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Comment

Counsel and Contempt: A Suggestion That the Summary Power Be Eliminated

I. INTRODUCTION

Before any system of resolving disputes can achieve "justice," it must function in an orderly, disciplined fashion.¹ To preserve courtroom order and decorum, the courts in the Anglo-American system of law possess the power to punish, as criminal contempt,² individuals whose conduct is incongruous with the desired ends of promoting order and respect in the courtroom. Traditionally, it had been urged that summary punishment³ of contempt was an inherent power of all

1. Order and discipline are considered necessary elements of any functional justice system. See Note, *Criminal Law—Contempt—Conduct of Attorney During Course of Trial*, 1971 WIS. L. REV. 329 [hereinafter cited as *Conduct of Attorney*]. See also Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971) [hereinafter cited as Dobbs]; Note, *Attorneys and the Summary Contempt Sanction*, 25 ME. L. REV. 89 (1973) [hereinafter cited as *Summary Contempt Sanction*].

2. "Contempt generally, is defined as an act or omission substantially disrupting the judicial process in a particular case." Dobbs, *supra* note 1, at 185. The basic end of contempt law, with respect to disruption in court, is avoiding interruption of, and insult to, the judicial process. See *People v. Gholson*, 412 Ill. 294, 298, 106 N.E.2d 333, 335 (1952). "Criminal contempt" is traditionally defined as one form of contempt of court done "in disrespect of the court or its process or which obstruct[s] the administration of justice or tend[s] to bring the court into disrespect." BLACK'S LAW DICTIONARY 390 (Rev. 4th ed. 1968). For the most part, contumacious acts are generally classified as civil or criminal. In a criminal contempt, the contempt sentence, which is usually for a fixed period of time, is for punishment of completed conduct. In a civil contempt, the court imprisons the contemnor until he agrees to comply with an order of the court. Note, *The Application of Criminal Contempt Procedures to Attorneys*, 64 J. CRIM. L. AND CRIMINOLOGY 301 (1973) [hereinafter cited as *The Application of Criminal Contempt*]. This has been generally considered the "punishment" test. In Pennsylvania, the distinction has been recently articulated as follows: if the purpose of the contempt citation is to vindicate the dignity and authority of the court, the citation is one for criminal contempt, but, if the citation's purpose is to coerce the contemnor into compliance with an order of the court, the citation is for civil contempt. *In re "B,"* 482 Pa. 471, 476-77, 394 A.2d 419, 421 (1978). See also *Gompers v. Buck Stove and Range Co.*, 221 U.S. 418 (1911). See generally R. GOLDFARB, *THE CONTEMPT POWER* 181 (1963); Dobbs, *supra* note 1, at 235-49. For definitions of "direct" and "indirect" contempt, see note 6 *infra*.

3. The United States Supreme Court in *Sacher v. United States*, 343 U.S. 1 (1952), has defined summary action as "a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and

courts.⁴ Recent research has revealed, however, that summary contempt may not have been an inherent power of common law courts, and, in fact, exists only as an historical aberration or accident.⁵ Today, this power is utilized only for direct contempt, involving occurrences of disruption in the court's presence.⁶ Justification of summary contempt power is presently premised on a two-fold rationale: first, the power gives the trial judge a means of preserving order in the courtroom, and, second, the procedure eliminates a wasting of administrative resources.⁷ In the shadow of the appropriately high regard our legal system places in orderly courtroom procedures lies the zealous advocate who is obligated to protect the interests of his client.⁸ But, balanced

answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional trial." *Id.* at 9.

4. This inherent power was said to be derived not from statute but from the nature of the judicial function. Without the power to punish those who declined to obey its rulings and orders, the court was viewed as unable to act effectively at judicial proceedings. See *The Application of Criminal Contempt*, *supra* note 2, at 300.

5. Although leading articles, treatises and case law of most states, including Pennsylvania, continue to characterize the contempt power of the court as "inherent," recent research has exploded the myths that contempt was an inherent power of the courts and that summary proceedings were utilized from time immemorial. See *Conduct of Attorney*, *supra* note 1, at 341-42. See also Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney*, 63 Ky. L.J. 945, 948 (1975) [hereinafter cited as *A Case Study*]. Blackstone's *Commentaries* was the primary source of the view that the power to summarily punish contempt was inherent in all courts based on the rationale that such power was essential and integral to courtroom order. See 5 W. BLACKSTONE, *COMMENTARIES* 282-88 (1803). See also *Ex parte Terry*, 128 U.S. 289, 303 (1888). However, severe and continual challenges to the historical validity of Blackstone's justification led to the realization by Justice Black, in a strong dissent criticizing the summary nature of the contempt power, that "[t]he power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law." *Green v. United States*, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

6. A "direct contempt" is defined as one committed in the presence of the court while it is in session. An "indirect contempt," on the other hand, is one committed outside the presence of the court tending to belittle, degrade, obstruct, interrupt or embarrass the court in the administration of justice. See generally 17 C.J.S. *Contempt* § 3 (1963).

7. The argument in support of the "administration of resources" rationale is that, since the judge has personally observed the contemnor's misbehavior, a second trial is not necessary. Essentially, time and economics appear to be the justifications for denying the right to an impartial adjudication of contempt charges. See *Summary Contempt Sanction*, *supra* note 1, at 91.

