NO. 26889

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

CHARLES CLARK MARSHALL, III; JEFFREY DOWD; JOSEPH KELLY; MICHAEL ABELES; MICHAEL LERNER; ROGER LIPPMANN; and SUSAN STERN,

Defendants-Appellants

APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

The Honorable George H. Boldt, Judge

BRIEF FOR DEFENDANTS-APPELLANTS

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On behalf of all counsel
and pro se defendants

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SECOND ISSUE: Must the convictions be reversed because the trial judge failed to set forth with particularity as to each defendant the facts allegedly constituting the contempts?

THIRD ISSUE: Assuming it was proper to proceed under Federal Rule of Criminal Procedure 42(a), were appellants entitled to a hearing on the issues of guilty and penalty?

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STATEMENT OF THE CASE

This is an appeal from a conviction under Rule 42(a) of the Federal Rules of Criminal Procedure. Trial of this cause was commenced on November 23, 1970 in the United States District Court for the Western District of Washington, George H. Boldt, District Justice, and aborted on December 10, 1970 by a sua sponte declaration of mistrial followed by citations for contempt of court. The District Court entered its order and judgment on December 4, 1970 and this Court, upon motion of plaintiff-appellee, ordered an expedited briefing schedule and oral argument. Defendants-appellants petitioned for an extension of time to January 28, 1971 in which to file their brief and this Court granted an extension to January 25, 1970.

This Court's jurisdiction is invoked under 28 U.S.C. § 1291.

Statement of Facts

On February 14 and 15, 1970, after a six-month trial of eight nationally prominent New Left leaders for their participation in demonstrations at the Democratic National Convention, presiding judge Julius J. Hoffman summarily found all defendants and their counsel of contempt of court, sentenced them to an aggregate of more than fifteen years in prison and denied bail pending appeal. Thousands of Americans had followed the stormy course of the trial, in which Black Panther Party Chairman Bobby Seal was chained and gagged at one juncture, and the

response of all fair-minded men and women to the Judge's action was as one: on February 17, 1970, a day which was to be known as "The Day After," thousands of people participated in demonstrations and rallies in a score of cities across the nation to voice their outrage.* Such a demonstration took place on the steps of the Federal Courthouse in Seattle, Washington on that day and, two months later, on April 16, 1970, the Director of the Federal Bureau of Investigation, J. Edgar Hoover, announced from Washington, D.C. the indictment of one woman and seven men all of whom, it was alleged, were responsible for the Seattle demonstration and for the damage done to federal property in its aftermath. The six-count indictment was the second invocation by the government of 18 U.S.C. § 2101 (United States v. Dellinger, supra, having been the first), commonly referred to as the H. Rap Brown Act, and it charged, inter alia, four persons with interstate travel to incite a riot and one person with the use of an instrument of interstate commerce, a telephone, with the intent to incite a riot. All eight defendants were further charged withconspiracy, 18 U.S.C. § 371, to damage federal property, 18 U.S.C. § 1361. All defendants save one were arrested and released on bail (subsequently reduced to release on recognizance bonds) pending trial. The missing defendant, Michael Justesen, has never been apprehended.

After a plethora of pre-trial motions and conferences, trial commenced in Tacoma, Washington on November 23, 1970.**

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* See United States v. Dellinger, ___ F.Supp. ___ (1970); and Epstein, The Great Conspiracy Trial (New York: Random House, 1970).

** The court had ordered a change of venue from Seattle, over vigorous objections by defendants.

The court had granted permission to defendants Marshall and Lerner to proceed pro se and from the first day forward, it was clear that Judge Boldt meant to consider their in-court statements and objections as being in furtherance of their defense (e.g, Tr. 49, 57, 61).

The first three trial days were consumed by voir dire, conducted almost exclusively by the Court. It is significant to note that, at several junctures (e.g., Tr. 190, 477, 490, 528, 542, 565, 567, 570), the Court permitted defendants to address questions to individual jurors who were seated in the box, for this permissiveness set the tone of participation by defendants which the Judge deemed not only acceptable but even commendable (Tr. 662).

The record reveals that the government exercised all save one of the peremptory challenges it used to exclude those prospective jurors who had evinced some understanding of "New Left" politics (e.g., Tr. 577) and could be said to be potentially sympathetic to the "life style" of the defendants. The exercise of the last of these peremptory challenges was the occasion for an outburst (Tr. 578-83) on the part of several of the defendants who were, understandably, shocked at the Government's blatant use of its power to, as they saw it, deprive them of any possibility of a fair trial and a trial by their peers. Each time the Government exercised such a peremptory challenge, the defendants issued similar protests, but, again, these must be viewed in the context of the court's statement at the conclusion of the voir dire:

> "I assure you that the attorneys on both sides and the defendants themselves have made a great effort to get the matter on its way as promptly as circum stances would permit, and I am not saying that with my tongue in cheek or anything of that kind. I really mean it." (Tr. 662).

It was on Tuesday, December 1, 1970, the fifth day of trial that Defendant Lippmann first raised the issue of admission of spectators to the courthouse as they waited for seats to become vacant in the courtroom itself (Tr. 863-64). Thereafter, the record is replete with similar expression of concern voiced by defendants and their counsel on this issue. The question was, in the minds of defendants, a two-fold one: defendants felt, and had stated on the record at least once a day, that denial of access to the courthouse and the slow pace with which United States marshals admitted and administered the search of each spectator before he could gain entry to the courthouse created a chilling effect on persons who would want to attend the trial, thereby denying defendants their right to a public trial; the defendants were genuinely concerned about these spectators who were made to line up outside the courthouse early each morning, more frequently than not in inclement weather, particularly in light of the fact that the vestibule and hallway immediately interior to the entrance of the courthouse could have accommodated those who were waiting for seats and that such an arrangement would be consonant with the

marshals' need to control and search such spectators as seats became available. The concern of defendants over this issue was further exacerbated by the judge's reduction of seating capacity in the courtroom on the advice and direction of the Tacoma fire department inspector who opined that the seating arrangement constituted a fire hazard, though the court had earlier ordered that all portable fire extinguishers be removed from the hallways on the floor of the courthouse where court was in session, a move which defendants interpreted as signifying diminished rather than increased concern on the part of the court for their physical safety.

When the defendants raised objections about spectator seating, the Court often responded by ordering changes in the marshals' methods (e.g., Tr. 863-64). This was not at all an issue which the Court had said it would do nothing about, and the defendants' objections were thus encouraged by some sense that they would be listened to even if not sympathetically treated.* And so the issue of the treatment of spectators was the leitmotif of defendants' "outbursts" through the ten-day trial period. It must be noted that at several points throughout the trial the spectators who were present in the courtroom voiced approval of the defendants' comments to the court on the above issue, but there was never any indication, as the court intimated in its Contempt Certificate No. 1, dated

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* Indeed, on Dec. 9, Defendant Dowd presented to the court a detailed plan to convert an unused room adjacent and contiguous to the courtroom into a seating gallery into which sound would be piped. He submitted a carefully drawn diagrammatic description of how such an arrangement could be accomplished and informed the court that the defense would pay for and install the appropriate sound equiipment. The court thanked him (Tr. 1871-72).

December 14, 1970, that these were pre-planned "demonstrations"; on the contrary, it is clear from a reading of the record that such outbursts were spontaneous reactions.

The first ten days are replete with the trial judge's comments to the defendants and their counsel that he had no intention of citing them for their statements and conduct in court. (E.g., Tr. 6, 587, 605).

The trial proceeded through the Government's first several witnesses. The Government's case began to founder, however, on December 8. The United States Attorney announced that he was not ready to proceed, even though the trial day was hardly half over, and while the judge admonished him, no statement was made to the jury, no attempt was made the jury hear or even know about the prosecutor's discomfiture (Tr. 1827-31).

The following day, December 9, the defense objected at the opening of the morning session to the testimony of the next witness, on the ground that it would clearly be outside the scope of the indictment. The Government had delayed until the last possible moment in delivering Jencks material to the defense, so the motion could not have been made earlier. The court ordered a recess, and despite defense requests to have the Government put on another witness so as not to waste the jury's time, it declined to take faurther testimony upon that day (Tr. 1892). Indeed, the court stated that it sould not "especially press any further" in the trial (Tr. 1894).

Referring to defense counsel, whom he claimed had not adequately supervised and controlled the defendants, the court

stated:

> "If you gentlemen cannot seem to restrain the defendants from these interruptions, I am not going to take the time, and if you want to have them up making these speeches on this, that and the other at some length and commenting on me personally and my background and all, I am just going to let them talk for the record, and that will just use up time." (Tr. 1894)

This comment followed the trial judge's earlier statement in specific response to a question by defense attorney Michael Tigar:

> "Statements by the defendants which in my judgment amount to a contempt of court will be cited as such hereafter, and I again say what I have said previously, that I do not intend to cite anyone, you or any other counsel, or any defendant or anyone else concerning past conduct. The past is past . . . ." (Tr. 1869-70)

To proceed by way of detailed chronological account of each instance of possible contumacious conduct on the part of each defendant would result not only in several dozen pages of minutiae but would also be more obfuscatory than edifying, for, as we argue below, the vagueness in the citation for contempt renders it impossible to know which particular conduct of which particular defendant was considered to be contemptuous.

It is therefore necessary to proceed directly to the day of the declaration of mistrial for, according to Contempt Certificate No. 1 dated December 14, 1970, it was the incident on this day which was the "culmination" of a course of conduct

which caused the court to discharge the jury.

On the morning of December 10, 1970 court was scheduled to convene at 9:00 A.M. See infra at p. (wherein is described the erratic and slovenly procedure invoked every morning).

At approximately 9:00 A.M., Mr. Holley, the defendant Dowd, and counsel for the Government appeared before the Court in chambers at a conference requested by the defense. Mr. Tigar and Mr. Steinborn appeared shortly thereafter. Mr. Holley indicated that he and Dowd had attempted for the last ten minutes to gain entry to the Court's chambers (Tr. 1942), Dowd had knocked on the entrance door to the chambers several times, and the court said that he intended to cite Dowd for contempt of court for pounding on his door (Tr. 1942). Both the defendant Dowd and Mr. Holley then requested the Court to take steps to provide persons who had come to observe the trial with a place to stand out of the rain while waiting for a seat to open up in the courtroom. The Court responded to defendants' request as follows:

> " . . . there is no place inside the courtroom for any sort of gathering of the kind that you speak of, particularly with the type of people who day after day have been extremely disruptive, and who have been causing difficulties constantly here." (Tr. 1945)

Mr. Holley said he thought the Court was biased and asked the Court whether he had seen the people waiting outside, to which the Court replied:

"I may show my bias, but I cannot do anything further about it, and I do not intend to, and if that is error, then make the most of it." (Tr. 1945)

Mr. Tigar inquired of the Court's purpose as to the matter of the contempt citation of Dowd and whether proceedings would be under F.R.Cr.P. 42(a) or 42(b). The Court responded:

"I haven't the particular section in mind, the number of it.

All right, are you ready to proceed with the trial now out here?

MR. TIGAR: So far as I am aware.

THE COURT: Then we will go ahead with the jury." (Tr. 1955). Proceedings in chambers were recessed at 9:27 A.M.

The jury was brought into the courtroom at 9:32 A.M.* At that time counsel for the Government and Mr. Maxey were present, but none of the defendants nor other defense counsel had entered the courtroom (Tr. 1956). Mr. Tigar, Mr. Holley, and Mr. Steinborn entered shortly thereafter. Mr. Tigar requested that the Court provide prospective spectators with a place to wait inside the building, and asked that the Court set a hearing on the matter of Dowd's contempt which would include testimony on the conduct of the marshals toward persons who had come to attend the trial (Tr. 1958). The Court declined to discuss the matter in the presence of the jury and directed counsel to summon the defendants to the courtroom (Tr. 1958-59), and the Bailiff to accompany them to insure that the defendants were so notified.

Defense counsel, with the exception of Mr. Maxey, accompanied by the Bailiff, then proceeded to the room which had been provided for defense conferences. The Bailiff reported to the Court that the defendants had been notified, and that they and defense counsel had requested five minutes to confer (Tr. 1960-61). During this time, however, defense counsel neglected to make specific mention of the fact that the jury was seated in the jury box; thus the defendants were unaware that the jury was present. (See affidavits of Michael Tigar and George Vradenburg).

Mr. Tigar, Mr. Holley, and Mr. Steinborn returned to the courtroom whereupon Mr. Tigar informed the Court that the defendant Dowd requested an immediate hearing on the matter of his contempt. The Court asked Mr. Tigar whether defendants had been notified to come to the courtroom and whether they had declined to do so. Mr. Tigar attempted to reply but the Court interrupted Mr. Tigar in the middle of his sentence and directed the Bailiff to summon the defendants (Tr. 1963). Mr. Tigar repeated his requested his request for a hearing on Dowd's contempt and for relief for the persons waiting in the rain (Tr. 1964-65). At that point the Bailiff returned to the courtroom and reported that he had been unable to obtain entrance to the defense room. The Court then said that he intended to go personally to summon the defendants. Mr. Steinborn offered his assistance to the Court, but the Court declined his offer and repeated his intention to summon the defendants himself (Tr. 1966). Mr. Steinborn once again offered to assis the Court but the Court again declined his

offer and left the bench to summon the defendants.

The Court, accompanied by counsel and the Court Reporter, proceeded to the defense room where he was met at the open doorway by the defendants who were then coming out of the room. The Court ordered them to come to the courtroom and the defendant Abeles replied, "We were just on our way." (Tr. 1967). The Court, counsel, and all defendants proceeded to the courtroom. On the way down the hall, the defendant Abeles and the Court were walking near each other. A United States marshal grabbed Abeles and threw him against the wall and swore at him using obscene words. (See affidavit of Mike James). The Court proceeded to his chambers, and the defendants entered the courtroom before the Court appeared on the bench.

Mr. Marshall attempted to give a brief explanation and apology for the delay. The Court appeared on the bench and the following colloquy was reported between him and the defendant Marshall:

> DEFENDANT MARSHALL: "We would like to explain to the jury why we refused to come in at the beginning of this trial. There are a number of people who have been kept outside every day in the rain, people who are getting sick, and all we ask is that the marshals allow these people to come into the lobby, which they have not done.
>
> (Judge Boldt on the bench.)
>
> THE COURT: "Mr. Marshall--
>
> DEFENDANT MARSHALL: "They should have the privilege--
>
> THE COURT: "Be silent, Mr. Marshall.

DEFENDANT MARSHALL: "The Judge ordered him, Jeff Dowd, for contempt and--

THE COURT: "Mr. Marshall--

DEFENDANT MARSHALL: "We should have a hearing.

THE COURT: "Mr. Marshall, please be silent. You have continued despite my repeated remarks.

Ladies and Gentlemen, the jury will please retire from the courtroom." (Tr. 1967-68).

The Court then cirected the jury to retire, stated that defendants except for Mrs. Stern who had been excused by the court in order to have an operation, were cited for contempt, and declared the case to be a mistrial on the grounds that the conduct of defendants had created "irremediable prejudice to fair trial." (Tr. 1969-74).*

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* It is critical to note that Judge Boldt dismissed the jury without any voir dire or any other attempt to determine whether any juror could have been prejudiced by the conduct of defendants. Juror No. 11, Floyd Getschell, paid an unsolicited visit to the defense room after the jury had been discharged to express his astonishment at the court's decision to declare a mistrial. He and three other jurors were interviewed by a member of the press immediately after the mistrial was ordered and while the court refused the tape recording of these interviews as part of the record, the attached affidavit of Bryan Johnson constitutes an offer of proof that that tape recording would show that all four jurors maintained that none of them was "irremediable," or in any other way, "Prejudiced by the conduct of defendants. See also the affidavit of Mike James, who spoke to eight jurors after they had been dismissed, none of whom said he had been prejudiced against the defendants.

The court then suspended proceedings in order to prepare the contempt certificates and stated that it would "hold a hearing thereon forthwith, giving the defendants such opportunity as they desired to prepare for this hearing." (Tr. 1969-70). When defense counsel attempted to object to the sua sponte declaration of mistrial, they were precluded from speaking by the court's call for a recess followed by its immediate withdrawal from the bench, even as counsel continued to speak. (Tr. 1978).

The court did not reconvene until Monday morning, December 15. The trial judge stated that he would not hold any hearing, and would proceed instead summarily. Thus, many important factual issues could not be explored. The Court read the contempt citation and then lawyers and defendants each spoke to its inadequacies and to their request for a hearing. At the conclusion of these allocutions, Mrs. Stern asked to speak. The Court asked her not to, and said she could speak but to do so might constitute contempt. She elected to speak and take the consequences. Her speech was quiet, though forceful, and consisted of an arraignment of the American judicial system. As she was concluding, the Court interrupted to tell her to stop. She asked leave to conclude briefly. What happened then is difficult to describe, but Mrs. Stern (5'1" tall, about 100 pounds and just released from the hospital) was grabbed by a United States Marshal who put a full nelson hold on her and began to wrench her around. Defense attorney Michael Tigar came to her assistance and was sprayed in the eyes by another

Marshal with a caustic chemical substance which temporarily blinded him. (See affidavits of Madeleine Levy and Linda Huber, previously filed, and affidavits of Brook Stanford, Bryon Johnson, and Mike James, for descriptions of the events that occured).

When order was restored, the Court returned to the bench and read a second contempt citation against all defendants except Lerner. This citation was even more vague than the first, containing no detailed recitation of the allegedly contumacious conduct. Since no hearing was held into the origin and nature of the tumult in the courtroom, there can be no detailed analysis of it except to say that the defendants and their attorneys sharply dispute the trial judge's version of the events. The judge then read a statement (attached as Exhibit E) in which he claimed that his actions were inspired by Divine Providence.

This day ended with the defendants in custody. Defense counsel made an extended presentation in support of bail, but the trial judge did not respond, did not ask for additional authority, did not point up any perceived inadequacies, and instead asked the government to file a written response by 10:00 a.m. on the following day.

On the morning of December 15 upon arrival at the Federal Courthouse, defense counsel were informed that plaintiff had been given an extension from 10:00 a.m. until 2:00 p.m. to file its memorandum concerning bail. That memorandum was not served on defense counsel until approximately 5:00 p.m., whereupon

defense counsel requested (as they had thrice before on that day) to meet with the Court for a brief time to counter the allegations set forth in the government's memorandum and for the opportunity to present to the court affidavits as to the conduct of defendants cited for contempt on the preceding afternoon and affidavits with regard to the defendants' reliability in support of their release on personal recognizance. The Court once again refused to see defense counsel and indicated to Mr. Tigar that it would not hear any argument on this matter.

At approximately 7:00 p.m. the bailiff, Mr. Clark, emerged from the judge's chambers with the Order on Defendants' Application for Bail. As the bailiff approached Mr. Tigar, who was standing in the hallway outside of the room to which he and other defense counsel had been restricted all day by order of the Court, he said, "I have been instructed by the Court to first give copies of this to the press" and proceeded into the press room. It was only after the bailiff had distributed copies of the order to all media representatives present, that he presented Mr. Tigar with a copy of that order.

ARGUMENT

I

THE TRIAL JUDGE ERRED IN CONVICTING AND SENTENCING APPELLANTS SUMMARILY RATHER THAN AFFORDING THEM THE PROCEDURAL PROTECTIONS OF FEDERAL RULE OF CRIMINAL PROCEDURE 42(b) AND THE FIFTH AND SIXTH AMENDMENTS.

A. Introduction Concerning the Summary Contempt Power

On December 14, 1970, four days after the jury was discharged, the trial judge adjudicated appellants in contempt, summarily, without notice or hearing. The catalog of procedural rights that he refused to recognize is lengthy.* Although he had delayed finding appellants in contempt for weeks, he would not delay another day or so to permit them and their counsel to study the transcript so they might dispute the factual basis of his determination in even the most cursory manner. Cf. Chandler v. Fretag, 348 U.S. 3 (1954). He did not, it goes without saying, give notice--the crucial elementary constitutional right of notice of charges--of the matters he alleged were contumacious. He did not afford a hearing, at which ambiguities in the record and the vitally important matter of the appellants' intent might be explored. Appellants could not be assisted by counsel in any meaningful sense, for counsel could only stand by as the court read out a prepared order and the proceedings marched on to their conclusion.

