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Invoking Summary Criminal Contempt Procedures--Use of Abuse? *United States v. Dellinger* --The "Chicago Seven" Contempts

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COMMENTS

Invoking Summary Criminal Contempt Procedures—Use or Abuse? *United States v. Dellinger**—The "Chicago Seven" Contempts

I. INTRODUCTION

In late August of 1968, while delegates to the Democratic National Convention were arriving in Chicago, a group of several thousand demonstrators gathered in the city's Lincoln Park to protest the Convention, the Vietnam War, and the city's refusal to grant the group a permit to hold rallies and marches during the Convention. The week that followed was marred by violent confrontations between the demonstrators and the city's police.[1] This violence in Chicago provided the impetus for an indictment by a federal grand jury of the defendants in *United States v. Dellinger*.[2]

The *Dellinger* case came to trial on September 24, 1969, and continued until February 14, 1970. During the trial the defendants, their counsel, and the presiding judge engaged in numerous heated and vituperative exchanges. As soon as the jury had received its instructions and had retired to deliberate, District Judge Julius J. Hoffman summarily cited the seven defendants[3] and their two attorneys for various instances of criminal contempt. The court, invoking summary powers granted by Rule 42(a) of the Federal Rules of Criminal Procedure,[4] read contempt specifications taken from the trial record and gave each contemnor an opportunity to address the court solely on the question of punishment. A separate sentence was imposed for each contempt specification with the terms of imprisonment to run consecutively.[5] The contempt citations represented punishment for

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* No. 69 C.R. 180 (N.D. Ill., Feb. 14-15, 1970).

1. *See, e.g.*, J. EPSTEIN, THE GREAT CONSPIRACY TRIAL (1970).

2. No. 69 C.R. 180 (N.D. Ill., Feb. 14-15, 1970). The grand jury returned an eight-count indictment charging eight defendants with conspiracy to violate 18 U.S.C. § 2101 (Supp. V, 1965-1969) (inciting to riot) and 18 U.S.C. 231(a)(1), (3) (Supp. V, 1965-1969) (furtherance of civil disorders). Dellinger, Davis, Hayden, Hoffman, Seale, and Rubin were also charged individually with violating 18 U.S.C. § 2101 (Supp. V, 1965-1969). Froines and Weiner were charged with violating 18 U.S.C. § 231(a)(1) (Supp. V, 1965-1969).

3. The eighth defendant, Bobby Seale, was given a mistrial and sentenced to four years imprisonment on summary contempt charges earlier in the trial. CONTEMPT, TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, 35-36 (1970) [hereinafter CONTEMPT]. The remaining defendants were quickly labeled the "Chicago Seven" by the news media.

4. Rule 42(a) provides:

> . . . 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.

5. *See* note 55 *infra*.

alleged misconduct that had occurred over the entire course of the proceedings. The earliest cited instance of alleged contempt took place on the first day of trial,[6] with the last incident occurring five days before the jury retired.[7] Judge Hoffman implied that the contempt citations resulted from the aggregate of the contemnors' actions during the trial. Addressing defense attorney Leonard Weinglass, the judge said: "I judge your whole attitude toward the Court. . . . But I am obligated under the law to particularize these items of contempt which I have."[8] Asserting the right to notice and a hearing and to a jury trial before a different judge, the defense objected strenuously to the contempt proceedings. The questions thus raised present crucial and unresolved issues in the area of criminal contempt.

II. Development of the Law of Contempt

A. *Common Law*

The power of courts to punish for contempt had its origin in canon law and was borrowed by the English chancellors as they assumed equity jurisdiction.[9] In the United States, the power to punish for contempt has been consistently viewed as a necessary and integral part of the independence of the judiciary and therefore has been deemed "inherent" in all courts.[10] Since the contempt power protects courts from insult and oppression while exercising their lawful duties, it is considered necessary for the preservation of order in judicial proceedings. Moreover, this power is regarded as essential to the enforcement of the judgments and orders upon which the administration of justice depends.[11]

The courts have classified contempts as "civil" and "criminal." Civil contempt proceedings are remedial in nature and are intended to force compliance with a court order that has been disobeyed.[12] In

6. Weinglass (Attorney), Specification No. 1 (continuing argument when told to cease). Contempt, *supra* note 3, at 213.

7. Kunstler (Attorney), Specification No. 24. *Id.* at 202.

8. *Id.* at 239-40.

9. C. Langdell, A Brief Survey of Equity Jurisdiction 25-26 (2d ed. 1908). The jurisdiction of both the canon-law courts and the equity courts was limited. To enforce their decisions it was necessary that those tribunals be able to issue commands and impose punishment in case of disobedience. *Id.* at 26.

10. *Ex parte* Robinson, 86 U.S. (19 Wall) 505 (1873). In this case the Court stated "[t]he moment the courts of the United States were called into existence . . . they became possessed of [contempt] power." 86 (19 Wall) at 510.

11. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911); Bessette v. W. B. Conkey Co., 194 U.S. 324, 333 (1904); *Ex parte* Robinson, 86 U.S. (19 Wall) 505, 510 (1873).

12. *See* Yates v. United States, 355 U.S. 66, 74 (1957); McCrone v. United States, 307 U.S. 61, 64 (1939).

a civil-contempt situation, the contemnor is imprisoned until he agrees to comply with the order. His action or inaction is thus determinative of the length of any incarceration.[13] Criminal contempt proceedings, on the other hand, are instituted primarily for the purpose of vindicating the dignity and authority of the court.[14] It consists of conduct disrespectful to the court or its processes, conduct that obstructs the administration of justice. Because a finding of criminal contempt is punitive in nature—operating as punishment for a completed act of disrespect or disobedience—sentences for this type of contempt are limited to fixed periods. In many instances it is difficult to distinguish civil and criminal contempt. Under the federal statute,[15] a single act may constitute either civil or criminal[16] contempt or both.[17] The distinction is important because the type of contempt determines what procedural safeguards, if any, will apply during the contempt proceedings. For example, while criminal contempt may necessitate the impaneling of a jury,[18] civil contempt will not.[19] Generally, the type of conduct, the purpose of the contempt proceeding, and the nature of the punishment sought determine whether the contempt is civil or criminal.[20]

Contempts have been further categorized as "direct" or "indirect." Direct contempt involves contemptuous conduct that is committed in the presence of the court or "so near thereto as to obstruct the administration of justice."[21] Indirect contempt arises from conduct that, although not occurring in or near the presence of the court, tends to obstruct the administration of justice.[22] These distinctions—civil-criminal and direct-indirect—have been codified in the rules and statutes that govern the exercise of the contempt power by the federal courts.[23]

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13. Although compliance by the contemnor will ensure his release, other events may also secure it. For example, if he has been civilly committed for failing to answer questions before a grand jury, he must be released from confinement upon dismissal of that grand jury. Shillitani v. United States, 384 U.S. 364, 372 (1966).

14. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 448 (1911).

15. 18 U.S.C. § 401 (1964).

16. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451-52 (1911); Bessette v. W. B. Conkey Co., 194 U.S. 329 (1904).

17. Yates v. United States, 355 U.S. 66, 72, 74 (1957).

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

19. Shillitani v. United States, 384 U.S. 364 (1966).

20. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 448 (1911).

21. 18 U.S.C. § 401(1) (1964). Although "direct" does not appear in the statute, the Court does recognize the term. *See* Nye v. United States, 313 U.S. 33 (1941).

22. Physical distance is determinative when measuring the "nearness" of the act. Nye v. United States, 313 U.S. 33, 52 (1941), in which a contemptuous act that occurred over one hundred miles from the court was held not to be direct contempt.

23. *See* notes 27-33 *infra* and accompanying text.

B. *Statutory Codifications*

The contempt power inherent under the common law received statutory recognition early in the nation's history. The original codification did little more than note the existence of the power: "[A]ll the said courts of the United States shall have the power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ."[24] Unfortunately, the sweeping language of this provision provided no guidelines or boundaries for its use and it was not until after the attempted impeachment of District Judge James Peck[25] that the contempt power was somewhat delimited.[26] Current statutes place specific limits on the exercise of the contempt power by the federal courts. The bounds are basically set forth in the federal statute[27] and in Rule 42 of the Federal Rules of Criminal Procedure.[28] Rule 42 is

24. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83.

25. Judge Peck invoked the contempt power to disbar and imprison an attorney who had published a criticism of one of Peck's decisions while it was pending appeal. The judge's action brought outcries from Congress concerning misuse of the power and resulted in impeachment proceedings against him. A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 445, 455 (1833). *See also* Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 423-30 (1928).

