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Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury

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LIMITING THE CRIMINAL CONTEMPT POWER: NEW ROLES FOR THE PROSECUTOR AND THE GRAND JURY

Richard B. Kuhns

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LIMITING THE CRIMINAL CONTEMPT POWER: NEW ROLES FOR THE PROSECUTOR AND THE GRAND JURY

*Richard B. Kuhns**

Two factors distinguish the courts' criminal contempt power¹ from the power to prosecute individuals for ordinary criminal violations. The first and most important distinction is that the contempt power, in theory, is inherent in the courts and therefore not dependent upon legislative authorization.² The rationale for an inherent judicial contempt power is necessity: A court must have the power, as an incident of its existence, to protect itself against abuses and to vindicate its authority.³ The second distinction, a corollary of the inherent power doctrine, is that courts may exercise the contempt power in a relatively summary manner. Some contempts are summary in the sense that the court may charge and convict the contemnor without any prior notice or hearing.⁴ This departure from traditional notions of due process is justified on the ground that the court must act immediately in order to vindicate its authority.⁵ Other contempts are summary only in the sense that the contemnor, while entitled to prior notice and hearing, is not entitled to all of the procedural protections available in ordinary criminal prosecutions.⁶ In these cases the asserted justification for

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1. For the distinctions between criminal and civil contempt, see text at notes 149-73 *infra*.

2. *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42 (1924); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1837). See generally J. FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927); R. GOLDFARB, *THE CONTEMPT POWER* (1963); 1 NATIONAL COMM. ON REFORM OF FED. CRIMINAL LAWS, *WORKING PAPERS* 601-03, 643 (1970) [hereinafter *WORKING PAPERS*].

3. *Wood v. Georgia*, 370 U.S. 375, 383 (1962); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

4. See, e.g., *Comstock v. United States*, 419 F.2d 1128 (9th Cir. 1969); *United States v. Hall*, 176 F.2d 163 (2d Cir.), *cert. denied*, 338 U.S. 851 (1949).

5. See *Harris v. United States*, 382 U.S. 162, 164-65 (1965).

6. See *Green v. United States*, 356 U.S. 165, 184-87 (1958). But cf. *Bloom v. Illinois*, 391 U.S. 194, 201-08 (1968).

treating criminal contempts differently from ordinary criminal prosecutions is that the inherent nature of the contempt power gives the contempt offense a sui generis character.⁷

This article will briefly describe the development and scope of the law of criminal contempt,⁸ and then turn to the question of whether the current exercise of the power is consistent with the rationale for its existence. The analysis will suggest not only that the answer to this question in many instances is negative, but also that substantial benefits would result from requiring that criminal contempts be treated as ordinary criminal prosecutions.

At the outset, it is important to note three limitations on the scope of this article. First, analysis is limited primarily to situations in which some form of prior notice and hearing is required before applying a criminal contempt sanction. Second, although the criminal contempt sanction may be invoked to deal with such diverse conduct as disruption of judicial proceedings,⁹ violations of orders prohibiting dissemination of pre-trial information,¹⁰ violations of

7. See *Myers v. United States*, 264 U.S. 95 (1924); *United States v. Barnett*, 346 F.2d 99 (5th Cir. 1965).

8. Several Supreme Court opinions deal at length with the nature and scope of the contempt power. *E.g.*, *Green v. United States*, 356 U.S. 165, 193-219 (1958) (Black, J., dissenting); *Sacher v. United States*, 343 U.S. 1, 23-42 (1952) (Frankfurter, J., dissenting); cases cited note 150 *infra*.

Although slightly dated in parts, the best contemporary work on the law of contempt is R. GOLDFARB, *supra* note 2. See also J. Fox, *supra* note 2; Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971); Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); Note, *Procedures for Trying Contempts in the Federal Courts*, 73 HARV. L. REV. 353 (1959).

The contempt power includes the power to impose both criminal and civil contempt sanctions. However, except for pointing out that adoption of the recommendations made here will have the benefit of eliminating confusion that sometimes exists over whether a contempt proceeding is civil or criminal, see text at notes 149-75 *infra*, this article deals solely with the criminal contempt power.

9. See, *e.g.*, *United States v. Hall*, 176 F.2d 163 (2d Cir.), *cert. denied*, 338 U.S. 851 (1949). See generally N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT* (1973).

10. See, *e.g.*, *United States v. Dickinson*, 465 F.2d 496 (5th Cir.), *on remand*, 349 F. Supp. 227 (M.D. La. 1972), *aff'd.*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

In England, the contempt power is commonly used to deal with prejudicial or unflattering publications about judicial proceedings. See generally G. BORRIE & N. LOWE, *THE LAW OF CONTEMPT* (1973). However, in the United States the availability of the contempt sanction for this purpose is limited by the first amendment. See *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). On the problem of balancing the rights of fair trial and free press, see A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* (1967); Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401 (1928); Committee of the Judicial Conference of the United States on the Operation of the Jury System, *Recommendations on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1969).

labor injunctions,¹¹ and failure to pay alimony or support,¹² the analysis and recommendations made here rest in part on practical considerations that are explored in only one setting: the refusal of a witness to testify.¹³ The article suggests that these practical considerations are probably the same in nonwitness cases, but no attempt is made to verify this hypothesis. Instead, the article sets forth alternative methods for implementing its proposals that take into account the possible inapplicability of these practical considerations to some types of contumacious conduct. Finally, because both the substantive and procedural aspects of contempt vary somewhat among jurisdictions,¹⁴ the discussion is limited to federal practice. Nonetheless, the principles and recommendations set forth here should be generally applicable to both state and federal jurisdictions.

I. SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON THE EXERCISE OF CRIMINAL CONTEMPT POWER

A. *The Substantive Scope of the Power*

The first significant challenge in this country to the exercise of criminal contempt power grew out of a federal judge's decision in 1826 to punish without prior notice or hearing an individual who had published an article critical of pending judicial proceedings. The public furor over this perceived abuse of power led to the impeachment of the judge, James Peck.¹⁵ Although Peck was ultimately acquitted, the incident moved Congress in 1831 to limit the categories of conduct subject to the courts' contempt power.¹⁶ Those

11. See, e.g., *United States v. UMW*, 330 U.S. 258 (1947). See Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. CHI. L. REV. 255 (1972).

12. See, e.g., *Ex parte Preston*, 162 Tex. 379, 347 S.W.2d 938 (1961). See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 465-71 (1968).

13. See, e.g., *United States v. Di Mauro*, 441 F.2d 428 (8th Cir. 1971).

14. Compare D'Auria & Corcoran, *Statutes of New York and Some Aspects of Criminal Contempt Proceedings*, 6 NEW ENG. L. REV. 163 (1971); Ellis, *The Contempt Powers of Tennessee Courts*, 37 TENN. L. REV. 538 (1970); Ricketts, *Direct Contempt in Oklahoma*, 26 OKLA. L. REV. 359 (1973); Snepp, *The Law of Contempt in North Carolina*, 7 WAKE FOREST L. REV. 1 (1970). See also Annot., 89 A.L.R.2d 1258 (1963) (relationship between perjury and contempt in various jurisdictions).

15. A full transcript of the impeachment proceedings before the House and the Senate appears in A. STANSBURY, *REPORT OF THE TRIAL OF JAMES H. PECK* (1833).

16. Act of March 2, 1831, ch. 99, 4 Stat. 487, as amended, 18 U.S.C. § 401 (1970). After defining the courts' contempt power, the 1831 act, in section 2, treated other obstructions of justice as ordinary criminal offenses. Section 2, as amended, is now 18 U.S.C. § 1503 (1970). See *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969). For the legislative history of section 401, see 7 CONG. DEB. 560-61 (1831), quoted in Frankfurter & Landis, *supra* note 8, at 1026 n.75. See also *Green v. United States*, 356

limitations are now set forth in 18 U.S.C. § 401, which provides that a federal court may "punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . [and] (3) [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."¹⁷

The Supreme Court, while continuing to maintain that the exercise of judicial contempt power is not dependent upon legislative authorization,¹⁸ has recognized that to some extent Congress may regulate the power,¹⁹ and section 401 has been viewed as an appropriate legislative regulation.²⁰ This judicial deference to section 401 has manifested itself primarily in two contexts. First, the Supreme Court has held that to fall within section 401(1) the misbehavior must occur within the geographic proximity of the court.²¹ Second, although several reported cases have upheld without discussion the combined sanction of a fine and a prison sentence,²² the Supreme Court²³ and most lower courts²⁴ have adhered to section 401's limitation of the penalty to fine or imprisonment.²⁵

U.S. 165, 168-73 (1958); *Nye v. United States*, 313 U.S. 33, 45-49 (1941); *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969); R. GOLDFARB, *supra* note 2, at 20-22; Frankfurter & Landis, *supra*, at 1024-38; Nelles & King, *supra* note 10, at 525-32.

17. Section 401(2) permits a court to punish "[m]isbehavior of any of its officers in their official transactions" Contempt charges are rarely based on section 401(2), which has been narrowly interpreted by the Supreme Court. See *Cammer v. United States*, 350 U.S. 399 (1956) (attorney is not an officer of the court).

18. See cases cited note 2 *supra*.

19. *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42 (1924); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904).

20. See *Bloom v. Illinois*, 391 U.S. 194, 203-04 (1968); *Nye v. United States*, 313 U.S. 33, 47-48 (1941); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904).

21. *Nye v. United States*, 313 U.S. 33 (1941). The contempt, however, need not occur in the presence of a judge. For example, the grand jury is considered an arm of the court, and contumacious conduct before it has been held to satisfy the presence requirement of section 401(1). See, e.g., *Carlson v. United States*, 209 F.2d 209 (1st Cir. 1954) (dictum); *In re Michael*, 146 F.2d 627 (3d Cir.), *revd. on other grounds*, 326 U.S. 224 (1945); *In re Ellison*, 133 F.2d 903 (3d Cir.), *cert. denied*, 318 U.S. 791 (1943); *Camarota v. United States*, 111 F.2d 243 (3d Cir.), *cert. denied*, 311 U.S. 651 (1940).

22. E.g., *United States v. Mensik*, 440 F.2d 1232 (4th Cir. 1971); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

23. *In re Bradley*, 318 U.S. 50 (1943).

24. E.g., *Philipps v. United States*, 457 F.2d 1313 (8th Cir. 1972); *United States v. Temple*, 372 F.2d 795 (4th Cir. 1966), *cert. denied*, 386 U.S. 961 (1967); *Carter v. United States*, 135 F.2d 858 (5th Cir. 1943). Cf. *MacNeil v. United States*, 236 F.2d 149, 154 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956).

25. Cf. 18 U.S.C. § 402 (1970), which provides a statutory right to jury trial and limits the potential contempt penalty to six months' imprisonment or \$1,000, or both, in cases in which (1) the conduct constitutes a criminal offense under some statute other than section 401, and (2) the contempt (a) does not occur in the presence of the

B. Criminal Contempt Procedures

For contempts falling within section 401, the Federal Rules of Criminal Procedure retain the prior judicial practice²⁶ of denying prior notice and hearing only when the contemnor's conduct occurs in the immediate view of the judge. Rule 42(a) provides that a criminal contempt "may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it occurred in the actual presence of the court."²⁷ All other contempts are governed by rule 42(b), which requires prior notice and hearing.

Occasionally notice is given by the return of a grand jury indictment, and no court has disapproved this practice.²⁸ Rule 42(b),

court or so near thereto as to constitute an obstruction of justice and (b) is not committed in violation of a lawful order issued in an action brought in behalf of the United States.

26. See *Ex parte Terry*, 128 U.S. 289 (1888). Cf. *Cooke v. United States*, 267 U.S. 517 (1925).

27. FED. R. CRIM. P. 42:

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

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

It is important to note that rule 42 is solely procedural. Confusion over this point occasionally arises because much contempt litigation concerns the appropriate scope of the summary procedures authorized by rule 42(a) rather than the substantive content of the offense. See, e.g., *Harris v. United States*, 382 U.S. 162 (1965).

28. See *United States v. Mensik*, 440 F.2d 1232, 1234 (4th Cir. 1971) (contention that use of indictment violates rule 42 without merit); *United States v. Sternman*, 415 F.2d 1165, 1168 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970) (implicit approval of use of indictment by rejection of contention that notice in indictment was insufficient). Cf. *United States v. Consolidated Productions, Inc.*, 326 F. Supp. 603 (C.D. Cal. 1971); *United States v. Cantillon*, 309 F. Supp. 700 (C.D. Cal. 1970).

There is also limited precedent for utilization of an information to initiate criminal contempt proceedings. See, e.g., *United States v. Dean Rubber Mfg.*, 72 F. Supp. 819 (W.D. Mo. 1947). However, the use of an information has not received explicit judicial approval, and in some instances the information has been treated merely as the equivalent of an application for an order to show cause rather than as an independent initiating document. Cf., e.g., *O'Malley v. United States*, 128 F.2d 676, 681 (8th Cir. 1942), *rev'd. on other grounds sub nom. Pendergast v. United States*, 317 U.S. 412 (1943).

however, makes no reference to this method of initiating criminal contempt proceedings, and instead provides that notice shall be given orally by the judge or by a written order of arrest or—as is usually the case²⁹—by an order to show cause.

Formerly, despite rule 42(b)'s limitations on the power to punish contempts without notice and hearing, grand jury witnesses who refused to testify were often denied even these minimal rights through the simple expedient of convening the grand jury in the judge's presence and having the witness repeat his refusal. The Supreme Court explicitly sanctioned this practice in 1959,³⁰ but reversed itself six years later in *Harris v. United States*.³¹ In *Harris* the Court noted that the summary procedures under rule 42(a) should be reserved for exceptional cases of misconduct that require immediate judicial action,³² and most courts have interpreted rule 42(a) narrowly in cases subsequent to *Harris*.³³ The Court's recent holding in *United States v. Wilson* that rule 42(a) can be used to punish a witness who refuses to testify at trial, although the refusal is neither disrespectful nor physically disruptive,³⁴ may, however, signal a reversal of this trend.

29. See, e.g., *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Green v. United States*, 356 U.S. 165 (1958). Cf. *Cooke v. United States*, 267 U.S. 517, 534 (1925).

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

31. 382 U.S. 162 (1965).

32. 382 U.S. at 164 (e.g., "acts threatening the judge or disrupting a hearing or obstructing court proceedings").

33. See, e.g., *United States v. Meyer*, 462 F.2d 827 (D.C. Cir. 1972). Cf. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Ciraolo v. Madigan*, 443 F.2d 314 (9th Cir. 1971).

34. No. 73-1162 (U.S., May 19, 1975).

Although the First Circuit had reached the same conclusion, *Baker v. Eisenstadt*, 456 F.2d 382 (1st Cir.) (dictum), cert. denied, 409 U.S. 846 (1972), the Second Circuit, relying on *Harris*, had held that rule 42(a) could not be used to punish a witness' orderly refusal to testify during a trial. *United States v. Wilson*, 488 F.2d 1231 (2d Cir. 1973), rev'd. No. 73-1162 (U.S., May 19, 1975); *United States v. Marra*, 482 F.2d 1196 (2d Cir. 1973); *United States v. Pace*, 371 F.2d 810 (2d Cir. 1967). Cf. *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In *Wilson*, the Court distinguished *Harris* on the theory that there is a greater need for immediate action to coerce testimony in a trial setting than in a grand jury setting: "*Harris* . . . recognized . . . that summary punishment may be necessary where a 'refusal [is] . . . an open serious threat to orderly procedure.' [H]ere [the refusal] plainly constituted a literal 'breakdown' of the prosecutor's case." No. 73-1162, slip. op. at 9-10. But, cf. *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (coercive purpose of contempt action renders it civil rather than criminal). The Court also noted that rule 42 was "a restatement of the law existing when the rule was adopted" and that "the law at that time allowed summary punishment for refusals to testify." No. 73-1162, slip. op. at 8.

For an excellent discussion of pre-*Wilson* Supreme Court cases interpreting the scope of rule 42(a), see *United States v. Meyer*, 462 F.2d 827 (D.C. Cir. 1972). For the view that the rule 42(a) summary criminal contempt power should be abolished, see N. DORSEN & L. FRIEDMAN, *supra* note 9, at 232-38. For the proposition that due process

Criminal contempt cases outside the scope of rule 42(a) have focused on the applicability of specific procedural guarantees available in ordinary criminal prosecutions. As early as 1822 the Supreme Court explicitly recognized that there were substantial similarities between criminal contempts and other crimes.³⁵ In 1911 the Court held that an individual charged with criminal contempt is presumed innocent until proved guilty beyond a reasonable doubt, and that he has the right not to be a witness against himself.³⁶ Three years later, noting that criminal contempt is a crime unless "we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech," the Court held that criminal contempt was an "offense" for the purposes of a three-year statute of limitations applicable to all "criminal offenses."³⁷ In 1925 the Court held that, unless the contempt occurs in the immediate view of the court, the contemnor is entitled to prior notice, a hearing, representation by counsel, and the opportunity to present and examine witnesses.³⁸ Other cases have held that the rules of evidence for criminal trials apply to criminal contempts,³⁹ and that the contemnor has the right to a public trial before an impartial judge,⁴⁰ a bill of particulars,⁴¹ and the right to confront and cross-examine witnesses.⁴²

Nevertheless, the analogy between criminal contempts and crim-

requires notice and hearing in all criminal contempt cases, see Note, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CAL. L. REV. 463 (1966); *Brief for Petitioner at 47-58*, *Taylor v. Hayes*, 418 U.S. 488 (1974).

35. *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42-43 (1822). Cf. *Bloom v. Illinois*, 391 U.S. 194 (1968); *New Orleans v. Steamship Co.*, 87 U.S. (20 Wall.) 387 (1874); *Creekmore v. United States*, 237 F. 743 (8th Cir. 1916).

36. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). Cf. *Nilva v. United States*, 352 U.S. 385 (1957); *United States v. Jose*, 63 F. 951 (C.C.N.D. Wash. 1894).

37. *Gompers v. United States*, 233 U.S. 604, 610 (1914). Cf. *Pendergast v. United States*, 317 U.S. 412 (1943).

The statute of limitations for criminal contempt actions is now five years unless the contempt is instituted pursuant to 18 U.S.C. § 402, see note 25 *supra*, in which case the period is one year. 18 U.S.C. §§ 3282, 3285 (1970).

38. *Cooke v. United States*, 267 U.S. 517 (1925).

39. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Nilva v. United States*, 352 U.S. 385 (1957); *United States v. Bukowski*, 435 F.2d 1094, 1104-07 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

40. *Offutt v. United States*, 348 U.S. 11 (1954); *In re Oliver*, 333 U.S. 257 (1948). But cf. *Levine v. United States*, 362 U.S. 610 (1960).

41. *United States v. Balaban*, 26 F. Supp. 491 (N.D. Ill. 1939); *Conley v. United States*, 59 F.2d 929 (8th Cir. 1932).

42. See *In re Oliver*, 333 U.S. 257 (1948); *United States v. Seale*, 461 F.2d 345, 372 (7th Cir. 1972).

inal prosecutions has never been complete. Most of the cases granting rights to criminal contemnors were based either on statutory construction⁴³ or on notions of due process,⁴⁴ and not on the theory that the rights were guaranteed by the provisions in the Bill of Rights specifically applicable to "crime[s]" or "criminal prosecutions." In fact, as late as 1958 the Supreme Court affirmed that contempts are not ordinary crimes but are *sui generis*, and held that criminal contemnors are not entitled to a grand jury indictment or trial by jury.⁴⁵

The Supreme Court subsequently reversed itself on the latter point and held that a criminal contemnor may not be incarcerated for more than six months without having had or waived a jury trial.⁴⁶ The six-month limitation was derived by analogy to the rule that jury trials are not constitutionally required for petty offenses.⁴⁷ While unwilling to hold that violations of section 401, which has no maximum penalty, are inherently nonpetty, the Court took the position that the imposition of more than a six-month penalty demonstrated that the particular contempt was not petty.⁴⁸ Thus, in crim-

43. *E.g.*, *Gompers v. United States*, 233 U.S. 604 (1914) (statute of limitations).

44. *E.g.*, *Cooke v. United States*, 267 U.S. 517 (1925) (right to counsel).

45. *Green v. United States*, 356 U.S. 165, 183-87 (1958).

46. *Bloom v. Illinois*, 391 U.S. 194 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (dictum).

47. *District of Columbia v. Clawans*, 300 U.S. 617 (1937). See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

Congress has defined a petty offense as one for which the maximum statutory penalty does not exceed six months' imprisonment or a \$500 fine, or both, 18 U.S.C. § 1(3) (1970), and the Supreme Court, without specifically adopting this definition as a constitutional test, has repeatedly emphasized the six-month imprisonment factor in recent cases dealing with the right to jury trial. See *Frank v. United States*, 395 U.S. 147 (1969); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). But cf. *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) ("we need not, however, settle in this case the exact location of the line between petty offenses and serious crimes"). For the proposition that other definitions of petty offenses would be more appropriate for constitutional purposes, see Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 68-78 (1963); Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. REV. 445, 453-56 (1965).

48. Regardless of whether one is dealing with ordinary criminal statutes that limit potential imprisonment to six months or with section 401 contempts, there are two problems created by the Supreme Court's focus on potential or actual prison sentences to determine whether the defendant is entitled to a jury trial. First, if a defendant is convicted of several offenses, none of which alone would require trial by jury, is it appropriate to deny a jury trial and, at the same time, impose an aggregate sentence exceeding six months' imprisonment? Second, even if there is a statutory limit of six months' imprisonment, or if in a section 401 contempt proceeding no jail sentence is imposed, is the defendant entitled to a jury trial in the former case if the statute *permits* a substantial fine or in either case if a substantial fine is in fact imposed? On the aggregation problem, see *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (aggregate jail sentence exceeding six months' imprisonment may

inal contempt cases a judge must now either grant the defendant a jury trial or limit the sanction to six months' imprisonment.⁴⁹

Although the six-month qualification is not inconsistent with the jury trial mandates of article III, section 2, and the sixth amendment, the Court initially grounded the right only on the Court's supervisory power over federal criminal procedures.⁵⁰ Two years later the right was elevated to constitutional status.⁵¹

At a time when the notions of inherent judicial contempt power and the sui generis character of contempt proceedings justified substantial procedural differences between criminal contempts and ordinary criminal offenses, it would have been futile to suggest that courts were not justified in exercising their inherent contempt power.⁵² This was true even a few years ago, when a recalcitrant grand jury witness could be convicted of contempt without a hearing and when no contemnor had the constitutional right to a jury trial. Now, however, except for the limited category of cases within rule 42(a), the only significant difference between procedures for criminal contempts and for other criminal prosecutions is that the former need not be initiated by information or grand jury indictment.⁵³ It is therefore appropriate to ask to what extent the inherent

not be imposed for multiple contempts arising during a single trial, charged by a single judge, and tried in a single proceeding). On the fine problem, see *United States v. R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971) (fine cannot exceed \$500 unless defendant is given right to jury trial). *But see Hoffman v. Local 10, Intl. Longshoremen's & Warehousemen's Union*, 492 F.2d 929 (9th Cir. 1974), *cert. granted sub nom. Muniz v. Hoffman*, 43 U.S.L.W. 3280 (U.S. Nov. 12, 1974) (No. 73-1924). *See also In re Local 225, Puerto Rico Newspaper Guild*, 476 F.2d 856 (1st Cir. 1973).

49. On the problems relating to prejudging the severity of the potential sentence, see text at notes 227-29 *infra*.

50. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

51. *Bloom v. Illinois*, 391 U.S. 194 (1968). Because *Bloom* arose out of a state court contempt proceeding, its holding was necessarily based on the due process clause of the fourteenth amendment rather than the sixth amendment jury trial right. The Court in *Bloom*, however, clearly indicated that it would reach the same result in a federal contempt case. 391 U.S. at 209-10. *See Williams v. Florida*, 399 U.S. 78 (1970); *Baldwin v. New York*, 399 U.S. 66 (1970), suggesting that the scope of the due process right to a jury trial is the same as the scope of the sixth amendment right.

52. The absence of procedural guarantees was of much more immediate concern to contemnors, and anyone attempting to persuade a court to limit its power would undoubtedly feel more secure analogizing contempts to other crimes for the purpose of securing specific procedural rights than he would feel challenging the well-established doctrine of inherent power.

53. See text at notes 35-51 *supra*. *See also Bloom v. Illinois*, 391 U.S. 194, 201-08 (1968).

There may be some other procedural differences, but they are relatively minor. *See United States v. Robinson*, 449 F.2d 925 (9th Cir. 1971); *United States ex rel. Bowles v. Seidmon*, 154 F.2d 228 (7th Cir. 1946); *Conley v. United States*, 59 F.2d 929 (8th Cir. 1932) (all indicating that notice to contemnor may be judged by stan-

power rationale justifies a unique initiating process for criminal contempts. In the absence of a sufficient justification, there is no basis for treating criminal contempts as other than ordinary criminal prosecutions—not because the right to an information or indictment is fundamental,⁵⁴ but because, in the absence of any basis for characterizing criminal contempts as *sui generis*, they should be viewed as ordinary criminal cases within the meaning of the fifth amendment's guarantee of a grand jury indictment as well as all other constitutional⁵⁵ and nonconstitutional⁵⁶ provisions generally applicable to crimes and criminal prosecutions.

dards less strict than those applied to indictments). *But see* *United States v. Schine*, 125 F. Supp. 734 (W.D.N.Y. 1954); *Bowles v. Bullock*, 5 F.R.D. 147 (D. Del. 1945). *See also* *Gelbard v. United States*, 408 U.S. 41, 74 (1972) (Rehnquist, J., dissenting), suggesting that pre-trial discovery may be more limited in contempt cases than in ordinary criminal prosecutions. *But cf.* cases cited note 41 *supra*.

54. *See* *Hurtado v. California*, 110 U.S. 516 (1884).

55. *E.g.*, the fifth amendment prohibition against double jeopardy and the sixth amendment rights to counsel. *See* text at notes 179-84 *infra* (double jeopardy); text at note 44 *supra* (right to counsel).

56. *E.g.*, FED. R. CRIM. P. 3, 4, 5, 7(a), 9. Rule 7 provides for initiation of ordinary criminal prosecutions by indictment or information, and rules 3 through 5 set forth the complaint, summons, warrant, and initial appearance procedures for cases in which the summons or warrant precedes the formal initiation of proceedings. Rule 9 deals with the form, execution, service, and return of summonses and warrants issued after the return of an indictment or information.

Several courts have equated an application for an order to show cause with an information. *See, e.g.*, *United States v. Sanders*, 196 F.2d 895 (10th Cir.), *cert. denied*, 344 U.S. 829 (1952); *Philippe v. Window Glass Cutters League*, 99 F. Supp. 369 (W.D. Ark. 1951). However, since a court presumably has discretion to deny the application even if probable cause exists, *see* text at notes 62-63 *infra*, the application does not represent a formal decision to proceed with the contempt action. Rather, the application is more analogous to the filing of a criminal complaint, which may or may not result in an official decision to prosecute. The critical issue is not, however, the method by which the charge is made, but the method of making the formal decision to act on the charge. If one rejects the premise that it is appropriate to utilize the indictment or information process rather than rule 42 for the formal initiation of criminal contempt cases, there would be no reason to utilize the charging procedures in rules 3 through 5. If the premise is accepted, as this article will argue it should be, a major distinction that now exists between criminal contempt proceedings and other criminal prosecutions will be eliminated, and failure to utilize the same charging procedures would be inconsistent with the assimilation of criminal contempt with other crimes.

The only potential problem in charging one with criminal contempt pursuant to rules 3 through 5 would be the question of the applicability of the rule 5(c) preliminary examination provision. That provision, which grants to defendants the right to a preliminary examination within 20 days of an initial appearance unless an information or indictment is filed prior to the date set for the examination, explicitly exempts petty offenses, and in the context of determining whether criminal contemnors have a constitutional right to a jury trial, the Supreme Court has taken the position that contempts are petty unless the sentence actually imposed exceeds six months' imprisonment. *See* text at notes 46-48 *supra*. This might suggest that criminal contemnors need not be given a preliminary examination, but that the failure to grant a preliminary examination in cases in which there is no indictment or information within 20 days of the charge will limit the contemnor's potential

II. ORDINARY CRIMINAL PROSECUTION AS AN ALTERNATIVE TO THE EXERCISE OF CRIMINAL CONTEMPT POWER

If criminal contempts were treated for all purposes as ordinary criminal prosecutions, there would be three important ramifications for the current law of contempt:

First, although courts have maintained that the exercise of the contempt power is not dependent upon authorizing legislation,⁵⁷ the ordinary criminal prosecution of a contemnor would become dependent upon the existence of a criminal statute proscribing his conduct.⁵⁸

Second, prosecutorial discretion in the initiation of criminal contempts would be transferred from the judiciary to the executive. Only the public prosecutor has the discretionary power to initiate or forgo an ordinary criminal prosecution.⁵⁹ If he decides to proceed, the court cannot dismiss the case without the prosecutor's consent unless further proceedings would violate some legal mandate.⁶⁰ In

penalty to a maximum of six months' imprisonment. This approach, however, might represent an unwarranted infringement on judges' sentencing discretion. The decision to deny a jury trial and thus to limit the potential contempt sentence is made by a judge, but the decision to deny a preliminary examination would be made by a magistrate. FED. R. CRIM. P. 5(c). Cf. text at notes 64-70 *infra*, discussing the possible effect of extending the grand jury indictment right to criminal contemnors. Unless one is willing to give magistrates this power, it would be desirable to amend rule 5(c) to clarify whether the preliminary examination right applies to all criminal contempts.

The possibility of serious contempt criminal penalties in some cases should be a sufficient basis for extending the preliminary examination right to all criminal contempts, and until rule 5(c) is so amended, it would be desirable for magistrates to assume that criminal contempts are not petty offenses, if only to avoid potential litigation over the issue. Since a defendant is entitled to a preliminary examination only if proceedings are not formally initiated prior to the date set for the hearing, it is not likely that extending the right to criminal contemnors will impose a significant burden on the judicial system. If the contumacious conduct occurs in the presence or is initially called to the attention of a prosecutor or grand jury, it is likely that an information or indictment will be returned prior to the defendant's initial appearance, and thus there would be no right to a preliminary examination. In cases in which the appearance occurs prior to the formal initiation of proceedings, the prosecutor could follow the common practice of making the preliminary examination right moot by formally initiating the case prior to the date set for examination. See *Hearings on the U.S. Commissioner System Before the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 127 (1965).

57. See cases cited note 2 *supra*.

58. There are no federal common-law crimes. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923).

59. See *United States v. Cox*, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963).

60. *United States v. Weinstein*, 452 F.2d 704 (2d Cir. 1971). Cf. *United States v. Gray*, 448 F.2d 164 (9th Cir. 1971).

contrast, a court may now both initiate criminal contempt proceedings on its own motion⁶¹ and refuse a request to initiate proceedings despite probable cause to believe that the contempt occurred.⁶² Furthermore, at least one case has held that a court may dismiss a criminal contempt proceeding after its initiation without the consent of the prosecutor on the basis of a discretionary determination that the dismissal is in the public interest.⁶³

Third, whereas the judiciary currently has complete discretion over the severity of a contempt sanction,⁶⁴ applying the fifth amendment's grand jury indictment provision to criminal contempts would allow both prosecutors and grand juries to have an impact on courts' sentencing discretion.⁶⁵ Since the right to an indictment exists only for crimes for which the statutory penalty exceeds one year's imprisonment,⁶⁶ and since the Supreme Court in the jury trial cases has been unwilling to view contempts as inherently nonpetty,⁶⁷ the right to a grand jury indictment presumably would not exist in all criminal contempt cases. However, just as the Court classified contempts as petty or nonpetty on the basis of the penalty actually imposed,⁶⁸ it presumably would also look to the actual penalty to determine the scope of the grand jury right.⁶⁹ Thus, a grand jury

61. *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971); *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967); *In re Fletcher*, 216 F.2d 915, 917 (4th Cir. 1954), *cert. denied*, 348 U.S. 931 (1955); *O'Malley v. United States*, 128 F.2d 676 (8th Cir.), *revd. on other grounds sub nom. Pendergast v. United States*, 317 U.S. 412 (1942). Cf. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949) (civil contempt).

62. *In re Sylvester*, 41 F.2d 231 (S.D.N.Y. 1930); *Ex parte McLeod*, 120 F. 130 (N.D. Ala. 1903).

63. *United States v. Barnett*, 346 F.2d 99 (5th Cir. 1965), *criticized in Note, Criminal Contempt: Federal Court's Power To Dismiss Proceeding Before Trial*, 66 COLUM. L. REV. 182 (1966).

64. *Green v. United States*, 356 U.S. 165, 182-83 (1958). Although the contemnor cannot receive more than a six months' sentence without "a jury trial or waiver thereof," *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966), it is the judge who has the power to grant or deny that right. See 384 U.S. at 382 (Harlan, J., dissenting).

65. It would also result in some delay, but the delay would be no more consequential in criminal contempt cases than in other criminal prosecutions. In cases now governed by rule 42(a), where immediate imposition of a penalty has been viewed as important, see text at note 5 *supra*, sentences cannot exceed six months' imprisonment. *Bloom v. Illinois*, 391 U.S. 194, 209-10 (1968). Therefore, the indictment right would not apply.

66. U.S. CONST. amend. V ("capital, or otherwise infamous crimes"). See *United States v. Moreland*, 258 U.S. 433 (1922); FED. R. CRIM. P. 7(a).

67. See text at note 48 *supra*.

68. See text at note 48 *supra*.

69. See *Bloom v. Illinois*, 391 U.S. 194, 211 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968).

(by refusing to return an indictment) or a prosecutor (by refusing to seek or sign⁷⁰ an indictment) could limit the potential maximum penalty to one year's imprisonment, and as a practical matter the limit could be imprisonment for six months. A judge perhaps would be reluctant to expend judicial resources on a jury trial if to do so would give him the option of adding only six months to the penalty that he could otherwise impose.

The remainder of this article will examine the justifications for continuing to treat criminal contempts differently from other criminal prosecutions in terms of these three factors.

A. *Independence of the Judiciary from the Legislature*

The judiciary, as an independent branch of the government, should have at least the powers necessary for it to function properly.⁷¹ These arguably include the power to define and determine penalties for affronts to its authority, both in the absence of any legislation proscribing contumacious conduct and also, perhaps, in situations in which existing legislation either does not proscribe certain conduct deemed contumacious by the judiciary or does not provide a penalty adequate to vindicate the courts' authority.⁷²

Although the proposition that power to vindicate the courts' authority through the imposition of criminal penalties must rest ultimately in the judiciary is not beyond dispute,⁷³ it need not be challenged here. That proposition can justify independent judicial action to define, initiate, and establish penalties for contempts only

70. See *United States v. Cox*, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

71. Courts have claimed inherent power to regulate a number of activities that are necessary for or related to the proper functioning of the judiciary. See, e.g., *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966) (inherent power to order payment from public funds of indigent defendant's appointed counsel); *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961) (inherent power to regulate practice of law). See also Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635 (1935); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965).

72. See, e.g., *Arnett v. Meade*, 462 S.W.2d 940 (Ky. 1971) (contempt statute limiting criminal penalty for refusal to testify to 30 dollars and 24 hours' imprisonment is an unconstitutional legislative infringement on courts' contempt power).

73. See R. GOLDFARB, *supra* note 2, at 284-308. Although Goldfarb does not deal specifically with the issue of the source of the power, most of his recommendations contemplate legislative action. He does suggest that courts should have a limited inherent right to quell disruptions through use of the contempt power. *Id.* at 299-300, 305-06. Even in these types of cases, however, the theoretical possibility that Congress may refuse to enact appropriate legislation arguably does not outweigh the danger that courts may not be sufficiently restrained in exercising a claimed inherent contempt power. See *id.* at 5-9. See also *Green v. United States*, 356 U.S. 165, 193-219 (1958) (Black, J., dissenting).

when the legislative provisions are inadequate, and that circumstance does not exist in the federal system. The Supreme Court has recognized that Congress can regulate the contempt power, and the Court has approved the present congressional limitations on the exercise of the power: The proscription in section 401 against imposing both a fine and a prison sentence is binding on the courts,⁷⁴ and courts may not exercise their inherent power under rule 42 to punish contumacious conduct that does not fall within the scope of section 401.⁷⁵ Contempts that do fall within that section, however, also may be initiated by indictment.⁷⁶ Thus, judicial fear of dependence upon the legislature cannot justify treating section 401 contempts differently from other criminal prosecutions.⁷⁷

The extent to which Congress could further limit the contempt power is admittedly uncertain. On the one hand, the Supreme Court has never struck down any congressional regulation of the contempt power, and, in fact, has suggested that Congress may have considerable latitude in regulating the contempt power of the circuit and district courts: "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 [now section 401] is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."⁷⁸ On the other hand, the Court affirmed

74. *In re Bradley*, 318 U.S. 50 (1943). Cf. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512 (1873).