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* An English Commission once thus summarized the principles of "natural justice" thus: (1) "a man may not be the judge in his own cause"; (2) "no party ought to be condemned unheard"; (3) "a party is entitled to know the reason for the decision." Quoted by Frankfurter, J., concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 n.17 (1951).

Of the basic material of that drama, this brief speaks at greater length in its concluding sections. This portion of appellants' argument concerns itself with the procedural rights gainsaid by the trial judge. Appellants attempt initially to underscore the limitations placed by courts upon the extraordinary power of summary contempt and to detail the ways in which the fundamental right to fair hearing were denied them. These are rights which belong to the most brutal murderer and the meanest pickpocket, remembering that "due process is not a fair weather or timid assurance," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring), and that the measure of freedom is our commitment to afford these rights to the most despised and defiant among us. Cf. Whitney v. California, 374 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

As background to the analysis of procedural shortcomings in imposing a total of 6 years imprisonment upon appellants, appellants show the federal law of contempt, as declared in a number of recent Supreme Court cases, has moved to restrict the summary contempt power and to harmonize its exercise with fundamental protections of individual rights.

1. Some Historical Perspective on the Contempt Power

The origins of the summary contempt power are not honorable. Sir William Holdsworth has shown that it originated in the Court of Star Chamber, and was engrafted upon the procedure of the common law courts in the 17th century. 3 Holdsworth, A History of English Law 391-92 (5th ed. 1942). Prior to the

Star Chamber's incursion into historic protections of the rights of the accused, summary punishment was limited to contempts of the courts' process and to punishments of the courts' officers (which latter punishments would almost invariably be liquidated with a fine or amercement). Id. at 392. Even for contempts committed directly in the presence of the court, witnessed by the judge, the outer limit of judicial authority except in the Star Chamber was to impose a trivial penalty such as a fine. This fact appears from an examination of the records of a large number of medieval cases of misconduct in the presence of the court, showing that in every such case involving allegations of more than trivial misconduct and more than a trivial penalty, the regular course of law was followed, including indictment or information, and jury trial. John Charles Fox has collected a number of such cases in which trials were in the ordinary course of law, including cases of "inciting a mob to burn the plaintiff and beating the jury . . .; assault on a clerk of the king in the presence of a justice . . .; contempt and hindering proceedings in court . . .; on being served with a prohibition, trampling it under foot in contempt . . .; slandering a Baron of the Exchequer . . .; abusing jurors in court . . .; abusing a party in court . . .; insulting a judge . . .; jurors departed in contempt without giving a verdict . . .; violent assault in court . . .; assaulting the Attorney-General in court . . .; attempting to rescue a prisoner from the bar of the court and abusing the marshal . . . ." Fox, The Summary Process to Punish Contempt, 25 L.Q. Rev. 238, 242-45 (1909). Fox also

records that a conviction for contempt in the presence of the Court was reversed in the fifth year of Edward III's reign (1331) for failure to afford the alleged contemnor a jury trial. Id. at 243.

As late as the 18th century, Serjeant Hawkins, in Pleas of the Crown, doubted the power of judges to punish contempts in the presence of the court summarily, except only those contempts which were minor in nature. And there, Hawkins doubted the power of the court to impose more than a fine. 2 Hawkins, Pleas of the Crown ch. 1, §14 (6th ed. 1787). See Fox, supra, 25 L.Q.R. at 248.

In the 18th century, debate over the contempt power was earnest and strong. The publishers of the North Briton, the newspaper whose battles with authority contributed so greatly to the American law of search and seizure, see Boyd v. United States, 116 U.S. 616 (1886), were active in this debate. Fox records that after the attachment for contempt of the paper's publisher William Bingley, in June 1768, the paper carried a letter protesting the use of summary process and objecting that if contempt is punished on information, there is no grand jury, and if by summary process, no jury at all:

> "The former [trial by information] seems to contain not only the spirit, but even the very substance of the Court of Star Chamber, and may justly be considered as the same jurisdiction transformed into another shape . . . How the Court of Star Chamber after being solemnly abolished by the legislature, came to be revived in another form, I may perhaps inquire more

particularly on another occasion. At present, I shall only observe that it was probably owing to the arbitrary dictates of some overbearing minister and the mean compliance of some time-serving Judge, who alleged that the court being taken away by the Parliament, all the power it ever claimed from the common law, that is all the power it ever exercised, was thereby devolved on the Court of King's Bench . . . . The knavery and absurdity of this doctrine are equally egregious; for hence it would follow that the legislature never meant to abolish this court, but only adjourned it to another place. The method of proceeding by attachment is, if possible, still more unconstitutional . . . . The accusation, the trial, the punishment--everything is arbitrary . . . . " Quoted in Fox, supra, 25 L.Q.R. at 363.

The anger over arbitrary exercises of the summary contempt power, and the uncertainty over its legitimacy* did not abate with the passing of years.

Oswald wrote is 1892:

"It should always be borne in mind in considering and in dealing with contempt of Court that it is an offence purely sui generis, and that its punishment involves in

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* The often-cited undelivered opinion of Justice Wilmot concerning the summary contempt power, in The King v. Almon, has been shown by Fox to rest upon a false historical premise. 24 L.Q.R. 184, 266 (1908). In any case, the opinion was not unearthed until after the adoption of the American Constitution and Bill of Rights.

most cases an exceptional interference with the liberty of the subject, and that, too, by a method of process which would in no other case be permissible, or even tolerated. It is highly necessary, therefore, in all questions of this nature, where the functions of the Court have to be exercised in a summary manner, that the Judge in dealing with the alleged offence whould not proceed otherwise than with great caution and deliberation and that when any antecedent process has to be put in motion, every prescribed step and rule (however technical) should be carefully taken, observed, and insisted upon [citing authority] . . . . Oswald, Contempt of Court 11-12 (1892)."

Oswald also notes, quoting Jessel, M.R.:

"It seems to me that this jurisdiction of contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges, to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing . . . should be adopted . . . . [I]t is

> necessarily only in the sense in which extreme measures are sometimes necessary to preserve men's rights--that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of this exercise of jurisdiction."

Id. at 12-13.

These concerns have continued in England, down to a report prepared under the direction of Lord Shawcross urging Parliamentary action to limit the contempt power. Justice, Contempt of Court (1959).

Thus, one can see that there is no historical warrant for concluding that a free-wheeling summary contmept power to hand out terms of imprisonment is "inherent" in courts which are in the Anglo-American tradition, and that the doubts appellants express over the procedure below have honorable forebears.

2. The Development of Contempt Law in the Federal Courts

There are federal cases, Supreme Court cases among them, stating the extent of the summary contempt power in exuberant terms. See Green v. United States, 356 U.S. 165 (1958) (compare Justice Frankfurter's concurring opinion at 189); Brown v. United States, 356 U.S. 148 (1958). These cases no longer state the law. Brown is overruled by Harris v. United States, 283 U.S. 162 (1965), and Green died with the decision in Bloom v. Illinois, 391 U.S. 194 (1968).

Bloom makes clear, if there were any doubt after Harris,

that the power to punish alleged contempt summarily is severely limited. These limitations are derived in part, as the Court held in Bloom, from a renewed attention to the history of the contempt power in Anglo-American law. Bloom, 391 U.S. at 198 n. 2. The opinions in Bloom and Harris call to mind that in the colonial history of contempt, there is every indication of a moderate and restrained use of the power.* As Justice Black said, dissenting in Green v. United States, supra, 356 U.S. at 207-08, n. 21:

> "Although records of the colonial era are extremely fragmentary and inaccessible apparently such contempts as existed were not the subject of major punishment in that period. From the scattered reported cases it appears that alleged offenders were let off after an apology, a reprimand or a small fine or other relatively slight punishment. I have found no instance where anyone was unconditionally imprisoned for even a term of months, let alone years, during that era when extremely harsh penalties were otherwise commonplace."

Bloom and Harris also recognize that the contempt power is, as Oswald observed, sui generis and laden with dangers to liberty. Taken together with Shillitani v. United States, 384 U.S. 364 (1966), these cases emphasize the difference between contempts which are civil and remedial and those which are punitive, and insist as to the latter that procedural protections historically thought essential to the imposition of punishment be afforded. Some of these protections arise from a proper interpretation of Federal Rule of Criminal Procedure 42, some from the Constitution itself, and some are fashioned in individual cases based

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* See also, Study Draft of a New Federal Criminal Code §1341 and comment thereto.

upon considerations of judicial convenience and public policy (e.g., Barnett v. United States, 346 F2d 99 (5th Cir. 1965)). All three considerations militate in favor of reversal in these cases, as the following argument shows.

B. Why Summary Procedures Were Inappropriate Here

On December 10, 1970, the trial judge declared a mistrial. Tr. 1969, et seq. He then adjourned, initially for the purpose of immediately preparing contempt certifications. After reflection, he continued the proceedings to Monday, December 14, 1970, in order more adequately to prepare the certification.

On that Monday the court read the contempt certification and meted out a six-months' punishment to all defendants previously cited, without calling a single witness and without giving any notice to any defendant of what conduct was to be considered criminal so that such defendant might attempt to rebut the charges against him. These facts appear in the Statement of Facts, supra.

Basing his findings of contempt both on the "totality of defendants' long continued and repeated misconduct" and "the final culmination of such course of repeated misconduct that occurred on Thursday, December 10, 1970," the trial judge certified that all of such misconduct had "occurred in the actual presence of the Judge and was personally seen and heard by the Judge." Contempt Certification dated December 14, 1970, at p. 7 (hereinafter "Contempt Certification No. 1").

It is not clear precisely what conduct on Thursday, December 10, 1970, constituted the "culmination." The trial judge's certification sets out an incident at the door to the reception room of the Judge's chambers allegedly involving defendant Dowd, Contempt Certification No. 1, at p. 5, "several" refusals by defendants to come to the courtroom for trial, id., at p. 5, "loud and boisterous epithets and obscenities . . . directed at the deputy marshals escorting the Judge" in the corridor on the way back to the courtroom by defendants Dowd, Abeles, Marshall and "others," id., at page 6. This issue is discussed under Point II, supra.

At Monday's session, the trial judge, after reading Contempt Certification No. 1, gave all defendants (Tr. 2015) the right of allocation (Tr. 2017). Each defendant proceeded to speak in turn. However, when defendant Stern began to speak (Tr. 2107), the trial judge attempted to stop her from speaking. Near the end of her comments the trial judge interrupted defendant Stern and first told her to conclude, then to stop and when she did not, held her in contempt (Tr. 2118-19).

When this ruling precipitated remarks from some spectators, the Judge ordered spectators cleared and left the courtroom. Several "special U.S. Marshals" entered the courtroom, carried off certain defendants and fought with spectators. The trial judge later re-entered the courtroom and cited all defendants except Lerner for contempt. (The Contempt Certification dated December 14, 1970, relating to this incident is hereinafter referred to as "Contempt Certification No. 2.") Cited conduct

included Defendant Stern's insistence on continuing her remarks (Contempt Certification No. 2, at p. 2, l. 17-19), her "attack on the court as an institution of the United States of America" (Contempt Certification No. 2, at p. 2, l. 11-12), the irrelevant nature of her remarks (Contempt Certification No. 2, at p. 2, l. 12-14), the apparently excessive length of those remarks (Contempt Certification No. 2, at p. 2, l. 14-15), "loud, boisterous and violent actions and language" of each defendant (other than Lerner)(Contempt Certification No. 2, at pp. 22-24), "riotous conduct and an incipient riot" in the courtroom (Contempt Certification No. 2, at p. 2, l. 25-26), and "scuffling and loud and boisterous language in the courtroom" for at least one-half hour after the trial judge had left the bench and heard "even though the doors were closed" (Contempt Certification No. 2, at p. 2, l. 30; p. 3, l. 2).

For four separate reasons, the purported use of F.R.Crim.P. Rule 42(a) in both these circumstances was improper: (1) on the face of the Judge's order and the Record of Trial, the "facts" constituting the criminal contempt either were not seen or heard by the judge or did not occur in his presence; (2) there was no need for "immediate penal vindication of the dignity of the court," Cook v. United States, 267 U.S. 517, 536 (1925); (3) the delay in adjudication deprived the court of power to proceed under F.R.Crim.P. 42(b) as to events of Thursday, December 10 only; and (4) the nature of the alleged contempts was sufficiently serious that the summary process of Rule 42(a) was inappropriate and a jury trial was required.

For these reasons, therefore, the contempt convictions should be remanded to the District Court for proceedings under Rule 42(b) with a trial before a jury.

C. Conduct Not Seen or Heard by the Judge or Not Occurring "In the presence of" the Court.

Defendants contend below that their due process right to a hearing would allow them to establish many incidents which, although claimed by the trial judge to be seen or heard by him and to have occurred in his presence, were not so seen or heard and did not so occur, see infra at

However, even without a hearing it is clear from a reading of the Contempt Certifications that the trial judge bases his finding on conduct not falling within his sight or hearing and presence, and thus the procedures of Rule 42(a) were inappropriate.* As we have shown, F.R.Crim.P. 42(a)'s summary procedures are so alien to constitutional concepts of fair hearing that they must be narrowly limited to situations in which their use is expressly authorized. It is clear that the trial court exceeded these limits.

18 U.S.C. §401(1) provides, in relevant part:

> "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; . . ."

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* Rule 42(a) states:

> "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." (Emphasis added)

The phrase "in its [the court's] presence or so near thereto" was held to have a geographical meaning, not causal, in Nye v. United States, 313 U.S. 33 (1941). However, when the court is not in session its presence may have a norrower meaning. In re Savin, 131 U.S. 267 (1888):

> "The jury-room and hallway where the misbehavior occurred were parts of the place in which the court was required by law to hold its sessions. . . . We are of the opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the places set apart for its own use. . ." Id. at 277.

Moreover, even if the hallway of the Courthouse is in the "presence" of the court, Rule 42(a) limits those contempts which may be punished summarily to those which occur in the "actual presence" of the court, a phrase suggesting a narrower scope language. Farese v. United States, 209 F.2d 312, 316 (1st Cir. 1954). "Actual presence" thus suggests that the contempt must occur in circumstances where the court does not require any testimony to determine the facts of the contempt. This common sense distinction has long been recognized in the case law.

> "Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form.' Ex Parte Terry, 128 U.S. 289, 309; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oaht of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." In re Savin, supra, at 277.

In Contempt Certification No. 1, the trial judge relied for his finding of contempt on "very loud noises apparently from

repeated pounding on the door to the reception room of the Judge's chambers." Contempt Certification No 1, at p.4, l. 1-3. The Judge stated further that ". . . Dowd acknowledged he had been pounding on the door. . . ." Contempt Certification No. 1, at p. 4, l. 23-24. It is clear on the face of Contempt Certification No. 1 that the Judge is not relying on his own eye-witness information but on the confession of defendant Dowd,* and thus that that cited conduct did not appear in the "actual presence" of the Court.

Moreover, the Judge cites, in Contempt Certification No. 1, at p. 6, l. 13-15, the "refusal" of defendants to come to the courtroom after having been notified by bailiff and counsel. See also Contempt Certification No. 1, at p. 5, l. 10-12. In fact, this is perhaps the "core" of the cited conduct in Contempt Certification No. 1. Yet, Contempt Certification No. 1 indicates, at p. 5, l. 13-26, when the Judge personally ordered defendants to come to the courtroom, they came. The Record reflects that, during the "period of refusal," from 9:32 a.m. until 9:50 a.m., the Judge was sitting in the Courtroom (Tr. 1956-66). The Judge never saw or heard any requests or directions being given to the defendants during that time frame; the Judge was relying on the unsworn testimony of one counsel (Tr. 1963, l. 2-10) and the bailiff Tr. 1960, l. 22; Tr. 1961, l. 3; Tr. 1965, l. 15) as to the delivery of the Judge's communications.

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* The record is clear that Dowd did not so acknowledge and that the Judge is, in fact, relying on the unsworn testimony of the bailiff in determining the identity of the party knocking on his door. (Tr. 1942)

Such "refusal" to come to the Courtroom thus did not occur in the "actual presence" of the Judge. See United States v. Willett, 432 F.2d 202 (4th Cir. 1970); Klein v. United States, 151 F.2d 286 (D.C. Cir. 1945).

We will indicate below what would be shown on this matter at a hearing pursuant to Rule 42(b). The confusion and failure of miscommunication that did occur starkly demonstrate the wise rule requiring a hearing when all conduct cited did not occur within the "actual presence" of the trial judge.

For these reasons this court should remand the contempt convictions referred to in Contempt Certification No. 1 to the District Court for proceedings under Rule 42(b).

In Contempt Certification No. 2 relating to Monday, December 14, the trial judge appears to rely on at least a half hour's "scuffling and loud and boisterous language in the courtroom" which occurred after he had left the bench and while he was in his office with the doors closed and guarded by a U.S. marshall. Contempt Certification No. 2, p. 2, l. 31; p. 2, l.2. In order that matters neither seen nor heard by him or occurring in his presence would be reflected in the record, the trial judge incorporated by reference "audio and visual recordings of the proceedings." Contempt Certification No. 2, at p. 1, l. 20-21. It is our contention that the audio and visual recordings are not equivalent to conduct seen or heard by the trial Judge, even if the Judge had certified that he has viewed the audio and visual recordings and they accurately reflected what the Judge had seen and heard. The video-tape

machine on which such events were recorded, is, by its very nature, limited in scope of visual and audial range. This, combined with the fact that the temporal scope of the events so recorded was determined exclusively by its operator, underscores the selectivity of the conduct which was captured on the video-tape.

Moreover, the trial judge made no effort, to the knowledge of counsel, to excise portions of that recording which reflected matters occurring after the Judge left the bench.

Because Contempt Certification No. 2 thus relies in significant part on conduct occurring outside the "acutal presence" of the Judge and on an audio and visual recording which may not have been seen by the trial judge before preparation of that Contempt Certification, the contempt convictions relating thereto should be reversed and remanded to the District Court for proceedings under Rule 42 (b).

D. No Need for Immediate Vindication.

The ostensible justification for finding the defendants in contempt without a hearing was Federal Rule of Criminal Procedure 42(a), which the trial judge believed permits punishment of any contempt seen or heard by the court without any hearing whatsoever, and regardless of whether such extraordinary action is necessary.

So remorselessly literal a reading of the Rule is error: it ignores the historic limitations upon the power of summary contempt, supra Introductory Statement. It forgets that

F.R.Crim.P. 42(a) did not broaden the power of summary contempt but restated the limits of such cases as Cooke v. United States, 267 U.S. 517 (1925), cited in Advisory Committee Notes to F.R. CrimP. 42(a), 18 U.S.C.A.; Harris v. United States, 382 U.S. 162, 165 n.3 (1965). It ignores the authoritative decision of the Supreme Court in Harris v. United States, supra. It flouts the teaching of Parmalee Transportation Co. v. Keeshin, 292 F.2d 806, 810 (7th Cir. 1965):

> "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."*

The limit of the summary contempt power, like that of the contempt power generally, is "[t]he least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231 (1821), cited with approval in Harris v. United States, 382 U.S. at 165. The "end" in question is that quoted above from Chief Justice Taft's opinion in Cooke v. United States, supra, "the immediate penal vindication of the dignity of the court." The summary contempt power is thus used to "quell" a "disturbance," to "stop insolent tactics." Harris v. United States, 382 U.S. at 165. The alleged contempt must be "such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures . . ., was necessary." Id. When the trial was over, as it was here, "swiftness [in imposing punishment] was not a prerequisite of

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* See also Parmalee Transportation Co. v. Keeshin, 294 F.2d 310 (7th Cir. 1961), rev'd sub nom. In re McConnell, 370 U.S. 230 (1962).

justice" and "delay would not imperil the . . . [trial] proceedings," since there was no trial going on to be disrupted. Harris v. United States, 382 U.S. at 164.