26. The Peck case served as the catalyst for congressional action. In 1831, the House of Representatives directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States and also to limit the punishment for the same." 7 CONG. DEB. 560 (1831). After the inquiry Congress adopted remedial legislation. *See* Act of Mar. 2, 1831, ch. 99, 4 Stat. 488.

27. 18 U.S.C. § 401 (1964) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It should be noted that a lawyer "is not the kind of 'officer' who can be summarily tried for contempt under 18 U.S.C. § 401(2)." Cammer v. United States, 350 U.S. 399, 407-08 (1956). This fact has application to the contempts issued in the "Conspiracy Seven" trial. Specifically, attorneys Kunstler and Weinglass would not be subject to subsection (2) of the act; their alleged contempts would fall within the terms of subsection (1).

28. Rule 42. Criminal Contempt.

> (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

substantially a restatement of prior law as propounded in decisions of the Supreme Court.[29]

Under Rule 42(a), the federal courts are allowed to punish "summarily"[30] direct criminal contempts committed in the actual presence of the court.[31] In a case of summary punishment, the defendant's procedural rights are significantly curtailed: he is not afforded notice, the chance to defend himself, the assistance of counsel, the opportunity to present and cross-examine witnesses, or the right to a jury trial.[32] Rule 42(b), which requires notice and a hearing, provides procedural regularity for all criminal contempts other than those occurring in the situations envisioned by Rule 42(a). Under 42(b), the contemnor is afforded the panoply of procedural safeguards operative in criminal proceedings and thus has, for example, the right to prepare a defense, to have the assistance of counsel, to call witnesses, and, in appropriate cases, to have a jury trial.[33]

III. Judicial Approaches to Direct Criminal Contempt

A. *The Constitutional Right to Trial by Jury: A Lesson in Circuity*

Notwithstanding the constitutional guarantees of trial by jury for criminal offenses,[34] until recently the Supreme Court had consistently upheld the power of the federal courts to punish direct

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.

29. Notes of Advisory Comm. on Rules, Fed. R. Crim. P. 42(a), in Appendix, 18 U.S.C. (1964), at 3766.

30. Summary proceedings differ procedurally from traditional criminal convictions. The Supreme Court has stated that "'summary' . . . refers to a procedure which dispenses with the formality, delay and digression that would result from . . . all that goes with a conventional court trial." Sacher v. United States, 343 U.S. 1, 9 (1952). Indeed, all the judge need do is inform the contemnors of the charges against them and specify the sentences for each charge. The contemnors have no right to participate in the proceedings. 343 U.S. at 9.

31. Fed. R. Crim. P. 42(a). For a discussion of limitations on the power of a court to invoke summary proceedings, see notes 90-135 *infra* and accompanying text.

32. The procedural anomalies in summary proceedings result from reliance on the theory that the court sees the contemptuous conduct in all its nuances and can act on its own knowledge of the facts. *See* Cooke v. United States, 267 U.S. 517, 536 (1925). This theory assumes that the court will be able to evaluate and act upon the facts in an objective manner, an assumption that is open to serious question.

33. Fed. R. Crim. P. 42(b), set out in note 28 *supra*.

34. U.S. Const. art. III, § 2 provides that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury . . . ." U.S. Const. amend. VI provides in part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

criminal contempt summarily.[35] Wary of impairing the ability of judges to preserve order and decorum during the course of a trial, the Court was hesitant to impose potentially cumbersome procedural safeguards on contempt proceedings. Instead, judges were urged to exercise the utmost self-restraint in utilizing their summary contempt powers[36] and were additionally instructed to consider "the extent of the willful and deliberate defiance of the court's order [and] the seriousness of the consequences of the contumacious behavior" before imposing sentence.[37] Although these nonconstitutional restraints still exist, the despotic potential of the contempt power has led the Court to impose additional restrictions of a constitutional nature.[38] Thus, in *Cheff v. Schnackenberg*,[39] the Court held that criminal contempt convictions in the federal courts involving a sentence of six months or less do not require a jury trial because they are "petty" offenses[40] excluded from the protection of the sixth amendment.[41] In an emphatic dictum, the Court went on to direct that all future sentences for criminal contempt exceeding six months require trial by jury.[42]

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35. *See, e.g.*, United States v. Barnett, 376 U.S. 681, 692-700 (1964) (defendants not entitled to a jury trial for serious contempts); Green v. United States, 356 U.S. 165, 183 (1958) (no constitutional right to jury trial for criminal contempt).

36. *See, e.g., In re* McConnell, 370 U.S. 230, 233 (1962); Green v. United States, 356 U.S. 162, 188 (1958).

37. United States v. UMW, 330 U.S. 258, 303 (1947). *See also In re* Bradley, 318 U.S. 50, 52 (1943) (fine and imprisonment mutually exclusive alternatives).

38. The Court had already imposed upon contempt proceedings some basic procedural safeguards. *See, e.g.*, Offutt v. United States, 348 U.S. 11, 17 (1954) (right to an unbiased judge); *In re* Oliver, 333 U.S. 257, 266-72 (1948) (right to a public trial); Michaelson v. United States, 266 U.S. 42, 66 (1924) (protection against self-incrimination).

39. 384 U.S. 373 (1966). Petitioner was charged with criminal contempt for aiding and abetting a company to violate a pendente lite compliance order, issued by a court at the instance of the Federal Trade Commission.

40. *See* District of Columbia v. Clawans, 300 U.S. 617, 624 (1937), in which the Court noted that

> [i]t is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty," which were tried summarily without a jury . . . .

41. 384 U.S. at 379-80.

42. 384 U.S. at 380. The Court's dictum presents a serious problem when applied to criminal contempt because the federal statute (18 U.S.C. § 401, set out in note 27 *supra*) does not establish a maximum penalty for contempt. Although the maximum penalty authorized by statute would normally be determinative of the classification of an offense as either petty or serious (*see* notes 70-71 *infra* and accompanying text), the actual penalty imposed must be used if contempt is the crime under consideration. Since the sentence to be imposed is unknown until after the summary contempt proceeding has been completed, it would appear that a two-step process may be necessary if the "six-month" rule is to be applied to criminal contempt. Initially, the trial judge would have to decide what sentence would be appropriate and, if the possible sentence exceeded six months, a jury would have to be empaneled to hear the case on

Subsequently, in *Bloom v. Illinois*,[43] the Court explicitly held that the sixth amendment requires a jury trial in both federal and state situations involving "serious" criminal contempt.[44] Both potential and real abuses of the contempt power served as justification for the new rule.[45] Indeed, the Court noted that the potential for judicial abuse was greater in the area of contempt than in any other type of criminal proceeding because contempt often strikes at the human qualities of the judge and usually signals a rejection of his judicial authority.[46] Presumably it was this potentially prejudicial aspect of the offense that led the Court to erect the jury as a buffer between the contemnor and the court, at least in all cases of "serious" criminal contempt.[47] Recently, in *Baldwin v. New York*,[48] the Court reaffirmed the use of the jury as a buffer in serious criminal cases:

> [T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge . . . , but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.[49]

Although *Baldwin* did not deal specifically with contempt, its concern with the possibility of oppression may be of even greater significance in the area of criminal contempt in which the judge himself acts as prosecutor.

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the merits. There is, of course an incongruity in this process since the trial judge would have to consider the merits at the outset in order to decide what would be an appropriate sentence. In the wake of *Cheff* the alert judge would simply limit his contempt sentences to six months and perhaps string together several sentences of six months in an attempt to avoid the jury trial requirement.

43. 391 U.S. 194 (1968). Defendant was charged with contempt for willfully petitioning to admit to probate a falsely prepared will. His demand for a jury trial on the contempt charge was refused and he was sentenced to two years imprisonment by an Illinois state court. 391 U.S. at 210.

44. [S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provision of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried wihout honoring a demand for a jury trial.

391 U.S. at 198.

45. *See* 391 U.S. at 202-08.

46. 391 U.S. at 202 n.2.

47. In recognizing this need for an intervening jury, the Court specifically rejected its prior holding in the case of *In re* Debs, 158 U.S. 564, 595 (1895), that "[t]o submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." 391 U.S. at 208.

48. 399 U.S. 66 (1970). The defendant had been charged with the misdemeanor of "jostling," which carried a maximum sentence of one year. The denial of his motion for a jury trial was reversed by the Court as a violation of the sixth and fourteenth amendments. 399 U.S. at 69, 73-74.