75. *Nye v. United States*, 313 U.S. 33, 50-53 (1941).

76. See cases cited note 28 *supra*.

77. Several methods exist for implementing the goal of treating criminal contempts as ordinary criminal prosecutions. For example, instead of abandoning reliance on the inherent contempt power theory and holding that contempts should be viewed as ordinary crimes, the judiciary (retaining its claim to inherent contempt power) could exercise its discretion to refuse to initiate proceedings pursuant to rule 42 on the theory that initiation by indictment is an adequate alternative. See text at notes 200-04 *infra*. Although existing legislation clearly permits this alternative, it is unclear whether the legislation is sufficient to allow courts entirely to forgo reliance on the notion of inherent contempt power. See text at notes 205-06 *infra*, suggesting that section 401 may be only a statement of the courts' contempt power and that the indictment precedents merely represent a judicial acquiescence in prosecutors' and grand juries' requests for contempt proceedings. But see note 206 *infra*.

78. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1873).

Since the Supreme Court, unlike other federal courts, derives its power from the Constitution rather than from Congress, see U.S. CONST. art. III, § 1, Congress may not be able to regulate the Court's contempt power at all, or at least not to the same extent that it can regulate the contempt power of lower federal courts. See *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (by implication); Frankfurter & Landis, *supra* note 8.

This suggested distinction between constitutionally created and legislatively created courts has little practical bearing on the legislative power to regulate contempts in

in the same case that "the power to punish for contempts is inherent in all courts."⁷⁹ Furthermore, the existing restrictions on the courts' exercise of the contempt power are not substantial: Section 401 contains an extremely broad substantive definition of contempt⁸⁰ and prescribes no maximum penalty.

If the Court continues to maintain that the need to impose immediate penalties for contempts now punishable pursuant to rule 42(a) outweighs granting even the minimal due process protections of prior notice and hearing,⁸¹ it is doubtful that the Court would condone a congressional attempt to eliminate this summary power. Similarly, the Court may be reluctant to accept amendments to section 401 that would leave some types of contumacious behavior unpunishable.⁸² Hopefully, however, the Court would not object to the imposition of reasonable maximum penalties for various types of contumacious conduct now governed by section 401,⁸³ or to limitations on the possible use of rule 42(b) through the enactment of legislation that restricts the substantive scope of section 401 but allows conduct now covered by that section to be treated as an ordinary criminal offense.⁸⁴ The 1831 contempt legislation provides a

the federal system. The Supreme Court has exercised its contempt power only once. See *United States v. Shipp*, 203 U.S. 563 (1906). The distinction, however, has important implications for the power of state legislatures to regulate the contempt power of state trial courts, many of which are constitutionally created. See Kuhns, *Revising a State Judicial Article: Issues for the North Dakota Constitutional Convention*, 48 N.D. L. REV. 219, 225-26 (1972). Since the reasons for deciding whether to give a state court constitutional status are generally unrelated to the contempt regulation question, *id.* at 225-26, 236, the mere fact that a court was established by the state constitution rather than by the legislature does not necessarily justify limiting the extent to which its contempt power may be regulated.

79. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

80. Falco, *Federal Criminal Contempts and the Proposed New Federal Criminal Code*, 11 AM. CRIM. L. REV. 429, 432-33 (1973).

81. See note 34 *supra*.

82. Some types of conduct presently within section 401 are punishable under other criminal statutes. For example, attempting to influence or bribe a juror is both a specific criminal offense and a section 401 contempt. Compare *Kong v. United States*, 216 F.2d 665 (9th Cir. 1954) (criminal prosecution for violation of 18 U.S.C. § 1503), with *Higgins v. United States*, 160 F.2d 223 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 840 (1947) (contempt prosecution under 28 U.S.C. § 385 (1940), *as amended*, 28 U.S.C. § 401 (1970)).

83. See NATIONAL COMM. ON REFORM OF FED. CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE § 1341 (1971) [hereinafter PROP. FED. CRIM. CODE].

84. It is important to distinguish between these two types of legislation. On the one hand, the mere imposition of maximum penalties for violations of section 401 or the enactment of several statutes patterned after section 401 that define the courts' contempt power and prescribe various penalties for different types of conduct would appear not to affect the courts' initiating discretion or the availability of rule 42. The maximum penalty provisions, however, presumably would determine whether the contemnor would be entitled to a jury trial. See note 47 *supra*. On the other

precedent for the latter type of regulation,⁸⁵ and 18 U.S.C. § 402 provides a limited precedent for legislative imposition of maximum contempt penalties.⁸⁶ Neither type of legislation would appear to infringe upon the judiciary's interest in protecting its capacity to

hand, eliminating from the scope of section 401 conduct proscribed by other existing or concurrently enacted statutes that do not explicitly refer to the courts' contempt power would appear to represent a congressional judgment to limit the substantive scope of that power. Proceedings for violations of these statutes presumably could be initiated only by information or indictment, and the penalty provision of any such statute would determine not only whether the defendant is entitled to a jury trial, but also whether he is entitled to a grand jury indictment.

The Proposed New Federal Criminal Code recommends an unusual and somewhat puzzling combination of these two types of regulation. *See* PROP. FED. CRIM. CODE, *supra* note 83, §§ 1341-49. Section 1341, the basic criminal contempt statute, retains the substantive definition of the court's contempt power currently contained in section 401, but imposes a six-month maximum prison sentence. Presumably, proceedings for violations of this section could be initiated pursuant to rule 42. *See* WORKING PAPERS, *supra* note 2, at 601-03. The next four sections define as specific criminal offenses and provide slightly different maximum penalties for conduct that, to a substantial extent, also comes under section 1341: failure to appear (§ 1342); refusal to testify (§ 1343); hindering proceedings by disruptive conduct (§ 1344); and disobedience of a judicial order (§ 1345). Proceedings for violations of these sections apparently could be initiated only by information or indictment. *See* PROP. FED. CRIM. CODE, *supra*, § 1349; comments to *id.* §§ 1342-49. These provisions, however, apparently are not intended to limit the substantive scope of section 1341, *see* WORKING PAPERS, *supra*, at 610-11, 614-15, 621, 624, 625-26, and with limited exceptions, prosecutions for violations of these sections could not be initiated without judicial certification that the case is an appropriate one to consider for prosecution. PROP. FED. CRIM. CODE, *supra*, § 1349; WORKING PAPERS, *supra*, at 625-26. Furthermore, if such a certification is accompanied by a recommendation for prosecution, section 1349 requires the public prosecutor to proceed with the case. The stated reason for the certification requirement is to allow the judiciary to retain initiating discretion over contempts. WORKING PAPERS, *supra*, at 625-26.

Of the number of questions raised by these proposed statutes, *see* Falco, *supra* note 80; *cf.* note 213 *infra*, one is of particular concern for the purposes of this article: Is the requirement of prior judicial certification for the initiation of proceedings under sections 1342-45 an implicit rejection of the precedent for allowing initiation of criminal contempt proceedings by indictment without prior judicial approval? *See* note 28 *supra* and accompanying text. *But cf.* text at notes 205-06 *infra*. Although neither the Proposed Code nor the Working Papers specifically addresses this question, an affirmative answer would be consistent with the Code's general scheme of maintaining judicial control over the initiating decision. If the answer is affirmative, and if the proposed contempt provisions are adopted in their present form, they will have the undesirable consequence of perpetuating a basic and largely unnecessary distinction between criminal contempts and other crimes.

85. *See* text at notes 15-17 *supra*.

86. *See* note 25 *supra*. In a brief comment affirming that Congress can regulate the contempt power, the Supreme Court in *Bloom v. Illinois*, 391 U.S. 194, 196 n.1 (1968), stated that *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42 (1924), had upheld the constitutionality of both the jury trial and maximum penalty provisions of section 402. *Michaelson*, however, dealt solely with the jury trial provision, and although there is no reason to believe that the Court would not also have upheld the penalty provision, it is important to note that *Michaelson* stressed that section 402 covered only limited types of contempts, thereby implying that a similar jury trial—and perhaps maximum penalty—provision applicable to *all* contempts might not be upheld. 266 U.S. at 66-67. *But cf.* text at note 78 *supra*.

function as an independent branch of the government,⁸⁷ and as the following analysis will suggest, such legislative regulation would be beneficial.⁸⁸

There is no certainty that Congress would limit itself to these types of regulation or that the judiciary would reaffirm the view that Congress may impose substantial limits on the contempt power. However, the precedent for judicial deference to congressional action, and the fact that Congress has not in the past attempted unreasonably to restrict the contempt power, suggest that the judiciary probably will not be forced to confront Congress over the question whether the inherent power rationale or the *sui generis* character of the contempt offense limits Congress' power to legislate in this area. In any event, the fact remains that, at least for the present, the need for judicial independence from the legislature is not a valid basis for refusing to treat criminal contempts as ordinary criminal prosecutions.

B. *Independence of the Judiciary from the Executive: Initiation*

Since treating contempts as ordinary criminal prosecutions would transfer prosecutorial discretion in criminal contempt cases from the judiciary to the executive,⁸⁹ it is important to consider whether the judiciary has an interest that justifies reserving to itself the power to decide whether to initiate criminal contempt proceedings. Four factors, one or more of which may exist in any contempt situation, suggest that the judiciary may have such an interest: (1) an asserted need for immediate action pursuant to rule 42(a) when the conduct occurs in the immediate view of the court; (2) the notion that the judiciary is the party injured by the conduct; (3) the theory that contumacious conduct that violates a court order is qualitatively different from violations of criminal statutes; and (4) the fear that the public prosecutor will not be sufficiently responsive to contempts

87. *But cf.* WORKING PAPERS, *supra* note 2, at 625-26.

88. *See* text at notes 205-13, 249-56 *infra*.

89. In light of recent criminal and political activities commonly referred to as the Watergate scandal, *see* C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* (1974), it may appear unreasonable to suggest that any additional powers should be given to the executive branch. The following analysis, which argues that prosecutorial discretion over criminal contempts should rest with the executive rather than the judiciary, is based solely on the premise that criminal contempts should be treated as are all other criminal prosecutions. The analysis does not address itself to and does not intend to imply any conclusions about the extent to or manner in which prosecutorial discretion in general should be regulated or insulated from executive political control. *See also* note 100 *infra*.

of the courts' authority. The analysis here will be limited to a consideration of the last three factors.⁹⁰

1. *Injury to the Judiciary*

The fact that the purpose of the criminal contempt sanction is to vindicate the courts' authority implies that injury to judicial authority is a necessary condition for a court's initiation of contempt proceedings. In contempt cases, however, courts are often injured parties only in a secondary sense. For example, when an individual disobeys a court order to testify, the most immediate injury is to the party that would have benefited from the testimony. If the fact of injury is a relevant criterion for allocating discretion to initiate criminal contempts, the court's interest arguably is not as great as the interest of the person for whose benefit the order was granted.

In some situations (*e.g.*, when court proceedings are physically disrupted or, perhaps, when an individual refuses to appear before a court or grand jury) the court itself may appropriately be viewed as the primary injured party. Yet, even in these situations, the fact of injury, although it may be a necessary condition for invocation of the contempt power, is not a sufficient basis for giving the judiciary power to decide whether to initiate criminal contempt proceedings: The right to invoke proceedings that may lead to a punitive sanction is one appropriately exercised in the public interest and not for personal vindication.⁹¹ The only federal precedent

90. It would be possible to require that contempts now punishable without prior notice or hearing pursuant to rule 42(a) also be initiated by the executive. However, even if prosecutors were generally responsive to requests from judges for the initiation of contempt proceedings in these cases, such a requirement could entail an arguably unwarranted delay. It is true that contemnors subject to punishment without a hearing presumably would not be entitled to a grand jury indictment, *see* note 65 *supra*, and the preparation and filing of an information often could be completed in a few minutes. Still, if the need for immediate action is sufficient to justify denying a hearing, the risk of delay might override considerations favoring executive initiation.

An additional argument for not requiring executive initiation of such contempts concerns the danger of establishing a precedent denying a hearing to a defendant in a case that appears, at least at the outset, to be an ordinary criminal prosecution. That precedent might be used in other contexts to suspend or modify defendants' rights on the basis of an asserted need for immediate punishment, the fact that the judge personally observed the criminal conduct, or some similar factor. To avoid any potential erosion of procedural rights in other criminal prosecutions, it would be preferable either to eliminate completely the possibility of summarily imposing a contempt penalty or to maintain the unique rule 42(a) procedure.

91. *See generally* *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319-20 (5th Cir. 1969); *United States v. Cox*, 342 F.2d 167, 171, 182-83, 190-93 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Pugach v. Klein*, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961); F. MILLER, PROSECUTION: THE DECISION TO

suggesting a contrary view is the inherent power claimed by Congress to punish contempts of its authority.⁹² The validity of the congressional claim to this power, however, is not beyond dispute.⁹³ If the power does exist, it arguably is only a coercive power analogous to the judiciary's coercive *civil* contempt power.⁹⁴ Moreover, since the rationale for exercising inherent contempt power is necessity, any support that the congressional precedent may appear to give to the claim that injured parties should be able to initiate contempt proceedings is undermined by the fact that Congress in recent years has not attempted to exercise the power.⁹⁵ Rather, contempts of Congress are dealt with as ordinary criminal prosecutions.⁹⁶

Even if one were to conclude that all contempts injure the judiciary and that injured parties generally should be able to initiate criminal proceedings, this should not be a sufficient basis for allowing the judiciary to initiate criminal contempt proceedings. The Supreme Court has explicitly recognized that the ability of the judiciary to punish an affront to its authority poses a danger that the judgment may be unduly vindictive or based on a distorted view of the gravity of the offense: Rule 42(b) provides that "[i]f the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing"⁹⁷ Rule 42(b), however, does not offer protection against a judge's possible *institutional* bias, and to the extent that institutional injury is the rationale for treating contempts uniquely, the potential for institutional bias may be increased.

Whether institutional biases would be mitigated merely by placing the initiating function with the executive is admittedly open to

CHARGE A SUSPECT WITH A CRIME 9-10 (1969); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64 (1948). But cf. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955).

92. See generally C. BECK, *CONTEMPT OF CONGRESS* (1959); R. GOLDFARB, *supra* note 2, at 40-43.

93. The Supreme Court has approved of the congressional exercise of inherent contempt power. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). But see C. BECK, *supra* note 92, at 3-5; R. GOLDFARB, *supra* note 2, at 25-30.

94. Cf. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821). See also *Quinn v. United States*, 349 U.S. 155, 169 (1955). On the distinction between criminal and civil contempt, see text at notes 149-61 *infra*.

95. See R. GOLDFARB, *supra* note 2, at 43.

96. 2 U.S.C. § 192 (1970). See *Russell v. United States*, 369 U.S. 749 (1962). See also notes 212-13 *infra* and accompanying text, discussing the statutory obligation of the prosecutor to present contempts of Congress to a grand jury.

97. Cf. cases cited note 100 *infra*.

question. The prosecutor's close professional contact with the courts may make him reluctant to refuse a judge's request that he initiate a contempt action.⁹⁸ Still, the requirement of an independent, executive initiating decision would provide at least a theoretical check against possible bias, and, more importantly, the *absence* of any such check on judicial power, both to initiate proceedings against and to convict individuals who affront judicial authority, gives the exercise of contempt power the appearance of being potentially arbitrary and unfair. Unless there are other overriding considerations,⁹⁹ the initiating power over criminal contempts should be removed from the judiciary, if only to ensure that "justice . . . satisfy the appearance of fairness."¹⁰⁰

98. Alfred A. Arraj, Chief Judge of the United States District Court for the District of Colorado, has established a policy of having criminal contempts initiated by indictment because the order to show cause may not inform the defendant of the charge against him with the same degree of specificity as would an indictment. *Cf.* note 53 *supra*. Although only a few criminal contempt cases have arisen since the policy was instituted, federal prosecutors have not refused to seek an indictment in any case called to their attention by the court, and Judge Arraj expressed the view that such a refusal would be highly unlikely in light of the close working relationship between the court and the prosecutors. Interview with Judge Arraj, November 21, 1973, Denver, Colo. Federal prosecutors in Denver confirmed this view, and prosecutors in other cities agreed that the process of initiating criminal contempts by indictment would not be likely to create conflicts between the court and the prosecutor's office. *See* note 134 *infra*.

99. *See* note 90 *supra*.

100. *Offutt v. United States*, 348 U.S. 11, 14 (1954). *See also* *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Ungar v. Sarafite*, 376 U.S. 575, 578 (1964); *Green v. United States*, 356 U.S. 165, 198-99 (1958) (Black, J., dissenting); *In re Murchison*, 349 U.S. 133 (1955); R. GOLDFARB, *supra* note 2, at 254-57.

In some situations there is arguably an equal or greater potential for unfairness if the public prosecutor is vested with initiating discretion over criminal contempts. For example, when a prosecutor decides to initiate a contempt prosecution against a recalcitrant grand jury witness, the prosecutor, because of his direct interest in the grand jury proceedings, may be acting, or may appear to be acting, on purely vindictive motives. This possibility, however, should not be regarded as a sufficient basis for retaining initiating discretion over criminal contempts with the judiciary for at least three reasons. First, in terms of the *appearance* of fairness, retaining initiating discretion with the judiciary does not solve the problem but only maintains the appearance of judicial unfairness. Second, to the extent that one is concerned with actual unfairness or abuse of discretion by the prosecutor, retaining initiating discretion with the judiciary is not likely to be an effective remedy. *See* text at notes 144-48 *infra*. Third, the potential for prosecutorial unfairness or the appearance of unfairness may exist not only in some contempt cases but in any cases in which the prosecutor has or appears to have a personal or institutional interest in the proceedings. For example, the danger of unfairness on the part of the prosecutor is no greater in the case of a grand jury witness who refuses to testify than in the case of a grand jury witness who appears to commit perjury or in any case in which a member of the prosecutor's office is the victim of some criminal act.

