# CRIMINAL PROCEDURE—SUPREME COURT NARROWS SCOPE OF SUMMARY PROCEDURES IN FEDERAL CRIMINAL CONTEMPT CONVICTIONS

*Under its power to supervise the administration of justice in the federal courts, the Supreme Court has severely circumscribed the use of summary proceedings to punish for contempt of court.*

UNDER RULE 42 (a) of the Federal Rules of Criminal Procedure[1] federal courts are permitted to punish summarily[2] certain forms of criminal contempt. Amidst increasing criticism of the summary procedure as being at variance with settled notions of due process by offering opportunities for abuse of individual rights,[3] the Su-

[1] "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." FED. R. CRIM. P. 42 (a).

The Advisory Committee's notes to the rules state that 42 (a) is "substantially a restatement of existing law," *Notes of Advisory Comm. on Rules*, 18 U.S.C. Rule 42, at app. 3766 (1964), as propounded in *Ex parte* Terry, 128 U.S. 289 (1888), where the Court held that summary punishment was proper for the contemnor who physically attacked a court marshal and brandished a knife, and Cooke v. United States, 267 U.S. 517 (1925), where the Court held the summary procedure unavailable to punish an alleged contemnor who sent a personally derogatory letter to the judge in chambers even though this contempt constituted "misbehavior in the presence of the court" and was thus within the meaning of the applicable statute.

[2] The procedure described by the word "summary" is perhaps most easily understood when viewed in distinction to the "procedural regularity" traditionally associated with criminal convictions. "We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense 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, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial." Sacher v. United States, 343 U.S. 1, 9 (1952).

[3] Perhaps the greatest volume of critical writing from any one source is that of Mr. Justice Black in his opinion for the Court in Cammer v. United States, 350 U.S. 399 (1956), and in his dissenting opinions in United States v. Barnett, 376 U.S. 681, 724 (1964); Levine v. United States, 362 U.S. 610, 620 (1960); Green v. United States, 356 U.S. 165, 193 (1958); Nilva v. United States, 352 U.S. 385, 396 (1957); Sacher v. United States, 343 U.S. 1, 14 (1952). Mr. Justice Black feels that in most cases the summary power is irreconcilable with a fair system of justice. He would apparently treat these contempt proceedings as criminal prosecutions within the meaning of the constitution, thus gnaranteeing indictment by a grand jury and a jury trial. "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. . . . He truly becomes the judge of his own cause." Green v. United States, *supra* at 199. See 36 MINN. L. REV. 965 (1952); 99 U. PA. L. REV. 540 (1951); 4 WYO. L. REV. 120 (1949); 33 YALE L.J. 536 (1924).

Even though the procedures normally associated with criminal prosecutions are noticeably absent in summary contempt cases, some earlier decisions nevertheless stated that "no formal charge or writ or answer or trial was required. A summary inquiry and a record of the finding and punishment were sufficient to constitute due process of law." Brown v. United States, 196 Fed. 351, 354 (7th Cir. 1912). See *Ex parte* Terry, 128 U.S. 289, 309-10 (1888).

preme Court in *Harris v. United States*[4] recently decided to limit application of rule 42 (a) to situations where *immediate* judicial action is necessary to rectify contemptuous conduct exemplified by such acts as threatening the judge with physical harm or seriously obstructing court proceedings.[5]

In *Harris*, the defendant had been convicted of criminal contempt and sentenced to one year in prison for refusal to obey a court order conferring immunity of prosecution and requiring him to answer questions asked by a grand jury.[6] The Supreme Court reversed the conviction, holding that the contempt could not be punished summarily under rule 42 (a). Rather, the "fair administration of justice" demanded that Harris be given notice and a hearing pursuant to rule 42 (b), which is applicable in the federal courts whenever use of summary procedures is not justifiable.[7]

Unlike the formal notice and hearing provisions of rule 42 (b), summary procedures in criminal contempt cases often proceed without notice, a hearing, an opportunity to prepare a defense and to present and cross-examine witnesses, or a jury trial.[8] The contempt power has traditionally been justified on the grounds that it is either "inherent"[9] in any judicial establishment or that it is necessary to

[4] 382 U.S. 162 (1965).

[5] *Id.* at 164.

[6] *Id.* at 163. The defendant had refused to answer the grand jury's questions on the grounds of self-incrimination. After inquiry, a federal district court granted him immunity from self-incrimination and ordered him to respond to the grand jury's inquiries. The defendant again refused and was again brought before the judge, who repeated the questions and ordered him to answer. Upon his third refusal Harris was summarily adjudged guilty of criminal contempt. *Ibid.* The conviction was affirmed in 334 F.2d 460 (2d Cir. 1964).

