1975

Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney

W. Eugene Basanta
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Law Commons, and the Legal Profession Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
NOTE

TAYLOR v. HAYES: A CASE STUDY IN THE USE OF THE SUMMARY CONTEMPT POWER AGAINST THE TRIAL ATTORNEY

INTRODUCTION

In its recent decision in Taylor v. Hayes, the United States Supreme Court reversed the ruling of the Kentucky Court of Appeals, which had upheld the summary criminal contempt conviction of Louisville attorney Daniel Taylor. This summary contempt conviction was imposed by Jefferson Circuit Court Judge John Hayes during the much publicized 10-day murder trial of Narvel and William Tinsley. Taylor represented Narvel Tinsley throughout the trial. At the close of the October 1971 trial, Judge Hayes cited Taylor on nine counts of contempt, punishing him with consecutive prison sentences aggregating to 54 months, though subsequently the judge reduced the sentence to six months imprisonment. The resulting litigation, culminating in the Supreme Court's ruling, brings into focus the many problems associated with the use of summary contempt proceedings against defense attorneys. Moreover, in Taylor and in Codispoti v. Pennsylvania, a decision handed down on the same day, the Supreme Court ruled on several significant procedural questions involving the summary criminal contempt power. These cases thus provide an excellent foundation on which to base a case study and general survey of the use of summary contempt proceedings to punish a defense attorney for his conduct during a trial.

I. THE SUMMARY CONTEMPT POWER

The so called "inherent" judicial authority to punish an

---

2 494 S.W.2d 737 (Ky. 1973).
4 Kentucky decisions clearly consider the contempt power to be "inherent" in the judiciary. See Otis v. Meade, 483 S.W.2d 161 (Ky. 1972); Miller v. Stephenson, 474 S.W.2d 372 (Ky. 1971); Arnett v. Meade, 462 S.W.2d 940 (Ky. 1971); Levisa Stone
individual summarily for criminal contempt of court is an extraordinary power clearly open to abuse. Criminal contempt is one form of contempt of court described as acts "done in disrespect of the court or its process or which obstruct the administration of justice or tend to bring the court into disrespect." The distinguishing feature of criminal contempt is that punishment is imposed for punitive purposes, while in other contempt proceedings, punishment is meted out to coerce action on the part of the alleged contemnor.

Criminal contempt, like any contumacious offense, can be either "direct" or "indirect." The former are those contempts "committed in the immediate view and presence of the judge," while the latter are those "not committed in the judge's presence but at a distance." In the case of a direct contempt,
courts have often employed summary proceedings to punish the alleged contemnor, either immediately or at the close of the trial, following the verdict.\textsuperscript{10} Summary action, in this context, has been defined by the Supreme Court as:

[A] procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional trial.\textsuperscript{11}

Summary proceedings for direct contempt have thus been used to suspend the normal procedural safeguards associated with other criminal prosecutions. The summary contempt power permits the judge citing for contempt to also adjudicate the case and find the offender guilty without notice, a hearing or the other rudimentary features which constitute due process of law.

Although virtually all authorities concede that such a judicial power poses a potential threat to basic constitutional requirements of fairness and due process,\textsuperscript{12} the traditional view has been that this summary contempt power is an "inseparable attendant" of every judicial tribunal, absolutely necessary for the orderly administration of justice, as well as the mainte-

\textsuperscript{11} Sacher v. United States, 343 U.S. 1, 9 (1952).
\textsuperscript{12} Note, Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal, 39 S. Cal. L. Rev. 463, 464 (1966) [hereinafter cited as Note, 39 S. Cal. L. Rev. 463]:

Summary procedure without hearing, for punishing direct contempts appears on analysis to violate fundamental norms of due process in that guilt is determined and punishment inflicted without providing an opportunity to prepare and present a defense before an impartial tribunal.

The leading cases in support of the view that due process does not require notice or a hearing before another judge in cases of direct contempt are *Ex parte* Terry, 128 U.S. 289 (1888) and Sacher v. United States, 343 U.S. 1 (1952). *See also* Fisher v. Pace, 336 U.S. 155 (1949). *But see* Groppi v. Leslie, 404 U.S. 496 (1972).
nance of judicial respect and the legal process. Other authorities have questioned and criticized the existence of the summary power, asserting not only that it is a wholly unnecessary violation of basic tenets of our constitutional and legal philosophy, and that other devices more effective in controlling the courtroom and less violative of due process exist; but also that, in any case, the summary contempt power exists only as an historical aberration or accident.


14 In N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT (1973) [hereinafter cited as DISORDER], the summary contempt power, as well as other aspects of trial disruption and its control, are closely examined. At 232 et. seq., the conclusions of the authors are outlined. It was concluded that this power is unnecessary and "performs no essential role in controlling misbehavior." Id. The study recommended that the summary power be replaced with a system in which the trial judge cites for contempts before him, with notice of the specific charges of misbehavior, but with a hearing before a different judge on the issue of guilt or innocence. The study found that the central defect in the summary contempt power is the power that it places in the trial judge. The report, citing the Taylor case, concluded that fears of the arbitrary and unfair use of this power have been warranted by empirical evidence. Id. at 233. See also Freund, Disruption in Our Courts: Why?, 7 TRIAL no. 1, 12 (1971).


In Green v. United States, speaking of the power of a judge to punish summarily, Justice Black, joined by Chief Justice Warren and Justice Douglas, commented:

It seems inconsistent with the most rudimentary principles of our system of criminal justice, a system carefully developed and preserved throughout the centuries to prevent oppressive enforcement of oppressive laws to concentrate this much power in the hands of any officer of the state. 356 U.S. 165, 198 (1958).

In State ex rel. Asbaugh v. Circuit Court, 72 N.W. 193, 194-95 (Wis. 1897), the court, in an often cited comment, looked upon such a power as the "nearest akin to despotic power of any power existing under our form of government."

There has been considerable discussion of the historical emergence of the sum-
The power to institute summary proceedings for contempt has its most telling effect upon trial attorneys, particularly criminal defense attorneys, for it is very rare that a trial judge will hold a prosecutor in contempt. The defense lawyer in our system is assigned dual and potentially conflicting roles. He is bound to vigorously and persistently uphold the rights of his client, providing that client with the best defense he can muster within the bounds of the law. At the same time, tradition has labeled the defense attorney an "officer of the court." Although this is a vague and largely undefined term, court deci-

mary contempt power. Studies indicate that this power arose in rather recent times (18th century) and that previously, contemptuous conduct was often dealt with like any other criminal offense. Kutner at 3-7. See also R. Goldfarb, THE CONTEMPT POWER (1963); Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers, 37 HARV. L. REV. 1010 (1924).


In the area of criminal contempt, courts have had difficulty distinguishing between substantive guilt and procedural due process for the accused contemnor. In Sacher v. United States, Justice Frankfurter made it clear in his dissenting opinion that a court's primary concern in the area of criminal contempt should be with the procedure employed to determine guilt or innocence. 343 U.S. 1, 27-28 (1952). A somewhat similar position is taken by Justice White in his opinion in the Taylor case. In contrast, Lane, supra note 13, at 387-88, seems to feel emphasis should be placed on the contemnor's guilt rather than on the procedure followed to assess the guilty. But see Offut v. United States, 348 U.S. 11, 17 (1954).

15 Many of the important cases dealing with criminal contempts involve trial attorneys. See Bloom v. Illinois, 391 U.S. 194 (1968); In re McConnell, 370 U.S. 230 (1962); Sacher v. United States, 343 U.S. 1 (1952); Fisher v. Pace, 336 U.S. 155 (1949). See also In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), cert. denied, 414 U.S. 1161 (1974).


17 See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (A Lawyer Should Represent a Client Zealously Within the Bounds of the Law). See also Ethical Consideration 7-4 et seq. (Duty of the Lawyer to a Client); Ethical Consideration 7-19 et seq. (Duty of the Lawyer to the Adversary System of Justice). Ethical Consideration 7-36 discusses the balancing of the need for zealous representation with the need for maintaining the decorum and dignity of the proceedings. See also Disciplinary Rules 7-106(c)(6)-(7).

18 DISORDER, supra note 14, at 144. See also Cammer v. United States, 350 U.S. 399, 405 n.3 (1956). For an interesting article in this area see Garry, Who's an Officer
sions reveal that this role is a very real one for trial attorneys, one which can, according to some courts, serve to limit the vigor of the attorney's defense of his client.\footnote{Huggins v. Field, 244 S.W. 903, 905 (Ky. 1922). In the case of Fisher v. Pace, 336 U.S. 155 (1949), the Court indicated that in assessing the propriety of a defense attorney's conduct, his position as an officer of the court must not be lost sight of. In his dissent, Mr. Justice Douglas, joined by Justice Black, emphasized the alternative role of the attorney as the "resourceful lawyer" defending his client with zeal. \textit{Id.} at 166.} These conflicting responsibilities can potentially place the attorney in an untenable position requiring him to in some manner violate his duty as an officer of the court in order to faithfully fulfill his role as an advocate, or vice versa.\footnote{Note, 25 ME. L. REV. 89, \textit{supra} note 14, at 93. \textit{See also} Note, 1971 Wis. L. REV. 329, \textit{supra} note 14, at 343, where it is stated:

This dual mandate may, however, thrust the trial lawyer into a situation which requires that he risk breach of one or the other of his obligations. Unfortunately, the moment at which zealous advocacy becomes contumacious conduct is no more certain than the point at which deference to the value of order becomes abdication as advocate.} Viewing these conflicting duties in the context of the summary contempt power, the potential for abuse and the danger of actual harm to a vigorous defense become apparent. One commentator has concluded that in an adversary legal system such as ours, "[t]he role of counsel as advocate requires particularistic limitations on the exercise of the summary contempt power to minimize the threat of intimidation which stifles vigorous and effective advocacy and impedes the policy of independence of the bar."\footnote{Note, 1971 Wis. L. REV. 329, \textit{supra} note 14, at 334-35. \textit{See also} \textit{Disruption in Our Courts: Why?}, 7 \textit{Trial} no. 1, 12 (1971). In one recent article the argument is made that affording the defense attorney involved in a trial contempt due process rights of notice and a hearing might prejudice his client by denying him his sixth amendment right to a "speedy trial." Comment, \textit{The Application of Criminal Contempt Procedures to Attorneys}, 64 J. CRIM. L. C. & P.S. 300 (1973). While this argument is interesting, it is also incorrect since any hearing permitted would necessarily follow completion of the client's own trial.} While undoubtedly it is true that a judge needs certain powers to control the conduct of attorneys,\footnote{Lane, \textit{supra} note 13, at 384.} nevertheless:

It is one thing to hold that a lawyer whose role in the legal system may demand that he risk contempt, may be punished if he goes beyond the ephemeral boundary of effective and
vigorous advocacy; it is another thing altogether to hold that the guilt of one in the position of an attorney may be determined by the accuser, without notice, hearing or an opportunity to defend.23

Moreover, the argument that the summary power is necessary to control the courtroom actions of defense attorneys is belied by empirical evidence. The fact is that instances of courtroom misconduct by attorneys are rare, and in those cases where attorney misconduct has occurred, the difficulties have perhaps arisen as much from the nature of the case or the actions of the trial judge, as from the conduct of defense counsel.24

Not only may the threat of a summary contempt conviction impede a lawyer's advocacy, but a conviction may carry with it the potential for further discipline by other members of the bar, "the ramifications of which may far exceed those of the legal sanction,"25 and may result in the suspension of the lawyer's right to practice.26 Finally, a summary contempt convic-

---

24 DISORDER, supra note 14, at 6-9, 131-32, 200-205. See ABA Code of Judicial Conduct, Canon 3A.
25 Note, 1971 Wis. L. Rev. 329, supra note 14, at 352. Daniel Taylor was disciplined by the Kentucky Bar Association but not in connection with the Tinsley case. See Kentucky Bar Ass'n v. Taylor, 482 S.W.2d 574 (Ky. 1972).

The use of bar discipline to control attorney conduct or to punish for previous conduct is discussed in DISORDER, supra note 14, at 159-62. That study concluded: As a general matter we think it is undesirable . . . to initiate disciplinary action against a lawyer for his behavior in a single hotly contested case. . . . If a lawyer exceeded the bounds of proper behavior in a single case, the most appropriate remedy may be contempt before a different judge from the one who heard the case. If his actions were consistently outrageous throughout the trial with no mitigating circumstances, disciplinary action (though not disbarment) may then properly be taken. Or if a lawyer's behavior occurs in more than one trial, it may show his unfitness to practice.

Id. at 162. The report cites the Taylor disciplinary case as one of two cases it found in which a lawyer was severely penalized by the bar for misconduct in a single case. In Taylor's case, the bar imposed a five year suspension on Taylor. The Court of Appeals, adopting a posture similar to that set out in DISORDER, felt that the issue in the case involved but one trial and that disbarment or a substantial period of suspension was inappropriate. The Court felt Taylor should not be made a "scapegoat." 495 S.W.2d 737, 747 (Ky. 1973).
26 Suspension of the right to practice law was a disciplinary technique which Judge Hayes sought to use against Taylor. The Court of Appeals, however, rejected the Judge's claimed authority to so act. 494 S.W.2d at 747. The Court cited Adams v.
tion may damage the attorney's reputation and thus harm his legal practice.

The problems encountered in the post-verdict discipline of a trial attorney through the use of summary contempt proceedings are dramatically illustrated in *Taylor v. Hayes*. The difficulties arising in this or any case involving the use of summary contempt against trial counsel include: (1) a determination of whether the attorney's conduct was in fact contemptuous within the meaning of the law; (2) whether there exist due process rights for the allegedly contumacious attorney requiring that he receive notice of the specific charges against him and a hearing at which he may speak in his own behalf before a judge other than the one who has accused him of contempt; and (3) whether under the circumstances, the attorney is constitutionally or statutorily entitled to a jury determination of his guilt or innocence.

*Taylor v. Hayes* dealt with all of these issues. The briefs of the parties and the decisions set out by the various courts in the case present a ready source for a study of the present status of the law of summary contempt and its use against the trial advocate. The remainder of this note will examine and analyze this area of the law through this particular case, an effort necessitating a detailed look at its factual background.

II. *TAYLOR v. HAYES: THE FACTS*

Taylor's contempt conviction arose out of events occurring

---

Gardner, 195 S.W. 412 (Ky. 1917), to support its view.

In *Disorder*, supra note 14, at 163-64, the issue of suspension as a disciplinary tool is raised. The study points out that both the American Trial Lawyers Report, *supra* note 13, and the ABA Project on Standards for Criminal Justice, Standards Relating to the Judge's Role in Dealing with Trial Disruptions, recommend the use of suspension as a means of controlling attorney courtroom conduct. The rationale advanced to support such action is that since the trial judge could, on his own, imprison the contumacious attorney for six months, he should also be able to suspend the attorney for a similar period.