8. The Canons of Professional Ethics require all attorneys to apply their "entire devotion to the interest of their client, warm zeal in the maintenance and defense of his rights . . . [N]o fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." ABA CANONS OF PROFESSIONAL ETHICS No. 15. See Robinson, *Use of the Contempt Power Against Lawyers in Michigan*, 51 MICH. ST. B.J. 659, 661 (1972). See also *Summary Contempt Sanction*, *supra* note 1, at 93 (the attorney must represent every client vigorously and diligently according to law and standards of professional conduct).

against his role as an advocate is his role as a court officer, whose duties include preserving the dignity and integrity of the judicial institution.

This comment will analyze the summary contempt power enjoyed by the court and will specifically address the power's potential for abuse. Because summary contempt power effectively deprives the litigating attorney of certain constitutional protections,⁹ he is placed in an untenable position which requires him to choose between his duty as an officer of the court and his role as an advocate; this chilling effect on proper and effective trial advocacy¹⁰ and the deprivation of constitutional guarantees¹¹ will be the focus of the comment. Finally, the ineffectiveness of the sanction in controlling attorney misbehavior will be discussed, with the conclusion calling for the elimination of the summary contempt power in our judicial system.

II. THE CONSTITUTIONAL INFIRMITIES OF SUMMARY CONTEMPT

A. *Constitutional Concerns*

The so-called "inherent" power of courts to summarily punish individuals for contumacious conduct was said to have been derived from the nature of the judicial function. In Blackstone's *Commentaries*, commonly considered the primary source for this view, it was asserted that this power was essential to courtroom order.¹² The United States Supreme Court, in *Ex parte Terry*,¹³ expressly adopted the rule that the summary power to cite and punish contempts tending to obstruct or degrade the administration of justice is inherent in all courts. Distinguishing between direct and indirect contempt, the *Terry* Court held that, although proceedings without notice are not judicial or wor-

9. It is at once apparent that a non-jury, "no-notice," on the spot, summary proceeding in front of the trial judge, who, due to the "heat of battle," may be anything but fair and impartial, raises serious constitutional questions. See *A Case Study*, *supra* note 5, at 947. See also Note, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CAL. L. REV. 463, 464 (1966).

10. See *A Case Study*, *supra* note 5, at 950. As a member of the bar and an officer of the court, the attorney has a duty to see that justice prevails in the courtroom. However, there may exist irreconcilable differences between the attorney's function as a court officer and a client defender. See *Summary Contempt Sanction*, *supra* note 1, at 93; *Conduct of Attorney*, *supra* note 1, at 335, 342-43.

11. It is repeatedly asserted that "[f]ew devices conflict within the lines of our Constitution with the ubiquity of the contempt power." Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962) [hereinafter cited as Goldfarb].

12. 5 W. BLACKSTONE, COMMENTARIES 280-83 (1803). See also notes 4 & 5 *supra*.

13. 128 U.S. 289 (1888).

thy of respect,¹⁴ notice and hearing are not required in the case of direct contempt because of the concern for an ordered society.¹⁵ The *Terry* Court then concluded that its holding was based upon a rule of "immemorial antiquity."¹⁶

The substantive power of federal courts to impose summary criminal contempt is embodied in 18 U.S.C. § 401.¹⁷ Rule 42(a) of the Federal Rules of Criminal Procedure¹⁸ provides for immediate punishment of

14. *Id.* at 307.

15. *Id.* at 307-09.

16. *Id.* at 307.

17. 18 U.S.C. § 401 (1976) reads in pertinent part as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

The Pennsylvania legislature has enacted a substantially similar contempt statute and the Pennsylvania courts have developed summary contempt law along similar lines as has the federal system. The Pennsylvania statutory treatment of contempt classifies summary contempt as follows:

The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases:

- (1) The official misconduct of the officers of such courts respectively.
- (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
- (3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

42 PA. CONS. STAT. ANN. § 4131 (Purdon Pamp. 1979). *See also* Knaus v. Knaus, 387 Pa. 370, 127 A.2d 669 (1956) ("direct criminal contempt"); *In re Carroll*, 393 A.2d 993 (Pa. Super. Ct. 1978) (vitality of summary criminal contempt proceedings); *Commonwealth v. Harris*, 195 Pa. Super. Ct. 8, 168 A.2d 761 (1961) (inherent power of the courts).

18. FED. R. CRIM. P. 42(a). Rule 42(a) reads as follows:

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt 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.

The Pennsylvania Judicial Code also makes provision for summary treatment of contempt charges. *See* 42 PA. CONS. STAT. ANN. §§ 4131, 4135 (Purdon Pamp. 1979). Section 4131, quoted at note 17 *supra*, outlines the circumstances under which a court is empowered to inflict summary punishment for incidents of direct contempt. Section 4135 outlines the procedures to be followed in adjudicating charges of indirect contempt. This latter section provides as follows:

(a) General Rule.—In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge, the accused shall enjoy:

- (1) The rights as to admission to bail that are accorded to persons accused of

direct contempts committed in the presence of the court.¹⁹ In the Rule 42(a) summary hearing, there is no indictment, no information, no jury and sometimes no testimony;²⁰ in short, the summary procedure contains none of the "trappings" and, unfortunately, none of the constitutional protections of a typical criminal trial.