[7] 382 U.S. at 167.

FED. R. CRIM. P. 42 (b) provides: "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."

[8] See, *e.g.*, Savin, 131 U.S. 267 (1889); Bisignano v. Municipal Court of Des Moines, 237 Iowa 895, 23 N.W.2d 523 (1946), *cert. denied*, 330 U.S. 818 (1947).

[9] See Fisher v. Pace, 336 U.S. 155 (1949) (use of the summary contempt power upheld and termed inherent). Of the contempt power it has generally been said: "The power to punish for contempts is inherent in all courts; its existence is essential to the

the preservation of courtroom order, the execution of court decrees and the vindication of judicial authority. The propriety of using summary procedures has traditionally been determined by a judicial classification of the contempt as "direct" or "indirect,"[10] the summary procedure being reserved for direct contempts. As a matter of substantive law, a direct contempt generally requires that the conduct occur in the presence of the court or "so near thereto as to obstruct the administration of justice."[11]

Since contempt procedures in the state jurisdictions are fairly similar to those prescribed for the federal courts in rule 42,[12] analogous abuses of the summary power have arisen in both the

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preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

[10] The distinction is made in numerous cases, *e.g.*, Nye v. United States, 313 U.S. 33, 42-43 (1941), and is essentially embodied in rule 42. Direct contempts are covered by 42(a), which requires that the judge certify "that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." FED. R. CRIM. P. 42(a).

Contempts are also more broadly classified as civil and criminal. Determinative of the classification in each case is the purpose of the proceeding. A contempt is civil when the purpose is to coerce the party to obey a court decree for the benefit of the injured party; such a purpose is essentially remedial. Conversely, contempt is criminal when the proceeding seeks to punish the contemnor in order to vindicate the authority of the court. See, *e.g.*, Nye v. United States, 313 U.S. 33 (1941); State *ex rel.* Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957).

[11] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487, 488 (now 18 U.S.C. § 401 (1964)).

[12] For a review of the state statutes see Note, 15 VAND. L. REV. 241, 250-55 (1961). A typical statute is that of Arkansas, ARK. STAT. ANN. §§ 34-901 to -903 (1962), which provides: "34-901. . . . Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others.

"First. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

"Second. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings.

"Third. Wilful disobedience of any process or order, lawfully issued or made by it.

"Fourth. Resistance, wilfully offered, by any person, to the lawful order or process of the court.

"Fifth. The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory.

. . . .

"34-903. . . . Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense."

Some states have statutes specifically prescribing the procedure to be followed in the case of a witness testifying before a grand jury. See, *e.g.*, IND. ANN. STAT. § 9-822 (1956); KAN. GEN. STAT. ANN. §§ 62-918 to -920 (1964).

state and federal courts.[13] The Supreme Court has already prohibited several obvious abuses,[14] but more subtle ones still flourish. For example, the preservation of the summary contemnor's right of appeal has been cited as militating in favor of the argument that the summary procedure is not unfair. Yet it has been shown that the right may be illusory in some situations.[15] Further, while the Supreme Court has said that summary contempt procedures are not available in federal courts for the first refusal to answer a grand jury's questions since the refusal does not occur in the actual presence of the court,[16] states apparently may permissibly avail them-

[13] The Court in *Harris* also based its conclusion on " 'the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power.' " 382 U.S. at 164, quoting from Brown v. United States, 359 U.S. 41, 54 (1959) (Warren, C.J., dissenting). See Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting): "A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt." *Id.* at 199 n.8, citing Yates v. United States, 355 U.S. 66 (1957); Nilva v. United States, 352 U.S. 385 (1957); Offutt v. United States, 348 U.S. 11 (1954); Sacher v. United States, 343 U.S. 1 (1952); Fisher v. Pace, 336 U.S. 155 (1949).

[14] For example, one of the most glaring abuses was corrected in Yates v. United States, *supra* note 13. In that case the Court was confronted with a finding of cumulative contempts with cumulative penalties for continued refusal to answer questions. The Court found that only one contempt was involved and advised the district court to alter its sentence accordingly. The defendant subsequently appealed again, complaining of the severity of the revised sentence of one year's imprisonment. The Court again reversed, noting that the district court judge was merely trying to impose his original cumulative sentence. The decision was reached by the Supreme Court, 356 U.S. 363 (1958) (per curiam), only after the petitioner had spent seven months in jail.

