

1-1-1976

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Recommended Citation

Sedler, Robert Allen. The Summary Contempt Power and the Constitution: The View from Without and Within. 51 N.Y.U. L. Rev. 34, 93 (1976)
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THE SUMMARY CONTEMPT POWER AND THE CONSTITUTION: THE VIEW FROM WITHOUT AND WITHIN

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The "political trials" of the past decade generated a storm of legal controversy over the conduct of the defendants and their attorneys—and of the judges who presided at their trials. For some, the actions and attitudes of both lawyers and defendants courted disrespect for and presaged a breakdown in the law and its processes; for others, however, it was the response of the judges—chiefly, their heavy-handed wielding of the summary contempt power—that presented the real danger.

Professor Sedler brings a unique expertise to his discussion of the use—and abuse—of summary contempt. While his approach reflects the concerns of the scholar, it also bears the impressions of one who pressed his arguments before the Supreme Court in its most recent review of the summary contempt power. His perspective thus represents a confluence of the interests of both the academic and the advocate, pulling into focus the disparate elements and inherent unreasonableness of the summary contempt power.

I

INTRODUCTION

The power of a judge to proceed summarily in punishing criminal contempt, a "crime in the ordinary sense,"¹ is clearly "an anomaly in the law."² Only in a summary contempt proceeding are the otherwise inconsistent functions of judge, jury and prosecutor combined in a single individual—necessarily involved in the events leading up to the charge—who "may proceed upon [his] own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form."³ Although the Supreme Court has "long recognized the potential for abuse in exercising the summary power to imprison for contempt,"⁴ it has never held that the mere exercise of that power violates due process of law. The Court has attempted to minimize judicial abuses, how-

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¹ *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

² *Green v. United States*, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

³ *Ex parte Terry*, 128 U.S. 289, 309 (1888).

⁴ *Bloom v. Illinois*, 391 U.S. 194, 202 (1968), citing *Ex parte Terry*, 128 U.S. 289, 313 (1888).

ever, by limiting the situations in which the summary power can be invoked. Mr. Justice Rehnquist may have been overstating when he recently maintained that the reforms have "virtually emasculate[d] this historic power of a trial judge,"⁵ but the summary contempt power is doubtless not the formidable weapon that it once was.

In this Article, I will discuss the evolution of constitutional limitations on the exercise of the summary contempt power and analyze the Supreme Court's most recent contribution to that process in *Taylor v. Hayes*.⁶ As the title indicates, the discussion will proceed from "without and within"—from the dual perspectives of an academician and of a part-time "movement lawyer"⁷ who, as counsel for the petitioner in *Taylor v. Hayes*, developed a decided opinion of the summary contempt power. I have approached legal questions in this manner previously⁸ and believe that such a method has much to commend it. To the extent that the impartial and dispassionate perspective of the pure legal scholar is a virtue, its absence will be missed by the reader. On the other hand, perhaps there is an existential as well as an objective component to legal scholarship, and participation and involvement might thus yield insights that detached observation could not supply. In any event, it is important at the outset to state the perspective from which—and the bias with which—I approach the question of the summary contempt power and the Constitution.

I will begin by discussing the development of the summary contempt power and the rationale that has been advanced to justify it. I will then discuss the limitations that the Supreme Court placed on its exercise prior to *Taylor v. Hayes* and go on to consider the viability of these limitations in the context of "political trials," in which problems of disorder are most likely to arise. I will next analyze *Taylor v. Hayes* "from within" and evaluate present limitations on the exercise of the summary contempt power. In

⁵ *Codispoti v. Pennsylvania*, 418 U.S. 506, 524 (1974) (dissenting opinion).

⁶ 418 U.S. 488 (1974) (decided the same day as *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974)).

⁷ There are many varieties of such lawyers. Some are full-time employees of "movement" or civil rights organizations. A large number are lawyers engaged in private practice who devote considerable time, generally without compensation, to taking such cases. And some, like the present writer, are law professors who venture forth from the groves of academe.

⁸ See Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1; Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within* (pts. 1-2), 18 KAN. L. REV. 237, 629 (1970); Sedler, *The Procedural Defense in Selective Service Prosecutions: The View from Without and Within*, 56 IOWA L. REV. 1121 (1971). See also Sedler, Book Review, 80 YALE L.J. 1070 (1971) [hereinafter Sedler, Book Review].

conclusion, I will argue that the exercise of the summary contempt power ought to be prohibited, not only because the power itself is unnecessary, but because its exercise violates due process of law.

II

THE DEVELOPMENT AND RATIONALE OF THE SUMMARY CONTEMPT POWER

Courts are said to possess "inherent" power to punish for contempt,⁹ for the exercise of the contempt power is deeply ingrained in English law.¹⁰ Originally the power was not exercised in a summary manner unless the contempt was committed "in the face of the court,"¹¹ but such contempts were punished quickly and sometimes severely.¹² The existence of the contempt power and the right of a court to exercise it summarily were part of the English common law received in this country¹³ and were justified by the Supreme Court in *Ex parte Terry*.¹⁴

We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court . . . the offender may, in [the court's] discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than [the court's] actual knowledge of what occurred; and that . . . such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who

⁹ The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the . . . due administration of justice. The moment that 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). However, the contempt power is unknown to civil law systems. See R. GOLDFARB, *THE CONTEMPT POWER* 1-2 (1963).

¹⁰ For a general discussion of the history of the contempt power, see J. FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927).

¹¹ See GOLDFARB, *supra* note 9, at 15-16.

¹² For the view that even in-court contempts were tried by a jury until the reign of Elizabeth I, see Solly-Flood, *Prince Henry of Monmouth and Chief Justice Gasceign*, 3 *TRANSACTIONS ROYAL HIST. SOC'Y* (n.s.) 47 (1886). Fox, however, takes the position that, from the reign of Edward I, the courts had the power to punish such contempts summarily. FOX, *supra* note 10, at 50-55. For a particularly outrageous contempt, e.g., throwing a brick-bat at the judge, the death penalty could be imposed summarily. GOLDFARB, *supra* note 9, at 15.

¹³ See note 9 *supra*.

¹⁴ 128 U.S. 289 (1888).

respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say . . . that [an] offender was accused, tried, adjudged to be guilty and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence.¹⁵

That the contemptuous acts in *Terry* occurred in the presence of the court was given as further justification for allowing the judge to punish the offender without notice or hearing, but this extraordinary procedure was sanctioned in the first instance only because it was necessary to "preserve order" and vindicate the dignity of an affronted court.¹⁶

At the same time, it was wellsettled in this country that the judge could not proceed summarily with respect to out-of-court contempts.¹⁷ In *Cooke v. United States*,¹⁸ for example, an attorney delivered a letter to a federal district judge who had presided over a case that the attorney had lost on the previous day. The letter requested the judge to recuse himself in four other cases that the attorney was scheduled to try before him, and it went on to criticize the previous conduct of the judge in "severe language, personally derogatory to the judge."¹⁹ Some days later the judge entered an order finding the attorney guilty of contempt and issued an attachment for his arrest. When the attorney was brought before the judge and admitted sending the letter, the judge sentenced him for contempt without allowing him to present any defense. On cer-

¹⁵ *Id.* at 313-14; *cf. In re Savin*, 131 U.S. 267 (1889). In *Terry* the defendant assaulted a marshal who tried to remove Terry's wife from the courtroom after the court had found her guilty of "misbehavior" and ordered her removal. For a discussion of the case from the perspective of the "frontier tradition," see SPECIAL COMM. ON COURTROOM CONDUCT OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, DISORDER IN THE COURT 39-41 (1973) [hereinafter DISORDER IN THE COURT].

¹⁶ See *Cooke v. United States*, 267 U.S. 517, 534 (1925). The *Cooke* Court stated:

To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. . . .

Id. at 524.

¹⁷ This was contrary to the English practice, which authorized summary procedure to punish such contempts. See FOX, *supra* note 10, at 5-33.

¹⁸ 267 U.S. 517 (1925).

¹⁹ *Id.* at 533-34.

tiorari, the Supreme Court held that the requirements of due process precluded the judge from proceeding summarily when the contempt charged was not committed in open court. Under such circumstances the Court could find no justification for refusing to advise the accused of the charges against him or for failing to provide him an opportunity to present and argue defenses.²⁰ The accused was given both the right to call witnesses to testify on his behalf at the required hearing and the benefit of counsel upon request.²¹

The Court also held that the judge should recuse himself in the subsequent contempt hearing because "the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion."²² Significantly, however, the suggestion that a judge personally embroiled in the controversy disqualify himself from hearing the contempt charges was limited to those cases in which a summary proceeding was not appropriate.²³

The different procedures applicable to in-court contempts and out-of-court contempts in federal proceedings are now embodied in Rule 42 of the Federal Rules of Criminal Procedure. Rule 42(a) authorizes the judge to punish the contempt summarily if he "certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court," and in such a case the rule requires the judge to enter an order of contempt reciting the facts for review by the appellate court. Out-of-court contempts must be dealt with under rule 42(b), which requires that the accused be given notice of the essential facts constituting the offense charged and be afforded a hearing before the court (or before a jury if the defendant is entitled to a jury trial).²⁴ 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."²⁵

²⁰ *Id.* at 536.

²¹ *Id.* at 537.

²² *Id.* at 539.

²³ *Id.* The Court felt that self-disqualification was appropriate only "where conditions do not make it impracticable, or where the delay may not injure public . . . right." *Id.*

²⁴ The conditions under which the right to a jury trial of contempt charges obtains are discussed in the text accompanying notes 93-119 *infra*.

²⁵ FED. R. CRIM. P. 42(b). The current federal contempt statute, 18 U.S.C. § 401 (1970), authorizes the federal courts to punish three categories of contempt—misbehavior in the presence of the court or so nearby as to obstruct justice; misbehavior of court officers in their official transactions; and disobedience of or resistance to a court's lawful writ, process, order or decree. The same categories were set

In *In re Oliver*,²⁶ the Supreme Court held that due process would be violated by the exercise of the summary contempt power when the contempt was not committed in open court, even though it may have been committed in the presence of the judge. In that case a circuit judge, functioning as a "one-man grand jury" under Michigan law,²⁷ summarily punished a witness believed to have committed perjury during the "grand jury proceedings." The state argued that, under *Terry*, the judge was entitled to proceed summarily because the conduct was committed in his presence. In rejecting this contention, the Court noted that since the conduct of the accused occurred in secret, there could be no possibility of a "demoralization of the court's authority" if it were not punished summarily and that the judge's conclusions were based partly upon additional testimony given in the absence of the accused.²⁸ The main thrust of the decision, however, was that a judge could proceed summarily only if the contempt was committed in open court, for only then would the preserving order rationale justify a summary proceeding "as a narrow exception to due process requirements."²⁹

In *Sacher v. United States*,³⁰ decided in 1952, the power to punish in-court contempts summarily may be said to have reached its zenith. *Sacher* arose out of the Smith Act conspiracy trial of the leaders of the Communist Party³¹ during which there was "constant contention between the lawyer, defendants, and the trial judge."³² The judge had not punished contempts when they occurred but waited until the end of the trial, when he proceeded summarily under rule 42(a) and found the defendants' lawyers guilty of numerous counts of criminal contempt.³³ The Supreme Court's grant of certiorari was limited to the narrow question of whether

forth in an 1831 statute, Act of Mar. 2, 1831, ch. 94, § 1, 4 Stat. 487, which was designed to limit the broad grant of the contempt power contained in the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73. The scope of such statutes is to be narrowly interpreted. *Nye v. United States*, 313 U.S. 33, 47-48 (1941).

²⁶ 333 U.S. 257 (1948).

²⁷ *Id.* at 261-63.

²⁸ *Id.* at 277, quoting *Cooke v. United States*, 267 U.S. 517, 536 (1925).

²⁹ *Id.* at 275.

³⁰ 343 U.S. 1 (1952).

³¹ See *Dennis v. United States*, 341 U.S. 494, 495-98 (1951).

³² DISORDER IN THE COURT, *supra* note 15, at 49. For examples of the conduct involved, see *id.* at 50-54; Appendix to Opinion of Justice Frankfurter, *Sacher v. United States*, 343 U.S. 1, 42-89 (1952).

³³ However, after sentencing, the judge did give the accused the opportunity to speak, and as the Supreme Court subsequently observed: "[He] would . . . no doubt have modified his action had their statements proved persuasive." *Groppi v. Leslie*, 404 U.S. 496, 506 n.11 (1972).

the judge could proceed summarily under rule 42(a) at the end of a trial,³⁴ but the impact of the decision went far beyond that question. A divided Court held that the trial judge could proceed summarily at that time and that the judge was not disqualified from sitting in judgment even though the contempts were "personal to him."³⁵

The *Sacher* majority held that "summary," as used in rule 42(a), did not refer to the timing of the judge's action, but to the method of its exercise. The rule was thus thought to contemplate a procedure dispensing with the "formality, delay and digression"³⁶ that would result from issuing process and holding a conventional trial on the contempt charges. Noting that the rule only allowed summary procedure with respect to conduct in the judge's presence, the Court asserted that "[r]easons for permitting straightway exercise of the summary power are not reasons for compelling or encouraging its immediate exercise."³⁷ In particular, the Court pointed out that finding an attorney guilty of contempt during the course of a trial could prejudice his client before the jury or otherwise interfere with the continuation of the trial. Emphasizing that counsel were repeatedly warned during the course of the trial that their conduct was regarded as contemptuous, the majority concluded:

If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.³⁸

Despite the fact that the trial judge had charged the attorneys with deliberately entering into an agreement to harass him in the hopes of impairing his health,³⁹ the Court held that the judge was

³⁴ 343 U.S. at 5.

³⁵ *Id.* at 11-12.

³⁶ *Id.* at 9.

³⁷ *Id.* at 9-10.

³⁸ *Id.* at 11.

³⁹ *Id.* The conviction on this count had been reversed by the Second Circuit, since the alleged conspiracy did not occur in the judge's presence. *Id.*

not disqualified. Taking an expansive view of the exercise of summary power, the Court felt it "almost inevitable" that any contempt would offend a judge's personal dignity, and thus refused to limit summary punishment to "such minor contempts as [would] leave the judge indifferent."⁴⁰ The clear impact of this aspect of the *Sacher* holding was that a judge's possible bias stemming from the personal nature of the contemptuous conduct would not operate to prevent him from proceeding summarily under rule 42(a), even after the trial, so long as that conduct occurred in open court. Yet this same possibility of bias would be sufficient to require a judge's recusal if the conduct did not occur in his presence.

The *Sacher* Court came down strongly in favor of the exercise of the summary contempt power because it considered that power crucial to preserving order in the courtroom.⁴¹ Conceding that summary punishment should always be "regarded with disfavor," Justice Jackson, writing for the majority, stated that "the very practical [interests in courtroom order] which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for its being made summary."⁴² With respect to in-court contempts, then, the *Sacher* Court held that a judge could proceed summarily either at the time the contempt was committed or after the trial⁴³ and indicated that when acting summarily a judge would not be required to recuse himself, even though the contempt may have been personal to him. Moreover, since the right to trial by jury usually did not

⁴⁰ *Id.* at 12.

⁴¹ The Supreme Court's emphatic endorsement of the summary contempt power was by no means unanimous. Justice Black dissented on the grounds that (1) the judge could not impartially sit in judgment on the charges, (2) the defendants were entitled to a jury trial and (3) the defendants had not been given a chance to defend themselves at all. *Id.* at 14-23. Justice Black also emphasized that the "[c]onviction without trial" made it impossible for the appellate court to properly review the convictions. *Id.* at 18. Justice Frankfurter dissented on the ground that since the judge waited until the end of the trial to act, the possible bias on his part due to the "personal" nature of the contempts should have required his recusal. *Id.* at 23-42. Justice Douglas dissented on the grounds that trial should have been before another judge and that the defendants were entitled to a jury trial. *Id.* at 89.

⁴² *Id.* at 8. *But see* GOLDFARB, *supra* note 9, at 1-2.

