Montana Law Review

Volume 32
Issue 2 *Summer 1971*

Article 1

3-19-1971

The Increasing Use of the Power of Contempt

John L. Hilts

ARTICLES

THE INCREASING USE OF THE POWER OF CONTEMPT

John L. Hilts*

INTRODUCTION

In a United States district court in Chicago, Illinois, in late 1969 and early 1970, several defendants were charged with and tried for conspiracy to organize a riot, and with crossing state lines to incite a riot at the time of the 1968 Democratic National Convention held in Chicago. The "Chicago Seven Conspiracy Trial" was the first test of the Federal anti-riot law which was a rider to the 1968 Civil Rights Act. As a result of the trial, seven of the defendants were acquited of conspiring to cause a riot, but five were convicted of crossing state lines to incite a riot.[1]

During the 100-day trial, Judge Julius Hoffman sentenced summarily, under Rule 42 (a) of the Federal Rules of Criminal Procedure, ten men to a combined total of more than 19 years in prison for contempt of court.[2] All of the defendants and their two lawyers were found guilty of criminal contempt, and were given sentences ranging from 8 months to 4 years.[3]

*Member of the Montana Bar, B.A., University of Wyoming, 1967; J. D., University of Montana, 1970.

[1]The five defendants who were convicted were David Dellinger, Rennard Davis, Abbot Hoffman, Jerry Rubin, and Thomas Hayden. The two other defendants who were acquitted of both charges and of a separate charge of teaching the use of an incendiary device were John Froines and Lee Weiner. An eighth defendant, Bobby Seale, is scheduled for separate trial on April 23, 1970.

[2]Federal Rule of Criminal Procedure 42, Criminal Contempt, provides:

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

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

[3]The prison sentences were as follows: Seale, four years on 16 counts; Dellinger, 29 months and 16 days on 32 counts; Davis, 25 months and five days on 23 counts; Hayden, 14 months and 14 days on 11 counts; Hoffman, eight months on 23 counts; Rubin, 25 months and 23 days on 15 counts; Weiner, two months and 18 days on seven counts; Froines, six months and 15 days on 10 counts. The lawyers were sentenced as follows: William Kunstler, 48 months and 13 days on 24 counts; and Leonard Weinglass, 20 months and five days on 14 counts.

Judge Hoffman isolated each incident of contempt in separate counts, and issued sentences not in excess of 6 months for each count.[4]

This article discusses the use of both civil and criminal contempt power. However, the major focus is directed to the denial of a right to jury trial in criminal contempt proceedings.

The origin of the power to punish for contempt of court is generally traced to England when all the courts were divisions of the Curia Regia, the supreme court of the English sovereign. It is considered a power inherent in all courts of record or general jurisdiction in the United States, whether federal or state.[5]

Contempt of court is defined as any act which embarrasses, hinders or obstructs a court in the administration of justice, or which lessens its authority or dignity.[6] Contempts of court are classified as direct or indirect. Direct contempts are those which are committed within the immediate view and presence of the court, or so near as to obstruct or interrupt the administration of justice.[7] An example of direct contempt is an insult or profanity directed by a lawyer to a judge during a trial. An indirect or constructive contempt is one committed at a distance from the court in time or location tending to hinder the administration of justice.[8] An example of indirect contempt is the refusal by a witness to answer questions before a grand jury when directed by court order to answer.

Contempts of court are also classified as civil and criminal. Contempt is considered civil if the punishment is wholly remedial and operates prospectively.[9] Civil contempt is used to serve the purposes of the

[4]Some of the incidents of contempt were these: Abbie Hoffman received seven days in prison for exposing his stomach to the jury and performing a little dance. Dellinger received six months for calling the judge "Mister" instead of "Your Honor." Dellinger also received one day for failing to stand when the judge entered the room, and five days for standing up in court and yelling "bullshit" when he thought a police informant was lying. Seale insisted on defending himself, and his accumulated interruptions resulted in a four year sentence. One of the defendants loudly stated, "You're a disgrace to the Jews, runt! You should have served Hitler better." The judge was also called a "racist," a "fascist" and a "pig." Lawyer Kunstler received four months for persisting in asking a witness, Mayor Richard Daley, questions after the judge told him they were improper. He was also cited for contempt for saying that the judge's ruling was "outrageous," and that the defendants were "going to jail in a legal lynching." Weinglass was given four months for persisting on one occasion in asking questions when directed by the judge to stop. He also received citations for defying orders from the bench for "insulting remarks," and for calling a court ruling "unfair."

[5]*Ex parte* Robinson, 86 U.S. 505, 510 (1873); Eilenbecker v. District Court of Plymouth County, 134 U.S. 31, 38 (1890); Bessette v. W.S. Conkey Co., 194 U.S. 324, 326 (1904).

[6]BLACK'S LAW DICTIONARY 390 (4th ed. 1957).

[7]Clark v. United States, 289 U.S. 1 (1932).

[8]*Ex parte* Earman, 85 Fla. 297, 95 So. 755 (1923).

[9]Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1911); Harnon, *Civil and Criminal Contempts of Court*, 25 MODERN L. REV. 179 (1962); Golfarb, *The Varieties of the Contempt Power*, 13 SYR. L. REV. 44 (1962).

complainant in a civil suit, such as payment of delinquent alimony, or to coerce compliance with court orders in either civil or criminal cases. A civil contempt sentence may call for a fine or imprisonment. However, the offender is usually given an opportunity to "purge" himself by complying with the court's directive.

Contempt is considered criminal if the punishment is punitive in nature and is used to vindicate the court's authority and to punish for past disobedience of its orders.[10] The punishment for criminal contempt prescribes a definite period of time, or is in the form of a fine. No opportunity is given the offender to "purge" himself. An example of criminal contempt is the use of offensive language, or offensive behavior, tending to prevent the progress of a trial, or demonstration of disrespect for the dignity and authority of the court.

The classification of contempt as civil or criminal generally does not depend on the type of action out of which it arises.[11] It depends on the nature and purpose of the contempt proceeding. For example, even though a criminal case may be on trial, the court may attempt to coerce compliance with its order through the use of civil contempt. Conversely, unruly behavior on the part of a lawyer in a civil suit may be punishable as a criminal contempt. The classification of contempt as direct or indirect and criminal or civil, has led to much confusion. The confusion is compounded in determining whether a contempt is civil or criminal depending on the character and purpose of the proceedings, and whether the criminal or civil contempt is direct or indirect depending on the casual or geographical effect on the court's administration of justice.

In recent years, there has been a great increase in the use of summary punishment of both civil and criminal contempt.[12] In summary punishment the judge charges an alleged offender with contempt, and inflicts punishment without a full formal hearing, the opportunity to present evidence, or the assistance of counsel.[13] "Summary" does not necessarily mean "instant", but means the use of a much less formal procedure to inflict punishment that is usually given a contemnor.

The use of summary punishment is limited to direct contempt in both civil and criminal contempt proceedings. The justification for its use is the necessity of removing the obstruction to justice without the delay involved in more formal proceedings. If the contempt is indirect, summary punishment is unavailable. Its use cannot be justified in cases of indirect contempt on the basis of the necessity of removing the obstruction to the

[10]Gompers (*supra*) note 9.

[11]In *Gompers, supra* note 9 at 441, the Court stated that the distinction between criminal and civil contempt is found in the dominant character and purpose of the proceeding.

[12]*Dennis v. United States,* 341 U.S. (1951), resulted in several Supreme Court contempt cases, including *Yates v. United States,* 355 U.S. 66 (1958) and *Sacher v. United States,* 343 U.S. 1 (1952).

[13]Sacher, *supra* note 12 at 455.

administration of justice, since the contempt did not occur in the immediate presence of the court.

Many writers and judges have expressed concern regarding the use of summary punishment in criminal contempt proceedings.[14] Their fear results from the unlimited power possessed by one man to punish another man summarily to a long prison sentence, especially when the judge imposing the sentence is the one against whom the affront was directed.

UNITED STATES SUPREME COURT CASES

Civil Contempt

As early as King Richard III, it was recognized that the Chancellor of England could imprison a party for a contempt of court, in order to secure obedience to the writs of the King, but not as punishment for the disobedience.[15] Therefore, civil contempt became widely used in England, and eventually in the United States, to aid in the proper functioning of the courts.

The usual punishment for civil contempt is a fine. However, many civil contempt proceedings have resulted, not only in the imposition of a fine, but also in imprisonment to coerce payment of the fine.[16] Summary punishment is available to a court, provided the contempt was committed within its immediate presence. If the contempt was indirect, the court must afford the alleged contemnor a formal hearing.

There is general agreement among judges and writers that the use of summary punishment is proper in civil contempt proceedings.[17] It is commonly felt that a court must be able to coerce enforcement of its decrees and orders to further the administration of justice. The usual justification for the use of summary punishment is that the contemnor "... holds the keys to his freedom in his willingness to comply with the court's directive."[18] It is now well established that there is neither a necessity nor a Constitutional basis for a jury trial in civil contempt proceedings.

[14]These writers and judges are discussed *infra*.

[15]Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 169-70, 174 (1908).

[16]Gompers, *supra* note 9 at 441.

[17]Shillitani v. United States, 384 U.S. 364 (1966). Judges, almost uniformly, concede that the power to coerce a person through civil contempt is essential to the functioning of the courts. *cf.* Green v. United States, 356 U.S. 165 169 (1958) (separate opinion of Justice Frankfurter); United States v. Barnett, 376 U.S. 681, 728 (1964) (Justice Goldberg dissenting), and 724 (Justices Black and Douglas dissenting).