The appropriate resolution of this problem is not to deprive the public prosecutor of initiating discretion over criminal contempts, but to develop standards and methods for regulating the prosecutor's discretionary power in all cases. *See generally* K. DAVIS, *DISCRETIONARY JUSTICE* (1969); F. MILLER, *supra* note 91. The general

2. *The Unique Nature of a Court Order*

Many criminal contempt cases result from the contemnor's refusal to obey a court order,¹⁰¹ and in one important respect the violation of a court order generally is treated differently from the violation of a criminal statute: If the statute is invalid, the invalidity will require the defendant's acquittal.¹⁰² If a court order is invalid, its violation may nonetheless be treated as contempt,¹⁰³ except where the court lacks jurisdiction to issue the order¹⁰⁴ or, perhaps, where the defendant has no opportunity to contest the validity of the order.¹⁰⁵ Thus, in *Walker v. City of Birmingham*,¹⁰⁶ the Supreme Court upheld the criminal contempt convictions of civil rights marchers who violated an injunction against demonstrating even though the language of the injunction—the validity of which was deemed collateral to the contempt proceeding and therefore not necessary to determine¹⁰⁷—“might be subject to substantial constitutional question.”¹⁰⁸ Had the defendants been convicted of violat-

problem of controlling prosecutorial discretion is beyond the scope of this article. Professor Davis, however, suggests the possible desirability of judicial review of decisions not to prosecute, K. DAVIS, *supra*, at 224-25, and the analysis here has argued that the judiciary is a particularly inappropriate body to exercise discretionary power to decide whether criminal contempt proceedings should be initiated. If federal courts develop the doctrine that refusals to prosecute are subject to judicial review, the question arises as to whether that doctrine should apply to criminal contempts as well as to other crimes. The answer should probably be affirmative—at least if the scope of judicial review is limited. Since the focus of inquiry would be on abuse of discretion rather than on injury to the judiciary, the potential for judicial bias or the appearance of unfairness probably would be minimal.

101. *E.g.*, *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) (enforcement of administrative agency's subpoena); *Harris v. United States*, 382 U.S. 162 (1965) (refusal to testify before grand jury); *United States v. UMW*, 330 U.S. 258 (1947) (labor dispute).

102. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Lovell v. Griffin*, 303 U.S. 444 (1938); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921). *Cf. Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

103. If the court has jurisdiction to issue the order, the validity of the order cannot be collaterally attacked in a criminal contempt proceeding. *Maness v. Meyers*, 43 U.S.L.W. 4143, 4146-47 (U.S. Jan. 15, 1975); *Howat v. Kansas*, 258 U.S. 181 (1922); *Western Fruit Growers, Inc. v. Gotfried*, 136 F.2d 98 (9th Cir. 1943). *See Cox, The Void Order and the Duty To Obey*, 16 U. CHI. L. REV. 86 (1948); *Rodgers, The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U. L. REV. 251 (1969); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

104. *In re Ayers*, 123 U.S. 443 (1887); *Ex parte Fisk*, 113 U.S. 713 (1885). *See* articles cited note 103 *supra*; *Maness v. Meyers*, 43 U.S.L.W. 4143 (U.S. Jan. 15, 1975).

105. *See Walker v. City of Birmingham*, 388 U.S. 307, 318-19; *Blasi, Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1555-72 (1970).

106. 388 U.S. 307 (1967).

107. 388 U.S. at 313-14, 320. *Cf.* note 103 *supra*.

108. 388 U.S. at 317. Justices Douglas, Warren, Brennan, and Fortas thought the

ing the parade ordinance on which the injunction was based, the invalidity of the ordinance would have required reversal.¹⁰⁹ However, since the trial court "[w]ithout question" had jurisdiction to issue the injunction,¹¹⁰ the contempt convictions were affirmed. The Court suggested that it might have reached the opposite conclusion only if the contemnors had not had an adequate opportunity to seek judicial review of the order prior to its violation.¹¹¹

Although this distinction between the consequences of violating invalid statutes and violating invalid court orders bears no necessary relationship to the process by which proceedings are initiated for either type of violation, it does suggest that the duty to obey court orders is more pervasive than the duty to obey statutes,¹¹² and to the

injunction was clearly unconstitutional. 388 U.S. at 334 (dissenting opinion). See also note 109 *infra*.

109. Two years after its decision in *Walker*, the Court unanimously reversed the convictions of defendants who had been prosecuted for violating the Birmingham parade ordinance. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

110. 388 U.S. at 315.

111. 388 U.S. at 318-19.

112. See Bickel, *Civil Disobedience and the Duty To Obey*, 8 GONZAGA L. REV. 199 (1973).

Professor Bickel draws a basic distinction between the duty to obey legislative commands and the duty to obey adjudicatory commands. Violations of legislative mandates, he contends, may sometimes be justified as legitimate acts of "law formation." *Id.* at 200. This would be the case, for example, if one violated a statute he thought was unconstitutional. Our legal system legitimizes this type of law violation by not punishing the violator if his theory of the law ultimately prevails. *Id.* at 200-01, 203. In contrast, Professor Bickel asserts that there is no justification for disobeying an adjudicatory mandate. For example, with regard to the defendants in *Walker*, he says:

If one is not under a moral obligation to obey at this point [after the issuance of the injunction], then the very possibility of any legal order at all . . . is placed in the gravest doubt. . . . Lack of assent to, and widespread disobedience of, a general law . . . may be a legitimate way of questioning it But disobedience of a court's judgment does not question the judgment, for it is, in theory and in practice, irreversible. Here disobedience questions the very legal order itself, which must in the end rest on something more than its power to coerce.

Id. at 212-13.

Although Professor Bickel relies heavily on the normative legal distinction between violations of invalid statutes and violations of invalid court orders, he does not rely on it exclusively to define the scope of what he considers legitimate law violation. For example, whereas an invalid criminal statute may be violated with impunity regardless of the violator's motives, Professor Bickel contends that such law violation is appropriate only if the violator acts "on grounds of moral or political principle," *id.* at 208, and he states that there "must, overall, be an imbalance on the side of obedience." *Id.* at 214. Professor Bickel, however, is less clear in distinguishing between the moral duty and the legal duty to obey court orders. For example, after citing *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922), for the proposition that even an invalid court order must be obeyed, he states that "[o]nly when the court's claim to authority is transparently frivolous, 'when a court is so obviously travelling outside its orbit as to be merely usurping judicial forms and facilities'; only then, in the case of an 'indisputable want of authority on the part of a court,' may an order be disobeyed." *Id.* at 212, quoting *United States v. UMW*, 330 U.S. 258, 309-10 (Frank-

extent that such a duty exists, there may be a symbolic value in utilizing different initiating procedures for the two types of violations. The analysis here will suggest that there may be no unique legal or moral duty to obey court orders, and that, even if such a duty exists, it should have no bearing on how contempt proceedings are initiated.

In *Walker* the Court implied that a contempt sanction for violating an invalid injunction may be justified by the fact that the mandate was issued by a court: "[I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."¹¹³ It is not clear, however, that the duty to obey invalid mandates rests

further, J., concurring) (footnotes omitted). Cf. Cox, *supra* note 103, at 109. To the extent that this statement is meant to be descriptive, it is inaccurate in two respects. First, it does not take account of the suggestion in *Walker* that lack of opportunity to challenge a court order may be a defense in a contempt proceeding to punish the violation, and, second, transparent frivolity has not been the exclusive test for determining whether a court has jurisdiction to issue the order. See cases cited note 118 *infra*; Cox, *supra* note 103, at 108. To the extent that Professor Bickel's statement is intended as one of moral principle, it leaves unanswered the question why such a duty should exist if there is no opportunity to challenge the validity of the order, see note 114 *infra*, or if there are reasonable grounds for challenging the court's jurisdiction. See text at notes 117-23 *infra*.

Since it is not clear whether Professor Bickel intended his statement to be one of moral principle, and since even the recognition of a greater moral or legal duty to obey court orders would not justify a unique initiating procedure for criminal contempts, see text at and following notes 125-26 *infra*, it is not necessary to dwell further on the nature and scope of the moral duty to obey court orders. The following analysis, however, will suggest that the legal duty to obey, as evidenced by the legal consequences of violating an invalid mandate, may not depend upon whether the mandate is legislative or adjudicatory. See notes 114-15 *infra* and accompanying text. If there is no unique legal duty to obey invalid court orders, the bases upon which Professor Bickel relies to support his distinction between the duty to obey adjudicatory mandates and the duty to obey legislative mandates would appear to be substantially undermined. Thus, in fairness to Professor Bickel, it is important to point out two factors that suggest that his views regarding the duty to obey are not necessarily inconsistent with the views expressed in this article. First, although he makes no explicit reference to the lack of opportunity for review dictum in *Walker*, he describes court orders as "final judicial decree[s] . . . issued against named individuals, following a trial to which they were parties," Bickel, *supra*, at 211 (emphasis added). Arguably, the italicized words define at least an implicit limitation on the scope of the duty to obey judicial orders. Second, although Professor Bickel's use of the term "law formation" to describe legitimate law violation and his reservation of that term for violations of nonadjudicatory mandates perhaps implies an exaggerated notion of the duty to obey court orders, the primary thesis of his article is not that all court orders must be obeyed, but that a commitment to the rule of law does not entail a moral duty to obey all laws. *Id.* at 211, 214. The establishment of this thesis does not require a detailed analysis of the scope of the duty to obey all adjudicatory mandates, and presumably Professor Bickel did not intend his observations to pass for such an analysis.

113. 388 U.S. at 320-21 (footnote omitted). But cf. *In re Berry*, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

solely, or even primarily, on whether they are of judicial origin. Rather, the critical issue may be whether there is an adequate opportunity for judicial review of the mandate prior to its violation. As noted previously, the *Walker* Court suggested that it might have reached a different result if the contemnors had not had an adequate opportunity to challenge the validity of the injunction,¹¹⁴ and it is arguable that the adequacy of pre-violation judicial review is—

114. See text at note 111 *supra*. See also *Thomas v. Collins*, 323 U.S. 516 (1945), reversing a contempt conviction on first amendment grounds where the defendant had made a speech in violation of an invalid restraining order served only hours before the speech was to be delivered. The injunction in *Thomas* had been issued to enforce a state statute requiring labor organizers to obtain a permit prior to soliciting membership, and in a habeas corpus proceeding challenging the contempt conviction, the state supreme court considered and rejected the merits of *Thomas*' constitutional claim, thereby implicitly disregarding any legal distinction between a violation of the statute and a violation of the injunction. *Ex parte Thomas*, 141 Tex. 591, 174 S.W.2d 958 (1943). The United States Supreme Court, recognizing that the case did not raise an issue of the state court's jurisdiction to issue an invalid order, treated the case as if the defendant had been prosecuted for violating the registration statute. 323 U.S. at 524-25 & n.7. Without relying specifically on the time factor, the Court reversed the conviction because the injunction represented an unconstitutional application of the statute. Thus, it is arguable that *Thomas* stands for the proposition that one may violate an unconstitutionally applied statute regardless of the availability of judicial remedies to test the validity of the application. Cf. *Blasi*, *supra* note 105, at 1562. Two factors, however, suggest that this is not an appropriate reading of *Thomas*. First, Justice Rutledge, the author of the plurality opinion, indicated in a later case that *Thomas* turned in large part on the lack of opportunity for judicial review. *United States v. UMW*, 330 U.S. 258, 351-52 (1947) (dissenting opinion). Second, in *Poulos v. New Hampshire*, 345 U.S. 395 (1953), the Court upheld the conviction of a defendant who violated a valid registration ordinance that had been unconstitutionally applied to him.

In *Poulos* the defendant had been arbitrarily denied a permit to hold a religious meeting, and although there were six weeks between the initial denial and the date scheduled for the meeting, the defendant decided to proceed with the meeting rather than pursue available remedies to challenge the denial. The majority mistakenly distinguished *Thomas* as a case holding the statutory scheme invalid on its face rather than as applied, see *Blasi*, *supra*, at 1561-62, and there is no explicit reliance on the fact that there were six weeks in which the defendant could have sought judicial review of the permit denial. Nonetheless, the Court's justification for the decision, which is strikingly similar to its justification for *Walker*, see text at note 113 *supra*, suggests that opportunity for judicial review is a critical factor in determining whether it is appropriate to resort to self-help in the face of an unconstitutionally applied mandate, whether or not the mandate is judicial: "[T]he expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the Rights of the First Amendment have a real and abiding meaning." 345 U.S. at 409. Cf. *Blasi*, *supra*, at 1568-72; *Ex parte Young*, 209 U.S. 123 (1908).

For other cases suggesting that at least a limited opportunity for judicial review may be a prerequisite to punishment for contempt in many circumstances, see *Carroll v. President & Commrs. of Princess Anne*, 393 U.S. 175 (1968); *In re Green*, 369 U.S. 689 (1962), discussed in *Walker*, 388 U.S. at 315 n.6 (majority opinion), 332-33 n.9 (Warren, C.J., dissenting), and in 56 CALIF. L. REV. 517, 522 (1968); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Alexander v. United States*, 201 U.S. 117, 121 (1906); *United States v. Di Mauro*, 441 F.2d 428 (8th Cir. 1971); *Carlson v. United States*, 209 F.2d 209 (1st Cir. 1954). See also 3 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 702, at 151-52 (1969, Supp. 1974).

or at least should be—determinative of whether an invalid statute may be violated with impunity.¹¹⁵

The extent to which availability of prior judicial review explains the consequences that flow from violating an invalid mandate is admittedly uncertain. The Supreme Court has never upheld a conviction based on a void statute, nor has it clarified its dictum in *Walker*.¹¹⁶ However, even if one concedes that there is or should be a unique duty to obey court orders, it is important to note that the legal duty to obey an invalid judicial mandate exists only if the court has jurisdiction to issue the order.¹¹⁷ Courts consistently have held that a judge lacks jurisdiction to order testimony that would violate a witness' privilege against self-incrimination,¹¹⁸ and in the

115. The availability of pre-violation review of a statute may often be inadequate regardless of the scope of review, merely because it is unreasonable to expect a potential criminal defendant to utilize the review procedures. See Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490, 1502-03 (1967). Where, however, the state has a legitimate interest in regulating conduct through, for example, a statutory licensing or permit scheme, the necessity for utilizing those procedures arguably should not depend upon whether the statutory scheme is void on its face, but upon the adverse effect that compliance would entail. Cf. note 116 *infra*. While invalidity of the statutory scheme should be considered in deciding whether the opportunity for review was adequate, it should not necessarily be conclusive. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), referred to in note 109 *supra*, where Justice Harlan based his concurring opinion specifically on the inadequacy of the opportunity for review and not on the facial invalidity of the statute. 394 U.S. at 159-64. See also Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 548-51 (1970).

116. In some instances it might be appropriate to punish an individual for violating an order even if there is no opportunity for judicial review. For example, violating a particular court order might substantially alter the position of the person for whose benefit it was issued, whereas obeying the injunction, even if invalid or beyond the court's jurisdiction, would not have a substantial adverse effect on the party enjoined. See, e.g., *Backo v. Local 281, United Bhd. of Carpenters & Joiners*, 308 F. Supp. 172 (1969), *affd.*, 438 F.2d 176 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). Cf. *United States v. UMW*, 330 U.S. 258, 311 (1947) (Frankfurter, J., concurring). Alternatively, there may be situations in which the rights infringed upon by the issuance of an invalid order are so important that one should be allowed to resort to self-help regardless of the opportunity for judicial review. See *Maness v. Meyers*, 43 U.S.L.W. 4143, 4147 (U.S. Jan. 15, 1975). But cf. 43 U.S.L.W. at 4151 (White, J., concurring); Blasi, *supra* note 105, at 1563.

If opportunity for judicial review is a prerequisite to the punishment of those who violate invalid court orders, the question remains as to how extensive the opportunity should be. For the proposition that the adequacy of the scope of review should turn in part on the nature of the rights infringed upon by the invalid order, see Blasi, *supra*, at 1559-72.

117. See cases cited note 104 *supra*.

118. The thought of punishing a witness for refusing to obey an order that violates the privilege against self-incrimination is apparently so abhorrent to courts that they rarely bother to mention the question of jurisdiction and instead proceed immediately to the merits of the fifth amendment claim. See, e.g., *Hoffman v. United States*, 341 U.S. 479 (1951); *Counselman v. Hitchcock*, 142 U.S. 547 (1892). But see *Maffie v. United States*, 209 F.2d 225, 226 (1st Cir. 1954) (criminal contempt) (court order violative of witness' fifth amendment right is not a "lawful order" within the meaning of section 401(3)); *Foot v. Buchanan*, 113 F. 156, 158 (C.C.N.D. Miss. 1902)

numerous recalcitrant witness contempt cases involving valid fifth amendment claims,¹¹⁹ the practical effect has been to treat violations of orders to testify no differently than violations of statutes.¹²⁰ In addition, although contemnors' jurisdictional challenges have seldom prevailed in non-witness cases,¹²¹ courts have not been consistent in distinguishing between orders that are merely invalid and orders that are beyond a court's jurisdiction.¹²² In situations in which this inconsistency raises a colorable claim of lack of jurisdiction—regardless of the legal consequences of violating the order—there would appear at least to be no unique *moral* obligation to obey the mandate merely because it is judicial. If one is justified in violating a statute to obtain judicial review of its constitutionality,¹²³ he should be equally justified in violating a court order to obtain review of the question of jurisdiction.

Despite present uncertainties over the nature of the duty to obey invalid judicial mandates, courts may begin to focus more clearly on the concept of jurisdiction and the relevance of an opportunity for pre-violation judicial review. If, as a result, it becomes clear that violations of invalid court orders—but not invalid statutes—are generally punishable, there is arguably a symbolic value in having a unique initiating procedure for contempts based on violations of court orders. Recognition of the principle that it is not appropriate to disobey court orders is particularly important in a society that openly condones violations of invalid legislative mandates. Especially if one perceives that those who may be prone to use self-help to advance their goals do not understand or appreciate this principle, a separate initiating process for criminal contempts may seem to be an appropriate, although admittedly somewhat obscure, device to

(civil contempt) ("Any exercise of jurisdiction or power violative of [the fifth amendment privilege against self-incrimination] is void, and the witness imprisoned by an order made in excess of the court's authority is entitled to be discharged . . ."). For the proposition that an order is "lawful" within the meaning of the contempt statute unless the court lacked jurisdiction to issue it, see Cox, *supra* note 103, at 87. Cf. *United States v. UMW*, 330 U.S. 258, 361 (1947) (Rutledge, J., dissenting). See also 56 CALIF. L. REV. 517, 520 (1968).

119. See, e.g., *Hoffman v. United States*, 341 U.S. 479 (1951); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. De Lucia*, 256 F.2d 493 (7th Cir. 1958); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *United States v. Cusson*, 132 F.2d 413 (2d Cir. 1942).