⁴³ In practice judges seem to wait until after trial to punish contempts by lawyers, thus avoiding any prejudice to a defendant that might result from his lawyer's contempt conviction. Just a few years after *Sacher*, the Ninth Circuit observed: "It is now well established practice for the trial judge to reserve punishment of contempts by participants in a criminal trial." *Yates v. United States*, 227 F.2d 851, 853 (9th Cir. 1955), *rev'd in part*, 355 U.S. 66 (1957). Concerning the problems that may arise when the judge proceeds summarily during the trial, see *People v. Fusaro*, 18 Cal. App. 3d 877, 888-91, 96 Cal. Rptr. 368, 375-77 (1971). *Cf. Hawk v. Superior Court*, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974), *cert. denied*, 421 U.S. 1012 (1975).

apply to criminal contempts at that time, judges were not required to convene juries to impose punishment for serious contempts.⁴⁴ Thus, the amount of punishment that the trial judge could impose without a hearing of any kind was simply unlimited.⁴⁵

III

THE EROSION OF THE SUMMARY CONTEMPT POWER: FROM *SACHER* TO *TAYLOR*

Dissenting in *Taylor v. Hayes* and *Codospoti v. Pennsylvania*,⁴⁶ Justice Rehnquist observed ruefully:

The Court's decisions today are the culmination of a recent trend of constitutional innovation which virtually emasculates [the] historic power of a trial judge . . . [F]rom the hodge-podge of legal doctrine embodied in these decisions, which have irretrievably blended together constitutional guarantees of jury trial in criminal cases, constitutional guarantees of impartial judges, and fragments of the law of contempt in federal courts, the only consistent thread which emerges is this Court's inveterate propensity to second-guess the trial judge.⁴⁷

Although Justice Rehnquist may have been overstating the matter somewhat, it is true that since *Sacher* the Supreme Court has imposed one constitutional limitation after another on the exercise of the summary contempt power. Additionally, the Court, exercising its supervisory powers over lower federal courts, has imposed standards of fair procedure that have themselves blended into constitutional doctrines and thus have equally limited the power of state court judges. These limitations have usually revolved around (A) the circumstances in which the summary contempt power may be

⁴⁴ In certain circumstances involving out-of-court contempts, Congress had provided for the right to trial by jury. See *United States v. Barnett*, 376 U.S. 681, 687-88 (1964); GOLDFARB, *supra* note 9, at 165-67. A number of states have similarly limited the extent to which a judge may punish for contempt without a jury trial. For example, a Kentucky statute, KY. REV. STAT. § 432.260 (1975), limited the power of a judge to punish for contempt without a jury to a maximum of \$30 or 30 hours' imprisonment. The statute was held violative of the Kentucky constitution as an improper interference with judicial power when *Taylor v. Hayes* was before the Kentucky Court of Appeals. See *Taylor v. Hayes*, 494 S.W.2d 737, 745 (1973), *rev'd*, 418 U.S. 488 (1974); note 241 *infra*.

⁴⁵ In *Sacher* the sentences ranged from 30 days to six months in jail. The real significance of the contempt convictions against the attorneys in *Sacher* was the bar disciplinary action that followed. For a discussion of this point, see *DISORDER IN THE COURT*, *supra* note 15, at 54-55.

⁴⁶ 418 U.S. 506, 523 (1974). *Codispoti*, decided the same day as *Taylor*, involved the applicability of the jury trial guaranty to cases of multiple contempts.

⁴⁷ 418 U.S. at 524.

exercised, (B) the disqualification of the trial judge and (C) the right to a jury trial.

A. *The Circumstances in Which the Summary Contempt Power May be Exercised*

The Court has made it clear that the summary contempt power may not be exercised against even in-court contempts unless all the facts giving rise to the charge are personally observed by the trial judge. This requirement is illustrated most clearly by *Johnson v. Mississippi*.⁴⁸ In that case the judge had directed the bailiffs and deputies to keep all persons entering the courtroom from walking in a certain area while jurors were being called. After being directed around this area by a deputy, the contemnor allegedly refused to move and "then continued to stand and look around over the room, disrupting the court proceedings."⁴⁹ The judge then ordered him removed from the courtroom and the next day issued an order directing the defendant to appear before the court the following week. After the occurrence of a number of other matters (which, as will be discussed subsequently, were held to require the judge's recusal⁵⁰), the judge summarily held the defendant in contempt. The Supreme Court found on due process grounds that the judge should not have proceeded summarily, because the record did not show him to have been "personally aware of the contemptuous action when it occurred,"⁵¹ but rather indicated that the sheriff and the deputy had "related to the Judge what had transpired."⁵² The contemnor was thus entitled to a "fair hearing . . . to show that the version of the event related to the judge was inaccurate, misleading, or incomplete."⁵³ In sum, allegedly contemptuous conduct not only must occur in the courtroom but must be witnessed personally by the trial judge before he can proceed summarily to punish it.⁵⁴

⁴⁸ 403 U.S. 212 (1971).

⁴⁹ *Id.* at 213.

⁵⁰ See note 91 *infra*.

⁵¹ 403 U.S. at 215.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ But see *In re Savin*, 131 U.S. 267 (1889). In *Groppi v. Leslie*, 404 U.S. 496 (1972), this principle was extended to legislative contempts. There the Assembly of the Wisconsin Legislature passed a resolution citing the defendant for contempt on the ground that two days previously he had interrupted its proceedings by leading a disorderly group of people onto the floor of the Assembly during a session. The contempt resolution was adopted without giving notice to the defendant or affording him an opportunity to defend. The Supreme Court held that the guarantees of procedural due process applied to legislative contempts and that when the citation for contempt did not occur until a later date, the legislature could not proceed summarily.

Even these limitations, however, cannot be applied mechanically to sanction the exercise of the summary contempt power. In *Harris v. United States*,⁵⁵ the Supreme Court overturned a contempt conviction that had issued only after events leading to the charge had been orchestrated to lend themselves to a summary proceeding. In *Harris* a recalcitrant grand jury witness was summarily convicted under rule 42(a) after he and the grand jury were brought before a federal district judge and the witness's original refusal to answer a question was repeated in the judge's presence. Overruling a contrary decision rendered only six years previously,⁵⁶ the Court found that the judge was precluded from proceeding under rule 42(a), because the "real contempt" occurred before the grand jury.⁵⁷ The defendant's appearance before the judge was found to have been an ancillary proceeding, undertaken for the sole purpose of rendering rule 42(a) applicable.⁵⁸ The contemnor had made clear his position before the grand jury, and, in his appearance before the judge, "the dignity of the court was not being affronted."⁵⁹ The Court concluded that rule 42(b) "prescribes the 'procedural regularity' for all contempts in the federal regime except those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself."⁶⁰

However, in *United States v. Wilson*,⁶¹ the Court held that a judge could proceed summarily under rule 42(a) to punish a criminal trial witness who had refused to testify following a grant of immunity, distinguishing *Harris* on the ground that it "did not deal with a refusal to testify which obstructed an ongoing trial."⁶²

Of course, in *Harris* the Court was rendering a decision with respect to the applicability of rule 42(a), and it would not necessarily follow that a similar sequence of events in state court would

ily. The Court distinguished the legislature's action from that of a judge acting at the close of a trial by pointing out that all of the legislators voting on the contempt citation might not have personally observed the prior events that gave rise to the charge. This possibility meant that as a matter of due process the contemnor was entitled to notice of the charges and an opportunity to be heard. *Id.* at 505, 507. It may be queried whether the legislature could have acted summarily even if it imposed the contempt citation on the spot, since there would be no way of knowing whether all the legislators had personally observed the relevant events.

⁵⁵ 382 U.S. 162 (1965).

⁵⁶ *Brown v. United States*, 359 U.S. 41 (1959).

⁵⁷ 382 U.S. at 164.

⁵⁸ *Id.* at 164-65.

⁵⁹ *Id.* at 165.

⁶⁰ *Id.* at 167.

⁶¹ 421 U.S. 309 (1975).

⁶² *Id.* at 318.

violate due process if, as in *Harris*, the defendant were given the full opportunity to explain his reasons for refusing to testify.⁶³

Apart from this possibility, however, *Johnson* makes it clear that the summary contempt power can be exercised consistently with due process only when the conduct giving rise to the contempt charges occurs in the courtroom and is personally observed by the judge.⁶⁴

B. Disqualification of the Trial Judge

In a clear departure from *Sacher*, the Supreme Court has limited the power of a judge to try contempt charges—at least where he does not act instantly—to cases where he has not become “personally embroiled in controversy” with the alleged contemnor.⁶⁵ In other words, when a judge waits until the end of a trial to punish contempts committed in his presence, lack of impartiality on his part will require his recusal, just as if he were seeking to punish for out-of-court contempts. The first case to impose this restriction was *Offutt v. United States*,⁶⁶ decided only three years after *Sacher*. There, as in *Sacher*, the judge waited until the end of the trial to punish an attorney,⁶⁷ but in his interchanges with the contemnor the trial judge had “revealed an attitude which hardly reflected the restraints of conventional judicial demeanor,”⁶⁸ and he was in fact described by the Court in a later case as “an activist seeking combat.”⁶⁹ On this basis the Court distinguished *Sacher*:

The [contempt] power . . . entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has

⁶³ In *Shillitani v. United States*, 384 U.S. 364 (1966), the Court held that summary imprisonment of a witness for refusal to answer questions before a grand jury constituted civil rather than criminal contempt, entitling the recalcitrant witness to be released when the grand jury was discharged.

⁶⁴ The failure of an attorney to appear in court on time has generally been held not to constitute a contempt committed in the actual presence of the court that would justify summary disposition under rule 42(a). E.g., *United States v. Delahanty*, 488 F.2d 396 (6th Cir. 1973); *In re Lamson*, 468 F.2d 551 (1st Cir. 1972); *United States v. Willett*, 432 F.2d 202 (4th Cir. 1970). *Contra*, *In re Niblack*, 476 F.2d 930 (D.C. Cir. 1973).

⁶⁵ *Offutt v. United States*, 348 U.S. 11, 17 (1954).

⁶⁶ 348 U.S. 11 (1954).

⁶⁷ The judge imposed a sentence of 10 days' imprisonment. The District of Columbia Circuit upheld the conviction but reduced the punishment to 48 hours. *Id.* at 12.

⁶⁸ *Id.*

⁶⁹ *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). For two of the more egregious examples of the *Offutt* trial judge's behavior, see 348 U.S. at 16-17 nn.2-3.

deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer.⁷⁰

The Court thus held that the principles of *Cooke v. United States*,⁷¹ requiring the disqualification of a trial judge who could not impartially try the charges, applied. However, the Court was careful to note that a personally entangled judge would be required to recuse himself only "where conditions do not make it impracticable, or where the delay may not injure public or private right."⁷² Thus, *Offutt* might be narrowly read to cover only those cases in which the trial judge defers punishment until the close of a trial.

In *In re Murchison*,⁷³ decided one year after *Offutt*, the Court dealt with what may be called the "institutional bias" of the judge. That case involved a variation of the situation presented in *In re Oliver*,⁷⁴ where the judge, functioning as a one-man grand jury, summarily punished a witness believed to have committed perjury in the grand jury proceedings. In *Murchison* the judge also believed that a witness had committed perjury in the grand jury proceedings, but he held a hearing on the contempt charges. A similar hearing was held for a witness who had simply refused to answer questions. Both were found guilty of contempt. The Supreme Court reversed the convictions because the judge, having been an integral part of the process leading up to the charges, could not be "in the very nature of things, wholly disinterested in the conviction or acquittal of the accused."⁷⁵ The Court also noted that the judge's recollection of what occurred when he was functioning as a grand jury was likely to weigh more heavily with him than any testimony given at the subsequent hearing and further pointed out that to sustain their defenses the defendants might have to cross-examine the judge himself.⁷⁶ Concluding that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer,"⁷⁷ the Court held that for the judge to try the contempt charges would be violative of due process.

⁷⁰ 348 U.S. at 14.

⁷¹ 267 U.S. 517 (1925), discussed in text accompanying notes 18-23 *supra*.

⁷² 348 U.S. at 14, quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925).

⁷³ 349 U.S. 133 (1955).

⁷⁴ 333 U.S. 257 (1948), discussed in text accompanying notes 26-29 *supra*.

⁷⁵ 349 U.S. at 137.

⁷⁶ *Id.* at 138-39.

⁷⁷ *Id.* at 137.

The only case in which the Supreme Court rejected a challenge to the trial judge's impartiality in the post-Sacher period has been *Ungar v. Sarafite*.⁷⁸ In that case the defendant contended that the judge lacked impartiality both because the defendant's contemptuous remarks constituted a personal attack upon the judge and because the judge's responses revealed a bias against the defendant. The defendant, a lawyer, was called as a hostile witness in a conspiracy-to-obstruct-justice trial. He interposed his own objections to the form of the questions asked and was unresponsive to a number of questions. On several occasions the trial judge had to instruct him not to rephrase questions or offer gratuitous testimony, but despite admonishments, he continued this behavior. On the third day of the trial, when instructed to give a responsive answer to a question, the defendant obtained a recess but was denied permission to leave the stand. He then said he could not and would not testify further and accused the judge of "coerc[ing] and intimidat[ing]" him and of "suppressing the evidence."⁷⁹ The judge replied, "You are not only contemptuous but disorderly and insolent."⁸⁰ After this interchange, the defendant received medical assistance and resumed his testimony. Following the trial the judge issued an order against the defendant to show cause why he should not be held in contempt. The defendant appeared and argued unsuccessfully that the case should be continued and heard before another judge. Refusing to defend further, he was found guilty, fined, and sentenced to 10 days' imprisonment.⁸¹

The Supreme Court, in an opinion by Mr. Justice White, found that the defendant had not been deprived of due process when he was tried by the judge before whom the contemptuous conduct occurred. It held first that the defendant had not launched a personal attack upon the judge, which would have required his disqualification. Refining the standards for disqualification enunciated in *Cooke* and *Offutt*, the Court stated:

[W]e are unwilling to bottom a constitutional rule of disqualification solely upon . . . disobedience to court orders and criticism of its rulings during the course of a trial. . . . We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions. . . . [The defendant's statements were] disruptive, recalcitrant and disagreeable commen-

⁷⁸ 376 U.S. 575 (1964).

⁷⁹ *Id.* at 580.

⁸⁰ *Id.*

⁸¹ *Id.* at 581.

tary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.⁸²

Disallowing the contention that the judge's remarks demonstrated bias on his part, the *Ungar* Court looked to the totality of the judge's conduct and concluded that he did not allow himself to become personally embroiled with the petitioner.⁸³ It also emphasized that the judge did not proceed summarily, "but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding."⁸⁴ The judge's reference to the defendant's conduct as being "not only contemptuous, but disorderly and insolent," was characterized as a "declaration of a charge against the petitioner, based on the judge's observations, which, without more, was not a constitutionally disqualifying prejudgment of guilt."⁸⁵ The Court concluded that there was not "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused."⁸⁶

Ungar is particularly significant in that the Court assumed that the constitutional test for disqualification of a state court judge in contempt proceedings was the same as the test applicable to federal judges. At the same time, the Court indicated that not every improper remark addressed to the judge would constitute a personal attack, and that bias could not be established without considering the totality of the judge's conduct in the case.

*Mayberry v. Pennsylvania*⁸⁷ is a good example of conduct that will constitute a personal attack on the judge and thus disqualify him from sitting in judgment on a contempt charge. Mayberry, a criminal defendant representing himself, addressed epithets to the judge during the trial such as "dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog" and "fool."⁸⁸ He accused the judge of "running a Spanish Inquisition," and told him to "Go to hell" and "Keep [his] mouth shut."⁸⁹ At the conclusion of the trial, the judge found the defendant guilty of 11 counts of contempt and sentenced him to a total of between 11 and 22 years' imprisonment.

⁸² *Id.* at 584.

⁸³ *Id.* at 585.

⁸⁴ *Id.* at 588.

⁸⁵ *Id.* at 587.

⁸⁶ *Id.* at 588.

⁸⁷ 400 U.S. 455 (1971).

⁸⁸ *Id.* at 466.

⁸⁹ *Id.*

In holding that the judge could not impartially try the contempt charges, the Supreme Court first noted that since the contemnor was a defendant and not an attorney defending another, he would not have been unfairly prejudiced by an immediate exercise of the summary contempt power, as might have the defendant in *Sacher*. But since the judge did not act at the time the contempt was committed, the Court was of the view that "it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take [one's] place."⁹⁰ Although the judge was not an activist seeking combat but rather "the target of petitioner's insolence," disqualification was constitutionally required, for, as the Court observed: "a judge, vilified as was this . . . judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."⁹¹

It should be noted that in all of these cases the judge waited until after the trial or until a later date to punish the contempts. Significantly, the Supreme Court has yet to hold that *immediate* summary punishment doled out by a judge embroiled in controversy with the contemnor would violate due process.⁹² But when the judge waits until the end of the trial to punish for contempt—as apparently is the common practice, particularly where the alleged contemnor is a lawyer—his demonstrated lack of impartiality will preclude him not only from acting summarily but also from sitting in judgment on the charges.

⁹⁰ *Id.* at 464.

⁹¹ *Id.* at 465. In *Johnson v. Mississippi*, 403 U.S. 212 (1971), discussed in text accompanying notes 48-54 *supra*, the Court found a lack of impartiality because of the trial judge's involvement with the defendant lawyer in matters other than those relating to the contempt charge itself. After the judge had issued a show-cause order against him, the defendant filed a motion, supported by other lawyers' affidavits, asking that the judge recuse himself because of his bias against the defendant, the civil rights organizations he represented and the lawyers' organization defending him. No hearing was ever held on that motion. Subsequently the defendant and others filed a federal suit against the judge, which resulted in an order enjoining the judge from discriminating "by race, color or sex" in jury selection in his court. *Id.* at 214. Two days after the order was issued the judge imposed the contempt sentence against the defendant. In holding that the judge could not constitutionally sit in judgment on the contempt charges or preside over the retrial on those charges, the Court felt it "plain that [the judge] was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit." *Id.* at 215-16. The imposition of the contempt sentence in juxtaposition with the entry of the federal court judgment against the judge made the lack of impartiality abundantly clear and was akin to the "institutional bias" that was the basis of the Court's decision in *Murchison*.

⁹² The fact that the judge proceeds summarily without giving the accused any opportunity to be heard in his defense is strong evidence of the judge's embroilment. See note 311 *infra*.