The authors of *Disorder* reject this device. They offer several reasons for doing so: (1) the same judge who hears the case should not adjudicate contempt charges or suspend since this violates impartiality; (2) the legal problems connected with suspension are numerous—a court has no inherent power to suspend and the right to practice law is constitutionally protected; and (3) other procedures exist to handle the few cases of attorney misconduct which arise.
during the trial of the Tinsley brothers, Narvel and William, for the murder of two Louisville police officers. The Tinsleys were both young and black; the police officers were both white. During the trial, which lasted from October 18, 1971 through October 29, 1971, Taylor represented Narvel Tinsley. The trial engendered considerable public interest and was the focus of substantial local press coverage. At various times as the trial progressed, Judge Hayes informed Taylor, either in chambers or outside the hearing of the jury, that he was in contempt. In some cases Taylor was permitted to respond to these citations for the record; in other instances response was denied. Several times during the proceedings counsel for William Tinsley moved for a severance of the cases due to antagonistic defense claims and because it was felt that Taylor's actions were prejudicial to William's defense. Likewise, Taylor moved for severance based on the theory that the brothers' defenses were antagonistic. These motions were uniformly denied by Judge Hayes.

At the conclusion of the trial, after the jury had found both brothers guilty, Judge Hayes, in the jury's presence summoned Taylor before the court and severely criticized his conduct, integrity and ability as counsel. Denying Taylor any opportunity to respond and threatening to gag him if he persisted in his attempts to do so, Judge Hayes, in what was surely the emotional culmination of a heated and at times bitter trial, summarily convicted Taylor on nine counts of criminal contempt, on two counts of which the sentences were a year in prison. All sentences imposed were, by the judge's order, to be served consecutively. Thus linked, the sentences totaled 54 months imprisonment. Taylor was then placed in jail.

Subsequently, Judge Hayes refused to hold a bail hearing. It was only after the Court of Appeals of Kentucky ordered such a hearing that one was held. Taylor was not permitted to be present at the hearing conducted by Judge Hayes and bail was denied. Bail was finally ordered by the Court of Appeals. Shortly thereafter, on November 4, 1971, Judge Hayes entered

---

27 For a discussion of press coverage and its impact on trial disruptions see DISORDER, supra note 14, at 253-54.
28 For the text of Judge Hayes' comments at the close of the trial see note 177 infra.
an order prohibiting Taylor from further practice before his court.

Several weeks after Taylor filed an appeal with the Kentucky Court of Appeals, the trial judge moved to correct his original judgment. This motion was granted and Judge Hayes proceeded to change the first contempt citation to a warning and to reduce the punishment under the eighth and ninth citations from one year to six months, thereby making all the sentences six months or less. The corrected judgment, unlike the original, did not specify that the individual sentences were to be served consecutively.

In his appellate brief, Taylor claimed that: (1) his actions did not constitute criminal contempt; (2) Judge Hayes was so biased as to not be able to impartially sit in judgment on the charges; (3) he had been denied an opportunity for a hearing and to speak in his own defense; and (4) by state law and constitutional right, his guilt or innocence should have been determined by a jury.

The Kentucky Court of Appeals, although denying Judge Hayes' claimed power to exclude Taylor from practicing in his court, substantially affirmed the trial court's summary action in its decision handed down March 23, 1973. The single significant alteration the Court made was to rule that the sentences imposed were to be served concurrently under Kentucky law, since the corrected order did not specify how the separate sentences were to run. This resulted in an imposed sentence of six months, indicating, the Court stated, that a jury trial was not constitutionally mandated. The Kentucky Court further decided, in the process of denying Taylor the right to the intervention of a jury, that a Kentucky statutory provision in this area was unconstitutional. The Court wholly rejected Taylor's assertion that his acts were not contemptuous. Further, Commissioner Catinna ruled that any right Taylor had to a hearing or to speak in his own defense had been satisfied by Judge

---

29 For a discussion of Kentucky law on the right to appeal a contempt conviction, see note 109 infra.
30 494 S.W.2d 737 (Ky. 1973).
31 KRS § 432.260 (1972). The text of this statute and a discussion of the Court's ruling on it can be found with the text following note 265 infra.
Hayes. Finally, the Court of Appeals concluded that Judge Hayes had evidenced no bias against Taylor and was qualified to sit in judgment of Taylor's guilt or innocence.

On June 15, 1973, the Court denied Taylor's petition for a rehearing, but stayed execution of the sentence for a 90-day period while Taylor sought Supreme Court review of his case by petition for Writ of Certiorari. During this time the Kentucky Court of Appeals sustained the Tinsley conviction, finding that Taylor's actions had not prejudiced the case, although the Court, in deciding Taylor's case, regarded his conduct as outrageous and highly offensive.

Taylor filed his petition for a Writ of Certiorari on September 12, 1973. On December 3 of that year, the Supreme Court agreed to hear Taylor's case as to the following issues:

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he, or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?
2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?
3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against petitioner?

In his brief to the Court, Taylor argued that he was entitled to a jury trial to determine his guilt or innocence and that due process required that he be given notice of the charges.

---

32 495 S.W.2d 776 (Ky. 1973). The Court indicated that Taylor's conduct in defending Narvel was not prejudicial to his brother and that the Judge had not expressed any bias against Taylor such as to prejudice Narvel's rights. Id. at 785.
against him and an opportunity to be heard in his own behalf. He also asserted that Judge Hayes could not sit in judgment of his case because he was not an impartial arbiter.

Judge Hayes responded that he was properly the judge in the case and that he was in no sense disqualified by any bias or hostility toward Taylor. The Judge further contended that Taylor had been afforded an adequate opportunity to be heard at trial and that, in any case, notice and a hearing in such a situation were not constitutionally guaranteed. Finally, Judge Hayes maintained that Taylor was in no sense entitled to trial by jury.

A number of amicus briefs were filed with the Court in support of Taylor's cause. These briefs, along with Taylor's, urged the Court to closely scrutinize the summary contempt power and, in light of accepted standards of due process and fairness, to discard this outdated and highly questionable device.

The Supreme Court reversed Taylor's conviction and remanded the case to the Kentucky Court of Appeals. But the Court's opinion, as its grant of certiorari foretold, was not the sweeping reexamination and disposal of the summary contempt power pressed upon it by the petitioner and those supporting him. Nevertheless, the Court did make some important decisions in the case. The Court's decisions in the problem areas outlined above will be explored and developed in an effort to reflect the present status of the law dealing with important aspects of the summary contempt power.

III. IS THE ATTORNEY’S CONDUCT CONTEMPTUOUS WITHIN THE MEANING OF THE LAW?

The initial issue in a case of a trial attorney's alleged contempt of court is whether his actions were indeed contemptuous.

It is often stated that four elements must exist in order to support a summary contempt conviction under the federal or equivalent state statutes. There must be "misbehavior"; such misbehavior must be in the court's presence; it must "obstruct the administration of justice"; and there must be
some sort of intent by the defendant to obstruct.\textsuperscript{34}

The concern here is with the latter two elements: "obstruction" and the "intent to obstruct." Intimately connected with these two requirements for contemptuous conduct is the concept of "good faith," which may itself function as an element to be considered in determining if an attorney's conduct during trial has in fact been contumacious.

A. Obstruction

It is generally claimed that the attorney's conduct must be "obstructive" in order to be contemptuous. This element is troublesome and one which has been frequently debated by both courts and commentators. The crux of the problem concerns the meaning of "obstruction" and the distinction between attorney conduct which is legitimate, through forceful and strenuous argument in his client's behalf, and conduct which goes beyond this point, becoming disruptive of the judicial process. Although the line dividing these two areas is undeniably indistinct, the fact remains that in order to be contemptuous an attorney's conduct must be found to be obstructive.

There are three major types of attorney conduct which most often lead to contempt citations. These include: (1) disrespectful conduct or remarks by the attorney, (2) disobedience of a court order or procedural directive, and (3) the pressing of excessive or repetitive argumentation after the court's ruling on the matter. While these are the three most common sources of trial attorney contempt citations, none is per se contemptuous, because in each case the attorney's action must obstruct the administration of justice in order to be contumacious.

In the area of disrespectful statements or conduct by an attorney before the court, some dispute has arisen as to whether "mere disrespect" by an attorney is contemptuous. Decisions by the Supreme Court and other courts seem to indicate that mere disrespect without obstruction is not contemptuous. In the case of \textit{Brown v. United States},\textsuperscript{35} the Supreme

\textsuperscript{34} \textit{Disorder}, \textit{supra} note 14, at 106.

Court remarked: "[T]rial courts no doubt must be on guard against confusing offenses to their sensibilities with obstruction of the administration of justice" calling for punishment by the use of the contempt power.\footnote{Id. at 153.}

In another Supreme Court decision, \textit{Harney v. Craig},\footnote{331 U.S. 367 (1947).} the Court set forth the idea that "[t]he vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."\footnote{Id. at 376.} The Court added that the law of contempt was not formulated for overly sensitive judges, and that judges should be "men of fortitude able to thrive in a hardy climate."\footnote{Id.}

In more recent decisions, the Court has further indicated that mere disrespect, absent obstruction and an actual threat to the administration of justice, is not contemptuous. In the case of \textit{In re McConnell},\footnote{370 U.S. 230 (1962).} the Court stated: "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."\footnote{Id. at 236. Of particular importance are the Court's comments at 234-36.} Another case in which the Court emphasized the need for obstruction of justice before an attorney's conduct could be found contemptuous is \textit{In re Little},\footnote{404 U.S. 553 (1972).} a 1972 decision involving a pro se criminal defense. The Court made it clear that so long as the defendant's remarks in conducting his own defense did not actually disrupt the court proceedings or constitute an imminent danger to the administration of justice, he could not be held in contempt merely for his statements in summation that the court was biased and had prejudged the case. Citing its decisions in \textit{McConnell}, \textit{Harney}, \textit{Brown} and \textit{Holt v. Virginia},\footnote{381 U.S. 131 (1965).} the Supreme Court concluded that an attorney's language though

\begin{itemize}
\item \footnote{Id. at 153.}
\item \footnote{331 U.S. 367 (1947).}
\item \footnote{Id. at 376.}
\item \footnote{Id.}
\item \footnote{370 U.S. 230 (1962).}
\item \footnote{Id. at 236. Of particular importance are the Court's comments at 234-36.}
\item \footnote{404 U.S. 553 (1972).}
\item \footnote{381 U.S. 131 (1965).}
\end{itemize}
forceful and at times vehement, is not in itself contemptuous absent an actual threat to the proper conduct of the judicial process.\textsuperscript{44}

Some federal courts have taken the stance that mere disrespect by an attorney in stating his case is not contumacious unless it blocks the judicial proceedings. A case of particular importance here is the Seventh Circuit's ruling in \textit{United States v. Seale}.\textsuperscript{45} The court, in dealing with contempt citations arising out of the highly publicized and criticized "Chicago Seven" trial, expressed the view that an actual obstruction of justice and "immediate interruption" of the proceedings, clearly disruptive of the judicial process, must occur before an attorney may be cited for contempt. The Seventh Circuit emphasized that disrespect alone should not be viewed as contemptuous: "[T]he Supreme Court seems to have expressed a high degree of tolerance in distinguishing disrespect from obstruction. A showing of imminent prejudice to a fair and dispassionate proceeding is therefore necessary to support a contempt based upon mere disrespect or insult."\textsuperscript{46}

This same court, in another decision arising out of the contempt citations imposed during the "Chicago Seven" trial, \textit{In re Dellinger},\textsuperscript{47} even more explicitly dealt with the issue of attorney conduct and disrespect. The court indicated that although the \textit{McConnell} case "cannot be read as an immunization for all conduct undertaken by an attorney in good faith representation of his client, . . . [it] does require that attorneys be given great latitude in the area of vigorous advocacy."\textsuperscript{48} The court then went on to discuss its views on attorney disrespect.

[M]ere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the "heat of courtroom debate" may prompt statements which are ill-considered and might later be regretted. . . . Substantial

\textsuperscript{44} 404 U.S. at 555.
\textsuperscript{45} 461 F.2d 345 (7th Cir. 1972).
\textsuperscript{46} Id. at 370.
\textsuperscript{47} 461 F.2d 389 (7th Cir. 1972).
\textsuperscript{48} Id. at 398.
freedom of expression should be tolerated in this area. . . . However . . . although it is elusive, there is a line beyond which disrespect becomes obstruction. When the remarks create an imminent prejudice to a fair and dispassionate proceeding, that line has been crossed.49

The court summarized its position regarding the scope of permissible attorney conduct and the issue of disrespect with the statement: "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf."50

Another recent federal court decision which in part concerns the issue of disrespect and obstruction is Weiss v. Burr.51 Here the contempt citations were leveled against a prosecuting attorney in a criminal case. This Ninth Circuit decision clearly acknowledged that a court does not have "unfettered discretion to punish attorneys for allegedly contumacious conduct."52 Noting that "[a] court cannot deprive attorneys of their liberty or property in order to avert perceived threats to the administration of justice if the court's actions would unduly impair legitimate, nondisruptive advocacy,"53 the court dismissed part of the contempt citation because it believed the attorney's conduct was not contumacious. The circuit court based its conclusion on the fact that certain of the attorney's allegedly violative remarks were not by law contumacious, since there was no disrespect involved and his remarks did not actually disrupt the trial or imperil the administration of justice. In disallowing these contempt citations the court seemed to indicate, as did the court in Dellinger, that obstruction must result from the attorney's remarks before there can be a contempt citation.

The concern with the issue of obstruction versus disrespect reflects the problem of balancing the attorney's role as an advocate with the need to insure the effective functioning of the trial process. Fearing that judges may read attorneys' remarks as

49 Id. at 400. See also Dobbs, supra note 8, at 204-05.
50 461 F.2d at 400.
51 484 F.2d 973 (9th Cir. 1973).
52 Id. at 980.
53 Id.
insulting and contemptuous, and that this may unduly hamper the attorney in carrying out his role, these court decisions have emphasized that an attorney's remarks, in addition to being disrespectful, must be disruptive and obstructive in order to be contemptuous. This is not to minimize the need for respect—a duty owed by the attorney to the court, not a mere courtesy. However, these federal courts, recognizing the practicalities of our adjudicatory system, have established that breach of this duty through mere disrespect, without resultant obstruction of justice, should not be punished by the use of the summary contempt power.

Commentators in recent years have likewise held to the view that attorney disrespect, unaccompanied by obstruction, should not result in contempt citations. Thus, one writer has observed: "There is increasing support for the proposition that a distinction between obstructive and disrespectful conduct should be made, and that the use of the contempt power should be confined to the former type of conduct." Another writer has stated: "[I]t should be emphasized that mere personal insult or irritating conduct should not readily be accepted as contempt." It has also been said that: "To be contemptuous the attorney must exceed the outermost limits of his proper role and hinder rather than facilitate the search for truth."