[18]*See* Barnett, *supra* note 17 at 724, dissenting opinion of Justice Black. Justice Black feels that courts should have power to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant "carries the keys to freedom in his willingness to comply with the court's order," is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.

In *Shillitani v. United States*,[19] the petitioners refused to testify before a grand jury under immunity granted by the district court, and were found guilty of contempt in proceedings under Rule 42 (b) of the Federal Rules of Criminal Procedure.[20] Each petitioner was sentenced to two years in prison, with the condition that he would be released sooner, if and when he answered the questions. The Court of Appeals rejected their Constitutional arguments that they were not indicted or given jury trials on the ground that the sentences gave them an unqualified right to release upon compliance with the orders to testify.

The Supreme Court looked to the "character and purpose" of the contempt actions. Even though the petitioners were ordered imprisoned for a definite period, their sentences clearly were intended to operate "in a prospective manner-to coerce, rather than punish." The Court held that the conditional nature of the sentences rendered the actions civil contempt proceedings for which indictment and jury trial are not Constitutionally required.[21]

Several limitations were stated by the Court regarding the use of civil contempt. First, the contemnor's continued defiance justifies holding civil contempt proceedings and imposing a conditional imprisonment without the safeguards of indictment and jury trial, *provided the usual due process requirements are met.*[22] Second, the justification for coercive imprisonment *depends upon the ability of the contemnor to comply with the court's order.*[23] Third, a court must exercise *the least possible power adequate to the end proposed.*[24]

Applying the above limitations, the Court found that since the grand jury had been finally discharged, the petitioners had no further opportunity to purge themselves of contempt. The Court held that the sentences were improper in extending beyond the cessation of the grand jury's term, and ordered the release of the petitioners.

In *Shillitani*, the Court affirmed the rule that ". . . courts have inherent power to enforce compliance with their lawful orders through civil contempt."[25] However, it failed to consider the district court's use of Rule 42 which provides the procedure to be used in criminal contempt cases. Rule 42 makes no provision for civil contempt proceedings.[26] Under *Shillitani*, the Court looks at the character and purpose of the contempt

[19]Shillitani, *supra* note 17; Comment, *Contempt of Court—Recent Developments*, 45 N.C. L. REV. 545 (1967).

[20]Federal Rules of Criminal Procedure 42, *supra* note 2.

[21]Shillitani, *supra* note 17 at 365. In footnote 5 at page 369, the Court stated: "On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence."

[22]*Id.* at 370, 371.

[23]*Id.* at 371.

[24]*Id.*; Anderson v. Dunn, 19 U.S. 204, 231 (1821).

[25]Shillitani, *supra* note 17 at 370.

[26]Federal Rules of Criminal Procedure 42, *supra* note 2.

actions and at the nature of the sentence imposed to classify the contempt. Therefore, the district court's use of the procedure provided by Rule 42 would appear to be irrelevant, since the Court will disregard the improper use of the criminal contempt procedure and resort to the "inherent power" of courts to punish for civil contempts.

However, someone who is adjudged guilty of contempt might appreciate knowing the nature of his sentence. Even though the sentence was rendered under Rule 42 (Criminal Contempt Procedure), its conditional nature might justify him in thinking he will not suffer the consequences of a criminal contempt charge—imprisonment for a definite period of time with no opportunity to purge himself. The Court has not yet defined what elements will make a sentence rendered under criminal contempt procedure sufficiently conditional to convert it into a civil contempt. Furthermore, the Supreme Court has previously stated that ". . . a mingling of civil and criminal contempt proceedings must be shown to result in substantial prejudice before a reversal will be required."[27]

As to future contemnors with conditional sentences rendered under Rule 42, the *Shillitani* case presents a dilemna. The only way to finally decide whether the sentence imposed was for civil contempt is to appeal it to the Supreme Court. If the Court decides that the sentence was not sufficiently conditional, or was imposed to punish for past conduct,[28] the contemnor will suffer the consequences of a criminal contempt conviction. He will be unable to show that the mingling of civil and criminal contempt proceedings "resulted in substantial prejudice" because he had sufficient warning that it was criminal contempt when the judge proceeded under Rule 42.[29]

In practical effect, the result of the case, on its facts, is satisfactory. The district court's power to coerce obedience to its orders was upheld, and the petitioners were released when it became impossible for them to purge themselves. However, the mixture of civil and criminal contempt should have made the judgment invalid since "civil and criminal contempt procedures are quite different and call for the exercise of quite different judicial powers."[30] Although the district court sought to coerce

[27]United States v. United Mine Workers of America, 330 U.S. 258 (1947).

[28]In *Yates, supra* note 12, the sentence imposed provided for imprisonment of one year, but if the defendant would answer the equestions within 60 days, the judge would accept her submission to the court's authority. The contempt was classified as criminal.

[29]*Id.*

[30]In *Reina v. United States*, 364 U.S. 507 (1960), Justice Black and Chief Justice Warren dissented, stating in substance: This mixture of civil and criminal contempt makes this judgment invalid since civil and criminal contempt procedures are quite different and call for the exercise of quite different judicial powers. Also, this judgment says that petitioner has not yet committed a crime and is being sentenced for civil contempt for the sole purpose of coercing his compliance with the demand for his testimony, but that if he fails to comply with this demand within the specified period, he will have committed a criminal contempt. Thus the judgment seems to

compliance with its orders, failure to comply resulted in a two year prison sentence under Rule 42. Therefore, the contempt sentence represented ". . . a present adjudication of guilt for a crime to be committed in the future."[31]

The *Shillitani* case makes it clear that there is no right to indictment and jury trial if the Court finds the contempt proceedings civil in nature. The case also demonstrates the confusion in the Federal district courts regarding the extent and use of Rule 42 in dealing with contempts of court.

CRIMINAL CONTEMPT

A. Rule 42

The Supreme Court has declared summary proceedings in contempt of court actions Constitutional.[32] Summary punishment is restricted to direct contempts. On practical grounds, its use is essential to the preservation of order in judicial proceedings, and to enforcement of judgments and orders of the courts.[33] It facilitates the smooth flow of the trial,[34] discourages further disturbances and operates as a sobering effect on others in the courtroom,[35] and promotes the dignity of the court.[36] Although no chance for preparation of a defense is afforded, there has been a trend toward disqualification of the judge if he becomes "personally embroiled" with the lawyer.[37]

In indirect contempts, there is no necessity for the use of summary proceedings. The alleged contemnor is given an opportunity to present a defense in extenuation of the charges, and the judge has an opportunity for reflection. However, when the indirect contempt consists of an affront to the presiding judge, there has been a tendancy to call for disqualification of the judge.[38]

There is no provision in the Constitution regarding the extent and limits of the power to punish for contempt. Congress has attempted to recognize and define the contempt power in various statutes. In the Act of 1789, Congress provided that the courts of the United States ". . . shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the

represent a present adjudication of guilt for a crime to be committed in the future. Therefore, a judgment invalid on its face can be challenged at any time.

[31]*Id.*

[32]*Ex parte* Robinson, *supra* note 5.

[33]Eilenbecker, *supra* note 5.

[34]Beale, *supra* note 15 at 172.

[35]Note, *Summary Proceedings in Direct Contempt Cases,* 15 VANDERBILT L. REV. 241, 257 (1962).

[36]Respublica v. Oswald, 1 U.S. 318, 329 (1788).

[37]Offut v. United States, 348 U.S. 11 (1954).

[38]Federal Rules of Criminal Procedure 42, *supra* note 2; Lane, *The Contempt Power v. The Concept of A Fair Trial,* 50 KY. L. REV. 351 (1962).

same."[39] Abuses arose from such a broad, undefined power,[40] and the Act of 1831 was passed. This Act still left problems in defining the extent of the courts' authority.[41] However, the power was rarely used until the turn of the Century.

With the advent of the "political" trial, and the increase in public sentiment against new unpopular causes, the use of contempt, and the length of sentences imposed, greatly increased during the first half of the present Century.[42] The most notable effort to curtail the use of summary punishment by Federal District Courts, and to delineate the procedure to be used in criminal contempt proceedings, is Rule 42 of the Federal Rules of Criminal Procedure.[43]

Rule 42 retains the distinction between direct contempts in subdivision (a), and indirect contempts in subdivision (b). Under Rule 42 (a), the judge has the power to punish summarily any conduct that he saw or heard in his actual presence. However, 42 (a) is "reserved for exceptional circumstances."[44]

Rule 42 (b) provides the general mode of procedure to be used in all criminal contempt cases. It provides for notice, hearing, time for preparation of a defense, admission to bail, and disqualification of the judge in certain situations.[45] Furthermore, the right to a jury trial is provided in ". . . any case in which an act of Congress so provides." Congress has provided for the right to a jury trial in three specific instances: 1. cases in which the contemptuous act constitutes a crime under state or federal law;[46] 2. cases of constructive contempt arising out of labor disputes;[47] and 3. cases under the voting rights provision of the Civil Rights Act of 1957.[48]

[39]1 Stat. 73, 82 (1789).

[40]James H. Peck, a federal district judge, was sought to be impeached for imprisoning and disbarring a man named Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Peck was acquitted, but the occasion resulted in a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789. For an account of this episode, *see Nye v. United States,* 313 U.S. 33, 45 (1941).

[41]4 Stat. 487 (1831). The first section of the Act provides: "That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or as near thereto as to obstruct the administration of justice, the misbehavior of any of the officers or the said courts in their judicial transaction, and the disobedience or resistance by any officer of the said courts, party, juror, or any other person or persons, to any lawful writ, process, order, ruling, decree, or command of the said courts." This Act limited summary proceedings in criminal contempt cases to acts of direct contempt plus acts in disobedience of the court's writs. For an interpretation of the Act, see *Toledo Newspaper Co. v. United States,* 247 U.S. 402 (1917).