C. *The Right to a Jury Trial*

As it existed at the time *Sacher* was decided, the summary contempt power legitimized judicial imposition of severe sentences on defendants who were not even afforded the opportunity to present available defenses, much less the chance to argue such defenses before a jury. Recognizing the possibility of abuse attending this situation, the Supreme Court has finally reached the apparent conclusion that punishment for contempt, whether by summary procedure or otherwise, cannot be imposed without the intervention of a jury when the maximum sentence authorized by statute or the sentence actually imposed in the absence of such a statute is at least six months' imprisonment. Defendants in contempt cases had long argued that they were entitled to a jury trial as in the case of other "serious crimes," but this argument had been consistently rejected by the Court:⁹³ at the time the Constitution was adopted the English courts summarily punished both in-court and out-of-court contempts.⁹⁴

Justice Black had repeatedly attacked the constitutionality of the summary contempt power itself on due process grounds, and he included in his attack the argument that the right to a jury trial applied to criminal contempt in the same manner as it applied to other crimes.⁹⁵ In a 1964 decision, *United States v. Barnett*,⁹⁶ he concurred in a dissenting opinion by Justice Goldberg which traced at length the historical development of the contempt power and found that when the Constitution was adopted, those criminal contempts triable without a jury were usually subject to only "trivial penalties."⁹⁷ These contempts did not differ from other "petty crimes" that could at that time be punished without a jury's determination of guilt.⁹⁸ The dissent thus would have condemned as unconstitutional "the relatively recent practice of imposing *serious* punishment for criminal contempts without a trial by jury."⁹⁹

Two years later, in *Cheff v. Schnackenberg*,¹⁰⁰ a plurality of the Court, joined on the particular issue by Justices Black and

⁹³ In *United States v. Barnett*, 376 U.S. 681, 694 (1964), the Court observed that there had been "at least 50 cases of this Court that support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense."

⁹⁴ See *id.* at 692-700; *Green v. United States*, 356 U.S. 165, 185-87 (1958).

⁹⁵ See *Green v. United States*, 356 U.S. 165, 201-19 (1958) (dissenting opinion); *Sacher v. United States*, 343 U.S. 1, 20-23 (1952) (dissenting opinion).

⁹⁶ 376 U.S. 681 (1964).

⁹⁷ *Id.* at 751.

⁹⁸ *Id.*

⁹⁹ *Id.* at 740.

¹⁰⁰ 384 U.S. 373 (1966).

Douglas, exercised the Court's supervisory power over lower federal courts to require that criminal contempt sentences in excess of six months not be imposed without a jury trial or waiver of such a trial by the defendant. Justices Black and Douglas again argued that criminal contempt was a "crime" within the meaning of article III, section 2¹⁰¹ and of the sixth amendment,¹⁰² and thus that the right to trial by jury applied to all criminal contempt proceedings regardless of the length of the sentence.¹⁰³

In *Bloom v. Illinois*,¹⁰⁴ decided in 1968, a majority of the Court finally came around to the view that a criminal contempt could be a "serious offense" to which the right to trial by jury would attach under the sixth amendment. *Bloom* was decided the same day as *Duncan v. Louisiana*,¹⁰⁵ in which the Court held that the sixth amendment's guaranty of the right to trial by jury in "serious" criminal cases applied to the states by virtue of the fourteenth amendment's due process clause. In holding in *Bloom*, over the dissent of Justices Stewart and Harlan,¹⁰⁶ that the right to a jury trial attached to serious contempts as well,¹⁰⁷ the Court stated that

serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and . . . the traditional rule is constitutionally infirm as it permits other than petty contempts to be tried without honoring a demand for a jury trial. . . .¹⁰⁸

Indeed, the Court not only felt that criminal contempt was "a crime in the ordinary sense,"¹⁰⁹ but believed that the defendant charged with that crime had greater needs than others for a jury

¹⁰¹ "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2.

¹⁰² In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

U.S. CONST. amend. VI.

¹⁰³ 384 U.S. at 384 (dissenting opinion).

¹⁰⁴ 391 U.S. 194 (1968).

¹⁰⁵ 391 U.S. 145 (1968).

¹⁰⁶ 391 U.S. at 215. The dissent argued both that the right to trial by jury did not apply to criminal contempts and that the sixth amendment's guaranty of trial by jury was not applicable to the states under the fourteenth amendment.

¹⁰⁷ In *Bloom* the defendant had been sentenced to two years' imprisonment. Since the Court held in *Duncan* that an offense for which a maximum sentence of two years' imprisonment was authorized was a "serious" one within the meaning of the trial-by-jury guaranty, there was no question that *Bloom* had been charged with a "serious" offense.

¹⁰⁸ 391 U.S. at 198.

¹⁰⁹ *Id.* at 201.

trial, because of the possible arbitrary or biased responses of judges to whom contempts were directed.¹¹⁰ Nor was the Court persuaded to subordinate this fundamental individual protection to the need for maintaining order in the courtroom. Asserting that "[g]enuine respect . . . will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries,"¹¹¹ the majority maintained that the interests in preserving courts' dignity and processing contempts efficiently would be adequately served by the unaffected power to try petty contempts without jury trials.¹¹² But with respect to serious contempts, to which the jury trial guaranty was held to apply, neither state nor federal trial judges could any longer impose punishment summarily, notwithstanding that such contempts might occur in the presence of the judge.

In *Bloom*, which involved a two-year sentence, the Court did not find it necessary to specify what constituted a serious contempt within the meaning of the trial-by-jury guaranty.¹¹³ One year later, in *Frank v. United States*,¹¹⁴ the Court denied a jury trial to a contemnor given a suspended sentence and placed on probation for three years. The Court first noted that a maximum sentence authorized by statute could be taken as a legislative expression of the seriousness of a crime and would thus control a defendant's right to a jury trial.¹¹⁵ Pointing out that Congress had not placed any limits on punishments that might be imposed for the wide variety of contempts occurring in federal courts, the Court held that, in the absence of an authorized maximum sentence, "the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense."¹¹⁶

It remained only to establish the watershed penalty that would divide serious contempts from petty contempts. In *Baldwin v. New York*,¹¹⁷ involving the right to a jury trial in a noncontempt situa-

¹¹⁰ *Id.* at 202.

¹¹¹ *Id.* at 208.

¹¹² *Id.* at 208-09. The Court also noted that "recalcitrant" juries might occasionally refuse to convict defendants who had actually committed contempts, but it recognized that such "miscarriages of justice" were an unavoidable aspect of the jury system and could no more justify denying a contemnor a jury trial than any other criminal defendant. *Id.* at 209.

¹¹³ In *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), decided the same day as *Bloom*, the Court, faced with a punishment for contempt of 10 days' imprisonment, held that the defendant was not entitled to a jury trial and observed that "it is clear that a six month sentence is short enough to be 'petty.'" *Id.* at 220.

¹¹⁴ 395 U.S. 147 (1969).

¹¹⁵ *Id.* at 149.

¹¹⁶ *Id.*

¹¹⁷ 399 U.S. 66 (1970).

tion, the Court held in effect that the right to a jury trial attaches whenever the authorized penalty for an offense exceeds six months. Justices White, Brennan and Marshall took this position and formed the plurality, while Justices Black and Douglas, concurring in the result, took the position that the right to a jury trial applied to all criminal offenses.¹¹⁸

Based on *Baldwin*, then, and using the approach taken to criminal contempts in *Frank*, the right to trial by jury would obtain in criminal contempt cases whenever an applicable statute authorized punishment in excess of six months' imprisonment or whenever the punishment actually imposed exceeded six months. In such cases, of course, the jury trial guaranty would preclude the judge from proceeding summarily. However, the case law of the early 1970's would indicate that if the punishment authorized—or, in the absence of statutory authorization, if the punishment actually imposed—does not exceed six months, a judge may summarily punish contempts committed in his presence.¹¹⁹

D. A Summary

Thus, the post-*Sacher* years saw the Supreme Court impose some very significant limitations on the exercise of the summary contempt power. At the end of that period, before the "political trials" of the 1970's, that power could be exercised only when the contempt was committed in the courtroom itself and when all of the facts were personally observed by the judge. Further, a judge who waited until the end of a trial to act could not himself impose punishment if he had become personally embroiled in controversy with the defendant. And the trial-by-jury guaranty would bar summary punishment in excess of six months' imprisonment regardless of the conditions under which the contempt occurred or of the judge's attitude towards the contemnor.

Although it was still assumed after *Bloom* and *Frank* that the trial judge could proceed summarily when the alleged contempt was committed in his presence and was personally observed by him,¹²⁰ even this power was apparently less than absolute. For example, the judge was required to hold a hearing if a question existed over the defendant's mental responsibility for his conduct.¹²¹

¹¹⁸ *Id.* at 74-75. Chief Justice Burger and Justices Harlan and Stewart dissented. The Chief Justice objected to the imposition of a uniform six-month test, *id.* at 77, while Justices Harlan and Stewart continued to argue that the jury trial guaranty should not be imposed on the states. *Id.* at 117-38, 143-45.

¹¹⁹ See DISORDER IN THE COURT, *supra* note 15, at 222-24.

¹²⁰ See, e.g., *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 708 (1969).

¹²¹ *Panico v. United States*, 375 U.S. 29 (1963).

Moreover, as the Supreme Court observed in *Groppi v. Leslie*,¹²² even in summary contempt proceedings the contemnor was "normally . . . given an opportunity to speak in his own behalf in the nature of a right of allocution."¹²³ All in all, the summary contempt power had come to be a far less formidable weapon in the hands of the trial judge than it had been at the time of *Sacher*.

IV

THE SUMMARY CONTEMPT POWER AND THE "POLITICAL TRIAL"

In the late 1960's and early 1970's there occurred a number of what may be called, at least from the perspective of the defendants and their lawyers, "political trials." The term "political trial" is the subject of much controversy, and it may have become "so value-laden that its usefulness as an analytic concept has been undermined."¹²⁴ Still, political trials have been defined variously as "trials in which public opinions and public attitudes on one or more social questions will have an effect on the decisions,"¹²⁵ trials that the "defendants and their counsel are using . . . for political ends,"¹²⁶ trials in which there is the "perception of a direct threat to established political power,"¹²⁷ and trials that "can be used to shift political power."¹²⁸

The Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York, in its widely respected study *Disorder in the Court*, concluded that political considerations may affect the judicial system in three different areas. First, the decision to prosecute may be motivated by political factors.¹²⁹ Sec-

¹²² 404 U.S. 496 (1972), discussed in note 54 *supra*.

¹²³ *Id.* at 504. Even in *Sacher* the defendants were given the opportunity to speak after sentence was imposed. See note 29 *supra*.

¹²⁴ DISORDER IN THE COURT, *supra* note 15, at 79. Many judges, prosecutors and establishment lawyers continue to insist that there is no such thing as a political trial. See, e.g., *id.* at 77-78 (statement of Louis Nizer); Burger, *The Necessity for Civility*, 52 F.R.D. 211, 212-14 (1971); Karlen, *Disorder in the Courtroom*, 44 S. CAL. L. REV. 996, 1007-08 (1971). At the other end of the spectrum, lawyers who make a practice of representing poor, young, minority or unpopular defendants contend that a political trial is "any trial in which the defendant feels he is not getting a fair shake." DISORDER IN THE COURT, *supra* note 15, at 78 (statement of William Kunstler).

¹²⁵ Burnstein, *Trying a Political Case*, 28 GUILD PRAC. 33 (1969), reprinted in DISORDER IN THE COURT, *supra* note 15, at 78.

¹²⁶ DISORDER IN THE COURT, *supra* note 15, at 78 (statement of Richard Uviller).

¹²⁷ POLITICAL TRIALS xi (T. Becker ed. 1971), quoted in DISORDER IN THE COURT, *supra* note 15, at 78.

¹²⁸ DISORDER IN THE COURT, *supra* note 15, at 78, discussing O. KIRCHHEIMER, POLITICAL JUSTICE 47 (1961).

¹²⁹ *Id.* at 80-84.

ond, the outcome of the case may be affected by political attitudes or considerations.¹³⁰ Third, the participants in a case, either before or during a trial, may behave in such a way as to maximize the political consequences or impact of the legal action.¹³¹ Regardless of the definition of the "political trial," or even the utility of that term as a means of analysis, it is difficult to dispute the conclusion of the Special Committee that political considerations do affect the judicial system, and it is the political trial, however defined, that brings to the fore the problems of courtroom disorder.¹³² When such problems do arise, experience indicates that the exercise of the summary contempt power will not infrequently follow.¹³³ Thus, in recent years the question of limitations on that power has often arisen in the context of political trials.

This has been particularly so in prosecutions arising out of acts of protest against the Vietnam war. These prosecutions showcased political considerations affecting the judicial system. The motivation of the Government in bringing these actions may well have been something more than the even-handed enforcement of the criminal law:¹³⁴ even unsuccessful prosecutions could have significantly blunted the antiwar movement.¹³⁵ The defendants were political activists and, to say the least, were not above using the courtroom for political purposes. Their lawyers were often committed to similar political objectives¹³⁶ and were fully cognizant of the interaction

¹³⁰ *Id.* at 84-86.

¹³¹ *Id.* at 86-88.

¹³² *Id.* at 89.

¹³³ See, e.g., *Sacher v. United States*, 343 U.S. 1 (1951) (Communist Party leaders accused of conspiring against the Government); cases discussed in text accompanying notes 174-91 *infra*; cf. *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950) (deportation proceedings against alleged Communist involved in labor disputes).

¹³⁴ In a conspiracy prosecution the Government is in an especially advantageous position to achieve its political objectives by indicting particular defendants. The variety of defendants in *Spock v. United States*, 416 F.2d 165 (1st Cir. 1969), may serve to demonstrate this point. Indicting and convicting Dr. Spock, the most prominent antiwar spokesman, could both discredit the antiwar movement and show that prominence and respectability afforded no protection. Prosecuting Reverend Coffin would send a message to the antiwar clergy and to those young men who relied on their leadership. Goodman's prosecution would be a warning to the academic community, and the conviction of Farber would show that any student could get caught in the net. The Government, of course, would deny that it ever intended such lessons.

Concerning the role of the prosecution in political trials, see *DISORDER IN THE COURT*, *supra* note 15, at 178-81. As to the hazards of prosecutorial misconduct in such cases, see *United States v. Dellinger*, 472 F.2d 340, 389-90 (7th Cir. 1972).

¹³⁵ "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

¹³⁶ Concerning the role of the lawyer in using the legal system to achieve political objectives, see Kinoy, *The Role of the Radical Lawyer and Teacher of Law: Some Reflections*, 29 GUILD PRAC. 3 (1970).

between legal and political strategy in the courtroom.¹³⁷ Finally, judges in these trials, even if ordinarily neutral and detached, were not infrequently disposed to use their power, consciously or unconsciously, to help the Government obtain a conviction and thereby assist it in accomplishing its political objectives.¹³⁸

Given the confrontation-oriented politics of the day, this cast of courtroom characters rounded out a scenario especially likely to produce the sort of disorder that would prompt the exercise of the summary contempt power.¹³⁹ Those who would have further limited the power faced their crucible: if ever the liberal exercise of the summary contempt power were justifiable, it would have been so in these trials, and any evaluation of the power undertaken in the early 1970's must almost necessarily reflect the then-pervasive sentiment for preserving order in the courtroom. This section of the Article will test these theses against actual appraisals of the contempt power in the early 1970's and against the pattern of appellate court decisions that dealt with contempts in political trials. The conclusions reached will hopefully reveal which way the summary contempt winds ought to be blowing and will serve to guide consideration of the Supreme Court's most recent pronouncements on the subject in *Taylor v. Hayes*.

The most notorious of the political trials was the "Chicago 7" conspiracy trial.¹⁴⁰ In the view of the defendants and their lawyers,

¹³⁷ In some cases acquittal might be thought to depend upon raising the level of the jury's political consciousness. In other situations the defense might decide to achieve political objectives at the risk of increasing the likelihood of a conviction.

¹³⁸ See Sedler, Book Review, *supra* note 8, at 1081-83.

¹³⁹ The inherent human unfairness of the summary contempt power was most clearly exposed in the "Chicago 7" conspiracy trial. See text accompanying notes 140-45 *infra*. As Professor Herman Schwartz has observed:

The two Hoffmans played to each other in Chicago, except that Julius had all the power and almost none of the restraints, although Abbie may have had the better lines. Although some judges see themselves as martyrs, it is still the defendants who face prison terms in a contest where the prosecution has most of the advantages, not the least of which is money, and experienced investigative resources; Abbie Hoffman may go to jail for five years, but Julius Hoffman went to Florida with a stop at the White House for breakfast where he met "my banker" former Treasury Secretary David Kennedy. . . .

Schwartz, *Judges as Tyrants*, 7 CRIM. L. BULL. 129, 133 (1971). When the contempt charges were retried before another judge, he found the defendants not guilty of all but 13 of the 52 remanded charges, and he refused to impose any sentence beyond those already served, observing that

the contumacious conduct of the defendants and their lawyers cannot be considered apart from the conduct of the trial judge and prosecutors. Each reacted to provocation by the other, and the tensions generated during four and a half months of so acrimonious a trial cannot be ignored. . . .