This analysis, consistent with Harris v. United States, supra, embodies the principles which underlie F.R.Crim.P. 42(a). The summary contempt power, it must be remembered, is "an exception to the requirements of due process," Sacher v. United States, 343 U.S. 1, 36 (1952) (Frankfurter, J., dissenting). As such, [n]ecessity must bound its limits." Id. These same sentiments were also expressed by Justice Black, dissenting in Green v. United States, 356 U.S. 165, 213 (1958), a dissent which in consequence of the overruling of Brown v. United States, 359 U.S. 41 (1959), has considerable authority today. Brown, it will be recalled, rested its holding that refusal to answer questions before a grand jury was punishable under F.R.Crim.P. 42(a) upon the literal language of the Rule. Since Brown had repeated his refusal to answer in the presence of a district judge, the judge could certify that he saw and heard the conduct in question and thus send him off to jail for fifteen months without further ceremony. This procedure, said the Court in Brown, did no violence to Brown's rights or to the literal terms of Rule 42(a).

Harris, in overruling Brown, returns to the spirit and intention of the Rule, and requires more than literal compliance with its terms. So extraordinary a power as that of summary contempt must be exercised only to the extent absolutely required. Harris commands attention, therefore, to the vigorous dissents

in Sacher v. United States, 343 U.S. 1, 14 (Justice Black), 23 (Justice Frankfurther), 89 (Justice Douglas); Green v. United States, 356 U.S. 165, 193 (Justice Black, with Justice Douglas and Chief Justice Warren) (1958); and, of course, Brown, itself, 359 U.S. at 53 (Chief Justice Warren, with Justice Black,, Douglas and Brennan). These dissents stressed precisely the point upon which the Court came to rest in Harris, that the most reasoned of the common law and early federal decisions, as well as the articulate statements of the commentators, require a narrow reading of the summary power to punish contempt, and therefore of F.R.Crim.P. 42(a).

The appellants' case illustrates the wisdom of such an interpretation. The trial below proceeded through ten trial days with the only significant trial delays occurring because of the failure of the U.S. Attorney (1) to have a witness available on December 8, 1970, Tr. 1826-1827, thereby losing 1 1/2 hours of jury time and (2) to have delivered Jencks Act material concerning witness Madsen in sufficient time so that serious legal questions concerning the admissibility of Madsen's testimony might be resolved on the afternoon preceding that witness' direct testimony (thereby losing a full day's jury time). Tr. 1847 (request for Jencks material by Carl Maxey); Tr. 1848-49 (request for Jencks material by defendant Marshal); Tr. 1876-77; Tr. 1889; Tr. 1897-98; Tr. 1898, 1900, 1902. In fact government counsel was admonished (outside the presence of the jury) for his having delayed the proceedings. Tr. 1827.

Although the vagueness of the Judge's contempt certification

makes it impossible to determine what conduct on trial days previous to Thursday was contemptuous, no conduct on the part of defendants resulted in significant delays and no conduct was sufficiently serious that the judge felt it necessary to take any of the possible courses of action set out in Illinois v. Allen, U.S. (1970).

Where is the "necessity," therefore, for summary contempt proceedings after the termination of the trial on December 10? Whatever "misconduct" had occurred prior to December 10 was past history; in fact, the trial judge explicitly recognized this to be the case on Wednesday, December 9, Tr. 1870.* Rather, on December 10, the trial judge "revived" conduct occurring prior to that date which he had the day before said would not be cited. Having the day before determined that summary contempt was not "necessary to vindicate the dignity of the court," how could such necessity arise the following day? And if it did, how could this necessity still be present four days later?

As a result of such action, the trial judge should not be allowed to rely on conduct occurring prior to Thursday in

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* In fact, at one point during trial the Judge had cited a defendant for contempt and had ordered a hearing to be held on the matter at the earliest possible date. Tr. 961. That hearing never occurred, which suggests that although the Judge considered that misconduct much more serious than other unusual conduct in the courtroom, there was no danger of an "obstruction" to the trial whatsoever.

rendering summary contempt.* Appellants are not saying that the trial court lost all power to seek to punish alleged contempts. They urge, rather, that the only means left to him on December 10, 1970, was to prepare an order looking to proceedings under F.R.Crim.P. 42(b).**

As to any misconduct on Monday, December 14, there was no trial at all. The Judge might easily have used the weapons available to him under Illinois v. Allen, supra, and proceeded under Rule 42(b), particularly in light of the factual issues as to the conduct of particular defendants. See affidavits of Madeline Levy, Linda Huber and infra, at Point.

To put the matter another way: F.R.Crim.P. 42(a) and 18 U.S.C. §401 carve out a narrow exception to the requirements of due process of law. They constitute a limited Congressional delegation of a power to dispense with the most elementary procedural rights. See Hannah v. Larche, 363 U.S. 420 (·).

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* State courts have reversed contempt convictions when the trial court acted after the "necessity" for immediate action had passed. E.g., In re Foote, 76 Cal. 543, 18 Pac. 678 (1888); People v. Burt, 257 Ill.App. 60 (1930). Compare Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950) and MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), where mid-trial contempt convictions were affirmed, this court having expressly noted that judges therein had acted as swiftly to adjudicate the contempt as circumstances permitted.

** To the extent that Sacher v. United States, 343 U.S. 1 (1952), is contrary to the position expressed above, it must be regarded as no longer authoritative. Harris seriously undercuts it. Sacher, was, at the moment of its announcement, however, inconcsistent with earlier cases construing the summary contempt power, and particularly with those Supreme Court cases which the draftsmen of F.R.Crim.P. 42(a) relied. See Harris v. United States, 382 U.S. at 165 n.3. Sacher was, of course, roundly and widely condemned from the moment of its decision. E.g., Note, 37 Corn.L.Q., 795, 979 (1952).

Such delegations are jealously and strictly construed, see Gutknecht v. United States, 396 U.S. 295 (1970), and the slightest exercise of power beyond them must be checked. Greene v. McElroy, 360 U.S. 474 (1959). See also Goldberg v. Kelly, 397 U.S. 254 (1970). Neither concepts of offended dignity, nor one hopes, invocations of divine guidance, can obscure this truth.

E. Delay, Of Itself, Deprived the Trial Judge of Power Under F.R.Crim.P. 42(a).

The court in Parmalee Transportation Co. v. Keeshin, 292 F.2d 806, 810 (7th Cir. 1961), said:

> "The court waited more than five months after the alleged contempt had been committed, and only then specified the charges and entered the order from which this appeal has been taken. The very fact that in the meantime various proceedings, including a long drawn-out trial, had occurred, is rather conclusive evidence that these words of respondent in no way obstructed the court in the performance of its judicial duty, an element that must be shown in every case where the power to punish for criminal contempt is exercised."

Parmalee certainly establishes the rule that the summary contempt power is lost by delay in exercising it. Delay is more than "evidence" that there is no such obstruction as to require immediate punishment, dispensing with procedural safeguards: delay is "rather conclusive evidence."

In fact, the trial judge initially recognized that a "hearing" on the issue was the appropriate procedural step (Tr. 1975, 7-8); even after concluding that a significant amount of time would be necessary before contempt certifications could be prepared

(Tr. 1982, l. 17-19), the trial judge indicated that a "notice" (under Rule 42(b))was an available procedural option (Tr. 1979, l. 18-19, 21-23; Tr. 1990, l. 14-19; Tr. 1991, l. 10-11; Tr. 1997, l. 18).

However, no notice or certification was delivered to defendants or counsel until court had convened on Monday. At that time Judge Boldt merely read the contempt certification allowing defendants and counsel only a right of allocation before sentencing. See generally Tr. 2002, et seq. For this reason alone, it was improper for the trial judge to proceed under F.R.Crim.P. 42(a) as to the contempts of Thursday, December 10.

Moreover, as appellants have stressed above, the trial judge's inclusion in Contempt Certification No. 1 of references to conduct prior to December 10 was manifestly improper. Since he had a day earlier evinced no intention to rely on any such conduct as the basis for a contempt citation and had at many other points in the record allowed the defendants to speak out, inclusion of these references to past conduct was not only irrelevant but also impermissible. Cox v. Louisiana, 377 U.S. 921 (1964); Daley v. Ohio, 360 U.S. 423 (1959).

F. The Nature of the Alleged Contempts Precluded Proceeding Under F.R.Crim.P. 42(a).

Two separate facts about the allegations of contempt in this case preclude exercise of the summary contempt power. First, the trial judge made clear his view that these alleged contempts

constituted serious interference with the administration of justice. The conduct of the appellants on Thursday, December 10, the trial judge said, " . . . [was] one of the most inexcusable and outrageous incidents of contempt of court that I have ever read about or learned of in any way, certainly far beyond anything that I have ever seen." Tr. 1969, l. 16-19. Second, the trial judge imposed sentences of one year on five defendants.

The severity with which the judge viewed the conduct in the courtroom suggests (1) that defendants had the right to trial by jury and (2) that even if no right to trial by jury exists, Rule 42(a) interpreted in light of its historical antecedents, precludes summary punishment for contumacious conduct which is considered serious in character.

1. The Nature of the Charges Against Appellants and the Length of the Sentences Imposed for the Alleged Contempts Each Make the Charges So Serious that Appellants Were Entitled to a Trial by Jury.

The keystone to trial by jury is the seriousness of the charge. A criminal defendant is constitutionally entitled to a jury trial except where the offense can be considered "petty." Duncan v. Louisiana, 391 U.S. 145, 159 (1968). In determining the seriousness of a charge the Supreme Court has looked to two separate indicia: the nature of the alleged offense* and the length of the

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* See, e.g., District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540 (1888); Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39 Harv.L.Rev. 917, 981 (1926).

sentence upon conviction for that offense.** Because contempt is now recognized for what it is, "a crime in the ordinary sense," Bloom v. Illinois, 391 U.S. 194, 201 (1968), the same criteria obviously apply to the trial of a contempt charge. See, e.g., Bloom v. Illinois, supra; Cheff v. Schnackenberg, 384 U.S. 373 (1966). Meeting either standard requires a trial by jury; appellants submit that both criteria are satisfied here.

a. APPELLANTS WERE EACH ENTITLED TO A TRIAL BY JURY BECAUSE OF THE NATURE OF THE CHARGES AGAINST THEM.

While there is nothing intrinsic about the charge of criminal contempt that requires a jury trial, Bloom v. Illinois, supra, at 211; such a conclusions marks the beginning, not end, of a proper examination of the charges against appellants. It is necessary to look at the offense itself, not merely its label or generic classification.**

We need not approach an examination of the conduct of appellants in a vacuum. For the trial judge himself described their conduct in terms that leave no doubt that he regarded the charges against them as grave.***

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* See, e.g., Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, supra.

** See, e.g., District of Columbia v. Colts, supra, holding that a particular type of traffic violation warranted a jury trial.

*** Appellants flatly deny the accuracy of Judge Boldt's characterization. That it is wholly erroneous is shown elsewhere in this brief and in a reading of the record. What is important here, however, is that the judge who brought the charges and convicted appellants believed that the charges were very serious.

> "The actions and conduct and language and remarks of the defendants . . . constitute the most serious possible contempt of court . . . . all [this conduct] is one of the most inexcusable and outrageous incidents of contempt of court that I have ever read about or learned of in any way, certainly beyond anything that I have ever seen." (Tr. 1969)

> "Interference of, obstruction of and frustration of judicial proceedings as serious as that of every one of the defendants is guilty of strikes a blow at the process of law guaranteed by the Constitution of the United States, which is indispensable to the preservation of the Constitutional rights and, indeed, of our nation itself." (Tr. 2127)

The trial judge thought the violations of law so serious that they justified consecutive, rather than concurrent, sentences. Tr. 2148.

It is hard to overestimate the gravity of these charges. The trial judge explicitly accused the appellants of attempting to sabotage their trial and the entire federal judicial system. It is difficult to think of a crime against society that is more serious.

In determining the seriousness of a charge, the Supreme Court has counseled that we must look to the social and ethical judgments of the community regarding the offense. Baldwin v. New York, 399 U.S. at ; District of Columbia v. Clawans, 300 U.S. 617, 628 (1937). The charges of contempt against defendants in this and similar cases have aroused unprecedented public comment by judges, lawyers and laymen alike. The charges have been a catalyst for widespread and continuing discussion of the respective roles of judge, lawyer and defendant in the course of a trial.

Severe collateral consequences which reflect these ethical judgments may attend an affirmance of these convictions.* This is conclusive proof that the community regarded the charges as serious.

Elsewhere the Court has looked to the degree to which the offense charged threatens society. In Callan v. Wilson, supra, the Court relied on its finding that the offense charged, conspiracy, affected the public at large, supra, at 550, i.e., that it represented more of a crime against society in general than against any person or persons in particular. See also District of Columbia v. Colts, supra. If Judge Boldt's charge against appellants were true, appellants' crime would have a substantial effect on the public at large. For he believed that appellants declared contempt "for the entire judicial system of this nation,". Tr. 2126. An attack upon the federal judicial system would plainly affect the public at large. That this is so is perhaps best demonstrated by the magnitude of public comment and discussion that the contempt charges against appellants have aroused. Moreover, the government has virtually conceded the point here by claiming that the cited conduct of appellants shows them to be so dangerous that they should not be released on bail pending appeal.

In determining whether a charge warrants trial by jury,

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* For example, the Washington State Bar Association has requested a transcript of the trial, thereby threatening severe sanctions against even uncited counsel in this case.

the Court has also examined the moral quality of the alleged offense. In District of Columiba v. Clawans, supra, selling unused railroad tickets without a license was a crime whose "moral quality is relatively inoffensive," 300 U.S. at 625, and therefore no jury trial was required. The sale of unstamped oleomargerine was found to be an offense "not necessarily involving any moral delinquency," Schick v. United States, 195 U.S. 65, 67 (1904), and thus it too did not require a trial by jury. In holding that reckless driving was a charge requiring trial by jury, the Court noted that such an offense involved "obvious depravity." District of Columbia v. Colts, supra, at 73. See also, Frankfurter and Corcoran, supra, at 981. Under this formulation, too, the charges against appellants warrant trial by jury. Attempting to sabotage the federal judicial system would be an offense involving a high degree of moral delinquency. About this there can be no dispute.

The charges against the appellants and similar charges against defendants in the Chicago conspiracy trial are very severe. They have occasioned widespread discussion in legal and lay circles. If true, they would substantially affect the public at large and would be morally offensive. Therefore, appellants were entitled to trial by jury.

b. A PERSON CANNOT BE SENTENCED TO MORE THAN SIX MONTHS IMPRISONMENT FOR CRIMINAL CONTEMPT WITHOUT BEING AFFORDED A TRIAL BY JURY.

Appellants, except Lerner and Stern, were sentenced for contempt to prison terms of one year. If each of these

sentences were for a single offense, the alleged contemnor was entitled to a jury trial. Baldwin v. New York, supra, Cheff v. Schnackenberg, supra. Whether such was the case is duscussed below. Assuming arguendo, however, that each appellant was sentenced for committing multiple contempts, the question is whether that makes any difference with respect to the right to jury trial. In other words, can the trial judge evade the strictures of Baldwin, Cheff, and Bloom v. Illinois, supra, by breaking up the alleged contempt into a multitude of separate offenses and imposing separate consecutive sentences which, when aggregated, exceed six months, although no single offense is punished by imprisonment for longer than that? Appellants submit that to allow such a procedure would be to ignore the interests the jury guaranty is designed to protect.

In holding the right to trial by jury fundamental to our system of criminal jusitce and therefore part of due process of law,* the Supreme Court spelled out at length the consideration underlying that right:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary by insisting upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury

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* For a history of trial by jury in criminal cases, see Duncan v. Louisiana, supra, at 151-53.

> of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, supra at 155-56.

See also Singer v. United States, 380 U.S. 24, 31 (1965).

Devlin has spoken eloquently of jury trial in the same light:

> "The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, Trial by Jury, 164 (1956).

It must be immediately apparent that the evils sought to be avoided through trial by jury are the very same evils that, historically, were feared by opponents of the power of summary contempt. In this respect trial by jury dovetails precisely with the determination to restrict summary contempt to "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. at 231. The issue posed above reduces to the question whether the evils sought to be avoided in Duncan, Bloom and Cheff are any less substantial when a sentence in excess of six months is imposed for a single offense. If the answer is "no," then

appellants, except Lerner and Stern, facing the same danger as S. Edward Bloom, are entitled to the same measure of protection.

To answer the question thus posed, it is necessary to assume a situation where "unfounded criminal charges [are] brought to eliminate enemies" and by a "complaint, biased or eccentric judge" "too responsive to the voice of higher authority." Duncan v. Lousiana, supra, at 156.* Given such a situation it is impossible to perceive how the danger of "oppression by the Government" is any less urgent where a lengthy sentence is based on alleged multiple contempts rather than on a single offense. The threat of intentionally erroneous findings of fact and incorrect conclusions of law is just as pressing. With respect to sentencing, the danger is increased. It would be possible to inflict a longer prison sentence than the judge could have otherwise imposed (as was done here). In this way, the interests the jury trial was designed to protect are just as vulnerable, if not more so, in the case where the lengthy sentence is based on an aggregation of small offenses.

The requirement of aggregation, where charges of criminal contempt are tried together, to determine whether there exists a right to trial by jury is supported by the case law. The Supreme Court of New Jersey recently held

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* Whether this is such a case, it is not now necessary to inquire.

that if the potential cumulative sentences for multiple offenses which are factually related and arise out of a single event would warrant a jury trial if based on the conviction for a single offense, then the defendant is entitled to trial by jury even if none of the individual offenses has a maximum penalty that would warrant a jury if tried alone. State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969). Courts have also aggregated sentences for charges tried together to determine the right to counsel. See, e.g., James v. Headley, 410 F.2d 325 (5th Cir., 1969); Bohr v. Purdy, 412 F.2d 321 (5th Cir., 1969); State v. Lucas, 24 Wisc. 2d 82, 128 N.W. 2d 422 (1964); In re Johnson, 62 Cal.2d 325, 398 P.2d 420 (1965).

In James, after noting that the trial judge treated each count of several tried together as standing alone, the Fifth Circuit said:

> "We cannot accept this conclusion. We consider it unrealistic to assume that criminal offenders are likely to compound their violations of the law for the purpose of securing free legal counsel at their subsequent trials. The total punishment should be the guide.
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> ". . . Assuming . . . that the length of the punishment is a relevant factor in determining the right to counsel, it is a false measure to weight only the largest of its component parts. If a guilty person is convicted, the sum of the potential penalties is what is important to him--and to society." 410 F.2d at 329.

Still further, where the right to appeal a criminal conviction turns on the penalty imposed, and several charges are joined in one case, the penalties are aggregated where

the charges are related. Chambers v. District of Columbia, 223 A.2d 799 (D.C. Mun.Ct.App. 1966).

These decisions all recognize that the touchstone to the rights of an accused is the full impact of a conviction on the defendant. If, for example, a defendant is convicted on five separate counts and sentenced to three months on each count, to be served consecutively, the impact on him is precisely the same where the defendant is convicted on a single count and sentenced to fifteen months imprisonment. It follows that the measure of protection must be the same in each instance.