[15] State v. Granchay, 1 Ohio App. 2d 307, 204 N.E.2d 562 (1964), illustrates this point. For refusal to answer grand jury questions, the trial judge committed the contemnors to prison with the right to purge themselves by answering. Under Ohio law summary procedure was warranted only where the purpose of the remedy was to coerce the contemnor to comply with court orders, but not where the purpose was punitive. *Id.* at 309, 204 N.E.2d at 564. Since the contemnors had been committed summarily, they could only be confined while the grand jury was in session, since it was only during that period that the coercive remedy could be effective. The trial judge, however, had made no such provision in his sentence, and they remained imprisoned after the grand jury had terminated investigations. *Id.* at 311, 204 N.E.2d at 565. On appeal the court held that the act of dismissing the grand jury also operated as an immediate discharge of the defendants. *Ibid.* Thus the court determined that it had no jurisdiction on appeal. The appeals "are now, for practical purposes, moot." *Id.* at 312, 204 N.E.2d at 565. Later in the opinion the Ohio court adverts to the possibility of an even more egregious abuse, noting that a judge might well purposely sentence contemnors in a manner similar to that used by the trial judge. The court stated, however, that "we do not imply that this reservation of power to defeat our jurisdiction was made maliciously or even consciously; it was merely an inevitable concomitant of selection of the coercive remedy by the trial judge." *Id.* at 312, 204 N.E.2d at 565-66.

[16] Under rule 42(a) the judge must certify "that he saw or heard the conduct

selves of summary procedures upon the first refusal to answer in the presence of the grand jury simply by denominating the grand jury an "arm of the court."[17] This method of disposition is highly suspect. Since the grand jury proceeding is secret, the authority or dignity of the court is not impaired in the eyes of the public and therefore no need for summary disposition is present.[18]

Compounding these abuses in both the state and federal courts is the potential deprivation of the *effective* assistance of counsel inherent in any summary procedure.[19] Often the contempt is adjudged before the contemnor has had an opportunity to elicit advice from his counsel to determine whether the information sought to be disclosed is confidential[20] or even whether the answer

constituting the contempt . . . . FED. R. CRIM. P. 42(a). See 382 U.S. at 169 nn.6-7 (Stewart, J., dissenting).

The majority opinion indicated that the very use of the summary procedure in *Harris* may have been abusive. "The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify 'committed in the actual presence of the court' for the purpose of Rule 42(a). It served no other purpose, for the witness had been adamant and had made his position known." 382 U.S. at 164-65. The dissent, however, per Justice Stewart, viewed this occurrence as an attempt on the part of the judge to give Harris the chance to purge himself and, hence, concludes that the procedure was equally as fair as the rule 42(b) procedure. *Id.* at 170-71.

[17] The contemnor in State v. Rodrigues, 219 La. 217, 52 So. 2d 756 (1951), had been ordered to answer by the judge. In dictum, however, the court observed: "The grand jury, therefore, is a constituent part, appendage, or arm of the court, and a contempt committed by any person in its presence is a direct contempt in the hearing and presence of the court itself." *Id.* at 226, 52 So. 2d at 759.

[18] "The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public." *In re* Oliver, 333 U.S. 257, 276 (1948).

In addition, the summary power is often viewed as inherently unfair in that the sentencing judge himself must act somewhat precipitously. "[F]rom the severity of the sentence here, it is clear that the judge was not advised how other judges were treating similar offenses . . . . Apparently, the 15-month sentence in this case is the longest contempt sentence ever sustained by an appellate court in the federal system for a refusal to answer questions of a court or grand jury." Brown v. United States, 359 U.S. 41, 57-59 (1959) (Warren, C.J., dissenting).

[19] The Court intimated that this deprivation occurred in *Harris*. See 382 U.S. at 163 n.1.

It has been pointed out that the danger of abuse "is heightened by the fact that the substantive elements of the contempt—the insulting tone, the provocative gesture —are matters which do not usually appear on the record and on which appellate courts usually take the word of the offended judge." 99 U. PA. L. REV. 540, 543 (1951). See Fisher v. Pace, 336 U.S. 155 (1949).

[20] See, *e.g.*, People v. Cochrane, 307 Ill. 126, 138 N.E. 291 (1923). In this case the defendant was not only in a confidential relationship with the person about whom he was being questioned, but he was also denied time to consult his counsel.

is within his privilege against self-incrimination.[21] Advice of counsel would also seem desirable in order to apprise the contemnor of the consequences resulting from his refusal to answer.