Of principal concern in the constitutional context is the inconsistency between the summary contempt power and the due process and trial by jury provisions of the fifth, sixth, and fourteenth amendments.²¹ One policy argument for summary contempt power which allegedly justifies the lesser degree of concern for the contemnor's constitutional rights is administrative convenience. However, as Justice Black so appropriately stated in his dissent in *Green v. United States*,²²

crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, if the alleged contempt is not committed in the immediate view or presence of the court.

(3)(i) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed.

(ii) The requirement of subparagraph (i) shall not be construed to apply to contempts:

(A) committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court;

Id. § 4135 (emphasis added).

19. The Advisory Committee Notes to Rule 42(a) describe the rule as "substantially a restatement of the existing law." 28 U.S.C. app. FED. R. CRIM. P. 42(a) (1976). The Committee cited *Ex parte Terry*, 128 U.S. 289 (1888), in which the United States Supreme Court affirmed the summary contempt conviction against an attorney who had assaulted a United States Marshal in the courtroom. In so ruling, the *Terry* Court stated that "the administration of justice would be in continual danger of being thwarted by the lawless." *Id.* at 303. The Committee also cited *Cooke v. United States*, 267 U.S. 517 (1925), which reversed the contempt conviction of an attorney who sent a contemptuous letter to a judge since the court did not have to "act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court." *Id.* at 534.

20. Dobbs, *supra* note 1, at 221. Compare the summary procedure for direct contempt in FED. R. CRIM. P. 42(a) with FED. R. CRIM. P. 42(b) and 42 PA. CONS. STAT. ANN. § 4135 (Purdon Pamp. 1979) both of which provide, *inter alia*, for the minimal due process procedures of prior notice and a hearing by an impartial judge for charges of indirect criminal contempt.

21. U.S. CONST. amends. V, VI, and XIV. In Goldfarb, *supra* note 11, the author raises several constitutional challenges to the summary nature of the contempt power: these include the fifth, sixth and fourteenth amendment questions of due process and trial by jury; first amendment questions of free speech; freedom of religion and of the press; fourth amendment questions of unreasonable search and seizure; eighth amendment problems of "cruel and unusual punishment"; and tenth amendment questions of federal-state relations. The focus of this comment is limited to the fifth, sixth and fourteenth amendment questions of due process and trial by jury.

22. 356 U.S. 165, 193 (1958) (Black, J., dissenting).

"[c]heap, easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights."²³

Generally, the due process requirements embodied in the fifth and fourteenth amendments mandate some minimum standards by which governmental proceedings must comply with contemporary notions of fairness and justice.²⁴ Under the power to summarily punish contemptuous conduct, however, several due process notions are nullified: namely, a fair trial, a fair tribunal and the absence of actual bias.²⁵ Moreover, the United States Constitution provides for the trial by jury of all criminal cases except those involving impeachment,²⁶ and it is not clear how summary contempt power, an anomaly in the law,²⁷ can be squared with this constitutional guarantee.²⁸ Although the sound policy of *stare decisis* directs adherence to prior decisions, this practice should not be so inflexible as to preclude the correction of an obvious error—an unyielding power which has been retained by historical accident.²⁹ The jury's role, as an indispensable element in the popular vindication of criminal law, permits public participation in disputes and, more importantly, serves as an insulation between the accused and the judge.³⁰ To allow the offended judge, in a criminal citation, to act as "victim, prosecutor, judge and jury" is fundamentally unfair.³¹ It is not enough that summary judgment be regarded with disfavor;³² its inher-

23. *Id.* at 216 (Black, J., dissenting).

24. *See* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

25. *In re Murchison*, 349 U.S. 133, 136 (1955).

26. *See* U.S. CONST. art. 3, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."). Similar language appears in the sixth amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." *Id.* amend. VI.

27. *See* note 5 *supra*.

28. *See* *Bloom v. Illinois*, 391 U.S. 194 (1968) (jury trial for all contempts resulting in punishment for six months or more is guaranteed). This rule is easily circumvented when a judge labels each contemptuous act a separate judgment and attaches separate sentences of under six months in length. *See Summary Contempt Sanction, supra* note 1, at 96 n.37. *See also* notes 53-54 and accompanying text *infra*.

29. *Green v. United States*, 356 U.S. at 195-98 (Black, J., dissenting). *See also* Goldfarb, *supra* note 11, at 289.

30. *See generally* Frankfurter & Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010 (1924).

31. *See* Goldfarb, *supra* note 11, at 290. ("The general public may look with skepticism upon a judicial process which allows one man to be victim, prosecutor, judge and jury").

32. There has, indeed, been a trend toward viewing summary contempt with disfavor. *See* Goldfarb, *supra* note 11, at 296 ("The contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings. Its use should be carefully restricted . . ."). *Accord, Fisher v. Pace*, 336 U.S. 155, 167 (1949) (Murphy, J., dissenting). *See also* *Farese v. United States*, 209 F.2d 312, 315 (1st Cir. 1954) ("The grant of summary contempt power . . . is to be grudgingly construed, so that instances where

ent repugnancy to the Constitution requires the elimination of the procedure.³³

B. Supreme Court Decisions

*Sacher v. United States*³⁴ was the first major judicial test of the summary contempt power provided in Rule 42(a). In *Sacher*, the trial judge at the conclusion of the trial found the defendants and their counsel guilty of summary contempt. On appeal from those contempt judgments, the Supreme Court conceded that its decision could not be based upon the need for maintaining courtroom order and decorum, since the trial had ended. Instead, the majority's decision, in upholding the conviction of contempt, focused on the waste of judicial resources rationale; that is, since the trial judge personally witnesses the conduct *in quo*, there is no need to encumber the courts with another trial.³⁵