120. It is perhaps not inappropriate to regard the defendants in these cases as engaging in legitimate acts of law formation. See note 112 *supra*.

121. See, e.g., cases cited note 103 *supra*.

122. See Cox, *supra* note 103; Rodgers, *supra* note 103.

123. See note 112 *supra*.

illustrate the distinction between violations of court orders and violations of statutes.

The potential illustrative or symbolic value of a separate initiating process for criminal contempts also may assist in the development of criteria for determining whether to initiate contempt proceedings. The administration of criminal justice in general would be qualitatively improved if prosecutorial discretion were exercised on the basis of specified, articulable criteria.¹²⁴ Even if the executive and the judiciary would exercise prosecutorial discretion in contempt cases in a similar manner, the criteria for the exercise of that discretion arguably should be different in some respects from the criteria utilized in determining whether to initiate an ordinary criminal prosecution. For example, if a statute is so frequently violated that it no longer represents community values, or if an individual openly violates a law he thinks is invalid in order to express his view that the law should be changed, a prosecutor might appropriately decide that the law is so questionable or the violator's motives so righteous that criminal prosecution is inappropriate. These factors, however, are arguably irrelevant when one violates a court order, at least if the court's jurisdiction to issue the order is clear. Instead, in the case of a court order violation, it may be appropriate to consider such factors as the extent of the violator's opportunity for judicial review in light of the detriment to him from obeying the order and the use or availability of the civil contempt sanction to deal with the conduct. The development and articulation of such differing criteria may be advanced by allocating initiating discretion to separate institutional bodies.

Apart from practical, political considerations, which will be discussed in the following section¹²⁵ and which may exist regardless of the legal effect of violating an invalid court order, a separate initiating process for criminal contempts based on the unique nature of court orders can be justified only because of its symbolic value, and this is not a sufficient justification for at least two reasons. First, the symbolic value with respect to the development of initiating criteria is at best speculative: Prosecutors develop and utilize differing initiating criteria for different types of crimes,¹²⁶

124. See ABA STANDARDS, THE PROSECUTION FUNCTION § 2.5 (1971); PRESIDENT'S COMM. ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE ON THE COURTS 7-8 (1967).

125. See text at notes 127-48 *infra*.

126. See Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965).

and there is no reason to expect that they would be less likely to make relevant distinctions in the contempt area. In addition, there is no evidence to suggest that judicial initiation of contempts has contributed to the articulation of initiating criteria in the past, and there is no reason to expect that it will in the future.

The symbolic value to the potential contemnor is at least as questionable: The mere fact that a contempt proceeding may be initiated by the court without information or indictment is unlikely to enhance the contemnor's understanding of the duty to obey a court order. If the unique initiating procedure has any impact on him, it is more likely to be a perception that he can be deprived of rights available to other criminal defendants. This raises the second problem with allowing judicial initiation of criminal contempts for symbolic purposes—the appearance of unfairness. Just as maintaining integrity and the appearance of integrity in the judicial process should be a sufficient reason to reject the fact of injury rationale for allowing judicial initiation of criminal contempts, it should be a sufficient reason to reject a rationale based on speculative symbolic considerations.

3. *Practical Considerations*

Perhaps the strongest argument for retaining discretion to initiate criminal contempts in the judiciary is a practical one. Criminal contempt cases would represent only a small portion of the business in a prosecutor's office,¹²⁷ and any injury from a contempt often might seem less serious to the prosecutor than that resulting from the commission of a serious crime. An overburdened prosecutor might therefore tend to ignore or treat lightly contumacious conduct, unless it involved a serious breach of the peace or interfered with an ongoing criminal investigation. In contrast, the judiciary is more likely to be sensitive to the seriousness of all contempts because they constitute affronts to its authority.

This argument is admittedly speculative. It is not clear that prose-

127. The Administrative Office of the United States Courts includes in its *Annual Report* the number of criminal contempt cases disposed of each year. In 1973 there were only 56 such cases in 90 judicial districts. *1973 Annual Report of the Director of the Administrative Office of the United States Courts* [hereinafter *Annual Report*], in *REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C., APRIL 5-6, 1973, AND SEPT. 13-14, 1973*, at 409 (1974). There is no indication of the number of criminal contempt cases filed. However, since contempt proceedings are relatively summary, there is probably a close correlation between the number of cases initiated and the number disposed of in any given year.

For a comment on the accuracy of the Administrative Office's statistics, see note 134 *infra*.

cutors would be more reluctant than courts to initiate criminal contempt proceedings. Moreover, as noted previously,¹²⁸ prosecutorial control over the initiating decision would enhance at least the appearance of fairness in contempt cases. Nevertheless, uncertainty as to how the prosecutor might react to contempts is perhaps a sufficient reason for the judiciary not to relinquish completely its control over the initiating function.

A partial response to this argument is that courts, while they have expressed the need for authority to exercise the contempt power independently of legislative action,¹²⁹ have rarely voiced concern over the possible abuses of the initiating power by the executive.¹³⁰ On the contrary, courts have suggested that the method of initiation is not a critical aspect of the contempt power,¹³¹ and have acquiesced in executive initiation of criminal contempt proceedings.¹³²

More importantly, there is evidence that prosecutors would not ignore contumacious conduct. In a number of recalcitrant witness criminal contempt cases under rule 42(b), the prosecutor initially sought the contempt citation,¹³³ and prosecutors interviewed in conjunction with this study¹³⁴ invariably stated that they were

128. See text at notes 98-100 *supra*.

129. See cases cited note 2 *supra*.

130. But see *O'Malley v. United States*, 128 F.2d 676, 684-85 (8th Cir. 1942), *rev'd. on other grounds sub nom. Pendergast v. United States*, 317 U.S. 412 (1943).

131. See, e.g., *United States v. Mensik*, 440 F.2d 1232, 1234 (4th Cir. 1971) (contention that use of indictment violates rule 42(b) without merit); *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955) (court or prosecutor, not private person, is appropriate party to take action against criminal contemnors).

132. See cases cited note 28 *supra*.

133. E.g., *United States v. De Simone*, 267 F.2d 741 (2d Cir.), *cert. denied*, 361 U.S. 827 (1959); *Ballantyne v. United States*, 237 F.2d 657 (5th Cir. 1956).

134. The interviews, which focused on the use of the contempt power to deal with recalcitrant witnesses, were conducted by the author with 18 current or recently resigned federal prosecutors in six cities: Baltimore, Chicago, Denver, Detroit, New York, and Washington, D.C. The interviews averaged 30 to 40 minutes each. Most of those interviewed were extremely cooperative, but none was able to give precise statistical data about the use of the contempt sanction over a long period of time. Such data does not exist in any readily available form. The annual reports of the Director of the Administrative Office of the United States Courts list the number of criminal contempt cases disposed of each year, but do not indicate the number of *civil* contempt cases filed or disposed of, or subdivide the criminal contempt cases among the various types of contumacious conduct. See, e.g., *Annual Report*, *supra* note 127, at 409. Furthermore, it is not clear that these statistics are accurate. Although the interviewees confirmed that there were very few contempt cases of either type, see note 127 *supra*, both prosecutors and staff members in several clerk of court offices were uncertain as to how contempt cases were filed. Apparently, they are sometimes given separate docket numbers and files and sometimes merely noted as part of the principal case. The variation in treatment does not necessarily relate to whether the contempt is civil or criminal or whether the contempt

responsible for the initiation of contempt cases against recalcitrant grand jury witnesses.¹³⁵ Indeed, most of the prosecutors viewed themselves, and not the judges, as possessing the power to decide whether to initiate contempt proceedings in these cases.¹³⁶

Even in criminal contempt cases, including recalcitrant witness cases, that are initiated by the court upon its own motion¹³⁷ or at the request of a private party¹³⁸ or a government official not associated with a prosecutor's office,¹³⁹ there is little if any reason to believe that the effect of removing judicial initiating discretion would be detrimental.¹⁴⁰ A prosecutor is not likely to jeopardize his working relationship with the judiciary by refusing reasonable

involves a particular type of conduct, and the practices seem to vary not only from office to office but also within particular offices. There apparently has been no attempt by either the Justice Department or the courts to make the filing system uniform.

Despite the absence of empirical data and the limited number of interviews, the information reported here is probably reliable. Although some prosecutors are more willing than others to condone a witness' recalcitrance, and although recalcitrant witness problems arise more frequently in some judicial districts than in others, the interviews revealed substantial uniformity in approaches to recalcitrant witness problems in situations in which the recalcitrance is not simply condoned. *See* note 136 *infra* and accompanying text. There is no reason to believe that the views and experiences of the prosecutors interviewed are not representative of current federal practice.

The interviews were given with the understanding that the interviewees would remain anonymous. To honor this understanding, the information reported here will be limited to general conclusions and impressions.

135. No prosecutor could recall more than three or four recalcitrant witness cases in his judicial district in any year, and most of these involved grand jury witnesses. Although in these cases the prosecutors usually sought coercive civil contempt sanctions, they indicated that their role in initiating the proceedings does not depend upon whether the contempt is civil or criminal. On the differences between civil and criminal contempts, *see* notes 149-73 *infra* and accompanying text.

136. Since a prosecutor is unlikely to seek a court order commanding a grand jury witness' cooperation unless he is prepared to follow through with a contempt proceeding in the event of continued recalcitrance, the decision whether to seek the court order is usually the critical one. Most of the prosecutors maintained, however, that even after an order is issued, they retain control over the decision whether to proceed with a contempt action, and at least as a practical matter, they were probably correct. After the judge issues the order to testify, the witness usually will return to the grand jury room for further questioning, and, as the prosecutors pointed out, judges generally do not inquire whether their orders to testify are obeyed. If a witness still refuses to testify, the judge will probably not become aware of the contempt unless the prosecutor calls the refusal to his attention. If the prosecutor seeks a contempt sanction, his request will rarely be refused. *Cf.* note 147 *infra* and accompanying text.

137. *E.g., In re Brown*, 454 F.2d 999 (D.C. Cir. 1971); *United States v. Pace*, 371 F.2d 810 (2d Cir. 1967).

138. *E.g., In re Fletcher*, 107 F.2d 666 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940).

139. *E.g., FTC v. Gladstone*, 450 F.2d 913 (5th Cir. 1971); *NLRB v. Rico*, 182 F.2d 254 (9th Cir. 1950).

140. *But see* WORKING PAPERS, *supra* note 2, at 625-26.

judicial requests for the initiation of contempt proceedings,¹⁴¹ and the fact that prosecutors do not appear to avoid requests from other agencies for perjury and obstruction of justice prosecutions¹⁴² suggests that they probably would not ignore agencies' requests for contempt prosecutions.¹⁴³ Whether prosecutors would be equally willing to initiate contempt cases at the request of a private citizen is unclear. However, even if they would be less responsive to such requests, it is doubtful that any serious incidents of contumacious conduct would remain unpunished. If the contempt were serious, the agency or court before which the conduct occurred or the court whose order was violated would also probably urge prosecution.

If there is any danger in giving initiating discretion over contempts to the executive, it is that prosecutors may initiate contempt proceedings that should not be pursued.¹⁴⁴ The contempt sanction has sometimes been utilized as a device to suppress dissident activity,¹⁴⁵ and the Justice Department on at least one occasion apparently considered this an appropriate use of the power.¹⁴⁶ Par-

141. The limited experience in Colorado, where criminal contempts are routinely initiated by indictment, lends some support to this proposition. *See* note 98 *supra*. *But cf.* WORKING PAPERS, *supra* note 2, at 626, suggesting that a prosecutor "might well [exercise his discretion not to prosecute] . . . where the contumacious conduct was favorable to his cause" [e.g., where a witness refuses to provide evidence that will be helpful to a criminal defendant]. If such inaction occurs in situations in which the court has no knowledge of the contumacious conduct, *see, e.g.*, note 136 *supra*, maintaining initiating discretion in the judiciary does not make imposition of an appropriate contempt sanction more likely. If, on the other hand, the court requests prosecution, it seems unlikely that a prosecutor would be less willing to honor that request than a request to forgo prosecution. *Cf.* WORKING PAPERS, *supra*, at 625 ("[I]t is not likely that a United States Attorney would prosecute if the court informally let it be known that a prosecution was unwarranted . . ."). In addition, if there is not sufficient justification for giving the judiciary initiating discretion over other cases in which the prosecutor has a potential conflict of interest, *cf.* note 100 *supra* & note 211 *infra*, there would appear to be no reason to do so in contempt cases.

142. *See, e.g.*, *United States v. Freedman*, 445 F.2d 1220 (2d Cir. 1971) (perjury prosecution for false testimony in SEC investigation); *United States v. Alo*, 439 F.2d 751 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971) (obstruction of justice prosecution for giving false and evasive answers in SEC investigation).

143. In any event, most contempt proceedings to enforce agency processes are civil rather than criminal. *See* Bartosic & Lanoff, *supra* note 11, at 262; Note, *Use of Contempt Power To Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541, 1555 (1958). Thus, a reallocation of initiating discretion for criminal contempts from the judiciary to the executive would have little, if any, impact on agency practices and policies.

144. *See* WORKING PAPERS, *supra* note 2, at 625.

145. *See* R. GOLDFARB, *supra* note 2, at 7-9. *See also* *Healey v. United States*, 186 F.2d 164 (9th Cir. 1950); *Alexander v. United States*, 181 F.2d 480 (9th Cir. 1950). Consider also the fears expressed by Chief Justice Warren in *Frank v. United States*, 395 U.S. 147, 153-54 (dissenting opinion).

146. *See* *Alexander v. United States*, 181 F.2d 480, 486-87 (9th Cir. 1950) (Denman, C.J., supplemental opinion).

ticularly in recalcitrant witness cases that arise in the grand jury context, prosecutors are likely to have a more direct interest than the court in ensuring that the contumacious conduct is punished, and a requirement of judicial initiation in these instances could minimize potential abuses of power. However, since courts traditionally have not exercised such a restraining influence,¹⁴⁷ it is doubtful that transferring the initiating function from the judiciary to the executive would aggravate these abuses. Furthermore, the potential for prosecutorial abuse of this nature is not limited to contempt cases but can arise in any situation in which a prosecutor has a particularly zealous attitude toward the matter at issue.¹⁴⁸ The fear of unwarranted prosecutions therefore is not a sufficient basis for treating criminal contempts differently from other criminal prosecutions.

4. *Benefits of Executive Initiating Discretion*

The discussion has already suggested one important benefit of executive initiating discretion: enhancing the fairness or at least the appearance of fairness in criminal contempt proceedings. A second substantial benefit would be the elimination of the confusion that often exists with respect to whether a contempt proceeding is civil or criminal.

The inherent judicial power to punish for contempt includes the power to impose both criminal and civil contempt penalties,¹⁴⁹ but

147. There appears to be only one reported case in which a court denied a federal prosecutor's request for a contempt citation: *Ex parte McLeod*, 120 F. 130 (N.D. Ala. 1903). Cf. Note, *supra* note 63, at 184-85.

148. See note 100 *supra*.

149. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-52 (1911).

Except for 28 U.S.C. § 1826 (1970), which was enacted as part of the Organized Crime Control Act of 1970 and which applies only to contemnors who refuse to testify before grand juries or other judicial bodies, there is no federal statute dealing specifically with civil contempts. This raises the question whether section 401, *see* text at notes 17-25 *supra*, is applicable to civil as well as criminal contempts. The answer is probably affirmative. In *Penfield Co. v. SEC*, 330 U.S. 585, 594 (1947), the Supreme Court, although explicitly refusing to decide the issue, assumed for the purpose of its decision that the fine or imprisonment limitation was applicable to civil contempts, and in *Ex parte Hudgings*, 249 U.S. 378, 382 (1919) (dictum), the Court, without specifying the particular statutory provision, apparently relied on section 401(1)'s predecessor in suggesting that perjury in the presence of a court does not constitute civil contempt. Cf. *United States ex rel. Shell Oil Co. v. Barco Corp.*, 430 F.2d 998, 1000 (8th Cir. 1970) (dictum); Special Comm. of the Junior Barristers of the Los Angeles Bar Assn., *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 169 (1955). See also note 150 *infra*. But see *Griffin v. County School Board*, 363 F.2d 206, 210-12 (4th Cir.), *cert. denied*, 385 U.S. 960 (1966); *In re Sixth & Wisconsin Tower, Inc.*, 108 F.2d 538, 544-45 (7th Cir. 1939) (Evans, J., concurring).

In some situations, the availability of a civil contempt sanction may preclude the use of a criminal contempt penalty, even though the conduct falls within section 401.

there are substantial differences between the two types of contempt. In contrast to the punitive objective of the criminal contempt sanction, civil contempt remedies are designed to compensate parties injured by violations of court orders or to coerce compliance with such orders.¹⁵⁰ When the objective is coercion, the sanction may be either (1) a fine that is payable absent compliance by a certain date¹⁵¹ or that increases with continued noncompliance,¹⁵² or (2) a jail sentence that will terminate when the contemnor indicates a willingness to obey the order.¹⁵³ Since both the compensatory and coercive contempt sanctions are viewed as equitable civil remedies,¹⁵⁴ the contempts need not be proved beyond a reasonable doubt;¹⁵⁵ the

In *Shillitani v. United States*, 384 U.S. 364 (1966), which involved the refusal of a witness to testify before a grand jury, the Court stated by way of dictum that "the trial judge [must] first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines for good reason, that the civil remedy would be inappropriate." 384 U.S. at 371 n.9. To date, however, there are no reported cases in which a court has relied on the *Shillitani* dictum to refuse a request to have a defendant held in criminal contempt. *But cf.* *United States v. Marra*, 482 F.2d 1196, 1202 (2d Cir. 1973) (short period of time remaining for purgation is sufficient indication of the inappropriateness of the civil sanction).

150. See *Shillitani v. United States*, 384 U.S. 364, 368 (1966); *United States v. UMW*, 330 U.S. 258, 302-04 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-43, 448-49 (1911).

Judicial declarations that the purpose of the civil contempt sanctions is to coerce compliance with or compensate for the violation of court orders are probably merely descriptive of the fact that most civil contempt cases arise after the violation of a court order and do not imply a limitation on the availability of civil contempt to deal with other types of contumacious conduct. See *Howard v. United States*, 182 F.2d 908 (8th Cir.), *vacated as moot*, 340 U.S. 898 (1950); *Ex parte Hudgings*, 249 U.S. 378 (1919). *But cf.* *In re Sixth & Wisconsin Tower*, 108 F.2d 538 (7th Cir. 1939).