As a result of these abuses, the history of American experience with summary criminal contempts is rife with indicia of the legislative and judicial dislike for the power and the consequent trend toward narrowing its scope. Although the statutory grant of the summary power to the federal courts was initially quite broad,[22] Congress has subsequently limited the situations subject to the power. On the one hand, Congress has defined the conduct which can be punished summarily,[23] and, on the other hand, it has expressly exempted from summary procedures those contempts occurring during prosecutions under specified federal statutes.[24] The Supreme Court has also indicated its growing sensitivity to abuses of the contempt power by providing minimal procedural safeguards and by narrowing the area where the power can be exercised in federal actions. The Court has guaranteed to persons charged with

[21] See Rogers v. United States, 340 U.S. 367 (1951), where the dissenting opinion indicated that the court refused to allow counsel, who was seated in the courtroom, to intervene while his client was being questioned by the judge. *Id.* at 380 (Black, J., dissenting). The majority of the Court affirmed the contempt conviction. The case presented the difficult question of whether there had been a waiver of the privilege to refuse to answer on the grounds of self-incrimination and the complexity of this inquiry underscores the need for assistance of counsel.

[22] The Act of September 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 was the first statute giving federal courts the power to punish contempts. The language was very broad, allowing the courts to punish generally all contempts of authority in any cause or hearing before them. "[C]ourts of the United States shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority . . . ." *Ibid.*

[23] Glaring abuses of the summary power under the initial broad statutory grant given the courts, note 22 *supra*, prompted Congress to pass the Act of March 2, 1831, ch. 99, 4 Stat. 487. The statute permitted the use of the summary procedure only for certain delineated forms of conduct by certain prescribed persons. The availability of summary contempt was limited to situations involving "misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. This provision was substantially reenacted in the Act of June 25, 1948, 62 Stat. 701, 18 U.S.C. § 401 (1964). See Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024-26 (1924).

[24] *E.g.*, The Clayton Act, ch. 373, § 22, as amended, 18 U.S.C. §§ 402, 3691 (1964) guarantees the right to a jury trial upon demand where the contempt is indirect and also constitutes a crime under any federal or state statute; The Norris-La Guardia Act, ch. 90, § 11, as amended, 18 U.S.C. § 3692 (1964), guarantees the right to a jury trial for contempts involving injunctions in labor disputes.

indirect contempts the right to a hearing and to the presentation of mitigating evidence.[25] It has buttressed the obstacles to finding a direct contempt by interpreting the phrase "so near thereto as to obstruct the administration of justice" as a strictly geographical, rather than causal, limitation.[26] And it has prescribed that a different judge try the case when the presiding judge becomes personally embroiled with the contemnor.[27]

The *Harris* decision represents a major extension of the Court's guarantee of fair procedures in criminal convictions both by overruling prior law as expounded in *Brown v. United States*[28] and by drastically narrowing the scope of rule 42 (a).[29] In *Brown*, the Court had held that summary punishment was proper for the witness who refused to answer grand jury questions after being ordered to answer by the Court. The Court in *Harris* quoted liberally from the *Brown* dissent and overruled its earlier determination by an analysis of the purposes of the summary procedure.[30] "Rule 42 (a) was re-

[25] Cooke v. United States, 267 U.S. 511 (1925).

[26] Nye v. United States, 313 U.S. 33 (1941).

[27] Offutt v. United States, 348 U.S. 11 (1954). "But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law .... These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Id.* at 14.

[28] 359 U.S. 41 (1959).

[29] This conclusion seems warranted as a result of the Court's extremely narrow interpretation of the situations rule 42 (a) procedure was "intended" to comprehend. The Court's language indicates that the decision accomplished more than a mere overruling of the factual holdings in *Brown*, which was nearly identical with that of *Harris*. See 382 U.S. at 164-65, 167. The *Brown* inquiry had proceeded in traditional form by noting that the contemnor had an unqualified duty to answer the grand jury questions, that there was no factual dispute about the existence of "misbehavior," that there was no personal dispute with the judge and, hence, that all the requirements of a literal reading of rule 42 (a) had been satisfied. 359 U.S. at 45-48. The language of *Harris*, on the other hand, addresses itself primarily to the manner in which summary disposition comports with the requirements of procedural regularity, thus indicating a total re-examination of the rule 42 (a) procedure. See 382 U.S. at 164, 167.

[30] The arguments the majority deemed controlling in its disposition of the case included the limited purposes of the summary procedure, the departures from normal procedure embodied in the summary power and the fact that the court in exercising its summary power might be acting without full knowledge of extenuating circumstances and thus might be depriving the contemnor of a "fair administration of justice." 382 U.S. at 164-67. To the dissenters the significant considerations compelling their conclusion were the well-settled and simplified rule of *Brown*, the fact that there is no reason to assume that the punishment under rule 42 (a) will be any more severe than under rule 42 (b) and the contention that the procedure employed in *Harris* was not unfair. *Id.* at 168-71. It is on this last point that the interpretations of the members of the Court differed most widely. The majority viewed the reiteration of the grand jury questions in the presence of the judge as merely an effort to have the contempt recommitted in the presence of the court for the purposes of rule 42 (a).