49. 399 U.S. at 72.

The first question to be answered in light of *Cheff* and *Bloom* is whether those decisions apply to the *Dellinger* situation since, on their facts, they relate only to indirect criminal contempt.[50] If these decisions are applicable only to indirect contempt, there is little reason for concern with the jury trial issue since even "serious" direct contempt could be tried without a jury. An argument that *Cheff* and *Bloom* should not be applied to cases of direct contempt can be made. Direct contempt summarily adjudged has normally produced sentences consisting of only a fine or a few days imprisonment[51] whereas the imposition of increasingly severe punishments, which prompted the Supreme Court's restrictive decisions in *Cheff* and *Bloom*, has been primarily confined to cases of indirect contempt.[52] The Court's apparent concern, therefore, was with abuses in the punishment of misbehavior that occurs beyond the purview of the judge and not with the handling of direct contempt that occurs in the judge's presence. Thus, proponents of a strong contempt power might well argue that the restrictions of *Cheff* and *Bloom* apply only to those cases involving indirect contempt. However, in *Bloom*, the Court precluded any such narrow interpretation; after announcing the application of the sixth amendment to cases of serious contempt, it went on to consider specifically the jury trial right in regard to the exercise of the summary (*i.e.*, direct) contempt power. Although noting the unique circumstances surrounding direct contempt and the attendant need for immediate action, the Court nevertheless found no reason to except serious direct-contempt proceedings from the right to a jury trial.[53] Hence, if the *Dellinger* offenses con-

50. The facts in *Cheff* and *Bloom* are discussed in notes 39 & 43 *supra*. The direct-indirect contempt distinction is discussed in text accompanying notes 21-22 *supra*.

51. *See, e.g., In re* Osborne, 344 F.2d 611 (9th Cir. 1965) (10 days imprisonment and $250 fine); United States v. Bradt, 294 F.2d 879 (6th Cir. 1961) ($100 fine); Cammer v. United States, 223 F.2d 322 (D.C. Cir. 1955), *revd.*, 350 U.S. 399 (1956) ($100 fine); Offutt v. United States, 208 F.2d 842 (D.C. Cir. 1953), *revd.*, 348 U.S. 11 (1954) (10 days imprisonment). *See generally* Comment, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 S. CAL. L. REV. 463 (1966).

52. *See, e.g.*, Green v. United States, 356 U.S. 165, 167 (1958) (three years imprisonment for failure to return from bail after a court had ordered return); Nilva v. United States, 352 U.S. 385, 386 (1957) (one year and one day imprisonment for disobeying a subpoena duces tecum); United States v. UMW, 330 U.S. 258, 269 (1947) (union fined $3,500,000 and its president fined $10,000 for disobeying a restraining order). *See also* Comment, *Constitutional Law—Right to Jury Trial in Indirect Criminal Contempts in Federal Courts*, 57 MICH. L. REV. 258, 264-66 (1958).

53. Although Rule 42(a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom. The power of a judge to quell disturbance cannot attend [sic] upon the impaneling of a jury. There is, therefore, a strong temptation to make exception to the rule we establish today for disorders in the courtroom. We are convinced, however, that no such special rule is needed.
391 U.S. at 209-10.

stitute serious direct contempts, the six-month rule is clearly applicable.[54]

Although the Court has established the six-month line as the major characteristic of a "serious" offense and has employed that concept in making clear the applicability of the jury trial right to cases of both direct and indirect contempt, it has not considered the question whether by charging a contemnor with a multiplicity of separate offenses and attaching a separate sentence of less than six months to each, a court may impose a total sentence exceeding six months without affording the protection of a jury trial. It was through the use of such a technique that the district court in *Dellinger* was able to mete out aggregate sentences that exceeded, on the average, twenty months in duration,[55] without expressly defying the underlying principles of *Cheff*, *Bloom*, and *Baldwin*. Consequently, the major issue presented by *Dellinger* is whether the applicability of the constitutional requirement of a jury trial for sentences exceeding six months is to be determined on the basis of the individual sentence for each of the various incidents of contempt or on the basis of the aggregate penalty for all the incidents of contempt. If the former is found to be the case, it would seem that the heart of the substantive six-month rule may be circumvented in any situation involving more than one alleged contempt by the same individual.

Even during the era of nonconstitutional constraints on the contempt power, the Supreme Court, in an effort to prevent judicial arbitrariness, required that each contemptuous act occurring during any proceeding be specified on the record thereof with the corresponding portion of the total punishment specifically set forth.[56]

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54. [W]hen serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court.

391 U.S. at 208.

55. The contempt sentences imposed were:

Defendant	*Charges*	*Sentence*
Dellinger	32 specifications	2 years, 5 months, 16 days
Davis	23 specifications	2 years, 1 month, 14 days
Hayden	11 specifications	1 year, 2 months, 14 days
Hoffman	24 specifications	8 months
Rubin	16 specifications	2 years, 1 month, 23 days
Weiner	7 specifications	2 months, 18 days
Froines	10 specifications	5 months, 15 days
Weinglass (Attorney)	14 specifications	1 year, 8 months, 28 days
Kunstler (Attorney)	24 specifications	4 years, 13 days

THE TALES OF HOFFMAN 287-89 (M. Levine, G. McNamee & D. Greenberg ed. 1970) [hereinafter TALES].

56. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 440 (1911). It should be noted that *Gompers* required specification of indirect criminal contempt. *Dellinger*, on the other hand, involves direct contempt. However, the specificity requirement

More important, the Court has held that in certain situations repetitive actions, such as persistent refusals by a witness to answer the same or similar questions, are to be adjudged a continuing contempt and that, consequently, only one offense may be charged.[57] Since this "continuing contempt" limitation purports to restrict the compounding of sentences for the same type of continual misbehavior, it can be argued that the incidents cited in the *Dellinger* contempt specifications should be considered as single continuing contempts by each defendant. For several reasons the continuing contempt concept seems applicable to the *Dellinger* case. First, the contemptuous conduct set out in the *Dellinger* specifications was chosen from a record replete with continuous misbehavior: the defendants' antics represent a formidable portion of the 22,000 page trial transcript.[58] Second, the trial judge conceded that the defendants were being punished for their participation in a single plan to disrupt the trial rather than for the isolated incidents specified. Thus, at one point, Judge Hoffman said "[I]t has been my considered judgment throughout this case that the behavior of the defendants was aimed at baiting the judge and inciting and harassing the U.S. Attorneys in an attempt to stop the trial."[59]

The vagueness of the authorizing statute relied on by the court in *Dellinger* lends further support to the use of the continuing contempt or single-offense theory. In its pertinent part the statute provides only that a court may punish "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[60] In passing this statute, Congress failed to fix the offense in an unambiguous fashion. The Court has said of construing such statutes that "doubt will be resolved against turning a single transaction into multiple offenses. . . ."[61] The application of this continuing offense

would appear to be equally applicable to direct criminal contempt since the Court in *Gompers* was concerned only with the distinction between civil and criminal contempts and applied the specification procedure to the latter contempts as a class. 221 U.S. at 441.

57. Yates v. United States, 355 U.S. 66, 73-74 (1957). *See also* United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953); United States v. Costello, 198 F.2d 200, 204 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

58. Judge Hoffman himself said, before sentencing defendants for their alleged contempts, "some of the offenders have engaged in such impudent repetition of their misconduct, that the court finds the imposition of consecutive sentences necessary." CONTEMPT, TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, 42 (1970) [hereinafter CONTEMPT].

59. *Id.* at 43-44.

60. 18 U.S.C. § 401(1) (1964).

61. Bell v. United States, 349 U.S. 81, 84 (1955). *Bell* involved a prosecution under the Mann Act wherein the defendant was charged with a separate violation for each of two women he transported across state lines. The Supreme Court reversed, holding that there was but a single violation. 349 U.S. at 84. The "single transaction" test of *Bell* is not the only test established by the Court. In Blockburger v. United States, 284

concept would allow the imposition of only one sentence per contemnor, which, in turn, would be subject to the six-month limitation on the use of summary punishment.