[42]*See* cases cited, *supra* note 12.

[43]Federal Rules of Criminal Procedure 42, *supra* note 2.

[44]Harris v. United States, 382 U.S. 162, 164 (1965).

[45]Federal Rules of Criminal Procedure 42, *supra* note 2.

[46]Clayton Act §§ 21-24, 18 U.S.C. §§ 402, 3691 (1958).

[47]Norris-LaGuardia Act, § 11, 18 U.S.C. § 3692 (1958).

[48]Civil Rights Act, 71 Stat. 638 (1957), 42 U.S.C. § 1995 (Supp. v. 1958).

Although Rule 42 sought to curtail the increase in the use of criminal contempt, at least regarding summary proceedings, an opposite result has occurred. Rule 42 resulted in confusion in the Federal district courts in the application of subdivisions (a) and (b).

In *Brown v. United States,*[49] the petitioner refused to answer questions relevant to a grand jury's investigation of possible Interstate Commerce Act violations. The grand jury sought the aid of the district court which granted the petitioner immunity, and ordered him to answer the questions. The petitioner persisted in his refusal before the grand jury, and was again brought before the judge. The judge proceeded to ask him the questions, and upon his refusal, sentenced him to 15 months in prison for criminal contempt under Rule 42 (a).

The Supreme Court held that since his disobedience of the district court's order occurred in its presence, it was proper for the court to proceed under Rule 42 (a). Four dissenters concluded that the contempt was already completed out of the court's presence when the petitioner refused to answer the questions before the grand jury, and the contempt should not be ". . . reproduced in a command performance before the court to justify summary disposition."[50]

The procedure approved by the majority of the Court in the *Brown* case was followed in subsequent cases.[51] However, it was overruled in *Harris v. United States.*[52] In *Harris,* the Court was presented with a factual situation, almost identical to the *Brown* case. The Court held that 42 (a) was improperly applied since the real contempt occurred before the grand jury in the petitioner's refusal to answer its questions, as directed by the district court.

In *Harris,* the Court adopted the reasoning of the dissenting opinion in *Brown.* The reason given for overruling *Brown* was that the petitioner's refusal was not ". . . such an open, serious threat to orderly procedure that 'instant' and summary punishment, as distinguished from due and deliberate procedures . . . was necessory."[53] The Court held that 42 (a) was ". . . reserved for exceptional circumstances," such as an affront to the dignity of the court, to quell a disturbance, or to stop insolent tactics. If none of these exceptional circumstances are found, the Court stated that 42 (b) provides the normal mode of procedure.[54]

The contempt committed before the grand jury in the *Harris* case was

[49]Brown v. United States, 359 U.S. 41, 42 (1959).
[50]*Id.* at 54.
[51]Levine v. United States, 362 U.S. 610 (1960); Piemonte v. United States, 367 U.S. 556 (1961).
[52]Harris, *supra* note 44 at 167; Note, *Criminal Procedure—Supreme Court Narrows Scope of Summary Procedures in Federal Criminal Contempt Convictions,* 1966 DUKE L. REV. 814 (1966).
[53]Harris, *supra* note 44 at 165.
[54]*Id.*

indirect. The obstruction to the administration of justice had occurred before the petitioner continued his contemptuous conduct in the presence of the judge. On this basis alone, the Supreme Court could have required the use of 42 (b), reserving 42 (a) for direct contempts. Although quite vague, the Court's "exceptional circumstances" standard is justifiable in view of the harshness of the consequences under 42 (a).

The Court has also carved out other exceptions to Rule 42 (a) to help clarify its application to criminal contempt cases. In *Offutt v. United States*,[55] a long trial was held in a Federal district court during which the judge displayed personal animosity and lack of proper judicial restraint toward defense counsel. At the close of the trial, the judge acting under 42 (a), summarily found defense counsel guilty of criminal contempt for "contumacious, and unethical conduct . . during the trial," and sentenced him to 10 days in prison.

The Supreme Court exercised its supervisory authority over the administration of criminal justice in the Federal courts, set aside the cause, and remanded it to the district court for retrial before a different judge. The record indicated that the judge, instead of representing the impersonal authority of law, had permitted himself to become "personally embroiled" with the lawyer. The Court stated that the power entrusted to a judge is "wholly unrelated to his personal sensibilities, be they tender or rugged."[56] Therefore, in a case of contempt by personal attack upon the judge, he may, "without flinching from his duty, properly ask that one of his fellow judges take his place."[57]

[55]Offutt, *supra* note 37.

[56]*Id.* In *Ungar v. Sarafite*, 376 U.S. 575 (1964), a prosecution witness in a state criminal trial was adjudged guilty of criminal contempt for his conduct as a witness in a post trial hearing presided over by the judge before whom the contempt occurred at trial. The witness, an attorney, was denied a continuance. He did not defend, arguing only that a continuance and a hearing before another jurge should be afforded. The judge found the exclamation of the witness at trial, that he was being "coerced and intimidated and badgered"; and that "the Court is suppressing the evidence" to be disruptive contempt of court, and sentenced the witness to 10 days in prison and to pay a fine.

The Supreme Court held that criticism of the court's rulings and failure to obey the court's orders did not on these facts constitute a personal attack on the trial judge so productive of bias as to require his disqualification in post trial contempt proceedings. At page 584 the Court stated: "We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with a resistance to their authority or with highly charged arguments about the soundness of their decisions. This was disruptive, claiming being badgered, and coerced and suppression of evidence, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." Therefore, unlike *Cook v. United States*, 267 U.S. 517 (1925) and *Offutt, supra* note 37, the Court did not feel that the trial judge permitted himself to become personally embroiled with petitioner. Furthermore, the judge's characterization of the conduct as contemptuous, disorderly and a malingering was at most a declaration of a charge against the petitioner, based on the judge's observations which without more was not a constitutionally disqualifying prejudgment of guilt. *See also*, Note, *Summary Punishment for Contempts A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 So. CAL. L. REV. 463 (1966).

[57]Ungar, *supra* note 56 at 585, citing Cooke v. United States, *supra* note 56 at 539.

The Court, in the *Offutt* case, engrafted onto Rule 42 (a) a provision for judicial self-restraint calling for self-disqualification similar to that expressly provided in 42 (b). The "personally embroiled" test for self-disqualification seems to provide an important safeguard to a contemnor under the otherwise harsh procedure of 42 (a). However, in practical effect, a judge who fails to exercise proper judicial restraint may have difficulty in determining when he has become sufficiently embroiled to call for his own disqualification. If he does disqualify himself, the lawyer is still proceeded against for contempt of court by another judge. The second judge will have to proceed under 42 (b) since the contempt did not occur in his presence. The lawyer may possibly get a fairer hearing and a less severe penalty. However, even though both the original judge and the lawyer may have been personally embroiled, only the lawyer could be held guilty of criminal contempt.

Further exceptions to the procedure under 42 (a) were established by other cases decided prior to *Offutt* and *Harris*. In *Sacher v. United States*,[58] 11 Communist Party leaders were convicted of violating the Smith Act. After the trial, the judge acted under 42 (a) to find the petitioners guilty of criminal contempt, and to impose jail terms up to 6 months.[59] The sentences they received were for long-continued conduct in the immediate presence of the judge. They challenged the judge's use of 42 (a) on the ground that "summary" means "instant", and the judge's delay until after trial called for the use of 42 (b).

The Supreme Court held that 42 (a) allows the judge two alternatives: he may immediately and summarily punish for a contempt committed in his presence if he thinks delay will prejudice the trial; or, if he feels the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power.[60]

In reaching this conclusion, the Court decided that "summary" as used in Rule 42 (a) does not refer to the timing of the contempt proceedings with reference to the contempt, but refers to "a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, . . ."[61] It felt that if summary punishment could be imposed instantly, sentences would be pronounced by judges "while smarting under the irritation of the contemptuous act," rather than according to a well-considered judgment.

[58]Sacher, *supra* note 12. *See also*, Note, *Criminal Procedure—Contempt of Court—Duration of Judge's Power to Punish Summarily*, 99 U. PA. L. REV. 540 (1951).

[59]Sacher, *supra* note 12 at 4. The Court quoted the lower court opinion, "The record discloses a judge sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with impertubability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess."

[60]*Id.* at 11; *Summary Punishment for Contempt*, *supra* note 56.

[61]*Id.* at 10.

The dissenting opinion felt that the judge in the district court was not impartial.[62] The judge repeatedly called the lawyer a liar, which marked "a drastic deviation from the desirable judicial standard."[63] The dissenters felt that, due to the conduct of the judge, he should not have passed on the contempt charges he preferred, and that there should have been notice, a hearing, and an opportunity for petitioners to defend themselves under 42 (b). Possibly, this dissent was the precedent for the "personally embroiled" standard of the *Offutt* case. However, the dissent went further and stated that the petitioners were Constitutionally entitled to a jury trial.

In the *Sacher* case, the acts of contempt occurred in the immediate presence of the court and Rule 42 (a) would apply. The Supreme Court had held previously that before summary contempt power should be invoked, there must be "an actual obstruction of justice. . . ."[64] However, the judge did not act until the jury was adjourned to find a verdict. He then asked the lawyers to stand up, read them the contempt certificates, and held them all guilty of contempt.