In re Dellinger, 370 F. Supp. 1304, 1321 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

¹⁴⁰ See *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (substantive of-

the Government was using the prosecution to show that social-change activists were responsible for the violence surrounding the Democratic Convention in Chicago in 1968.¹⁴¹ Likewise, they felt that the trial judge, District Judge Julius Hoffman, was using his judicial power in every way possible to help the Government obtain a conviction.¹⁴² The defendants' views appear to have been borne out by the Seventh Circuit's reversal of all the convictions on the ground that the behavior of the judge and the prosecutor "would require reversal if other errors did not."¹⁴³ At the trial, the defendants' and lawyers' reaction to their perceived situation was widely interpreted as "courtroom disruption." In response to this disruption, the trial judge wielded the summary contempt power as a meat-ax. He declared a mistrial with respect to defendant Bobby Seale, summarily found him guilty of 16 acts of contempt and imposed consecutive three-month sentences totaling four years' imprisonment.¹⁴⁴ At the end of the trial, he summarily found all other defendants and their lawyers guilty of numerous counts of contempt and imposed sentences ranging from two months and 18 days for defendant Weiner to four years and 13 days for attorney Kunstler.¹⁴⁵ While the summary contempt power was also exercised in political cases such as that of the "D.C. 9"¹⁴⁶ and "Tacoma

fense); *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972) (original contempt charges); *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) (same); *In re Dellinger*, 370 F. Supp. 1304 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (contempt charges on remand). The case was originally referred to as the "Chicago 8" trial but became the "Chicago 7" trial when a mistrial was declared as to Bobby Seale.

¹⁴¹ See *Dellinger, The Making of a Conspiracy*, in *THE CONSPIRACY* 144-57 (D. Babcox, C. Babcox & B. Abel eds. 1969); Kunstler, *The Chicago Eight Prosecution: A Perversion of Law*, in *THE CONSPIRACY*, *supra* at 27-40.

¹⁴² See Kunstler, *supra* note 141, at 38-40.

¹⁴³ *United States v. Dellinger*, 472 F.2d 340, 391 (7th Cir. 1972). On appeal, the court found that the trial judge had demonstrably exercised his discretion against the defense and in favor of the Government and had acted unreasonably in giving admonitions to and restricting the examination of defense witnesses. *Id.* at 387. But, above all else, the judge's "deprecatory and often antagonistic attitude toward the defense" in the presence of the jury required reversal. *Id.* at 386. In addition, the remarks of the prosecutor—particularly his closing argument to the jury, during which he referred to the defendants as "evil men," "violent anarchists" and the like—"were not justified . . . and fell below the standards applicable to a representative of the United States." *Id.* at 389-90.

¹⁴⁴ *United States v. Seale*, 461 F.2d 345, 350-51 (7th Cir. 1972).

¹⁴⁵ *In re Dellinger*, 461 F.2d 389, 392 (7th Cir. 1972). The specifications and sentences as to each defendant are set out in this opinion. *Id.* at 402-65.

¹⁴⁶ See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (substantive offense); *United States v. Meyer*, 462 F.2d 827 (D.C. Cir. 1972) (original contempt charges); *United States v. Meyer*, 346 F. Supp. 973 (D.D.C. 1972) (contempt charges on remand). The case is discussed in *DISORDER IN THE COURT*, *supra* note 15, at 75.

7"¹⁴⁷ trials, it was the Chicago 7 case that gave rise to the spectre of "disruptive defendants represented by contemptuous lawyers."

The outcry was loud and furious. The American College of Trial Lawyers, "deeply concerned by the tactics of trial disruption,"¹⁴⁸ appointed a blue-ribbon committee to investigate the problem.¹⁴⁹ Chief Justice Burger spoke of "adrenalin-fueled lawyers" who "at the drop of a hat—or less—cry out that theirs is a 'political trial,' " and for whom "rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant."¹⁵⁰ In a number of jurisdictions, new legislation was enacted or new rules of court adopted, all designed to prevent "disruptive behavior in court."¹⁵¹ American courts, it seemed, faced a crisis.

It was in this atmosphere that the Association of the Bar of the City of New York appointed a Special Committee on Courtroom Conduct to undertake a comprehensive analysis of the nature and extent of the purported problem. The Special Committee's analysis included an empirical study based upon a detailed questionnaire about courtroom disruption sent to every trial judge of general jurisdiction in the United States and to lower criminal court judges in New York City and California.¹⁵² A similar questionnaire was sent to the 93 United States Attorneys and to the district attorneys of the 69 largest jurisdictions.¹⁵³ An unusually high return was received, and the Committee sent out follow-up questionnaires to all respondents.¹⁵⁴

The results produced a "most startling revelation": there was "*no serious quantitative problem of disruption in American courts.*"¹⁵⁵ Further, such disruption as was reported did not occur in politically oriented trials, but in ordinary felony cases.¹⁵⁶ As the Committee noted:

¹⁴⁷ This trial ended in a mistrial, and contempt citations followed. The contempt convictions were set aside in *United States v. Marshall*, 451 F.2d 372 (9th Cir. 1971). On remand, the defendants pleaded *nolo contendere* to the contempt charges and were sentenced to varying jail terms. See *DISORDER IN THE COURT*, *supra* note 15, at 75.

¹⁴⁸ *DISORDER IN THE COURT*, *supra* note 15, at 3-4.

¹⁴⁹ The members of the Committee included Whitney North Seymour, former president of the American Bar Association, Simon Rifkind, a former federal judge, Edward Bennett Williams, the noted criminal lawyer, and Lewis F. Powell, Jr., now a Justice of the Supreme Court. *Id.* at 3.

¹⁵⁰ Burger, *supra* note 130, at 213.

¹⁵¹ *DISORDER IN THE COURT*, *supra* note 15, at 4-5.

¹⁵² *Id.* at 5.

¹⁵³ *Id.* at 7.

¹⁵⁴ *Id.* at 5-7. The questionnaires are set out in Appendices. *Id.* at 267-332.

¹⁵⁵ *Id.* at 6 (emphasis added).

¹⁵⁶ *Id.*

The breakdown of figures indicates that courtroom disruption is primarily a problem of highly emotional defendants, disturbed about serious criminal charges facing them, often unhappy with their lawyers and concerned that the proceedings are somehow stacked against them. Many factors may contribute to disruption in such cases: the long prison term facing the defendant, the tactics of the prosecution, the presence of friends or relatives, and the attitude of the judge. In many cases, the judges reported that they were able to handle the disruptions simply by impressing on the defendants that they would receive a fair trial and acting to protect the defendants' rights.

In twenty-one of the cases, the judges reported that there were some political overtones to the disruption. For the most part this involved spectators creating a disturbance in the court to show their support of the defendant and his political philosophy. The disorders were generally handled by ordering the court cleared. In other cases, the defendant in an ordinary criminal trial uttered certain radical slogans to attack the proceedings or to justify his actions although there was no political component to the crimes he was charged with. In only four cases were the defendants political activists charged with crimes with some political coloration (selective service violations, student demonstrations, etc.).¹⁵⁷

Disruption caused by lawyers was found to be even less significant.¹⁵⁸ To say the least, as the Committee concluded, the problem of courtroom disorder has been "overemphasized."¹⁵⁹ Other studies have also debunked the myth of the disruptive defendant and the contemptuous lawyer and have revealed that courtroom disorder is simply not a serious problem in American society.¹⁶⁰

The Special Committee also analyzed the exercise of the summary contempt power as reflected in the reported decisions of appellate courts. That analysis bore out the point, long ago recognized by the Supreme Court, that a judge's decision to punish contempts summarily is "arbitrary in its nature and liable to abuse."¹⁶¹ From 1960 to 1972, there were 72 reported appellate decisions reviewing summary contempt convictions; in 40 of these cases (more than 50%), the convictions were reversed. Twenty-three of the reversals were on the merits.¹⁶² The Committee recommended that the summary contempt power be abolished in toto.¹⁶³

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 131-32.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *See id.* at 7-8 & nn. 21-22, 24.

¹⁶¹ *Id.* at 232, quoting *Ex parte Terry*, 128 U.S. 289, 312 (1888).

¹⁶² DISORDER IN THE COURT, *supra* note 15, at 233-34.

¹⁶³ *Id.* at 232-38.

Contrary to what might have been expected, the myth of the disruptive defendant and the contemptuous lawyers had little if any effect on the federal appellate courts that reviewed the contempt convictions arising out of the political trials of the late 1960's and early 1970's. The courts of appeals continued to implement, and in some cases to expand, the limitations on the exercise of the summary contempt power imposed by the Supreme Court in the post-*Sacher* years.¹⁶⁴ In *United States v. Seale*,¹⁶⁵ for example, the Seventh Circuit dealt with the trial judge's efforts to avoid jury trials in the Chicago 7 contempt cases by imposing multiple consecutive sentences of no more than six months each, which in the aggregate amounted to as much as four years' imprisonment. The court of appeals held that a trial judge who acts immediately could summarily impose punishment of up to six months for each separate contempt, regardless of the aggregate amount of the sentences.¹⁶⁶ However, the court held that the sentences had to be aggregated for jury trial purposes if the judge waits until the end of the trial to impose punishment.¹⁶⁷ Since the aggregate sentence imposed on Seale exceeded six months, he was entitled to a jury trial. The distinction between the two tests related to the perceived potential for abuse in permitting a judge to parcel out sentences in retrospect and thus control a defendant's right to a jury trial. The court observed that a judge who delays punishment "could review the record to single out 'discrete' instances of contempt, impose up to six-month consecutive sentences for each instance and thereby [summarily] imprison the contemnor for a theoretically unlimited term."¹⁶⁸ Because this same potential for abuse was not thought to be present when a judge acts to punish for contempt on the spot, the court reasoned that in such a situation the sentences did not have to be aggregated when determining a defendant's right to a jury trial.¹⁶⁹

¹⁶⁴ At the same time the Supreme Court was making it clear that the class of acts that might constitute criminal contempt was subject to constitutional limitations, in particular, holding that statements in court could not be punished as contempt unless they created an "imminent . . . threat to the administration of justice." *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974), quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947); see *In re Little*, 404 U.S. 553 (1972); *Holt v. Virginia*, 381 U.S. 131 (1965). And in the recent case of *Maness v. Meyers*, 419 U.S. 449 (1975), the Court held that a lawyer could not be held in contempt for advising his client, in good faith, to refuse to produce subpoenaed material on the ground that it would violate the client's fifth amendment privilege against self-incrimination.

¹⁶⁵ 461 F.2d 345 (7th Cir. 1972).

¹⁶⁶ *Id.* at 355-56.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 353.

¹⁶⁹ The Supreme Court took the same approach in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), discussed in text accompanying notes 288-93 *infra*.

In *Seale* the Seventh Circuit also held that the trial judge was personally embroiled in controversy and could not impartially sit in judgment on the contempt charges. The Government had conceded that Seale had launched the same kind of personal attack on the judge that had been launched in *Mayberry v. Pennsylvania*,¹⁷⁰ but it sought to distinguish *Seale* on the ground that the judge's action was an "emergency measure to prevent a complete breakdown of the trial and to salvage the proceedings against the remaining defendants."¹⁷¹ Rejecting this argument, the Court assumed that the judge could have summarily punished contempts on the spot notwithstanding his personal embroilment with Seale¹⁷² but held that the alleged deterrent effect of summarily punishing Seale after the fact was "simply too tenuous and improbable a ground to overbalance the inherent possibility of prejudice to Seale in the trial judge's acting himself."¹⁷³

In *In re Dellinger*,¹⁷⁴ the Seventh Circuit reversed the remaining contempt convictions arising out of the Chicago 7 trial, including those of the attorneys. Under *Seale*, of course, all who received an aggregate sentence in excess of six months' imprisonment were entitled to a jury trial. On the issue of the disqualification of the trial judge, the Government conceded that the convictions of the nonlawyer defendants should be reversed under *Mayberry*, but it argued that the convictions of the lawyer defendants should be upheld under *Sacher*.¹⁷⁵ The Seventh Circuit agreed that in *Sacher* the contemptuous conduct of the lawyers included a personal attack on the judge; nevertheless, it concluded that "cases subsequent to *Sacher* have considerably undermined its vitality"¹⁷⁶ and held that when a judge delays punishment until the end of the trial, he cannot sit in judgment if he has been the victim of a personal attack.¹⁷⁷

In *United States v. Meyer*,¹⁷⁸ the Court of Appeals for the District of Columbia Circuit reversed the summary contempt conviction of the attorney for the D.C. 9 on the ground that there,

¹⁷⁰ 400 U.S. 455 (1971), discussed in text accompanying notes 87-91 *supra*.

¹⁷¹ 461 F.2d at 351.

¹⁷² *Id.* This question was not resolved in *Taylor v. Hayes*, 418 U.S. 488 (1974); see text accompanying notes 319-24 *infra*.

¹⁷³ *Id.* at 352.

¹⁷⁴ 461 F.2d 389 (7th Cir. 1972).

¹⁷⁵ *Id.* at 392.

¹⁷⁶ *Id.* at 393. The Court referred to *Offutt, Ungar and Mayberry. Id.* at 393-94; see text accompanying notes 66-92 *supra*.

¹⁷⁷ *Id.* at 395. The Court emphasized the "numerous and unprecedented attacks and insults by both trial counsel." *Id.* at 396. The Court did not discuss the defendants' contention that the trial judge himself was an "activist seeking combat."

¹⁷⁸ 462 F.2d 827 (D.C. Cir. 1972).

too, the judge had been the victim of a personal attack. The court assumed, as did the Seventh Circuit in *Dellinger*, that even an embroiled judge could proceed summarily at the time contemptuous conduct occurred, but it held that embroilment was a defense when the judge waited until the end of the trial to act.¹⁷⁹ Interestingly enough, when the charges were heard before another judge, the lawyer was acquitted on all counts.¹⁸⁰ In *United States v. Marshall*,¹⁸¹ the Ninth Circuit reversed the summary contempt convictions arising out of the Tacoma 7 trial because the conduct underlying one charge had occurred out of the judge's presence and because the judge's contempt certificate relating to the other charge failed to satisfy the requirements of rule 42(a).¹⁸²

Thus, the general pattern of appellate court reversal of summary convictions noted in the study of the Special Committee on Courtroom Conduct also occurred with respect to the contempt convictions arising out of the political trials of the late 1960's and early 1970's. During the same period, the Supreme Court and the lower federal courts were defining more precisely the substantive elements of the offense of criminal contempt,¹⁸³ making it clear that language or conduct would not amount to criminal contempt unless it created a material and actual obstruction of the administration of justice.¹⁸⁴ In sum, limitations on the exercise of the summary contempt power continued to expand despite widespread, albeit unfounded, fears that disruptive defendants and contemptuous lawyers posed a serious threat to the judicial system. If anything, the political trials revealed even more graphically the abuses inherent in the exercise of the summary contempt power and in fact added impetus to the need for further limitation and even to a possible challenge to the summary contempt power itself.

¹⁷⁹ *Id.* at 842-44. In the contempt certificate the judge had characterized the lawyer's conduct as "insulting, derogatory and disrespectful." However, the Court gave more weight to the nature of the conduct itself, in particular the fact that the lawyer had accused the judge of determining the defendants' guilt in advance and of being interested in "expeditiously dispatching the defendant to prison." *Id.* at 844-45.

¹⁸⁰ *United States v. Meyer*, 346 F. Supp. 973 (D.D.C. 1972).

¹⁸¹ 451 F.2d 372 (9th Cir. 1971).

¹⁸² *Id.* at 376-77. See also note 147 *supra*.

¹⁸³ Justice Black referred to the offense of criminal contempt as the offense "with the most ill-defined and elastic contours in our law." *Green v. United States*, 356 U.S. 165, 200 (1958) (dissenting opinion).

¹⁸⁴ See *In re Little*, 404 U.S. 553, 555 (1972); note 164 *supra*.

V

TAYLOR v. HAYES: THE VIEW FROM WITHIN

A. *The Factual Context*

One of the advantages of the "view from within" is that it is possible to discuss all dimensions of a case's factual context without striving for impartiality. The following discussion of *Taylor v. Hayes* is clearly based on the totality of the situation as perceived by Taylor at the time the events in question occurred and as subsequently perceived by myself and co-counsel.¹⁸⁵ In our view, the contempt convictions represented a flagrant abuse of power by a trial judge who was determined to use his position in every way possible to secure the conviction of Taylor's client and who reacted to Taylor's challenges by invoking yet another power in his arsenal of judicial authority¹⁸⁶—that of summarily convicting an attorney of criminal contempt.

Taylor v. Hayes arose out of the trial of two brothers, Narvel and William Michael Tinsley—black youths charged with the wilful murder of two white police officers in Louisville, Kentucky. As was noted by both the Kentucky Court of Appeals and the Supreme Court, the "murders created some considerable sensation in Louisville . . . [and] newspaper coverage was overly abundant."¹⁸⁷ Taylor, working without pay, represented Narvel Tinsley, and William Michael Tinsley was represented by three court-appointed attorneys. The trial was held before Judge John P. Hayes of the Jefferson County (Louisville) Circuit Court and lasted from October 18 to October 29, 1971.¹⁸⁸

Daniel T. Taylor, III, is a well-known criminal and civil rights lawyer in Kentucky. In a career spanning some 20 years he has defended over 100 capital cases and numerous other serious criminal cases, often without pay. He is, to say the least, controversial and has the unenviable distinction of being one of only two lawyers in the country who appear to have suffered serious disciplinary punishment for "misconduct" occurring in the trial of a single case.¹⁸⁹ As we stated in our brief, his "reputation for vigorous, in-

¹⁸⁵ I was fortunate to have as co-counsel Doris Peterson and Morton Stavis of the Center for Constitutional Rights, both of whom had been counsel in the Chicago 7 contempt cases.