In deciding whether the actions in *Dellinger* constitute separate offenses or a single contempt, reference must again be made to the language of the authorizing statute.[62] It should be noted that the other contempt provisions embodied in the federal code contain fixed maximum penalties;[63] the statute in question, however, leaves the choice of penalty completely to the discretion of the trial court. This lack of any statutory maximum for judicially imposed contempt sentences may indicate an intention on the part of Congress to allow a substantial degree of judicial discretion with respect to contempt by authorizing trial court judges to select not only the sentence of their choice but the basis for prosecution as well—that is, by giving them the power to determine exactly what actions will constitute separate offenses. The history of section 401 belies this argument, however. The federal contempt statutes were not enacted to provide the courts with a new tool for dealing with courtroom disturbances.[64] The contempt power existed long before 1789 when the first contempt legislation was passed by Congress.[65] Instead the statutory refinements have purported to restrict and define the courts' contempt power, not to enhance it.[66] Any interpretation granting such unrestricted power to a judge contravenes the spirit of the legislation. In view of the restrictive intent of the original contempt statute, it does

U.S. 299, 304 (1932), the Court announced: "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [charge] requires proof of fact [*sic*] which the other does not." Since each contempt specification is a separate incident susceptible to proof by different facts, it could be argued that the "same evidence" test under *Blockburger* is met. However, in Ashe v. Swenson, 397 U.S. 436 (1970) (the fifth amendment's protection against double jeopardy embodies the collateral estoppel principle), Justices Brennan, Douglas, and Marshall expressly rejected use of the "same evidence" rule in their concurring opinion. Instead, they offered a "same transaction" test as a substitute. 397 U.S. 448, 451-52. Argument by analogy here would be tenuous since Justices Brennan, Douglas, and Marshall were not speaking for a majority of the Court. Indeed, it could be argued that the test is inappropriate for a unique offense such as contempt. While *Bloom* has seemingly disposed of this proposition by proclaiming contempt to be a crime like any other crime, the distintion receives some support from the lack of any time-space relation in the setting of continuing misbehavior. While a man can murder six men at virtually the same time, the contumacious acts may be spread over a period of several months as in *Dellinger*. On this basis the analogy might prove unsound.

62. 18 U.S.C. § 401, set out in note 27 *supra*.

63. Contempts committed in military courts are statutorily restricted. Article 28 of the Uniform Code of Military Justice, 10 U.S.C. § 848 (1964) prescribes a punishment not to exceed confinement for 30 days or a fine of $100, or both. 22 U.S.C. § 703(c) (1964), concerning service courts of friendly foreign forces, limits punishment to a fine of $2,000 or 6 months imprisonment, or both.

64. *See* notes 25-26 *supra* and accompanying text.

65. *See* note 24 *supra*.

66. *See generally* Recent Decision, 14 SYRACUSE L. REV. 114 (1962).

not seem amiss in doubtful cases to construe its provisions in favor of finding a single continuing offense rather than a string of multiple offenses. Such a reading of the statute would, of course, allow the imposition of only one sentence, which then would be subject to the six-month limitation on summary proceedings.

Should the attempt to characterize the contempts in *Dellinger* as single continuing offenses prove unavailing, there remains the serious concern that, by simply dividing the offense into numerous components, potentially infinite sentences could be meted out summarily by a trial judge under Rule 42(a) without the defendant receiving the protection of any procedural safeguards.[67] Thus, one of the basic issues posed by *Dellinger* is whether any of the contemnors are entitled to a jury trial under *Cheff* and *Bloom*. If the total punishment that Judge Hoffman could have summarily imposed must fall within the six-month limitation for serious criminal contempt, all but two of the contemnors should be accorded a jury trial.[68] The crux of the problem is that no statute or court decision expressly denies a trial court the power to aggregate sentences that individually do not exceed the six-month line drawn by *Bloom* and *Cheff*. The deficiency inherent in any such proposition, however, lies in its practical application, for it is only when the aggregate sentence is considered determinative that any realistic limits are imposed by *Bloom* and *Cheff*. If trial judges are left free to dispense six-month sentences for each count of contempt, any judge could, simply by searching the record for any colorable instances of contempt and imposing the maximum sentence for each one, send a contemnor to jail for an almost infinite period of time. Thus, if the six-month rule is applicable only to each offense, it does not curtail potential abuse of the contempt power. It was, after all, the Supreme Court's recognition of the potential abuse inherent in the contempt power that led it in *Bloom* to impose the six-month maximum for nonjury proceedings. If harshness and abuse in the form of lengthy contempt sanctions are tolerated under the guise that they represent punishment for separate offenses, the entire purpose of the constitutional limitations imposed by *Bloom, Cheff,* and *Baldwin* is frustrated.[69] If the Court is genuinely concerned about

67. There are at least three potential restraints on the use of summary contempt under Rule 42(a). First, while punishment generally lies within the sound discretion of the court, it may be disturbed if clearly abused. Nilva v. United States, 352 U.S. 385, 396 (1957). Second, the punishment cannot be cruel and unusual. Green v. United States, 356 U.S. 165, 187-88 (1958); United States *ex rel.* Brown v. Lederer, 140 F.2d 136, 138 (7th Cir.), *cert. denied*, 322 U.S. 734 (1944). A final potential limitation is the rule that a penal sanction exceeding six months in duration may not be imposed absent a jury trial. *See* notes 39-54 *supra* and accompanying text.

68. Only defendants Froines (5 months, 15 days) and Weiner (2 months, 18 days) were given less than six-month sentences. *See* note 55 *supra*.

69. A decision of the Supreme Court of Pennsylvania, Commonwealth v. Langes, 434 Pa. 478, 255 A.2d 131 (1969), *vacated and remanded sub nom.* Mayberry v. Penn-

potential abuse of the contempt power, it would appear self-defeating to affirm Judge Hoffman's actions in *Dellinger*.

In determining whether the six-month limit applies to aggregate sentencing, analogy to other areas of constitutional law and criminal procedure might prove fruitful. In regard to the constitutional right to counsel, for example, the aggregate punishments authorized by statute determine whether the guarantee is applicable.[70] The aggregate sentence is also often determinative when a defendant seeks a court appeal.[71] Since these procedural rights are based upon the *aggregate* punishment levied, it seems logical to extend the constitutional right to a jury trial in contempt proceedings on the similar basis of the aggregate sentence imposed. Even given this view, however, it could be argued that since Judge Hoffman could have summarily punished the contemnors immediately after each outbreak, he should be allowed to cumulate the individual offenses for dispensation upon termination of the trial. Indeed, the summary contempt power under Rule 42(a) has sometimes been invoked after completion of the trial, the justification being that the trial judge should not be precluded from utilizing a power he possessed during the trial just because he awaited the conclusion of the trial to invoke it.[72] The Supreme Court, in *Sacher v. United States*,[73] concluded that no possible prejudice could result in that case from the delayed use of summary contempt, since the conduct of the contemnor had warranted immediate punishment on "dozens of occasions."[74] This reasoning, however, has come under attack by critics and has been disregarded in more recent Court decisions.[75]

It would appear that theories are available that would both allow or deny the imposition of multiple contempt sentences in excess of six months by a judge acting without a jury. Because of the argumentative circuity involved, attempts to resolve the problem of the application of *Bloom* and *Cheff* to multiple consecutive contempt

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sylvania, 400 U.S. 455 (1971), serves to illustrate the potential ramifications of cumulating prison sentences in summary contempt proceedings. Mayberry, a convict, was summarily sentenced for contempt under Pennsylvania law for a term of eleven to twenty-two years imprisonment on eleven separate one- to two-year sentences. For further discussion of this case, see text accompanying notes 132-35 *infra*.

70. James v. Headley, 410 F.2d 325, 329 (5th Cir. 1969) ("If a *guilty* person is convicted, the sum of the potential [actual] penalties is what is important to him—and to society."). *See also* Beck v. Winters, 407 F.2d 125 (8th Cir.), *cert. denied*, 395 U.S. 963 (1969); Bohr v. Purdy, 412 F.2d 321 (5th Cir. 1969); Steadman v. Duff, 302 F. Supp. 313 (1969).

71. *See* Chambers v. District of Columbia, 194 F.2d 336 (D.C. Cir. 1952); O'Bryant v. District of Columbia, 223 A.2d 799 (D.C. Mun. Ct. App. 1966).

72. Sacher v. United States, 343 U.S. 1 (1952).

73. 343 U.S. 1 (1952).

74. 343 U.S. at 10.

