337, 254 P. 506 (1927); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923). The second reason is that presence of the accused is essential to the jurisdiction of the court. *See* Neal v. State, 257 Ala. 496, 59 So. 2d 797 (1952); State v. Reed, 65 Mont. 51, 210 P. 756 (1922); State *ex rel.* Boner v. Boles, 148 W. Va. 802, 137 S.E.2d 418 (1964); State v. McCausland, 82 W. Va. 525, 96 S.E. 938 (1918). *See also* Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966).

[17] When a suggestion has been made to an accused by the authorities that he waive the right to be present, the defendant has not made a voluntary waiver. Massey v. State, 31 Tex. Crim. 371, 20 S.W. 758 (1892). A federal court has more explicitly held that in order for a waiver to be voluntary, the accused must

(Continued on next page)

known right or privilege."[18] It has long been accepted that the voluntary absence of a defendant from his trial constituted waiver and that the proceedings could continue in his absence.[19] Only two previous cases, however, have denied the accused the right to be present as a result of his voluntary misconduct. In *United States v. Davis*,[20] a federal court of appeals upheld, without reference to the sixth amendment, the lower court's expulsion of an unruly defendant, stating:

> 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 . . . [and] 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, which he could at any time have terminated by signifying his willingness to avoid creating disturbances.[21]

In *People v. DeSimone*,[22] the Illinois Supreme Court held that disruptive behavior may be deemed a voluntary waiver of the defendant's constitutional right,[23] commenting:

> The constitutional privilege relied upon was conferred for the benefit and the protection of the accused. Like any other right it may be waived. Thus, where a defendant voluntarily absents him-

---

(Footnote continued from preceding page)
intelligently waive both the right to be present and the right not to have the trial continued in his absence. United States v. McPherson, 421 F.2d 1127 (D.C. Cir. 1969). Illness will not subject an accused to trial in absentia, but absence due to a feigned or self-inflicted injury may be construed as voluntary. Hill, *Some Special Problems Commonly Encountered in Criminal Cases*, in *Seminar on Practice and Procedure*, 28 F.R.D. 37, 283, 284 (1960). Absence due to threats to the life of the defendant has been held a voluntary waiver. Vicks v. State, 42 Ga. App. 451, 156 S.E. 729 (1931). *Contra*, Massey v. State, *supra*.

[18] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[19] A state court has remarked that by the adoption of Rules 43, *supra* note 15, the Supreme Court put the imprimatur of due process upon the "inference of waiver from voluntary absence." State *ex rel.* Shetsky v. Utecht, 228 Minn. 44, 36 N.W.2d 126, 129 (1949). The implied waiver provision does not, however, become operative until the accused has first appeared and submitted himself to the court's jurisdiction. Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968).

It should be noted that there is a very important difference between an express waiver and a waiver implied from the voluntary absence of the accused. In the former case, the defendant's absence may be explained to the jury; in the latter, it may not be, leaving the natural conclusion that "the defendant has fled because of 'consciousness of guilt.'" J. MOORE, FEDERAL PRACTICE § 43.02 (2d ed. 1970). As to the right of a court to insure the defendant's continued presence at trial by revoking bail, see United States v. Bentvena, 288 F.2d 442 (2d Cir. 1961).

[20] 25 F. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1869).

[21] *Id.* at 774.

[22] 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

[23] It should be noted that the appeal was based on ILL. CONST. art. 2, § 9, which parallels U.S. CONST. amend. VI.

> self from the courtroom . . . he is deemed to have waived his right and cannot claim any advantage on account of his absence. The same result must follow under the circumstances attending this defendant's involuntary absence. It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was in turn, effective as a waiver of the defendant's right to be present.[24]

In the instant case, the Supreme Court resolved the definitional dilemma, construing "voluntary waiver" to include misconduct by a defendant at his trial.[25] As a case of first impression before the Court, *Allen* reflects the conflict between society's interest in an orderly judicial process and its interest in protecting individual rights, and between the individual's right to be present and his right to appear unfettered before the jury.

While stressing the paramount importance of order in the courts, the Court emphasized that procedural safeguards must be followed, *e.g.*, that the accused be fully and fairly warned of the consequences of future misconduct, that every reasonable presumption be indulged against waiver, and that the accused must be allowed to return at any time he agrees to conduct himself properly.[26] To preserve order, the Court endorsed three methods for controlling an unruly defendant: (1) bind and gag him; (2) cite him for contempt; (3) remove him from the courtroom. The method chosen will be left to the discretion of the trial judge in each case.[27]

Underlying the entire opinion is the spectre of total, chaotic disintegration of the judicial process.[28] Warning that the democratic system "cannot endure if we allow our precious heritage of ordered liberty to be ripped apart amid the sound and fury of our time,"[29] Mr. Justice Brennan, concurring, quoted with approval from *Falk v. United States*:

> 'The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own

---

[24] People v. DeSimone, 9 Ill. 2d at ———, 138 N.E.2d at 562.
[25] Illinois v. Allen 90 S. Ct. at 1060.
[26] *Id.*
[27] *Id.* at 1061.
[28] Circuit Judge Hastings' dissent in *Allen v. Illinois* conjures up visions of "[s]hackles, chains, gags, and a courtroom full of deputy marshalls." 413 F.2d at 236.
[29] Illinois v. Allen, 90 S. Ct. at 1063.