151. See *United States v. UMW*, 330 U.S. 258, 305 (1947) (fine payable unless contempt purged within five days); *Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467, 471 (2d Cir. 1958) (in addition to compensatory fine, defendant ordered to pay fixed fine for each future violation). *But cf.* *Shillitani v. United States*, 384 U.S. 364, 370-71 n.6 (1966) (dictum that a fixed term of imprisonment to commence if the contemnor fails to purge himself within a specified time may not be an appropriate civil contempt sanction).

152. *International Business Mach. Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

153. See, e.g., *In re Giancana*, 352 F.2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965).

Since the purpose of the sanction is solely coercive, the penalty cannot extend beyond the time when compliance becomes impossible, *Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948); *Loubriel v. United States*, 9 F.2d 807 (2d Cir. 1926), and in the case of witnesses who refuse to testify before grand juries and other judicial bodies, the maximum period of incarceration may not exceed 18 months. 28 U.S.C. § 1826 (1970). Thus, a recalcitrant grand jury witness who refuses to purge himself of the contempt would be released at the expiration of the grand jury term or after 18 months, whichever occurs first. On the length of grand jury terms, see 18 U.S.C. § 3331 (1970); FED. R. CRIM. P. 6(g).

154. See cases cited note 150 *supra*.

155. Civil contempt must be proved by something more than a preponderance of

contemnor does not have the right to a jury trial;¹⁵⁶ and whereas the rules of appellate review for criminal judgments are applicable to criminal contempts,¹⁵⁷ civil contempt judgments are appealable in accordance with the rules applicable to civil judgments.¹⁵⁸

Despite these differences, both civil and criminal contempts usually are initiated by an oral or written judicial order to show cause.¹⁵⁹ For this reason, and because the violation of a court order may appear to warrant either a criminal or a civil sanction, or both,¹⁶⁰ it is often unclear whether the proceeding is for criminal or civil contempt.¹⁶¹

Prior to the adoption of rule 42, courts tended to classify contempts as civil or criminal according to such factors as the title of

the evidence but something less than proof beyond a reasonable doubt. *See* *Oriel v. Russell*, 278 U.S. 358, 363-64 (1928); *Schauffier v. Local 1291*, I.L.A., 292 F.2d 182, 189-90 (3d Cir. 1961); *Kansas City Power & Light Co. v. NLRB*, 137 F.2d 77, 79 (8th Cir. 1943). *See also* R. GOLDFARB, *supra* note 2, at 251-53.

156. *See* R. GOLDFARB, *supra* note 2, at 175; *Dobbs*, *supra* note 8, at 231-34.

157. Annot., 24 A.L.R.3d 650, 663-74 (1969).

158. *See generally* Annot., 33 A.L.R.3d 448 (1970). *See also* 28 U.S.C. § 1826 (1970) (appeal from civil contempt judgment for refusal to testify before grand jury or other judicial body must be disposed of within at least 30 days of the filing of the appeal).

159. *See, e.g., Sunbeam Corp. v. Golden Rule Appliance Co.*, 252 F.2d 467 (2d Cir. 1958).

Occasionally coercive civil contempt sanctions are imposed without prior notice and hearing, and the federal prosecutors interviewed for this study, *see* note 134 *supra*, indicated that this practice was common in recalcitrant witness cases. *See, e.g., In re Grand Jury Proceedings*, 450 F.2d 199, 201 (3d Cir. 1971) *affd. sub nom. Gelbard v. United States*, 408 U.S. 41 (1972); *In re October 1969 Grand Jury*, 435 F.2d 350, 354 (7th Cir. 1970), 28 U.S.C. § 1826(a) (1970) provides that coercive civil contempt penalties may be "summarily" imposed against recalcitrant witnesses; it is unclear, however, whether this provision is intended to authorize the imposition of a civil contempt penalty without notice and hearing. The legislative history suggests that the statute was "designed to codify present practice." *See* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4022. At least two cases have held that a grand jury witness charged with civil contempt is entitled to the same notice and opportunity to prepare a defense that is provided criminal contemnors by rule 42(b). *In re Sadin*, Docket No. 74-2003 (2d Cir. Jan. 23, 1975); *United States v. Alter*, 482 F.2d 1016, 1022 (9th Cir. 1973). *Cf. United States v. Boe*, 491 F.2d 970 (8th Cir. 1974). *But see In re Persico*, 491 F.2d 1156, 1162 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3240 (U.S. Oct. 22, 1974); *In re October 1969 Grand Jury*, 435 F.2d 350, 354 (7th Cir. 1970).

160. *See Yates v. United States*, 355 U.S. 66 (1955); *United States v. UMW*, 330 U.S. 258, 298-99 (1947). If the procedural requirements for criminal contempts are complied with, both a civil and a criminal contempt penalty may be imposed in the same proceeding. 330 U.S. at 299. Section 401's limitation on the penalty to fine or imprisonment will not preclude a fine for one offense and imprisonment for the other. *See Penfield Co. v. SEC*, 330 U.S. 585, 594 (1947). *Cf. MacNiel v. United States*, 236 F.2d 149, 154-55 (1st Cir.), *cert. denied*, 352 U.S. 912 (1956).

161. *See, e.g., Clark v. Boynton*, 362 F.2d 992 (5th Cir. 1966) (remand to determine if contempt criminal or civil). *Cf. United States v. Montgomery*, 155 F. Supp. 633, 636-37 (D. Mont. 1957). On the general difficulty of distinguishing between criminal and civil contempts, *see Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-52 (1911); R. GOLDFARB, *supra* note 2, at 49-67.

the proceeding,¹⁶² whether the defendant testified,¹⁶³ the nature of the relief sought¹⁶⁴ or granted,¹⁶⁵ and who conducted the prosecution.¹⁶⁶ The controlling factor would vary from case to case, and the labeling might occur for the first time on appeal, when classification of the contempt as civil or criminal was necessary to decide a procedural issue.¹⁶⁷ In *McCann v. New York Stock Exchange*,¹⁶⁸ Judge Learned Hand pointed out the unsatisfactory nature of the tests for distinguishing the two types of contempt and suggested that there should and can be "some simple and certain tests by which the character of the prosecution can be determined."¹⁶⁹ The promulgation of rule 42(b), which provides that the notice to the defendant "shall state the essential facts constituting the criminal contempt charged *and describe it as such*,"¹⁷⁰ was in part a response to Judge Hand's criticism.¹⁷¹ It has proved, however, to be an ineffective response. Courts have held that the failure to label the charge as criminal does not preclude the imposition of a criminal penalty,¹⁷² and even if the proceeding is clearly designated as criminal, an appellate court may nonetheless conclude that the contempt was civil.¹⁷³

So long as distinct civil and criminal contempt sanctions remain available to deal with the same conduct, the best way to avoid the confusion between the two remedies is to distinguish more clearly the initiating processes for each. Giving the executive initiating discretion over criminal contempts would accomplish this task. Since the prosecutor would initiate all criminal contempts pursuant to an indictment or information, there would be no need for rule 42(b) initiation, and the existence of an indictment or information would clearly indicate that the contempt was criminal.¹⁷⁴ The de-

162. See, e.g., *Wakefield v. Housel*, 288 F. 712, 715 (8th Cir. 1923).

163. See, e.g., *Mitchell v. Dexter*, 244 F. 926, 929-30 (1st Cir. 1917).

164. See, e.g., *Lamb v. Cramer*, 285 U.S. 217, 220 (1932).

165. See, e.g., *In re Merchants' Stock & Grain Co.*, 223 U.S. 639 (1912).

166. See, e.g., *In re Kahn*, 204 F. 581 (2d Cir. 1913). See *In re Eskay*, 122 F.2d 819, 822-23 (3d Cir. 1941); R. GOLDFARB, *supra* note 2, at 62-64.

167. See, e.g., *Nye v. United States*, 313 U.S. 33, 42-44 (1941); *In re Merchants' Stock & Grain Co.*, 223 U.S. 639 (1912); *In re Guzzardi*, 74 F.2d 671 (2d Cir. 1935). Cf. *Penfield Co. v. SEC*, 330 U.S. 585 (1947).

168. 80 F.2d 211 (2d Cir. 1935), *cert. denied*, 299 U.S. 603 (1936).

169. 80 F.2d at 214.

170. (Emphasis added.) See note 27 *supra*.

171. See Notes of Advisory Committee, 18 U.S.C.A. FED. R. CRIM. P. 42 (1961).

172. See *United States v. UMW*, 330 U.S. 258, 297-98 (1947); *FTC v. Gladstone*, 450 F.2d 913 (5th Cir. 1971).

173. See, e.g., *Shillitani v. United States*, 384 U.S. 364, 369 (1966).

174. Since there is no precedent for adjudicating civil claims in ordinary criminal

fendant would know in advance that a finding of contempt would result in a criminal penalty, and the rules of trial and appellate procedure would be clear from the outset. Since criminal penalties could not be imposed in the absence of an indictment or information, there would be no opportunity for a judge to frustrate an aggrieved party's coercive objective by treating the application for a conditional sanction as a criminal contempt.¹⁷⁵

Executive control over initiation may also lead to a more systematic treatment of criminal contempts: Since a court could not require a prosecutor to litigate a contempt action,¹⁷⁶ the prosecutor could evaluate the importance of particular cases in light of other demands on his time. If one assumes that prosecutors will react as responsibly to contempt allegations as to allegations of other types of criminal conduct, this would result in a better and more efficient allocation of prosecutorial resources. In addition, recognition that the executive is responsible for the initiation of all criminal contempts may cause prosecutors to develop a more systematic approach to initiating decisions, which they may currently treat in a relatively ad hoc fashion merely because contempts are perceived as *sui generis* offenses.

Since prosecutors already exercise de facto initiating discretion in many contempt cases,¹⁷⁷ formal transfer of initiating discretion to the executive may not have a substantial impact on current practices. Moreover, since contempt cases arise infrequently in most judicial districts,¹⁷⁸ it may be difficult to avoid an ad hoc approach to initiating decisions regardless of who has formal initiating power. Nevertheless, granting initiating discretion to the executive would provide at least the potential for a more systematic treatment of contempts.

cases, the decision to treat criminal contempts as other crimes for the purpose of initiation presumably would preclude the imposition of both civil and criminal contempt sanctions in the same proceeding. Although the Supreme Court approved the practice of imposing both types of sanctions in a single proceeding in *United States v. UMW*, 330 U.S. 258, 299 (1947), it also suggested that the better practice is to try the contempts separately. 330 U.S. at 299. Cf. *United States v. Consolidated Prods., Inc.*, 326 F. Supp. 603, 607 (C.D. Cal. 1971).

175. In *Penfield Co. v. SEC*, 330 U.S. 585, 588 (1947), the district court had refused to grant the coercive relief requested by the SEC and instead imposed a "flat unconditional fine of \$50.00"

176. Courts commonly appoint United States attorneys to prosecute criminal contempt cases. See, e.g., *Frank v. United States*, 384 F.2d 276, 278 (10th Cir. 1967), *affd.*, 395 U.S. 147 (1969). For a strong criticism of the appointment of counsel for an opposing party to prosecute a criminal contempt action, see *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 318-20 (5th Cir. 1969). Cf. *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir.), *cert. denied*, 344 U.S. 918 (1955).

177. See text at notes 133-36 *supra*.

178. See note 127 *supra*.

Finally, transferring initiating discretion to the executive could assist in removing an ambiguity as to the applicability of the double jeopardy clause¹⁷⁹ to criminal contempts. To date, the Supreme Court has not fully extended the prohibition against double jeopardy to criminal contempts, and several early contempt cases, relying on the *sui generis* characterization of contempts, state that the same act may be punished both as a criminal contempt and as an ordinary crime.¹⁸⁰ While the continued validity of these cases is questionable in light of the Court's recent expansion of the constitutional rights due to criminal contemnors¹⁸¹ and its expansion of the scope of the double jeopardy clause in noncontempt contexts,¹⁸² the cases have not been specifically repudiated.¹⁸³ Were the Court to require executive initiation by holding that criminal contempts are indistinguishable from other criminal prosecutions, presumably the double jeopardy clause would be fully applicable.¹⁸⁴

5. *Methods of Limiting Judicial Control over the Initiating Function*

a. *Judicial action.* No legislation is necessary to transfer the initiating function for criminal contempts from the judiciary to the executive. The judiciary could accomplish this result by several methods, each of which has ample precedential support. First, it could explicitly recognize that judicial initiation of criminal contempts is the only significant difference between contempts and other crimes and that there is no necessity for the unique rule 42(b) initiating procedures. On this basis, the Supreme Court could hold that all criminal contempts not summarily punishable pursuant to rule 42(a) are "crimes" within the meaning of the fifth amendment

179. U.S. CONST. amend. V.

180. See *O'Malley v. United States*, 128 F.2d 676, 684 (8th Cir. 1942), *rev'd. on other grounds sub nom. Pendergast v. United States*, 317 U.S. 412 (1943); *Merchants' Stock & Grain Co. v. Board of Trade*, 201 F. 20, 27 (8th Cir. 1912). Cf. *Jurney v. MacCracken*, 294 U.S. 125, 151-52 (1935); *In re Chapman*, 166 U.S. 661, 671-72 (1897); *Chicago Directory Co. v. United States Directory Co.*, 123 F. 194 (C.C.S.D.N.Y. 1903); *United States v. Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963). But see *In re Bradley*, 318 U.S. 50, 52 (1943), discussed in Dobbs, *supra* note 8, at 242.

181. See text at notes 35-51 *supra*.

182. See *Waller v. Florida*, 397 U.S. 387 (1970) (rejection of dual sovereignty theory as a basis for allowing both a state and a municipality within the state to impose criminal penalties for the same act); *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969) (protection against double jeopardy is fundamental right within the meaning of due process of law). See also *Colombo v. New York*, 405 U.S. 9 (1972).

183. But see *United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971).

184. Even if the nonconstitutional methods suggested in the next section, see text at notes 193-213 *infra*, were utilized to require or encourage executive initiation of criminal contempts, the resulting assimilation of criminal contempts with other crimes would tend to undermine the proposition that criminal contempts are *sui generis* and therefore not within the scope of the protection against double jeopardy.

grand jury provision as well as all of the other constitutional and nonconstitutional provisions generally applicable to crimes and criminal prosecutions.¹⁸⁵ There are, however, three potential problems with this approach:

First, the application of the grand jury provision to criminal contempts could affect the courts' sentencing discretion in criminal contempt cases. This matter will be considered below.¹⁸⁶

Second, relinquishing the claim to inherent contempt power may entail unwarranted risks. Subsequently enacted legislation that unduly restricts the contempt sanction, or executive insensitivity to the effect of contumacious conduct, could force the Court to re-evaluate its position and to attempt to justify a reversal of or exception to its earlier decision.¹⁸⁷ Furthermore, the argument against judicial exercise of the initiating function may not be as compelling for all types of contempt cases as it is for recalcitrant witness cases, where the prosecutor often exercises de facto initiating discretion. These risks, however, are probably minimal. There is little reason to believe that prosecutors would irresponsibly exercise their discretion in nonwitness contempt cases,¹⁸⁸ and the problem of restrictive legislative action can be anticipated by clearly basing the holding on the adequacy of existing legislation.

Finally, there is the problem of overruling the substantial precedent approving rule 42 and basing contemnors' constitutional protections on notions of due process rather than on the more specific

185. This alternative is based on the assumption that prosecutors would be able to initiate proceedings for violations of section 401 by indictment or information. The possibility that section 401 may be interpreted to preclude independent executive initiation of contempts is considered at note 206 *infra* and accompanying text.

186. See text at notes 216-56 *infra*.

187. See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

188. But cf. WORKING PAPERS, *supra* note 2, at 625-26. Perhaps the greatest risk is that attorneys may not be punished for their misconduct. Prosecutors may be reluctant to initiate contempt proceedings against other members of the bar and especially against colleagues in their own offices. Trial courts, however, have sometimes abused their discretion in exercising contempt power against defense attorneys, see, e.g., *Offutt v. United States*, 348 U.S. 11 (1954); *United States v. Meyer*, 462 F.2d 827 (D.C. Cir. 1972), and courts generally do not utilize the contempt power against prosecutors. See Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629, 674 (1972); Singer, *Forensic Misconduct by Federal Prosecutors—And How It Grew*, 20 ALA. L. REV. 227, 276 (1968). Nevertheless, it is arguable that judicial abuses of the contempt power could be substantially minimized by the elimination of rule 42(a) initiating procedures and that prosecutors should be no more immune from the contempt sanction than other attorneys. Cf. N. DORSEN & L. FRIEDMAN, *supra* note 9, at 186-87, 226-38. If one accepts these propositions, there may be a limited role for the exercise of inherent judicial contempt power. Although the possibility of unwarranted refusals to prosecute does not exist only in the case of misconduct by attorneys, see notes 100 *supra* & 211 *infra*, that possibility coupled with the recognition that an attorney, as an officer of the court, has a special obligation to preserve and maintain respect for the judiciary, see N. DORSEN & L. FRIEDMAN, *supra*, at 144,

provisions of the Bill of Rights.¹⁸⁹ The complete assimilation of criminal contempts with other crimes could be viewed merely as the final step in a consistent progression of judicial decisions that have gradually eroded the distinctions between contempts and other crimes.¹⁹⁰ However, one might take the position that the long tradition of evaluating contempt procedures by standards of due process should not be rejected in the absence of some compelling necessity,¹⁹¹ and that the benefits of placing initiating discretion with the executive, although substantial, are not sufficient to justify the overruling of extensive prior authority.¹⁹²

If the Supreme Court is unwilling to abandon the due process precedent in criminal contempt cases, it could still effect a substantial assimilation of criminal contempts with other crimes by at least one and possibly two methods. First, the Court could submit to Congress an amendment to rule 42 that would eliminate paragraph (b) and require that all criminal contempts not punishable pursuant to rule 42(a) be initiated in the same manner as other criminal prosecutions. Unless Congress rejected the amendment within ninety days, it would become law.¹⁹³

Second, just as it did in initially applying the jury trial right to criminal contempts,¹⁹⁴ the Court perhaps could rely on its supervisory power over federal courts¹⁹⁵ to hold that criminal contempts not punishable pursuant to rule 42(a) must be initiated by indictment or information. It is unclear, however, whether the imposition of such a requirement is within the scope of the Court's supervisory power.¹⁹⁶ The limits of that power are not clearly defined,¹⁹⁷ and

is arguably a sufficient basis to justify the use of inherent contempt power in cases of attorney misconduct.