served 'for exceptional circumstances,' . . . such as acts threatening a judge or disrupting a hearing or obstructing court proceedings."[31] The Court concluded that the summary power was not justifiable as a pervasive prerogative inherent in all courts;[32] rather, its utilization was deemed proper only when "speedy punishment may be necessary."[33] "In the instant case, the dignity of the court was not being affronted: no disturbance had to be quelled; no insolent tactics had to be stopped."[34]

This seemingly straightforward formulation of the scope of rule 42 (a), however, does not embody "clear and consistent guidance to the federal judiciary."[35] The Court's statement that its only concern is "procedural regularity"[36] is apparently an acknowledgment of the basically criminal nature of the proceeding: the primary sanction being criminal, the minimal safeguards surrounding criminal trials should be observed. The only exception envisioned by the language of the opinion is that necessary to the preservation of the judicial institution itself.[37] In the recognized exceptional case it is presumably the emergency which gives rise to the power.[38] The Court, however, did not specify the situations in which emergency will outweigh the value of procedural regularity. The standard of "necessity" hardly clarifies the decision, for the Court gave no indication of what degree of necessity must exist in order to justify summary procedures.

Further difficulty is raised by the opinion as a result of the Court's

*Id.* at 164-65. The minority saw this occurrence as offering an additional chance to Harris to purge himself. *Id.* at 170.

[31] *Id.* at 164.

[32] See note 9 *supra.*

[33] 382 U.S. at 164.

[34] *Id.* at 165.

[35] *Id.* at 168 (dissenting opinion).

[36] *Id.* at 167.

[37] *Id.* at 164, 167.

[38] Mr. Justice Black disagrees with the necessity argument. In his dissent in Green v. United States, 356 U.S. 165 (1958), he noted that "the argument from 'necessity' appears to rest on the assumption that the regular criminal processes . . . will not result in conviction and punishment of a fair share of those guilty of violating court orders . . . and by intervening between the court and punishment for those who disobey its mandate somehow detract from its dignity and prestige . . . . Nothing concrete is ever offered to support the innuendo that juries will not convict the same proportion of those guilty of contempt as would judges . . . . At the same time, and immeasurably more important, trial by jury and in full compliance with all the other protections of the Bill of Rights is much less likely to result in a miscarriage of justice than summary trial by the same judge who issued the order allegedly violated." *Id.* at 214-15.

failure to pursue its own logic. If necessity is the only limitation on procedural regularity, then notice and a hearing must be accorded whenever speedy punishment is not necessary to the proper functioning of the judiciary. Even in the exceptional situation where summary punishment would be proper under *Harris*,[39] however, it is difficult to envision an occasion where normal criminal procedures would not suffice to meet the situation. In fact, existing procedural provisions which bar the use of summary procedures in order to avoid their potential abuse seem to comprehend the situations where exercise of the power would be most necessary. For example, if the contempt charged involves disrespect to or criticism of a judge,[40] or if the judge becomes personally embroiled with the contemnor,[41] the judge is disqualified and the summary procedure is unavailable. Moreover, it has been suggested that a court may readily employ alternative remedies which are just as appropriate as the summary power in the prevention of a repetition of the contempt and simultaneously preserve the contemnor's procedural safeguards.[42] Consequently, under the view taken by the Court in *Harris*, the necessity "to protect the judicial institution itself" would never seem so great that summary punishment should be warranted.[43] The practical effect of the decision then emerges as an

[39] ". . . those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself." 382 U.S. at 167. See note 7 *supra*.

[40] See FED. R. CRIM. P. 42(b).

[41] See Offutt v. United States, 348 U.S. 11, 17-18 (1954).

[42] "For the purpose of facilitating the progress of a trial, the contemnor might be removed bodily from the courtroom. If this failed to deter him, a peace hond might be levied; in the last resort, the contemnor might be imprisoned until the end of the trial." Note, 15 VAND. L. REV. 241, 265-66 (1961). See note 21 *supra*.

Federal statutes make special provisions applicable to federal courts for the prosecution of indirect contempts that constitute criminal offenses under federal or state laws. "[I]f the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, [such person] shall be prosecuted for such contempt as provided in section 3691 . . . ." 18 U.S.C. § 402 (1964). The latter section [3691] entitles the accused to a trial by jury upon demand. 18 U.S.C. § 3691 (1964). This provision obviously represents a legislative concern over the possibility of the crime being subsumed within the contempt and being punished as a contempt without the constitutional safeguards specified for criminal trials.