¹⁸⁶ See *Illinois v. Allen*, 397 U.S. 337, 343-47 (1970).

¹⁸⁷ 418 U.S. at 490, quoting 494 S.W.2d at 739.

¹⁸⁸ *Id.* at 490.

¹⁸⁹ See *Kentucky State Bar Ass'n v. Taylor*, 482 S.W.2d 574 (Ky. 1972); *DISORDER IN THE COURT*, *supra* note 15, at 160-62.

novative, and effective advocacy was known to the trial judge, himself a former prosecutor."¹⁹⁰ The trial judge, the prosecutor and many members of the bar, however, would say that Taylor was a disrespectful showman, who relied on antics and trickery to confuse the jury or force a mistrial. However one viewed Taylor, there was no question that he would vigorously defend his client with all the means at his disposal and that in doing so he would not hesitate to challenge the authority of the trial judge. The judge himself had been an F.B.I. agent as well as a prosecutor, and even his most ardent defenders would not deny that he was prosecution-minded. He was also quick to assert his authority in court and, in our view, was obsessed with the notion of "respect" due to him as "the Court."¹⁹¹ The legal community of Louisville assumed that the *Tinsley* trial would produce a head-on confrontation between Taylor the attorney and Hayes the trial judge, and indeed it did, as *Taylor v. Hayes* bears witness.

The events leading up to the *Tinsley* trial set the stage for this emotion-laden confrontation. The killings arose when two white police officers wearing civilian clothes approached the *Tinsleys* in a vacant lot while the brothers were talking with another black youth, David Keith White. The officers demanded that the youths produce identification, which Narvel refused to do, and an exchange of remarks, including a racial slur, followed between Narvel and one officer. That officer then attempted to place Narvel under arrest, at which point William Michael picked up the pistol that he had dropped at the police's approach and fatally shot the officer. The dispute at the trial would be over who killed the second police officer. The resolution of the question was a matter of some import: the death penalty was still in effect in Kentucky, and the prosecutor had publicly announced that he would seek this penalty against both defendants.

Narvel's defense was that he fled as soon as the first officer was shot and thus did not kill the remaining officer. The only witness to what occurred was David Keith White, the youth who was with the *Tinsleys* at the time of the shooting. He gave the police inconsistent versions of what happened, and one of his accounts

¹⁹⁰ Brief for Petitioner at 4, *Taylor v. Hayes*, 418 U.S. 488 (1974).

¹⁹¹ His obsession with "respect" is revealed in the contempt citations themselves, five of which refer to Taylor's conduct as "disrespectful" or the like. The judge also accused Taylor of not being able to learn "proper respect" for the court. Joint Appendix at 62, *Taylor v. Hayes*, 418 U.S. 488 (1974). The admonition of the Supreme Court to the effect that judges must be on their guard against "confusing offenses to their sensibilities with obstruction to the administration of justice," *Brown v. United States*, 356 U.S. 148, 153 (1958), is not infrequently honored more in the breach than in the observance.

incriminated Narvel. Narvel's defense clearly depended on destroying White's credibility, but if he were successful the jury would necessarily have to conclude that William Michael killed both officers and would no doubt impose the death penalty. Narvel was unwilling for obvious reasons to go this route or to try to persuade the jury directly that William Michael killed the second officer. Faced with the dilemma of creating this brother-against-brother confrontation or seriously inhibiting his ability to present an effective defense, Taylor moved for a severance, which was denied by the trial judge. This and other actions of the trial judge convinced Taylor that the judge would do everything possible to secure Narvel's conviction and the imposition of the death penalty on him.

The atmosphere maintained in the courtroom heightened the probability of confrontation. The judge rigorously controlled all access to the courtroom and required all persons entering to submit to a search.¹⁹² The front rows of the seating section were apparently reserved for relatives of the slain officers, who understandably wept at frequent intervals. Numerous armed police officers, both in uniform and plainclothes, were seated among the spectators. Moreover, even though there were often empty seats in the courtroom, would-be spectators were lined up outside, trying unsuccessfully to obtain admission.¹⁹³

The *Tinsley* case was thus a "political trial" in the broadest sense of the term: due in no small part to the demonstrated attitude of the trial judge, the defendants did not feel that they would "get a fair shake."¹⁹⁴ The "totality of the situation" as perceived by Taylor and his counsel was stated in our brief:

The trial judge, realizing from the outset the weakness of the prosecution's case against Narvel, and determined that in the final tallying there would be "two black lives for two white ones," did absolutely everything that he could to help the prosecution obtain a conviction against Narvel and a verdict of death by electrocution. Beginning with his refusal to sever the trials, and concluding with his effectively instructing the jury to find Narvel guilty of the shooting of the second officer by directing a verdict in favor of Michael as to this death, he tried in every way possible to interfere with the successful presentation of Narvel's defense, and to convey to the jury his firm belief that Narvel was guilty of wilful murder and should be sentenced to death. In so doing he was hostile, sarcastic and threatening toward the petitioner and did not attempt to hide his feelings toward

¹⁹² 494 S.W.2d at 741.

¹⁹³ *Id.*; Joint Appendix at 79. Taylor's challenge to the refusal to admit persons to the courtroom was the partial basis for one of the contempt citations. 418 U.S. at 492-94 n.3.

¹⁹⁴ See note 124 *supra*.

the petitioner and his client from the jury. It was in the context of this hotly-contested trial, accompanied by an evident drive by the judge to bring about a conviction, that the petitioner was called upon to represent and protect his client.¹⁹⁵

And it was in this context that Taylor would be found guilty of eight counts of criminal contempt.

B. The Contempt Charges and the Proceedings Before the Trial Judge

The voir dire lasted for three days, during which time Taylor was held in contempt for "going over the same [forbidden] question" with a prospective juror.¹⁹⁶ A conference in chambers followed the citation, and the judge informed Taylor that he would impose punishment later.¹⁹⁷ At the end of the conference, however, the judge rescinded the contempt citation and changed it to a "warning."¹⁹⁸

Two more of the contempt citations issued during the presentation of the prosecution's case.¹⁹⁹ The judge did not specify what the precise charges were on either count two or count three, and he did not impose punishment on these—or on any other of the charges—at the time of citation.²⁰⁰ On count two, for example, the judge told Taylor that he was holding him in contempt for "completely ignoring the court's ruling" with respect to evidence concerning Narvel Tinsley's escape from custody²⁰¹ and for "the antics he's going through."²⁰² In the judge's chambers, Taylor was permitted to respond to these two charges for the record, but his responses were intermingled with a discussion of the substantive issues in the case.²⁰³

¹⁹⁵ Brief for Petitioner at 6-7 (footnote omitted). The Kentucky Court of Appeals held that the directed verdict on behalf of Michael was not improper. *Tinsley v. Commonwealth*, 495 S.W.2d 776, 783 (Ky.), *cert. denied*, 414 U.S. 1077 (1973). Since only Narvel and his brother were present at the time of the second shooting, the directed verdict meant the jury would necessarily have to conclude that Narvel killed the second officer.

¹⁹⁶ 494 S.W.2d at 739; Joint Appendix at 30.

¹⁹⁷ Joint Appendix at 30.

¹⁹⁸ *Id.* at 37. However, when the judge imposed sentence at the conclusion of the trial, he included the first count, forgetting that he had changed it to a warning. *Id.* at 29. In the corrected judgment, he rescinded the sentence on that count. 418 U.S. at 490-91.

¹⁹⁹ 418 U.S. at 492-93 n.3 (counts two and three).

²⁰⁰ *Id.* at 497.

²⁰¹ Joint Appendix at 42-64.

²⁰² *Id.* at 42. While awaiting trial, Narvel Tinsley escaped, but he subsequently gave himself up.

²⁰³ *Id.* These "antics" were not mentioned in the formal charges that the judge subsequently filed. *See* 418 U.S. at 492 n.3 (count two).

On count three, the judge stated that "[t]he court . . . is holding Mr. Taylor in contempt for the second time during this trial for smarting off to the Court in Open Court. That's all I've got to say."²⁰⁴ As with the previous count, Taylor was given permission to respond for the record and did so. The judge then said that he too would respond for the record: his response consisted of criticizing Taylor for leaving the courthouse as soon as the trial was over on the previous day. After Taylor responded to this criticism, the discussion returned to the tone of voice Taylor had been using. It then shifted to the judge's accusing Taylor of not following his orders. The judge next questioned whether Taylor was properly representing his client and accused him of not knowing how to show respect to the court. Another colloquy followed, in the course of which the prosecutor stated that in his opinion Taylor was trying the case in the best interest of his client. This prompted the trial judge to walk out of the room and to order the reporter to record that fact. Matters concluded with Narvel Tinsley's being called in and examined with respect to his representation by Taylor.²⁰⁵

The remaining contempt charges issued during the presentation of the defense. On count four, the judge simply called the attorneys into chambers and stated: "It's the order of the Court again that Mr. Taylor is in contempt of Court."²⁰⁶ There was then some discussion about admissibility of evidence and the procedure for making objections, but no discussion about the still-unspecified contempt charge.²⁰⁷ In his chambers, the judge cited Taylor for the fifth time when ruling that a witness whom Taylor had been examining would not be permitted to testify further. The judge demanded that Taylor produce a list of all other witnesses that he intended to call for the defense and said that Taylor was "also in contempt of Court for [his previous] actions in the Court," but he did not specify what those actions were.²⁰⁸ When Taylor asked whether he could speak for the record, the judge responded that he had 10 minutes to submit the witness list and said: "You can speak to the record all you want to, sir."²⁰⁹

²⁰⁴ Joint Appendix at 56.

²⁰⁵ *Id.* at 55-68.

²⁰⁶ *Id.* at 69. The basis of this count was that Taylor was "disrespectful" to the court and refused to take his seat at counsel's table as ordered. 418 U.S. at 493 n.3. On remand, Taylor was convicted on this count.

²⁰⁷ Joint Appendix at 69-79.

²⁰⁸ *Id.* at 97. The basis of this count was that Taylor had purportedly disobeyed the court's order in regard to asking questions about a press conference, and that he had accused the court of disallowing the admittance of black persons in the courtroom. 418 U.S. at 493 n.3. In point of fact, neither part of the count was supported by the record, *see* Joint Appendix at 94-97, and on remand the count was dismissed in its entirety.

²⁰⁹ Joint Appendix at 97.

When Taylor produced the witness list, the judge summarily ruled that nine of his 21 witnesses, all of whom had been properly subpoenaed, would not be permitted to testify.

There were no conferences in chambers following the subsequent contempt citations. On count six,²¹⁰ the judge simply informed Taylor that he was in contempt, and when Taylor asked to respond for the record, the judge said that he could do so at the next recess.²¹¹ The record is silent with respect to anything more on this charge.²¹² On count seven,²¹³ the judge initially permitted Taylor to respond, but then directed the court reporter not to include the response in the record, saying: "I'm not going to even—don't even put this in the record. Mr. Taylor is not running this Court, I am."²¹⁴ The judge specifically refused to let Taylor make a response for the record on the eighth count,²¹⁵ and on the ninth count he simply informed Taylor that he was again in contempt.²¹⁶

Throughout the trial there was, in the words of the Supreme Court, a "running controversy" between Taylor and the trial judge.²¹⁷ During the voir dire the judge interrupted Taylor's examination of a prospective juror, stating that he was going to take over the voir dire, and saying to Taylor: "I think you're putting on a show. That's my opinion."²¹⁸ During a discussion in chambers about wrangling between attorneys, he stated in reference to Taylor: "I can't blame the guy too much for [talking] but . . . he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him now."²¹⁹ The

²¹⁰ This count accused Taylor of reading parts of a witness's statement out of context in violation of the court's order when questioning a police officer about the statement. 418 U.S. at 493 n.3. The record shows that Taylor did not read from the statement at all when questioning the officer. Joint Appendix at 105-06. This count was dismissed on remand.

²¹¹ 418 U.S. at 490 n.1; Joint Appendix at 107.

²¹² 418 U.S. at 490 n.1.

²¹³ The basis of this count was that Taylor "again referred to a press conference that the court had previously ordered him not to go into," and that he had "waved his arms at the witness in a derogatory manner indicating the witness was not truthful." 418 U.S. at 493 n.3. On remand it was dismissed in its entirety.

²¹⁴ Joint Appendix at 109; *see* 418 U.S. at 490 n.1.

²¹⁵ 418 U.S. at 490 n.1. This count involved an incident arising out of a deputy sheriff's statement that Taylor's aide had not been searched and Taylor's demand that his aide be searched. *Id.* at 493-94 n.3. On remand, Taylor was convicted of this count.

²¹⁶ Joint Appendix at 119. The basis of this count was that Taylor repeatedly asked a witness a question that the court had ruled improper—it does not appear in the record what that question was, *see* Joint Appendix at 117-19—and that Taylor was "disrespectful" in referring to a police officer as "this nice police officer." 418 U.S. at 494 n.3. This count was dismissed in its entirety on remand.

²¹⁷ 418 U.S. at 501.

²¹⁸ Joint Appendix at 31, *quoted in* 418 U.S. at 502.

²¹⁹ *Id.* at 40, *quoted in* 418 U.S. at 502.

judge also questioned whether Taylor's purpose was in fact to defend his case²²⁰ and accused him of trying to make every case a political trial.²²¹ At one point, when Taylor remarked that he had five months of his life wrapped up in the case, the judge retorted: "Before it's over, you might have a lot more than that."²²² The judge refused to explain the meaning of this statement.²²³ At the same time, Taylor accused the judge of denying his client's right to a public trial²²⁴ and of acting on the basis of rancor in ruling that race was not an issue in the case.²²⁵ He complained of the judge's "overbearing contentiousness in regard to me, both by phrase and . . . utterances," and asserted that the judge was prejudicing the defendant's trial.²²⁶ And when Taylor made some reference to the jury in arguing an evidentiary point, the judge accused Taylor of implying that the judge had "rigged the jury."²²⁷ When Taylor replied that he had filed a motion challenging the composition of the jury, the judge said: "I impaneled this jury. If it's rigged, I did it."²²⁸

At the conclusion of the trial, the jury found both defendants guilty and sentenced them to death.²²⁹ At this time, the judge, after calling into question Taylor's motives, ethics and legal abilities, summarily found him guilty of nine counts of contempt and imposed separate, consecutive sentences on each count, ranging from 30 days to one year in length and totaling four and one-half years' imprisonment.²³⁰ Taylor, given no opportunity to respond to the sentences or to the tirade preceding them,²³¹ was immediately placed in custody and taken to the Louisville city jail. Because the trial judge refused to make himself available to Taylor's local counsel for the purpose of setting bail, a bail hearing had to be ordered by the Kentucky Court of Appeals. At the hearing, Judge Hayes refused to allow Taylor to be present and denied

²²⁰ *Id.* at 61; 418 U.S. at 502.

²²¹ Joint Appendix at 82-83.

²²² *Id.* at 98, *quoted in* 418 U.S. at 502.

²²³ *Id.*

²²⁴ *Id.* at 79.

²²⁵ *Id.* at 82.

²²⁶ *Id.* at 60, *quoted in* 418 U.S. at 502.

²²⁷ *Id.* at 86.

²²⁸ *Id.*

²²⁹ The Kentucky Court of Appeals affirmed both convictions but held that the death sentences had to be reduced to life imprisonment. *Tinsley v. Commonwealth*, 495 S.W.2d 776, 783-84 (Ky.), *cert. denied*, 414 U.S. 1077 (1973).

²³⁰ Joint Appendix at 28-29. This rather one-sided exchange between the judge and Taylor is set out in its entirety in the Supreme Court's opinion. 418 U.S. at 491-92 n.2. At one point, when Taylor attempted to respond to the accusations being leveled against him, the judge threatened to have him gagged. Joint Appendix at 29, *quoted in* 418 U.S. at 491-92 n.2.

²³¹ Joint Appendix at 28-29, *quoted in* 418 U.S. at 491-92 n.2.

bail.²³² Bail was finally ordered by the Kentucky Court of Appeals, and Taylor was released. Shortly thereafter, the judge entered an order prohibiting Taylor from practicing law in his court.²³³

C. *The Proceedings Before the Kentucky Court of Appeals*

An appeal from the contempt conviction was seasonably taken to the Kentucky Court of Appeals, the highest state court.²³⁴ Before deciding the case, however, the court of appeals granted over our objection a motion by the trial judge for permission to "correct the judgment." In the "corrected judgment" the judge stated that the first count of contempt should have been changed to a warning, and he reduced the two one-year sentences he had previously imposed to six months each.²³⁵ While he did not specifically state that the sentences were to run consecutively—as he did when imposing sentence from the bench—neither did he say that they were to run concurrently.²³⁶ He also filed a "certificate of contempt," analogous to that required under rule 42(a),²³⁷ setting out the contempt charges.²³⁸

We raised five issues on the appeal—(1) that Taylor was entitled to a trial by jury on the contempt charges; (2) that Taylor was denied due process because he was not given the opportunity to be heard in defense or mitigation; (3) that the trial judge could not impartially sit in judgment on the contempt charges, since he was personally embroiled in controversy with Taylor; (4) that none of the citations supported a conviction for criminal contempt; and (5) that the trial judge did not have the power to bar an attorney from practicing before the court over which he presided as punishment for criminal contempt. The case was submitted on briefs, since the Kentucky Court of Appeals only hears oral argument by special permission, which was denied us.