189. See text at notes 43-45 *supra*.

190. Compare the gradual (but not yet complete) assimilation of criminal contempts with other crimes, see text at notes 35-51 *supra*, with the "requirements of later precedent" rationale for overruling earlier precedent discussed in Israel, *supra* note 187, at 223-26, 242-61. But cf. text at notes 216-19 *infra*.

191. See, e.g., *Green v. United States*, 356 U.S. 165, 192-93 (1958) (Frankfurter, J., concurring). Cf. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650-52 (1895) (White, J., dissenting).

192. Whether the benefits of executive initiation and the lack of necessity for utilizing rule 42(b) procedures provide sufficient bases for overruling the due process precedents depends primarily on one's views as to the role of precedent in judicial decision-making. See generally Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U. L.Q. 589 (1931); Israel, *supra* note 187, at 215-19. Compare Justice Frankfurter's concurring opinion with Justice Black's dissenting opinion in *Green v. United States*, 356 U.S. 165, 189-219 (1958).

193. 18 U.S.C. § 3771 (1970). See 1 C. WRIGHT & A. MILLER, *supra* note 114, § 4.

194. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

195. See *McNabb v. United States*, 318 U.S. 332 (1943).

196. There is no explicit constitutional grant of supervisory power to the Supreme

the precedent for joint judicial and legislative action to adopt and amend the Federal Rules provides a basis for arguing that the Court cannot take unilateral action that, in effect, would constitute an amendment to rule 42.¹⁹⁸ Even if the Court believed that it had such power, it might be reluctant to pursue a course of action that bypasses the established procedures for congressional approval of amendments to the Rules.¹⁹⁹

Prior to any action by the Supreme Court, lower federal courts, without overruling past precedent or becoming completely dependent upon the executive's initiating decisions, could effect a significant restriction on the judicial power to decide whether to initiate criminal contempts. As early as 1821 the Supreme Court recognized that the rationale for the exercise of the contempt power was necessity and, therefore, that its use should be limited to "the least possible power adequate to the end proposed."²⁰⁰ Although courts have not always been consistent in observing this dictum,²⁰¹ the Supreme Court has referred to it in judicial contempt cases to stress the im-

Court. To the extent that the Court has supervisory power not explicitly granted to it by Congress, the power exists as an inherent judicial power. See Note, *supra* note 71, at 1051-52. Whether such power extends to changing the method for initiating criminal contempts is the question whether change should be viewed as an exercise of judicial power or as an exercise of legislative power. See *id.* at 1051-56. Cf. Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). See also Hyde, *From Common Law Rules to Rules of Court*, 22 WASH. U. L.Q. 187 (1937).

197. See Note, *supra* note 71.

198. It is arguable, however, that the power to make and amend procedural rules is, at least to some extent, an inherent judicial power. See Pound, *supra* note 71, at 601; Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). See generally 4 C. WRIGHT & A. MILLER, *supra* note 114, § 1001.

199. A third possibility is a holding by the Supreme Court that the potential for bias or the appearance of unfairness that results from the vesting of initiating discretion over contempts with the judiciary, see text at notes 97-100 *supra*, violates the contemnor's right to due process. The Court's recent concern with the appearance of unfairness that results when a judge before whom a contempt is committed sits in judgment over the contemnor, see *Taylor v. Hayes*, 418 U.S. 488, 501-02 (1974), reemphasizes that due process requires maintaining the appearance of fairness. However, there may be a substantial difference, at least for the purposes of due process, between the appearance of unfairness that results from allowing a judge with prior knowledge of contumacious conduct to try, convict, and sentence the contemnor, and the appearance of unfairness that results merely from the fact that the judiciary may exercise initiating discretion in contempt cases. Furthermore, it is by no means clear that even a judge's prior knowledge of the contempt necessarily would require his disqualification. *Taylor*, 418 U.S. at 501-02.

200. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). Although *Dunn* dealt with the congressional contempt power, the Supreme Court has stated that the "least possible power" principle also should govern the exercise of judicial contempt power. *In re Michael*, 326 U.S. 224, 227 (1945).

201. See, e.g., *Brown v. United States*, 356 U.S. 148 (1958), overruled in *Harris v. United States*, 382 U.S. 162 (1965).

portance of ensuring that a contemnor not be denied important procedural rights.²⁰² It would be consistent with the spirit of these precedents for lower courts, on a case-by-case basis, to refuse to initiate contempt proceedings²⁰³ on the theory that ordinary criminal prosecution would be an adequate alternative. Should the prosecutor thereafter refuse to initiate proceedings, the court could still do so. From this process there could evolve a line of precedent applicable to broad categories of contumacious conduct.

A similar but more far-reaching approach would be for the presiding judges in the various judicial districts to establish an informal policy of utilizing the indictment process rather than rule 42(b) for the initiation of all or certain types of criminal contempts. Such a policy has been successfully established through the cooperative efforts of the presiding judge and the United States Attorney's office in at least one judicial district,²⁰⁴ and the adoption of similar policies in other districts would be desirable.

b. *Legislative action.* Congress may be able to provide alternative or additional limitations on the courts' exercise of prosecutorial discretion in criminal contempt cases. Initially, Congress should explicitly provide that violations of section 401 may be treated as ordinary criminal prosecutions. Since section 401 is the only criminal statute that provides that "a court shall have the power to punish" the conduct described therein, and since the only significant difference between criminal contempts and ordinary criminal prosecutions is the different initiating process for each, it is possible to interpret that section as a statement only of the courts' power to initiate and punish criminal contempts, and not as an ordinary criminal statute.²⁰⁵ Viewed in this light, the cases allowing the initiation of criminal contempts by indictment are not authority for the proposition that violations of section 401 may be treated as ordinary criminal prosecutions; rather, they merely represent judicial approval of the prosecutor's decision to initiate proceedings.²⁰⁶

A more far-reaching step would be for Congress to repeal or limit the scope of section 401 and, at the same time, enact specific

202. *E.g.*, *Harris v. United States*, 382 U.S. 162, 165 (1965) (rule 42(a) procedures are not available to punish grand jury witness who refuses to testify); *In re Michael*, 326 U.S. 224, 227 (1945) (mere perjury is not criminal contempt; to allow prosecution of perjury would deprive defendant of important procedural safeguards). *Cf.* *United States v. Seale*, 461 F.2d 345, 353 (7th Cir. 1972).

203. *Cf.* cases cited note 62 *supra*.

204. *See* note 98 *supra*.

205. *See* note 84 *supra*.

206. It is by no means clear that this interpretation of section 401 and the indictment precedents is correct. The only practical difference between viewing section 401

criminal statutes (where they do not already exist²⁰⁷) to cover the types of conduct currently included therein.²⁰⁸ While complete repeal of section 401 may be unacceptable to the Supreme Court,²⁰⁹ it is reasonable to expect that the Court would uphold legislation that eliminates judicial initiating discretion in types of cases in which the need for such discretion is most clearly lacking²¹⁰—for example, in recalcitrant witness cases not subject to rule 42(a).

If Congress fears that prosecutors will be reluctant to initiate proceedings for some types of contumacious conduct excluded from the amended section 401, it could provide that in such cases the prosecutor, at the request of a court, must formally initiate proceedings or at least present the case to the grand jury.²¹¹ The contempt of Congress statute²¹² provides precedent for such a requirement. The constitutionality of this legislative restriction on prosecutorial discretion apparently has not been challenged, however, and it is unclear to what extent, if at all, Congress may impose such restrictions on the executive's initiating discretion.²¹³

as merely a statement of the courts' contempt power and viewing it as a statute that will support independent executive (as well as judicial) initiation of contempts is that the former reading of section 401 would permit courts to exercise discretionary power to dismiss contempt indictments. *See* text at notes 62-63 *supra*. There is no indication, however, that either the judiciary or Congress has viewed this discretionary power to forgo prosecution as an essential aspect of the courts' contempt power. *See* cases cited note 131 *supra*. *But cf.* WORKING PAPERS, *supra* note 2, at 625.

207. Such statutes do exist for some types of contumacious conduct. *See, e.g.*, note 82 *supra*.

208. *See* note 84 *supra* and accompanying text.

209. *See* text at note 79 *supra*. *See also* *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924).

210. *See* text at notes 78-88 *supra*.

211. If there is a reasonable fear that prosecutors may initiate unwarranted proceedings, the legislation might also require prior judicial approval of the initiating decision for types of cases in which abuse is most likely. *See* PROP. FED. CRIM. CODE, *supra* note 83, § 1349; WORKING PAPERS, *supra* note 2, at 625-26. However, in view of the fact that the judiciary generally has not exercised its discretion to refuse prosecutors' requests for the initiation of section 401 contempt proceedings, *cf.* note 147 *supra*, the value of such a provision is doubtful.

Because it would defeat the objective of transferring initiating discretion to the executive for Congress to limit the scope of section 401 and at the same time apply substantial restrictions on prosecutorial discretion, it should apply such restrictions only where there is a likelihood of abuse of discretion, and it should not necessarily limit the restrictions to crimes previously punishable under section 401. For example, a reasonable fear that prosecutors may not initiate proceedings against witnesses whose misconduct is helpful in attaining a conviction, *see* note 141 *supra*, may justify requiring prosecution upon judicial certification in such situations.

212. 2 U.S.C. § 194 (1970) provides that the Speaker of the House or the President of the Senate shall certify facts constituting a violation of 2 U.S.C. § 192 (1970) (contempt of Congress) to the appropriate United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action." *See* WORKING PAPERS, *supra* note 2, at 625 (congressional certification not only imposes a duty to prosecute, but it may be a prerequisite to prosecution).

213. Perhaps there would be no objection to legislation that merely required the

c. *Executive action.* Even in the absence of legislative and judicial efforts to limit the use of rule 42, the executive can play a role in demonstrating the lack of necessity for unique initiating procedures in criminal contempt cases. Since section 401 contempts may be initiated as ordinary criminal prosecutions,²¹⁴ prosecutors seeking contempt penalties could simply proceed by way of information or indictment. Although there may appear to be little incentive for a prosecutor to forgo use of rule 42(b), a prosecutorial policy of initiating criminal contempts by information or indictment would at least have the benefit of reducing possible confusion over whether a contempt is civil or criminal.²¹⁵

C. *Independence of the Judiciary from the Executive and Grand Jury: Sentencing*

The Supreme Court's holding that the fifth amendment right to a grand jury indictment is inapplicable to criminal contempts²¹⁶ is

prosecutor to present the case to the grand jury. *See* *United States v. Cox*, 342 F.2d 167, 182-85 (5th Cir.) (Brown, J., concurring), *cert. denied*, 381 U.S. 935 (1965). Outside the contempt area, however, courts have taken the position that deciding whether formally to initiate criminal proceedings is a discretionary executive function, and that the separation of powers doctrine precludes the judiciary from requiring prosecution in particular cases. *See* *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Pugach v. Klein*, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961).

Although deciding whether to initiate criminal contempt proceedings has been treated as a judicial function, it is not clear that this function can be exercised in cases involving conduct that, while traditionally within the scope of the courts' contempt power, is in fact defined as an ordinary criminal offense. On the one hand, it may appear to laud form over substance to hold that Congress can grant initiating power to the judiciary by defining conduct as falling within the scope of the courts' contempt power, but that Congress cannot define the same conduct as an ordinary offense (outside the scope of the contempt power) and, at the same time, specifically grant the judiciary some control over the initiating decision. On the other hand, assuming that Congress' decision to treat the conduct as an ordinary criminal offense does not represent an unconstitutional restriction on the courts' inherent contempt power, *see* text at notes 78-88 *supra*, the decision to define the conduct as an ordinary crime arguably should be determinative of the extent to which the executive is able to exercise independent initiating discretion; the fact that the conduct could have been defined as within the courts' contempt power should perhaps be irrelevant. This latter approach would require both Congress and the courts to deal explicitly and separately with the questions of (1) the appropriate scope of the judicial contempt power and (2) the extent to which executive prosecutorial discretion over the initiating decision in ordinary criminal cases may be limited. Specific focus on these questions would avoid any gradual erosion of executive prosecutorial discretion through a process of legislation and judicial interpretation based solely or primarily on hypothetical assumptions about what Congress might have been able to do. *Cf.* *United States v. Romano*, 382 U.S. 136, 144 (1965); *Tot v. United States*, 319 U.S. 463, 472 (1943) (statutory presumption unconstitutional because no rational connection between fact proved and fact presumed; assertion that Congress had power to proscribe same conduct without reference to presumed fact, even if correct, does not vitiate unconstitutionality of statute).

214. *See* cases cited note 28 *supra*.

215. *See* note 175 and text at notes 174-75 *supra*.

216. *Green v. United States*, 356 U.S. 165 (1958).

not surprising in light of the development of the law of contempt. The Court traditionally has begun with the assumption that contempts are *sui generis*, and that the summary nature of the procedure is limited only by the requirement of fundamental fairness implicit in the concept of due process.²¹⁷ The constitutional right to a jury trial was extended to criminal contempts only after the Court had concluded that the right was fundamental and applicable to state criminal prosecutions through the fourteenth amendment due process clause,²¹⁸ and the Court has never taken that position with respect to the grand jury indictment provision.²¹⁹ Nevertheless, as suggested previously,²²⁰ the issue should not be whether the right to an indictment is fundamental, but whether the rationale of necessity, which is the basis for the *sui generis* classification, justifies excluding criminal contempts from the scope of the explicit indictment right. This question is considered here independently from the question whether initiating discretion should be transferred to the executive.²²¹

Since the right to an indictment in criminal contempt cases presumably would exist only if the actual penalty exceeded one year's imprisonment,²²² the question becomes one of determining whether there is any necessity for refusing to limit contempt sentences to one year unless the proceedings are initiated by indictment. There are arguably three such reasons: First, the grand jury requirement would have a substantial negative impact on the power of the judiciary to initiate serious criminal contempt charges; second, regardless of whether the judiciary or the executive should have initiating discretion, the grand jury, by refusing to return an indictment, could restrict the courts' power to punish serious con-

217. See text at notes 35-51 *supra*.

218. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Compare *Green v. United States*, 356 U.S. 165 (1958) (no constitutional right to jury trial in criminal contempt cases), decided prior to *Duncan*, with *Bloom v. Illinois*, 391 U.S. 194 (1968) (due process requires jury trial in serious criminal contempt cases). Cf. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

219. See *Hurtado v. California*, 110 U.S. 516 (1884).

220. See text at notes 54-56 *supra*.

221. In the absence of a decision to treat criminal contempts as ordinary criminal prosecutions for all purposes, it is probably unlikely that the Supreme Court would extend the grand jury right to contemnors. The grand jury question, however, is distinguishable from the question whether initiating discretion should be transferred to the executive. The Court could make the indictment right applicable to criminal contempts on the theory that the grand jury would provide a desirable check on judicial initiating discretion. Alternatively, the Court could continue to hold that contemnors are never entitled to a grand jury indictment and, at the same time, require executive initiation of contempts. See notes 193-98 *supra* and accompanying text.

222. See text at notes 65-69 *supra*.

tempts; and finally, even if one assumes that the prosecutor should have the power to initiate all contempt proceedings, he arguably should not have the power to limit the courts' sentencing discretion. Yet, if the indictment right were applicable to criminal contempts, the prosecutor could limit the potential maximum sentence to one year simply by proceeding by information rather than indictment.²²³ The following analysis will explore each of these limitations on the judiciary and suggest that they would probably be desirable. Since there may be disagreement about some of the ramifications of applying the grand jury right to criminal contempts, however, the section will conclude with a brief assessment of alternative approaches to the grand jury issue.

1. *The Effect of Granting Contemnors the Right to a Grand Jury Indictment*

The indictment requirement would severely inhibit, if not eliminate, the power of the judiciary to initiate serious criminal contempt charges. If a prosecutor were reluctant to present evidence of a contempt to the grand jury, the judge could encourage the grand jury to develop the evidence without the prosecutor's assistance.²²⁴ It is questionable, however, whether the indictment would be valid without the prosecutor's signature. The Federal Rules require his signature,²²⁵ and at least one case²²⁶ has held that a United States Attorney has the discretionary power to refuse to sign an indictment.

Perhaps a court could avoid these difficulties by relying on its inherent power to appoint a special prosecutor or by eliminating the signature requirement in contempt cases.²²⁷ However, there are serious disadvantages in any procedure that allows a judge to bypass a reluctant prosecutor. Unless indictments were sought in all judi-

223. See text at notes 69-70 *supra*.

224. See *O'Bryan v. Chandler*, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926 (1966). Cf. *Lumbard, The Criminal Justice Revolution and the Grand Jury*, 39 N.Y.S. B.J. 397, 399 (1967).

225. FED. R. CRIM. P. 7(c)(1).

226. *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

227. In cases involving violations of statutes other than section 401, the appointment by the court of a special prosecutor would probably be viewed as a violation of the separation of powers doctrine. See *United States v. Cox*, 342 F.2d 167, 171 (opinion of the court), 190-93 (Wisdom, J., concurring) (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577, 614-15 (1973). However, if one starts with the premise that the only limitation on the judiciary's initiating discretion in criminal contempt cases is the requirement that a grand jury make a finding of probable cause in serious cases, the judiciary's inherent power to exercise initiating discretion arguably includes the power to appoint a special prosecutor to present the case to the grand jury and to sign the indictment.

cially initiated contempt cases, an alternative that seems unduly burdensome, the judge's decision to seek an indictment would require him to evaluate and to some extent pre-judge the case prior to trial. Even if a different judge conducted the contempt hearing, he could be prejudiced by the assessment of seriousness made by the initial judge, and this could affect the severity of the subsequent sanction.²²⁸ While this problem also exists with regard to the jury trial right, which similarly must be based on a prior assessment of the seriousness of the offense,²²⁹ perhaps the importance of that right outweighs any danger of prejudice. In contrast, the right to an indictment arguably is not sufficiently important to risk the possibility of pre-judgment bias.

The difficulty with this argument is the initial premise that the judiciary needs the discretionary power to initiate contempt proceedings that may result in lengthy sentences. A prosecutor's unwillingness to seek or sign an indictment may indicate that a serious sanction is unwarranted. The analysis has already suggested that there is little, if any, need for judicial initiating discretion. However, even if one assumes that the judiciary should retain some initiating power, it would be desirable to limit the potential penalty in judicially initiated contempt cases. The absence of any nonjudicial check on the judiciary's power to initiate and punish affronts to its authority creates the potential for bias, and an explicit sentencing limitation at least would make the exercise of the power appear less arbitrary. Although the Supreme Court has indicated that appellate courts can and should exercise discretion to reduce excessive contempt penalties,²³⁰ the criteria for the exercise of that discretion are extremely vague,²³¹ and appellate courts have approved a wide range of sentences for what appears to be very similar conduct.²³² In view of the Court's holding that contempts are not inherently nonpetty,²³³ a one-year limitation on the power to sentence contemnors in cases in which the prosecutor refuses to seek an indictment does not seem unreasonable.