In his dissent in *Sacher*, Justice Black planted the seeds of constitutional challenge to summary contempt power when he noted that there is an effective denial of the constitutional right to a jury trial and due process of law where the same judge not only indicts the attorney for contempt but also adjudicates the contempt violation.³⁶ Because courts in subsequent cases have agreed with Justice Black and recognized the constitutional infirmities present in the summary contempt power, the majority's holding in *Sacher* has been continuously eroded. For example, in *Offut v. United States*,³⁷ a post-trial contempt conviction, based upon personal exchanges with the trial judge, was reversed by the United States Supreme Court on the grounds that the trial judge became "personally embroiled" with the alleged contemnor.³⁸ In so ruling, the Court stated that a post-trial summary proceeding will be in-

there is no right to a jury trial will be narrowly restricted. . . ."); *United States ex rel. Robson v. Oliver*, 470 F.2d 10, 13 (7th Cir. 1972) (where the line between zealous advocacy and actual obstruction of justice "defies strict delineation, doubts should be resolved in favor of vigorous advocacy").

33. One leading commentator is quite adamant in this regard: "The Constitution is specific and clear. Criminal contempt should be tried as other crimes are—with all procedural guarantees protecting the accused. There should be a right to a jury trial of the charged contempt." Goldfarb, *supra* note 11, at 299. See also *Green v. United States*, 356 U.S. at 193-94 (Black, J., dissenting); note 84 *infra*.

34. 343 U.S. 1 (1952).

35. *Id.* at 9.

36. *Id.* at 14-18 (Black, J., dissenting). See also *A Case Study*, *supra* note 5, at 947 (summary contempt power permits the judge citing for contempt to also adjudicate the case and, without notice, hearing, or other rudimentary features of due process of law, to find the offender guilty).

37. 348 U.S. 11 (1954).

38. *Id.* at 14, 17.

validated where bias can be shown on the part of the trial judge.³⁹ However, the problem created by *Offut* was obvious: under the holding of that case, the judge whose bias was in question determined, *ab initio*, whether or not he could be impartial.⁴⁰

The later case of *Mayberry v. Pennsylvania*⁴¹ provided some relief to this situation. In that case, the Supreme Court reversed the contempt conviction of a defendant for misconduct during trial. Ruling that the trial judge should have requested another judge to adjudicate the contempt charges, the Court stated that when unseemly conduct toward the trial judge is readily apparent, bias on the part of the trial judge in later contempt proceedings would be presumed.⁴² Although this more objective standard for determining the existence of bias served to clarify, at least to some extent, the ambiguity created by the *Offut* decision, the *Mayberry* decision did not completely alleviate the constitutional problems associated with the use of summary contempt power. In certain circumstances, the trial judge still retains the power to act, in effect, as judge, jury, and sentencer. Furthermore, the paradoxical situation arises whereby a defendant whose conduct is less insulting and whose guilt, therefore, less certain has less of a chance to protect his due process procedural guarantees vis-a-vis an unbiased judge;⁴³ although clearly insulting a trial judge will probably assure one before the court of a full hearing before another judge, the same treatment will not be prompted by less disrespectful conduct. In this regard, an already accused contemnor is encouraged to show further disrespect to secure greater procedural protection.⁴⁴ Under *Offut* and *Mayberry*, then, where the conduct of the alleged contemnor includes a

39. *Id.* at 15-16.

40. See 4 J. MAR. J. PRAC. & PROC. 92 (1970). See also *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (to subject a defendant to a trial in a criminal case involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him is a denial of due process of law).

41. 400 U.S. 455 (1971).

42. Under *Mayberry*, a presumption of embroilment exists where there is a contumacious byplay between the alleged contemnor and the trial judge. See *Summary Contempt Sanction*, *supra* note 1, at 92. In a recent Pennsylvania case, *Commonwealth v. Africa*, 466 Pa. 603, 353 A.2d 855 (1976), the court held that where the judge is personally attacked by defendant's allegedly contumacious behavior, the Constitution requires that post-trial contempt proceedings be held before a judge that had not been directly subjected to the abuse. See also 42 PA. CONS. STAT. ANN. § 4135(a)(4) (Purdon Pamp. 1979), which provides that the defendant shall have "the right to file with the court a demand for the withdrawal of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge. . . ."

43. N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* 226 (1973) [hereinafter cited as *DISORDER IN THE COURT*].

44. *A Case Study*, *supra* note 5, at 994 n.172.

personal attack on the trial judge carrying such potential for bias that he is not likely to maintain calm detachment for a fair adjudication, the trial judge must disqualify himself from the contempt proceeding if he waits until the conclusion of trial to rule on the contempt.