Given what I perceived to be the Kentucky Court of Appeals's concern over courtroom disruption, coupled with Taylor's reputa-

²³² 418 U.S. at 502.

²³³ 418 U.S. at 497. The Kentucky Court of Appeals then held that the judge lacked the power to impose such a ban. 494 S.W.2d at 747.

²³⁴ At the time there was no intermediate appellate court in Kentucky.

²³⁵ The judge specifically stated that the reduction was being made because he did not have the power to impose a sentence in excess of six months' imprisonment on a particular count in the absence of a jury. Joint Appendix at 27.

²³⁶ *Id.* The court of appeals had previously seemed to hold that if a judgment did not provide otherwise, multiple sentences would be construed to run consecutively. *Beasley v. Wingo*, 432 S.W.2d 413, 414 (Ky. 1968).

²³⁷ Rule 42(a) has no analogue in Kentucky practice, as the judge noted in his certificate. Joint Appendix at 24.

²³⁸ *Id.* at 24-27.

tion as a controversial lawyer,²³⁹ I was not optimistic about getting the contempt convictions set aside on any ground other than the claim of the right to a jury trial. But in view of the widespread availability of a jury trial in criminal proceedings under Kentucky law,²⁴⁰ I thought it unlikely that the court of appeals would be willing to uphold the summary power of a trial judge to sentence a lawyer (or anyone else) to a lengthy prison term. Moreover, while *Taylor* was pending, the court of appeals held in another criminal contempt case that under Kentucky law it was "clear that unless the right is waived the trial court may not inflict a fine greater than \$500 or incarceration for more than six months except upon the unanimous verdict of a jury . . . as in comparable criminal cases."²⁴¹ And, as it indicated in *Taylor*, the Kentucky Court of Appeals assumed that for jury trial purposes the sentences on separate counts had to be aggregated, as they were in *Seale*.²⁴² My "nightmare" was that the court would somehow reduce the sentence to six months and reject all of our other attacks on the conviction.

²³⁹ When the Kentucky Court of Appeals imposed six months' suspension from practice as discipline for Taylor's conduct in a 1968 murder trial, it stated:

It is common knowledge that in certain widely publicized trials of recent years a new breed of lawyers has instituted the studied technique of baiting the trial judge in order to convey to the public an impression that its courts are instruments of discrimination and injustice. Frequent contempt citations are the hallmark of that technique. It will not be tolerated in this jurisdiction. The representation of unpopular clients or points of view does not clothe the lawyer with a special immunity from his obligations as an officer of the court . . .

Kentucky State Bar Ass'n v. Taylor, 482 S.W.2d 574, 584 (Ky. 1972).

²⁴⁰ In all noncontempt criminal cases tried before the circuit court there is the right to trial by jury irrespective of the maximum penalty that can be imposed. KY. CONST. § 11. Prior to *Taylor*, the right to trial by jury was also generally provided for by statute in the inferior courts. See *Colten v. Kentucky*, 407 U.S. 104, 113 (1972); KY. REV. STAT. § 432.260 (1975); note 241 *infra*.

²⁴¹ Local 1667, UAW v. Kawaner Co., 490 S.W.2d 747, 748 (1973). As stated above, in the noncontempt situation the right to trial by jury in the circuit court is absolute. See note 240 *supra*. The Kentucky legislature had limited the punishment that could be imposed for contempt by a witness to a maximum fine of \$30 and a maximum imprisonment of 24 hours, KY. REV. STAT. § 421.140 (1971), and had provided that for other direct contempts the maximum punishment that could be imposed without the intervention of a jury was \$30 or 30 hours' imprisonment. KY. REV. STAT. § 432.260 (1975). In *Arnett v. Meade*, 462 S.W.2d 940 (Ky. 1971), the court of appeals invalidated the provisions of § 421.140 under the Kentucky constitution, finding it to "materially interfere with the administration of justice." 462 S.W.2d at 948. In *Taylor* we tried to distinguish § 432.260 on the ground that it limited only the punishment that could be imposed without a jury, not the punishment that could ultimately be imposed. The court of appeals, however, was of the view that this was a "distinction without a difference" and invalidated the limitations contained in § 432.260 as well. 494 S.W.2d at 745.

²⁴² 494 S.W.2d at 746-47.

This nightmare became a reality. The court of appeals did hold that the total sentence summarily imposed on Taylor could not exceed six months,²⁴³ but, noting that the corrected judgment did not direct otherwise, it went on to hold that the sentences were to be served concurrently.²⁴⁴ Since the aggregate sentence thus modified did not exceed six months, the claim of entitlement to a jury trial was denied.²⁴⁵

The court of appeals did not specifically discuss our argument that Taylor was entitled to a "minimum due process" hearing before finally being adjudged guilty of the contempt charges. It merely noted that the judge's actions at the end of the trial could not have surprised Taylor, "because upon each occasion and immediately following the charged act of contempt the court [had] informed Taylor that he was at that time in contempt of court."²⁴⁶ The court of appeals surmounted the embroilment issue by emphasizing that at no time had Taylor made a personal attack on the judge:²⁴⁷ the judge's strong remarks at the time of adjudication and sentencing were described as "more akin to a declaration of a charge against Taylor based upon the judge's observations [than] a constitutionally disqualifying prejudgment of guilt."²⁴⁸ The court felt that the judge's language, although "inappropriate," did not require his disqualification "in the light of the obvious guilt of Taylor."²⁴⁹

The court omitted discussion of the specific contempt charges and ignored our argument that Taylor had not actually committed criminal contempt for on no count was an actual and material obstruction of the administration of justice shown to exist.²⁵⁰ Instead, it accused Taylor of "embark[ing] upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal."²⁵¹ Finding that Taylor's actions had "place[d] on trial the entire judicial system of [the] Commonwealth," the court simply concluded that, "[i]n the light of the entire record," Taylor was guilty of each charge.²⁵²

²⁴³ *Id.* at 747.

²⁴⁴ *Id.* The court also reversed the disbarment order. *Id.*; see text accompanying note 233 *supra*.

²⁴⁵ 494 S.W.2d at 747.

²⁴⁶ *Id.* at 742. This occurred only in the context of its discussion of the embroilment issue. See *id.* at 741-42.

²⁴⁷ *Id.* at 741.

²⁴⁸ *Id.* at 744.

²⁴⁹ *Id.* at 745.

²⁵⁰ See note 164 *supra*.

²⁵¹ 494 S.W.2d at 740.

²⁵² *Id.* at 741. The court also noted that our belief "demonstrate[d] something

D. Before the Supreme Court

1. The Issues on Certiorari

The Supreme Court's grant of certiorari was limited to three "procedural" issues raised in our petition—entitlement to a jury trial, the right to a hearing and disqualification of an embroiled judge.²⁵³ On the same day that our petition was granted, the Court also granted certiorari in *Codispoti v. Pennsylvania*²⁵⁴ on the issues of whether sentences imposed for separate contempts must be aggregated for jury trial purposes and whether a jury trial is required in any case when "a substantial term of imprisonment" is imposed.²⁵⁵

The grant of certiorari in *Taylor*, coupled with the grant of certiorari in *Codispoti*, indicated to me that the Supreme Court was contemplating "giving plenary consideration to the constitutional requirements applicable to the disposition of criminal contempt cases."²⁵⁶ As I prepared our brief on the issues of the right to a hearing and the embroilment of the trial judge, I could not escape the feeling that the arguments I was making were also arguments against the existence of the summary contempt power itself. If a right to notice and opportunity to be heard existed, and if embroilment of a particular judge mandated his disqualification, then it would seem only reasonable to require that every hearing be before another judge, because trial judges are necessarily involved in the events leading up to contempt charges. The requirement of a "neutral and detached" judge, announced by the Court in *Ward v. Village of Monroeville*,²⁵⁷ had recognized that "institutional bias" was sufficient to disqualify a judge,²⁵⁸ and such bias clearly seemed to be present in every exercise of the summary contempt power. Furthermore, widespread abuse of the summary contempt power had been empirically demonstrated in the study of the Special Committee on Courtroom Conduct of the Association of

less than complete and total respect for the judicial system of [the] Commonwealth." *Id.*

²⁵³ 414 U.S. 1063 (1973). The Court denied our request to grant certiorari with respect to the substantive question of "what conduct on the part of an attorney engaged in zealous representation of his client can be made punishable as criminal contempt on the ground that it has created a material obstruction to the administration of justice." Petitioner's Brief for Certiorari at 28.

²⁵⁴ 414 U.S. 1063 (1973).

²⁵⁵ *Id.* at 1063-64.

²⁵⁶ Reply Brief for Petitioner at 28.

²⁵⁷ 409 U.S. 57, 61-62 (1972), discussed in text accompanying notes 349-52 *infra*.

²⁵⁸ See *id.* at 60; text accompanying notes 330-33 *infra*. "Institutional bias" was also the basis of the decision in *In re Murchison*, 349 U.S. 133, 137-38 (1955), discussed in text accompanying notes 73-77 *supra*.

the Bar of the City of New York,²⁵⁹ and the Committee had strongly recommended its complete abolition.²⁶⁰

In short, the time seemed propitious to revive the challenge to the constitutionality of the summary contempt power itself, and after careful consideration we decided to do so.²⁶¹ Recognizing that this question had not been specifically raised in the petition for certiorari, we suggested in our brief that the Court might wish to consider whether summary punishment for contempt was violative of due process of law.²⁶² Although I was permitted to devote a portion of the oral argument to this question, the Court made it abundantly clear in the colloquy that it was not about to abolish the summary contempt power, and it did not address the issue in its opinion. Nevertheless, in deciding the issues presented in *Taylor* and *Codispoti*, the Court did further limit the summary contempt power, provoking Justice Rehnquist to protest that "the total absence of any basis in the Fourteenth Amendment for the result which the Court reach[ed]" was to him "clear beyond any doubt."²⁶³

2. *The Right to a Jury Trial*

Our contention that Taylor was entitled to a jury trial consisted of the following arguments, which were made in ascending order—(1) Taylor was entitled to a jury trial in the circumstances of the particular case; (2) contempt was a "serious" offense, and the right to a jury trial should thus attach in all contempt prosecutions; and (3) whenever an accused faces possible imprisonment for any offense, he is charged with a "serious" offense within the meaning of the trial-by-jury guaranty.²⁶⁴ We first argued that the Court had *not* adopted a "six-month rule" for determining the right to trial by jury in cases of criminal contempt.²⁶⁵ In a noncontempt situation, the Court had looked to the maximum penalty authorized by statute as one of the "objective indications of the seriousness with which society regards the offense,"²⁶⁶ but it had also held that a particular offense might be considered sufficiently serious to justify

²⁵⁹ See DISORDER IN THE COURT, *supra* note 15, at 233-34; text accompanying notes 161-62 *supra*.

²⁶⁰ DISORDER IN THE COURT, *supra* note 15, at 232-38.

²⁶¹ There is always a temptation to try to make a case an important one, and, in retrospect, I cannot be sure that the omens were as favorable as we thought, or, perhaps more accurately, as we wanted to believe.

²⁶² Brief for Petitioner at 47.

²⁶³ *Codispoti v. Pennsylvania*, 418 U.S. 506, 531 (1974) (dissenting opinion).

²⁶⁴ Brief for Petitioner at 13-15.

²⁶⁵ *Id.* at 19-23.

²⁶⁶ *Frank v. United States*, 395 U.S. 147, 148 (1969).

a jury trial despite a relatively mild maximum penalty.²⁶⁷ In criminal contempt cases, the Court had looked to statutory penalties to determine the seriousness of the offense,²⁶⁸ and in their absence it had considered the "severity of the penalty actually imposed as the best indication of . . . seriousness."²⁶⁹ We argued, however, that the Court had never held these to be the only relevant indications.²⁷⁰ Taylor, we contended, had been charged with quite a serious offense: the four-and-one-half-year sentence originally imposed was certainly severe punishment, and both the trial judge and the Kentucky Court of Appeals had characterized Taylor's conduct as being nothing short of despicable.²⁷¹ Without agreeing with this characterization, we argued that it was utterly incongruous for the court of appeals to portray Taylor's actions in this way and yet maintain that he stood charged only with a "petty offense" when he asserted his right to jury trial.²⁷² We further argued that Taylor should have prevailed even if the Court were to adopt a six-month rule, because the right to a jury trial should have attached at the time the sentence was originally imposed and ought not to have been defeated by subsequent modification of the sentence.²⁷³

In arguing the broader proposition that criminal contempt should be considered a serious offense within the meaning of the trial-by-jury guaranty, we relied on Supreme Court holdings that a person cannot constitutionally be convicted for contempt unless his conduct created an actual and material obstruction of the administration of justice.²⁷⁴ This being so, we argued, contemptuous conduct was "likely to be regarded as contrary to the 'social and ethical judgments of the community,' in a society in which the fair and orderly administration of justice is held in high regard"²⁷⁵ and should thus be considered to involve a serious offense entitling one to a jury trial.²⁷⁶ We also noted that the seriousness of a charge of criminal contempt against a lawyer was magnified by its possible

²⁶⁷ In this respect I relied particularly on *District of Columbia v. Colts*, 282 U.S. 63 (1930), in which the Court held that the offense of "driving recklessly as to endanger persons and property" was a serious offense within the meaning of the trial-by-jury guaranty, although the maximum authorized punishment was a fine of \$100 and 30 days' imprisonment. *Id.* at 73-74.

²⁶⁸ See, e.g., *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

²⁶⁹ *Frank v. United States*, 395 U.S. 147, 149 (1969).

²⁷⁰ Brief for Petitioner at 22-23.

²⁷¹ See 494 S.W.2d at 740-41; text accompanying note 251 *supra*. As to the trial judge's characterization, see Joint Appendix at 28-29.

²⁷² Brief for Petitioner at 24-26.

²⁷³ *Id.* at 28-29.

²⁷⁴ See Brief for Petitioner at 30; cases cited in note 164 *supra*.

²⁷⁵ Brief for Petitioner at 30-31, quoting *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937).

²⁷⁶ *Id.* at 31, citing *District of Columbia v. Colts*, 282 U.S. 63 (1930).

collateral consequences, such as bar disciplinary proceedings,²⁷⁷ and we pointed out that since a contempt proceeding involves a confrontation between the defendant and the court, represented by the judge, the appearance of justice required that trial be before a jury.²⁷⁸

Our third level of argument, that the right to a jury trial should attend every prosecution involving the possibility of imprisonment, was based on *Argersinger v. Hamlin*,²⁷⁹ which established an absolute right to the assistance of counsel whenever such a possibility exists. We argued that the different historical genealogy of the right to trial by jury²⁸⁰ did not justify treating that right differently from the other guaranties of the sixth amendment: those other guaranties were not contingent on the extent of possible imprisonment, and neither should the trial by jury guaranty be so conditioned.²⁸¹

A majority of the Court, rejecting all these arguments, held that since the sentence ultimately imposed on Taylor had not exceeded six months, he was not entitled to a jury trial. The Court stated:

Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. . . .²⁸²

²⁷⁷ See *Edmunds v. Chang*, 365 F. Supp. 941, 944 (D. Hawaii 1973), *rev'd on other grounds*, 509 F.2d 39 (9th Cir.), *cert. denied*, 96 S. Ct. 39 (1975). We did not argue that there should be a different rule for attorneys and nonattorneys, but maintained only that because so many contempt cases do involve attorneys the collateral consequences to an attorney should be taken into account in determining whether criminal contempt was by its very nature a serious offense. See Reply Brief for Petitioner at 23.

²⁷⁸ Brief for Petitioner at 31-33. In *Bloom v. Illinois*, 391 U.S. 194 (1968), the Court had stated:

Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

Id. at 202.

²⁷⁹ 407 U.S. 25 (1972).

²⁸⁰ See *id.* at 30; *Powell v. Alabama*, 287 U.S. 45, 60-65 (1932).

²⁸¹ Justice Black and Justice Douglas had previously taken the position that the right to a jury trial applied to all "crimes" irrespective of the punishment authorized or imposed. See text accompanying notes 95, 102 *supra*.

²⁸² 418 U.S. at 495.