A second possible objection to making the grand jury right

228. It also could affect the fact-finding process in nonjury trials. However, the contemnor's sentence cannot exceed six months' imprisonment unless he is given the right to a jury trial. *Bloom v. Illinois*, 391 U.S. 194 (1968).

229. See *Cheff v. Schnackenberg*, 384 U.S. 373, 382 (1966) (Harlan, J., dissenting); UNIFORM R. CRIM. P. 321(b), Comments 51-56 (Prop. Final Draft, 1974).

230. See, e.g., *United States v. UMW*, 330 U.S. 258, 303-05 (1947).

231. Cf. *Green v. United States*, 356 U.S. 165, 188-89 (1956).

232. See *Brown v. United States*, 359 U.S. 41, 58 n.11 (1959) (Warren, C.J., dissenting).

233. See *Bloom v. Illinois*, 391 U.S. 194 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

applicable to contempts is the fear that the grand jury would refuse to return an indictment in a case in which either the prosecutor or judge, or both, felt that an individual's conduct deserved a serious penalty. Initially, it is questionable whether such a fear is warranted. In many contempt cases, there is little doubt as to the existence of probable cause,²³⁴ and, in any event, it is doubtful that a grand jury would not accede to a request for an indictment.²³⁵ If the grand jury were to refuse to indict, its action might simply reflect a proper exercise of the institution's time-honored function as a shield against unwarranted prosecution.²³⁶ Still, the grand jury may act arbitrarily. Given the likely absence of serious probable cause issues, that risk, even if minimal, is arguably a sufficient basis for denying the non-fundamental indictment right to contemnors.

It should be a sufficient response to this argument to note that a grand jury's refusal to indict would not preclude prosecution but would limit only the potential penalty. In light of the extremely speculative nature of the fear that a grand jury may refuse to indict, this is a small price to pay for enhancing the potential fairness, or at least the appearance of fairness, of contempt proceedings.

Finally, even if one assumes that the executive should have the power to decide whether to initiate contempt proceedings, it arguably should not be able to limit the courts' sentencing discretion to the imposition of a one-year prison term by utilizing an information rather than an indictment.²³⁷ Prosecutors, however, routinely exercise a closely analogous power in noncontempt cases. When-

234. This would probably be true, for example, where the contumacious conduct is a refusal to testify.

235. See Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Note, *The Grand Jury: Powers, Procedures, and Problems*, 9 COLUM. J. L. & SOC. PROB. 681, 699-702 (1973). See also Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 295, 325, 330, 363 (1931). But cf. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 176-79 (1932).

236. See *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

237. In noncontempt contexts, only the legislature may limit the courts' sentencing discretion, and one of the underlying policies of the double jeopardy ban is the prevention of executive interference with legislative and judicial sentencing power. See Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 302-08 (1965). If Congress, for example, sets a maximum penalty at ten years' imprisonment, the prosecutor cannot subvert that determination by seeking punishment both for the crime and for a lesser included offense. Cf. Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 529-31 (1949). If the court decides that the appropriate penalty is less than the maximum, the double jeopardy provision bars the prosecutor from retrying the case to obtain a more severe penalty. Cf. *In re Nielsen*, 131 U.S. 176 (1889). However, as these examples point out, the double jeopardy limitations on executive interference with sentencing are designed to protect defendants against executive efforts to increase criminal penalties. Since the sentencing limitation that would result from the use of an information could work only to the defendant's advantage, the exercise of prosecutorial discretion to charge by information rather than by indictment is not inconsistent with the policies underlying the double jeopardy clause.

ever they decide which of a number of possible crimes to charge, and particularly when they engage in plea bargaining prior to the filing of an indictment or information, they are making discretionary decisions that will limit the court's sentencing power.²³⁸

Exercise of this discretionary power in the contempt situation would be merely a recognition that there are two types of criminal contempts—infamous and noninfamous;²³⁹ it would be as if there were two contempt statutes, one with no maximum penalty and one with a maximum penalty of one year's imprisonment.²⁴⁰ Since the elements of both types of contempts are the same, the absence of any criteria for distinguishing serious from nonserious contempts creates the possibility for arbitrary prosecutorial classification.²⁴¹

238. For example, the recent guilty plea by former Attorney General Richard Kleindienst to a charge of violating 2 U.S.C. § 192, the contempt of Congress statute, was based on testimony that was arguably perjurious. *See* N.Y. Times, May 17, 1974, at 1, col. 1 (late city ed.). The maximum potential penalty for violating the contempt of Congress statute is one year's imprisonment and a \$1,000 fine. 2 U.S.C. § 192 (1970). Had Mr. Kleindienst been prosecuted for perjury and found guilty, the maximum potential penalty would have been five years' imprisonment and a \$2,000 fine. 18 U.S.C. § 1621 (1970).

239. *See* note 66 *supra* and accompanying text.

240. In *United States v. Green*, 356 U.S. 165, 182-83 (1958), the Court explicitly held that section 401 gives complete discretion over the length of contempt sentences to the judiciary. Of course, Congress could not give the courts power prohibited by the Constitution, and as an abstract proposition, the Supreme Court should have no difficulty in holding that Congress has no power to enact a statute that both allows courts to impose more than a one-year sentence for an ordinary crime and, at the same time, deprives defendants charged with that crime of the right to a grand jury indictment. It is arguably inappropriate, however, for courts to require grand jury indictments in serious contempt cases when the right to an indictment is not fundamental to fairness and the granting of the right would appear to contravene Congress' specific delegation of complete sentencing discretion to the judiciary.

There are at least two responses to this congressional intent argument. First, it is not clear that Congress intended to vest unlimited sentencing discretion in the courts. Rather, as *Green* suggests, *see* 356 U.S. at 169, 179-81, it is likely that Congress was merely expressing a refusal to regulate the courts' inherent sentencing power, whatever its scope may be. In fact, since the Supreme Court has suggested that the congressional power to regulate contempts is a limited one, *see* note 86 *supra*, Congress may have believed that, even if it wanted to, it could not completely regulate the sentencing of contempts. If the sentencing provision in section 401 is merely a recognition of the existence of inherent judicial sentencing power rather than a specific delegation of that power, the statutory language offers no basis for objecting to the prosecutorial sentencing discretion that would follow from the application of the fifth amendment grand jury indictment provision to criminal contempts. Second, even if prosecutorial sentencing discretion would contravene congressional intent, the Supreme Court has never suggested that the necessity rationale, which justifies the *sui generis* treatment of contempts, extends to the protection of legislative as opposed to judicial interests. Thus, congressional intent should not be a valid justification for a judicial claim of inherent power to exercise total sentencing discretion.

241. Several state courts have taken the position that the exercise of prosecutorial discretion to charge under the more severe of two or more criminal statutes proscribing the same conduct violates the defendant's right to equal protection. *See, e.g., State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146 (1969) (defendant entitled to be sentenced under less severe statute); *State v. Collins*, 55 Wash. 2d 469, 348 P.2d 214

This problem, however, can be met only by creating specific maximum penalties for different types of contumacious conduct. Until that is done, prosecutorial discretion to limit sentencing, even if no less arbitrary than the present unfettered judicial discretion, at least has the potential for preventing the imposition of excessive sentences by judges who may be prone to bias because a contempt represents an affront to their authority.²⁴²

2. *Alternative Solutions to the Grand Jury Issue*

Despite the lack of necessity for refusing to apply the fifth amendment's indictment provision to criminal contempts, the preceding analysis has recognized that the extent to which a grand jury can be expected to act as a shield against unwarranted prosecutions is questionable. Rather, the primary benefits (in addition to enhancing the appearance of fairness in contempt proceedings) of extending the grand jury right to contemnors lie in the collateral consequences of such a requirement—namely, the prosecutor's power to limit contempt sentences in all proceedings that he initiates and the restraints on judicial initiation of contempts punishable by more than a year's imprisonment. The judiciary, however, may be reluctant to overrule the precedent for evaluating contempt procedures by standards of due process²⁴³ or to surrender any sentencing discretion to the executive. Moreover, even if the judiciary is willing to allow or promote the initiation of criminal contempts by indictment or information on a case-by-case basis, it may be unwilling to yield or limit its power to impose substantial penalties

(1960) (prosecutor may not choose between negligent homicide and manslaughter statute where latter requires more favorable standard of proof). See Comment, *Prosecutorial Discretion in the Duplicative Statutes Setting*, 42 U. COLO. L. REV. 455, 458-61 (1971). The Supreme Court, however, has avoided this equal protection issue, see *Berra v. United States*, 351 U.S. 131, 135 (1956), and at least one other court has found no constitutional barrier to the prosecutor's decision to charge under one of two statutes proscribing the same conduct, even when only one of the statutes—the one selected—required that upon conviction the defendant be given a mandatory minimum sentence. *Hutcherson v. United States*, 345 F.2d 964 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965).

Regardless of the validity of the equal protection claim in other contexts, it should have no applicability to the prosecutor's discretionary power to initiate a section 401 contempt proceeding by information or indictment. Since the penalty, and not the method of initiation, determines whether the crime is a misdemeanor or a felony, see FED. R. CRIM. P. 7(a) (misdemeanors may be initiated by indictment), a prosecutor's decision to initiate contempt proceedings by indictment will not affect the classification of the crime. Cf. *Berra v. United States*, 351 U.S. 131, 135 (1956). And since the use of an indictment will not require the imposition of any minimum sentence, there is no danger of the prosecutor's arbitrary conduct working to the detriment of the defendant. Cf. *Hutcherson v. United States*, 345 F.2d 964, 973-74 (D.C. Cir.) (Bazelon, J., dissenting in part), cert. denied, 382 U.S. 894 (1965).

²⁴² See text at notes 97-100 *supra*.

²⁴³ See text at notes 189-92 *supra*.

in all cases. With the hope of ensuring that possible judicial reluctance to extend the fifth amendment indictment right to criminal contempt will not impede efforts to transfer initiating discretion from the judiciary to the executive, this subsection will suggest and discuss several alternative methods of resolving the grand jury issue.

First, it would of course be possible simply to reaffirm the view that contemnors are never entitled to a grand jury indictment. This approach—which would not place any limitations on judicial initiating and sentencing power—offers the least protection against potential abuses of the contempt power and is difficult to justify in terms of the necessity rationale. It would not, however, prevent the judiciary from encouraging or requiring the executive to initiate criminal contempts.²⁴⁴

Second, if one is concerned only with prosecutorial discretion to limit a court's sentencing power, it would be possible for the Supreme Court, by amendment of the Federal Rules of Criminal Procedure or perhaps pursuant to its supervisory power,²⁴⁵ to require that *all* criminal contempts be initiated by indictment. Since the criminal contempt power is easily subject to abuse and has in the past been used as a device to inhibit dissident political activity,²⁴⁶ such a requirement may be desirable. Even if the grand jury would not be an effective shield, the indictment requirement would enhance the appearance of fairness, and the burden of having to seek an indictment could restrain overzealous prosecutors. The extent of such restraint would be questionable, however; the indictment requirement probably would do little to curb the excesses of personally interested or vindictive prosecutors. In addition, it would seem anomalous for the indictment right to exist for all contempts when the more fundamental right to a jury trial exists only in cases in which the actual sentence exceeds six months' imprisonment.

Rather than requiring that all criminal contempts be initiated by indictment, the Court, by amendment to the Federal Rules or pursuant to its supervisory power, could require only that criminal contempts initiated by the executive be by indictment.²⁴⁷ Limiting the method of executive initiation would eliminate the possibility of executive control over sentencing, and the court could justify the

244. See text at notes 193-204 *supra*.

245. See text at notes 194-99 *supra*.

246. See text at notes 145-46 *supra*.

247. Since there is existing precedent for the proposition that rule 42 does not provide the exclusive method for initiating criminal contempts, see cases cited note 28 *supra*, reliance on the supervisory power to control the method of initiation when rule 42 is not utilized would not have the effect of amending or limiting the scope of rule 42. Cf. text at notes 194-99 *supra*.

requirement on this basis, thereby avoiding the apparent inconsistency between the scope of the jury trial right and the indictment right. In addition, judges could still initiate contempts if the executive fails to act. The major disadvantage of this alternative is that it may discourage executive initiation of contempts: So long as the rule 42 option remains available, a prosecutor who prefers the convenience of rule 42 could simply refuse to indict,²⁴⁸ thereby forcing the court to initiate proceedings itself or let the contemnor remain unpunished.

Another possible method of resolving the grand jury problem is through two types of legislative action. First, as suggested above,²⁴⁹ Congress could repeal or limit the scope of section 401 and treat various types of contumacious conduct as ordinary criminal offenses that could be initiated only by indictment or information. If these ordinary criminal offenses contained maximum penalty provisions, the indictment question would be resolved: A potential penalty of more than a year's imprisonment would entitle the defendant to a grand jury indictment.

Second, instead of or in addition to limiting the courts' initiating discretion by narrowing the scope of section 401, Congress could impose a maximum penalty for violations of that section. Since the Supreme Court has concluded that criminal contempts are not inherently nonpetty, a maximum penalty of no more than a year's imprisonment would not appear unreasonable,²⁵⁰ and if the penalty were so limited, there would be no basis for granting contemnors the right to a grand jury indictment. The question of executive initiation then could be resolved by the types of executive or judicial actions suggested previously.

A decision by Congress to establish a greater maximum penalty for violations of section 401 would not establish the right to an indictment in the absence of a decision to make the fifth amendment's indictment guarantee applicable to criminal contempts. Contemnors, however, could be granted that right, either through an amendment to the Federal Rules or through the Supreme Court's exercise of its supervisory power.²⁵¹ While such action would de-

248. But *cf.* note 98 & text at note 215 *supra*.

249. See text at notes 205-13 *supra*.

250. *Cf.* PROP. FED. CRIM. CODE, *supra* note 83, § 1341(2) (six-month maximum prison term for criminal contempts).

251. Even though reliance on the supervisory power would in effect amend rule 42, the congressional action explicitly authorizing a serious penalty would appear to represent a legislative judgment that contempts should no longer be viewed as inherently nonserious offenses, and this expression of congressional intent arguably would be a sufficient basis to justify use of the Court's supervisory power to require

prive the judiciary of its formal initiating power, it probably would not create the anomaly of making the indictment right more pervasive than the jury trial right—a situation that, as noted previously, would exist if a nonconstitutional right to an indictment were extended to criminal contemnors in the absence of any maximum penalty limitations for violations of section 401. The legislative determination that the penalty may exceed a year's imprisonment would represent a judgment that the crime of contempt is not a petty offense,²⁵² and the right to trial by jury therefore presumably would always apply.²⁵³

The major difficulty with relying on legislative action to resolve or assist in resolving the grand jury issue is uncertainty over the extent to which Congress can regulate the contempt power. The problems with regard to limiting the substantive scope of section 401 have already been mentioned.²⁵⁴ With regard to the imposition of maximum penalties, the judiciary may view the failure to provide for the possibility of serious contempt sanctions as unduly restrictive, and if, as a result of the penalty provisions, all contemnors become entitled to jury trials, the judiciary may view the legislation as overly burdensome.²⁵⁵

Potential objections to congressional regulation of contempt sentences would perhaps be minimized by enactment of a carefully considered statutory scheme that establishes various maximum penalties for different types of contumacious conduct. However, regardless of the form the legislation might take, hopefully the judiciary would continue to defer to congressional regulation and not assert the doctrine of inherent power to invalidate contempt legislation unless it is patently unreasonable.²⁵⁶

III. CONCLUSION

The analysis here has attempted to demonstrate (1) that despite the judicial rhetoric about inherent power and the *sui generis*

that contemnors be given the right to a grand jury indictment. Compare *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), with text at notes 193-99 *supra*.

252. Compare 18 U.S.C. § 1(3) (1970) ("Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months . . . is a petty offense") with *Bloom v. Illinois*, 391 U.S. 194, 211 ("[W]hen the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense"). See *Frank v. United States*, 395 U.S. 147, 148 (1969).

253. See cases cited note 47 *supra*.

254. See text at notes 82-85, 207-10 *supra*.

255. See *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42 (1924), discussed at note 86 *supra*.

256. See note 72 *supra*.

nature of criminal contempt, the only substantial difference between criminal contempts and other crimes is the method by which the proceedings are initiated; (2) that, at least in recalcitrant witness cases, the rationale of necessity, which is the basis for the exercise of contempt power, does not justify the existence of the unique rule 42(b) initiating procedures; and (3) that there would be substantial benefits from treating rule 42(b) criminal contempts as ordinary criminal prosecutions for all purposes. Admittedly, however, there are problems in moving from the premise that there is no necessity for the unique rule 42(b) initiating procedures in most, if not all, criminal contempt cases to some definitive action requiring that criminal contempts be treated as ordinary criminal prosecutions. Both Congress and the Supreme Court may view complete elimination of the judiciary's initiating power as involving too great a risk that some contemnors may go unpunished. Even if this risk factor is discounted, there are other obstacles to the assimilation of criminal contempts with other crimes. Uncertainty over the extent to which the judiciary will permit legislative regulation of the contempt power may make Congress reluctant to limit the scope of section 401 or even to provide maximum penalties for violations of that section. The Supreme Court may be unwilling to overrule the substantial precedent for evaluating contempt procedures by standards of due process, and although the Court could eliminate the rule 42(b) option through an amendment to the Federal Rules or perhaps through the exercise of its supervisory power, it may instead prefer to retain rule 42(b) merely to avoid facing the question whether granting contemnors the right to a grand jury indictment is appropriate.

In light of these practical restraints on congressional or Supreme Court action to eliminate or restrict the rule 42(b) contempt power, probably the most important recommendation made here is that prosecutors begin to use and lower court judges to encourage the use of the indictment process in criminal contempt cases. There is precedent for such a practice. Moreover, reserving rule 42(b) for the rare case in which a prosecutor fails to proceed would provide empirical evidence of the extent to which the judiciary may need to retain initiating discretion in criminal contempt cases. This evidence would provide a sound basis for both Congress and the Supreme Court to reassess and clarify the nature and scope of inherent judicial contempt power.