Although the courts concede that in the case of a personal attack the possible prejudice to the accused overrides any economy of effort that would be achieved by a summary procedure, this same concession is not evidenced where a non-personal attack is present. In *Ungar v. Sarafite*,⁴⁵ the United States Supreme Court, in upholding a criminal conviction for contempt imposed summarily by the judge before whom the contempt allegedly occurred, held that criticism of the court's rulings and failure to obey court orders did not constitute a personal attack on the trial judge so as to require the judge's disqualification in post-trial contempt proceedings. In *Ungar*, the defendant was an attorney who was testifying as an important prosecution witness in a conspiracy and conflict of interests case. The *Ungar* Court ruled that the defendant's statements that he was being "coerced and intimidated and badgered" by the trial judge and that "the court is suppressing the evidence" did not preclude the trial judge from acting without prejudice.⁴⁶ In determining the presence or absence of bias, the *Ungar* majority apparently gave no consideration to the trial judge's characterization of the defendant's conduct as being "not only contemptuous but disorderly and insolent."⁴⁷ Instead, the Supreme Court in *Ungar* drew an arbitrary distinction between conduct which constitutes a personal attack and conduct which is disruptive, recalcitrant and disagreeable,⁴⁸ concluding that the former requires the judge's removal from the post-trial contempt proceeding, but that the latter does not.

Another early distinction outlined by the Supreme Court in the contempt area was the difference between direct and indirect contempts.⁴⁹ Summary power, under the pre-*Sacher* case of *Cooke v. United States*,⁵⁰ is determined unwarranted in instances of indirect contempt because once the trial is terminated, for example, no legitimate interest is served by permitting the court to summarily punish and convict for contempt. In such cases of indirect contempt there is no trial which will be interrupted, thereby rendering moot the rationales for use of summary power, which include the wasting of judicial resources and

45. 376 U.S. 575 (1964).

46. *Id.* at 580, 583-84.

47. *Id.* at 580.

48. *Id.* at 584.

49. See notes 6, 15 & 20 and accompanying text *supra*.

50. 267 U.S. 517 (1925). *Cooke*, an indirect contempt case, concerned the contents of a contumacious letter written by an attorney, advising the judge of his client's desire to have another judge try the case.

the maintenance of courtroom order and decorum. The concern is that post-trial summary contempt proceedings and convictions peculiarly lend themselves to charges that the court is exacting personal vengeance.⁵¹ However, although this argument is particularly persuasive with respect to indirect contempts, its application is also pertinent with respect to direct contempts in light of the pervading constitutional challenges in *any* summary procedure; since in both direct and indirect contempt situations there is an accusation, both situations require notice, opportunity to defend and a hearing before an impartial tribunal. Providing these due process safeguards for indirect violations but denying them for direct violations appears, therefore, to be another arbitrarily drawn discrimination in the contempt area.

It is now well-settled that jury trials for criminal contempt are guaranteed the alleged contemnors who may be imprisoned for more than six months. This question was settled by the Supreme Court's decision in *Bloom v. Illinois*.⁵² In that case, the Court recognized that the power of courts to summarily punish contempt must be balanced against the contemnor's due process rights. More importantly, however, the Court acknowledged that an alleged contemnor retains his constitutional rights in a summary contempt proceeding. Unfortunately, the express holding of *Bloom*, requiring a jury trial if the potential sentence is in excess of six months, can be easily circumvented by classifying each contemptuous act separately and imposing a distinct sentence of six months or less for each act.⁵³ Thus, the jury trial guarantee under *Bloom* is, in reality, no guarantee at all.

The Court's decision in *Codispoti v. Pennsylvania*⁵⁴ provided some relief to this situation by invalidating non-jury trial, post-verdict convictions accumulating over six months. Nevertheless, the potential still remains for non-jury trial summary contempt proceedings where the contempt sentences are meted out during trial. The *Codispoti* majority rationalized that to require accumulation of contempt sentences imposed during trial would hinder the trial judge in controlling the courtroom.⁵⁵ However, Justice Marshall's partial concurrence recognized that the potential for arbitrary, biased, and prejudicial action on the

51. See, e.g., *Commonwealth v. Africa*, 466 Pa. 603, 353 A.2d 855 (1976).

52. 391 U.S. 194 (1968).

53. By classifying each such act distinctively, contemnors can be subjected to an accumulated period of imprisonment beyond the six-month limit of *Bloom* without having been afforded a jury trial. 4 J. MAR. J. PRAC. & PROC. 92 (1970). See, e.g., *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972), wherein attorney William Kunstler was found guilty of twenty-four separate acts of contempt with sentencing ranging from seven days to six months; the total time of imprisonment, due to consecutive sentencing, was four years, thirteen days.

54. 418 U.S. 506 (1974).

55. *Id.* at 514-15.

part of the trial judge is present in both mid-trial and post-trial contempt adjudications.⁵⁶

III. THE CONFLICT BETWEEN SUMMARY CONTEMPT POWER AND EFFECTIVE ADVOCACY

The theoretical dilemma surrounding the summary contempt power is further compounded when the alleged contemnor is an attorney, for the attorney in our system of justice is faced with dual and potentially conflicting roles. As an officer of the court, he must not transcend the bounds of decency and dignity so essential to an orderly administration of justice.⁵⁷ On the other hand, he is required to zealously, fearlessly and persistently uphold the rights of his client. The vitality of the adversary structure of the American judicial system depends, to a large extent, on the attorney's zealous representation of his client.⁵⁸ It is suggested here that the existence of the present summary contempt power stifles effective, vigorous, and zealous advocacy.