75. *See* notes 108-13 *infra* and accompanying text.

sentences solely in terms of the length of imprisonment may prove fruitless. Because the length of the prison term is so intertwined with the issue of defendants' rights to a jury trial, it might be better to approach the problem by seeking alternative means of measuring the seriousness of the contempt. Given that the contempt must be "serious" if defendants are to qualify for a jury trial, the problem could be viewed as one of measuring the gravity of their offenses in terms of the traditional factors normally relied upon for determining the seriousness of other crimes.[76] The "nature of the offense" and its "stigma" represent types of alternative factors that might be taken into consideration.[77] Illustratively, the mere existence of multiple, as opposed to single, contempt may be considered as an indication of a more serious offense. Further, the stigma which attaches to conviction and four years imprisonment, and which may cause irreparable damage to a defendant's reputation, is surely indicative of a "serious" offense. On the other hand, the character of contempt is such that it is rarely considered a "hard-core" crime like murder or rape.

There is some evidence that the Supreme Court might be receptive to analyzing the seriousness of the contempts in terms of factors other than the length of the sentence. At least in the case of ordinary offenses, the Court has said that punishment is but one indication of the seriousness of a crime.[78] Since contempts are indistinguishable from ordinary crimes,[79] it would appear reasonable to apply this "alternative-factor" analysis. However, the Court has been reluctant to move in this direction. In *Frank v. United States*,[80] defendant was charged with indirect criminal contempt for violation of an order of the Securities and Exchange Commission. After being denied a jury trial, he was convicted and sentenced to three years' probation. The case appeared ripe for the use of the alternative-factor analysis by the Supreme Court since the statutory definition of a "petty offense" speaks exclusively in terms of penal sanctions and monetary fines[81]

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76. Justices Black and Douglas dissented from the majority's opinion in *Cheff*. They felt that any determination of seriousness required a sophisticated analysis of the nature of the offense, not just the punishment. Factors to be considered, they felt, should include (but would not be limited to) the stigma, character (*malum in se* or *malum prohibitum*), and gravity of the offense. Furthermore, they argued, the right to trial by jury should be expanded to encompass all crimes, petty and serious. 384 U.S. at 387-90.

77. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980-81 (1926).

78. Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses"). *See also* District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (reckless driving offenses held to require a jury trial because they were *malum in se*).

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

80. 395 U.S. 147 (1969).

81. "Any misdemeanor, the penalty for which does not exceed imprisonment for a

without any mention of how to deal with a probationary penalty. The Court refused, however, to consider any factors other than the actual length of the penalty imposed[82] and, since probation for up to five years is appropriate for both petty and serious offenses,[83] the three-year probationary period fell, at least definitionally, within the confines of the petty offense statute. While this decision may be limited to probation cases, if read broadly it would imply that the Court is unwilling to look beyond the length of sentence imposed in determining the seriousness of the contempt. *Frank* may thus signal a judicial intention to adhere strictly to the letter of *Bloom* and *Cheff*. The duration of the sentence may be the only factor that the Court is willing to consider, and while it may be appealing to argue alternative factors, the Court may be less than willing to listen.

The question whether the contemnors should be afforded a jury trial is thus a circuitous one. If the sentence exceeds six months in duration, a jury trial is required. Yet it is unclear whether the six-month limit applies to each separate sentence or to the aggregate term of imprisonment. Support can be found for either proposition. Finally, it appears doubtful that the courts will look beyond the length of sentence to determine the "seriousness" of the crime. Faced with the difficult problem of interpreting "seriousness," the courts may well look to one of the other issues raised by *Dellinger* in order to prevent abuses of the contempt power.

B. *Summary Proceedings vs. Notice and Hearing*

> Citation for direct contempt should not be delayed for months. It should spring fresh from the alleged obstruction of the court's performance of its judicial duty, although adjudication and punishment might well await the convenience of the court's business.[84]

Rule 42 provides two methods for dealing with contempt: summary disposition and disposition upon notice and hearing.[85] Of the various categories of contempt, only certain direct contempts are subject to summary disposition under Rule 42(a).[86] Beyond this narrowly defined class of misbehavior, contempt may be adjudged only after notice and hearing under Rule 42(b). In discussing the two types of contempt, the Court has said: "Rule 42(b) prescribes the 'procedural regularity' for all contempts in the federal regime except

period of six months or a fine of not more than $500, or both, is a petty offense." 18 U.S.C. § 1(3) (1964).

82. 395 U.S. at 149. *See also* 18 U.S.C. §§ 402, 3691-92 (1964), which specifically provide for jury trials.

83. *See* 18 U.S.C. § 3651 (1964).

84. Parmelee Transp. Co. v. Keeshin, 292 F.2d 806, 810 (7th Cir. 1961).

85. FED. R. CRIM. P. 42, set out in note 28 *supra*.

86. *See* R. GOLDFARB, THE CONTEMPT POWER 48 (1963).

those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself."[87]

The justification for summary action in cases of direct contempt is twofold. First, because the misbehavior occurs before the judge, he is able to observe the contempt in all its nuances. Thus, if the trial court can remain objective, no further facts need be introduced to prove or disprove the defendant's guilt. Second, the power to summarily punish contempt is often justified as necessary to the preservation of order in the courtroom or of "the judicial institution itself." Consistent with the logic of this second justification, summary punishment of contempt is authorized only when the exigencies of the trial require immediate action.[88] This restriction is an outgrowth of the general belief that judicial action should be limited to the least possible power adequate to the end proposed."[89]

Notwithstanding such justifications, the summary contempt power has evoked criticism from legal scholars,[90] many of whom feel that the need for procedural safeguards outweighs the justifications offered in support of the power. Concern has focused on the seemingly anomalous position held by the summary contempt power in a judicial system predicated on due process of law. Undoubtedly because of these concerns, the Supreme Court has attempted to restrict the situations in which the power may be invoked. Thus, in a case decided over two decades ago, the Court recognized that a judge sitting as a one-man grand jury was not qualified to sit in judgment on the contempt charges he had levied against witnesses appearing before him.[91] However, this relaxation of what previously had amounted to a strict and zealous protection of judicial authority was partially nullified by dictum to the effect that any "demoralization" of judicial authority would not be tolerated and summary action would

87. Harris v. United States, 382 U.S. 162, 167 (1965). *See also* United States v. Pace, 371 F.2d 810, 811 (2d Cir. 1967).

88. "[Summary] punishment was so contrary to . . . due process, that the assumption that the court saw everything that went on in open court was required to justify the exception [for summary contempt]; but the need for immediate penal vindication of the dignity of the court created it." Cooke v. United States, 267 U.S. 517, 536 (1925). *See also In re* Oliver, 333 U.S. 257 (1948); *Ex parte* Hudgings, 249 U.S. 378 (1919); *Ex parte* Terry, 128 U.S. 289 (1888).

89. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821).

90. Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024-26 (1924); Note, *Supreme Court Narrows Scope of Summary Procedures in Federal Contempt Convictions*, 1966 DUKE L.J. 814; Recent Cases, 36 MINN. L. REV. 965 (1952); Recent Cases, 99 U. PA. L. REV. 540 (1951).

91. *In re* Oliver, 333 U.S. 257 (1948). While the Court specifically alluded to the need for a public trial when one man fulfills the roles of prosecutor, plaintiff, judge, and jury, there was equal concern for the defendant's right to defend himself against the charge, especially since there was no apparent need for instantaneous punishment. 333 U.S. at 273.

be sanctioned in such circumstances.[92] In yet another case, the Court noted that contempts could be disposed of only after notice and a hearing

> [u]nless [the action presents] such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice", . . . [that if it] is not instantly suppressed and punished, demoralization of the court's authority will follow.[93]

At the outset then, the Supreme Court's concern with the degree of disrespect shown the lower courts lends some support to Judge Hoffman's choice of summary contempt in *Dellinger* since the defendants' purported goal was to defy and ridicule the entire system of justice.[94] However, since it appears that "immediacy" is at least generally required before summary disposition can be had under Rule 42(a), the contempt sentences in *Dellinger* appear to be questionable in light of the fact that the summary proceedings took place after the trial was over. Yet, in *Sacher v. United States*,[95] the Court ignored the "immediacy" requirement for summary contempt and specifically sanctioned the use of summary procedure in a trial in which direct contempts were involved. After the jury had returned a verdict in *Sacher*, the contemnors[96] were summarily punished for their courtroom behavior. In interpreting Rule 42 for the first time and citing two lower-court decisions in which contempt proceedings had been deferred until after trial,[97] the Court affirmed the contempt charges. However, the Court's reliance on these two lower court decisions may have been unfortunate since the cases involved only short overnight delays[98] between the actual misbehavior and the contempt proceedings, whereas the *Sacher* contempt proceedings had been delayed for nine months, a period covering the entire trial. Although this time distinction was obvious, the Court concluded that

92. 333 U.S. at 257, quoting from Cooke v. United States, 267 U.S. 517, 536 (1925).