If the principle of aggregation is employed in ordinary criminal cases to determine the existence of a constitutional right, particularly the right to trial by jury, the need to adopt that principle is much greater where the alleged offense is contempt. For the danger to the individual rights and liberties is compounded in such a case. Earlier we discussed the increased opportunity for injustice where a single person performs multiple functions. In a contempt proceeding, the judge is the grand jury, the prosecutor, trier of fact and trier of law. This directly contradicts the major consideration underlying the right to trial by jury, the "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge to to a group of judges." Duncan v. Louisiana, supra, at 156. The danger of injustice is further magnified when the alleged contempt occurs in court, so that the judge is also the complaining

witness, and when the alleged contempt involves personal criticism of the judge. The situation here is markedly different than when ordinary offenses are tried under ordinary criminal statutes. In the latter case, the judge is limited to two roles to play and has no direct interest in the outcome. Here there is an enormous concentration of power in a single individual, under a very general and vague statute, to judge conduct involving criticism of that very individual. The danger of the evils that trial by jury is designed to prevent is manifest.* Since Bloom's concern was with the placing of limits on the power of the trial judge over contemnors, a jury must be provided as a buffer between judge and alleged contemnor where the latter is threatened with more than six months imprisonment, regardless of whether that term constitutes an aggregate of lesser terms. The definition of contempt in 18 U.S.C. §401 is sufficiently vague that a court could endlessly multiply the number of contempts that were allegedly committed. If a judge could sentence for six months for each such alleged act of misconduct, he could sentence the

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* "[I]n contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament." Bloom v. Illinois, supra at 202.

"One ground for the Bloom result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt." DeStefano v. Woods, 392 U.S. 631, 634 (1968).

defendant to a lifetime of imprisonment without ever affording him a trial by jury. The holding in Bloom and the concerns which lay under it would then, as a practical matter, be reduced to fiction.

We noted earlier that one key to determining the seriousness of the charge is the severity of the maximum authorized penalty. Baldwin v. New York, supra. In the case at bar, however, no maximum penalty has been authorized. Congress has placed no limits on the length of sentence that may be imposed for violation of 18 U.S.C. §401, the criminal contempt statute. In such a situation, "when 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." Bloom v. Illinois, supra at 211. Here the penalty imposed on all appellants except Lerner and Stern was longer than six months. That represents a judgment that the charges against each were "serious" and, therefore, warranted a trial by jury. Frank v. United States, 395 U.S. 147, 150 (1969); Cheff v. Schrackenberg, supra. The severity of the charges remains the same today. Reducing the penalty now in no way affects the nature of the charges and the judgment earlier made about them. If they were serious enough to warrant a jury trial before, they remain serious enough now. If a criminal defendant were tried for murder without a jury, convicted and sentenced to life imprisonment,

could the appellate court simply reduce his sentence to six months and affirm the conviction? Would the charge of murder suddenly be less serious? In the case at bar, appellants were each denied a constitutional right. The only remedy is to provide each appellant with that same right.

Requiring a trial by jury whenever the aggregate penalty for contempt exceeds six months leaves ample power to deal with serious misconduct at trial. Courts can conduct a summary proceeding and impose up to a six-month sentence if such a proceeding is necessary; or the case may be set down for hearing later before a jury. And, of course, courts can employ a variety of strong remedies other than criminal contempt.* As in supra, at , what is involved here is not the power of the courts to deal with misconduct; the question is simply of the appropriate procedures to be followed in exercising that power.**

c. THE CONDUCT OF EACH APPELLANT CONSTITUTED AT MOST A SINGLE CONTEMPT AND THE COURT BELOW THUS ERRED IN IMPOSING ANY SENTENCE IN EXCESS OF SIX MONTHS WITHOUT ACCORDING THE APPELLANTS A JURY TRIAL.

The vitality of Bloom can be preserved if this Court determines that the conduct of each appellant constituted

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* See Illinois v. Allen, 397 U.S. 337 (1970) upholding the power of the courts to deal with seriously disruptive misconduct by removing the defendant, binding and gagging, or imprisoning for civil contempt.

** Appellants have discussed the aggregation of sentences in terms of the constitutional right to trial by jury. We wish to point out that, in addition, the federal supervisory power is also a proper basis for aggregation. Cf. Cheff v. Schnackenberg, supra.

at most a single contempt, since there would then be no question but that every appellant except Lerner and Stern was entitled to a jury trial. Whether each appellant's conduct, assuming it was contemptuous, constitute multiple crimes or only a single offense is a question of statutory construction, Ladner v. United States, 358 U.S. 169, 173 (1958), and a trial court cannot alter the substance of a contemnor's action by merely describint it as one or several contempts.* In order to decide how many different contempts, if any, each appellant committed, this Court must determine what is the "allowable unit of prosecution" under 18 U.S.C. §401(1), Bell v. United States, 349 U.S. 81 (1955)--the facts which, if proven, constitute a single crime. When a series of acts constitute but a single unit of prosecution, even though each one of those acts occurring by itself would have constituted a complete unit of prosecution, that series of acts is denoted a "continuing offense."** A

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* Thus the federal courts have repeatedly reversed multiple penalties imposed for an act or series of acts which constituted but a single offense. See e.g., Heflin v. United States, 358 U.S. 415 (1959); Bell v. United States, 349 U.S. 81 (1955).

** There are many such continuing offenses in federal law: assaulting two federal officers with a single shot (18 U.S.C. §254, Ladner v. United States, supra); wilfully remaining in the United States after one's alien permit expires (18 U.S.C. § 1282(c), United States v. Cores, 356 U.S. 405 (1958)); transporting several women across state line in a single car for immoral purposes (18 U.S.C. §2421, Bell v. United States, supra); violating a provision of the Fair Labor Standards Act with regard to have dozen different employees (29 U.S.C. §§ 215, 216(a), United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952)); one conspiracy to commit several crimes (18 U.S.C. § 88, Braverman v. United States, 317 U.S. 49 (1942)); transporting goods across several state lines at an illegally low rate (49 U.S.C. §411,

statute may define a continuing offense although words such as "course of conduct" do not appear in the provision.* Such a single continuing offense may be involved even though the various component acts were charged as separate counts and were subject to proof by different facts.**

Appellants maintain that the appropriate unit of prosecution for a direct contempt under §401(1) is the entire course of an alleged contemnor's conduct during a trial. This interpretation of §401(1) is supported by (a) the statutory language, (b) the legislative history and the purpose of the statute, (c) the need to prohibit improper multiplication of offenses by the prosecution of the trial court, (d) the policy of lenity applied in interpreting criminal statutes, (e) the incongruous results which would follow from any other unit of prosecution, and (f) the previous application of §401(1). These various considerations should be weighed separately; their effect, of course, is cumulative.

United States v. Midstate Horticultural Company, Inc., 306 U.S. 161 (1939); several fraudulent entries in a bank book to conceal a single embezzlement (12 U.S.C. §592, United States v. Adams, 281 U.S. 202 (1930)); illegally cohabiting with more than one woman over a three year period (22 Stat. 3, Ex Parte Snow, 120 U.S. 274 (1887)). See also United States v. Johnson, 323 U.S. 273, 271-82 (1944)(use of the mails for a particular illegal purpose); Dunn v. United States, 284 U.S. 390, 397 (1932)(maintaining a nuisance).

Where a defendant guilty of only one continuing crime has been mistakenly convicted of several offenses, all but the first conviction must be reversed. See, e.g., Yates v. United States, 355 U.S. 66 (1957).

* See United States v. Universal C.I.T. Credit Corp, 344 U.S. at 277.

** United States v. Empsak, 95 F.Supp. 1012 (D.Del. 1951).

Fixing the entire course of trial conduct as the unit of prosecution is particularly appropriate here. The trial judge believed that the alleged contempts were related incidents, that they were all part of a single plan to stop the trial. See Tr. 2124-2129.* Thus, the Judge himself believed that the appellants were committing only one offense. If this were true then each appellant really committed only one offense, although it may have "surfaced" at different points during the trial. Each appellant would then be guilty of only one contempt. Yates v. United States, supra.**

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*Appellants wish to emphasize again that they fully deny this accusation, a denial which is borne out by the record. We are interested here only in what Judge Boldt thought was happening, not what actually did happen.

** In Yates, the petitioner was charged with eleven separate contempts for refusing to answer eleven different questions relating to the membership of other persons in the Communist Party. In holding that the separate refusals constituted only a single contempt, the Supreme Court said:

> "Even though we assume the Government correct in its contention that the eleven questions in this case covered more than a single subject of inquiry, it appears that every question fell within the area of refusal established by petitioner on the first day of her cross-examination." 355 U.S. at 73.

Similarly, even if we assume that the alleged acts of contempt by each appellant involved different acts during the trial, all these separate acts would, according to the trial judge, be part of a single strategy of disruption.

No term of imprisonment, then, for longer than six months could be imposed without a trial by jury.*

Should this Court conclude that the appropriate unit of prosecution under § 401(1) is the entire course of trial conduct, this would not impair the power of a trial court to cite a party, attorney, or spectator for criminal contempt without waiting for the end of the trial. Nor would it alter the length of sentence that could be imposed for contemptuous conduct. It would simply alter the procedure under which that sentence might be imposed.

2. Rule 42(a) Limited to Minor Contempts.

From the earliest records of common law, the rule that summary punishments are limited to minor contempts has been enforced. The instances of its disregard stand as anomalies in

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* The close interconnection between the allegedly contemptuous incidents in this case is typical of direct contempt cases. See, e.g., Yates v. United States, supra; Wood v. Georgia, 370 U.S. 375 (1962); United States v. Sacher, 343 U.S. 1 (1952); Gautreaux v. Gautreaux, 220 La. 564, 57 So. 2d 188 (1952); State v. Mouser, 208 La. 1093, 24 So. 2d 151 (1945). Where multiple violations of a single statute typically or necessarily involve a single motive or impulse, the Supreme Court has consistently favored treating those violations as constituting a single continuing crime. Blockburger V. United States, 284 U.S. 229, 302 (1932). In United States v. Universal C.I.T. Credit Corp., supra, the court held that several violations of the minimum wage law constituted but a single crime where they resulted from a single management policy decision. 344 U.S. at 244. And in United States v. Midstate Horticultural Company, Inc., supra, the court held that interstate transportation of goods at an illegally low rate was only one crime, although it involved a series of acts over an extended period of time and the crossing of several state lines, because the crime was "set on foot by a single impulse and operated by an unintermittent force." 306 U.S. at 166. See also Justice White dissenting in Toussie v. United States, 397 U.S. (1970.

the law, and as examples of the reign of arbitrariness when the passion of a jurist sets fire to his reason. As Fox concluded in the study cited in the Introductory Statement, supra, the power to punish summarily for contempt was limited to contempts which were "not heinous".* The definition of heinousness was in part based upon the penalty which was sought to be applied, and in part upon the innate seriousness of the alleged offense. The list of older cases in which a trial with full procedural rights was afforded, reproduced in part in the Introductory Statement, supra, surely indicates that the offenses allegedly committed by the appellants were regarded by the trial judge as "heinous" both in their nature and in the consideration of penalty.

G. Concluding Observations on Federal Rule of Criminal Procedure 42.

Had the trial judge proceeded under Rule 42(b), the fundamental rights of appellants would have been preserved. Most important, each appellant would be notified of the charge against him or her. This notice would have complied with the standards set down in Russell v. United States, 369 U.S. 749 (1962), and would have permitted each appellant to raise a reasonable doubt as to guilt by dealing not with vague allegations of"misconduct", but with specific alleged acts.

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*Fox, supra, 25 L.Q.R. at 252. There may have been an exception for "officers of the court", but the power in such a case appears not to have been exercised save to impose a trivial penalty.

The defendants could have prepared to defend themselves, a request which is not idly made in view of the serious dispute as to the facts underlying these contempts.

Defendants would have been meaningfully represented by counsel. They would, since the trial judge himself said these contempts involved disrespect to him, have been entitled to have the matter heard before another judge. Obviously, there are serious constitutional obstacles to this court approving a summary procedure which sends six men and one woman to jail for up to one year. But the first task is to construe this rule of Criminal Procedure. Cf., Yates v. United States, 354 U.S. 298 (1957).

Clearly, the appellants were prejudiced by the court's failure to give them any sort of hearing before ordering them carted off to federal prison. But the presence of absence of prejudice, it should be said, is not controlling: To paraphrase Justice Clark in Simmons v. United States, 348 U.S. 397, 406 (1955):

> "[Appellant]has been deprived of the fair hearing required by the [Rule], a fundamental safeguard, and he need not specify the precise manner in which he would have used this right--and how such use would have aided his cause--in order to complain of the deprivation."

For the above reasons, the trial judge should have followed the procedures of Rule 42(b) and this Court should remand to the District Court for a hearing under that Rule.

II

THE CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO SET FORTH WITH PARTICULARITY AS TO EACH DEFENDANT THE FACTS ALLEGEDLY CONSTITUTING THE CONTEMPTS.

Even if the trial judge properly proceeded under Federal Rule of Criminal Procedure 42(a), these convictions cannot stand, for he failed to identify the specific conduct which he allegedly saw and heard and which formed the basis of appellants' sentences to terms of imprisonment.

A. Contempts Relating to Thursday, December 10, 1970.

The trial judge, in his December 14, 1970 contempt certificate under Federal Rule of Criminal Procedure 42(a) (hereinafter "Contempt Certificate No. 1"), explicitly cited as contempt "the totality of defendants' long continued and repeated misconduct . . . and the final culmination of such course of repeated misconduct that occurred on Thursday morning, December 10, 1970,. . .". Contempt Certificate No. 1, at p. 7, l. 16-23. (Emphasis added.)

The trial court commented further:

> "What occurred on Thursday [December 10, 1970] cannot be fully understood or appraised apart from all of the misconduct that had occurred prior to Thursday. ... The conduct of defendants on Thursday was very serious, so much so as to seriously impair fair trial either for plaintiff or for any defendant and, as the Court has found, and ordered, required mistrial." Contempt Certification No. 1, at p. 2, l. 23-31.

In setting forth these summaries of fact which he believed constituted a sufficient basis for summary contempt, the trial judge was apparently attempting to comply with Federal Rule of Criminal Procedure 42(a), which requires that the contempt

order "recite the facts" of the conduct which the trial judge believes constitute a criminal contempt.

However, it is impossible to determine from the language of the Contempt Certificate (1) whether the defendants are charged with contempt for the totality of the alleged misconduct on all days or solely for their conduct on Thursday, December 10, with previous misconduct constituting only evidence of the intent of defendants' actions on Thursday; (2) what conduct it is that the trial judge believed to be contemptuous; and (3) which defendant is to be charged with which conduct.

It is the contention in this portion of the Brief that the failure of the trial judge to set forth consistently the legal basis of the contempt, the facts underlying conclusory allegations of contemptuous behavior and the defendant to whom the alleged misconduct was attributable constitutes error which necessitates reversal and dismissal of the dontempt charges. Tauber v. Gordon, 350 F.2d 843 (3d Cir. 1965) (en banc); Pietsch v. The President of the United States, et al., Docket No. 34605 (2d Cir. November 25, 1970) (opinion by Mr. Justice Clark, U.S. Sup. Ct., retired, sitting by designation).

(1) At p.7 of Contempt Certification No. 1, the Judge cites as contumations the "totality of defendants' long continued and repeated misconduct" and "the final culmination of such course of repeated misconduct that occurred on Thursday..." (emphasis added). Earlier the trial judge stated that "[w]hat occurred on Thursday cannot be fully understood or appraised apart from all of the misconduct that had occurred prior to Thursday". Contempt Certification No. 1, at p.2, l. 23-26.

It is ambiguous from these statements whether the trial judge is citing all prior misconduct or only using the prior misconduct to show a wrongful intent, a "refusal", on the part of defendants in not appearing in court on Thursday morning.* Which of these legal theories was intended by the Judge affects the manner in which the appellants must approach this Court. If the judge relies on the former theory, the conviction may not stand if the defendants show from the record that a significant portion of their alleged prior misconduct did not in fact constitute misconduct. However, if the Judge intended to rely on the latter theory, the defendants must show that, even though no prior misconduct occurred, their conduct on Thursday was not undertaken with a wrongful intent.

Moreover, if the trial judge, in fact, relied on one theory, this Court may not affirm that decision on another theory. See Stromberg v. California, 283 U.S. 359 (1931).

Therefore, convictions of contempt relating to Contempt Certification No. 1 must be reversed and dismissed.

(2) In Tauber v. Gordon, the defendant Tauber, pursuant to Rule 42(a), summarily was fined $100 for contempt. The trial judge in his contempt order stated that "throughout the trial of the case ... Joseph N. Tauber continuously objected to and commented upon the rulings of the Court after

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* See also Contempt Certification, p.6, l. 16-17 ("... considered in the context of all previous misconduct by defendants ...").

said rulings had been made" and "had been constantly admonished by the Court that his action bordered on contempt". Tauber v. Gordon, supra, at 844.

The Court of Appeals, directing its attention to the above-quoted language, stated:

> "But beyond this general assertion the court did not specify the items or occasions of misbehavior which it deemed serious enough, individually or cumulatively, to merit punishment as contempt. Such a general characterization of behavior over a seven day trial period is not specific enough to satisfy the requirement of Rule 42(a) of the Rules of Criminal Procedure that a summary order of contempt shall recite the facts ...'. See Parmelee Transportation Co. v. Keeshin, 7th Cir. 1961, 294 F. 2d 310, 314-315. This requirement is more than a formality. It is essential to disclosure of the basis of decision with sufficient particularity to permit informed appellate review." Id. , at 845. See also Pietsch v. The President of the United States, supra.

In the case at bar the trial judge relied on both misconduct prior to Thursday, December 10, and misconduct which occurred on that date.

As to prior misconduct, he described in general terms what that misconduct was:

> "The trial judge saw and heard misconduct of defendants in the courtroom frequently every day for ten days prior to Thursday, December 10, 1970, consisting of: Standing, vocal and obviously prearranged demonstrations by spectators, sometimes led by one or more defendants and joined in by all; shouting epithets, sometimes threats of violence and profanity and other improper language accompanied by a variety of disorderly movements and actions; interruption by one or more or all defendants in qualification of the jury, exercise of challenges, opening statement for the plaintiff, examination of witnesses, offering of Exhibits, making and hearing of objections, rulings and statements of the Judge, and in various other phases of trial proceedings." Contempt Certification No. 1, at pp. 6-7.

Such a statement of the conduct deemed contemptuous in no way identifies the specific facts on which the trial judge has relied in finding each defendant guilty of contempt. Without a showing of criminal complicity, the misconduct of spectators should not be considered attributable to defendants; what the trial judge considered to be an "interruption" is not set out, nor why a particular interruption constituted misconduct;* what it is that the trial judge considered to be an "epithet", "threat of violence or profanity" or "improper language" is nowhere to be found.**

Thus, the inability of this Court to determine which conduct occurring prior to a specific day was deemed contumatious by the trial judge is as unclear here as it was in Tauber v. Gordon, supra.

Additionally, it is unclear which conduct on Thursday December 10, 1970, is relied upon by the trial judge. He

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* Defendants Michael Lerner and Charles Marshall acted pro se and "interruptions" by either of these defendants might likely by quite proper conduct.

* At one point the trial judge incorporates the trial transcript by reference, Contempt Certification No. 1, at p.2, and at another point the trial judge indicates that "particularly significant portions of the transcript" are indicated "in the text or attachment hereto", id. p.1. However, counsel, after inquiry of the Court Reporter and Court Clerk, was unable to find any attachment to the Contempt Certification No. 1 or any transcript of trial marked by the Judge. It is not self-evident whatsoever which conduct in the over 2,000 pages of trial transcript constitutes "misconduct".

considered the misconduct of defendants on Thursday to be the "culmination" of a course of repeated misconduct.

In relating the events of Thursday he recites four incidents: (1) loud noises, "apparently from repeated pounding upon the paneling of the door to the reception room of the Judge's chambers", Contempt Certification No. 1, at p. 3-4; (2) "refusals" by defendants to come to the courtroom, Contempt Certification No. 1, p. 5, l. 10-12; 6, l. 13-15; (3) "loud and boisterous epithets and obcenities" in the corridor, including "violent language" by defendants Dowd, Abeles and Marshall, Contempt Certification No. 1, p.6, l. 7-12.

Having recited these four factual situations, the trial judge appears to rely on only (2) and (3) for he says:

> "The gross misconduct of the defendants in refusing, after several times being notified by bailiff and counsel, to come to the courtroom, and their misconduct in the corridor above described... constituted wilful, flagrant and totally inexcusable defiance of the court ...", Contempt Certification No. 1, p.6, l. 13-22.