If the purpose of summary punishment under 42 (a) is to prevent "an actual obstruction of justice," there was no need for its use in the *Sacher* case. The contempt for which the petitioners were convicted was a course of conduct throughout the trial. The trial proceeded all the way to adjournment of the jury without the necessity of resorting to summary punishment. Therefore, there was no "actual obstruction to justice." But, this argument overlooks the use of the contempt power to preserve the dignity and authority of the court. On this ground, the result of the *Sacher* case is justifiable.

When contemptuous conduct occurs in the presence of the court, the judge may "instantly" hold the offender guilty of criminal contempt. However, the offender will often be a lawyer, and the effect of a criminal contempt conviction may prejudice the result of his client's case. Therefore, the exception to Rule 42 (a) in giving the trial judge the alternative to punish instantly or to wait until the trial has ended has a supportable foundation.[65]

A restriction on the sentencing practices of the Federal district courts under Rule 42 (a) was announced in *Yates v. United States*.[66] In *Yates*,

[62] *Id.* at 16, 17.

[63] *Id. at* 18.

[64] *Ex parte* Hudgings, 249 U.S. 378, 383 (1919).

[65] In *Sacher, supra* note 12 at 14. Justice Black in dissent called for a reversal because the judge should not have passed on the contempt charges he had preferred, there should have been notice, a hearing and an opportunity for petitioners to defend themselves, and they were constitutionally entitled to a jury. According to Black, the defendants had to defend Communist leaders and the judge charged them with following a concerted course deliberately designed to bring the whole judicial system into public contempt and disgrace. He stated at page 18: ". . . the menace is most ominous for lawyers who are obscure, unpopular or defenders of unpopular or unorthodox causes."

[66] Yates, *supra* note 12.

the petitioner and 13 co-defendants were tried for conspiracy to violate the Smith Act. While testifying in her own defense, the petitioner refused to answer questions about the Communist membership of both a co-defendant, who had rested his case, and a non-defendant. She was imprisoned for civil contempt to coerce her to answer. She later refused to answer 11 similar questions, and the judge notified her that he would treat the 11 refusals as criminal contempts under 42 (a). After the close of the trial, the judge found her guilty of 11 separate criminal contempts. She was sentenced to imprisonment for 1 year on each count, with the sentences to run concurrently. However, the sentence also provided that if she would answer the questions within 60 days, the court would accept her submission to the court's authority.

The Supreme Court held that there was only a single contempt because the questions all related to identification of others as Communists after she had made it clear that she would not be an informer.[67] The Court recognized that imprisonment through civil contempt cannot be used to coerce evidence after the termination of a trial. However, it felt that the sentences were not imposed to coerce answers to the 11 questions, but to "vindicate the authority of the court" by punishing the petitioner's defiance. The Court stated:

> The judge did hope that petitioner would still purge herself by bowing to the authority of the court by answering within 60 days after sentencing or at the time of sentencing, but he acted under Rule 35 which says: "Correction or Reduction of Sentence. . . . The court may reduce a sentence within 60 days after the sentence is imposed. . . ."[68]

The Court remanded the case to the district court for appropriate resentencing in light of its finding of only one contempt.

Three Justices dissented, finding the case "a shocking instance of the abuse of judicial authority."[69]

In a subsequent decision,[70] the Supreme Court exercised its supervisory power and set aside the new one-year sentence imposed by the district court. On remand, the trial judge had imposed the same sentence for this single offense that it had imposed for the 11 original charges. The Supreme Court felt that the time the petitioner had already served, 7 months, was an adequate punishment for her offense, and ordered her release.

The *Yates* case preceded *Shillitani v. United States.*[71] In *Shillitani,* the trial judge acted under Rule 42 (b) to sentence each petitioner to two years in prison but with the condition that they would be released sooner if they answered certain questions. In *Yates,* the trial judge acted under

[67] *Id.* at 62.
[68] *Id.*
[69] *Id.* at 76.
[70] Yates v. United States, 356 U.S. 363, 366-67 (1958).
[71] *See* the form of the sentence in *Shillitani, supra* note 17.

Montana Law Review, Vol. 32 [1971], Iss. 2, Art. 1

42 (a) to sentence the petitioner to 11 concurrent 1-year terms in prison, but with the condition that she would be released if she answered certain questions within 60 days. The Supreme Court classified the *Shillitani* proceedings as civil contempt. It classified the *Yates* proceedings as criminal contempt.

The two cases are difficult to reconcile. In *Shillitani,* the Court ignored the judge's use of criminal contempt procedure under 42 (b), and looked to the purpose and character of the sentence he had imposed. The contempt sentence was imposed to coerce answers relevant to the grand jury's inquiry while it was in session. In *Yates,* the Court found that the sentence rendered under 42 (a) was to vindicate the authority of the court by punishing the petitioner's defiance. That is, the Court held that the petitioner was given 60 days after trial to purge herself of her guilt for criminal contempt by bowing to the authority of the judge, and not for the purpose of coercing answers to the 11 questions.

In *Yates,* the petitioner was originally held in civil contempt to coerce answers to several questions. She was later held in criminal contempt for the very same reason. The primary object of the judge in these proceedings was to get answers to the questions. If the questions had been answered within the 60-day period after trial, the sentence would not have been imposed. Therefore, with its purpose being to coerce, and its nature being conditional, the sentence could just as easily have been classified as civil contempt, as in the *Shillitani* case. It should make no difference that the sentence was imposed after the trial. The answers, although no longer relevant to the co-defendant, could affect the interests of the non-defendant. There was still a valid reason for coercing the answers other than vindicating the authority of the court.

The *Yates* case demonstrates the danger in thinking, as a contemnor, that the conditional nature of the contempt sentence will not result in imprisonment for a definite period of time.[72]

B. Constitutional Right to Jury Trial

There has been a tremendous amount of disagreement concerning the use of summary punishment in criminal contempt proceedings.[73] The Supreme Court repeatedly held, until recently, that there is no Constitutional right to a jury trial in any criminal or civil contempt cases.[74] Probably, the most notable case reflecting the split of opinion regarding jury trial is *Green v. United States.*[75]

[72] *See* Justice Goldberg's dissent in Barnett, *supra* note 17, and Justice Black's dissent in *Green, supra* note 17, in which he was joined by Justice Douglas, and Chief Justice Warren's dissent in *Barnett, supra* note 17, *Levine v. United States,* 362 U.S. 610, 620 (1960), *Nilva v. United States,* 352 U.S. 385, 396 (1957) and *Sacher, supra* note 12 at 13.

[73] *See* cases cited, *supra* note 5. *See also* Note, *Constitutional Law—Criminal Contempt —Right To A Public Trial,* 15 S.W.L.J. 427 (1961).

[74] *See* cases cited, *supra* note 72; Lane, *The Contempt Power, supra* note 38.

[75] Green, *supra* note 17 at 181.

Prior to the *Green* case, the petitioners had been convicted of violating the Smith Act in *Dennis v. United States.*[76] While out on bail pending appeal, their counsel were served with copies of a proposed surrender order. They disappeared and remained fugitives for more than 4½ years. When they surrendered, they were tried in the district court without indictment or jury trial for criminal contempt under the Clayton Act,[77] and Rule 42 (b), for disobedience of the surrender order. The sentences imposed for criminal contempt were 3 years in prison, and one of the cases was appealed in the name of *Green v. United States.*

Under the Clayton Act, contempts were to be punished "in conformity to prevailing usages at law . . ." Before the *Green* case, no Federal district court had imposed a contempt sentence of more than 1 year. However, the Supreme Court found no abuse of discretion in the imposition of 3 year sentences on the ground that Congress had not incorporated into the Clayton Act "the sentencing practices up to that date. . . ."[78] Instead, contempts were to be tried "under familiar contempt procedures . . . among other things, by the court rather than a jury."[79]

The Court rejected the petitioner's Constitutional argument that criminal contempts required prosecution by indictment for the reason that such contempts should be classified as "infamous crimes" within the meaning of the 5th Amendment. The Court said that contempts have always had a unique status under the Constitution, whether subject to infamous punishment or not.[80] The Court based its decision on its established precedent that criminal contempt has never been subject to jury trial either Constitutionally or historically. It stated:

> . . . [O]f course the summary procedures followed by English courts prior to the adoption of the Constitution in dealing with many contempts of court did not embrace the use of either grand or petit jury. See 4 Blackstone Commentaries 283-287. It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over 1 year are "infamous crimes" under the Fifth Amendment (for indictment purposes) although they are neither "crimes" nor "criminal prosecutions" for the purpose of jury trial within the meaning of Art. III, § .2, and the Sixth Amendment.[81]

[76]18 U.S.C. §§ 401, 412, 38 Stat. 730, 738-40 (1914).

[77]Green, *supra* note 17 at 181.

[78]*Id.*; Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); Note, *Criminal Contempt and Trial by Jury*, 8 WM. & MARY L. REV. 76 (1966).

[79]Green, *supra* note 17 at 183. The Fifth Amendment to the Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ." The argument of the petitioners was that proceedings for criminal contempts, if contempts are subject to prison terms of more than one year, must be based on grand jury indictments under the above clause of the Fifth Amendment. Since an "infamous crime" is one punishable by imprisonment in a penitentiary [Mackin v. United States, 117 U.S. 348 (1886)], and since imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year [18 U.S.C. § 4083], the petitioners asserted that criminal contempts, if subject to such punishment, are infamous crimes under the Amendment.

[80]*Id.* at 187.

[81]*Id.* at 184,85. The Sixth Amendment provides in part: "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

The petitioners argued that prior Supreme Court decisions which denied the right to jury trial in criminal contempt proceedings had been based upon an "historical error", or a misunderstanding as to the scope of the power of English courts at the early common law to try summarily for contempts.[82] Therefore, such error should not be extended to a denial of the right to grand jury indictment.