The recent report of the Association of the Bar of the City of New York, Disorder in the Court, discussed at some length the issues of obstruction and attorney disrespect. The study rightfully emphasized the need for the trial advocate to conduct himself respectfully in the courtroom in recognition of the position of responsibility which he occupies and the need for continued public respect and confidence in our system of justice. Although the study concluded that "[b]oth direct insults and disrespectful comments by a lawyer can be punishable," the issue in this regard is one of obstruction as

---

51 Hermann, supra note 14, at 591.
52 Dobbs, supra note 8, at 208.
54 Note, 25 Me. L. Rev. 89, supra note 14, at 93-94.
55 Disorder, supra note 14, at 149. See also ABA Code of Professional Responsibility, supra note 17 (particularly Ethical Consideration 7-36).
56 Disorder, supra note 14, at 150.
a result of this sort of conduct. The study indicated that ob-
struction of justice is a standard element of a contemptuous
offense and pointed to several of the recent court decisions
discussed above to support the view that mere disrespect by an
attorney without some actual disruption is not contemptuous.
“In recent years,” the study stated, “courts have become more
tolerant of isolated instances of disrespect, often noting that
insulting language that does not obstruct the trial should not
be punished as contempt.”9 The conclusions of the study on
the issues of disrespect and obstruction by attorneys are pre-
presented in the form of a judge’s response to the study commit-
tee's questionnaire.

So far as attorneys are concerned, nothing should be done to
limit even the most aggressive defense, provided that that
which is done is not directed to obstruction of the proceed-
ings. A “normal” amount of “judge baiting” is permissible,
as a stock in trade of the lawyer. Only when these limits are
continually transgressed should the contempt power be used
(it should be used sparingly and only under the direct provo-
cation for in a contempt proceeding the judge usually turns
out to be the defendant). Patience, a most difficult attribute
in these days of demand for instant justice must be cultivated
by the judge to an unusual degree.40

The conclusion can be reached that although respectful
conduct by the trial attorney is important in the courtroom,
when the attorney, in the pursuit of his legitimate goals as an
advocate of his client's cause, offends the court’s sensibilities
or insults the judge in some manner, this action is not contemp-
tuous unless it actually disrupts the trial and obstructs justice.
Clearly, the facts of each case will necessarily have to be con-
sidered to determine if the particular conduct was contuma-
cious.

As noted earlier, there are two other types of attorney con-
duct which result in imposition of the contempt sanction. One
of these occurs when the attorney disobeys a court's ruling or
procedural directive; the other is when the attorney makes re-
petitive or excessive argumentation of a particular point after

9 Id.
40 Id. at 152.
the judge has excluded the matter or otherwise ruled on it. In both of these situations the attorney may be held in contempt. Here too, however, the court should be mindful that obstruction of justice is required before such actions can be punished by way of contempt.

Disobedience of rulings and procedural orders set down by the trial court is, of necessity, improper conduct by the attorney. "A lawyer may not disobey a valid rule of procedure or a proper order of the court."41 In both the Seale and Dellinger cases, the federal appeals court discussed the problem of disobedience of court directives and orders. The court in Seale remarked:

[F]ailure to heed the directive of the court to desist from arguing, to sit down, or to remain quiet may indeed constitute an actual material obstruction to the administration of justice. . . . As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands. . . . We do not say that automation-like reflexive obedience to the court's orders is necessary to avoid a contempt citation. The law does not expect unhuman [sic] responsiveness. But where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey.42

The court in the Dellinger case likewise stressed that an attorney cannot continually press a point after the judge has ruled on the matter. The attorney, the court felt, can preserve his point for appeal, but he cannot openly defy the court's orders governing argument or procedural matters, even if the order might be erroneous.43 As noted in the Seale case, disobedience of a court directive or order may become obstructive and

41 Id.
42 461 F.2d 345, 371 (7th Cir. 1972).
43 461 F.2d 389, 398-99 (7th Cir. 1972).
therefore contemptuous. The necessary implication, however, is that not every disobedience is obstructive and hence contemptuous. This is well illustrated by a statement made by the Ninth Circuit in the *Weiss* case:

The mere transgression of an order governing trial procedures is, however, almost invariably insufficient to sustain a contempt conviction. Due process requires, we think, something more serious than a minor disagreement such as may often and understandably follow an attorney's failure strictly to comply with this type of order, before a contempt citation can be issued. . . . In general, the misconduct must entail a persistent disregard for the court's authority that the attorney could have avoided through a reasonable good faith effort. . . .

It is often difficult for an attorney to strike an effective accommodation between his client's interests and his obligations to meet the demands of the judge before whom he must argue his case. Consequently, when, in attempting to reach an appropriate compromise, one transgresses a court order, he is not necessarily guilty of contempt.4

These opinions indicate that a mere transgression of a court's order or procedural ruling committed by counsel in good faith, while attempting to argue his case, is not in itself contemptuous. But if by so acting, the attorney obstructs justice, in clear disregard of the court's authority, then his conduct may be viewed as contumacious.5

The third type of trial conduct which often leads to contempt citations is repetitive or excessive argumentation on the part of the advocate. *Disorder in the Court* discussed this area of the law in some detail.6 As this study notes, excessive argument by an attorney or the continued repetition of a point already raised and ruled upon can be disruptive and hence punishable. Thus, in the report's words, the attorney "may make any point he wishes so long as he does so courteously and

---

4 484 F.2d 973, 980-81 (9th Cir. 1973). See also State v. Pokini, 521 P.2d 668 (Hawaii 1971).
5 For a case illustrative of the problem see In re Charbonneau, 116 Cal. Rptr. 153 (Ct. App. 1974).
6 DISORDER, supra note 14, at 155-57.
in good faith. He may argue the question fully and preserve his record for appeal. But if he continues after all these conditions are met, he is obstructing the proceedings and can be properly punished for contempt."\[^7\] Emerging from the report is the conclusion that use of the contempt power simply because the attorney's argument is novel, time consuming, or perhaps annoying to the judge, is not justified, for, absent obstruction, all of this is permissible conduct.\[^8\] In order for the attorney's arguments to be contemptuous they must overstep the bounds of legitimate advocacy and become, by their excessive nature, defiant and obstructive. Finally, it should be recognized that part of the problem surrounding both an attorney's excessive argument on a point and his disobedience of a court order may arise not only from the attorney's conduct, but from the conduct of the judge as well. Remarks by the judge about the attorney, his skill, his integrity and so on, as well as judicial interference with the arguments of the attorney, may well cause counsel to disobey the judge or continually repeat his arguments either out of frustration or in an attempt to alter the court's view. In any case, judicial misconduct can at times play some role in courtroom disorder.\[^9\]

In sum, it appears that simply because counsel's language or actions may appear insulting or because he violates a court's order or continues to argue a point raised and ruled on previously should not mean that the attorney is automatically found to be in contempt. His conduct in any of these situations must be something more than merely disrespectful, in violation of a judge's directive, or excessive. It must disrupt the trial, obstruct justice and hinder the effort to discover the truth.

**B. Intent**

Obstruction itself, according to many courts and commentators, is not the only necessary element of contempt. The alleged contemnor must also have *intended* in some manner to disrupt the proceedings. "Deliberate intent on the part of an

\[^{7} \text{Id. at 155.} \]
\[^{8} \text{Id. at 156.} \]
\[^{9} \text{Id. at 200-05.} \]
attorney in pursuing a course of improper argument or prohibited conduct has been deemed necessary to justify the contempt citation.\textsuperscript{70} Nevertheless, courts often disregard this factor or are simply unaware of any intent requirement.\textsuperscript{71} Furthermore, some courts, while acknowledging the element of intent as part of a contumacious offense, determine its presence merely by relying upon the assumption that one intends the "natural consequences" of his own actions.\textsuperscript{72} Failure to consider intent in holding an attorney in contempt has unfortunate results, for it "could serve to seriously impede effective advocacy of lawyers and subvert the independence of the bar if lawyers were subject to contempt charges based on zealfulness and no more."\textsuperscript{73} Fearing such a result, it has been urged that "[a] more rigid insistence on the intent requirement for criminal contempt punishment is needed."\textsuperscript{74}

Part of the difficulty with the intent factor is that the meaning of the word "intent" is uncertain. In one sense, the word may indicate a need to look at the subjective thoughts and considerations which motivated the alleged contemnor's conduct. In another sense, however, the word may simply mean that one measures the supposed contemnor's conduct against some standard to see if it can be concluded that the obstructing conduct was intentional. In addition, as pointed out in Disorder in the Court, there is a lack of judicial clarity in this area, with courts taking vacillating and, at times, contradictory positions.\textsuperscript{75} Because of these problems, this study concluded: "Although we recognize that 'intent' is sometimes said to be an essential element of any crime, we think that in the context of contempt it is at best a distracting concept and at worst a misleading one."\textsuperscript{76} However, the report did not completely abandon the concept of "intent" as an element of contempt. Rather, the study looked to the Seale case for a resolu-

\textsuperscript{70} Note, 25 Me. L. Rev. 89, supra note 14, at 94.
\textsuperscript{71} Note, 39 S. Cal. L. Rev. 463, supra note 12, at 465.
\textsuperscript{72} Id.
\textsuperscript{73} Dobbs, supra note 8, at 265. This statement from Dobbs is quoted by the court in the Seale case, 461 F.2d 345, 368 n.44.
\textsuperscript{74} Id.
\textsuperscript{75} DISORDER, supra note 14, at 108-09.
\textsuperscript{76} Id. at 109.
tion of the conflicting views as to the meaning of "intent" and its place in the context of attorney contempts.

In Seale the Seventh Circuit set forth the basic elements of contempt under federal law and held that "intent to obstruct" was a required element of a contemptuous offense. In reaching this conclusion the judges initially stated:

[T]his requirement has received a variety of treatment by different courts. For example, while numerous courts, including this Court, have apparently required a specific finding of wrongful intent . . . a standard urged by appellant Seale, the Government has vigorously argued that the lesser requirement enunciated in Offutt v. United States, 232 F.2d 69 (D.C. Cir.), certiorari denied, 351 U.S. 988 . . . (1956), be applied. In Offutt, the Court established a two-part test for the intent requirement.78

Apparently, the Offutt test was based upon the nature of the contempt. If the conduct was "clearly blameworthy," intent need not be shown but if it was not so clear, then there would be no contempt absent a showing of "some sort of wrongful intent."79 Based upon its analysis, the Seale court reached the conclusion "that the better position is strictly to require a finding of intent in every case,"80 with proof beyond a reasonable doubt of this intent to be an essential part of the contempt case.

The court, however, did not stop there, for it realized that the problem was more complex. Recognizing that requiring a showing of "intent" in order to punish for contempt without defining in some form what was meant by that term would be of little value, the court pointed to the extreme disparity in judicial treatment of the topic. One view holds that "all that is required is a willful or volitional act without regard to the known or intended consequences of the act."81 The opposing position, expounded by Seale in this case, is that a showing of actual or "culpable" intent to obstruct justice is required to

78 461 F.2d 345, 367 (7th Cir. 1972).
79 Id.
80 Id. at 367-68.
81 Id. at 368.
punish for contempt. The court’s response to these divergent claims was: “To us, neither formulation offers a viable standard. The minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.” The court thus sought to establish some objective criteria, based upon volition and reasonable knowledge, for resolving the issue of intent. It rejected the view that intent must be presumed or that one must intend the “natural consequences” of his acts. The court took the position that intent in some form was an essential feature of a contumacious offense and that absent a showing of the requisite intent, a contempt conviction could not be sustained.

The Seventh Circuit carried its formulation of the intent factor over into the area of attorney misconduct. In the Dellinger decision the court stated: “[A]n attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.”

Disorder in the Court praised the stance taken by the Seale court, yet the report also asserted that what the court had called intent was not really intent. When dealing with attorneys involved in the conflict of a trial, it would seem particularly appropriate to emphasize, as the courts did in Seale and Dellinger, that the lawyer’s conduct must be intentional and willful in order to be found contemptuous. Otherwise, zealous and forceful arguments by the advocate would be threatened.

82 Id.
83 Id.
84 461 F.2d 389, 400 (7th Cir. 1972). The Sixth Circuit decision in United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973), also emphasized the need for intentional attorney misconduct in order to justify a contempt citation. The court stated that an “essential element of [criminal] contempt is an intent either specific or general, to commit it.” The view was expressed that “[b]y definition, contempt is a willful disregard or disobedience of a public authority.” By way of concluding the court stated: “The requisite intent may of course be inferred if a lawyer’s conduct discloses a reckless disregard for his professional duty. In the appellant’s case, however, there was no evidence that he deliberately or recklessly disregarded his obligation to the court, or that he intended any disrespect for the court.” Id. at 398.
85 DISORDER, supra note 14, at 110.
To reject a consideration of intent because of potential difficulties in resolving the issue is clearly wrong. The *Seale-Dellinger* standards, while not the only ones available, have value. They acknowledge that some form of intent is required for an attorney’s conduct to be contumacious. Secondly, these standards emphasize that in order to find the requisite intent on the part of the trial lawyer, a court must conclude that at the time of the violative conduct, the attorney knew or should reasonably have known his conduct was obstructive. In assuming this stance, the court recognized that an advocate’s conduct, although obstructive, may not be contemptuous if he acted without reasonable knowledge that such conduct was indeed obstructive. At least theoretically, such standards may protect the overly zealous attorney from possible arbitrary punishment, while permitting conduct which is clearly wrongful to be effectively sanctioned.

C. Good Faith

Bearing on both “obstruction” and “intent,” the element of “good faith” should be considered in determining whether an attorney’s conduct is contumacious. In this context, a finding of good faith serves as a limiting or mitigating factor. A court which recognizes the difficult position of the trial lawyer, attempting to provide his client with the best possible defense, should consider the circumstances surrounding the offensive actions and whether the attorney acted in good faith in so conducting himself. Of course this does not mean that a good faith motivation should excuse all actions on the part of counsel. What it does mean, however, is that in assessing whether the attorney’s actions were in fact contemptuous and, if so, the kind and degree of sanction called for, the judge should take into consideration the attorney’s attitude and any “good faith” motivations of his conduct.

A court, deciding if a trial attorney’s conduct is contemptuous, should consider the various factors set out above, paying

---

66 *Id.* at 110-11.

67 *Note, 25 Me. L. Rev. 89,* supra note 14, at 94; *Note, 1971 Wis. L. Rev. 329,* supra note 14, at 335. For a case dealing with the “good faith” issue see *State v. Pokini,* 521 P.2d 668 (Hawaii 1974).
particular attention to whether an obstruction of the judicial process results from the conduct and whether the requisite intent is present. Likewise the attorney's good faith should be considered in mitigation of the offense. Unfortunately, courts often neglect these elements and simply hold the attorney in contempt with little regard for such "formalities." There may be many reasons for this; but it would seem that one prominent reason is that, in its haste to vindicate its own authority and punish what is considered a crime against the court itself, a court may often neglect technicalities or procedural rules. Clearly, this is not proper. Still, however, it is obvious that a court must have effective devices by which to control the proceedings so that it can maintain at least the minimum decorum necessary for proper judicial administration. To strike an even balance here, particularly in our adversary, adjudicatory system, can often be difficult.

D. The Kentucky Court's Assessment of Taylor's Conduct

In the Taylor case there were nine alleged instances of criminally contemptuous conduct, consisting of disrespectful "tone of voice" or gestures, disobedience of the judge's orders, and continued argument on a particular point already ruled upon by the court. On appeal, Taylor asserted that none of

88 The nine criminal contempts of Taylor, as certified in the corrected judgment by Judge Hayes were as follows:

Contempt 1. Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions to the jury as a whole. He evidenced utter disrespect for prospective jurors.