Again defendants are left in the dark as to which conduct is being deemed conteimtuous and again this Court may be limited in the grounds on which it might base any affirmance. Stromberg v. California, supra.

Additionally, the Judge's description of the conduct described as incident (3) alluded to above suffers the same defects as outlined earlier with respect to the Judge's descriptions of conduct occurring previous to Thursday in that the conduct deemed contumatious is described only in conclusory terms and does not contain a statement of the "facts" deemed contumatious.

The extensive efforts of the U.S. Attorney in detailing numerous incidents which the U.S. Attorney believed to be misconduct does not satisfy Rule 42(a)'s requirement that the Judge's contempt order set forth the "facts" concerning the conduct deemed contemptuous. Tauber v. Gordon, supra, at845.

Because of the explicit reliance by the Judge on the "totality of defendants' long continued and repeated misconduct" and "the final culmination of such course of repeated misconduct...on Thursday" (which culmination must, under any interpretation of the Judge's Contempt Certification No. 1, include incident (3) described above), Contempt Certification No. 1 does not satisfy the prerequisites of Rule 42(a) requiring a certification of "facts" and the contempt convictions arising out of Thursday must be dismissed. Tauber v. Gordon, supra; Parmelee Transportation Co. v. Keeshin, 294 F.2d 310, 314-15 (7th Cir. 1961).

(3) Contempt Certificate No. 1 suffers a further infirmity which renders it impermissibly vague in light of Rule 42(a)'s mandate that the order of contmept recite the "facts" concerning the conduct constituting a criminal contempt.

The trial judge is explicitly holding a particular defendant responsible for the conduct of another defendant or of spectators. The trial judge in describing on incident of alleged misconduct stated:

> "The Judge saw and heard defendants Dowd, Abeles and Marshall yelling some of the violent language referred to. Others, not identified by the judge, were also yelling...." Contempt Certification No. 1, at pp. 5-6.

In the next paragraph the trial judge states:

> "The gross misconduct of defendants in refusing ...to come to the courtroom, and their misconduct in the corridor above described ... constituted ... defiance of the Court ..." (Emphasis added.)

Contempt Certification No. 1, at p.6.

The trial judge is thus citing all defendants for misconduct in the corridor when he just claims that he could only identify three of the defendants. The record indicates that several Marshals, a Court Reporter and several counsel accompanied the Judge on his way to and from the Defense Room (Tr. 1966, 1969) so that no inference may be made that any of the others who participated in any yelling were in fact defendants.*

Even as to defendants Dowd, Abeles and Marshall there is no recital of what each said or even of an example of what constituted the "loud and boisterous epithets and obcenities" or "violent language" so that this Court might determine from the record who said what to whom.

Moreover, we contend that an important distinction must be drawn between speech directed at the Judge and speech directed at a U.S. Marshal or U.S. Attorney. Thus, whether the speech of defendants Dowd, Abeles or Marshall was directed

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* Defendants later claim that in fact U.S. Marshals voiced some obcenities and that at least one of the defendants said nothing at all. See Affidavits of George Vradenburg III and Mike James.

at the Judge or was, as the Judge indicates, "primarily directed at the Deputy Marshals" becomes a question which deserves a factual determination.

By his repeated insistence throughout Contempt Certification No. 1 on referring to the misconduct of defendants, each defendant deprived of the knowledge of which conduct he is deemed to have participated in. The unfairness (and the difficulty presented to this Appellate Court) in this all-inclusive condemnation is apparent from the "corridor incident" discussed above. E.g, Defendant Lerner has not been advised what conduct in which he participated has been deemed contemptuous.

Other examples of this lack of clarity loam large throughout the record.

The Judge states that "[d]efendants were several times directed and requested to come to the courtroom for trial proceedings (Tr. pp. 1957-1966)", Contempt Certification No.1, at p. 5, l. 10-12. An examination of those pages in the transcript indicates that as to all defendants there is only one indication that a request to come to the courtroom had been delivered. (Tr. 1963, l. 6). However, as to defendant Kelly, there was an indication that he had been notified a second time. (Tr. 1965, l. 14-15). Thus, the characterization of the Judge concerning "several" requests is not accurate as to any defendant (except possibly Kelly who had apparently been notified twice).

The conclusion of the Judge, therefore, in characterizing

the incidents of Thursday as "gross misconduct of defendants" is misleading because of the four separate factual incidents relied upon, defendant Dowd participated in three [incidents (1), (2), (3)], defendant Marshall in three [incidents (2), (3), (4)], defendant Abeles in two [incidents (2), (3)], and defendants Lippman, Lerner and Kelly in only one [incident (2)]. And we show elsewhere that incident (2) if a hearing were granted defendants would show not to be a "refusal".

Finally, the use of the all-inclusive nomenclature, "defendants" makes it doubly impossible to glean from the record what it is that would show the "course of conduct" or "totality of defendants'" misconduct condemned by the Judge on p. 7 of Contempt Certification No. 1. Not only does each defendant not know what conduct prior to Thursday it is that was deemed contemptuous, but he does not know which conduct of each of his co-defendants is being taken to whow either "totality" or "course of conduct".

For all the above reasons, Contempt Certificate No. 1 is impermissibly vague and not in compliance with Rule 42(a) and, therefore, the contempt convictions described therein should be reversed and dismissed.

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For all the above reasons, Contempt Certificate No. 1 is impermissibly vague and not in compliance with Rule 42(a) and, therefore, the contempt convictions described therein should be reversed and dismissed.

B. Contempt Convictions Relating to December 14

Certain of the same fatal infirmities as exist in the contempt certification relating to Thursday, December 10, have infected the Contempt Certification pursuant to Rule 42(a), Federal Rules of Criminal Procedure (relating to conduct on December 14) (hereinafter "Contempt Certification No. 2").

Although the trial judge did, in Contempt Certification No. 2, specify one set of facts as to Defendant Stern with some particularity, (Contempt Certification No. 2, p.1, l. 31-p. 2, l. 19), he went on to cite all defendants, including Defendant Stern (but excluding Defendant Lerner*) for "loud, boisterious and violent actions and language . . . ." Moreover, the trial judge went on to say that "[r]iotous conduct and an incipient riot occurred in the courtroom" and, after he had left the courtroom, "at least for a half hour or more scuffling and loud and boisterous language in the courtroom could be heard in the Judge's office even though two doors were closed." Contempt Certification No. 2, at p. 2, 25-p. 3, l.2.

Although the trial judge is clearly relying on conduct occurring from the time Defendant Stern got up to speak until the proceedings recommenced at 1:20 P.M., he again fails to specify (1) exactly what conduct is deemed contemptuous and (2) which defendant is responsible for which conduct.

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* No inference should be drawn that the trial judge has particularized the facts because of the exclusion of Defendant Lerner. Lerner was sitting nearest the trial judge (and his law clerk) and his non-participation in any violent action or threatening language was particularly clear because of that proximity, but not because the conduct of other defendants was distinctly different. See affidavits of Madeleine Levy and Linda Huber, previously filed, and of Mike James, Bryan Johnson, and Brook Stanford.

(1) The trial judge relies, as to Defendant Stern, both on her apparent refusal to stop talking despite the trial judge's orders and on her participation in the loud, boisterous and violent actions and language. Thus, any failure to specify the nature of such participation for any cited defendant infects Defendant Stern's contempt conviction as well. For the same reasons and on the same authority cited above in relation to the first contempts, we contend that the trial judge's description of cited conduct is too vague and conclusory.

Niether appellants nor this court has been made by the trial judge's language of what "loud, boisterous and violent actions and language" means. Does Mrs. Stern's comment at Tr. 2098 ("There's something rotten in Denmark.") constitute "boisterous language"? If so, the trial judge didn't seem to mind it then. As a matter of fact he acknowledged the veracity of her observation (Tr. 2098).

Simply stated, the trial judge is not certifying as to the "facts which constitute criminal contempt; he is concluding that the factual events occurring in his courtroom could be characterized "loud, boisterous and violent actions and language," riotous conduct" and "incipient riot," leaving the appellants with the impossible task of convicing this court that under no circumstances can those "kinds" of conduct constitute criminal contempt. We cannot do that, nor do we believe we are required by the law and common sense to do so. Rule 42(a) gives appellants the right to have the trial judge certify "facts," not characterizations of conduct.

(2) Moreover, the trial judge again fails to specify precisely what conduct of each defendant is considered criminal contempt. The trial judge does state that each defendant "personally participated" in the cited conduct (and thus improves somewhat from Contempt Certification No. 1), but again that conclusory inference drawn from what was a confused and confusing situation presents this court with no possible factual information on which to base its review of the find of "personal participation." Even more fraught with danger is the sentence, "[r]iotous conduct and an incipient riot occurred in the courtroom," with absolutely no showing, even in conclusory terms, of the responsibility of each defendant. And even after the trial judge had left the courtroom, he insists on citing further conduct without any attribution whatsoever to any or all of the defendants. In fact, any "riot" may have been the responsibility of U.S. marshals or spectators, neither of whose actions are the legal responsibility of the defendants.* See affidavits of Brook Stanford, Mike James, and Bryan Johnson. The trial judge, as to this cited conduct, did not even make an effort to state a factual connection with defendants, let alone a particular defendant.

For all the above reasons, Contempt Certification No. 2 is impermissibly conclusory, not in complians with Rule 42(a) and, therefore, the contempt convictions described therein should be reversed and dismissed.

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* In fact, at a hearing at least four defendants would be able to show that they were taken into custody by U.S. Marshals (cont.)

(cont. from previous page)

almost immediately after Defendant Stern was cited for contempt and thus could not have participated in much, if any, of the conduct cited by the trial judge.

III

ASSUMING IT WAS PROPER TO PROCEED UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 42(a), APPELLANTS WERE ENTITLED TO A HEARING ON THE ISSUES OF GUILT AND PENALTY.

Appellants will demonstrate below that considerable factual dispute exists concerning their alleged conduct which the trial judge made the basis for the contempt convictions. First, there is serious question at many points in the record that the judge properly identified the person speaking. Hence, there is question whether the trial judge's certificate of what he "heard" and "saw" is accurate. The trial judge's "plate umpire" calls are the sole basis for many identifications of defendants in the record as having spoken a particular word or done a particular act, and the bailiff, reporter, or government attorney is the hearsay declarant whose unsworn statement underlies other in-court identifications. Despite these uncertainties, and without giving any appellant a chance to defend himself against the serious charges of misconduct which he made, the trial judge found each appellant guilty summarily under a blanket condemnation.

Appellants contend, in short, that even if the trial judge might properly have proceeded under Rule 42(a), he ought to have held a hearing before finding them in contempt. It may be argued (which appellants deny) that the need for haste was great, but it must equally be remembered that "[t]he requirement of due process is not a fair-weather or timid assurance." Joint Anti-Fascist Refugee Committee v. McGrath, 241 U.S. 123, 162 (1951) Frankfurter, J., concurring).

We do not speak here of the full-scale hearing which is demanded when an ordinary criminal conviction is sought. Rather, it must be stressed that whenever the law seeks to impose any disability, any penalty of any sort, some sort of hearing is commanded by the Constitution.

This is true of contempt cases. Ungar v. Sarafite, 376 U.S. 575, 589 and n.9 (1964), a case in which an attorney was convicted of in-court contempt and sentenced to ten days in jail, assumes without deciding that some hearing is necessary and holds that the hearing given the petitioner was adequate in terms of notice, opportunity to defend and the right to counsel. Earlier, in Holt v. Virginia, 381 U.S. 131 (1965), the Court had held that an alleged contemner was entitled to his "day in court."

Ungar and Holt state a principle of universal application in every instance of governmental imposition of a sanction, a principle recently extended even to cases in which the government seeks only to terminate a benefit. Goldberg v. Kelly, 397 U.S. 254 (1970). Compare In re Oliver, 333 U.S. 247 (1948), and Cooke v. United States, 267 U.S. 517 (1925) for other indications that the contempt power is not the power to dispense entirely with procedural safeguards.

In short, even if the trial judge was correct in relying on F.R.Cr.P. 42(a), he improperly construed the rule as not requiring any hearing at all in the circumstances of this case,*

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* There may be cases, which appellants do not attempt to classify or anticipate, but perhaps involving disorder on the part of a spectator dealt with immediately and summarily, in which no hearing need be held. This is clearly not such a case.

a conclusion finding no support in the law of contempt,* but contrary to the dictates of due process of law. See Sacher v. United States, supra at 29-30 (Frankfurter, J. dissenting).

At such hearing the appellants would show that their conduct during the ten days of trial did not have as its intent the purpose to obstruct the adjudicatory proceedings and that their conduct on Thursday, December 10 was not a "refusal" to come to court, but a genuine confusion as to the courtroom situation. And the appellants would show that as to Monday, December 14, 1970, the statement of facts of the trial judge completely distorts the facts in which a way as to exculpate the judge himself for a major share of the responsibility for what happened.

As pointed out below, Point IV, the intent of an alleged contemnor is vitally important in assessing his guilt and imposing punishment. See Harris v. United States, supra, 382 U.S. at 166. The trial judge in his Contempt Certifications left no doubt that he regarded appellants' intent as grossly contumacious (see, e.g. Contempt Certification No. 1., at p. 6, 18-19, 26). Their acts, he said, constituted an "attack" on the court and its processes (Tr. 2126).

Before setting out fully our offer of proof of what would be shown at such a hearing, we outline portions of the Transcript of Proceedings which support various points and general conclusions in such offer.

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* See also Judge Friendly's opinion in United States v. Galante, 298 F.2d 72, 76 (2d Cir. 1962) (concurring and dissenting opinion).

(1) The record strongly supports the proposition that defendants not only did not purposefully delay or obstruct trial proceedings, but in fact welcomed them and proposed procedures to quicken the pace of the trial.

The defendants specifically proposed a procedure to speed up the voir dire of prospective jurors (Tr. 504, et seq.). The defendants accepted the jury without using all their peremptory challenges (Tr. 618). The Judge complimented the defense for their efforts (Tr. 662). Susan stern specifically commented that she did not want to hold up court proceedings while she was in the hospital, waiving her right to be present for two days of trial (Tr. 1777). The Government was admonished for failure to have a witness (Tr. 1827). Carl Maxey, defense counsel, specifically asked on Tuesday, Dec. 8, 1970, for Jencks Act material on the Government's next witness so that preparations for (or objections to) such witness's testimony might be made prior to Wednesday morning, December 9 (Tr. 1847). Defendant Marshall reiterates this request, and the U.S. Attorney assures timely delivery (Tr. 1848-1849). After the Judge indicates his concern over the loss of jury time, Defendant Lerner concurs and requests a Saturday session (Tr. 1862). The U.S. Attorney does not deliver Jencks Act material until Wednesday morning (see Tr. 1876-77). When serious legal questions concerning the witness Madsen's testimony arise, a full day's jury time is lost. See generally Tr. 1889-1902. Both the Judge (Tr. 1889) and the United States

Attorney (Tr. 1897) agree that important legal questions have been raised. But the U.S. Attorney was aware of the defense's legal position for a week on the issue in question. See Tr. 1898. Defense counsel Michael Tigar indicates impatience with the loss of jury time (Tr. 1892). The Court concurs in a suggestion by defense counsel Jeffrey Steinborn that Jencks Act material should be delivered a full day in advance to avoid future delays (Tr. 1898). The U.S. Attorney apologizes for the delay (Tr. 1900); the Judge thanks Jeffrey Steinborn for the suggestion (Tr. 1902).

A hearing would show that the transcript accurately reflects the continuing requests by defendants to their counsel to do everything to speed up the pace of the trial.

Further, a hearing would show that all defendants clearly desired to go to trial with the jury chosen for this trial and that they strongly objected to this mistrial and termination of the proceedings. (Tr. 1994, 2047).

A hearing would thus negate the conclusion of the Judge that "the conducts of defendants, from beginning to end, has shown a calculated, deliberate intent to be disruptive at frequent intervals, to shout, to make noises, in concerted action, to frustrate orderly progess of this trial" (Tr. 1971, l. 14-19).

(2) the transcript of proceedings also reflects frequent and repeated errors of eye-witness identification by the Judge of certain defendants, e.g., Tr. 49, 208, 209 (twice), 294, 587, 920, 1252, 1712, 1981 (mistakes Michael Lerner for Charles Marshall and vice versa); Tr. 903 (mistakes Carl Maxey and Lee

Holley); Tr. 183 (mistakes Susan Stern and Loni Levy); Tr. 2104 (confuses Susan Stern and Joe Kelly). The Judge also positively identified, and had removed, a young woman in the back of the courtroom as having spoken out improperly although Susan Stern told the Judge that she herself had made the remark (Tr. 1264-66). The Judge claimed that he had absolutely no reservation about his identification (Tr. 1353-55, 1358). Finally, after an informal "hearing" with the individual involved, the Judge admitted his error (Tr. 1505). The Judge often referred to the conduct of defendants in the plural and, in at least one instance, where even the reporter had been more able to accurately reflect what simple good eyesight would have accomplished (Tr. 2013).

These simple mistakes of eye-witness identification reflected on the record strongly bolster defendant's contentions that a hearing would show that the Judge erred repeatedly in identifying a defendant who spoke out in the courtroom.*

(3) The transcript would show that the Judge freely permitted defendants, even though represented by counsel, to participate in their own defense by speaking out in court.**

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* The difficulties inherent in eyewitness identification have led the Supreme Court to fashion a series of constitutional rules, resting upon the due process clause and the sixth amendment right to counsel, to ensure accuracy in such identification in criminal cases. See United States v. Wade, 388 U.S. 218 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967). See generally, Wall, Eyewitness Identification in Criminal Cases, relied on extensively in Wade.

** The references to the transcript are voluminous. The following is a sample:
Abeles: Tr. 65, 134, 565, 570, 1099, 1252 (joked with Judge), 1463 (joked with Judge), 1603, 1776, 1784;
Dowd: Tr. 315, 732, 865, 1605, 1871; (cont. next page)

And the Judge allowed the pro se defendants not only to speak but was both permissive and complimentary with respect to their efforts. See, e.g., Tr. 39, 98, 125, 389, 627 (Marshall; Tr. 385, 1071, 1255 (Lerner).

(4) Judge Boldt's court had never started on time during eleven days of trial. Delay at the beginning of trial ran anywhere from ten to forty-five minutes. In fact, the transcript reflects that proceedings on Thursday, December 10, started precisely at 9:00 A.M., but was an in-chambers conference (Tr. 1942).

The serious factual issues which might be aired in a hearing held on the contempt citations can be no more than briefly sketched here. It is apparent from the affidavits filed with this brief as exhibits that the defendants were not aware until quite late on the morning of December 10, 1971, that the jury was in the box. Each defendant would also testify that he did not intend any obstruction of the court's processes, but was seriously interested in seeking the court's aid on a matter of great importance. The record simply will not support a conviction of contempt in its present state, and a hearing would give the defendants an opportunity to demonstrate that there was no occasion for declaring a mistrial and punishing them.

(cont. from previous page)

Kelly: Tr. 88, 567, 569, 917, 1317, 1548, 1602, 1879;
Lippman: Tr. 295, 649, 695, 859, 863, 875, 1097, 1189, 1507, 1782;
Stern: Tr. 119, 562, 999, 1102-3, 1191, 1236, 1265, 1268, 1635, 1776

IV

THE CONTEMPT CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL JUDGE SOUGHT TO PUNISH CONDUCT NOT CONTUMACIOUS WITHIN THE TERMS OF 18 U.S.C. § 401(1).

This conviction is beset with procedural infirmities, as the preceding sections show. The record also reveals that the trial judge sought to punish conduct which was not only not contempt but which he had admitted was not the proper occasion of punishment. Taken as a whole, this record simply fails to show that the defendants are guilty beyond a reasonable doubt of the offenses charged. This court, it must be said, bears a special responsibility in reviewing convictions entered under 18 U.S.C. § 401(1) and F.R.Cr.P. 42(a), for such convictions have not been attended with the procedural safeguards of notice and hearing. This Court ought, we suggest, to review the record de novo.