The Supreme Court looked at recent historical research into English contempt practices, predating the adoption of the Constitution, and found no such clear error, but only much obscurity.[83] The Court stated:

> . . . [I]t at least seems clear that English practice by the early Seventeenth and Eighteenth Centuries comprehended the use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside the court. Such indeed is the statement of English law of this period found in Blackstone . . . who explicitly recognized use of a summary power by English courts to deal with disobedience of court process. . . .[84]

The Court also cited, as support, the Act of 1789 which first attempted to define the contempt power. According to the Court, the Act was passed by the members of the "recent Constitutional Convention who no doubt shared the prevailing views in the American colonies of English law as expressed in Blackstone."[85]

Justice Black wrote the dissenting opinion.[86] He could find no justification in history, in necessity, nor in the Constitution for trying those charged with criminal contempt of court in a manner "wholly different from those accused of disobeying any other mandate of the state." Justice Black called summary proceedings of punishment for criminal contempt "an anomaly in the law," and would have accorded the petitioners the right to be tried by jury after indictment by a grand jury "in

---

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." Article III, Section 2 of the Constitution provides in part: "The trial of all crimes, except in Cases of Impeachment, shall be by jury. . . ." The Court in *Green* stated at 185 that "beginning with the Judiciary Act of 1789, Congress has consistently preserved the summary nature of the contempt power in the Act of 1831 and its statutory successors, departing from this traditional notion only in specific instances where it has provided for jury trial for certain categories of contempt."

[82]The historical error was that summary proceedings for contempt originated from an undelivered opinion of Justice Wilmot in England. The case, *King v. Almon*, 1765, Wilmot's Notes, 243, justified summary treatment as being founded upon immemorial usage. However, that statement was somewhat incorrect according to Fox in his treatise, THE HISTORY OF CONTEMPT OF COURT, (1922), as there was no common law precedent until 1720. *See, Criminal Contempt and Trial by Jury, supra* note 78; *Summary Proceedings in Direct Contempt Cases, supra* note 35.

[83]FOX, *The King v. Almon Parts I and II*, 24 L. Q. REV. 184, 266 (1908); FOX, THE HISTORY OF CONTEMPT OF COURT, 5-43 (1927).

[84]Green, *supra* note 17 at 185.

[85]*Id.* at 189. Justice Frankfurter concurred. He felt that regardless of conflicting views, it was indisputable that it has always been constitutional to punish for contempt without the intervention of a jury.

[86]*Id.* at 193.

full accordance with all the procedural safeguards required by the Constitution for 'all criminal prosecutions.' "[87]

Justice Black also contended that the power of summary punishment in one man, the very judge who charges others with violation of his command and sits in judgment on his own charges, precludes an indispensable element of due process of law "an objective . . . impartial tribunal. . . ."

To support his view that the right to jury trial extends to criminal contempts, Justice Black referred to recent scholarship, historical error, the Constitution and the Bill of Rights. According to Black, recent scholarship had refuted the myth of "immemorial usage", since until the late 17th Century or early 18th Century, English courts, except the Court of Star Chamber, "neither claimed nor had the power to punish for contempts committed out of court by summary process."[88]

Black stated that earlier cases "erroneously assumed that courts had always possessed the power to punish all contempts summarily as being inherent in their very being."[89] Furthermore, those who adopted the Constitution and Bill of Rights sought to protect individual liberty from unchecked power in government officials. As a result, the 5th, 6th, 7th, and 8th Amendments were adopted to confine the power of courts and judges regarding the procedures used in the trial of crimes.[90] Black stated:

> . . . I find it difficult to understand how it can be maintained that the same people who manifested such great concern for trial by jury as to explicitly embody it in the Constitution for every $20 civil suit could have intended that this cherished method should not be available to those threatened with long imprisonment for the crime of contempt.[91]

The majority of the Court relied heavily on the "necessity" argument that the regular criminal processes of indictment and jury trial would not result in conviction and punishment of a fair share of those guilty by violating court orders. Black answered this argument by saying

[87] *Id.*

[88] *Id.* at 202. Justice Black cites FOX, THE HISTORY OF CONTEMPT OF COURT, *supra* note 83 and Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-52 (1924).

[89] Curtis and Curtis, *The History of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51 (1927).

[90] Green, *supra* note 17 at 207. Justice Black stated that there was not word of discussion in the Constitutional Convention affirming the jurisdiction of courts to punish a contempt by summary process, a power inherently alien to the method of punishing other public offenses provided by the Constitution. He also stated that contempts were not the subject of major punishment in the colonial era and he could find no instance of unconditional imprisonment for even months in an era when extremely harsh penalties were commonplace. The Declaration of Independence had as a principal complaint against England the denial of trial by jury, and to this extent, Justice Black added: "Witness the fierce opposition of the colonials to the courts of admiralty in which judges instead of citizen juries were authorized to try those charged with violating certain laws."

[91] *Id.* at 209, 210. Justice Black questioned whether anyone would have dared to take the floor of the Constitutional Convention and suggest that federal courts be given the power to summarily imprison a person for contempt.

that the jury "injects a democratic element into the law, . . ." and "cheap, easy convictions, were not the primary concern of those who adopted the Constitution and the Bill of Rights."[92]

The *Green* case, at least for the time-being, laid to rest any further Constitutional challenges against the summary punishment of criminal contempts. However, eight years later, the Governor and Lientenant Governor of Mississippi, in *United States v. Barnett,*[93] challenged their criminal contempt charges for disobedience of three injunctions.[94] The Supreme Court, citing *Green,* held that they were not entitled to a jury trial as a matter of Constitutional right.

The *Barnett* case is significant, not for its affirmation of *Green,* but for its footnote no. 12, which provided a hint for future decisions:

> In view of the impending contempt hearing, effective administration of justice requires that this dictum be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited o that penalty provided for petty offenses.[95]

It was nowhere revealed which members of the Court were of this view. However, it seemed to indicate a definite change in attitude on the Court.

In *Barnett,* Justice Goldberg wrote an important dissent.[96] He felt that the petitioners' claim to trial by jury should not be denied on the "authority of the history of criminal contempt at the time of the Constitution," nor on established precedent which relied on that history.[97] According to Goldberg, his review of history at the time of the Constitution revealed that courts were authorized to impose minor criminal penalties without trial by jury for a variety of trivial offenses, including criminal contempts. Therefore, the reason why criminal contempts were not tried by a jury was that the penalties then authorized and imposed were generally minor.

Goldberg concluded that the petitioners' claim should be evaluated by analyzing the real nature of criminal contempts, and applying "the policy of the Constitutional requirement of trial by jury in 'all crimes' and 'all criminal prosecutions.' "[98] Black also dissented.[99] He restated his

[92] *Id.* at 216. Justices Brennan and Douglas and Chief Justice Warren dissented on the basis that the evidence was insufficient to establish beyond a reasonable doubt that petitioner was guilty of criminal contempt.

[93] *See* cases cited, *supra* note 17.

[94] Barnett, *supra* note 17 at 682.

[95] *Id.* at 695.

[96] *Id.* at 724, Chief Justice Warren and Justice Douglas concurring.

[97] *Id.* at 752.

[98] *Id.* at 751. "The available evidence seems to indicate that . . . at the time of the Constitution criminal contempts triable without a jury were generally punishable by trivial penalties, and that . . . all types of "petty" offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts."

[99] *Id.* at 724.

Constitutional argument for trial by jury in all "criminal presecutions," but welcomed footnote no. 12 as giving those charged with criminal contempt a trial with all the Bill of Rights safeguards including indictment by grand jury and trial by petit jury.[100]

Shortly after *Barnett,* the Supreme Court imposed an important limitation on the use of summary punishment in the sentencing practices of Federal district courts. In *Cheff v. Schnackenberg,*[101] the petitioner was held in criminal contempt for having aided a company in violating a pendente lite order issued by the district court to enforce the Federal Trade Commission's cease and desist order against the company. The petitioner was denied a jury trial, and was given a 6 month prison sentence.

Upon review, the Supreme Court held that the sentence of 6 months for criminal contempt did not warrant treatment other than as a petty offense. Therefore, the denial of a jury trial was proper. However, the Court recognized that by limiting its decision to sentences less than 6 months, it left in doubt instances involving sentences greater than 6 months. The Court sought to remove the doubt by exercise of its supervisory power, and ruled that henceforth, "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. . . ."[102]

The Court rejected the petitioner's Constitutional argument that the right to jury trial should attach to all criminal contempts including petty offenses. Its holding that six months imprisonment was the maximum sentence that could be imposed without a jury in federal cases, was determined by "objective indications of the seriousness with which society regards the offense . . ." The "objective" criteria was found by analogy to a congressional statute which made an offense punishable by six months or less or a fine of not more than $500 a petty offense.[103] Therefore, a 6 month non-jury contempt sentence was permissible under the *Cheff* decision.

Justice Harlan dissented. He argued that it would be better to follow the *Green* case, since in administration of the majority's holding, the district court judge would have to look ahead to the sentence to be given in order to determine whether there is a right to a jury trial. By so doing, the court would have to determine the precise facts which the trial would reveal.[104]

[100] *Id.* at 726-27.

[101] Cheff v. Schnackenberg, 384 U.S. 373 (1966). *See also,* Note, *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors,* 1967 DUKE L. REV. 632 (1967); *Contempt of Court—Recent Developments, supra* note 19.

[102] Cheff, *supra* note 101 at 380.

[103] 18 U.S.C. § 1 (1964), provides in part: "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months and a fine of not more than $500 or both."