The Supreme Court has also limited the availability of the summary power under a federal statute which permits summary punishment for "misbehavior of any of its [the court's] officers in their official transactions." 18 U.S.C. § 401(2) (1964). In Cammer v. United States, 350 U.S. 399 (1956), 8 HASTINGS L.J. 56, the Court decided that an attorney is not an "officer of the court" and thus could not be summarily punished for contempt under that statute.

[43] Even where courts have in fact found necessity to exist, courts often suspend exercise of the power in deference to conflicting interests. For example, where the contemnor's conduct in court would be prejudicial to the effectuation of a fair and

extreme curtailment by indirection of the availability of the summary contempt power in the federal courts.

While the majority did not specify the explicit basis for restricting the use of the summary contempt power, the decision was presumably based on the Court's supervisory power over the administration of federal criminal justice.[44] This conclusion finds support in the Court's tendency to avoid constitutional questions when possible.[45] The expressed concern for procedural regularity, however, and the language adopted in disapproving of the summary procedure in this case on grounds of fairness suggest that the summary power may be limited to emergency situations as a matter of due process of law.[46] Thus, it is conceivable that the standard of the *Harris* case may in the future be made binding upon the states under the due process clause of the fourteenth amendment.[47]

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speedy trial, the contemnor would be subject to summary punishment. Rather than adjudge the contemnor guilty at the time of the contempt, when it may be "necessary," courts seem more disposed to wait until the end of trial to cite for contempt in order to avoid the equally prejudicial effect which such action might have on a client or jury during trial. Even though the jury could be removed while the contempt was being summarily adjudged, the Court has noted that "only the naive and inexperienced would assume that news of such action will not reach the jurors." Sacher v. United States, 343 U.S. 1, 10 (1952). By the time the trial is over, however, it is no longer necessary to invoke the summary procedure. *But see* Sacher v. United States, *supra*, where the Court allowed the use of summary procedures after the trial had been concluded. *Id.* at 10-11. The result would presumably be different under the *Harris* rationale.

[44] See McNabb v. United States, 318 U.S. 332, 340 (1943). "[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Ibid.* The Court has relied on its supervisory powers in prior summary contempt cases under rule 42(a). See, *e.g.*, Offutt v. United States, 348 U.S. 11, 13 (1954), 24 FORDHAM L. REV. 144 (1955).

[45] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[46] "Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice." 382 U.S. at 167.

An interesting problem in this context is raised by the Court's quotation of a statement from Cooke v. United States, 267 U.S. 517, 537 (1925): "'Due process of law, therefore, in the prosecution of contempt, *except of that committed in open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.'" 382 U.S. at 166 n.4. (Emphasis added.) Such language manifests the fact that the Court in *Harris* was well aware of the due process objection to use of the summary power. Nevertheless, by retention of the "exceptional case" in this quotation, the Court has presumably indicated that the summary power does not violate due process when used to vindicate direct contempts.

[47] Should such a decision be forthcoming, the Court will be faced with the difficult question of whether explicit standards of the *Harris* decision will be imposed in toto

The possibility that the *Harris* holding may be elevated to the constitutional level and be applied to the states finds support from recent Supreme Court decisions strengthening procedural safeguards in criminal convictions in analogous contexts.[48] Moreover, several basic substantive considerations also militate toward such a decision. First, the summary procedure is an anomaly in the constitutional system in that it guarantees only minimal procedural rights. Second, the harm threatened by the summary contempt power, fine or imprisonment, is of singular magnitude.[49] Third, there are available to courts alternatives to the summary procedure which in fact render the "necessity" of the summary power unconvincing.[50] Finally, the burden on lower court efficiency, barring retroactive application, would be slight. In addition, the due process clause has already been used to impose some limitations upon state discretion to adjudge contempts summarily. The Supreme Court has held it to be a violation of due process for a judge who had acted as a one-man grand jury and before whom the alleged contempt had been committed, to judge the contempt even though there was no personal involvement.[51] The Court has also indicated in dictum that if the

upon the states. A similar question arose in Mapp v. Ohio, 367 U.S. 643 (1961), where the Supreme Court applied a well-established rule of administration in the federal courts—exclusion of evidence illegally seized under the fourth amendment—to state criminal trials as a constitutional requirement under the fourteenth amendment. *Id.* at 655. The exclusionary rule had been made applicable to the federal courts forty-seven years earlier in Weeks v. United States, 232 U.S. 383, 391-92 (1914). If the Court does extend the *Harris* holding to the states, it would seem likely that the narrow standards established by the Court—summary procedures will be unavailable where the contemnor has refused to answer before a grand jury—would be applied. The more difficult question is whether the broad rationale of *Harris* and its requirement of necessity as a precondition to application of the summary procedure will be extended to the states.