Contempt 2. The Court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the Court's ruling.

Contempt 3. During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the Court and Mr. Taylor was advised by the Court that he could use it in his final summation to the jury. Mr. Taylor was disrespectful to the Court by his tone of voice and manner when he replied, "I'll keep that in mind your honor."

Contempt 4. During cross examination of Narvel Tinsley by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the Court
his cited actions amounted to contempt because none were obstructive in result or done with the requisite intent. They were at most, he argued, disrespectful to the court. Concerning and refused to take his seat at counsel’s table as ordered.

Contempt 5. Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, as attorney and Legal Advisor to the Louisville Police Department. Mr. Taylor accused the Court of disallowing admittance of black persons in the Courtroom and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom.

Contempt 6. The witness, Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the Court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the Court’s order and ruling by continually reading parts of the statement out of context.

Contempt 7. Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the Court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the Court’s ruling.

Contempt 8. The Court directed Mr. Taylor to call his witness. He called Lt. Garrett, Louisville Police Department. After this witness was sworn and took the stand, a deputy sheriff advised the Court that Mr. Taylor’s aide was not searched, as everyone else had been upon entering the Courtroom. Mr. Taylor ordered the deputy to search his aide. The Court ordered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in Court’s chamber.

Contempt 9. Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the Court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as “this nice police officer.”

494 S.W.2d 737, 739-40 (Ky. 1973).

The California Supreme Court has also dealt with the issue of disrespect in tone of voice as a basis for contempt. In In re Hallinan, 459 P.2d 255, 81 Cal. Rptr. 1 (1969), the court held that where the words spoken by the attorney were not themselves insulting, a mere recital, in conclusionary terms that the attorney’s tone was disrespectful was not enough to sustain a contempt conviction. The court felt that in defending a client, an attorney must be given broad freedom of expression and that in the heat of courtroom debate the lawyer must be permitted to be persistent. In Gallagher v. Municipal Court, 192 P.2d 905 (Cal. 1948), Justice Traynor followed the same sort of reasoning. Where an attorney’s language was not in itself disrespectful, conclusions by the judge that it was loud, insolent and so on, were, in Traynor’s opinion, not enough to uphold a criminal contempt conviction. It is equally clear, however, that an open refusal by an attorney to obey a court’s order, even if the order is wrong, is contemptuous. See Seale v. United States, 461 F.2d at 371.

Brief for Appellant at 27-36, Taylor v. Hayes, 494 S.W.2d 737 (Ky. 1973) [hereinafter cited as Brief for Appellant].
ing such disrespect, Taylor stated: "[M]aking disrespectful remarks to the Court, about the Court or in reference to witnesses simply does not constitute criminal contempt where the making of such a remark does not involve an actual and material obstruction to the administration of justice." 90

Judge Hayes contended that the record fully sustained each finding of contempt and could in fact have supported more. 91 Accepting Taylor's definition of contempt as "an actual obstruction of the administration of justice with some form of intent to obstruct with full appreciation of the contentious role of trial counsel and his duty of zealous representation," 92 Judge Hayes concluded that Taylor's conduct was indeed contemptuous. 93

The Kentucky Court of Appeals completely rejected Taylor's arguments. The Court's opinion made no mention of the factors of obstruction, intent or good faith, 94 but instead stated: "Daniel Taylor was guilty of each and every contempt as charged by the court, and if the court had so desired there could have been numerous other charges assessed in the course of the trial." 95 The Court of Appeals made it abundantly clear that in its opinion, Taylor's conduct was unquestionably contemptuous. As sources of these contempts, the Court pointed not only to his disrespectful conduct, but also to his "innumerable objections, statements, and requests for conferences in chambers," 96 and to the fact that he "continuously disregarded the court's orders and directions." 97 Commissioner Catimma, in

90 Id. at 35.
91 Brief for Appellee at 24-31, Taylor v. Hayes, 494 S.W.2d 737 (Ky. 1973) [hereinafter cited as Brief for Appellee].
92 Id. at 24. The judge's brief expresses the view that intent can be determined by relying upon the concept that one intends the natural consequences of his actions. "If a trial judge tells a lawyer not to do something and he does it anyway, we can only assume he intended to do it and obstruction of justice is apparent." Id. at 26.
93 Id. at 24-31.
94 While the Court cited the Seale case on the point of obstruction, it did not in fact discuss this factor in any detail. The Court did conclude that Taylor's actions were deliberate and disruptive but again failed to discuss the meanings of such terms or how it reached this conclusion.
95 494 S.W.2d at 741.
96 Id. at 740.
97 Id. at 740-41.
emphasizing Taylor’s disrespect, indicated that even Taylor’s appellate brief “demonstrates something less than complete and total respect for the judicial system of this Commonwealth.”

The ruling of the Kentucky Court largely followed the line of reasoning, developed in its earlier decisions, that disrespectful conduct by an attorney amounts to a contempt of court. Generally, it appears that Kentucky courts have not considered intent or good faith in determining whether an attorney’s conduct before a court is contemptuous. Further, the Kentucky view appears to be that obstruction can be presumed from disrespect. Although in some cases, such as Lewis v. Rice, the Court has indicated that a lawyer could not be held in contempt for “charging in good faith merely that the judge is biased or prejudiced” in a written motion to vacate the bench, Kentucky courts have generally emphasized the duty of respect owed by an attorney to the court, a duty which may not be breached in defense of a client. In Huggins v. Field, the Court forcefully announced:

Attorneys are officers of the court, and as such are called upon to uphold the dignity of the court and to respect its authority, and they have no right, under the guise of protecting the interest of their clients, to depart from the well-established rules of practice in order to unnecessarily insult, scandalize, and otherwise impugn the honor and integrity of the court. They should confine their utterances to such as the law allows, and in exercising their rights on behalf of their clients they should do so in a respectful manner, and employ only respectful and decorous language.

In the context of such prior decisions, it is not unusual that the Court of Appeals in Taylor v. Hayes emphasized “respect,”

---

11 Id. at 741.
12 See cases cited in note 7 supra.
10 Id. at 804 (Ky. 1953).
81 Id. at 805.
102 74 Ky. (11 Bush) 95 (1875).
103 Id. at 905. For cases following Huggins, see Casteel v. Sparks, 226 S.W.2d 533 (Ky. 1950); Marshall v. Hancock, 188 S.W.2d 477 (Ky. 1945). See also Miller v. Stephenson, 474 S.W.2d 372 (Ky. 1971); In re Woolley, 74 Ky. (11 Bush) 95 (1875). See text accompanying notes 18-23 supra for a discussion of the lawyer’s status as an “officer of the court.”
while largely ignoring the questions of actual obstruction, intent and good faith. The Court apparently adopted the view, largely rejected in the Seale case, that "clearly blameworthy" conduct is per se contemptuous, and evidenced no real concern for the substantive factors constituting a contumacious offense. While these factors should form the nucleus of a determination of contempt, the Kentucky Court, like many others, did not really deal with them. Although conduct such as Taylor's may well be contemptuous, to disregard the basic factors outlined above in judging counsel's conduct places a heavy burden on the trial lawyer who must be "respectful" to the court and at the same instant may be "persistent, vociferous, contentious and imposing even to the point of appearing obnoxious," in advocating his client's rights.

The Taylor decision points strikingly to the need for courts to more carefully consider an attorney's conduct under trial circumstances, even where the attorney's guilt may seem to be "obvious," before sustaining a conviction for criminal contempt based upon "disrespect" or zealous and lengthy argumentation. By employing the factors outlined above, a court can more readily distinguish between that conduct of trial counsel that is truly contumacious, and that which, though offensive to the court's sensibilities, is yet nonobstructive and simply the result of a hard fought adversary adjudication. Again, it should be noted that the concern here is not with the actual guilt or innocence of Taylor, or any other trial attorney. What is significant is that because of the nature of this offense, a court should give full and serious consideration to the essential elements of a contumacious offense and not simply presume guilt from the nature of the charge.105

104 In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).
105 Taylor attempted to have the Supreme Court assess his substantive guilt. Petition for Writ of Certiorari at 28-31, Taylor v. Hayes, 418 U.S. 488 (1974) [hereinafter cited as Petition]. See also Brief for Association of Trial Lawyers of America as Amicus Curiae at 3-6, Taylor v. Hayes, 418 U.S. 488 (1974). However, the Supreme Court was unwilling to delve into this area of state substantive law. Nevertheless, Justice White indicated his feeling that Taylor's conduct was improper. 418 U.S. at 503.
IV. THE ATTORNEY'S DUE PROCESS RIGHTS

Closely joined to the problem of what type of conduct constitutes contempt is the issue of the procedure by which the attorney's guilt or innocence is adjudged. In the summary procedure for contempt, two particular points in time are important. A trial judge, under accepted law, may cite and convict for contempt immediately upon its occurrence in his presence, during trial. Alternatively, and more usually with attorneys, the judge may delay his action in response to contemptuous conduct until the close of the trial, at which time he cites and convicts the attorney of contempt for conduct occurring previously in his presence during trial. In both of these situations the issues arise as to whether the judge must grant the accused contemnor notice and an opportunity to be heard before imposing punishment, and whether the judge who cites for contempt may also determine guilt or innocence and impose punishment.

A. Due Process Rights: The Conflicting Positions

Several reasons can be advanced in support of affording the accused contemnor notice and some form of hearing as part of the contempt procedure. An initial reason is that the factual issues of obstruction, intent and good faith, as well as the issue of whether contempt is the proper sanction to employ, must be adequately resolved. It seems obvious that some form of notice and hearing are necessary to a proper determination of these issues—a hearing allowing an attorney to explain or apologize for his conduct, and notice allowing him to adequately prepare his defense. A second reason indicating the

---

106 See note 10 supra.

107 The position in support of a hearing to deal with a lawyer's allegedly contemptuous performance is set forth in Note, 1971 Wis. L. Rev. 329, supra note 14, at 353:

To ensure vigorous and effective advocacy and the independence of the bar, the power to summarily punish an attorney for contempt ought properly accede to traditional due process procedure. The trial judge would retain the substantive power to indict for contempt, but the procedural power would then be defined according to the constitutional requirements of notice, hearing, and an opportunity to defend. This procedure is essential for both the determination of guilt and the assurance of meaningful appellate review.

need for notice and a hearing in contempt cases is the general inadequacy of appellate review in such cases. The summary procedure makes no provision for the accused attorney to defend himself, thus compelling the appellate court to rely solely on the trial record and the judge's own descriptions of the conduct in assessing the propriety of the trial court's sanction. Absent a hearing, the issues of obstruction, intent and good faith can only be inferentially examined by way of the "facts" present in the record. Furthermore, because trial courts have often found contempt in such items as tone of voice, stance, facial expression and so on, a record containing no more than the trial judge's own description of the conduct places the appellate court in no position to adequately review such contempt convictions. Based upon such a record the appellate court must either totally defer to the trial judge's opinion or simply reject it.

Third, due process of law requires both notice and a hearing in such cases. To deny these basic procedural safeguards is to deny fundamental concepts of our constitutional system. Clearly, the imposition of serious criminal penalties for contempt, without affording the accused notice or a hearing, can-

---

109 Until recently, Kentucky law denied appellate review in criminal contempt cases. See KRS § 21.060(1)(c): "Appeals may be taken to the Court of Appeals as a matter of right from all final orders and judgments of circuit courts in civil cases except: (c) judgments punishing contempts." This statutory limitation on appellate review has been considered by the Kentucky Court in several cases. See Levisa Stone Corp. v. Hays, 429 S.W.2d 413 (Ky. 1968); Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961); Adams v. Gardner, 195 S.W. 412 (Ky. 1917); Gordon v. Commonwealth, 133 S.W. 206 (Ky. 1911); French v. Commonwealth, 97 S.W. 427 (Ky. 1909). From these cases the following qualifications to the statutory limit upon appellate review emerged: (1) the statutory provision did not prohibit an appeal on the issue of the legality or excessiveness of the punishment imposed; (2) although the Court of Appeals could correct illegal or excessive penalties, it could not review the substantive issue of contempt; and (3) this statute was applicable only to criminal contempts. Review of contempt convictions was afforded despite this statutory provision by way of the writ of prohibition.

In Miller v. Vettiner, 481 S.W.2d 32 (Ky. 1972), the Court of Appeals held that the limitations on appeal of contempt convictions imposed by KRS § 21.060(1)(c) did not apply to those contempts for which punishment was not limited by statute. Thus, the present law of Kentucky permits an appeal of a criminal contempt conviction.

110 Note, 39 S. CAL. L. REV. 463, supra note 12, at 466. See also note 89 supra & note 121 infra.

111 See notes 12-14 supra.
not be squared with well-established due process concepts.

Furthermore, to conform with the rudimentary principles of due process and fairness, any such hearing should be before a judge other than the one who has brought the contempt charge. A basic tenet of our judicial philosophy is that the court, in deciding a case before it, must be impartial. "The principle that no man should be a judge in his own cause is a principle early accepted in American law."112 Although the requirement of judicial impartiality does not demand judicial indifference,113 when the issue to be dealt with focuses on conduct allegedly contemptuous of the court and trial judge, a real question arises as to that judge's ability to decide the case without bias. As a result, summary adjudication of criminal contempt by the offended judge represents an apparent deviation from the principles of impartiality and due process of law.

In his dissenting opinion in *Green v. United States*,114 Justice Black observed that in a contempt case:

> [w]hen the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I have always thought to be an indispensible element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him.115

---

112 Kutner, *supra* note 14, at 70. The Supreme Court established this fundamental rule in the case of *In re Murchison*, 349 U.S. 133, 136 (1955):

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge of his own cause and no man is permitted to try cases where he has an interest in the outcome. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."


115 *Id.* at 199 (Black, J., dissenting). For another opinion by Justice Black which presents an interesting contrast to his dissent in *Green*, see FTC v. Cement Institute,
In *Disorder in the Court*, the Special Committee on Courtroom Disorder also questioned whether the offended judge should rule on the matter. "Due process of law," the report stated, "requires an impartial judge in all criminal cases. This problem is particularly acute in contempt cases, where the actions or words of an individual accused of contempt often antagonize the sitting judge, raising questions about his suitability to act on the charge."

The argument against summary adjudication by the accusing judge is that although criminal contempt is an offense against the court, often an attorney's conduct is considered an affront to the trial judge himself. As a result, while "[i]deally the power given to a judge must be separate from his emotions. . . . [j]udges are human and may in the heat of the moment confuse personal affront with judicial disruption,"

To insure the impartiality necessary to due process, another judge, uninvolved with the incident or issues, should consider the contempt charges in a separate hearing after proper notice.

The case for denying notice and a hearing before an impartial judge draws its strength from the basic rationale for summary contempt proceedings. One reason given for denying a hearing before another judge is that since the offense has occurred in the very presence of the judge, there is no need for a separate hearing. Having witnessed the contempt, this judge

---

333 U.S. 683 (1948).


In *Sacher*, the majority indicated that any direct contempt would be regarded by the trial judge as an offense against him personally. 343 U.S. at 12. See the dissents of Mr. Justice Black, 343 U.S. at 14-15, and Mr. Justice Frankfurter, 343 U.S. at 33-35, in *Sacher* for additional argument against permitting the offended judge to adjudicate a contempt case.