[104] Cheff, *supra* note 101 at 380-82.

Justice Douglas also wrote a dissenting opinion.[105] He reiterated his view that criminal contempts are "crimes" within the meaning of Art. III, § .2, and "criminal prosecutions" within the meaning of the 6th Amendment, both of which guarantee the right to trial by jury. He also disagreed with the majority's method of defining a petty offense by reference to the sentence actually imposed. The method he proposed would be to use the maximum potential sentence.[106] However, until petty criminal contempts are properly defined and isolated from other species of contempts, Justice Douglas concluded that "punishment for all manner of criminal contempts can Constitutionally be imposed only after a trial by jury."[107]

The *Cheff* case seemed to place a severe limitation on the power of judges to summarily punish offenders with sentences in excess of 6 months. Most judges would probably prefer to keep within the sentencing limits to avoid cluttering their already crowded dockets. However, in practical effect, the summary power is not as restricted as *Cheff* may make it appear. Prior to imposing the sentence, the judge has a guideline of 6 months. That is, he may isolate each incident of contempt in separate counts, and issue sentences not in excess of 6 months for each count. He may thereby impose a total sentence well in excess of 6 months, and without any limitation.[108]

The sentence will stand unless the Supreme Court finds that there was a lack of "exceptional circumstances" *(Harris)*, that the judge had become "personally embroiled" *(Offutt)* or that the counts all relate to a single contempt *(Yates)*.

In *Cheff*, the Court seemed to adopt the view, implied in footnote no. 12 of the *Barnett* case, that all types of petty offenses punishable by trivial penalties were generally triable without a jury at the time of the Constitution. Therefore, such history justified the imposition of no more than trivial penalties for criminal contempts without trial by jury. Although the majority was careful to place its decision on its supervisory power rather than on Constitutional grounds, the Constitutional right to a jury trial in criminal contempt cases was soon to be recognized.

In *Bloom v. Illinois*,[109] the petitioner was convicted of criminal contempt in an Illinois state court and was sentenced to 2 years imprisonment

[105]*Id.* at 384. Justice Black concurred in this dissent.

[106]*Id.* at 389. Justice Douglas stated: "Resolution of the question of whether a particular offense is or is not "petty" cannot be had by confining the inquiry to the length of sentence actually imposed. That is only one of many factors. As the analysis of the court in *Clawans* [District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)] demonstrates, the character of the offense itself must be considered. The relevance of the maximum possible sentence is that is may be taken as a guage of social and ethical judgments of the community."

[107]*Id.* at 389, 393.

[108]*See* discussion, *supra* note 4. This method was employed by Judge Hoffman.

[109]Bloom v. Illinois, 391 U.S. 194 (1968).

for willfully petitioning to admit to probate a will falsely prepared and executed after the putative testator's death. He was denied a jury trial.

The Supreme Court held that the Constitution guarantees the right to jury trial for a criminal contempt punished by a two year prison term, and such right extends to the States through the 14th Amendment.[110]

A majority of the Court had finally become convinced that "... serious contempts are so nearly like other serious crimes that they are subject to the trial provisions of the Constitution."[111] The Court reaffirmed its view in *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one. When the legislature has not defined the seriousness of the offense by fixing a maximum penalty which may be imposed, the trial court must look to the penalty actually imposed to determine whether the offender is entitled to a jury trial. The Court found "objective indications of the seriousness which society regards the offense," and held that the two year sentence the petitioner had received entitled him to a jury trial. However, the Court would not define the boundary between petty and serious offenses in the States.

The rejection of its prior decisions did not rest entirely on historical grounds.[112] The Court found more compelling reasons for finding the right to jury trial fundamental in criminal contempt cases. The right to jury trial is a protection against the arbitrary exercise of official power. Though a public wrong, contemptuous conduct "often strikes at the most vulnerable and human qualities of a judge's temperament." As a result, extremely serious penalties are imposed upon conviction.[113]

The Court was also willing to cope with malfunctioning of the jury system which may acquit those who should be punished. It found no necessity in the use of the summary power to maintain the independence of the judiciary, nor did it feel that additional time and expense in jury trials would handicap the effective functioning of the courts.

As a result of the *Bloom* case, there is no Constitutional right to a

[110]In the same term of court, the Supreme Court had decided *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the petitioner was sentenced to 60 days in prison and received a $150 fine under Louisiana law which provided that simple battery is a misdemeanor, punishable by a maximum of two years and a $300 fine. He was denied a jury trial since the Louisiana Constitution grants jury trials only in cases where capital punishment or imprisonment at hard labor may be imposed. The Supreme Court held that the right to trial by jury, guaranteed defendants in criminal cases in federal courts by Article III of the United States Constitution and by the Sixth Amendment thereto, was also guaranteed by the Fourteenth Amendment to defendants tried in State courts. The penalty authorized by the law of the locality may be taken as a guage of its social and ethical judgments." Therefore, a crime punishable by two years is, based on past and contemporary standards in this country, a serious crime and not a petty offense, thereby entitling petitioner to a jury trial.

[111]Bloom, *supra* note 109 at 198.

[112]*Id.* at 198-99.

[113]*Id.* at 208. The Court stated: "We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap the effective functioning of the courts."

jury trial in State civil contempt cases nor in criminal contempt cases, which involve only petty offenses. There is a Constitutional right to jury trials in all State criminal contempt cases involving serious offenses (where) the legislature has authorized a maximum penalty dividing petty and serious offenses. When the legislature has stated its judgment about the seriousness of an ordinary criminal prosecution, the severity of the penalty authorized, not the penalty actually imposed, is the basis to use to determine whether an offense is petty. If there is no such legislative determination, then the penalty actually imposed is the standard.

The *Bloom* case leaves State court judges in doubt as to the length of sentences they can impose without a jury trial. The present limitation is two years or as otherwise provided by State legislature. However, the Supreme Court has indicated that one year, or possibly 6 months will be the dividing line in the States as to petty-serious classification. In 49 of the 50 States, the right to jury trial is provided for criminal sentences exceeding one year. In fact, there are only two instances, aside from Louisiana, where a State denies jury trial for a crime by imprisonment for longer than six months.[114]

In the Federal system, the dividing line between petty and serious offenses is six months. The district court judge may still segment his counts, and impose sentences of six months for each count thereby avoiding the jury trial requirement. However, he has another alternative to use to control the life of a contemnor for a substantial period of time without a jury trial. The alternative is provided in *Frank v. United States.*[115]

In the *Frank* case, the petitioner was convicted of criminal contempt for violation of an injunction issued by a Federal district court at the request of the Securities and Exchange Commission. His demand for a jury trial was denied. Upon his conviction, the court suspended imposition of sentence, and placed him on probation for three years.

The Supreme Court held that since the petitioner's actual penalty was one which could be imposed upon those convicted of otherwise petty offenses, a jury trial was not required. To reach its conclusion, the Court reaffirmed its rationale for determining whether an offense is petty or serious.[116] It found that Congress had placed no specific limits on punishment for criminal contempt, nor had it classified contempts as serious or

[114]In *Duncan, supra* note 110 at 161, footnote 33, the Court reviewed the criminal statutes of the 50 states. It found that in 49 of the 50 states, offenses are tried without a jury trial if the punishment which is authorized is no more than one year in jail. The Court found only two instances, aside from Louisiana, in which a jury trial was allowed only for capital punishment or imprisonment at hard labor and was not allowed in cases of imprisonment for longer than six months. These two instances are New Jersey, which provides a one year maximum sentence without a jury trial, and New York, which provides that in New York City, a jury trial extends only to offenses exceeding one year.

[115]Frank v. United States, 395 U.S. 147 (1969).

[116]The rationale is stated most concisely in *Dyke v. Taylor Implement Manufacturing Co.*, 391 U.S. 216, 219-20 (1968).

petty. Therefore, the severity of the penalty actually imposed indicated the seriousness of the particular offense.[117]

The Court looked to the Federal probation statute, and found that Congress had not indicated that the additional penalty of a term of probation placed usual petty offenses in the serious category. The Court stated:

> Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself. In noncontempt cases, Congress has not viewed the possibility of five years' probation as onerous enough to make an otherwise petty offense "serious."[118]

The Court provided that upon revocation of probation, the lower court may impose any sentence which might originally have been imposed. Under the *Cheff* case, that sentence would be limited to six months imprisonment and a $500 fine without a jury trial. Therefore, under the *Frank* case, the maximum nonjury penalty authorized in petty criminal contempt cases in Federal district courts is not simply six months and a $500 fine. The contemnor "may be placed on probation for up to five years and, if the terms of probation are violated, he may then be imprisoned for six months."[119]

Chief Justice Warren wrote a dissenting opinion.[120] He called the decision "an alarming expansion of the nonjury contempt power." He stated:

> Now freed from the checks and restraints of the jury system, local judges can achieve, for a term of years, significant control over groups with unpopular views through the simple use of the injunctive and contempt power together with a punitive employment of the probation device, the conditions of which offer almost unlimited possibilities for abuse.[121]

According to Justice Warren, the lower court may use this device to impose a lengthy probation sentence up to five years, and after four years and 11 months, find a probation violation and impose a six month prison term, all without a jury trial. Finding that Congress "clearly did not intend the maximum five year probation period to be any indication

[117]Frank, *supra* note 115 at 149, footnote 2. Of course, if the statute, creating the offense specifies a maximum penalty, then that penalty is the relevant criterion. *See also* Dyke, *supra* note 116.

[118]Frank, *supra* note 115 at 151-52.