> safety, to restrict the operation of the principle of personal liberty.'[30]

Thus, the Court, after balancing the interests involved, tipped the scales of justice toward society's right to a functioning legal system.

Of the three options available to a court faced with disruption of its proceedings, the contempt power should be exercised first. In many cases it may suffice; in cases involving a defendant determined to sabotage the proceedings, however, it probably will be of no avail.[31] Should the judge in such cases discontinue the trial until the accused agrees to modify his conduct, the delay might well benefit the contumacious defendant by making it more difficult to secure prosecution evidence and witnesses. In addition, the right to a speedy trial militates against lengthy delays.[32] Criminal contempt sentences imposed without a jury trial are limited to six months;[33] however, a jury trial for contempt could be an exercise in futility, with the defendant disrupting each successive trial *ad infinitum.* Some judges, notably Judge Julius Hoffman, have skirted the jury trial requirement by levying several successive sentences of less than six months each.[34] But even lengthy sentences will have scant effect on those who face more severe sanctions if the trial continues.

If contempt citations fail to deter disruption, the trial court will of necessity face a choice between physical restraint and expulsion of the defendant. The trial judge, at his discretion, may employ whatever measures are necessary to restrain an unruly defendant.[35] But implicit in *Allen* is the Court's value judgment that enforcement of the defendant's right to be present by physical restraint is more detrimental to his interests than exclusion from the courtroom. Certainly the advantages secured by the right are so diminished as to be

---

[30] 90 S. Ct. at 1064 (concurring opinion), *quoting* Falk v. United States, 15 App. D.C. 446, 460 (1899).

[31] Illinois v. Allen, 90 S. Ct. at 1062.

[32] The constitutionality of indefinite recess of an unruly defendant's trial has not been determined, but is, at best, doubtful. *See* 6 WAKE FOREST INTRA. L. REV. 499, 506-07 (1970). *Cf.* Klopfer v. State, 386 U.S. 213 (1967).

[33] Duncan v. Louisiana, 391 U.S. 145 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

[34] NEWSWEEK, March 2, 1970, at 25.

[35] United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963); People v. Loomis, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938). The reasons for the trial judge's exercise of discretion should be stated and included in the record. People v. Stabler, 202 Cal. App. 2d 862, 21 Cal. Rptr. 120 (1962); Flowers v. State, 43 Wis. 2d 352, 168 N.W.2d 843 (1969). Only the minimum amount of physical force necessary to maintain the order and dignity of the proceedings may be employed. DeWolf v. State, 95 Okla. Crim. 287, 245 P.2d 107 (1952). Abuse of discretion constitutes reversible error unless it can be clearly shown that the accused suffered no prejudice thereby. Lias v. United States, 51 F.2d 215 (4th Cir. 1931); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916).

almost nonexistent in the case of a bound and gagged defendant who can neither communicate with counsel nor participate in the proceedings.

The probability of jury bias, moreover, toward a defendant in chains has long been recognized.[36] These factors point to the inescapable conclusion that this method of control is the least desirable judicial alternative. At this point the exercise of a defendant's right to be present becomes prejudicial to the interests of both the individual and society in a fair trial.

While a cardinal rule of criminal procedure has been and must continue to be that "after indictment found, nothing shall be done in the absence of the prisoner,"[37] obstreperous defendants in some instances may force qualification of that right. The soft underbelly of the American judicial process was dramatically exposed by the recent "Chicago 7 (or 8)" trial in which deliberate disruption of the proceedings was used as a tactic to force a mistrial. In *Seale v. Hoffman*,[38] a federal district court upheld the handcuffing and gagging of Black Panther leader Bobby Seale as the only means available to preserve order. Both *Seale v. Hoffman* and the Seventh Circuit's *Allen* opinion[39] on which it relies, forbid removal of a defendant under any circumstances; but both also have disregarded the established exceptions to the right to be present, the detrimental effect on the jury of a shackled defendant, and the existence of the right to appear free from physical restraints.[40] Their rigid insistence on "absolute" defini-

---

[36] In *State v. Roberts*, 86 N.J. Super. 159, 206 A.2d 200 (1965), the court expressed doubt whether any jury

> . . . can ever dismiss from its mind that the accused has appeared before it in handcuffs or chains. His being restrained must carry obvious implications even to the most fair-minded of juries. *Id.* at 168, 206 A.2d at 205.

The fear that the presumption of innocence until proven guilty will be destroyed has been well articulated:

> When a court allows a prisoner to be brought before a jury with his hands chained in irons . . . the jury must necessarily conceive a prejudice against the accused as being, in the opinion of the judge, a dangerous man. . . . State v. Temple, 194 Mo. 237, 245, 92 S.W. 869, 872 (1906), quoting State v. Kring, 64 Mo. 591.