In so holding, the Court refused to accept our argument that the right to a trial by jury irrevocably attaches at the time an original sentence is imposed. The majority saw no difference between a state's initial choice to impose a sentence no longer than six months and a state's post-conviction decision to reduce a longer sentence already imposed. In either case a jury trial might be legally avoided, for "the State itself has determined that the contempt is not so serious as to warrant more than a six-month sentence."²⁸³

Dissenting on this point, Justice Marshall saw the trial judge's reduction of Taylor's sentence²⁸⁴ as a "transparent effort to circumvent this Court's Sixth Amendment decisions and to save his summary conviction of petitioner without the necessity of airing the charges before an impartial jury,"²⁸⁵ and he noted that it was hardly coincidental that Taylor's sentence had been reduced to the six-month maximum.²⁸⁶ Likewise, he saw the majority's decision as an "extraordinarily rigid and wooden application of the six-month rule," which the Court had changed

from a reasonable effort to distinguish between "serious" and "petty" contempts into an arbitrary barrier behind which judges who wish to protect their summary contempt convictions without exposing their charges to the harsh light of a jury may safely hide.²⁸⁷

In *Codispoti v. Pennsylvania*,²⁸⁸ decided the same day as *Taylor*, the Court held in a five-to-four decision that when a judge waits until the end of the trial to impose sentences for separate contempts, the sentences must be aggregated in determining the defendant's right to a jury trial. Thus, when the aggregate sentence imposed exceeds six months, the right to trial by jury attaches. However, the Court made it clear that if a judge imposes punishment at the time contempt is committed, he may impose any number of six-month sentences without triggering this right.²⁸⁹ In the view of the majority, when a judge waits until the end of a trial to punish for contempt, there is "no overriding necessity for instant

²⁸³ *Id.* at 496.

²⁸⁴ The actual reduction was accomplished by the Kentucky Court of Appeals, which based its decision on the fact that the trial judge did not specify in his corrected judgment whether the sentences were to run consecutively or concurrently. 494 S.W.2d at 746.

²⁸⁵ 418 U.S. at 504.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 504-05.

²⁸⁸ 418 U.S. 506 (1974).

²⁸⁹ *Id.* at 513-15. Justice Marshall, who joined a plurality of the Court in holding that sentences must be aggregated if imposed after trial, also argued that the six-month limitation was equally applicable where the trial judge acted "on the spot." *Id.* at 519 (concurring in part). The Chief Justice and Justices Blackmun, Stewart and Rehnquist dissented. *Id.* at 522, 523.

action to preserve order.”²⁹⁰ The majority further noted, as did the Seventh Circuit in *Seale*,²⁹¹ that a trial judge acting after the fact might tailor his choice of punishments and of acts to be punished in such a way as to evade the necessity for a jury trial. To allow this would pose “the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate.”²⁹² The dissenters argued that prior to *Codispoti* the Court had never required a jury trial in the case of direct contempts, and felt in any event that “[t]he determination of whether basically undisputed facts constitute a direct criminal contempt is a particularly inappropriate task for [a] jury.”²⁹³

Taylor and *Codispoti*, taken together, thus constitute the Court’s latest pronouncement on the right to trial by jury in cases of criminal contempt. When no maximum penalty for contempt is provided by statute, the sentence actually imposed—even if it is the result of a retroactive modification by the trial judge or reviewing court—determines whether the offense is a serious one for jury trial purposes. And only if that sentence exceeds six months’ imprisonment will the offense be a serious one. When multiple contempts have been committed, if the judge adjudicates and punishes each contempt as it occurs, he can impose any number of consecutive six-month sentences, but if he waits until the trial is over, the sentences must be aggregated for the purpose of applying the six-month rule. When the punishment for contempt is imprisonment, then, the availability of the right to trial by jury now appears to be definitively settled.²⁹⁴

²⁹⁰ *Id.* at 515.

²⁹¹ See text accompanying notes 165-69 *supra*.

²⁹² 418 U.S. at 515.

²⁹³ *Id.* at 523 (opinion of Blackmun, J.).

²⁹⁴ In *Muniz v. Hoffman*, 422 U.S. 454 (1975), Justice White, writing for the Court, stated the law as follows:

(1) Like other minor crimes, “petty” contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial; (2) criminal contempt, in and of itself and without regard for the punishment imposed, is not a serious offense absent legislative declaration to the contrary; (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial; (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Id. at 475-76. In that case, the Court held that the imposition of a \$10,000 fine on a labor union was not “of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment.” *Id.* at 477. The Court left open the question of whether the right to jury trial applied at all when a fine was imposed against a labor union or a corporation.

Subsequently, in *Douglass v. First Nat’l Realty Corp.*, No. 1429-67 (D.C. Cir. Mar. 3, 1976), the Circuit Court for the District of Columbia noted that a \$5000 fine imposed on an individual had “immensely greater” impact than it would if the con-

3. *Entitlement to a Hearing*

The issue that might suddenly have become the most important and explosive aspect of our case was the right to be heard. Even in *Sacher*, the Supreme Court had never been presented with the precise issue of whether due process requires a trial judge, in whose presence a contempt has been committed, to give the contemnor some opportunity to be heard in defense or mitigation before he is summarily adjudged guilty and sentence is imposed.²⁹⁵ We argued that even when the judge proceeds summarily, there must be a "minimal due process hearing": the judge must separate discussion on the contempt charge from discussion on other matters, state the precise nature of the charge, listen to arguments in defense or mitigation and rule on guilt or innocence.

On this issue, we emphasized that Judge Hayes had never specified the precise nature of the charges during the trial,²⁹⁶ and that whenever Taylor was allowed to respond, his statements were intermingled with discussions of other aspects of the case and were received strictly for the record, indicating that the judge had already made up his mind.²⁹⁷ Thus we asked that there be a point in time removed from the rest of the trial when an accused be given notice of the contempt charges and an opportunity to be heard. We made it clear, however, that we were not seeking the same kind of full-scale hearing required when the events giving rise to the charge do not occur in the judge's presence.²⁹⁸ The necessity for a minimal due process hearing, we argued, was not obviated by the

temnor were a large organization and found that a jury trial would be required under such circumstances. Instead of remanding the case for trial, however, the court reduced the fine to \$500, presumably transmogrifying the offense into a "petty" one.

In *Maita v. Whitmore*, 508 F.2d 143 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975), the defendant was charged with four criminal contempts, each of which was punishable by statute by a maximum six months' imprisonment. He was convicted on all four counts, but the total sentence imposed did not exceed six months. The argument that the total authorized penalty under the statute in his case was 24 months, thus entitling him to a jury trial, was rejected by the court. Citing *Taylor*, it held that since the penalty actually imposed did not exceed six months, and since the judge had the discretion to impose consecutive or concurrent sentences, there was no right to a jury trial.

²⁹⁵ In *Sacher* the judge had given the right of allocution. See note 33 *supra*. Notice of charges and an opportunity to be heard were not specifically required by rule 42(a), and there were both federal and state cases indicating that summary punishment for contempt could be imposed without any hearing whatsoever. *E.g.*, *United States v. Galante*, 298 F.2d 72, 76 (2d Cir. 1962); *People v. Carr*, 3 Ill. App. 3d 227, 229-30, 278 N.E.2d 839, 840 (1971).

²⁹⁶ See text accompanying notes 199-200 *supra*. The charges were first specified in the "corrected judgment and certificate of contempt." Joint Appendix at 24-27.

²⁹⁷ See text accompanying note 201 *supra*. See generally Joint Appendix at 30 *passim*.

²⁹⁸ See, *e.g.*, FED. R. CRIM. P. 42(b).

fact that the conduct in question might occur in the judge's presence, since presumably no judge would be impervious to arguments that he perceived the facts inaccurately or was mistaken in his view that the conduct constituted criminal contempt.²⁹⁹ While carefully noting that it was only necessary on our facts to hold that an accused be entitled to such a hearing when the judge waits until after the trial to act, we urged that there be a right to a hearing even when the judge acts immediately, since the utility of a hearing and the impact of a conviction are the same in both instances.

With only Justice Rehnquist dissenting, the Court ruled in our favor on the hearing issue. Although it refused to expand its holding to include immediate exercises of the summary contempt power,³⁰⁰ the Court held that the minimal due process requirement of "reasonable notice of the specific charges and opportunity to be heard"³⁰¹ must be satisfied whenever a judge delays his action until the end of a trial. In such circumstances, any denial of the basic right to be heard in one's own defense could not be tolerated, for the "usual justification of necessity" would carry much less weight.³⁰² The Court noted that the judge's own observations or the trial transcript could be determinative of factual issues but pointed out that the accused might argue "that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client" or that "he might present matters in mitigation or otherwise attempt to make amends with the court."³⁰³ Because Taylor was admittedly not given even this minimal hearing at the end of the trial and before the imposition of sentence, his contempt conviction was reversed and the case was remanded to the Kentucky Court of Appeals for further proceedings.³⁰⁴

4. *Disqualification of the Trial Judge*

On the issue of recusal, we argued that under any test Judge Hayes had clearly been embroiled in controversy with Taylor. Em-

²⁹⁹ That such arguments might well be effective is indicated by the frequent appellate reversals, often on the merits, of summary contempt convictions. See text accompanying notes 161-62 *supra*.

³⁰⁰ 418 U.S. at 497, citing *Ex parte Terry*, 128 U.S. 289 (1888).

³⁰¹ The Court made it clear that this minimal requirement of due process was not the same as the full-scale hearing required where the conduct did not occur in the court's presence. *Id.* at 499, 500-01 n.9; see text accompanying note 298 *supra*.

³⁰² 418 U.S. at 497-98.

³⁰³ *Id.* at 499.

³⁰⁴ *Id.* at 500, 504. In *Weiss v. Burr*, 484 F.2d 973 (9th Cir. 1973), the Ninth Circuit also held that a minimal due process hearing was required when the judge waited until the end of the trial to act. *Id.* at 984.

phasizing the judge's statements and actions throughout the trial and particularly at the time of final adjudication and sentencing.³⁰⁵ we maintained that he had been an activist seeking combat, that he had perceived himself as the victim of a personal attack, that he had shown demonstrable bias against Taylor and finally that he had adopted an adversary posture with respect to the alleged contemnor.³⁰⁶ Here, too, we noted that the Court need not decide whether the embroilment defense was available when the judge acted on the spot, but we argued that it ought to be held to apply equally to that situation, since "where [the judge] cannot impartially sit in judgement, the denial of due process is no less because committed in the name of 'preserving order.'"³⁰⁷

Again, the Court refused to extend its holding to immediate exercises of the summary contempt power, but it held that Judge Hayes, who had delayed his actions, was personally embroiled in controversy with Taylor and was thus disqualified from proceeding summarily and from trying Taylor on remand. To justify this holding, the Court took some pains to create a new category of embroilment that would disqualify a judge who was neither the unfortunate victim of a personal attack nor the sort of person that might mount such an attack himself. Thus, although Judge Hayes had clearly not been subjected to any personal attack as had been the judge in *Marbury*, the Court did not find it necessary to consider whether he was an activist seeking combat as was the judge in *Offutt*. Instead, the Court focused on the judge's reactions to the alleged contempts³⁰⁸ and concluded that his words and conduct—set out at length in the opinion³⁰⁹—demonstrated that he had become "embroiled in a running controversy" with Taylor.³¹⁰ In this connection the opinion noted particularly that "as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability and his motives, sufficiently so that the contempt issue should have been finally adjudicated by another judge."³¹¹ In sum, the Court's treatment of the embroilment issue indicates that whenever the record evidences a material lack of impartiality, whatever its genesis or justification,

³⁰⁵ See text accompanying notes 230-31 *supra*.

³⁰⁶ See *United States v. Meyer*, 462 F.2d 827, 841-42 (D.C. Cir. 1972).

³⁰⁷ Brief for Petitioner at 66.

³⁰⁸ 418 U.S. at 503 n.10.

³⁰⁹ *Id.* at 491-92 n.2, 502.

³¹⁰ *Id.* at 501.

³¹¹ *Id.* at 501-02. The Court also relied on the judge's failure to provide a hearing on the contempt charges as showing bias on his part, distinguishing *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964), on that basis. 418 U.S. at 502-03.

the trial judge—at least when he waits until the end of the trial to act—cannot sit in judgment on contempt charges.³¹²

5. *The Impact of Taylor v. Hayes on the Summary Contempt Power*

Justice Rehnquist, dissenting in *Taylor*, felt that the Court's opinion had indeed wrought significant changes in the summary contempt power. He thought that the notion of a minimal due process hearing was "completely at odds with *Sacher*,"³¹³ and he asserted that "procedures upheld within the unitary confines of the federal court system only two decades ago [could not after *Taylor*] be constitutionally employed by a State."³¹⁴ The decision in *Taylor*, he said, "will surely come as something of a shock to federal judges who must now decide whether they may constitutionally utilize the provisions of [rule 42(a)] in punishing direct contempts."³¹⁵ *Taylor* does represent a departure from *Sacher* on this score, but in no way does it preclude federal judges from using the summary procedures set forth in rule 42(a). *Taylor* simply means that federal judges, like their state court counterparts, will have to proceed less summarily when they wait until the end of the trial to punish for contempt: they will have to afford the minimal due process hearing outlined in *Taylor*. Justice Rehnquist also argued that recognizing the defense of embroilment when the judge was not a victim of a personal attack was a "total repudiation of the principle laid down in *Sacher*."³¹⁶ This is true, but, as indicated

³¹² When the case was remanded, the state, through Judge Hayes, elected not to seek the imposition of a penalty in excess of six months' imprisonment. On retrial, Judge Robert M. Spragens dismissed counts two, five, six, seven and nine but found Taylor guilty on counts three, four and eight. As in the Chicago 7 remand, he imposed no punishment beyond the time already served and the payment of court costs. Although we believed that a conviction could not be sustained on those counts either, we decided against appealing in view of the absence of any punishment.

In *In re Karagozian*, 44 Cal. App. 3d 516, 118 Cal. Rptr. 793 (1975), a virtual replay of *Taylor*, an apparently embroiled judge waited until the end of trial to sentence the attorney and afforded him no notice or hearing. The only difference between that case and *Taylor* was that the judge took action while the jury was still deliberating. The court of appeals, noting that at that time no justification for proceeding summarily existed, found *Taylor* controlling and reversed the convictions, directing that the case be retired before another judge. For post-*Taylor* cases where a proper hearing was afforded before an impartial judge, see *Howell v. Jones*, 516 F.2d 53 (5th Cir. 1975); *Bell v. Hongisto*, 501 F.2d 346 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In *In re Williams*, 409 F.2d 949, 959 (2d Cir. 1975), the court indicated that the trial judge probably was embroiled in controversy with the contemnor, but reversed the conviction on the ground that the conduct charged did not on the record constitute criminal contempt.

³¹³ 418 U.S. at 525.

³¹⁴ *Id.* at 527.

³¹⁵ *Id.*

³¹⁶ *Id.* at 529. He distinguished *Offutt v. United States*, 348 U.S. 11 (1954), *dis-*

earlier,³¹⁷ the foundation of *Sacher's* conservative embroilment standard had long been eroded away. *Taylor* merely limits *Sacher* to its precise holding that a federal judge may proceed summarily under rule 42(a) even when he waits until the end of the trial to act.³¹⁸ When he does attempt to proceed in this manner, however, he is constrained—as is his state counterpart—by the guaranties of procedural due process: he cannot try contempt charges when he is personally embroiled in controversy with the accused.

Left unanswered by the decision in *Taylor* is whether the right to a hearing obtains and the defense of embroilment is available when a trial judge immediately exercises his power “for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him.”³¹⁹ Proponents of the summary contempt power will read *Taylor* as affirming exercise of the summary contempt power in this manner, while their opponents will argue that the question has been left open.³²⁰ Moreover, if the *Taylor* Court is to be taken at its word, and the immediate exercise of the summary contempt power is thus truly an exception to the

cussed in text accompanying notes 66-71 *supra*, on the ground that it involved the Court's supervisory powers over the lower federal courts rather than a constitutional question. 418 U.S. at 530.

³¹⁷ See text accompanying notes 87-92 *supra*.

³¹⁸ In *Taylor*, the Supreme Court encouraged judges to postpone hearing contempts:

Moreover, whatever justifications may sometimes necessitate immediate imposition of summary punishment during trial “to maintain order in the courtroom and the integrity of the trial process in the face of an ‘actual obstruction of justice,’ . . . [r]easons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise.”

418 U.S. at 500-01 n.9, quoting *Codispoti v. Pennsylvania*, 418 U.S. 506, 513 (1974), and *Sacher v. United States*, 343 U.S. 1, 9-10 (1952) (citations omitted).

³¹⁹ *Id.* at 497. In *United States v. Wilson*, 421 U.S. 309 (1975), the trial judge, proceeding under rule 42(a), explained to the contemnors the protection accorded by a grant of immunity and advised them that if they continued to refuse to testify he would hold them in contempt. He also offered them an opportunity to speak in their own behalf. *Id.* at 315-16, n.7.