The underlying requisite for conduct to be held contemptuous is that it must be considered "obstructive" in some manner. The dividing line, however, between what is and what is not obstructive is anything but clear,⁵⁹ and absent definite guidelines⁶⁰ counsel may become very

56. *Id.* at 519 (Marshall, J., concurring in part). Justice Marshall felt that the sixth amendment right to a jury trial should be applicable in both situations; he wrote: "Indeed, the Court's suggestion provides an incentive for a trial judge to act in the heat of the moment, and thus encourages the very arbitrary action which it is the purpose of the Sixth Amendment to eliminate." *Id.* See also *United States v. Meyer*, 462 F.2d 827 (D.C. Cir. 1972), a case which involved the post-trial conviction and sentencing of an attorney for stating that the judge had predetermined the defendant's guilt. The court reversed a conviction of summary contempt because the judge delayed charging the alleged contemnor until after the trial, and since the conviction was not imposed until after the trial, the court rationalized that the summary procedure was not employed to restore order in the courtroom. However, the *Meyer* court refused to completely eliminate the summary contempt procedure; indeed, the court stated that where immediate action becomes necessary to restore order, summary procedure would be preferable to holding subsequent hearings. Three circumstances would, according to *Meyer*, rebut the presumption in favor of a mid-trial exercise of summary contempt procedure: namely, the personal involvement of the trial judge, actions which would naturally destroy the objectivity of an outwardly calm trial judge, or the judge's overt adoption of an adversary posture toward the contemnor.

57. See *Conduct of Attorney*, *supra* note 1, at 342. ("As an essential actor in the American legal system, counsel necessarily owes a duty to that system to refrain from disorderly and disrespectful conduct"). See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-19 (duty of the lawyer to the adversary system of justice) and EC 7-36 (balancing the need for zealous representation with the need for maintaining the decorum and dignity of the proceedings). See generally *A Case Study*, *supra* note 5, at 949.

58. See *Conduct of Attorney*, *supra* note 1, at 343.

59. *Id.* ("Unfortunately, the moment at which zealous advocacy becomes contumacious conduct is no more certain than the point at which deference to the value of order becomes abdication as advocate").

60. Determination of what is and is not obstructive ultimately rests on a case-by-case

apprehensive over arguing in a particular manner or persistently stating a point on behalf of and in the best interest of his client.

The recent decision of the United States Court of Appeals for the Third Circuit in *Pennsylvania v. Local 542, International Union of Operating Engineers*,⁶¹ is illustrative of the potentially adverse effect summary power may have upon effective and zealous trial advocacy. In that case, the court of appeals held that an attorney's insistence on stating reasons for excepting to the trial court's sustaining of an objection to the trial attorney's method of cross-examining a witness justified the entering of a criminal contempt order against him. The attorney disregarded repeated orders from the trial judge not to state his specific reasons for exception, asserting his belief that he was justifiably compelled to make his exception specific in order to protect the record for his client.⁶² Although the trial court and the court of appeals considered the attorney's disregarding the judge's direct orders as the contemptuous conduct, the trial attorney's right to be contentious, fearless, and zealous would necessarily seem to include the assurance that evidentiary issues based on adverse trial court rulings will be preserved for appeal. The *Local 542* court concluded that despite the fact that compliance with the judge's rulings may cause counsel, and his client, to lose an advantage that may never be regained, that loss is a small premium to pay to protect the judicial system from courtroom chaos.⁶³ However, although the importance of courtroom order may never be underestimated, the court's characterization of a "never to be regained advantage" may be anything but a "small premium" to the litigant who is denied justice on appeal because of an inadequately preserved record.

In recognition of the attorney's essential role as a zealous advocate, the United States Supreme Court, in *In re McConnell*⁶⁴ attempted to set forth a workable standard for determining how far an attorney could go before the contempt power could be imposed, holding that only when the conduct becomes an "actual obstruction of justice" may summary contempt power properly be imposed.⁶⁵ The *McConnell* Court

analysis. *Summary Contempt Sanction*, *supra* note 1, at 93.

61. 552 F.2d 498 (3d Cir.), *cert. denied*, 434 U.S. 822 (1977).

62. *Id.* at 504-05.

63. *Id.* at 509.

64. The Supreme Court, in *In re McConnell*, 370 U.S. 230 (1962), appreciated that it was "essential to a fair administration of justice that lawyers be able to make honest, good faith efforts to present their client's cases, [and that] an independent judiciary and a vigorous independent bar are both indispensable parts of our system of justice." *Id.* at 236.

65. The *McConnell* Court reaffirmed the principle initially enunciated in *Ex parte Hudgings*, 249 U.S. 378, 383 (1919): "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest."

took full cognizance of the balancing of interests that was involved, noting that the search for the essential elements of the crime of contempt must be made with full appreciation of the contentious role of the trial advocate and his duty to zealously represent his client's interests. Although the *McConnell* decision cannot be read as an immunization for all conduct undertaken by an attorney in good faith representation of his client, it does require that attorneys be given great latitude in the area of vigorous advocacy.⁶⁶ Unfortunately, the *McConnell* decision did not totally eliminate the due process problems associated with summary contempt as it relates to the courtroom conduct of an attorney, since under *McConnell*, the trial judge initially decides what constitutes an "actual obstruction of justice."⁶⁷