When undertaking this review, this Court is faced with reviewing twelve separate convictions involving nine defendants. In considering our arguments we ask that this Court take particular care in considering the unique individual factual and legal setting pertaining to each defendant. Each defendant, to this point in the case, has been aggregated by the trial judge with each other defendant. "Defendants" have been cited for contempt; "defendants" have been convicted and sentenced to six months (per specification) for contempt; and "defendants" have been denied bail. The trial judge has not treated each defendant as a discrete human being with his or

her own conduct being judged separately.

When discussing below the criteria to be used in evaluating the defendants' conduct in this trial prior to December 10, 1970, we do not at all concede the relevance of any such condcut to this appeal. As we noted above, the trial specifically exempted all such conduct from consideration on December 9. However, we think it appropriate and important to discuss the trial conduct of the defendants from a different perspective than that urged by the trial judge and the Government, to set events in an undistorted context.

The argument below begins with consideration of the scope of the contempt power under 18 U.S.C. § 401(1), then analyzes the individual contempt citations.

A. The Vagueness of 18 U.S.C. § 401(1)

The power of federal judges to punish summarily for contempt was early recognized as subject to misuse. The Act of 1789 (1 Stat. 73, 83) provided that federal judges "shall have 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." Because the power under that was seriously abused, Congress enacted the Act of March 2, 1831 (4 Stat. 487), now 18 U.S.C. § 401, substantially curtailing the power of federal courts to punish contempts, "to the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231. See Nye v. United States, 313 U.S. 33 (1941).

No further restrictions have since been placed on the summary contempt power by Congress, but federal appellate courts have been active in examining and limiting the power from the time their appellate jurisdiction in contempt uses was established at the turn of the century. As twentieth-century courts have continued to define the dimensions of due process protection for criminal defendants, procedural limitations on the contempt power have been strengthened in case after case. But no court has yet grappled with the necessity of substantive redefinition. We respectfully suggest that this appeal is the proper vehicle to begin the inquiry. In recent months, many respected members of the bar have called for such an effort. Some suggest that the proper vehicle is the bar associations, but the job is for the courts, and, in the first instance, the federal courts, since important and delicate values involving both freedom of speech and effective assistance of counsel are threatened by well-meaning but ill-conceived effects to make the trial judge an all-powerful arbiter of defendants', including pro se defendants', conduct. In troubled times, there will always be some who prefer short-term solutions without regard to the lessons of history. We submit that intelligible standards governing the scope of section 401(1) are needed now, lest we return to the abusive use of power which preceded the Act of 1831. It has many times been said that summary contempt is a drastically limited power, see In re Michaels, 336 U.S. 224, 227 (1945); United States v. Sopher, 347 F.2d 415, 418 (7th Cir. 1965), but

much work needs to be done.

The need for intelligible standards is so pressing, and the threat to fearless and effective criminal self-defense so great that we urge the Court to reach this issue even if the convictions here appealed from should be reversed for the procedural reasons presented above (unless, of course, the Court reverses the conviction and dismisses the charges under Argument II above).

On remand, the district must have guidance in this very difficult and troubling case, and we urge that the most efficient allocation of judicial resources requires that the issue of substantive standards be resolved now.

The statute, 18 U.S.C. § 401, provides some guidance:

> "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.
> >
> > ". . . ." (emphasis added)

The underscored words, "and none other," indicate that Congress realized that the contempt power by its very nature was subject to abuse, and so, we submit, thought to limit it to a certain narrow class of acts. Unfortunately, the core of the statute is the vague phrase, "obstruct the administration of justice." On its face, section 401(1) does not tell

a defendant what acts are and are not prohibited, and if it were simply a matter of due process, a criminal statute which gave no more warning than "misbehavior . . . as to obstruct the administration of justice" should fail.

To meet constitutional standards, the words of a criminal statute must

> "constitute a fixing by Congress of an ascertainable standard of guilt and (be) adequate to inform persons accused of violation thereof the nature and cause of the accusation against them."

United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1920). On its face, section 401(1) gives no more guidance than the statute condemned in Cohen Grocery, supra, which made it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ." Act of Oct. 22, 1919, c. 80, § 2, 41 Stat. 497. In declaring this statute unconstitutionally vague, the Court observed that the prosecution was functionally identical to

> "an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and the jury."

Id. at 89. We submit that, in terms of vagueness, the statute in this case is worse than the one condemned in Cohen Grocery, and that the operative phrase "as to obstruct the administration of justice" is fully as incompatible with notions of due process as the pernicious example before the Court in Cohen: "all acts detrimental to the public interest." The teaching

of Cohen was reaffirmed in Giaccio v. Pennsylvania, 382 U.S. 399 (1966), and the continuing vitality of its teaching is evident. See also, Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1966).

It has been said, however, that section 401(1), although vague on its face, has received judicial interpretation so as to give meaning to its vague operative words. See, e.g., Sacher v. United States, 343 U.S. 19 (1952). But when the leading cases on criminal contempt are examined, one comes away with a feeling that the statutory words have merely been exchanged for phrase that have no more content. Some examples:

> "court-disrupting misconduct." In re Oliver, 333 U.S. 257, 274-75.
>
> "the nature of the deportment was (such that) . . . . it prejudiced the expeditious, orderly, and dispassionate conduct of the trial." Sacher v. United States, 343 U.S. 1, 5.
>
> the conduct in some way "creates an obstruction which blocks the judge in the performance of his duties." In re McConnell, 370 U.S. 230, 236.

These quotations all echo section 401(1)'s central phrase, that the conduct must, in some demonstrable way, undercut the procedures upon which an orderly adjudication depends, but none suggests how we are to identify conduct of this sort. The only lesson to be drawn from the cases is that in the circumstances of each such case, the particular conduct cited is or is not criminally punishable. This is not functionally

different than "acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

Of course some conduct is so inherently dangerous that it can never be countenanced, for example physical assault on the judge. The defendants are not charged with any acts of this sort. Most of the conduct here certified, when viewed in context, as we shall show, did not obstruct the administration of justice when that phrase is properly construed. Speech, even in the courtroom, is constitutionally protected. A vague statute cannot be saved by pointing out that the defendants' conduct might be punishable under a narrowly drawn statute.

In order to narrow the overboard and vague contours of 18 U.S.C. 401(1), we suggest at the very least that a defendant must be proven beyond a reasonable doubt to have acted with the criminal intent to impair some interest rationally protected by the statute and to have performed conduct clearly displaying such intent and having such an effect (either cumulatively or in isolation).

The following sections of our brief attempt to delineate the two branches of this standard.

B. The Role of Intent

Criminal intent sometimes referred to as "vicious will" has long been recognized as a requisite of contempt. "Vicious will" in this context implies more than mere advertence, more

than simple knowledge on the part of a defendant that he is saying what he is saying.* Defendant's purpose in speaking or behaving as he does must be to commit the criminal act proscribed by the statute. Defendant must intend to "obstruct the administration of justice".

Because of the vagueness of contempt we submit that this requisite specific intent is of constitutional significance. The problem is similar to that of Screws v. United States, 325 U.S. 91 (1944), in which, like the present case, a criminal statute with vague contours was under review. The Court dealt with the problem by enjoining strict attention to the role of specific intent.

> "The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid these consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning .... But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law."....

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* Defendants during the trial were allowed to speak even though represented by counsel, Tr. 219. Although the trial judge seemed to change this working rule (see Tr. 362), he consistently allowed represented defendants to make comments or ask questions without indicating that such speech was improper for that reason. See, e.g., Tr. 65, 134, 565, 570, 649, 731 (Abeles); 88, 567, 569 (Kelly); 119, 562 (Stern); 295, 649, 695 (Lippman); 315, 732 (Dowd). Of course, this argument applies full force in any event to defendants Lerner and Marshall acting pro se.

> "Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fall." (Emphasis added).

The argument applies fully to the contempt statute. Its vagueness is acute, the constitutional interests threatened by overboard application of summary contempt are substantial, and full recognition of the role of specific intent in this context would go far toward protecting the vital interests involved. To sustain a criminal conviction for contempt it should be clear beyond a reasonable doubt that defendant's purpose in acting was to obstruct the administration of justice.*

Moreover we submit that specific intent should be clear on the face of the record unaided by conclusory findings by the trial judge.

The purpose of the Screws approach is to make the standards of guilt ascertainable and give defendant fair warning of when his conduct is subject to sanction, thus to eliminate the subjective element of the crime and the potential for abuse of the contempt power. A specific intent requirement provides no such safeguard if the judge can surmount it merely by making the appropriate finding. If the right of appeal is to be meaningful, the record alone should be the basis on which specific intent is tested. In the days before

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* The same approach has been followed in the income tax evasion field. Spies v. United States, 317 U.S. 492 (1942); Holland v. United States, 348 U.S. 121 (1954).

there was review of contempt citations, no particular problem was presented by findings of contempt which could no be demonstrated on the record. Conclusions about counsel's contemptuous purposes could be drawn by the trial judge. Since there was no hearing in summary contempt, no view of what had transpired in the courtroom was important except that of the trial judge, and no external criterion to substantiate the judge's view had to be presented to a reviewing court.

The right of review presumes that the review must be meaningful. It cannot be unless the record, rather than the judge's findings, testifies to the contempt.* See Parmelee v. Keeshin, supra; Tauber v. Gordon, supra.

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* This argument is different from that made earlier concerning the necessity for a particularized contempt order, see supra at Point II. There, we argued that the Judge's contempt order must itself set forth the "facts" underlying the contempt in order to comply with Rule 42(a) and accord defendants their right of review. Here, we contend that even if those facts are particularized, the appellate court must review those facts in order to determine whether the requisite specific intent to obstruct the administration of justice is clearly shown.

C. The Rational Interests Protected by the Statute: Integrity of a Fair Adjudicatory Process in the Particular Trial.

We submit that only acts which directly impair a fair adjudicatory process at the particular trial are punishable as contempt. In re McConnell, 370 U.S. 230 (1962). Further, as the only interest protected by section 401(1), it alone is needed for effective and vigorous representation. We submit that other interests--the person of the individual judge, the overall dignity of the federal judicial system-- have no part in this balance, as the Supreme Court has made clear that these are not "the end protected" by 18 U.S.C. § 401.

First, the judge must assure that both sides, the state and the defendant, be permitted to present evidence concerning the charges in the indictment, be given the opportunity to try to change the trial judge's mind on procedures being followed and be allowed to point out to the jury their view of the integrity of the procedures being followed to bring out all relevant facts.

Second, the verdict of the jury should be based on admissible evidence received in an atmosphere which permits its assessment in light of the ability of the particular adjudicatory process employed to bring out all relevant information. This, we submit is the true meaning of the phrase, "administration of justice" (emphasis added) in section 401(1). The exclusive concern of the Supreme Court in McConnell was upon the integrity

of the particular trial they were reviewing, demonstrated by the Court's insistence that, prerequisite to punishment, the trial record clearly showed that the district judge was actually obstructed in the performance of judicial duty.

In short, the elements of the offense are specific intent to obstruct and actual obstruction. It should not be for the trial court or reviewing court to use elastic and vague standards to punish "disrespect"or "insult". These terms hark back to the 18th Century punishement of libel on government. See Rosenblatt v. Baer, U.S. Garrison v. Louisiane, 379 U.S. 64 (1964). The First Amendment should be considered as alive even in the courtroom and the broad power to punish for contempt limited to protecting the interestsin whose name power was created. Only a standard which insists on proof of both intent to do that which the statute prohibits and actual accomplishment of that purpose can save the statute from infirmity as a matter of free speech and due process.

1. Interests Not Protected.

Section 401)(1) protects neither the dignity and person of the individual judge, nor the overall dignity and repute of the federal judicial system.

(a) Dignity of the Individual Judge

In Offutt v. United States, 348 U.S. 11 (1954) the Supreme Court emphatically rejected the notion that protection of the judge's personal dignity was a permissible object of the contempt power. Its exercise by the trial judge should be "wholly unrelated to his personal sensibilities, be they tender or rugged." Id., at 14. The judge should be presumed to be a hardy person whose sense of security and detachment is not dependent on the maintenance at all times of a deferential attitude by defense counsel or defendants. Bridges v. California,

314 U.S. 252 (1941). Our traditions insure that not public official, which of course a judge is, can by use of their official powers shield themselves from criticism, however intemperate and ill-considered it might be. Compare Garrison v. Louisiana, 379 U.S. 64 (1964). Only when in-court misconduct demonstrably impairs the integrity of the particular trial, is it punishable (see below); the personal interests of the judge as a man are not protected by section 401(1).

(b) The Dignity of the Federal Judicial System

Some courts have assigned the contempt power the wider role of protecting the dignity of the judiciary at large. "The Principle upon which Attachments issue for Libels upon Courts" said Judge Wilmot in the infamous Almons Case, "is of a more enlarged and important nature,-- it is to keep a blaze of Glory around them [Judges and Courts] and to deter people from attempting to render them contemptible in the eyes of the Public." Frankfurter and Landis. "Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts--A study in the Separation of Powers", 37 Harv. L. Rev. 1010, 1048 (1924)

To accept any such concept of the modern contempt power would return to the courts the power given them by the Judiciary Act of 1789, 1 Stat. 73, 83--the power to punish "all contempts of authority" --and deliberately taken away by the Act of 1831, 4 Stat. 487, the predecessor of the present statute. See Nye v. United States, 313 U.S. 33, 44-48 (1945).

Although heated and highly publicized trials seem to evoke predictions of the imminent downfall of the federal courts if "something isn't done", Justice Black almost thirty years

ago supplied a complete answer to such prophets:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probable engender resentment, suspicion, and contempt much more than it would enhance respect.
>
> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.
>
> He cites Justice Brewer, "The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

Bridges v. United States, 314 U.S. at 270-71. While he was speaking of the citation of a newspaper for published criticism, his words are as true about punishment of in-court behavior on the grounds that it tends to bring the dignity of the judiciary into disrepute.

Appellants lay particular stress on Bridges, because its careful analysis of a problem closely related to our own provides a most helpful model.

Contempt convictions in Bridges rested upon critical and disrespectful comments published in a local newspaper concerning a judge's rulings in still-pending litigation. Justice Black, writing for the majority, first stated the working

principle that the "substantive evil" threatened by the statements in question "must be extremely serious and the degree of imminence extremely high before utterances can be punished." Id., at 263. He then examined the degree of curtailment of expression and finds it significant, particularly insofar as the speaker is "compelled to act without any clear definition of the offense and at 'his peril' under the 'unfocused threat' that judges might find in the utterance a 'reasonable tendence' to obstruct justice in a pending case." Id., at 269. Next he examines and differentiates the substantive evils which the contempt convictions were designed to avert.

> "The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. . . . ". .The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." Ib., at 271.

Thus "disrespect" is isolated and definitely rejected as a rationale for out-of-court contempt.

The obvious distinction between Bridges and the present cases--out-of-court versus in-court expression-- in no way bears on the rejection of "disrespect for the judiciary" as a rationale for contempt. The greater need of courts to control in-court expression stems solely from its greater potential for obstruction. Hence the force of the distinction between in-court and out-of-court expression serves to further emphasize that obstruction, not expressed disrespect for the judical system,

is the rationale for contempt. Further, there is often a greater need for forceful in-court expression than for pungent out-of-court criticism. In the courtroom, the liberty of the defendant is directly at stake, and the militant battle to protect that liberty is a characteristic of the adversary system to which proud reference is made by the next conservative lawyers and judges.

(c) Disrespect

Unlike directly disruptive tactics discussed above, the "obstruction" resulting from disrespect by counsel or defendants is somewhat ephemeral in quality. Description of the harm involved often refers to the "atmosphere" of the courtroom. While harm of this ephemeral sort may justify punishing a course of remarks which are so sustained and gratuitous as to show a specific intent to stop the adjudicatory process or an occasional remark or short series of remarks in the heat of advocacy does not justify punishment. See Shefler v. United States, 359 F. 2d 91 (6th Cir. 1965).

Of themselves, most of the cited acts in this case are rather insignificant, and similar acts by and large have only been held contemptuous when part of a purposeful scheme to disrupt and thereby stop the adjudicatory process. See e.g., Schiffer v. United States, 351 F. 2d 91 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966).

The critical conceptual point is that even language which is disrespectful can be punished only if it is specifically intended to be, and does constitute, an obstruction of the administration of justice. "The question . . . comes down to whether it can 'clearly be shown' on this record that the

petition

petitioner's statements . . . actually obstructed the district judge in the performance of judicial duty." In re McConnell, 370 U.S. 230 (1962).

Where a defendant is representing himself or where he is participating with the court's express or implied permission in his own defense, the standards of impropriety should be given a broader reading, for the defendant is not professionally trained and is likely to be much less aware of what "tone" of argument is permissible in court. Where the Judge permits such self-representation, he has a corresponding duty to accord more deference to unusual comments from defendants without imposing criminal contempt unless there is a clear warning and the use of less onerous alternatives before such imposition.

Examination of the three McConnell decisions, district court, court of appeals and Supreme Court, confirms the rejection of disrespect as an independent rationale for punishment.

McConnell involved an affront to the court's dignity which would certainly have been punishable had "disrespect" been an independent rationale for contempt, or had the Supreme Court envisioned any easy elision of affronts and obstructions. McConnell threatened disobedience of the court's order in clearest terms--"we have a right to ask the questions, and we propose to do so unless some bailiff stops us." In prefatory remarks to the contempt specification Judge Miner described the conduct of McConnell as "unprofessional, unethical, intimidating, insulting, defiant, unfair and improper behavior ..." Quoted by the Court of Appeals at 294 F.2d 310, 316, (1961).

The opinion of the Seventh Circuit recognized the considerable affront to the dignity of the court embodied in McConnell's defiant threat. The Court first determined that McConnell's expression involved no obstruction (apparently the court was using 'obstruction in a physical sense):

> "In the case at bar the order . . . contains no finding that respondent's conduct tended to obstruct or continued to obstruct the administration of justice, although we do not base our decision on this omission. Rather we think that its absence strongly indicated that the district court could find no support in the record for such a statement."
>
> Id. at 314.

The court then focused on the threat and upheld the contempt citation with respect to it.

> "His language . . . indicates that he did not rely along upon . . .[his right of appeal] but that he took the position that he intended to physically defy the court to the point that only a superior physical force called upon by the court could prevent him from proceeding . . . This threat was inexcusable contumacious conduct." Id. at 314.

The opinion thus finds in McConnell's defiant statement a sufficient affront to the court's dignity to be considered tantamount to actual obstruction and thus to warrant punishment, notwithstanding that there had been no obstruction in a physical sense.

Before the Supreme Court the government argued the case on the basis of McConnell's affront to the trial court's dignity. If accepted, the government's argument would have left "affront to dignity" as a viable independent rational for punishment. The argument is particularly interesting because no brief for appellants in this case could demonstrate as credibly the inherent vagueness of "dignity of the court" as a rationale for contempt.*

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* "The requirement that an act of misbehavior in the presence of the court . . . must obstruct the administration of justice does not mean, as petitioner and the dissenting judge below apparently assume, that the misbehavior must be accompanied by, or result in, some overt physical interruption of the trial . . . more common than such physical ways of demoralizing the authority of the court have been the subtler acts or utterances whereby that authority has been exposed to the danger of scorn or obloquy--the slighting remark, the contemptuous gesture, the defiant rejoinder, the insolent retort. Particularly where, as here, a jury is sitting, able to observe

(cont. next page)

This position was rejected by the Supreme Court. Justice Black's insistence on "actual obstruction" "clearly shown" makes clear on this background that "affront to dignity" is not an independent rationale for punishment. 370 U.S. 230, 236 (1962). As we will show below, a careful reading of the record does not show, beyond a reasonable doubt, such an intentional scheme to subvert the trial.