See also Murray, *supra* note 10; 23 VAND. L. REV. 431, 435-36 (1970).

At common law, the accused was entitled to appear free from all shackles in order to avoid bias. Practical exceptions to the rule were recognized, however, including restraint when necessary to prevent escape (4 W. BLACKSTONE, COMMENTARIES *332) or to maintain order at trial. *See, e.g.*, Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); State v. McKay, 63 Nev. 118, 165 P.2d 389 (1946); People v. Mendola, 159 N.Y.S.2d 473, 140 N.E.2d 353 (1957); Comment, *Violent Misconduct in the Courtroom—Physical Restraint and Eviction of the Criminal Defendant*, 28 U. PITT. L. REV. 443 (1967).

[37] Lewis v. United States, 146 U.S. 370, 372 (1892).

[38] 306 F. Supp. 330 (N.D. Ill. 1969).

[39] United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969). *See* note 5 *supra*, and accompanying text.

[40] *See* notes 11, 12, and 37 *supra*, and accompanying text.

tions does not seem, in these cases, to operate in favor of the accused.

Every available means should be employed to minimize the effects of removal from the courtroom.[41] Various devices, including use of a plastic "isolation booth" similar to the one designed for the Eichman war crimes trial in Israel, have been suggested.[42] Closed circuit television transmission of the courtroom proceedings to the defendant in another room is another possibility.[43] Both have advantages: the booth would allow the defendant to actually be present in the courtroom while the television system would allow the defendant to observe the witnesses against him while guaranteeing that order is preserved in the courtroom. The cost of implementing these safeguards probably makes them unlikely at present for all courts. But should disruption of criminal trials become a frequent occurrence, safeguards will have to be developed and used if courts are to afford the maximum protection to the accused while resisting the challenge to their authority.

The delicate balance between the orderly functioning of the judicial process and the protection of individual constitutional rights will be severely tested in *Allen's* wake. Mr. Justice Douglas, while agreeing with the basic hypothesis of the decision and its application in "classical criminal cases," emphasizes the necessity for formulating new judicial guidelines for other, more complex, situations which will arise in the future. Stare decisis will clearly be inadequate as the sole determinant for decision-making in cases involving factors absent in the *Allen* case. One future area of concern, the mentally ill defendant whose disruptive actions are not volitional although he is legally competent to stand trial, presents a dilemma requiring a thorough reexamination of interests and values.[44]

Two other kinds of cases, however, provide an even more fundamental challenge to the judicial process and the constitutional system. Political trials have been a not uncommon occurrence in the history of the American republic, and great injustices have been done to unpopular minorities by "sincere, law-and-order men of their day."[45]

---

[41] Mr. Justice Brennan, concurring, suggested that the disadvantages of exclusion be mitigated "as far as technologically possible in the circumstances." Illinois v. Allen, 90 S. Ct. at 1064.

[42] TIME, Feb. 23, 1970, at 14.

[43] *Id.*

[44] Some evidence in the record indicates that Allen was mentally ill at the time of his trial. However, as Mr. Justice Douglas states, staleness of record—the original trial took place 13 years before the instant decision—prevented adequate documentation. Illinois v. Allen, 90 S. Ct. at 1067 n. 5 (concurring opinion).

[45] Mr. Justice Douglas cites the 1670 trial of William Penn as an example. Illinois v. Allen, 90 S. Ct. at 1065-67.

The ominous consequences of an extension of *Allen* to political trials is suggested by Mr. Justice Douglas. He asks:

> Would we tolerate removal of a defendant from the courtroom during a trial 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?[46]

A third unresolved problem area involves trials used as a tactic by radical minorities for their own political ends. Deliberate disruption, designed to incite the extreme right into promulgating repressive measures, has historically been utilized by extremist groups to rally support for their attack on the system.

Each of these situations, like *Allen*, involves not simply a struggle between right and wrong, but a confrontation between two conflicting "rights." Each demands careful and responsible consideration of the interests on both sides.[47] The primary importance of *Illinois v. Allen* may well lie in its application to these complex and menacing cases of the future.

Donna H. Terry

ADMINISTRATIVE LAW—SELECTIVE SERVICE—CONSCIENTIOUS OBJECTOR DILEMMA—QUESTION STILL UNRESOLVED—Elliot Ashton Welsh refused to submit to induction into the military service and was found guilty in a United States District Court for violating federal law which makes it a crime to refuse service in the Armed Forces.[1] On June 1, 1966, he was sentenced to three years in prison. Welsh asserted in his defense that he was conscientiously opposed to participation in war in any form and therefore should be exempted from combat and noncombat service based on Section 6 (j) of the Universal Military Training and Service Act which exempts "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war

---

[46] *Id.* at 1067.

[47] *See generally*, Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); Note, *The Supreme Court and Fundamental Rights—A Problem of Judicial Method*, 23 VAND. L. REV. 792, 807-08 (1970).

[1] 50 U.S.C. App. § 462 (a) (1964) which provides in part:
[A]ny person . . . who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections] . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both . . .