Recently, in the Chicago Seven Conspiracy Contempt cases,⁶⁸ the Court of Appeals for the Seventh Circuit espoused a test which paid strong heed to the concern over deterring zealous advocacy by means of the unrestricted use of summary contempt power. Admitting that the line between vigorous advocacy and obstruction of justice defies strict delineation, the Seventh Circuit would resolve doubts in favor of advocacy and limit findings of contempt to instances in which the attorney knew or should have known that his conduct would obstruct justice.⁶⁹ In reaching that conclusion, the court of appeals recognized that summary contempt proceedings are inappropriate if the trial judge fails to take immediate action on the contempts since the "maintenance of order" rationale cannot be determinative.⁷⁰ The cases were remanded for hearings before impartial judges because the defendants' remarks involved personal criticism of the trial judge, thereby invoking the presumption of bias set forth in the *Mayberry* case.⁷¹

It is fortunate that the "obstruction of justice" test espoused by the United States Supreme Court in *McConnell*⁷² was considered by the Seventh Circuit in light of the great latitude which must be given attorneys in the area of advocacy: specifically, that attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf.⁷³

66. See *In re Dellinger*, 461 F.2d 389, 398 (7th Cir. 1972).

67. See *Summary Contempt Sanction*, *supra* note 1, at 93. ("The degree of departure in attorney conduct ultimately rests with the trial judge").

68. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972). The Court of Appeals for the Seventh Circuit perceptively recognized the attorney's right "[t]o be persistent, vociferous, contentious and imposing, even to the point of appearing obnoxious, when acting in his client's behalf." *Id.* at 400.

69. *Id.* at 400.

70. *Id.* at 392-93.

71. See note 42 and accompanying text *supra*.

72. See note 64 *supra*.

73. *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972).

It is questionable whether many attorneys would act so dogmatically when they are faced with an individual who has the power to cite, convict and punish those before him for an alleged "obstruction of justice." Even though it has been argued that appellate review is a potential safeguard against the arbitrary use of the contempt power in stifling vigorous representation,⁷⁴ the appellate courts are often hesitant to reverse;⁷⁵ as Justice Black noted, review of criminal contempt convictions by an appellate court is largely "impotent" because review is based on a "cold record," and appellate court judges are reluctant to overturn contempt convictions imposed by their brethren.⁷⁶

However, where a different judge hears the case of contempt based on a citation from a trial judge, an attorney will not have to fear that his overzealousness will result in a criminal record on the spot. The combined deterrent effect of the citation itself, the effect on the jury, and the repercussions from the legal community⁷⁷ on disruptive conduct in the courtroom will be at least as great as a summary contempt proceeding. Parenthetically, it is submitted that, if an attorney is determined to disrupt any trial, he will probably do so whether punishment is immediate or relatively forthcoming. Summary proceedings would be of little avail in such a case since the only remedy would be to remove counsel from the courtroom.⁷⁸ This conclusion is buttressed by a recent empirical study which showed that the summary contempt power plays substantially no part in deterring attorney misbehavior.⁷⁹

IV. CONCLUSION—ELIMINATION OF THE POWER

Notwithstanding those situations in which due process safeguards will be available for alleged contemnors, such as in the case of indirect

74. See *Sacher v. United States*, 343 U.S. at 12-13 ("The [legal] profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates that before punishment takes effect he may have appeal on law and fact to the Court of Appeals"). See also *Conduct of Attorney*, *supra* note 1, at 350 ("Traditionally it has been urged that a safeguard on the possibility of intimidation of zealous advocacy is the existence of appellate review").

75. As one commentator indicates, "[t]he detached review of a contempt decision by an appellate court whose members are sometimes sympathetic to their brethren of the lower trial courts, and are often hesitant to reverse in absence of clear and serious error, is to some viewers *an impotent and idle ceremony*." Goldfarb, *supra* note 11, at 290 (emphasis added).

76. See *Green v. United States*, 356 U.S. 165, 200 (1958) (Black, J., dissenting).

77. See *Conduct of Attorney*, *supra* note 1, at 352 n.95 ("While the non-lawyer will pay a fine or serve a sentence, counsel, in addition to being vulnerable to these sanctions, remains subject to intra-professional discipline, the ramifications of which may far exceed those of legal sanction").

78. *Conduct of Attorney*, *supra* note 1, at 353-54.

79. See *DISORDER IN THE COURT*, *supra* note 43, at 233.

contempt, post-trial convictions, and situations in which "personal embroilment" is found on the part of the trial judge, the rule in the federal system and in the state courts, including Pennsylvania, is that mid-trial exercise of the summary contempt power is still an inherent power of all courts.⁸⁰ Those cases which have eroded the unrestricted power referred to in *Sacher* have placed more and more limitations on the right of a trial judge, engaged in combat, to act as judge, jury, and sentencer. Nevertheless, these cases have failed to take the final, constitutionally imperative step of eliminating completely the summary contempt procedure. One commentator perceptively notes that summary conviction appears quite clearly to violate fundamental norms of due process in that guilt is determined and punishment inflicted without providing an opportunity to prepare and present a defense before an impartial tribunal.⁸¹ The judiciary's interest in preserving orderly judicial process and vindicating the authority and dignity of the court may surely be effectuated by a method more consistent with the spirit and letter of the Constitution. Indeed, one such method, analogous to a Rule 42(b)⁸² hearing in the federal system, which provides for a hearing before an impartial judge, will be discussed further. However, to retain the present summary contempt system ignores two basic implications of due process referred to by Justice Frankfurter in his dissent in *Sacher*: specifically, that no judge should sit in a case in which he is personally involved, and that no criminal punishment should be meted out except upon notice and hearing.⁸³

The anomalous procedure by which a trial judge, often the personal subject of the contempt, acts as judge, prosecutor, jury, and sentencer destroys the alleged contemnor's due process rights.⁸⁴ Although, as has been noted, under *Offut* and *Mayberry* the personal embroilment of the trial judge may rebut the presumption in favor of the validity of a

80. See notes 38, 39 & 42 and accompanying text *supra*.

81. See Note, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CAL. L. REV. 463, 463-64 (1966).

82. See note 20 *supra*.

83. *Sacher v. United States*, 343 U.S. 1, 29 (1932) (Frankfurter, J., dissenting).