[119]*Id.* at 150, footnote 4. If imposition of sentence is suspended, the court may upon revocation of probation "impose any sentence which might originally have been imposed." 18 U.S.C. § 3653. Under *Cheff*, *supra* note 101, that sentence would be limited to six months imprisonment.

[120]*Id.* at 153. Justices Harlan and Stewart adhered to their dissents in *Bloom* and *Cheff*. Justices Black and Douglas also dissented, calling for jury trial for those who commit offenses against courts, since they should be no less entitled to the Bill of Rights than those who commit offenses against the public in general.

[121]*Id.* at 158. Chief Justice Warren in his dissent stated: "In orienting the probation system toward the individual criminal and not the crime itself, and in making it available for felonies and misdemeanors as well as petty offenses, Congress clearly did so [sic] intend the maximum five year probation period to be any indication of society's view of the seriousness of crimes in general, except to provide that probation is inappropriate for capital or life sentence cases."

of society's view of the seriousness of crimes in general,"[122] he preferred reaffirmance of the holding in the *Cheff* case that six months is the maximum permissible non-jury sentence, whether served on probation, or in prison, or both. Therefore, if probation were revoked after four months, only a two months' jail term could be imposed in Federal district courts.

The *Cheff* and *Bloom* cases sought to limit "arbitrary official power" by taking away from one man the power to inflict summarily lengthy prison terms. The *Frank* case seems to return that power to the judge in an almost unbridled form. Without any jury deliberation, the judge can control the life of a contemnor for five years and six months. However, it could be argued that such control is only minimal in its effect on the contemnor, and is "certainly less onerous than jail itself." Furthermore, if the contemnor behaves himself, he will never have to suffer the consequences of a prison term.

Conversely, it is arguable that the amount of control over a contemnor by a judge could make a jail sentence "less onerous" than the conditions of probation. In the *Frank* case, the conditions of the probation required the petitioner to make monthly reports to his probation officer, to associate only with law-abiding persons, to maintain reasonable hours, to work regularly, to report all job changes to his probation officer, and to leave the probation district only with the permission of his probation officer. Chief Justice Warren suggests that a strict application of the conditions could "effectively deprive" a contemnor of any meaningful freedom for over five years.[123]

Upon finding an offender guilty of criminal contempt, the lower court could suspend imposition of a five-year sentence, but place him on probation for that period. The court could require the probation officer to construe the hours requirement strictly and refuse permission to leave the jurisdiction. This application would result in denying the offender his freedom of movement. Furthermore, by insisting that he work regularly, the court could regulate the contemnor's working life. Because of the requirement that he associate only with law-abiding citizens, he would be limited in his freedom of association. He would thus choose his associates at his peril. With such a strict application of the conditions, it would be a simple matter finding a violation of probation and imposing a six month sentence. As an extreme example, the court could find that he had failed to associate with a law-abiding citizen by having lunch with an individual who had recently received a traffic ticket.

Although this application of the conditions is somewhat severe, and possibly unlikely, it does serve to illustrate the fact that probation may not always be "less onerous than jail itself," especially when a six-month jail term may be imposed for any violation at any time during the probationary period. If a six-month prison sentence is only a petty offense, it

[122] *Id.*
[123] *Id.* at 153, 154.

would seem that substantial control over a man's life for five years plus a possible six-month prison term should remove the offense from the petty ctaegory. In any event, a jury should decide whether or not a man's life should be restricted for five years and six months.

If sobriety cannot be maintained under the methods prescribed in the preceding cases, and persistent disorderly conduct disrupts the administration of justice, a federal judge has new and interesting alternatives to insure decorum. Those alternatives are set forth in *Illinois v. Allen.*[124]

Allen was convicted of robbery by an Illinois jury. He petitioned for a writ of habeas corpus in federal court claiming a wrongful deprivation of his Sixth Amendment Constitutional right to remain present throughout his trial. The federal court declined to issue the writ, but the Court of Appeals reversed.[125] The United States Supreme Court reversed the Court of Appeals, holding that Allen's continuing disruptive and disorderly conduct despite repeated warnings by the trial judge resulted in his loss of the Constitutional right to be present throughout the trial. Furthermore, removing Allen from the courtroom and proceeding without him until he promised to conduct himself properly was not unconstitutional.

Allen's misconduct began during voir dire examination of prospective jurors. He argued with the judge in an abusive and disrespectful manner. At one point, he stated to the judge, "when I go out for lunchtime, you're [the judge] going to be a corpse here."[126] He then tore up the file of his Court-appointed attorney.

Justice Black wrote the majority opinion. The decision that Allen had lost his right to be present in the courtroom was carefully qualified with the reservation that a defendant can reclaim the right as soon as he is willing to conduct himself consistently with judicial decorum and respect.

The majority of the Court proposed three far-reaching "constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."[127]

The Court went on to say that no person should be tried while bound and gagged "except as a last resort."[128] The use of this alternative affronts the dignity and decorum of judicial proceedings, and denies a defendant of his privilege to communicate with his counsel. Yet, the Court felt that "in some situations which we need not attempt to foresee, binding

[124]Illinois v. Allen, 397 U.S. 337 (1970).
[125]United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969).
[126]Allen, *supra* note 124 at 340.
[127]*Id.* at 343, 344.
[128]*Id.* at 344.

and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here."[129]

The use of criminal contempt as a sanction could restore decorum without resort to the alternative of binding and gagging. However, criminal contempt as a sanction has limitations if a defendant desires to prevent any trial of his case, or if his offense is so serious that a mere contempt sentence presents no effective sanction. Possibly, civil contempt could be used, thereby preserving the right to be present. But, a lengthy confinement may result in the loss of adverse witnesses from which a defendant could profit.

The majority of the Court did not hold that removing this defendant from this own trial was the only solution of the problem. However, the Court stated: "Deplorable as it is to remove a man from his own trial even for a short time, we hold that the judge did not commit legal error in doing what he did."[130]

Justice Brennan concurred. He felt that a nation cannot endure if it falls short on the "guarantees of liberty, justice and equality embodied in our founding documents." The Constitutional right to remain present during a trial must be considered in this context. Therefore, the governmental prerogative to proceed with a trial, as opposed to the defendant's right to be present, "may not be defeated by conduct of the accused that prevents the trial from going forward."[131]

Justice Brennan would accord an unruly defendant adequate warning that his conduct is intolerable as well as the possible consequences of continued misbehavior. He would also add that a trial court should make reasonable efforts to enable an excluded defendant to communicate with his attorney and to keep informed of the progress of the trial.

Justice Douglas agreed with the preservation of decorum in a criminal trial. However, he disagreed with the use of this case to establish "guidelines for judicial control."[132] The record intimates that Allen was a mental case, and with the passage of 13 years since the date of the trial, the case should have been reversed for staleness of the record. According to Justice Douglas,

> What a judge should do with a defendant whose courtroom antics may not be volitional is a perplexing problem which we should not reach except on a clear record.[133]

Justice Douglas felt that the real problems were not present in this case, but rather in two other strikingly different situations. First, the political trial raises the question of "whether the accused has rights of

[129] *Id.*
[130] *Id.* at 347.
[131] *Id.* at 348, 349.
[132] *Id.* at 351.
[133] *Id.* at 352.

confrontation that the law invades at its peril.''[134] Second, trials may be used by ''minorities to destroy the existing constitutional system and bring on repressive measures.''[135] Justice Douglas would not propose any guidelines for these 2 cases. He argued that the weighty problems presented by either situation should only be resolved when it reaches the Court for review.

The result of the Allen case is justifiable on its facts. The trial judge maintained his judicial serenity and dignity all throughout the proceedings, at no time resorting to a ''mudthrowing contest.'' He had several choices to solve the problem, and the removal of Allen from the courtroom allowed the trial to commence. If the trial had been delayed, great inconvenience and expense would have resulted to judge, jurors, and counsel. One man should never be allowed to upset the orderly processes of the judicial system. In the words of the Court:

> It would degrade our Country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes.[136]

Status of the law of Contempt in Montana

A vast majority of Montana attorneys who are admitted to practice in the State courts are also admitted to practice in the Federal district courts throughout the state.

All of the Supreme Court cases discussed previously in this article are applicable to the federal courts in Montana. As a result, Montana lawyers admitted to federal practice are subject to the possibility of criminal or civil contempt sanction. There has been very little use of the contempt power by Montana federal judges to the present time. However, various changes in the legal field may possibly cause an increase in use of the contempt power, and an increase in the severity of punishment.

The possibility is not too remote that Montana may experience in the future a ''political'' trial such as the Chicago-Seven Trial with the overtones of disrespectful and disorderly conduct on the part of the defendants. The very nature of a political trial may present a dilemma for the attorney. He must present his client with zeal within the bounds of law and ethics. Yet, that zeal may seemingly place him in a position which conflicts with his duty as an officer of the court. In other words, the cause that the attorney is representing may be distasteful to judge and jury thereby creating an impression that the attorney is disrespectful to the judiciary. Still, the attorney must provide his client with adequate representation which includes all available defenses. Certainly, this representation should not foster abusive and vile language, nor disrespect and disruption of the

[134] *Id.* at 353.
[135] *Id.* at 356.
[136] *Id.* at 346.

judicial system. It is doubtful whether many Montana lawyers would place themselves in such a position, except in rare situations. Montana communities within which lawyers practice are small. Local public embarrassment as well as constant appearance before a limited number of state and federal judges promotes self-restraint and reflection.

However, as a political trial becomes national in focus, lawyers with national renown will be called into the state to participate in the defense. Their special knowledge and ability in this field should secure an adequate defense. But, there will be less reason for the self-restraint that could be expected of a local attorney, since this trial in the local courts would be a one-time event, and local public embarrassment would be short-lived. As a result, the contempt power could become as widely used as it was by Judge Hoffman in the Chicago-Seven trial.