³²⁰ In *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974), *cert. denied*, 421 U.S. 1012 (1975), a post-*Taylor* case, the trial judge summarily imposed punishment each time the acts in question occurred, but he also gave the defendant a minimal due process hearing in chambers each time. The court also found that the judge was not embroiled. *Id.* at 132-33, 116 Cal. Rptr. at 729-30. The case demonstrates how a minimal due process hearing can be conducted during the trial without substantial interference. In *State ex rel. Young v. Woodson*, 522 P.2d 1035 (Okla. 1974), the court held that a minimal due process hearing was required by the Oklahoma constitution when the judge punished during the course of the trial. The *ABA Standards Relating to the Function of the Trial Judge* § 7.4 (Approved Draft 1972), which the Court cited in *Taylor*, 418 U.S. at 499 n.8, provide for the right to a hearing whenever the judge acts to impose punishment for contempt.

ordinarily "indispensable" right to a hearing,³²¹ then it can be forcefully argued that *no* exercise of that power without a hearing or by an embroiled judge can be justified unless it is necessary for the purpose of maintaining order.³²² Such an argument finds support in the long-recognized principle that the authority to punish for contempt is limited to "the least possible power adequate to the end proposed."³²³ Indeed, pausing to hold a minimal due process hearing during a trial would not seem greatly to impair a court's ability to preserve order, nor would an embroiled judge's need to maintain the dignity of his court seem to outweigh an alleged contemnor's right to be tried by an impartial arbiter. Thus the further argument might be made that the summary contempt power, even when invoked to preserve order, should only be exercised after a minimal due process hearing held before an impartial judge. Acceptance of this conclusion by the Supreme Court would go a long way toward preventing the arbitrary and improper use of the summary contempt power.³²⁴

In the end, however, the questions of whether the right to a hearing attends immediate exercises of the contempt power and of whether an embroiled judge can act on the spot to punish contempts cannot be separated from the question of whether the exercise of the summary contempt power is itself unconstitutional. As noted, the *Taylor* opinion specifically refused to consider the first two questions, and it did not mention the last at all. Cogent arguments can be marshalled against the summary contempt power: while the Supreme Court will doubtless have to face these arguments in the future, it is not too early to advance them now.

³²¹ 418 U.S. at 497-98 n.6, quoting *Cooke v. United States*, 267 U.S. 517, 536 (1925).

³²² Presumably the appellate court would have to make an independent determination of this fact. In light of *United States v. Wilson*, 421 U.S. 309 (1975), discussed in text accompanying note 61 *supra*, "maintaining order" would include preventing obstruction of the proceedings.

³²³ *Shillitani v. United States*, 384 U.S. 364, 371 (1966). The principle was first enunciated in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821) (legislative contempt), and was reaffirmed in *United States v. Wilson*, 421 U.S. 309 (1975).

³²⁴ This conclusion apparently was reached in *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974), *cert. denied*, 421 U.S. 1012 (1975). However, in *State v. Gonzalez*, 134 N.J. Super. 472, 341 A.2d 694 (1975), a defendant who uttered certain vulgarities while he was being sentenced immediately was held in contempt and given a six-month sentence. When the defendant again directed similar remarks to the judge, the judge responded by imposing another six-month sentence. The contempt sentences ran consecutively, and were to be served before the sentence on the underlying charge.

VI

THE CASE AGAINST THE EXERCISE OF THE
SUMMARY CONTEMPT POWER

The essence of the case against the summary contempt power is that any exercise of that power is inherently unfair to the accused, and that less unjust methods are available to preserve order in the courtroom. The case is a strong one, for the authority to punish summarily for contempt, even as it has been or might be limited by the Supreme Court, will always be arbitrary and liable to abuse.³²⁵ But the denial of basic rights and the inevitable unfairness that attend summary proceedings are not usually disputed by proponents of the summary contempt power. Instead, they argue that the justification for the power—the need to maintain order in the courtroom—outweighs these evils. In this section I will attempt to show that this proposition is seriously infirm and that the summary contempt power therefore ought to be abolished altogether. First, I will examine the inherent unfairness in the exercise of the power, for although (or perhaps because) the point is frequently conceded, one is apt to forget how pernicious summary contempt proceedings actually are. Second, I will argue that the summary contempt power is not in fact justifiable, both because the need for harsh weapons to preserve order in the courts is greatly exaggerated and because less objectionable but equally efficient alternatives are available.

As has been observed: “[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.”³²⁶ That the existence of this power is not merely anomalous but embarrassing and somewhat shameful to our legal system was perhaps best expressed by Justice Black:

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 what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. . . . “To this end no man can be a judge

³²⁵ *Ex parte Terry*, 128 U.S. 289, 309 (1888).

³²⁶ *Green v. United States*, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." . . .³²⁷

The exercise of the summary contempt power is most clearly a situation "in which an official . . . occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and which] necessarily involves a lack of due process of law in the trial of defendants."³²⁸ Try as he may, no judge can divorce his role as "the court" against which the purported contempt was committed from his position as the adjudicator of the contempt charge. This point was recognized in *Sacher*:

It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. . . .³²⁹

Of course, the *Sacher* Court refused to disqualify "inevitably offended" trial judges from hearing the contempt charges, even if they waited until the end of the trial to act. This approach has been changed, as *Taylor* makes clear, but the fact that a particular judge embroiled in controversy may now be disqualified does not alter the validity of what was said in *Sacher*: any contempt of court committed in the presence of the judge will be treated as an offense against him personally.

In noncontempt situations, it is not necessary to show a judge's personal involvement in order to establish a violation of due process: if the circumstances indicate that "institutional bias" is present in the person of the judge, he will be disqualified. This is illustrated most clearly by the Supreme Court's decisions in *Ward v. City of Monroeville*³³⁰ and *Tumey v. Ohio*.³³¹

In *Tumey*, the Court found that a trial before a mayor of a municipality violated due process because the mayor personally received income from the fees and costs levied by him against convicted violators. The mayor-judge in *Tumey* may thus be likened to a judge personally embroiled in controversy, since both have a per-

³²⁷ *Id.* at 199, quoting *In re Murchison*, 349 U.S. 133, 136-37 (1955) (footnote omitted).

³²⁸ *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

³²⁹ 343 U.S. at 12.

³³⁰ 409 U.S. 57 (1972).

³³¹ 273 U.S. 510 (1927).

sonal stake in finding the accused guilty. In *Ward* the mayor-judge did not share in the fees and costs, but the Court found the absence of such a personal interest irrelevant to the denial of due process:

The fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle . . . [T]he test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . ." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. . . .³³²

By the same token, the fact that a judge is charged with maintaining order in the court over which he presides offers a "possible temptation not to hold the balance nice, clear and true" between the court and the accused. Indeed, every judge could be said to have a real stake in the institution of his court—in its preservation, power and dignity. Trial by the judge before whom an alleged contempt has been committed is thus inherently a denial of the right to trial before an unbiased judge.

Given this built-in abridgment of due process, one might well pause to ask whether the game is worth the candle in the first instance: would it not be better to abolish the summary contempt power and simply suffer whatever courtroom disorder might follow? In its exhaustive study of the contempt power,³³³ the Special Committee on Courtroom Conduct of the Association of the Bar of the City of New York found, contrary to popular belief, that courtroom disorder was not a significant problem in American courts.³³⁴ On the other hand, abuse of the summary contempt power was found to be serious.³³⁵ These findings suggest that the problem of courtroom disorder, and the need to remedy it, cannot really justify so dangerous a response as that of summary contempt.

This point need not be pressed, however, because the case against the summary power does not have to focus on weighing the justification of preserving courtroom order against the evils of the summary contempt power. As evidenced by Justice Jackson's opinion in *Sacher*,³³⁶ the proponents of the summary contempt power

³³² 409 U.S. at 60, quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

³³³ DISORDER IN THE COURT, *supra* note 15.

³³⁴ *Id.* at 6, discussed in text accompanying notes 154-60 *supra*.

³³⁵ *Id.* at 232-38, discussed in text accompanying notes 161-63 *supra*.

³³⁶ [T]he very practical reasons which have led every system of law to vest a

contend that, despite its inherent unfairness, the power is *necessary* to enable judges to preserve order and is thus constitutional. It would logically follow that if order in the courtroom could be preserved just as effectively by means less objectionable than the exercise of the summary contempt power, then the exercise of the power would be violative of due process of law. Drawing an analogy to the approach taken to governmental interference with fundamental rights and to governmental classifications that are inherently invidious,³³⁷ it may be asked whether the presumably "compelling" governmental interest in preserving order in the courtroom cannot be achieved by means other than the exercise of the summary contempt power. Interestingly enough, this less-drastring-means test has been applied to the exercise of the contempt power in general, for the Court has held that the authority to punish for contempt is limited to "the least possible power adequate to the end proposed."³³⁸ All of this lends impetus to the proposition that if the summary contempt power cannot be shown to be clearly necessary to prevent courtroom disruption, its exercise should be held violative of due process of law, or at least prohibited as a matter of policy.³³⁹

When the summary contempt power is not exercised until the trial has concluded, no basis whatsoever exists for invoking the necessity justification. It is undoubtedly fairer for the judge to delay his action until after trial, when the accused enjoys the right to a minimal due process hearing and can raise the defense of embroilment. It is but a short step to extend the requirement to a full-scale hearing before another judge.³⁴⁰ More significantly, if the summary contempt power is not immediately exercised to maintain order in the face of contemptuous acts, the justification for allowing

contempt power in one who presides over judicial proceedings are also the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. . . .

343 U.S. at 8.

³³⁷ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

³³⁸ *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

³³⁹ The Supreme Court could set such a policy for the federal courts by abolishing rule 42(a) and providing for trial before another judge under the present rule 42(b). State appellate courts could accomplish the same result if they had similar rulemaking authority. As to action by the states and other recommendations for limiting the summary contempt power, see the discussion in *DISORDER IN THE COURT*, *supra* note 15, at 236-38.

³⁴⁰ This was the argument we advanced to bring the issue within the grant of certiorari in *Taylor*. Brief for Petitioner at 47.

its exercise at all disappears. As Justice Frankfurter, dissenting in *Sacher*, observed:

Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity must bound its limits. In this case the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. . . .³⁴¹

Although Justice Frankfurter was referring to the embroiled judge, the same rationale would apply to any judge who proceeded summarily after the trial, if institutional bias does indeed inhere in a judge trying contempts allegedly committed in his presence. In *Taylor*, the Court noted that “[t]he usual justification of necessity is not nearly so cogent when final adjudication and sentence are postponed until after trial.”³⁴² In fact, it is utterly absent at that time. Thus for the judge to proceed summarily (or more accurately after *Taylor*, “semi-summarily”) when the trial has been concluded should be considered a violation of due process of law. Present practice need only be changed to require that trial be before another judge, whether or not the trial judge was embroiled, and that there be a full-scale—rather than minimal due process—hearing.

The argument that strikes at the heart of the summary contempt power, however, is that the justification of necessity is untenable even when the accused is cited and punished on the spot in order to prevent alleged courtroom disruption. This argument has great force because the summary contempt power is simply not necessary to prevent such disruption. Apart from the fact that no serious quantitative problem of disruption plagues American courts,³⁴³ there are numerous methods available to deal with disruption when it does occur, and these methods do not involve the inherent unfairness of the exercise of the summary contempt power. A judge can control the disruptive defendant by using any of the weapons in his “arsenal of authority” that the Supreme Court set forth in *Allen v. Illinois*.³⁴⁴ Among these weapons is the power to remove the defendant from the courtroom, or to hold him in civil contempt by discontinuing the trial and imprisoning him until he agrees to cease the misconduct.³⁴⁵ With respect to

³⁴¹ 343 U.S. at 36.

³⁴² 418 U.S. at 497 (citation omitted).

³⁴³ See text accompanying notes 154-60 *supra*.

³⁴⁴ 397 U.S. 337 (1970).

³⁴⁵ *Id.* at 343-44. As the *Disorder in the Court* study indicates, most of the prob-

lawyers, a citation for contempt, carrying the assurance of subsequent trial and the likelihood of bar disciplinary proceeding upon conviction, would surely seem to be a sufficient deterrent for all but the most persistently obstructive. The deterrent effect of a possible criminal conviction on contemptuous conduct will be no less because the determination of guilt and punishment will occur in a nonsummary proceeding before another judge.³⁴⁶ In the exceedingly rare instances when a lawyer embarks on a course of persistent obstruction, summary punishment for contempt, even if imposed on the spot, will probably not alter or deter the lawyer's behavior. And once such severely disruptive conduct has occurred, it would doubtless be inadvisable to continue the trial. The judge ought to declare a mistrial, cite the offending lawyer for contempt and rely on subsequent conviction and bar disciplinary proceedings to prevent a recurrence.³⁴⁷ In sum, the exercise of the summary contempt power is simply not necessary to preserve order in the courtroom,³⁴⁸ and the experience with its abuse should have persuaded the Supreme Court to put an end to this "anomaly in the law."³⁴⁹

lems of courtroom disruption occur in ordinary felony prosecutions as a result of actions by the defendants. *DISORDER IN THE COURT*, *supra* note 15, at 90-105.

³⁴⁶ As Justice Frankfurter observed in *Sacher*:

the administration of justice and courts as its instruments are vindicated, and lawyers who might be tempted to try similar tactics are amply deterred, by the assurance that punishment will be certain and severe regardless of the tribunal that imposes it.

343 U.S. at 37 (dissenting opinion).

³⁴⁷ This point was made by the Louisville Bar Association in its amicus curiae brief filed in *Taylor*. Brief of the Louisville Bar Association as Amicus Curiae in Support of Petition for Certiorari at 32-33.

³⁴⁸ The absence of any necessity for the exercise of the summary contempt power is further demonstrated by the fact that administrative agencies have long been denied the contempt power, *see ICC v. Brimson*, 154 U.S. 447 (1894), yet do not appear to have had any appreciable difficulty in conducting their proceedings. Nor does the absence of the contempt power in civil law countries, *see* note 9 *supra*, appear to have created any major problems with maintaining order. *See GOLDFARB*, *supra* note 9, at 2.

³⁴⁹ *Green v. United States*, 356 U.S. 165, 193 (1958) (Black, J., dissenting). As the Special Committee on Courtroom Conduct concluded:

The power of a trial judge to punish contumacious behavior in his courtroom by summary process is of long vintage, has been approved by the United States Supreme Court, and has been justified widely as a necessary weapon in the judicial arsenal. Nevertheless, we do not think it should be perpetuated. It was recognized early that any procedure that permits a single judge to exact criminal punishment without notice of charges or an opportunity of the defendant to be heard is "arbitrary in its nature and liable to abuse." . . .

After reconsidering the justification and effect of summary contempt, we have concluded that it performs no essential role in controlling misbehavior, that alternative means are available to assure order in the court—including

But, at least to this point, the Supreme Court has been unwilling to abolish the power. Perhaps it is persuaded that there will be cases where the exercise of the summary contempt power, particularly during a trial, will make a difference. Or perhaps it believes that the mere existence of the summary contempt power deters improper conduct in the courtroom and that this deterrent effect would be eviscerated if the trial judge were limited to citing for contempt. And perhaps it is not unfair to say that what may be involved is a bit of judicial conceit—the notion that judges, despite the fact that they are performing otherwise inconsistent functions and are necessarily involved in the events leading up to the charge, can “hold the balance nice, clear and true” between the court and the accused.³⁵⁰ In any event, the exercise of the summary contempt power itself, subject to the significant limitations that the Supreme Court has imposed, remains for the time being fully constitutional.

VII

CONCLUSION

In this Article, I have attempted to analyze the development of the summary contempt power and the limitations imposed on its exercise by the Supreme Court. Today, this power can be exercised only where all the events giving rise to the charge occurred in the courtroom and were personally witnessed by the judge. In addition, the right to a jury trial prohibits the trial judge from summarily imposing sentences in excess of six months' imprisonment for any one charge, and it requires that the aggregate summary sentence on all charges not exceed six months when the judge waits until the end of the trial to act. Likewise, at least when he does not act instantly, a judge must hold a minimal due process hearing, affording reasonable notice of the charges and the opportunity to argue in defense or mitigation. Finally, when a judge delays his action, he will be disqualified from trying the charges if he has allowed himself to become personally embroiled in controversy with the accused. The effect of these limitations has been to make the exercise of the summary contempt power somewhat “less

the civil contempt power—and that the arbitrary power it affords trial judges should be terminated. Courtroom misbehavior should be subject to punishment only after notice and fair hearing before a judge other than the one who presided during the incident giving rise to the contempt citation.

DISORDER IN THE COURT, *supra* note 15, at 232, quoting *Ex parte Terry*, 128 U.S. 289, 312 (1888) (citations omitted).

³⁵⁰ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

summary," and hopefully to impose safeguards against its arbitrary exercise. The answer to whether these limitations will "virtually emasculate this historic power of the trial judge," as Justice Rehnquist contends,³⁵¹ must await future development. But there can be no doubt that this "historic power" has indeed undergone significant change.

There is still, however, a judicial unwillingness to abandon the summary contempt power entirely, and for this reason I have also set forth the case against it. When we are further removed from the myth of the disruptive defendant and the contemptuous lawyer, perhaps the utility of the power's continued existence will be reconsidered. In *Bloom v. Illinois*,³⁵² the Court, breaking with long-standing precedent to hold that the right to trial by jury applied to cases of criminal contempt, stated:

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.³⁵³

Perhaps the Court will someday recognize that the summary contempt power itself is totally repugnant to those self-same, centuries-old, "institutionalized procedures." Until that time, however, the power will stand out as a stigma on the face of a judicial system that purports to administer justice impartially.

³⁵¹ *Codispoti v. Pennsylvania*, 418 U.S. 506, 524 (1974) (dissenting opinion).

³⁵² 391 U.S. 194 (1968).

³⁵³ *Id.* at 208.