For an extensive discussion of the criteria applicable in due process adjudication, see generally Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961).

[48] Griffin v. California, 380 U.S. 609 (1965) (impropriety of comment on defendant's failure to testify); Escobedo v. Illinois, 378 U.S. 478 (1964) (expanding guarantees of counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (same); Mapp v. Ohio, 367 U.S. 643 (1961) (inadmissibility of evidence obtained by illegal search and seizure).

[49] Mr. Justice Black noted in his dissenting opinion in Green v. United States, 356 U.S. 165 (1958), that "since the adoption of the Constitution it [the contempt power] has undergone an incredible transformation and growth . . . until it has become a powerful and pervasive device for enforcement of the criminal law . . . . All the while sentences imposed on those found guilty of contempt have steadily mounted, until now they are even imprisoned for years." *Id.* at 207-08.

[50] See note 42 *supra* and accompanying text.

[51] *In re* Murchison, 349 U.S. 133, 137 (1955). "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they

penalty for the contempt is of sufficient magnitude the defendant may be entitled to a jury trial.[52]

Regardless of whether the *Harris* rationale will be elevated to a constitutional requirement, its possible retroactive application in federal courts remains unresolved. A holding of retroactivity would require that all contemnors convicted improperly under the *Harris* rationale be retried in a proceeding only after notice and a hearing had been afforded. In *Linkletter v. Walker*,[53] the Supreme Court refused to apply retroactively the rule propounded in *Mapp v. Ohio*[54] which excludes the receipt of evidence in a criminal trial if seized in violation of the fourth and fourteenth amendments. The Court denied retroactive application primarily because the purpose of the exclusionary rule was to deter undesirable police action and not to insure fairness of trial procedures.[55] Since the holding

prefer." *Ibid.* The Court had previously held in *In re* Oliver, 333 U.S. 257 (1948), that such a " 'judge-grand jury' cannot consistently with the due process clause of the fourteenth amendment summarily convict a witness of contempt for conduct in the secret hearings." *In re* Murchison, *supra* at 133-34.

[52] United States v. Barnett, 376 U.S. 681, 694-95 n.12 (1964). "However, our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed . . . might entitle a defendant to the benefit of a jury trial . . . ." *Ibid.* This dictum has subsequently been followed in some lower federal court cases. *E.g.*, Rollerson v. United States, 343 F.2d 269, 277-78 (D.C. Cir. 1964). See also the interpretation given the dictum in Randazzo v. United States, 339 F.2d 79, 82 (5th Cir. 1964) (the court reversed and remanded to allow the district court judge to use his discretion in deciding whether to follow the *Barnett* dictum). Presumably the dictum means that a jury trial will be afforded if the sentence exceeds that provided for petty offenses. United States v. Barnett, *supra* at 694-95 n.12; Reply Brief for the Petitioner, pp. 14-15, Harris v. United States, 382 U.S. 162 (1965). To avoid practical difficulties the court will have to decide "ahead of time whether this is likely to be an aggravated or petty offense" in order to determine whether a jury trial is necessary. Brief for the Petitioner, p. 17.

[53] 381 U.S. 618 (1965); 15 AM. U.L. REV. 122 (1965), 17 HASTINGS L.J. 124 (1965), 41 NOTRE DAME LAW. 206 (1965), 13 U.C.L.A.L. REV. 422 (1966), 68 W. VA. L. REV. 70 (1965).

"Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

[54] 367 U.S. 643 (1961).

[55] Concerning the purposes of the *Mapp* holding on the exclusionary rule, the Court said: "[I]n each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome." 381 U.S. at 639.

Increasingly courts are criticizing the Blackstonian theory of retroactivity, which postulates that judges do not create law, but merely propound what has always been

in *Harris* was aimed directly at the fairness of the contemnor's conviction and sentence,[56] retroactive application might well be deemed proper under the *Linkletter* standards. The gravity of the fundamental right to judicial action predicated upon bases other than "surmise or suspicion"[57]—a right with which the Supreme Court was especially concerned in *Harris*—may impel the Court to apply its decision retroactively.[58] The right would appear to possess an inherent value at least equivalent to the opposing considerations of the increased burden on lower courts and the widespread change in prior law which *Harris* represents.