18 The general concept of judicial impartiality has been the basis of a number of Supreme Court decisions in noncontempt cases. See *Ward* v. Village of Monroeville, 409 U.S. 57 (1972); *Tumey* v. Ohio, 273 U.S. 510 (1927). See also American Cyanamid v. FTC, 363 F.2d 757 (6th Cir. 1966).
can himself assess guilt or innocence without a hearing; and, to require a hearing before a different judge, it is argued, would be no more than a waste of time and judicial resources.\textsuperscript{119} Secondly, those disputing the right to a hearing consider appellate review wholly adequate to remedy any deficiencies in the trial judge’s rulings and to insure that the punishment imposed is both legal and not excessive.\textsuperscript{120}

A third argument advanced against requiring a separate hearing, in cases of direct contempt, is that the trial judge must have this summary power in order to maintain the order and integrity of his courtroom. To demand that there be notice and a hearing before a different tribunal on issues surrounding the alleged contempt would, the argument goes, deprive the trial judge of a tool essential to the preservation of order and propriety in the courtroom.\textsuperscript{121} Lastly, it is argued by some that to require a separate hearing before a judge other than the one citing for contempt, at which that trial judge might have to appear as a witness, would adversely affect respect for the judiciary.\textsuperscript{122}

These justifications for the summary contempt procedure have been subjected to intense criticism. The critics suggest that the conclusions that the accusing judge is best able to determine contempt and that a separate hearing would be a waste of time and expense, because the accusing judge is an

\textsuperscript{119} Note, 39 S. Cal. L. Rev. 463, supra note 12, at 464-65:
If the alleged contempt occurs in the presence of the court, is there any need for a hearing? The judge, assuming his objectivity, sees the act with all its nuances. It may be argued that he is in a good position to know whether the behavior is, as a matter of law, contemptuous and whether, as a matter of law, there can be any justification for the behavior.
See also Lane, supra note 13, at 384; American Trial Lawyers Report, supra note 13, at 35-36.

\textsuperscript{120} Lane, supra note 13, at 392. "[S]trict appellate supervision of contempt convictions affords the best opportunity for minimizing the possibility of arbitrary action, particularly in those situations where the offended court has proceeded summarily without granting the contemnor a hearing." Id. Still, however, Lane is forced to acknowledge the limitations on appellate review. See also American Trial Lawyers Report, supra note 13, at 36.

\textsuperscript{121} American Trial Lawyers Report, supra note 13, at 35-36. The argument is that the threat of a later trial does not provide the trial judge with an effective deterrent to courtroom misconduct.

\textsuperscript{122} Lane, supra note 13, at 385.
“eyewitness” to the offense, are belied by several factors. First, the rationale that the “eyewitness” status of the accusing judge somehow vitiates the need for a fair hearing before an impartial judge is clearly flawed. To begin with, eyewitness testimony is never in itself conclusive of guilt in a criminal case. While it may be strong evidence of guilt, it alone is not dispositive of the issue. Why then should it be treated as dispositive in cases of criminal contempt?123

In addition, it is highly questionable that time and economics are sufficient justifications for denying the right to an impartial adjudication of criminal contempt charges. Savings of time and money can never serve as an adequate justification for the suspension of basic constitutional rights. As Justice Black pointed out in *Green v. United States*, while the summary contempt procedure may save time and funds:

> [S]uch trifling economics as may result have not generally been thought sufficient for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy.124

Moreover, courts themselves have acknowledged that appellate review is, in reality, inadequate to remedy the deficiencies of the summary contempt process.125 Finally, upon exami-

---

123 Note, 25 Me. L. Rev. 89, supra note 14, at 100.
125 Green v. United States, 356 U.S. 165, 199-200 (1958). See also Fisher v. Pace, 336 U.S. 155 (1949) (where the Court indicates that its ability to review the trial judge’s actions are limited by the record before it); DISORDER, supra note 14, at 236.
nation, the remaining arguments in support of summary contempt procedures, those that say requiring notice and a hearing would irreparably injure the functioning of an orderly court and that requiring a judge to appear as a witness in a later hearing would harm the judicial system, appear to lack substance. The need to preserve order is absent in post-verdict adjudications of contempt and it is questionable that the summary power is truly necessary to control the courtroom or the trial attorney. “That the threat of immediate punishment is a more effective deterrent than the threat of punishment somewhat later [after a separate hearing] is a highly speculative assertion.” Moreover, to say that the orderly functioning of our judicial system necessitates the retention of a power which not only goes against the grain of our entire legal philosophy but also suspends due process of law by denying notice and an opportunity to be heard and by allowing the accuser to sit as judge in his own cause, casts a dark shadow across that system. If requiring conventional due process in direct criminal contempt cases would greatly harm or destroy our legal structure, then that structure is far more unstable than even its most ardent critics would imagine. The fact is that there is no just reason for not following the dictates of due process in such cases.

Note, 39 S. Cal. L. Rev. 463, supra note 12, at 468. It has been observed that:

Note, 25 Me. L. Rev. 89, supra note 14, at 90. See also Disorder, supra note 14, at 235.

Note, 1971 Wis. L. Rev. 329, supra note 14, at 354, where the author remarks:

Note, 39 S. Cal. L. Rev. 463, supra note 12, at 469:
The adverse effects upon the judiciary allegedly caused by requiring that the accusing judge appear as a witness at a later hearing are mitigated by the fact that criminal contempt citations are rather infrequent. Furthermore, it would seem that by emphasizing impartiality and due process of law in dealing with contempts, increased respect for the judiciary would be engendered. The authors of Disorder in the Court, in discussing the prospects of the trial judge being called as a witness, concluded:

We understand the caution with which these courts have approached the possibility of requiring a judge to testify about a contempt that allegedly took place in his presence and in which he may have been involved. But we do not think that this presents a serious problem. In the exceptional case where a trial judge's testimony would be important and there is no adequate substitute available, there is no indignity or loss of prestige to the bench in requiring the judge to testify and be cross-examined.

B. Due Process Rights in Summary Contempt Proceedings: The Kentucky Cases

There are but a few Kentucky cases dealing with the issue of due process rights in criminal contempt proceedings. One early decision of some importance is In re Woolley, which dealt with an allegedly contemptuous petition for rehearing.

It is concluded that the summary method of dealing with contempts is unfair in not permitting the accused to prepare and present evidence, and in permitting the offended judge to decide the issue. Further, neither of these deficiencies is cured by the scope of appellate review currently available. The alternative procedure of a hearing before another judge would not significantly handicap the judiciary in the performance of its function. Because there is a reasonable alternative which provides persons accused of direct contempt with procedural rights generally considered necessary, the summary imposition of punishment should be held violative of due process. All direct contempts should be proceeded against by means of notice and a hearing before an independent tribunal.

DISORDER, supra note 14, at 6-8, 131.


DISORDER, supra note 14, at 231-32.

74 Ky. (11 Bush) 95 (1874).
filed with the Kentucky Court of Appeals by attorney J.W. Woolley. The petition contained "language not only disrespectful, but insulting to the court." Woolley filed a statement attempting to explain his language, but only succeeded in further irritating the Court. He was then directed to appear and show cause why he should not be held in contempt. Although he sought to avoid sanction by disavowing any intent to insult, the Court of Appeals found him in contempt. The Court ruled that since the offense was contained in a written motion to the Court, the contempt was "in the presence of the court," just as if the statements had been made orally to the judges. The Court then asserted its power to punish such a "direct" contempt summarily. Regarding the need for notice and a hearing, the Court said:

[W]hen the offense is committed in the presence of the court notice to the offender is not usually essential . . . in *Ex parte Secombe* (19 How. U.S. Court Reports, 13) an attorney, for acts committed in the presence of the court, was disbarred without notice of the proceeding and without being heard, and yet the Supreme Court held that the order disbarring him was not void as it necessarily would have been if notice had been essential under the circumstances . . . .

However, later in its opinion, the Court expressed mixed feelings about this policy.

By the rule recognized by the Supreme Court in Secombe's case respondent was not technically entitled to notice at all. But regarding that rule as of doubtful propriety and not wishing to be instrumental in introducing it into the practice of the courts of this state, we caused him to be notified to appear, and offered him such opportunities to be heard as he and his counsel desired.

Thus, the Court of Appeals, in dealing with a *contemptuous written motion*, held that it had the power to punish the contempt without notice or a hearing, but declined

---

133 *Id.* at 102.
134 *Id.* at 99-100.
135 *Id.* at 99.
136 *Id.* at 100.
to do so on the belief that such a procedure was of "doubtful propriety." The Court apparently felt that providing notice and a hearing, which would allow the attorney to explain his words and disclaim any contemptuous intent, was the better procedure.

Certain later decisions of the Kentucky Court of Appeals seem to follow the reasoning of the Woolley case. These decisions, at least with regard to apparently contemptuous written motions, emphasized the need for notice and a hearing as well as the need for judicial impartiality. For example, in the case of Marshall v. Hancock, the Court indicated:

The necessity for the exercise of the power to punish for contempt has been recognized, and the power has been enforced from an early period, but where the contempt consists of statements derogatory to the court, the power should be exercised with caution and discretion. Where the contempt consists of statements susceptible to the construction that they were intended to reflect on the integrity of the judge, opportunity should be afforded to the offender to purge himself of the contempt by explanation, apology, or retraction. The court, however, acts in its discretion in the matter.

In this opinion, a stance similar to that in the Woolley case was taken—a hearing is advisable and is the better procedure, but the trial court has the power to proceed without notice or a hearing. Furthermore, citing the Supreme Court case of Cooke v. United States, the Marshall opinion emphasized the need to avoid arbitrary or oppressive rulings in the exercise of the contempt power. The Court of Appeals indicated that in utilizing his contempt powers the trial judge should avoid any impulse to personal reprisal in order to afford the alleged contemnor a fair adjudication. Again, it should be noted that these cases dealt with written motions of a supposedly contumacious nature.

A recent Kentucky case dealing with the notice and hear-

---

137 Id.
138 188 S.W.2d 477 (Ky. 1945).
139 Id. at 479. See also Lewis v. Rice, 261 S.W.2d 804, 806 (Ky. 1953).
140 267 U.S. 517 (1925).
141 188 S.W.2d at 480.
ing issue is *Miller v. Vettiner.* This case concerned the failure of a witness to obey a subpoena, rather than the conduct of an attorney toward the court. Nevertheless, the Court undertook to present a summary of Kentucky law on the need for a hearing in contempt cases:

> [W]hat we are holding is that when the existence or non-existence of a contempt, civil or criminal, requires the resolution of a factual issue, the trial court may itself resolve that issue upon the basis of a hearing in which the alleged offender is afforded a fair opportunity to present a defense, but may not in such a case inflict a fine greater than $500 and incarceration for more than six months except upon the unanimous verdict of a jury finding the offender guilty beyond a reasonable doubt. We do not deal with cases in which the contempt is committed in the immediate presence of the court or in which the factual basis for the finding of contempt is otherwise conclusively established, except to point out that in such cases it is imperative, incident to the right of appeal, that the facts be shown by a proper record.

This summary clearly indicates: (1) that the trial judge has power to summarily punish contempts committed in his presence; (2) that if there is a factual dispute in a contempt case, either civil or criminal, a hearing is required, at which the alleged contemnor has the right to speak in his own behalf; (3) that in cases of direct contempt the presumption is that guilt of contempt is conclusively established by the trial judge and no hearing is required; (4) that even in such a case, without a hearing, an adequate record must be presented for appellate review; and, (5) that the imposition of a fine in excess of $500 and/or imprisonment for more than six months requires a jury trial on the issue of guilt or innocence. This opinion seems to establish a right to a hearing in cases, such as *Woolley* and *Marshall,* where there might be a factual issue in dispute; but it clearly holds that there is no hearing required in the case of a direct contempt. Despite its comments in earlier cases, the Court in *Miller* was apparently willing to establish the rule in Kentucky that direct contempts do not require notice and a

---

142 481 S.W.2d 32 (Ky. 1972).
143 *Id.* at 35.
hearing. Miller also sanctions adjudication by the offended judge, a result not inconsistent with cases such as Marshall and Lewis v. Rice, which reveal a concern for judicial impartiality in contempt cases, but which do not prevent the offended judge from ruling in the case. Thus, the decisions of the Kentucky Court of Appeals, while acknowledging the infirmities of the summary contempt process, have except in certain limited situations, served to sanction the process.

C. Due Process Rights and Summary Contempt: The Federal Decisions

A case frequently cited for the view that a hearing is not required in cases of direct contempt is Ex Parte Terry, decided by the Supreme Court in 1888. This case involved a wild occurrence in a federal court in California. A Miss Sarah Hill alleged that Senator William Sharon was her husband and sought a divorce and property settlement from him. Eventually, she succeeded and was awarded a substantial recovery. After Sharon's death his estate sued in federal court to set aside the earlier verdict in favor of Miss Hill, who had in the meantime married California Judge David S. Terry. The estate prevailed, but when the time came for the federal judge to read his opinion, the Terrys broke into a slug-fest with the marshal, during which Judge Terry attempted to pull a knife while his wife cursed the court and struggled with the marshals. After being held in contempt of court, Terry took his case to the Supreme Court. The Court discussed the hearing issue at length and concluded that authority established the power of a trial court to punish a direct contempt immediately, without notice, a hearing or any other proceedings. Based on this

---

144 261 S.W.2d 804 (Ky. 1953).
145 128 U.S. 289 (1888).
146 Id. at 309-10. In reaching this conclusion the Court in Terry stated: It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the
power and the premise that instantaneous action was necessary to preserve courtroom order, the Court in *Terry* upheld the use of contempt without notice or a hearing.

In a later case, *Cooke v. United States*, the Supreme Court again had occasion to deal with the issue of whether the accused contemnor must be afforded notice and a hearing. The Court discussed the *Terry* decision and its conclusion that, in the case of a direct contempt, notice and a hearing were not necessary, because the judge had witnessed the offense and such a power was essential to preserve order. The situation in *Cooke*, however, was distinguishable from *Terry*, in that Cooke's alleged contempt arose from a letter he had sent to the trial judge. Finding that the need to preserve order was not present, in such a case, and that the offense was not in the court's presence, Chief Justice Taft concluded that Cooke was entitled to notice and a hearing. The Court stated:

Due process of law in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

The *Cooke* decision recognized the power of the trial judge to punish a contempt committed in his presence immediately,

---

entire community. . . .

. . . It results from what has been said that it was competent for the Circuit Court, immediately upon the commission in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue on trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied, from what occurred under its own eye and within its hearing, that the ends of justice demanded immediate action, and that no explanation could mitigate his offense or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment.

*Id.*

* 267 U.S. 517 (1925).

* 4 Id. at 537.
with neither notice nor hearing. But the Court ruled that con-
tempts committed outside the court's view, in which factual
issues might arise, require both notice and a hearing. Still un-
resolved, however, was the issue of the use of the summary
proceedings, without notice or hearing, at the close of the trial
to punish for contemptuous conduct occurring before the court,
during the trial.