84. See *Green v. United States*, 356 U.S. 165 (1958), which upheld a conviction of summary contempt, relying on the long line of cases to the effect that certain criminal contempts are not subject to jury trials. In his dissent, Justice Black articulated:

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied . . . an indispensable element of the due process of law

Id. at 199 (Black, J., dissenting).

mid-trial contempt citation,⁸⁵ it is not difficult to conceive of the stone-faced judge whose mental processes we may never perceive.⁸⁶ In most situations, the trial judge is so involved in the controversy and alleged contemptuous conduct that he is unable to act without prejudice.

What is suggested here as an alternative to the summary nature of mid-trial contempt proceedings is a constitutionally acceptable hearing where the alleged contemnor receives notice, has an opportunity to prepare a defense, and has the ultimate issue of guilt or innocence decided by an impartial tribunal. A shift in judicial personnel will certainly be more calculated to insure fairness.⁸⁷ Unfortunately, the axiom that no man should judge his own cause⁸⁸ has not found acceptance in summary criminal contempt cases. Thus, the paradoxical situation exists whereby a wealthy judge must disqualify himself on the basis of a minor pecuniary interest but may decide a case involving matters which may have a deep and profound effect upon his emotional attachments.⁸⁹

The reasons advanced for retention of the summary rule are, in essence, precedent, judicial self-defense and respect, and efficiency. Although the Supreme Court has recognized that the summary power may be arbitrary in nature and subject to abuse, the "settled doctrine" of both England and the United States as well as the necessity for orderly administration of justice, allegedly justified the Court's immediate acceptance of the power.⁹⁰ However, the United States Constitution guarantees to a defendant in *all* criminal proceedings notice of any charges against him, a hearing on those charges, and a jury trial. None of these constitutional protections are afforded to the defendant charged with criminal contempt in a summary proceeding.⁹¹ To rationalize that summary contempt is an exception which has been carved out to necessitate order in the courtroom not only tips the protective

85. See notes 38, 39 & 42 and accompanying text *supra*.

86. Just as with other men, "[We] can never know the mental processes by which a judge has acted." Goldfarb, *supra* note 11, at 331.

87. *Id.* Mr. Goldfarb posits that the Supreme Court has often referred to the human qualities of judges by which they, as others, are subject to fallibilities and frailties, such as anger, petulance, and even vengeance. To him, the more reasonable conclusion is that the impersonal authority of law is better guarded and applied by one who is not himself personally involved in a given conflict. *Id.*

88. See *Tumey v. Ohio*, 273 U.S. 510, 522 (1927).

89. Address by Edmond Cahn at the New York University Law School (November, 1969), cited with approval in Goldfarb, *supra* note 11, at 332. See also *Summary Contempt Sanction*, *supra* note 1, at 95.

90. See *Ex Parte Terry*, 128 U.S. 289 (1888).

91. *Id.* at 307.

balance provided by the Constitution drastically against the alleged contemnor, but, ironically, is unwarranted by empirical evidence.⁹²

Nevertheless, it must be conceded that some form of deterrence must exist to keep the workings of the judicial system from disintegrating into complete disarray. What is suggested here, however, is that the threat of a later conviction, especially for an attorney, will have as much of a deterrent effect against obstructing the judicial process as will a conviction summarily imposed. To maintain courtroom order, the trial judge would retain the power to *cite* for contempt; whereas, an impartial judge or jury, at the conclusion of the trial, would review the record and impose the sentence.⁹³ This procedure will provide the alleged contemnor with notice and an opportunity to be heard fully and fairly on the issues. Moreover, this will severely limit the potential for judicial bias⁹⁴ by providing a different judge or a jury to hear the contempt proceeding.⁹⁵ Adoption of this alternative procedure would not only aid in resolving the inherent constitutional infirmities of the present summary procedure, but would also assure effective trial advocacy.

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92. See note 5 *supra*.

93. See 4 J. MAR. J. PRAC. & PROC. 74, 94 (1970). See also *Summary Contempt Sanction*, *supra* note 1, at 102.

94. See *Summary Contempt Sanction*, *supra* note 1, at 102 n.60 ("It is unclear whether bias will be completely eliminated due to fellow judges' empathy for each other").

95. A recent empirical examination of the summary power made a substantially similar recommendation. The study states that the central defect in the summary contempt procedure is the power that it vests in the trial judge, thereby creating a fear of judicial bias or arbitrary use of the power. Concluding that the power is unnecessary and performs no essential role in controlling courtroom misbehavior, the study suggests that the present system be replaced with one in which the trial judge cites for contempt, with a different judge later deciding the ultimate issue of guilt or innocence. See DISORDER IN THE COURT, note 43 *supra*.