This tentative conclusion as to retroactivity is, however, by no means clear, for the Supreme Court has demonstrated a decided tendency to deny the retroactive application of its landmark de-

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the true law, every decision thus being retroactive. See, *e.g.*, Sisk v. Lane, 331 F.2d 235, 238-39 (7th Cir. 1964); United States *ex rel.* Linkletter v. Walker, 323 F.2d 11, 14-15 (5th Cir. 1963), *aff'd sub nom.* Linkletter v. Walker, 381 U.S. 618 (1965). These courts have instead viewed an overruled decision as governing for the period during which it was in effect. See, *e.g.*, United States *ex rel.* Angelet v. Fay, 333 F.2d 12, 15-16 (2d Cir. 1964), *aff'd sub nom.* Angelet v. Fay, 381 U.S. 654 (1965); Gaitan v. United States, 317 F.2d 494, 496-97 (10th Cir. 1963).

[56] Even if it is admitted that the fact of guilt is not in question, since the court itself is witness to the contemptuous conduct, the procedure prescribed by *Harris* will be determinative of both the existence and nature of the sanction and the fairness of the sentence may thus be appropriately questioned.

In this respect *Harris* is much more akin to the deprivation of counsel in Gideon v. Wainwright, 372 U.S. 335 (1963), than it is to the exclusion of illegally seized evidence in *Mapp v. Ohio* since the pre-*Harris* procedure put the contemnor at such a prejudicial disadvantage that it was impossible for him either to present a defense or offer mitigating evidence. Nearly all federal courts have applied *Gideon* retroactively. See, *e.g.*, Palumbo v. New Jersey, 334 F.2d 524, 529-30 (3d Cir. 1964); United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 311 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

[57] 382 U.S. at 167.

[58] A holding that *Harris* should be applied retroactively may well impose a burden on lower court efficiency since it would require a retrial of all contemnors who had been improperly sentenced under rule 42(a). Because the length of criminal contempt sentences has continually been increasing, see note 49 *supra*, the number of contemnors who would be affected by a holding of retroactivity might thus be significant in numerical terms.

The extent to which prior law had been relied on is also relevant to a determination of whether to give a decision which departs from prior law retroactive effect. In *Linkletter v. Walker*, the Court found persuasive the fact that prior to Wolf v. Colorado, 338 U.S. 25 (1949), the exclusionary rule was not generally followed in the states. Since *Harris* reverses Brown v. United States, 359 U.S. 41 (1959), retroactive application of the *Harris* rule that summary procedures are not available on the refusal of the contemnor to answer grand jury questions will have a significant impact. Presumably a substantial number of contemnors were convicted summarily under the *Brown* rule for refusing to answer grand jury questions. See 382 U.S. at 171 n.11 (Stewart, J., dissenting).

cisions in the period since *Linkletter*.[59] A recent manifestation of this attitude is *Johnson v. New Jersey*,[60] wherein the Court refused to apply the right-to-counsel standards of *Escobedo*[61] and *Miranda*[62] in favor of individuals whose trials were begun prior to the date on which those cases were handed down.[63] Crucial to the determination in *Johnson* was the fact that the retroactivity of *Escobedo* and *Miranda* would have required the retrial of a myriad of prisoners convicted in the first instance under proper constitutional standards, the drastic alteration of which could not fairly have been foreseen.[64] This consideration is likewise relevant to a discussion of a speculative retroactivity problem in *Harris*.[65] On the other hand, a factor emphasized in *Johnson*, which may tend to distinguish *Escobedo-Miranda* from the *Harris* situation, is the notion that the probative value of evidence admitted in violation of the *Escobedo-Miranda* test is not necessarily greatly suspect.[66] To the extent, however, that fundamental fairness would entail notice and a hearing if *Harris* were elevated to constitutional doctrine, the withholding of these elements would appear to strike at the very heart of the validity of the contempt proceedings.[67]

Even though the Court's analysis in *Harris* is somewhat incomplete and the standards appear vague of application, the practical result of the decision is to eliminate the possibility of many summary contempt convictions in federal courts. To this extent the anomaly of the summary power as an "exception" to the due process clause has been removed by indirection. The removal of this anomaly would be enhanced should the Court impose a similar restriction upon the state courts, and the implications of the Court's language would seemingly signal that result. Perhaps the initial experience of the federal courts in administering the *Harris* rule will provide some guidance in making the determination.

[59] See, *e.g.*, Tehan v. Shott, 382 U.S. 406 (1966) (refusal to apply retroactively the rule of Griffin v. California, 380 U.S. 609 (1965), which had held unconstitutional a prosecutor's comment on the failure of a defendant to testify).

[60] 384 U.S. 719 (1966).

[61] Escobedo v. Illinois, 378 U.S. 478 (1964).

[62] Miranda v. Arizona, 384 U.S. 436 (1966).

[63] 384 U.S. at 734.

[64] *Id.* at 731.

[65] See note 58 *supra*.

[66] See 384 U.S. at 730.

[67] See notes 56-58 *supra* and accompanying text.