The Supreme Court approached this issue in the case of
Sacher v. United States, which dealt with contempt convic-
tions imposed on certain defense attorneys at the end of the
heated trial of several supposed communists. Speaking for the
majority, Mr. Justice Jackson concluded that, in such a case, the
trial judge could impose contempt convictions at the close
of trial without affording the attorneys notice or a hearing. The
majority clearly held that delaying punishment until the close
of trial did not extinguish the judge's power to proceed summa-
arily.

In his dissent, Justice Frankfurter questioned the validity
of the majority's conclusions, relying in part on the fact the
trial had continued until completion. "[W]hen the trial in fact
goes to completion, as here, without invoking summary convic-
tions, that in itself proves that there was no occasion for depar-
ture from the historic method of trying criminal charges, that
is, after notice and an opportunity for defense before a disinter-
ested judge." Justice Frankfurter asserted that in a case such
as this, the need to preserve order by means of summary adju-
dication was absent, and that therefore, the rationale in sup-
port of summary proceedings failed. However, the majority
apparently held the opposite view.

149 343 U.S. 1 (1952).
150 Id. at 9-11. In Sacher, the Court was dealing with federal law, but the Court's
opinion broadly indicated that notice and a hearing were not necessary. The justifi-
cation set out by Justice Jackson for such a position included the need to preserve order,
the waste of time and money involved in a later hearing before another judge, and the
ability of appellate review to remedy any deficiencies in the trial judge's actions.
151 Id. at 39 (Frankfurter, J., dissenting). See also Justice Black's dissent for his
argument in support of notice and a hearing in the case. Id. at 18.
152 Certain cases after Sacher, including Offutt v. United States, 348 U.S. 11
(1954) and Mayberry v. Pennsylvania, 400 U.S. 455 (1971), have required that the
alleged contemnor be given a hearing before a judge other than the one who cited for
contempt. The rationale of these decisions was the citing trial judge's lack of impartial-
Prior to the decision in *Taylor*, other cases were handed down by the Supreme Court which intimated that the *Sacher* decision was not the last word on the issue of whether notice and a hearing should be made available to the accused contemnor. As a result, the argument that due process of law demanded notice and a hearing for the accused contemnor remained very much alive.  

Several recent federal appellate courts' decisions have also dealt with the issues of notice and a hearing in contempt cases. For example, in *Weiss v. Burr*, a case involving the contempt conviction of a prosecuting attorney, the Ninth Circuit Court of Appeals stated:

The last and most difficult question is whether the trial court's contempt procedures in respect to the three remaining citations impinged Weiss's constitutional right to speak in
defense and mitigation before being sentenced. . . . We hold that they did. Due process requires that contemnors, such as Weiss, who are not cited and simultaneously punished for the purpose of either restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution.\textsuperscript{155}

Thus, the Ninth Circuit held that, in dealing with an attorney's contemptuous conduct during the trial, if the trial judge delays punishment until the close of the trial, due process requires that the contemnor be given an opportunity to be heard in his own behalf.\textsuperscript{156}

In a number of opinions the Supreme Court has considered the need for an unbiased judge in criminal contempt cases. In the Cooke case,\textsuperscript{157} Chief Justice Taft emphasized the importance of judicial impartiality in the exercise of the summary contempt power. He remarked:

The power of contempt is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible.\textsuperscript{158}

\begin{footnotes}
\item[155] Id. at 984. Note the court's observation that the Terry decision is outdated. Id. at 986, n.24. See also United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973).
\item[156] A final authority which might be considered in support of affording the accused contemnor notice and some occasion to defend himself is the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS, Part F(4), where it is stated:
Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.\textit{Commentary}
Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, \textit{Ex parte Terry} . . . such a procedure has little to commend it, is inconsistent with basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard however, implies that a plenary trial of contempt charges is required.
\item[157] 267 U.S. 517 (1925).
\item[158] Id. at 539.
\end{footnotes}
The Court indicated in *Sacher*\textsuperscript{159} that the citing trial judge was fully empowered to deal with criminal contempts committed in his presence, either during or at the close of the trial.\textsuperscript{160} Subsequent decisions, however, expanded the concepts set out in the *Cooke* opinion, announcing that in certain situations the broad powers of the trial judge permitted by the *Sacher* ruling would have to be curtailed in order to insure fair and impartial adjudication of contempt citations. What has evolved, unfortunately, is a confusing and at times unfair set of "standards" for assessing the judge's impartiality.

The first such decision eroding *Sacher* came in the 1954 case of *Offutt v. United States*.\textsuperscript{161} In this case the trial judge and defense counsel had engaged in extended, often hostile disputes. In examining the trial record, the Court remarked:

The question with which we are concerned is not the reprehensibility of petitioner's conduct and the consequences he should suffer. Our concern is with the fair administration of justice. The record describes not a rare flare-up, not a show of evanescent irritation—a modicum of quick temper must be allowed even judges. 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. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury.\textsuperscript{162}

The Court thus established the *personal embroilment* standard, requiring the trial judge to step down in those cases where he has become personally involved with trial counsel in sharp controversy and open hostility. Although the *Offutt* decision has been criticized,\textsuperscript{163} it has remained as a major limitation on the power of the trial judge to summarily punish misconduct.

\textsuperscript{159} 343 U.S. 1 (1952).
\textsuperscript{160} Id. at 9-12.
\textsuperscript{161} 348 U.S. 11 (1954).
\textsuperscript{162} Id. at 17.
\textsuperscript{163} Lane, supra note 13, at 382-83.
in his presence. The Court’s ruling indicated that the trial judge should represent the “impersonal authority of law;” if he becomes incapable of doing so, due to an “infusion of personal animosity” and a “lack of impartiality,” justice requires that another judge hear the contempt charges.\textsuperscript{164}

In 1971, the Court again examined the power of the citing trial judge to rule on the contemnor’s guilt or innocence. The Court announced in \textit{Mayberry v. Pennsylvania}\textsuperscript{165} that, along with the “personal embroilment” limitation established in \textit{Offutt}, where the trial judge was the target of bitter and gross insults, if he waits until the end of trial to act against the contemnor, he may not act summarily, but is obliged to have another judge hear the case.\textsuperscript{166} “[A] judge, vilified as was the Pennsylvania judge, necessarily becomes embroiled in a running bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”\textsuperscript{167} While urging that not every attack on a judge should lead to his vacating the bench, Justice Douglas’ opinion for the Court held that where the attacks upon the judge are as grossly and personally insulting as they were in this case, it should be presumed that such remarks affected the judge’s impartiality.\textsuperscript{168} The \textit{Mayberry} and \textit{Offutt} decisions thus constitute major restrictions on the power of the accusing judge to summarily

\textsuperscript{164} 348 U.S. at 16. While the \textit{Offutt} ruling has remained a significant limitation upon the trial judge’s summary contempt powers, its application has not always been simple. In \textit{Ungar v. Sarafite}, 376 U.S. 575 (1964), the Court split as to whether the situation revealed in the record called for implementing the “personal embroilment” rule of \textit{Offutt}. The record showed that in response to an attorney-witness' refusal to answer a question, the judge stated, “You are not only contemptuous but disorderly and insolent.” \textit{Id.} at 585. (The accused was given a hearing.) The majority felt the record did not indicate personal embroilment requiring judicial disqualification. \textit{Id.} Justices Douglas, Black and Goldberg dissented: “This case is a classic example of one situation where the judge who cites a person for contempt should not preside over the contempt trial.” \textit{Id.} at 592. The case serves as an example of the Court being widely split as to whether the trial judge was embroiled in a disqualifying controversy with the contemnor.

\textsuperscript{165} 400 U.S. 455 (1971).

\textsuperscript{166} \textit{Id.} at 463-64. This decision does allow a judge to act summarily, if he does so immediately, even if he is insulted. \textit{Id.} at 463, 466. \textit{See Illinois v. Allen}, 397 U.S. 337 (1970).

\textsuperscript{167} 400 U.S. at 465.

\textsuperscript{168} \textit{Id.}
dispose of contempt citations at the close of trial.

In another 1971 decision, *Johnson v. Mississippi*, the Supreme Court inserted an additional element into the judicial impartiality standard. Here, the petitioner was a civil rights worker charged with criminal contempt by Judge Perry, who subsequently presided at a hearing to decide the petitioner's guilt. After being found guilty of contempt, Johnson asserted that the judge had evidenced, by his prior conduct, prejudice against him, his attorneys, civil rights workers, their organization, and movements in general. Further, between the time the judge cited Johnson for contempt and his adjudication of Johnson's guilt, Johnson and the judge were involved in federal court litigation concerning the judge's prejudice in the selection of jurors, litigation which the judge lost. Based upon the claimed prejudice, Johnson argued that the judge should not have adjudicated his guilt in the contempt case. The Supreme Court again acknowledged the trial judge's power of "instant action" to punish for contempt in order to maintain courtroom order. Here, however, the judge's action was delayed rather than instantaneous, thus removing the maintenance of order rationale. The Court then evaluated the propriety of Judge Perry himself deciding the petitioner's guilt, and concluded that the petitioner should have been afforded a hearing before another judge. In reaching this conclusion the Court stated:

[W]e do not rely solely on the affidavits filed by the lawyers reciting intemperate remarks of Judge Perry concerning civil rights litigants. Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before "an unbiased judge" is essential to due process.\(^{169}\)

The *Johnson* case adds a new dimension to the *Offutt* and *Mayberry* decisions. It is concerned, at least in part, with a judge's attitudes and adverse position towards the alleged con-

\(^{169}\) 403 U.S. 212 (1971).

\(^{170}\) Id. at 215-16.
temnor, independent of any controversy, argument or insult that might have arisen during the trial. Under *Johnson*, a showing of the trial judge's adverse position and attitude toward the contemnor may compel the judge to excuse himself and have another judge hear the contempt charges.

In sum, this trio of cases requires the trial judge to step down: (1) when he becomes "personally embroiled" with the alleged contemnor during trial—*Offutt*; (2) when he has been so grossly insulted at trial that bias must be presumed—*Mayberry*; and (3) when he has evidenced a position and attitude clearly adverse to the alleged contemnor—*Johnson*.

These significant limitations on the broad power of the citing trial judge to rule in contempt cases have not gone unchallenged. In particular, the standards of *Offutt* and *Mayberry* have been criticized for allowing unfair and illogical results. It has been remarked that, under the rule of these cases, "[t]he attorney whose behavior is insufficiently provocative to embroil the judge in a manner visible on the record will have fewer procedural rights than the attorney whose conduct is sufficiently provocative to create a record indicating personal embroilment." A similar stance is taken in *Disorder in the Court*. Asserting that the standards of *Mayberry* are "paradoxical," this study goes on to comment: "[A]s a defendant becomes less insulting and his guilt therefore less certain, his right to the procedural safeguard of a plainly unbiased judge becomes less sure." This has led some to conclude: "It would seem more realistic to assume that no judge in a trial court before which allegedly contemptuous acts are committed can be sufficiently disinterested to meet the impartial tribunal test of due process." The Supreme Court has itself remarked: "It

---

111 Note, 1971 Wis. L. Rev. 329, supra note 14, at 341. See also Note, 25 Me. L. Rev. 89, supra note 14, at 95.

112 *Disorder*, supra note 14, at 226. The paradox here is that Taylor's acts were not disrespectful enough to guarantee himself full procedural rights. If he had clearly insulted Judge Hayes, he would have been assured a full hearing before another judge. Without a great deal of effort one can imagine a situation where these standards could encourage further disrespect by an already accused contemnor in order to secure greater procedural protection.

113 Note, 39 S. Cal. L. Rev. 463, supra note 12, at 466.
is almost inevitable that any contempt of court committed in
the presence of a judge during a trial will be an offense against
his dignity and authority. From this position it is but a short
and logical step to the view that, in order to insure full due
process rights for the accused attorney, the trial judge citing for
contempt should step aside and have another judge rule on
guilt or innocence.

D. Taylor v. Hayes: The Kentucky Court's Approach to the
Due Process Issues

In Taylor v. Hayes, the Kentucky Court of Appeals was
asked to deal with the issues of Taylor's right to notice of the
contempt charges against him and his right to a hearing before
a judge other than Judge Hayes. Taylor's basic argument was
that due process required that he be given reasonable notice
and the opportunity to be heard before an impartial judge prior
to the imposition of punishment. Taylor asserted that during
the trial, as he was cited for contempt, he was not permitted
to respond; and, that at the trial's close, when Judge Hayes
sentenced him on multiple counts of contempt, his efforts to
reply were met by a threat from Judge Hayes to have him
gagged. Further, Taylor contended that Judge Hayes was "per-
sonally embroiled in controversy with [him] . . . so that he
could not impartially sit in judgement on a contempt
charge." Citing Offutt, Mayberry and Johnson, as well as

114 Sacher v. United States, 343 U.S. 1, 12 (1952). See also DISORDER, supra note
14, at 229.
115 494 S.W.2d 737 (Ky. 1973).
116 Brief for Appellant, supra note 89, at 4-8.
117 Id. at 8. In support of his claim that Judge Hayes was not impartial, Taylor
cited the following:

The Court: (interrupting) I've heard that, Dan, a hundred times. I real-
ize what you're trying to do. You've got a job to do, but on the other hand,
it's my opinion—I think you're putting on a show. That's my opinion.

. . . .

The Court: —you all were talking, and I can't blame the guy too much
for that, but on the other hand, he is getting away from the questions and
knowing him, if you give him an inch he'll take a mile. I might as well sit on
him right now.

. . . .

Judge Hayes "raps" on bench showing his disapproval of Taylor's ques-
tioning.
Judge Hayes characterizes Taylor's actions as his "antics."

Taylor claims Judge Hayes continually interfered with his efforts to question witnesses.

Mr. Taylor: Does your Honor understand that my purpose is to defend my case?
The Court: I think that's probably what you're here for. I'm not sure.

Taylor claims Judge refused to admit when he was mistaken, refused to inform Taylor of certain items and generally favored the prosecution.

Mr. Taylor: The objection is that he uses the word 'also' as inferring that he's got these confessions.
The Court: Don't go through all those configurations and put on an act.

Taylor points out the racial issue which disturbed Judge Hayes during the trial. Hayes insisted race was not involved and that Taylor was trying to make this a racial and political case and that he, Hayes, would not permit this.

Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know, five months of my life wrapped up in this case, and maybe more than that—
The Court: (interrupting) Before its over, you might have a lot more than that.

Mr. Taylor: Would the Court care to amplify on the meaning of that?
The Court: The Court just made a statement.

Mr. Taylor: Sir I didn't—
The Court: (interrupting) The Court just made a statement.

Mr. Taylor: Yes, sir, and I asked if the Court would care to expand on the meaning of—
The Court: (interrupting) I don't have to explain my comments.

Id. at 10-18.

Many other exchanges are cited by Taylor to illustrate the hostile mood of the court, but perhaps the best illustrations are Judge Hayes' closing comments:

The Court: Mr. Taylor, the Court has something to take up with you, sir, at this time.