(cont. from previous page)

the manner in which the dignity and authority of the court are treated with disdain, it is the less overt manifestations of disrespect, more often than the grosser forms of contumacious conduct, which present the greater danger that the majesty of the law, identified in the jurors' minds with the person of the presiding judge, will be degraded, and the administration of justice obstructed, in ways which might not be readily apparent.

For these reasons, the law has never required that an action or utterance . . . must be accompanied by some palpable physical obstruction of the pending proceeding. That insolent, insulting, defiant, or otherwise disrespectful language to a judge in open court in the course of a trial constitutes punishable contempt, without further proof of the obstructive consequences of such conduct, has to our knowledge never been questioned." Brief for the Government, In re McConnell, 370 U.S. 230 (1962), at pp. 36-37.

Appellants distinguish three categories of in-court expression by defendants which are or might be thought disrespectful:

(1) Gratuitous insult, so tenuously connected with substantive argument as to make clear that invective and not substantive argumentation or comment is the object of the expression;

(2) Substantive argument, phrased politely, which is inherently critical; and

(3) Substantive argument which is phrased impolitely.

Gratuitous Insult.

Defendants., both pro se and those represented by counsel (when permitted by the judge), have a right to speak in their own defense. The bounds of legitimate defense must be framed so as to give full range to an aggressive, vigorous defense.

Polite, critical argument:

By contrast to gratuitous insult, polite, albeit highly critical argument is clearly protected. Holt v. Virginia, 381 U.S. 131 (1965), In re Hallinan, 81 Cal. Reptr. 1,459 P.2d 255 (1969). Holt dealt with argument by counsel in a change of venue motion, asserting politely, but strongly, that the judge was biased and had wrongfully refused to disqualify himself. Reversing a contempt citation by the trial court, the Supreme Court declared that the defendant had a sixth amendment right to be heard through counsel, that this included the right to file motions and raise relevant issues, and that the insult was inherent in the issue raised. "Our conclusion is that these petitioners have been punished by Virginia for doing nothing more than exercising the constitutional right of an accused and his counsel to defend against the charges made." [381 U.S. 131, 138] Holt unquestionable extends to protect pro se and other defendants (unless explicitly forbidden by the trial judge) in raising and arguing during trial all points of relevance to their defense.

Substantive Argument Spoken Impolitely:

Analytic difficulty arises with situations in which the pro se defendant or other defendant participating in his own defense argues a substantive issue with a zealousness and commitment which leads him to use abrasive language or an impolite tone in advancing his position. Such argument by defendants should not be considered criminal.

1. In most such instances there is no specific intent to obstruct. The primary object is to present a substantive argument and the defendant oversteps out of zeal rather than a vicious will.

11. In most such instances obstruction would be avoided if the judge let the remark pass while "noting" the remark for the record may cause the very obstruction or delay which is the object of the contempt power to avoid. In contrast to gratuitous insult which is blunt, clearly focused, and which virtually demands a discrete response, incidental impoliteness in substantive argument will seldom produce an emontional confrontation unless the judge intervenes, and by doing so, breaks the flow of rational argument.*

"The wise judge" says Jerome Frank, "will overlook or try to forgive any such excesses of zeal which do not seriously disrupt the proceedings." Frank, Courts on Trial, 410-15 (1949).

In the words of Judge Mosk, in Smith v. Superior Court of Los Angeles, 440 P. 2d 65, 74 (1968),

> "Patience and understanding, rather then a punctillious insistence on courtroom etiquette are the hallmarks of the judicial temperament.

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* Defendants Abeles and Lerner make just this point during trial. Tr. 1099, 1883.

D. Judge Boldt Used Erroneous And Unclear Standards of Law in Judging Whether Defendants' Conduct Was Contumatious.

Because it is so unclear precisely what conduct the trial judge considered to be contumatious, it is difficult to determine what, if any, standards he used to separate contumatious from noncontumatious conduct. See Point II, supra. Since so much of the law of contempt is vague, subjective, and dependent on the discretion and integrity of the trial judge, it is essential to the defendants and to the reviewing court that the trial judge at least make his contempt findings with reference to as clear and well understood a conception of the law of contempt as current case law permits. If it appears that the sentencing judge himself was confused or superficial in his understanding of the substantive law, neither the defendants nor the reviewing court can be confident of his application.

Judge Boldt apparently tried to apply a test requiring conduct evidencing a specific intent to defy the court and whose effect was a serious and substantial interference and delay in the trial and obstruction in the orderly administration of justice. See Contempt Certification No. 1, at p. 6, l. 18-22; p.7, l. 28-31. Contempt Certification No.2, at p. 3, l. 14-16.

But at another point he indicates that his understanding of what misconduct might constitute contempt extended to "actions, language, other unjustified trial disruptions and

inexcusable delays in trial proceedings". Contempt Certification No. 1, at 1, l. 14-17; Contempt Certification No. 2, at 1, l. 13-17. This latter standard would include any language or conduct by defendants which was "unjustified" or "inexcusable", since length of disruption or delay does not appear to be a criterion.

This latter standard might readily include comments of defendants critical of the judicial system, proper argumentation by defendants, particularly pro se defendants (either polite and critical or impolite but related to substantive matters), or the multitude of minor nonobstructive interruptions or comments by defendants. All of these categories of conduct, as argued above, fall outside the conduct punishable under 18 U.S.C. § 401(1). And the record clearly shows, as we demonstrate below, that this vague, sweeping and subjective standard was the one in fact used by the trial judge.*

In Contempt Certification No. 1, Judge Boldt condemns, without particularization, the following general "categories" of misconduct:**

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* We have argued above that the first Contempt Certification is unclear as to its legal theory. The analysis in the following portion of the Brief will attempt to demonstrate, not only that Judge Boldt was using the broader standard of contempt but also that there was no "course of repeated misconduct" and that whatever occurred prior to December 10 does not provide any substantial evidence that the defendants' specific intent on December 10 was to obstruct the trial.

* The cited conduct occurring on Thursday, December 10, will be dealt with infra.

(1) "Standing, vocal and obviously prearranged demonstrations by spectators, sometimes led by one or more defendants and joined in by all", id., at 6;

(2) "Shouting epithets, sometimes threats of violence and profanity, and other improper language accompanied by a variety of disorderly movements and actions", id., at 6;

(3) "interruption by one or more or all defendants in qualification of the jury, exercise of challenges, opening statement for the plaintiff, examination of witnesses, offering of exhibits, making and hearing of objections, rulings and statements of the Judge, and in various other phases of trial proceedings." id., at 6-7.

And in Contempt Certification No. 2, the Judge has added a forth general category of conduct (again without particularization as to any defendant):

(4) "loud, boisterous and violent actions and language ...riotous conduct and an incipient riot....". id., at2.

Although the trial judge did not particularize all the specific factual situations falling into these categories, the U.S. Attorney has, in his Memorandum accompanying his Motion for Summary Affirmance, done just that.* It would appear that

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* Although we have argued that this procedure is insufficient to correct the failure of the Judge to particularize his contempt order, see supra, Point II, we use the U.S. Attorney's most extensive array of page numbers as the compleat guide to instances of possible misconduct at the trial.

category (3) above would easily encompass most, if not all, the U.S. Attorney's inclusions up to and including December 10. However, the trial judge did limit Contempt Certification No.2 to (i) the continuing efforts by defendant Stern to speak despite efforts by the Judge to silence her and (ii) the actions occurring thereafter. Thus, inclusion by the U.S. Attorney of conduct or speech on Monday December 14, 1970, not within the limits of the Judge's Contempt Certification No. 2 cannot be considered part of such Certification.*

As to each category of general conduct, we would note the following:

As to category (1), the only incident clearly falling within its terms occurred on the first day of trial when a defendant called for a moment of silence. Tr. 10. This instance was not cited by the U.S. Attorney, was not commented upon at the time by the trial judge, and did not cause any significant delay of or obstruction to any administration of justice.

As to category (2), the record reflects some incidents which, while they appear to fall within the definition "shouting epithets, sometimes threats of violence and profanity, **

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* See, for example, Appendix C to the U.S. Attorney's Memorandum and references therein to Tr. 2008, 2010, 2015, and 2016.

** The remainder of category (2), i.e., "and other improper language accompanied by a variety of disorderly movements and actions", is too vague and general to permit determination of whether any particular instances thereof appear in the record. Whatever is included within that phrase is, in any event, likely to fall within the broad language of category (3).

are not demonstrably contumatious in intent or effect.

The defendants' statements to which the judge may have had reference in his certification must be seen in the following context:

In none of the instances even arguably covered by category three was the jury present; the failure to hold a hearing on these episodes robs the appellants and this court of valuable evidence concerning the appellants' intent; and, the trial judge had never seen fit at any time prior to December 10 to use any of the powers available to him short of declaring a mistrial and imposing six-month sentences. (He did not, for example, impose small fines or attempt removal of the defendants from the courtroom as a form of 'civil' contempt). Let us, then, examine some of the defendants' statements:

(i) Tr. 271 ("Defendant Dowd: How would you feel if we come by your house in the middle of the night tonight, fooling around in your bushes?"). This comment is directly related to the U.S. Attorney's claim of "privacy" for his notes, a claim which the trial judge did not take seriously. The remark, which can by no stretch be termed "obstructive", evidently refers to the U.S. Attorney's admission in a prior proceeding that he had tapped certain defendants' telephone wires for up to four years.

(ii) Tr. 272 (Defendant Dowd: "Stan, I'm going to shoot to kill the next agent I see on my property. I'm going to drag him into your office.") This comment is an

exaggeration designed to emphasize a rational point. It does not in any way bespeak a specific intent to obstruct the administration of justice in Judge Boldt's courtroom: the jury was not present, the threat is hypothetical and not related to the judicial process, and the comment is sufficiently abbreviated so that no inference of stopping, halting or delaying the trial can be drawn. If the comment is punishable at all, it must be under some other statute dealing specifically with "threats". Even then, first amendment standards would clearly preclude a conviction.

(iii) Tr. 272 (Defendant Abeles: "Judge, don't you understand, the only reason that [defendants speaking out] is happening is because Stan [Pitkin] is standing over there and saying "Fair Trial", and so on, and that's bullshit, because he's not doing it.") "Bullshit" is not profanity in the vocabulary of many of the best-selling books in the country, and the best-attended movies in San Francisco contain stronger language. Abeles point was clear: he was seeking to point up the gulf between the U.S. Attorney's words and his conduct. In any case Abeles later apologized, Tr. 273, and the trial judge's effulgent praise of the defendants and counsel at Tr. 662 would seem to cover the matter.

(iv) Tr. 579 (Defendant Dowd: "You are not going to remove anybody out of here.") This particular comment is not directed at the court, but at the marshals. It is

nearly identical to the offer of resistance held non-contumatious in McConnell, supra. In fact, Dowd did nothing at all in furtherance of his words thus belying any assertion that he had the intent required under 18 U.S.C. § 401(1).

(v) Tr. 960 (Defendant Marshall: " ... [after explaining how a U.S. Marshal had assaulted a young woman, Marshall says:] ... if he doesn't stop this kind of harassment, the next time he touches somebody, he is going to get decked, man.") The judge, although characterizing these comments as contemptuous and calling for a hearing, never held a hearing on the matter. The Judge privately told defendant Marshall that this matter would be dropped if he apologized privately to the Judge; defendant Marshall refused and requested a hearing in order to air the many grievances concerning the conduct of the U.S. marshals. The remark of defendant Marshall had nothing whatsoever to do with the adjudicatory process; Judge Boldt's personal sensitivities concerning "respect" for the judicial office are not sufficient grounds for a criminal contempt.

* * * * * *

In short, as to none of these comments may it be said that the time was obstructed or delayed, as as to none of them may it be said that the intent to obstruct is present.

More needs be said: the trial judge's sweeping condemnation of the defendants takes in the entire record of 2000 pages. He does not isolate from this record those remarks which he "appreciates", Tr. 662, those which he regards as proper albeit distasteful to him, those which he regards as improper though not contumatious, and those which he deems worthy of punishment. This failure lends credence to the view that the judge relied upon an impermissibly broad interpretation of the contempt power. Hence, whether or not some instances of purported misconduct co

uld be classed as contempts, the overbroad and vague condemnation of the defendants requires reversal. Stromberg v. California, 283 U.S. 359 (1930). See also Street v. New York, U.S. ( ), which deals with disrespect to and contempt for the American flag and therefore provides some telling parallels to the situation here.

It bears noting, too, that the defendants played quiet roles in the trial. The rhetoric of some is more assertive than that of others. The trial judge did not seek to separate out the conduct of each defendant, and the government has not sought to dissipate the confusion.

Clearly, though, the trial did proceed each day, and was conducted with unusual dispatch. This court knows the many difficulties which may attend the trial of a complex conspiracy case--the legal arguments which break the flow of testimony; the manifold objections by different counsel on different theories

for their various clients, the bitter arguments between counsel. In this case the trial judge elected to add to his burden by permitting defendants to speak as well as counsel. It is appropriate that he did so, for a system which cabins the plea of those with most to lose does not deserve the name "justice". However that may be, the trial judge made his choice. Ane the record taken as a whole is no more laden with instances of delay than, let us say, the record in United States v. Roselli, F. 2d (9th Cir. 1970), which was also a long and hard-fought conspiracy case. There is simply no evidence that the defendants intended to stop the trial which they believed they were winning. And there is no evidence of actual obstruction. For the trial judge to have found otherwise means either that his perception of the facts is mistaken (see POint IV), or that he applied a wholly wrong standard to the defendants' conduct.

E. The Trial Judge Failed to Apply the Doctrine of the Least Onerous Alternative.

A federal district judge has a multitude of powers available to quell disorder in his courtroom. He can warn and remonstrate. He can cite for contempt and impose a fine. He can order an unruly defendant removed until an assurance of good behavior is given. He can put a defendant in custody for a few hours as punishment. He can refer serious misconduct to a grand jury or to the United States Attorney.

In using these powers, the judge is engaged in making up rules of conduct under a broad grant of authority embodied in 18 U.S.C. §401(1). Such a broad and standardless grant of authority, if it is constitutional at all, must be confined to the terms of the grant. See Gut Knecht v. United States, 396 U.S. 295 (1970); Kent v. Dulles, 357 U.S. 116 (1958). There should be clear warning that certain conduct will be deemed improper and certain sanctions applied. Cf. Emspale v. United States 349 U.S. 190 (1955).

Above all, the judge must proceed in a measured way to make his will known, and he must confine his use of remedial (civil) and penal (criminal) sanctions to the "least possible power adequate to the end proposed." United States ex rel. Robson v. Malone, 412 F. 2d 848, 850 (7th Cir. 1969), quoting In re Michael, 326 U.S. 224,227 (1945). In this case, the trial court never sought to impose the smallest punishment, or to employ the most trivial remedial sanction, before declaring a mistrial and imposing as lengthy a contempt sentence as he

could without affording a jury trial (or perhaps more lengthy - see Point I, Supra). Such a response is hardly measured or reasoned. Appellants urge that United States ex rel. Robson v. Malone, supra, incorporates into the law of contempt the doctrine of the "least drastic alternative," a familiar part of free speech doctrine. See, e.g., United States v. Robel, 389 U.S. 258 (1967). The contempt power is so extraordinary that a judge should simply not be permitted to use it in other than a measured way.

V

IF THIS COURT ORDERS A REMAND FOR ANY REASON IN THIS CASE, SUCH REMAND SHOULD BE HEARD BY ANOTHER JUDGE.

The Supreme Court in Offutt v. United States, 348 U.S. 11 (1954) reversed and remanded a conviction for summary contempt of a lawyer because the trial judge had used his power as a federal judge to vindicate his personal feelings against the lawyer.

> "The question with which we are concerned is not the reprehensibility of petitioner's conduct and the consequences which he should suffer. Our concern is with the fair administration of justice . . . . The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner." Offutt v. United States, supra, at 17.

Appellants submit that the trial judge has convinced himself of completely of the moral propriety of what he has done that he would be unable to render a judgment based on an objective view of the law and the facts.

The Judge commented after the declaration of mistrial that he concluded that that procedure was necessary only after long soul-searching:

> "I have been concerned and worried about the necessity for doing this [declaring a mistrial] for some time, Mr. Lerner. I have been brooding and thinking of this, giving thought to it in my quiet time, sometimes

in the middle of the night, as to what would be the just and proper thing to do . . . ."
(Tr. 1994)

"Whatever others may believe, I cheerfully permit them to believe. I myself have not the slightest doubt that my daily prayers for strength and guidance to be calm, understanding and patient in this case and to do that which is fair and just, not necessarily in my eyes but in the sight of our Heavenly Father have been answered

"I believe Divine Providence may have given this Court and others guidance to an effective solution of disruptive trials. I pray it may be so." (Tr. 2129)

Not only does the trial judge feel that what he is doing is justified by Divine Providence, but also that it is essential to the preservation of our country:

". . .In my presence defendants have declared and demonstrated contempt for the entire judicial system of this nation, that has been repeated here this morning. Interference of, obstruction of and frustration of judicial proceedings as serious as that of which everyone of the defendants is guilty strikes a blow at the process of law guaranteed by the Constitution of the United States, which is indispensable to the preservation of the Constitutional rights and, indeed, of our nation itself . . . .(Tr. 2127)

The trial judge, protected by God, and protecting our Nation, has shown by his comments an unwillingness to recognize his own frailties and limitations.*

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* Does the Court recall with us the scene from Robert Bolt's play "A Man for All Seasons," which makes the point as Thomas More refuses to arrest a political enemy:

"ROPER: Arrest him.

ALICE: Yes!

MORE: For what?

ALICE: He's dangerous!

ROPER: For libel. He's a spy.

ALICE: He is! Arrest him!

MARGARET: Father, that man's bad.

MORE: There is no law against that.

ROPER: There is! God's law!

MORE: Then God can arrest him.

ROPER: Sophistication upon sophistication!

MORE: No, sheer simplicity. The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal.

ROPER: Then you set man's law above God's.

MORE: No, far below . . . .

ALICE: . . . While you talk, he's gone!

MORE: And go he should, if he was the Devil himself, until he broke the law!

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

(cont. next page)

It is precisely this common human failure that the Supreme Court in Offutt v. United States, supra, with reference to a different human failure, decided should preclude the same judge from sitting on the remand.

This Court should follow the Offutt procedure in this case in the event it decides a remand is necessary for any reason.

(cont. from previous page)

MORE: . . . Oh? . . .And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat? . . .This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake."

CONCLUSION

For the reasons heretofore stated, the convictions should be reversed, with appropriate directions to the District Court.

Respectfully submitted,

MICHAEL TIGAR
2101 Smith Tower
Seattle, Washington 98104
(206) MA 4-2180

CARL MAXEY
208 Rookery Building
Spokane, Washington 99201

JEFFREY STEINBORN
LEE A. HOLLEY
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CHARLES CLARK MARSHALL, III, pro se
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APPENDIX

Contents

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES CLARK MARSHALL, III, et al., Defendants-Appellants.	No. 26,889 AFFIDAVIT OF MIKE JAMES

MIKE JAMES, being first duly sworn, on oath, deposes and says:

1. I am a news reporter for KING-TV and was assigned to cover the trial of United States v. Marshall, et al. before Judge Boldt in Tacoma, Washington and attended the trial each day.

2. I attended the proceedings on December 10, 1970. I went into the courtroom shortly after 9:00 A.M. Carl Maxey was seated at the defense table, but none of the defendants or other defense counsel were in the courtroom. The Government attorneys were seated at their table. The Judge and jury came into the courtroom and the Judge asked where the defendants were. Mr. Tigar, Mr. Holley, and Mr. Steinborn came in and Mr. Tigar began to address the court, but the Judge refused to hear him and ordered defense counsel to go summon the defendants and said that noone else was to leave the courtroom.

I was standing by the door so I went down the hall to the defense room and waited outside the door while the lawyers went in. A few minutes later the lawyers came out and I heard the defendants saying to the lawyers to ask the Judge for five more minutes. Mr. Clark, the Bailiff, was standing near me in the hall during this time.