93. Cooke v. United States, 267 U.S. 517, 536 (1925).

94. *See* TIME, Feb. 23, 1970, at 38-39; NEWSWEEK, Feb. 16, 1970, at 26, cols. 1-2.

95. 343 U.S. 1 (1952).

96. The contemnors were defense attorneys involved in a criminal trial. The contempts stemmed from their actions in the district court in the case of United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd.*, 341 U.S. 494 (1951).

97. The Court cited Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951), in which the court affirmed a lower court's summary contempt proceeding which had been delayed overnight before judgment was pronounced; and MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952), in which the court affirmed a summary contempt proceeding involving an overnight delay before the contemnor was notified that a certificate of contempt would be filed. 343 U.S. at 7.

98. *See* note 97 *supra*. *See also* United States v. Hall, 176 F.2d 163 (2d Cir.), *cert. denied*, 338 U.S. 851 (1949), in which the contempt citation occurred the same day as the disruptions, but formal judgment was deferred for five days.

"summary" does not refer to the timing of the contempt action but merely does away with the "formalities" of notice and hearing.[99] Specifically, the delay was deemed to fall within the trial court's discretion as long as the defendants were not prejudiced by it, and, since any contempt proceedings during the trial might have prejudiced the defendants either in the eyes of the jury or by loss of counsel, the Supreme Court found no abuse of discretion in the lower court's decision to await the trial's conclusion before taking affirmative action.[100] However, in *Dellinger* the prejudice problem is less compelling because many of the specified contempts took place while the jury was out of the courtroom.[101] Had the defendants been cited for contempt during the jury's absence there could have been no prejudice, since the jury was sequestered during the entire trial. Moreover, when the contemptuous acts did take place in the jury's presence, prejudice might have been avoided by sending the jury from the courtroom and immediately citing the defendants while deferring adjudication and punishment until after the trial.

In *Sacher*, the Court also voiced concern over the delay that might be caused by interjecting a contempt proceeding into the middle of a trial. Such potential delay, it was argued, could be best avoided by awaiting the trial's conclusion and then proceeding against the contemnors summarily.[102] There are at least two objections to the Court's reasoning. First, delay could be avoided by proceeding in the two-step fashion discussed above, that is, by immediate citation with adjudication and punishment deferred until after the conclusion of the trial. Second, if delay is only a problem during and not after the trial, there is no reason for not holding a full hearing on the contempt question after the trial. Indeed, if summary action is the exception rather than the rule and is justified only when delay must be avoided, it has no purpose when the need for immediate action has passed. If the summary power is justified by its service to the judge in his attempts to quell disturbances that obstruct or delay the trial, that justification ceases to suffice when the trial has ended.

The proposition that only an acute need for an immediate sanction allows the use of the summary powers found in Rule 42(a) is supported by Justice Holmes' statement:

> I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but

99. 343 U.S. at 9.

100. 343 U.S. at 8-10.

101. For example, many of the contempt charges against attorney Weinglass were the result of lengthy legal argument. These arguments often occurred after the jury had been excused. *See* CONTEMPT, *supra* note 58, at 213-34.

102. 343 U.S. at 10.

> when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts.[103]

Justice Black, in his dissent in *Sacher*, echoed this thought: "There was no necessity here for . . . summary action, because the trial was over and the danger of obstructing it was passed."[104] Seemingly then neither Holmes nor Black would condone the proceedings in *Dellinger* since the contempt sentences were dispensed in summary fashion after the trial had ended. However, Judge Hoffman may well have believed that the interjection of 161[105] citations for contempt during the trial would have resulted in constant disruption, thereby defeating the very end that the summary contempt power was created to further. It might additionally be posited that if the judge's actions were restricted in such fashion that it was impossible for him to exercise his authorized power during the trial, he at least should be able to use the power after the trial. Indeed, if the reason for delay in dealing with the alleged contempts was solely to prevent any prejudice from tainting the defendants' trial, why should they thus be allowed to escape summary punishment that could have been administered but for solicitude for their right to a fair trial? As the Court in *Sacher* stated:

> If the conduct of these lawyers warranted immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of the trial if the circumstances permit such delay. The overriding consideration is the integrity and efficiency of the trial process. . . .[106]

Perhaps the only reply necessary to the position taken in *Sacher* is to remark that it appears somewhat anomalous that the Court should, in effect, consider the power of summary contempt superior to those procedural safeguards so vital to anyone charged with criminal misconduct. Further, the Court in *Sacher* failed to deal with the aspect of the practical deterrent effect on future courtroom misbehavior that immediate citation for contempt might have provided. If one of the fundamental premises underlying punishment of criminal behavior is the belief that a sanction will serve to deter similar conduct in the future, the use of the summary contempt power after a trial has ended forecloses any deterrent effect that a

103. Toledo Newspaper Co. v. United States, 247 U.S. 402, 425-26 (1918) (Holmes, J., dissenting).

104. 343 U.S. at 21. *See also* Harris v. United States, 382 U.S. 162, 164 (1965) (refusal to answer not "committed in presence of court"); Cooke v. United States, 267 U.S. 517 (1925) (letter to judge no obstruction to trial). *Cf.* United States v. Combs, 390 F.2d 426 (6th Cir. 1968); United States v. Pace, 371 F.2d 810 (2d Cir. 1967).

105. *See* note 55 *supra*.

106. 343 U.S at 10.

finding of contempt during the trial might have by warning the offenders that all future contemptuous actions would be met with swift judicial action. The delayed use of the summary contempt power in both *Sacher* and *Dellinger*, coming as it did after the conclusion of the trials, only served to reprimand the misconduct and deter similar misbehavior before other courts. It did not deter further misconduct during the parent proceedings.

Fortunately, *Sacher* remains an anomaly disregarded in later cases, a decision that has evoked strong criticism from commentators.[107] Subsequent decisions[108] indicate a return to the traditional view requiring a need for immediate action that prevailed prior to *Sacher* and was the basis for the dissents in that decision.[109] Thus, the use of summary contempt under Rule 42(a) came under attack in 1965 in *Harris v. United States*.[110] In *Harris*, the defendant refused, both before and after being assured immunity, to answer certain questions before a grand jury. Finally, he was sworn before a district judge and again questioned. When the defendant continued his refusal to answer, the court issued a summary contempt citation and imposed a one-year jail sentence as punishment.[111] In reversing the contempt sentence, the Supreme Court declared that summary punishment should be used only when necessary to achieve a speedy recovery of the court's dignity.[112] The need for immediate action was thus restored as the prerequisite to summary action:

> [S]peedy punishment may be necessary in order to achieve "summary

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107. *See, e.g.*, Goldfarb, *supra* note 86, at 255-56; Comment, *supra* note 51; Note, *Effect of Delay in Summary Punishment for Criminal Contempt Under Rule 42(a), Federal Rules of Criminal Procedure*, 37 CORNELL L.Q. 795 (1952).

108. *See* Harris v. United States, 382 U.S. 162 (1965); United States v. Combs, 390 F.2d 426 (6th Cir. 1968); United States v. Pace, 371 F.2d 810 (2d Cir. 1967).

109. Justices Black, Frankfurter, and Douglas dissented (343 U.S. at 14, 23, 89), their concern being twofold. The first concern was that

> [r]eason and fairness demand, even in punishing contempt, procedural safeguards within which the needs for the effective administration of justice can be amply satisfied while at the same time the reach of so drastic a power is kept within limits that will minimize abuse.

343 U.S. at 24 (Frankfurter, J., dissenting).
The dissenters also found fault with the majority's unyielding support of a trial judge who "failed to exercise the moral authority of a court possessed of great tradition." 343 U.S. at 38 (Frankfurter, J., dissenting). Justice Frankfurter assailed the majority's logic by noting that protection of an abuse of power diminishes, not enhances, the authority and tradition of the courts. 343 U.S. at 25.

110. 382 U.S. 162 (1965).

111. 382 U.S. at 163.