An increase in the use of contempt power could appear in other areas of litigation directly affecting Montana lawyers. Automobile and other accident cases continue to flourish, and jury awards have correspondingly increased. Moreover, the products liability field of civil law has completely over-reached the accident cases in significance and potential recovery. The million dollar recovery has become a reality rather than a rarity. As a result, products liability trials will become increasingly heated controversies. Since these trials usually involve an individual who brings suit against a foreign corporation, federal jurisdiction will be involved, and with it comes the potential of contempt sanction.

If the jurisdiction of a case lies in one of the judicial districts in the State court system, the extent of contempt sanction is much more limited than in the federal system. The State judges are restricted to imposing sentences not in excess of $500 or five days, or both in criminal contempt cases.[137] Of course, civil contempt procedures are also provided by statute and recognized as inherent in the courts of record.[138]

Our changing times may call for changes in the judicial approach of maintaining order and decorum during the resolution of social problems. An increase in the monetary value of civil suits, environmental control, political trials and criminal cases such as the Manson trial in California are among some of the considerations for the Montana lawyer and judiciary in the future.

CONCLUSION

The potential for the use and the abuse of the contempt power is unlimited. Nevertheless, it is absolutely essential to our judicial system, and should not be so diluted that it can no longer be used to preserve decorum

[137] REVISED CODES OF MONTANA, § 93-9810 (1947) [hereinafter cited as R.C.M. 1947].

[138] R.C.M. 1947, § 93-9811; Territory v. Murray, 7 Mont. 251, 15 P. 145 (1887). Montana also distinguishes between direct and indirect contempts. Summary punishment of direct contempt is provided in R.C.M. 1947, § 93-9803. The procedure for indirect contempt is found in R.C.M. 1947, §§ 93-9803, -9804, and -9809.

and to facilitate the smooth flow of the administration of justice. However, some safeguards must be provided for lawyers and their clients, especially when charged with criminal contempt.

At present, the Supreme Court requires a jury trial for criminal contempt sentences in excess of six months in federal district courts. However limited that restriction may seem, the Court further extends the power to allow the district courts to place offenders on probation up to five years.[139] The total time an offender may be within the control of the court is 5 and one-half years. Furthermore, the court now allows the district court during the trial the power to eject a defendant from the courtroom until he promises to behave, or to keep him in the courtroom after binding and gagging him.[140]

The Supreme Court requires a jury trial for criminal contempt sentences in excess of 2 years in State courts.[141] That limitation may be further restricted depending on the individual State's ordinary criminal sentencing statutes, or their criminal contempt sentencing statutes. However, States with no statutory limitations on criminal contempt sentencing, and unclear sentencing provisions under their ordinary criminal statutes, may have difficulty in applying the Supreme Court's rationale.

Today, there has been a great advance in labor unrest, civil rights demonstrations, communist agitation, and racial disruptions. Many conservative people, and even some liberals, have difficulty tolerating such movements. Sometimes, the conservative, or the liberal, who cannot tolerate an unpopular cause, is a judge.

When judge and lawyer become entangled in a heated dispute over some unpopular cause, and the lawyer becomes too persistent in advancing his client's cause through his zeal as an advocate, the lawyer may find himself faced with a prison sentence for criminal contempt. However, on a given occasion the judge may become embroiled in the controversy to such an extent that his personal bias toward the unpopular cause manifests itself in his disposition of justice during the case. The lawyer is the only one who is subject to the sanction of contempt. The judge, although partially or even equally at fault for the disruption to the orderly administration of justice, can neither be held in contempt and imprisoned nor be placed on probation for 5 years.

Of course, the courtroom must not be turned into a mockery of the judicial system, and the lawyer must exercise all possible self-restraint to avoid being offensive to the court. Insolent language and tactics on the part of the lawyer cannot be tolerated. However, he should be accorded every opportunity to advance his client's cause or to present his defense within the bounds of the law and the Canons of Ethics.

[139]Frank, *supra* note 115.
[140]Illinois v. Allen, *supra* note 124.
[141]Bloom, *supra* note 109.

The conduct of the defendants in the Chicago Conspiracy Trial was hardly respectful. Other means were available for the lawyers and their clients to receive justice in a court of law. The judge exercised the contempt power extensively, and, without a transcript or a report of the case, it is difficult to comment on the propriety of his actions. However, it is inexcusable for a lawyer and his clients to shout abusive language at a judge because of his rulings. If the rulings are unfair, or prejudicial, it is a simple matter to preserve the record for an appeal. A properly functioning judicial system will afford a reversal and a new trial. Then, disqualification of the judge would further assure a fair trial.

It devolves upon the attorney to assure decorum in the courtroom. At all times, he should be respectful toward the judge, jury, and opposing counsel. If his client disrupts the functioning of the system, he must caution him against further disturbance. Judges are human and should not be required to withstand a constant barrage of personal attacks, misconduct, and disrespect. In the words of Justice Black in *Illinois v. Allen*,

> It would degrade our Country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes.[142]

The government's right to proceed against individuals charged with crime must be balanced against arbitrary governmental power. On a rare occasion, a judge may unjustly impose a contempt sentence, or impose a sentence which is too lengthy. Certainly, governments and judges must live by the rules even when challenged by rebels who refuse to do so. But, the United States Supreme Court has provided an important safeguard in the form of a jury trial.

A jury trial adds a democratic element to the law of contempt. It takes away from one man the power to punish another summarily. It also removes the power to control another's life for many years. Of course, the power of contempt will still be available, and those who should be charged with contempt will not be turned away without receiving a just penalty. They will still be charged, but will be tried by a jury of peers—twelve men instead of one.

The judge should always be assured of the use of civil contempt. Therefore, the distinction between civil and criminal contempt should be preserved. Civil contempt serves an altogether different purpose from criminal contempt. It is used to coerce and compel compliance. No jury trial should be accorded, because the contemnor holds the keys to his own freedom through compliance with the provisions of the civil contempt.

Criminal contempt is used as a form of punishment, whether to preserve decorum or to facilitate the smooth flow of justice. The contempt must be classified as serious rather than petty before the right to a jury

[142]Illinois v. Allen, *supra* note 124 at 346.

trial attaches. A recurring opinion throughout the dissents in the Supreme Court cases is that the serious-petty distinction is too difficult to determine. Therefore, a jury trial should extend to all criminal contempts.

Although the Supreme Court guidelines for determining the distinction between serious and petty offenses are rather nebulous and somewhat unworkable, they do provide a safeguard for a contemnor. If there were no distinction, and a jury trial extended to all criminal contempts, the jury would decide the fate of all charged. If a determination of guilt were made, the sentence would still have to be rendered. Since in most states, the judge prescribes the length of the sentence, a diverse variety of sentences could result.

At least under the present distinction, a six-month proscription without a jury trial keeps within reason the length of the possible sentence. A judge may be more prone to impose a six-month sentence to avoid the inconvenience and expense of a jury trial. Of course, there is always the chance that a sentence exceeding six months would be rendered, and a jury trial required. But, if a jury concludes that the contemnor is guilty, the maximum sentence would be limited to that originally rendered by the judge.

The procedure adopted by Judge Hoffman in Chicago of segmenting charges of contempt in counts and imposing sentences less than 6 months for each count in order to avoid the jury trial requirement has not yet been considered by the Supreme Court. Approval of his approach could lead to incongruous results. The total number of years a contemnor could receive from criminal contempt punishment without a jury trial might exceed the maximum punishment possible for the offense charged.

The Supreme Court will likely require a jury trial in the Chicago-Seven criminal contempt cases for the portion of the total of the sentences exceeding six months regardless of the isolation of the counts. This conclusion is based on the trend of the law extending the jury trial safeguard, and the three alternatives that were made available to a judge in *Illinois v. Allen*. These defendants apparently obstructed justice, and were disrespectful to the judge. But, the possibility for abuse of the contempt power in other cases such as this could be too great if the Court were to accept the procedure adopted without according some safeguard. Rather than permit the imposition of sentences far in excess of any other previously rendered, the Court should extend its rationale in *Cheff v. Schnackenberg* and *Bloom v. Illinois* to these contempt cases.

It is possible the Court will look at each incident of contempt, and uphold Judge Hoffman's procedure under the facts of the case. The abuse given the judge by both the defendants and their lawyers may outweigh the jury trial safeguard, especially when the contemptuous conduct was so repeated and continuous as to amount to nearly 4 years in total sentences. Yet, the approach adopted by the judge in *Illinois v. Allen* would seem preferable, since the Chicago trial could have been delayed, the defendants could have been removed from court or bound and gagged

and kept with the court. Furthermore, the lawyers could either have been removed from the defense of the case for breach of their duty as officers of the court, or confined to prison through civil contempt until they were willing to maintain decorum and respect.

The greatest difficulty with the present state of the law of contempt is the decision of *Frank v. United States*.[143] Under that decision, the judge may suspend a sentence for criminal contempt, and place the offender on probation for five years. If the conditions of probation are violated, the offender could receive a sentence of six months without a jury trial. However, the conditions of the local county jail could certainly make a six-month sentence appear to be an eternity.

The *Frank* case is an anomaly in the law of contempt. It provides too much control over an individual by one judge. The individual may be subjected to the same conditions of probation as would a felony offender, but the felony offender may secure a jury trial whereas the contemnor may be dealt with summarily. Therefore, the only solution to the present status of the law is to extend the right to a jury trial to all criminal contempts.

[143]Frank, *supra* note 115.