Mr. Taylor: Well, I'll be right here, Judge.
The Court: I've for two weeks sat here and listened to you. Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years on this bench and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon trickery; it doesn't mean that it's based upon plain confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.
other decisions, Taylor argued that the judge was manifestly hostile to him and so personally involved as to deny him his due process right to a fair adjudication. It was Taylor’s claim that Judge Hayes had with “actual intent” sought to “bait” him and “abuse” him and thereby “to completely curb the defense abilities” of Taylor, thus insuring a verdict against the murder defendant.

In response, Judge Hayes maintained that Taylor had been permitted to respond and defend himself. Taylor, he said, “was given ample and adequate opportunity to be heard in defense and mitigation.” The Judge further asserted that “nothing in the record shows that [he] . . . was personally embroiled in a controversy with appellant so as to prevent an impartial judgement in a contempt case.” Judge Hayes’ attorneys contended that Taylor’s allegations of bias and lack of impartiality were “completely unfounded and patently ab-

---

It’s a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you’re not. I want the jury to hear this; I want the law students of this community to hear this, that you’re not the rule, you’re the exception to the rule.

Mr. Taylor: (interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself. [sic].

Mr. Taylor: I would respond to you, sir—

The Court: (interrupting) You’re not responding to me on anything.

Mr. Taylor: (interrupting) Oh yes, I will.

The Court: No, you’re not either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (interrupting) Unless you intend to gag me—

The Court: (interrupting) I’ll do that—

Mr. Taylor: (interposing) My lawyers will respond to you—

The Court: (interposing) I’ll do that, sir.

Id. at 28-29.

Judge Hayes then proceeded to cite Taylor on nine counts of contempt and sentence him to 54 months in prison.

178 Id. at 9.

179 Id. at 10. Taylor also argued that Judge Hayes viewed himself as under a personal attack, pointing to the denial of bail, the Judge’s attempt to disbar him and to the severity of the sentence imposed as additional factors revealing Judge Hayes’ bias. Id. at 21-22.

180 Brief for Appellee, supra note 91, at 10.

181 Id. at 12.
The Court of Appeals rejected Taylor's claims that his due process rights had been violated by denial of notice or a hearing before an unbiased judge. The Court made it clear that, in its view, Taylor was at all times aware of the nature of the contempt charges against him and was in no position to claim otherwise. Further, the Court apparently reached the conclusion that any response permitted by Judge Hayes was wholly adequate to conform to due process requirements. The opinion, however, failed to mention Taylor's efforts to respond during the heated confrontation at the trial's end. The Court also refused to accept the arguments that due process, as outlined in *Offutt*, *Mayberry* and *Johnson*, commanded that Judge Hayes step aside in deciding the contempt charges. Discussing at length the *Offutt* case, the Court concluded that, unlike the situation in that case, here "there is no evidence of personal embroilment or any type of controversy with Taylor." One source of some difficulty for the Court, however, was Judge Hayes' closing remarks concerning Taylor's conduct, remarks similar in nature to those made by the trial judge in the *Offutt* case. In *Offutt* the Supreme Court had pointed to these statements as revealing the judge's true bias against the accused contemnor. Nevertheless, the Kentucky Court did not recognize Judge Hayes' statements "as clearly demonstrating bias." Instead, these remarks and threats were characterized by the Court as "more akin to a declaration of a charge against Taylor based upon the Judge's observations and not a constitutionally disqualifying prejudgment of guilt." The Court found that although the judge's comments were inappropriate, in light of Taylor's "obvious guilt," they did not demonstrate sufficient bias to demand disqualification.

The Court further concluded that under the rule of dis-

---

182 *Id.* at 13. The Judge asserted that he had shown commendable restraint throughout the trial and that Taylor's arguments alleging bias were sustained only by lifting parts of the record out of context. *Id.*

183 494 S.W.2d at 741-42.

184 *Id.* at 744.

185 *Id.*

186 *Id.*

187 *Id.* at 745.
qualification set out in *Mayberry*, Judge Hayes was not required to excuse himself. Although *Mayberry* requires a judge who has been subjected to bitter and harsh personal attacks to disqualify himself in any related contempt proceedings, in this case the Court stated: "It is crystal clear from the record that at no time did Daniel Taylor ever indulge in any personal attack upon the Judge."\(^{188}\)

In arriving at its decision that Judge Hayes could, under present Supreme Court standards, adjudicate Taylor’s contempt charges, the Kentucky Court of Appeals relied heavily on the case of *Ungar v. Sarafite*.\(^{189}\) Although the *Ungar* decision was a debatable ruling by a closely divided Supreme Court, the Kentucky Court of Appeals was convinced that it clearly justified Judge Hayes’ actions.\(^{190}\)

The Kentucky Court’s decision demonstrates the inadequacy of the *Offutt-Mayberry* standards. The “personal embroilment” test is elusive. *Ungar*, the case relied upon by the Court of Appeals to illustrate a lack of personal embroilment, was disputed by three Supreme Court Justices, who reached a diametrically opposite conclusion from a reading of the same record and remarks. Thus, this standard may not be particularly well suited as a guide to proper appellate review. Secondly, the conclusion of the Court of Appeals that Taylor was not so insulting to Judge Hayes as to call into force the *Mayberry* ruling graphically illustrates the inadequacy of that standard. Not only may such a standard encourage attorney disrespect, but it, in effect, turns due process on its head by giving those more clearly guilty of gross insults greater procedural safeguards and assurances of impartiality than those whose guilt is less apparent. Thus, the view can be reached, from an examination of the Kentucky application of the *Offutt-Mayberry* standards, that those standards are inadequate, contradictory, confusing and should be replaced by a more logical and fair rule.

---

\(^{188}\) *Id.* at 744.  
\(^{189}\) 376 U.S. 575 (1964).  
\(^{190}\) See note 164 *supra* for a discussion of this case and the conflicting views of the Justices.
E. Taylor v. Hayes: The Supreme Court's Decision on the Due Process Issues

In the arguments both for and against the granting of certiorari, major issues arose as to whether due process of law mandated that Taylor be provided notice of the specific charges against him and an opportunity to defend himself at a hearing before another judge. Taylor argued that he was never afforded proper notice of the charges against him and that he was wrongfully prevented from defending himself. Further, Taylor asserted that the events both during and at the close of the trial clearly revealed Judge Hayes' bias.

Judge Hayes responded that due process had indeed been afforded Taylor. Citing several decisions for the proposition that in a case of direct contempt committed in open court, notice and a hearing were not required, Judge Hayes maintained that Taylor had been given more than his due, since he had been permitted to make some response. The judge also contended that his conduct evidenced no unfairness or bias.

In granting certiorari, the Supreme Court specifically chose to deal with the notice-hearing issue, as well as the issue of trial judge disqualification. In doing so, the Court accepted the opportunity to examine some of its prior decisions, particularly Sacher, as to the need for proper notice and a hearing in criminal contempt cases. The briefs submitted by the parties contained exhaustive argumentation on these issues, and, the Court's decision, to a limited extent, reflected these arguments.

The opinion of the Court, authored by Justice White, clearly indicated that due process of law requires that the allegedly contemptuous attorney be given specific notice of the

---

191 Petition, supra note 105, at 17-19.
192 Id. at 8.
194 Id.
195 Id. at 9-ll.
196 414 U.S. 1063 (1973). For the text of the questions certified, see text accompanying note 33 supra.
charges against him and some occasion to speak in response. Upon its review of the record, the Court concluded that these fundamental requirements had not been met, even though Taylor had been allowed to respond at points during the trial. The Court placed particular emphasis on exchange at the close of the trial, when the judge sentenced Taylor and, with overt threats, denied him any opportunity to speak. "This procedure," Justice White concluded, "does not square with the Due Process Clause of the Fourteenth Amendment." The opinion, however, limited its coverage to situations where the adjudication of the contempt citation against the attorney is delayed until the close of trial. In such circumstances, the Court ruled, the "preservation of order" rationale supporting judgment without notice or hearing is not present. The opinion did not reach cases were the trial judge cites and punishes immediately for a contempt committed in his presence, for the purpose of maintaining courtroom order. The Court also discounted the contention that adjudication without notice or a hearing can be justified on the basis of conservation of judicial resources. As Justice White wrote: "Due process cannot be measured in minutes and hours or dollars and cents."

The substance of the Court's holding is reflected in the following statement:

[B]efore an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or he might present matters in mitigation or otherwise attempt to make amends with the court.

---

198 Id. at 496-97.
199 Id. at 497.
200 Id. at 497-98.
201 Id. at 497.
202 Id. at 500.
203 Id. at 488-89. See also id. at 500, n.9.
The ruling thus apparently upholds the power of the trial judge to punish summarily without notice or a hearing, during the trial's progress. However, if the judge delays adjudication of the alleged contempt until the close of the trial, he must give the accused contemnor notice of the charges against him and some occasion to respond, although this need not be a full trial. This holding overrules; at least in part, the Sacher decision, which had been read as permitting the trial judge to punish an attorney for contempt at the completion of the trial without notice or a hearing.\textsuperscript{264}

The Court's distinction between contempt sanctions imposed during the trial and those imposed at its conclusion, with regard to the right to notice and a hearing, seems to be mistaken. The need to preserve courtroom order, which is the basis of that distinction, is an inadequate justification for dispensing with such rudimentary elements of due process as notice and a hearing. Whether the trial judge immediately cites for contempt or delays until the close of trial, there is simply no reason to believe that the cause of order would suffer if the accused contemnor is afforded notice of his specific offense and some chance to be heard in response.\textsuperscript{265} Although the Court's decision in \textit{Taylor v. Hayes} does not go that far, the decision does make it clear that when the trial judge cites an attorney at the close of trial for allegedly contumacious conduct during the trial (which is the normal procedure for dealing with attorney misconduct), the lawyer must be given notice and an opportunity to be heard, even if such a hearing is not a full-scale trial. Perhaps in future decisions the Court will see its way clear to rule that these basic elements of due process must also be afforded to the contemnor cited and punished during the course of the trial.

In resolving the issue of the propriety of Judge Hayes himself deciding Taylor's guilt, the Supreme Court rejected the

\textsuperscript{264} This is the reading Justice Rehnquist gives \textit{Sacher} in his dissent. \textit{Id.} at 524. (Rehnquist, J., dissenting).

\textsuperscript{265} Part of the Court's rationale in permitting notice and a hearing where adjudication of the contempts is delayed until the close of trial appears to be a fear of an abuse of the contempt power. \textit{Id.} at 500. The potential for abuse is equally present and perhaps greater where the judge acts immediately to punish for contempt.
stance of the Kentucky Court and the arguments of Judge Hayes, that under established standards the judge properly ruled on these contempt charges. Although it agreed with the Kentucky Court's opinion that Taylor's conduct was not such as would invoke the *Mayberry* "personal attack" standards, the Supreme Court was convinced that the trial record clearly evidenced the "personal embroilment" of Judge Hayes:

With these considerations in mind, we have examined the record in this case and it appears to us that respondent did become embroiled in a running controversy with petitioner. Moreover, as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability and his motives, sufficient so that the contempt issue should have been finally adjudicated by another judge.

In taking this position, the Court referred to specific sections of the trial record as revealing the personal embroilment of Judge Hayes. Of particular concern to Justice White were certain of the judge's disparaging remarks about Taylor and the confrontation which occurred at the trial's end. As further indicia of bias, Justice White noted the judge's disbarring of Taylor, the refusal of the judge to grant Taylor bail pending his appeal, and the magnitude of the sentence initially imposed in the case.

The Court also commented on the respondent's reliance upon *Ungar v. Sarafite*, rejecting the judge's claim that the *Ungar* case supported his actions here. The majority felt that in *Ungar*, the judge did not act summarily either during or at the close of the trial, but instead afforded the contemnor notice and an opportunity to be heard. The *Ungar* proceedings were, in the Court's view, conducted dispassionately and with the requisite impartiality. In the *Taylor* case, however, no notice or hearing was granted to the contemnor and the judge's sentencing at the close of trial was conducted in a highly emotional

---

206 Id. at 501.
207 Id. at 501-02.
208 Id. at 502.
210 418 U.S. at 503.
and unjudicial atmosphere. The Court concluded that the Taylor record unquestionably revealed a situation of judicial embroilment, which, in the light of established standards, called for Judge Hayes to refrain from adjudicating the contempt charges he had leveled against Daniel Taylor.\(^{211}\)

The Court’s ruling on the issue of judicial disqualification in contempt cases, like its ruling on the notice-hearing issue, is limited in nature. The decision does not amplify or alter the guidelines set out in Offutt, Mayberry and Johnson; it simply applies them. Although Taylor reflects the inherent deficiencies of these standards, the Court declined to completely re-examine the summary contempt power issue, in terms of either judicial disqualification or the notice hearing issue.

However, just as the due process arguments in support of granting a contemnor notice and a hearing refute the Court’s limitation of these rights to post-trial contempt adjudications, so do they refute the Court’s continued recognition of the summary contempt power. Again it should be observed that principles fundamental to our legal system demand an impartial tribunal in all criminal cases. The arguments in support of allowing the judge citing for contempt to also adjudicate guilt or innocence are inadequate. Such a power is unnecessary to preserve order and its abuse is uncured by appellate review. The possibility of conserving some judicial resources certainly does not justify such a departure from basic constitutional principles. Moreover, the Court’s efforts to grant a contemnor an impartial tribunal by way of the Offutt-Mayberry guidelines are wholly insufficient.

Thus, in order to make justice in fact coincide with the appearance of justice, the better rule would be to eliminate the summary contempt power altogether. With the potential for judicial abuse equally present, whether the judge acts to punish misconduct immediately during trial or only after the trial, the more acceptable course to follow would be to have the trial judge simply cite for contempt and then, following the trial, upon proper notice, grant the accused contemnor a hearing before another judge. This would preserve the trial judge’s sub-

\(^{211}\) Id.
stantive contempt power, while granting the alleged contemnor the basic elements of procedural due process.

V. THE RIGHT TO A JURY TRIAL IN CONTEMPT PROCEEDINGS

The right of an individual accused of contempt to have his guilt or innocence ruled upon by a jury raises many questions of both a constitutional, and in the Taylor case, a statutory nature. Some have argued that from both an historical and a legal viewpoint it is necessary for a jury to consider an individual’s guilt of criminal contempt.

A. The Constitutional Right to a Jury Trial

On the constitutional plane, early decisions by the Supreme Court indicated that an individual accused of criminally contumacious trial conduct was not entitled to have a jury decide his case. In the important 1958 case, Green v. United States, Justice Harlan, speaking for the majority, took the position that the Supreme Court “[I]n a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders [has established] beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.”

Viewing the issue in terms of historical developments and the “unique character” of criminal contempts, the Court’s majority concluded: “Against this historical background, the Court has never deviated from the view that the constitutional guarantee of trial by jury for ‘crimes’ and ‘criminal prosecutions’ was not intended to reach criminal contempts.”

In his landmark dissent in Green, Justice Black, joined by Chief Justice Warren and Justice Douglas, rejected the majority’s reasoning. Justice Black disputed the idea that criminal contempts were for some reason not to be regarded as crimes.