112. 382 U.S. at 164. In so ruling the Court overruled Brown v. United States, 359 U.S. 41 (1959), which had permitted the use of summary procedures under almost identical facts. Other cases in which courts invoked summary contempt when there was no need for immediate action were probably overruled by *Harris*. *See, e.g.*, Levine v. United States, 362 U.S. 610 (1960) (refusal to testify before grand jury); Rogers v. United States, 340 U.S. 367 (1951) (refusal to answer query by grand jury); Wilson v. United States, 221 U.S. 361 (1911) (refusal to respond to subpoenas duces tecum by grand jury).

> vindication of the court's dignity and authority." . . . But swiftness was not a prerequisite of justice here. . . .
> . . . The contempt here committed was far outside the narrow category envisioned by Rule 42(a). . . .
> . . . .
> We are concerned solely with "procedural regularity" . . . . Rule 42(b) prescribes the "procedural regularity" for all contempts in the federal regime except those unusual situations envisioned by Rule 42(a) where instant action is necessary . . . .[113]

Consequently, *Harris* has apparently overruled sub silentio the earlier *Sacher* decision by requiring that there be an open and serious threat to the proceedings which only "instant action" is capable of dispelling. Therefore, this requirement defines the scope of 42(a); anything requiring less than immediate judicial action must be disposed of in accordance with 42(b).

If instantaneous action is the test to be applied to direct contempt under *Harris,* Judge Hoffman's actions in *Dellinger* are unlikely to be upheld for, by the time of the contempt sentences, the trial had concluded and the need to restore order to the proceedings or to ensure their orderly continuation had passed.[114] The fact that the trial had concluded suggests that Judge Hoffman found himself able to exert enough control during the trial, without utilizing his summary powers, to bring it to a close. If the trial judge felt no compelling need to resort to summary action during the trial, it is difficult, in light of *Harris,* to imagine why it should be utilized after the trial had ended. Moreover, while a Rule 42(b) hearing would have delayed the grand jury proceedings in *Harris,* no delay would have ensued in *Dellinger* since the actual trial had already been completed. Thus the potential delay—which the Court deemed minimal in *Harris*[115]—was not even present in *Dellinger. Harris* strongly suggests that a hearing under Rule 42(b) was the proper procedure for the *Dellinger* court to follow.

C. *Embroilment of the Trial Judge*

Distinguishing situations appropriate for the use of the summary contempt power from those requiring nonsummary proceedings under Rule 42 is further complicated by the assumption that due process of law requires a judge who holds a personal interest in the

113. 382 U.S. at 164-67 (footnotes omitted).

114. The situation in *Dellinger* may indeed resemble that described by Justice Frankfurter in *Sacher*:

> Despite the many incidents of contempt that were charged, the trial went to completion . . . without a single occasion making it necessary to lay any one of the lawyers by the heel in order to assure that the trial proceed. The trial judge was able to keep order and to continue the court's business. . . .

343 U.S. at 36 (Frankfurter, J., dissenting).

115. 382 U.S. at 164.

outcome of a trial to disqualify himself from hearing the case.[116] The possibility of a judicial bias affecting the outcome of a contempt proceeding is most serious when one man acts as both judge and jury, which, essentially, is the role of the judge when he summarily adjudges contempts under Rule 42(a). Cognizant of this danger, the Supreme Court has intensively scrutinized contempt convictions summarily imposed under Rule 42(a) when the trial judge may have been personally embroiled in the contemptuous events.[117] Thus, while the majority in *Sacher* disregarded the defendants' allegations that the trial judge was personally involved in the parent proceeding, the dissenters placed great weight on this contention.[118] Citing from the trial record, they noted that a judge who is embroiled in the proceedings should not be permitted to sit in judgment of the contempts.[119] Indeed, Justice Frankfurter spoke directly to the majority's concern with diminishing the esteem held for the courts when he recognized that by permitting an embroiled judge to rule on the contempts, the Court was actually rendering a disservice to the judiciary and tainting the very image they were seeking to uphold.[120] The majority, however, rejected this argument, reasoning that to require a hearing before another judge would only serve to harass the trial judge since he would have to defend his actions in a separate proceeding.[121]

The Court's subsequent holding in *Offutt v. United States*[122] vitiated the embroilment aspect of the *Sacher* decision. In *Offutt*, the trial court, relying on *Sacher*, waited until after the jury had retired to deliberate before summarily sentencing the defense counsel to ten days' imprisonment for his constant bantering and generally undignified exchanges with the judge during the course of the trial.[123] Relying not on *Sacher*, but on the older precedent of *Cooke v. United States*,[124] the Supreme Court held that a judge who becomes em-

116. Offutt v. United States, 348 U.S. 11, 14 (1954); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

117. Offutt v. United States, 348 U.S. 11, 13-15 (1954).

118. 343 U.S. at 16-17 (Black, J., dissenting).

119. "A judge who . . . [becomes embroiled] should no more be permitted to try the lawyer he accuses than a judge should be permitted to try his own case." 343 U.S. at 17 (Black, J., dissenting).

120. 343 U.S. at 37 (Frankfurter, J., dissenting).

121. 343 U.S. at 11-12.

122. 348 U.S. 11 (1954).

123. 348 U.S. at 12. The Court commented that the exchanges between the attorney and the judge revealed "an attitude which hardly reflected the restraints of conventional judicial demeanor." 348 U.S. at 12.

124. 267 U.S. 517 (1925). The Court in *Cooke* held that a contemptuous letter given to the judge, although technically "misbehavior in the presence of the court," must be adjudged in a hearing before another judge since the letter had vilified the trial judge, thus personally involving him in the outcome of the contempt proceeding. 267 U.S. at 539.

broiled in the contemptuous conduct has lost the impersonal authority necessary to sit in judgment of the contemnor.

> The real issue is whether under the decision of the *Cooke* case such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice for which the power of summary contempt is available, the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct.[125]

The Court went on to state that if the trial judge is involved in the contemnor's misbehavior another judge, perhaps the chief judge of the district, should determine the contemnor's guilt and punishment, if any, after a hearing under Rule 42(b).[126]

After the *Offutt* decision, in order for a defendant to request and receive a hearing by a separate judge under Rule 42(a), the trial judge must have played an active role in the defendant's misbehavior or become personally involved in the outcome of the case.[127] The test established by *Offutt* and *Cooke* was whether the contemnor's behavior could be considered apart from the trial judge's own actions.[128] For example, in *Offutt* the trial judge had participated in the exchanges with the contemnor that served as the basis for the contempt citations;[129] thus, the trial judge's behavior could not be considered apart from that of the contemnor. However, if the trial judge chose to proceed only after notice and hearing under Rule 42(b), the rule itself provided for his disqualification should the contempt have "[involved] disrespect or criticism" of him.[130] Thus, under the approach established by the *Offutt* and *Cooke* interpretation, no parity existed between 42(a) and 42(b) situations since each section provided a separate and distinct test for embroilment: under 42(a) the trial judge had to be involved in the contemnor's misbehavior, as in *Offutt*, before he could be disqualified, whereas a mere criticism or disrespectful remark, even though it failed to elicit any response from the bench, automatically disqualified the judge from participating in a 42(b) proceeding. As a result of this disparity, it was easier for a contemnor to be granted a new judge for a 42(b) hearing

125. 348 U.S. at 15.

126. 348 U.S. at 18. The chief judge appears to be the logical choice since he is not exactly on the same level with the other district judges and may not feel quite as restricted in ruling on contempts that involve other judges' actions. *See also* Cooke v. United States, 267 U.S. 517, 539 (1925).

127. *See, e.g.*, United States v. Combs, 390 F.2d 426, 429-30 (6th Cir. 1968).

128. 348 U.S. at 13; 267 U.S. at 539.

129. 348 U.S. at 16 n.2.

130. FED. R. CRIM. P. 42(b). Rule 42(a) has no such provision. *See* note 28 *supra*.

than for a contempt proceeding under 42(a).[131] However, in a recent decision, the Supreme Court has made the requirements for "embroilment" the same under 42(a) and 42(b). The contemptuous behavior in *Mayberry v. Pennsylvania*[132] consisted of various verbal assaults on the trial judge by the defendant, who was acting as his own counsel. The judge, however, restrained himself and avoided becoming involved in the defendant's misbehavior. After the trial the defendant was summarily sentenced to a term of eleven to twenty-two years imprisonment on eleven separate one- to two-year sentences.[133] The Supreme Court noted that since the trial judge had refrained from active participation in the defendant's contempt, the *Offutt* test[134] had not been met.