The lawyers went back into the courtroom and I followed them and waited by the door. One of the defense counsel began to speak

the defendants personally.

The Judge left the bench accompanied by a large number of marshals and proceeded down the hall. I followed along and was near the Judge as he arrived at the door to the defense room. The defendants came out the door at the same time the Judge was speaking, and they said, "We're coming," "We're on our way," or words to that effect.

The entire group including the Judge, marshals, defendants, and defense counsel proceeded down the hall toward the courtroom and I trailed along behind. A couple of the defendants, I believe Dowd and Abeles, broke into a run. A marshal knocked against one of them and swore at him, using obscene words. One of the defendants said to the Judge, "Did you see that?" or words to that effect. The Judge appeared frightened by the incident.

The Judge entered the door to his chambers and everyone else went into the courtroom. Before the Judge appeared on the bench, Marshall defendant/began to address the jury in a calm tone of voice, apologizing for the delay and expressing his concern for the people waiting out in the rain. The Judge came on the bench and ordered Marshall to stop speaking, but he went on to say a few words more. The Judge then sent the jury out of the room and declared the case a mistrial.

Following the dismissal of the jury, I spoke to jurors in the hallway outside the courtroom. James Brecker said he had formed no opinion in the case, and that so much was going on that he hadn't been able to understand it all. Mrs. Grace Crane said she had formed no opinion in the case and had no prejudice against the defendants. Bob McNamee characterized the case as a "run-of-the-mill TV trial" and said he saw nothing that had prejudiced him against the defendants. I joined a group of three jurors, whose names I didn't get, speaking to other reporters, and they all said that they had formed no opinion in the case. Robert Owen said that he had formed no opinion and said, "The outbursts didn't bother us." Floyd Getschell said he predicted the case would have ended in a hung jury and that he felt

no prejudice against the defendants.

Altogether, I spoke with eight jurors and none of them said he had any prejudice against the defendants.

3. I attended the proceedings on December 14, 1970. I was seated in the first row of spectators reserved for press on the left side of the courtroom next to the center aisle, and from that position made the following observations:

Mrs. Stern got up and went to the lectern. The Judge said she had no right to speak and would be in contempt if she didn't sit down, but she insisted on speaking and eventually he let her go ahead.

She talked at length about her feelings toward a system that talks about justice and then brings injustice on its own people and the Vietnamese. The sense of what she was saying seemed to be, "You call our behavior violent, but look at the American government and how disruptive it is to human lives."

After she had spoken for awhile, the Judge told her to conclude and she said she was almost finished. He told her to stop speaking. Several of the defendants said to the Judge that she had a right to continue.

The next thing I knew, Mrs. Stern was seized by marshals and dragged away from the lectern. Spectators stood up and shouted their outrage. I heard Michael Tigar saying, "Your honor, it's not necessary to be that rough with a woman just out of the hospital," or words to that effect. I believe the Judge left the bench at this time. Defendants Dowd and Marshall were in the area of the lectern shouting angrily but neither of them was touching anyone. Marshall said, "Is this American justice?" and then turned toward the spectators and said, "I don't have to take this. This is an outrage." As he turned, he was grabbed by marshals and taken away. Defendant Abeles was grabbed at about the same time.

I saw Tigar near the jury box protesting to Mr. Pitkin about the manhandling of Mrs. Stern. He appeared in discomfort, and I later

learned he had been teargassed. Pitkin made a gesture to the marshals and the stranglehold on Mrs. Stern was released.

I looked back to the defense table. The defense table had been moved in the scuffle so there was now a wider space between the table and the bar. Defendant Dowd was in this area pacing back and forth and expressing his outrage about the whole business.

Marshals and spectators were pushing against each other at the bar. I went out in the hallway and came back in the courtroom at the front corner doorway. The marshals were removing spectators one by one.

After the disturbance had quieted, I spoke to United States Marshal Charles Robinson in the hallway. He told me the defendants were in the lockup. I was surprised that the defendants had been taken into custody since they did not seem to be engaging in any conduct that would single them out, so I asked Robinson why this was done. He said that there was an instruction from the Judge to take them into custody.

(Mike) Michael James

MIKE JAMES

Subscribed and sworn to before me this 18 day of January, 1971.

Michael H Rosen

Notary Public in and for the
State of Washington residing
at Seattle

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES CLARK MARSHALL, III, et al., Defendants-Appellants.	No. 26,889 AFFIDAVIT OF BRYAN JOHNSON

BRYAN JOHNSON, being first duly sworn, deposes and says on oath:

1. I am radio news director for KOMO Radio and covered several days of the proceedings in the trial of United States v. Marshall, et al., before Judge Boldt in Tacoma, Washington.

2. I attended the proceedings on December 10, 1970. After Judge Boldt declared the case a mistrial and dismissed the jury, jurors, reporters, and defendants were milling around in the hallway on the third floor. I asked one of the jurors, Floyd Getschell, to step into the press room and asked him some questions and recorded the interview, which is fully and accurately transcribed below.

Q What's your name?

A Floyd Getschell.

Q Floyd, what was your reaction to what went on in that courtroom the few hours that the jury was in?

A Justice moves quite slowly.

Q Did you feel prejudiced by anything that happened there? Did your opinion change as the dramatics unfurled in the courtroom?

A No, I had no prejudice against any of the defendants.

Q Were you surprised that you were let go?

A Yes, quite.

Q There was a big argument about voir dire, you know, the right of the attorney to question you rather than be questioned through the judge. Do you think that makes any difference on what your answers would have been?

A I think it might have made a difference with some of them, yes. Personally, I'm not sure. It might have. I might answer some of the questions differently now.

Q How do you feel about getting out of the case now?

A A little disappointed.

Then I went outside the courthouse to the Court A entrance and interviewed three other jurors, John Bohrman, James Brecker, and Robert Owen, as they came out of the courthouse, and recorded the interviews, which are fully and accurately transcribed below.

Q I'm with KOMO in Seattle. What's your name?

A John Bohrman.

Q John, did you have any reaction to all the outbursts that occurred while you were in that courtroom?

A We saw very few outbursts, other than just a little bit this morning is about all that any of us on the jury saw.

Q Did it prejudice you in any way?

A No, I don't believe so.

Q Were you surprised that you were dismissed?

A Yes.

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Q How about personal reaction?

A Kind of a disappointment that I wasn't allowed to finish out the trial.

Q How about you, sir? Your name?

A Yes, James Brecker, Vancouver.

Q Was there anything that you saw in that courtroom that you felt prejudiced you?

A No, I hadn't made any kind of an opinion up till this morning.

Q What opinion did you form this morning?

A Well, just surprise. I thought we were just going to be locked up. I had no idea the court was going to dismiss.

Q Are you disappointed?

A I actually am. I am interested in the judicial system and I would have liked to have went through the case.

Q What's your name, sir?

A Robert Owen

Q Mr Owen, how did you feel about what happened today?

A Well, it was the first real outburst we had seen. We had seen a few small incidents. I doubt whether the jury would have been prejudiced after having seen the incident, but there was always the possibility. It's difficult to see displays such as that and still remain unprejudiced, but with the type of jurors we had I think they would have all bent over backwards to attempt to

Q Are you disappointed?

A Yes, extremely so. This is the first case in my life I've ever had an opportunity to serve on and I was hoping to follow it all the way through.

Q Thank you very much.

I was served with a subpoena for the tape by attorney Michael Tigar moments after the aforementioned interviews and verify the tapes were preserved, protected, and are untampered.

I met with a number of reporters in the press room to compare notes on the jurors we had talked to. Altogether, eight jurors had been questioned and none of these had said he had prejudice against the defendants.

BRYAN JOHNSON

Subscribed and sworn to before me this 14th day of January, 1971.

Notary Public in and for the
State of Washington residing
in Seattle

AFFIDAVIT OF MICHAEL E. TIGAR

County of Los Angeles) ss
State of California)

Michael E. Tigar, being sworn, deposes and says:

1. I am counsel for certain appellants in these proceedings and make this affidavit in support of their appeal.

2. On December 10, 1970, I arrived at the federal courthouse in Tacoma at about 8:45 a.m. Thereafter, as the record shows, I was in chambers conference with the district judge and engaged in performing other duties as counsel.

3. When I left the judge's chambers after our conference about Jeff Dowd, I assumed that the trial judge would, as he had done each day before, send the bailiff to notify the defendants and counsel that the court was ready to proceed. I went down the hall to the defense room and told the defendants who were there about my conversation with the judge. They asked me to seek a hearing before the trial judge concerning Jeff Dowd's alleged contempt and the issue of spectator seating. I went then to the courtroom and was shocked to see the jury in the box. Under the strain of the moment, I haltingly conveyed the defendants' request. The trial judge responded in the manner revealed by the transcript. I returned to the defense room as directed by the judge, but did not inform the defendants that the jury was in the courtroom. I did convey the judge's direction, but under the pressure of

the situation, I simply omitted to pass on the information that the judge had sought formally to convene the proceedings. When I returned to the courtroom to ask, at the defendants' request, for a hearing on the contempt and spectator issues, I was cut off by the judge in seeking to explain that I had not told the defendants that the court was actually sitting with the jury present.

4. I have read George Vradenberg's affidavit and believe it true as to allmatters therein of which I have knowledge.

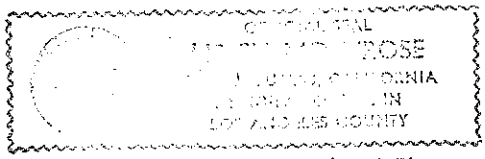
5. So far as I am aware, neither Jeff Dowd nor Roger Lippman, for whom I am counsel of record in the court below, engaged in any acts of violence on December 14, 1970. I repeatedly urged them not to commit any such acts.

Subscribed and sworn to before

me this 21st day of January 1971

Helen Montrose

Helen Montrose



My Commission Expires April 23, 1971

AFFIDAVIT OF GEORGE VRADENBURG, III

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GEORGE VRADENBURG, III, being first duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York having been admitted to practice before the Court of Appeals of the State of New York on October 8, 1968.

2. During the trial of United States v. Charles Clark Marshall, et al., No. 51942, Western District of Washington, I acted in the capacity of legal adviser and staff counsel for the Attorneys of Record and Pro Se Defendants.

3. At various times on Thursday, December 10, 1970, I was in the Federal Court House (hereinafter "Courthouse") in Tacoma, Washington, and in the courtroom of the Honorable George H. Boldt, United States District Judge for the Western District of Washington (hereinafter "Courtroom").

4. The following is a recital of what I saw and heard between the times of 8:45 a.m. on December 10, 1970.

I arrived at the Courthouse at approximately 8:45 a.m. In order to gain entrance to the Courthouse I had to pass through about 40-50 persons who were waiting at the door to the Courthouse to be admitted as spectators in this case. Many of those potential spectators were standing in the cold rain because there was not sufficient covered space outside the Courthouse for all those who were waiting. I recognized several of those persons as persons who had on

previous mornings waited outside the Courthouse in the rain for possible admission into the Courtroom. After showing my "Admit" pass to the Deputy U.S. Marshal at the door, the door to the Courthouse was opened and I was allowed to enter. Simultaneously, approximately 15 other persons forced themselves through the door and into the anteroom at that entrance to the Courthouse despite the efforts of the U.S. Marshals to keep them out. Those that had gained entrance in that manner waited quietly to be searched by U.S. Marshals before obtaining passes for admission to the Courtroom on the Third Floor of the Courthouse. Those persons waiting outside pushed on the doors requesting admittance at least into the shelter of the anteroom of that entrance to the Courthouse. I spoke to the U.S. Marshal, Charles Robinson, and asked him if it would be possible to allow those persons who remained outside to come in and wait either in a small anteroom immediately inside the door to the Courthouse or to sit on two long benches which had been set up in the entrance hall. The U.S. Marshal indicated to me that he would do so as soon as those persons who had already gained admission were processed. While those persons were being processed defendant Charles Clark Marshall was admitted to the Courthouse and approximately five additional persons pushed through the doors despite the vigorous efforts of four or five Deputy U.S. Marshals to prevent their entrance. At this time there was a significant amount of pushing and cursing by both Marshals and potential spectators. After the doors had again been locked, those persons who had gained admittance sat on the benches in the entrance hall and awaited their turn for processing. At that

point and at approximately 9:05 a.m. I proceeded to the Third Floor of the Courthouse.

I proceeded to the Defense Room where I removed my coat. Several defendants, including Michael Lerner and Charles Marshall, were in the Defense Room speaking to some persons I recognized as newsmen. At about 9:10 a.m. I went to the Courtroom.

In the Courtroom the only persons at either counsel table were Michael Tigar and Carl Maxey, both Attorneys of Record for certain defendants. Soon after arriving in the Courtroom, at about 9:15 a.m., Jeff Dowd exited the door to the Judge's chambers and indicated that the Judge had just cited him for contempt for knocking on the door to the Judge's office. Michael Tigar and I both requested, and were granted, admittance to the Judge's chambers.

In the Judge's chambers were U.S. Attorney Stan Pitkin, defense attorney Lee Holley and the Judge's law clerk Lou King. The Judge indicated at that time that he had cited Jeff Dowd for contempt but had not yet determined whether he would proceed under Rule 42(a) or 42(b) of the Federal Rules of Criminal Procedure. He also stated that he did not consider it his responsibility to make any determination of the propriety of the U.S. Marshal's actions in denying admission to potential spectators to the anteroom, entrance hall or any other room of the Courthouse. The Judge asked counsel if they were ready to proceed; Mike Tigar stated that as far as he knew, the defendants were ready to proceed. Mike Tigar, Lee Holley and I proceeded to the Defense Room at about 9:25 a.m. When we entered that room, I recall that Michael Lerner,

I do not recall which, if any, of the other defendants were present at that time. I do recall that Carl Maxey, Defense Counsel, was not present. Mike Tigar stated that the Judge had cited Jeff Dowd for contempt and that the Judge had indicated that he felt no responsibility for the conduct of the U.S. Marshals in failing to admit potential spectators in from the rain. Several individuals, including some defendants, stated that they desired that there be a hearing conducted some time during the day on whether Jeff Dowd's conduct constituted a contempt and on the conduct of the U.S. Marshal in failing to admit spectators in from the rain despite available facilities in the Courthouse.

Lee Holley, Mike Tigar, Jeffrey Steinborn and I proceeded to the Courtroom at approximately 9:30 a.m. As I entered the Courtroom, Judge Boldt, from the bench, was saying, "Good morning, ladies and gentlemen" to the jury who were seated in the jury box. I recall being very surprised that the Judge and jury were already in the Courtroom for on every morning preceding this the bailiff, Mr. Clark, had asked both counsel table whether they were ready to proceed and the Judge had not come onto the bench until he had received an indication from the bailiff that both parties were ready to proceed.

The Judge, in front of the jury, first noted for the record only Mr. Maxey was present at defense table. When counsel appeared, the Judge noted, again in front of the jury, that none of the defendants was present in Court. Mike Tigar stated that the defendants desired that a hearing be scheduled on the question of Jeff Dowd's contempt and on the conduct of

indicated that he would not discuss either of those issues. The Judge then ordered each Attorney of Record to proceed to where his client was and to communicate to his client or clients and to the pro se defendants that it was the order of the Court that the defendants come to the Courtroom forthwith. The Court also ordered the bailiff to accompany the lawyers and to make sure that the order was in fact delivered. Jeffrey Steinborn indicated that he would communicate the Judge's order to his clients (who were also the clients of Carl Maxey). Judge Boldt excused Carl Maxey from his order. All attorneys, except Carl Maxey then proceeded to the Defense Room (at about 9:40 a.m.).

Upon arrival at the Defense Room Mike Tigar stated to all present that the Judge had ordered him to communicate to his clients the Judge's order to proceed to the courtroom. Charles Marshall then asked what the Judge had said about the two hearings that the defendants had asked for. Tigar stated that the Judge had refused to make any comment or rulings on either hearing. At some point after we arrived in the Defense Room, Joe Kelly and Roger Lippman came into the room and stated that the U.S. marshals were still excluding spectators. At that point certain of the defendants, specifically including Charles Marshall, indicated that the lawyers should proceed back to the Judge and ask again that he at least set down for a hearing both of these matters. Certain other of the defendants, specifically including Michael Lerner, stated that they were not convinced that two procedural issues were worth spending any more time discussing and that the defendants should thus go into the Courtroom. While these discussions among defendants were still under way, the lawyers left with instructions to get at least a yes or no answer from the

(except Carl Maxey who had remained in the Courtroom) went back into the Courtroom at about 9:45 a.m.

Michael Tigar started to explain the request of the defendants but was cut off when the Judge asked whether his order had been communicated. Michael Tigar indicated that he had notified his clients. The Judge asked whether the defendants were coming immediately into the Courtroom. Mike Tigar said no. The Judge then ordered the bailiff to proceed immediately to the Defense Room to order the defendants to come to the Courtroom. At that point I left with the bailiff and went with him to the Defense Room.

I went into the Defense Room and stated to the defendants that the Judge had precipitated a confrontation in front of the jury, that because of the Judge's comments they were being severely prejudiced in front of the jury and that it was quite likely that they would be held in contempt if they did not come to the Courtroom immediately. Defendant Lerner said, "What do you mean the jury and the Judge are in the Courtroom? I didn't realize that. Why didn't the lawyers tell us that the first time they came down here? I thought the lawyers were talking to the Judge in chambers. This certainly isn't the issue to get contempt over and the jury is certainly not going to understand our position on this issue. Let's go back immediately", or words to that general effect. Defendant Marshall said, "Yes, I agree; but since the jury now thinks that it's our fault that the trial has been delayed, somebody will have to explain what the issue is," or words to that general effect. Then Michael

Lerner told me to proceed immediately back to the Courtroom and inform the Judge that the defendants were coming. I left the room and saw the bailiff at the end of the hall; I yelled to him that the defendants were coming and started walking quickly back toward the Courtroom. At that moment the Judge, Mike Tigar, Jeff Steinborn, and several others appeared in the hall. I quickly mentioned to the Judge that the defendants were on their way back to the Courtroom. The Judge responded with, "Yes, they are", or some words to that effect.

When the Judge arrived at the Defense Room, the door was open and all defendants were gathered at the door. The Judge ordered the defendants to proceed back to the Courtroom; several defendants stated that they were on their way. The Judge, lawyers, Marshals and defendants all proceeded back towards the Courtroom. On the way back to the Courtroom, two or three of the defendants were moving more quickly than the Judge. Two or three deputy U.S. Marshals moved into the path of those defendants and bodily prevented them from proceeding down the hall. There was a very brief verbal exchange between certain defendants and the U.S. Marshals; certain U.S. Marshals voiced some obscenities at certain defendants. The Judge went through the door into his office and the defendants and lawyers proceeded into the Courtroom at about 9:50 a.m.

Defendant Marshall explained briefly to the jury why the defendants had been delayed and sat down. The Judge took the bench almost immediately after Defendant Marshall began speaking.

What occurred thereafter is part of the record.

When walking from the Defense Room to the Courtroom,

I was walking with defendant Lerner and can clearly recall that he did not say anything to the Judge or U.S. Marshals while proceeding to the Courtroom. Neither did he state anything to the jury after entering the Courtroom and before the Judge had returned to the bench.

George Vradenburg, III

Subscribed and sworn to
before me this 12th day
of January 1971.

Notary Public

My Commission Expires on

JEAN W. FORDYCE
Notary Public, State of New York
No. 41-127[illegible] - Queens County
Cert. Filed in New York County
Term Expires March 30, 1971

EXHIBIT E

"Whatever others may believe, I cheerfully permit them to believe. I myself have not the slightest doubt that my daily prayers for strength and guidence to be calm, understanding and patient in this case and to do that which is fair and just, not necessarily in my eyes but in the sight of our Heavenly Father, have been answered.

I believe Divine Providence may have given this Court and others guidance to an effective solution of disruptive trials. I pray it may be so." Tr. 2129)