> *Offutt* does not fit this case for the state judge in the instant controversy was not an activist seeking combat. Rather, he was the target of petitioner's insolence. Yet a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.[135]

Thus, under *Mayberry*, vilification of the trial judge is all that is necessary under Rule 42(a) to require a contempt hearing before a different judge.

Unfortunately, many of the specific contempts in *Dellinger* do not fall within the *Mayberry* rule of "vilification." While several of the contempt specifications involved direct assaults on the judiciary, and Judge Hoffman in particular, many were based on outbreaks unrelated to the judge.[136] However, at least with regard to those

131. Not every criticism of the judge is sufficient to support a new hearing by a separate judge. Ungar v. Sarafite, 376 U.S. 575, 578, 583-84 (1964) (a prosecution witness' criticism of the trial judge's rules did not necessarily mean that the judge was embroiled). *But cf.* United States v. Combs, 390 F.2d 426 (6th Cir. 1968), in which contemnor was charged with contempt for (1) alleging bias by the judge and (2) recording proceedings in the courtroom with neither the knowledge nor consent of the trial judge. While the trial judge agreed to allow another judge to hear the first charge, he retained jurisdiction over the second. The court of appeals reversed, holding that both should be tried by a new judge since the trial judge's "feelings" were involved in the second charge and there was no need for immediate action. 390 F.2d at 431.

132. 400 U.S. 455 (1971).

133. 400 U.S. at 455.

134. *See* text accompanying note 125 *supra*.

135. 400 U.S. at 465.

136. Thus, at least thirty-one of the specifications involved the defendants' refusals to rise when the judge entered the courtroom and other indignities paid the court. Specifically,

> [O]n February 6th, the defendant[s] Hoffman [and Rubin] attempted to hold the Court up to ridicule by entering the courtroom in judicial robes. . . .
> While the transcript does not reflect it, [they] remained in those robes for a considerable period of time before the jury. Later, [they] removed the robes, threw them on the floor of the courtroom, and wiped [their] feet on them.

Specifications No. 13 (Rubin) and 24 (Hoffman). CONTEMPT, *supra* note 58, at 127,

specifications that were based on remarks exhibiting disrespect for the authority of the trial judge, Judge Hoffman should have been precluded from personally deciding the contempt question. If impartiality in the contempt proceeding is the goal, it is doubtful that it could have been achieved under the circumstances of *Dellinger*. Moreover, the trial court exhibited personal disdain for the defendants and their counsel. The court's attitude was best characterized by its address to attorney Kunstler before the latter was sentenced for contempt:

> I am going to make a rather unorthodox statement. First of all, there is a lot of crime . . . . I am one of those who believe that crime, if it is on the increase, . . . is due in large part to the fact that waiting in the wings are lawyers who are willing to go beyond . . . professional duty in their defense of a defendant, and the fact that . . . some defendants know that such a lawyer is waiting in the wings, I think, has a rather stimulating effect on the increase in crime.[137]

There remain some discernible factors that could lead to an appellate court affirmation of Judge Hoffman's actions. First, as the Supreme Court noted in *Mayberry*, "it is of course not every attack on a judge that disqualifies him,"[138] and it is at least questionable whether all the attacks on Judge Hoffman were of the vindictive quality envisioned by the Court in *Mayberry*. Second, an appellate court may hesitate to overrule Judge Hoffman for fear that to do so will reduce the courts' summary contempt powers and result in a loss of respect for judicial authority. However, limitations on the arbitrary use of the contempt power do not affect the over-all disciplinary impact of the threat of a finding of contempt on those who enter the courtroom. The only difference would be that an adjudication of, and punishment for, contempt during a trial would be determined by another judge. Finally, any deleterious effect that delay may have on the parent proceedings[139] could be minimized if the contemnors are cited immediately, leaving only the actual adjudication and punishment to await the close of the trial.

The entire tenor of the *Dellinger* trial, with its constant exchanges

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139. Many of the remaining 124 specifications do not clearly involve any vilification of Judge Hoffman. Some of the contemnors' comments were leveled directly against the prosecutor. For example, Dellinger was cited for his reaction to a prosecution statement concerning Senators Robert Kennedy and Eugene McCarthy. Specification No. 27 (Dellinger). *Id.* at 63-64.

137. *Id.* at 207.

138. 400 U.S. at 465.

139. *See, e.g.*, Parmelee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961); MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951); Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950).

between the defendants and the judge,[140] was such that to allow Judge Hoffman to adjudicate at least those contempts leveled directly against him would destroy even the appearance of justice. The defendants exhibited a clear showing of disrespect for Judge Hoffman, and the disparity in Judge Hoffman's treatment of the defense and prosecution exemplified his personal involvement in the trial. The resulting animosity between the defendants and the judge was sufficient, under both *Mayberry* and *Offutt*, to require at least a separate contempt hearing before a different district judge.

IV. Conclusion

The 161 contempt citations issued in *Dellinger* present issues of constitutional and statutory importance—all of which seem to require that the contempt convictions be reversed. Although the question of the appropriateness of a jury trial in the criminal contempt setting has been raised on past occasions,[141] the Supreme Court has never addressed itself to the question of exactly how the six-month standard relates to multiple contempt sentences.[142] There are arguments supporting the application of the six-month rule to either each individual contempt citation or to the aggregate sentence. It is clear, however, that if the rule is applied only to individual charges a judge can circumvent the jury trial requirement by simply imposing sentences of less than six months duration and running several contempt sentences consecutively. The potential for harshness and misuse inherent in such an interpretation is perhaps the strongest argument for applying the six-month rule to the aggregate contempt sentence. Only in this way can the substance of the constitutional right to jury trial be preserved. Judge Hoffman's decision to utilize summary proceedings under Rule 42(a) instead of conducting a separate hearing under 42(b) raises what is perhaps a more subtle issue. However, the Supreme Court has recently addressed itself to this problem and has resolved it by stating unequivocally that "Rule 42(b) prescribes the procedural regularity . . . except [in] those unusual situations envisioned by Rule 42(a) where instant action is necessary."[143] Thus, the procedures under Rule 42(b) should have been followed since immediacy, the linchpin of summary action, was lacking in *Dellinger*. Another recent Supreme Court decision, *Mayberry v. Pennsylvania*,[144] suggests that the contempt citations in *Dellinger* would have been

140. *See* Tales, *supra* note 55, at 16-237.

141. *See* notes 39-44 *supra* and accompanying text.

142. While Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966), held that a sentence of six months or less would not necessitate a jury trial, some dicta in Baldwin v. New York, 399 U.S. 66, 73 (1970), hinted that the six-month line may not be definitive.

143. Harris v. United States, 382 U.S. 162, 167 (1965).

144. 400 U.S. 455 (1971).

more appropriately handled by another judge[145] and that reversal is required because of Judge Hoffman's "embroilment" in the contemptuous events.

Perhaps even more basic than the statutory and constitutional issues raised by *Dellinger* is the question of the appropriateness of criminal contempt as a sanction at all. In the 1970 case of *Illinois v. Allen*,[146] the Supreme Court condoned three alternative methods of dealing with unruly defendants. Under *Allen* such a defendant may be cited for contempt, bound and gagged, or removed from the courtroom entirely with the understanding that return is contingent upon future good behavior.[147] The Court noted that physical restraint within the courtroom should be the last alternative chosen by a judge since it arouses negative feelings in the jury and defies the very dignity that the court is attempting to uphold.[148] Beyond that suggestion, the Court in *Allen* held no apparent preference for any of the possible sanctions. An immediate sanction, similar to that used in *Allen*, may well have been a more appropriate remedy than contempt for dealing with the defendants' disruptions during the course of the *Dellinger* trial. At least such action may have had some deterrent effect on the contemnors' future behavior, whereas summary action after the trial had no deterrent value whatsoever. The choice of sanctions—so long as of the type approved in *Allen*—appears to be wholly within the discretion of the trial judge. Once, however, that choice has been made it is incumbent upon the trial judge to abide by the various procedures established by the Supreme Court—and, of course, those set out in the Constitution itself.

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145. *See* notes 132-37 *supra* and accompanying text.

146. 397 U.S. 337 (1970). The defendant, on trial for armed robbery, interrupted the proceedings initially at *voir dire* by screaming and shouting. After several more outbreaks the judge had him removed from the courtroom and conditioned his return upon a promise of good behavior. Approximately halfway through the trial Allen was allowed to return for the remainder of his trial. 397 U.S. at 339-41.

147. 397 U.S. at 343-44.

148. 397 U.S. at 344.