---

212 See, e.g., Gompers v. United States, 233 U.S. 604 (1914); In re Debs, 158 U.S. 564 (1895); Savin, 131 U.S. 278 (1889).
214 Id. at 183.
215 Id. at 186. For an interesting “checklist” supporting the denial of a jury trial in criminal contempt cases see Justice Frankfurter’s concurring opinion in Green. Id. at 189.
By historical analysis, he concluded that criminal contempt was properly viewed as a crime and should procedurally and constitutionally be treated as such. Looking to the basic foundations of our society, the Constitution and the Declaration of Independence, Mr. Justice Black asserted that it was totally inconsistent and unsupported by evidence to claim that the founding fathers intended criminal contempt to be excluded from the purview of the sixth amendment. Finally, he rejected the idea that denial of a jury trial in contempt cases was necessary to preserve judicial order, or that economy and necessity themselves were sufficient to justify withholding a jury trial in cases of criminal contempt. "In the last analysis," Justice Black stated:

there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulation of the Executive insofar as punishment for their violation is concerned. There is no valid reason why they should be singled out for an extraordinary and essentially arbitrary mode of enforcement. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth. In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt.

---

216 Id. at 193-219 (Black, J., dissenting).
217 Id. at 218-19. Others who have argued that, from both an historical and a legal viewpoint, a jury should be necessary to decide an individual's guilt of criminal contempt include Dobbs, supra note 8, at 231; Hermann, supra note 14, at 603; and Kutner, supra note 14, at 3-7.
The *Green* decision, although challenged and altered to some extent in cases such as *United States v. Barnett*\(^{218}\) and *Cheff v. Schnackenberg*,\(^{219}\) survived until 1968. In that year the Court decided *Bloom v. Illinois*,\(^{220}\) which announced that in certain instances the alleged contemnor's right to a jury trial was *constitutionally* mandated. After reconsidering, in light of more recent rulings,\(^{221}\) its earlier position denying any such constitutional right, the Court concluded: "[S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial."\(^{222}\)

The reasoning here that criminal contempt "is a crime in the ordinary sense," in that it is a public wrong punishable by a fine or imprisonment which serves the same purpose as and is indistinguishable from other criminal convictions, revealed a distinct change in the Court's orientation. Based upon this concept the Court decided that the constitutional provisions governing conventional criminal prosecutions applied to crimi-

---

\(^{218}\) 376 U.S. 681 (1964). In *Barnett* the Supreme Court upheld the *Green* decision's denial of a constitutional right to a jury trial in contempt cases. However, the Court indicated the possibility of some distinction between "petty" and "serious" criminal contempts in determining a jury trial right. *Id.* at 694-95. Chief Justice Warren and Justices Black, Douglas and Goldberg dissented, believing that criminal contempts should be treated like other crimes, in terms of right to a jury trial.

\(^{219}\) 384 U.S. 373 (1966). In *Cheff*, the Court, pursuant to its supervisory authority over lower federal courts, established a right to jury trial in *federal* criminal contempt cases where the penalty imposed exceeded six months. This rule was based upon the idea that the six-month line distinguished "serious" and "petty" offenses. It did not establish a constitutional right, binding on state courts in this area. Because *Cheff* received a sentence of six months, he had no right to a jury trial in this case. Justices Stewart and Harlan concurred in the result denying the right to a jury trial here, but vigorously opposed the federal supervisory ruling. They argued that all criminal contempts should be adjudicated without a jury, in accordance with traditional practice. *Id.* at 382. Justice Douglas, joined by Justice Black, dissented, rejecting the six-month rule as the sole gauge of a contempt's seriousness. *Id.* at 384.

\(^{220}\) 391 U.S. 145 (1968).

\(^{221}\) The rulings of most importance were *United States v. Barnett*, 376 U.S. 681 (1964); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); and *Duncan v. Louisiana*, 391 U.S. 145 (1968).

\(^{222}\) 391 U.S. at 198.
nal contempt as well. The Court held, however, that under the sixth and fourteenth amendments, this right to a jury trial applies only to "serious" cases of criminal contempt, with the usual method of ascertaining seriousness based upon the penalty actually imposed. If the trial court sentences the contemnor to a period of imprisonment in excess of six months, the contempt is presumed to be serious and a jury trial must be afforded by both federal and state courts. The Bloom decision clearly rejected the reasoning of Green in establishing the requirement of a jury trial in cases of "serious" criminal contempt and served as a source for the so-called "six-month" rule, which has been the subject of considerable controversy.

One difficulty which arose out of the Supreme Court's ruling in Bloom centered upon application of the six-month rule, under which the penalty actually imposed was to serve as the gauge of the contempt's "seriousness," with a penalty in excess of six months as the line of demarcation on the right to a jury trial. Some felt that this rule was only one factor to consider in assessing the seriousness of the contemnor's conduct, on the theory that the rule set out was at best arbitrary and unfair.

---

223 Id. at 201-02. The Court went on to state:
Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the Court.

224 Id. at 202. Justice White's Bloom opinion justified restricting a trial judge's power to proceed against an alleged contemnor without a jury trial because of the potential for abuse of the contempt power. The Court held that the contemnor, like someone accused of any other crime, has the right to benefit from all of the procedural safeguards our judicial system has developed. Id. at 208.

225 Id. at 198, 211. See also Baldwin v. New York, 399 U.S. 66 (1970); Frank v. United States, 395 U.S. 147 (1969) (cases further developing the six month rule). For a discussion of the Court's ruling in Bloom see DISORDER, supra note 14, at 222.

226 In addition to the criticism of the six-month rule by Justices Douglas and Black in Cheff v. Schnackenberg, 384 U.S. 373 (1966), see their renewed attack on the rule in the Baldwin v. New York, 399 U.S. 66, 74 (1970). Judge Edward Hill, of the Kentucky Court of Appeals, criticized the rule in his dissent in Otis v. Meade, 483 S.W.2d 161, 163 (Ky. 1972). Hill found the rule to be "arbitrary and unrealistic" but felt that his protest would "reverberate as a pop gun." Id.
Others, however, read this as an established and inflexible guideline, a view supported by the cases subsequent to *Bloom*.\(^{227}\)

Yet another problem with the *Bloom* decision developed out of the potential for abuse of the six-month guideline through the use of multiple short-term sentences to be served consecutively. If a trial judge cited an individual for contempt at several points during a trial and, for each such “separate” act of contempt imposed a six-month sentence, with each of the sentences to be served consecutively rather than concurrently, the sentence actually imposed would easily exceed six months. In this way, the *Bloom* rule would be satisfied, at least, in form, and the accused contemnor would be denied a jury trial.\(^{228}\)


\(^{228}\) Prior to the Supreme Court’s ruling in the case of Codispoti v. Pennsylvania, 418 U.S. 506 (1974), a companion case to Taylor v. Hayes, 418 U.S. 488 (1974), the major decision in the area of multiple, consecutive sentences was United States v. Seale, 461 F.2d 345 (7th Cir. 1972). The Court in *Seale* was faced with the problem of aggregated short-term contempt sentences which when totaled exceeded six months, but which when considered separately were each within the six-month limit. In answer to the argument that such a situation did not require a jury trial, the federal appellate court responded: “Where the trial judge waits to act until a mistrial or end of a trial, consecutively imposed sentences for contemptuous conduct occurring during the course of the trial must be cumulated to determine the defendant-contemnor’s right to a jury trial.” *Id.* at 356. Thus, the Court held that consecutive contempt sentences must be aggregated to determine the right to a jury trial. The *Seale* ruling, however, was limited. The Court, fearing that the imposition of a six-month contempt sentence during the trial would exhaust the trial judge’s power to control courtroom conduct if aggregation was required, concluded that when a trial judge acts immediately to punish contumacious conduct by means of the summary power, the sentences imposed may be considered separately, thus precluding a jury trial. Here, as in the case of right to notice and hearing, a court made a crucial distinction between immediate action by the trial judge and punishment imposed only at the close of the trial. The rationale here, too, was the questionable belief that somehow the potential for abuse of the contempt power would be greater following the trial than immediately after the allegedly offensive act.

This effort to distinguish between aggregation of post-trial contempt citations and immediately punished citations during trial, in order to determine the right to a jury trial, has been criticized. In *DISORDER*, supra note 14, at 223, the following observation is made:

In light of the strong policies enunciated by the Supreme Court in favor of a jury trial in serious criminal cases, we do not agree that aggregation should be required only at the end of trial. The opportunity for abuse is also present when summary contempt is imposed at once; a judge can tailor the punish-
B. Taylor v. Hayes: The Kentucky Court's Decision on the Constitutional Right to a Jury Trial

The issue of whether the defendant was entitled to a jury trial also arose in Taylor v. Hayes. Although the Kentucky Court of Appeals acknowledged the Supreme Court's jury trial rule established in Bloom, by a curious path of reasoning the Kentucky judges concluded that Daniel Taylor was not constitutionally entitled to a jury trial.  

Originally, Judge Hayes had ordered Taylor to serve the individual sentences consecutively, resulting in a term of imprisonment totaling 54 months. Later, however, the judge issued an amended judgment which not only brought each individual contempt citation within the six-month limit of Bloom, the sentences thus aggregating to 41 months in prison, but also failed to specify whether the sentences were to be served concurrently or consecutively. In his subsequent brief to the Kentucky Court of Appeals, the judge argued that so long as no single contempt citation was punished by more than six months imprisonment, an aggregate sentence in excess thereof did not require a jury trial. The obvious import of the judge's argument was that the corrected judgment, like the original, required the sentences to be served consecutively, and that he was empowered to so act without the intervention of a jury. This assertion clearly demonstrated one of the potential abuses possible under the Bloom ruling. Judge Hayes claimed that the Seventh Circuit's decision in Seale, requiring aggregation of multiple contempt sentences, was distinguishable from the Taylor situation and that, in any event, the Seale ruling was not applicable in Kentucky courts. He concluded that in this state a trial judge could act in this manner without impaneling a jury to consider the case. The judge also contended that a

---

494 S.W.2d 737, 746 (1973).
229 Brief for Appellee, supra note 91, at 14-24.
230 461 F.2d 345 (7th Cir. 1972).
231 For a discussion of the Seale decision on this issue see note 228 supra.
232 Brief for Appellee, supra note 91, at 20.
jury trial in such a case should be denied because a jury simply was not qualified to deal properly with cases of criminal contempt.  

Taylor's brief to the Court of Appeals relied upon a number of cases, including Bloom and Seale, to support his claim for a jury trial. He argued that where the sentence actually imposed was in excess of six months, there was a constitutional right to have the case decided by a jury. Maintaining that the separate sentences imposed by Judge Hayes were to be served consecutively, Taylor asserted that his punishment actually exceeded three years in prison, a fact mandating a jury trial. Taylor's attorneys urged that in the case of multiple contempt citations, where the potential for judicial abuse was so great, the rationale of the Seale case, requiring the numerous separate sentences to be considered as a single unit, should be followed. Taylor's lawyers also responded to the claim that a jury was inadequate to handle such a case, noting that the basic reasoning of the Bloom case rejected this argument and that claims of wasted time and additional expense necessitated by a jury trial did not justify dispensing with such an essential right.  

Apparently accepting the Seale rule requiring jury intervention where several contempt sentences to be served consecutively cumulate in excess of six months, the Kentucky Court of Appeals nevertheless proceeded to hold that Taylor was not entitled to a jury trial. Despite the intention of Judge Hayes to impose consecutive sentences in the corrected judgment (an intention apparent in his written argument to the Court), the Kentucky Court concluded that, because the judge had neglected to specify this in the amended judgment, Kentucky law

---

234 Id. at 21.  
235 Brief for Appellant, supra note 89, at 24-26. See also Reply Brief for Appellant at 9-11, Taylor v. Hayes, 494 S.W.2d 737 (Ky. 1973) [hereinafter cited as Reply Brief for Appellant].  
236 Brief for Appellant, supra note 89, at 25-26.  
237 Reply Brief for Appellant, supra note 235, at 11.  
238 494 S.W.2d at 746. See Local 1667, United Auto Workers v. Kawneer Co., Inc., 490 S.W.2d 747 (Ky. 1973); Miller v. Vettiner, 481 S.W.2d 32 (Ky. 1972) (recent Kentucky cases accepting the idea that a penalty for criminal contempt in excess of six months may not be imposed without a jury trial).
dictated that the sentences were to be served *concurrently*. With no single sentence in the corrected judgment greater than six months, the total penalty imposed was thus six months. In this manner, the Court brought the conviction within the six-month limit of *Bloom*, avoided the *Seale* problem, and circumvented a jury trial.\(^{239}\) As will be discussed subsequently, the validity of the Court’s reasoning on this point is highly questionable. Moreover, the Court’s action reveals yet another of the potential abuses latent in the *Bloom* rules. In any event, Taylor was denied a jury trial and his sentences was set at six months.

C. *Taylor v. Hayes: The Supreme Court Ruling on the Constitutional Right to a Jury Trial*

In its grant of certiorari in *Taylor v. Hayes*, the Supreme Court chose to consider the jury trial issue. Of particular concern to the Court was the fact that although Judge Hayes had initially imposed consecutive contempt sentences far exceeding the six-month rule, the trial judge and the Court of Appeals took subsequent actions apparently designed to reduce the sentence to conform with the *Bloom* limitations, thus defeating the claim for a jury trial.\(^{240}\)

In his argument to the Supreme Court, Taylor renewed the claim that he was constitutionally entitled to a jury trial. His arguments were necessarily altered, however, due to the position taken by the Kentucky Court of Appeals. Taylor claimed that there was no six-month rule as such, asserting that no decision of the Court had established this figure as the sole criterion of an offense’s “seriousness” and hence the right to a jury trial. Rather, he argued, the proper concern was with “objective criteria of seriousness,” with such factors as the

\(^{239}\) 494 S.W.2d at 746-47. Apparently, despite the arguments in his original brief to the Court, Judge Hayes adopted the Court’s reasoning that the corrected sentence was to be served concurrently. See Response to Petition for Rehearing at 1, Taylor v. Hayes, 494 S.W.2d 737 (Ky. 1973).

\(^{240}\) 414 U.S. 1063 (1973). For the complete text of the questions certified see text accompanying note 33 supra. On the same day the Court granted certiorari in the case of Codispoti v. Pennsylvania, 414 U.S. 1063 (1973), to consider the issue raised in *Seale* and *Taylor* where multiple six-month penalties are imposed for criminally contemptuous conduct.
magnitude of the initial sentence imposed and statements by the Kentucky Court of Appeals that Taylor's conduct threatened and sought to destroy the entire judicial system of Kentucky indicating the actual seriousness with which Taylor's actions were viewed.\footnote{Petition, supra note 105, at 9-14; Reply to Brief in Opposition to Petition at 3-4, Taylor v. Hayes, 418 U.S. 488 (1974); Brief for Petitioner at 19-29, Taylor v. Hayes, 418 U.S. 488 (1974) [hereinafter cited as Brief for Petitioner].} It was further maintained that even if the Supreme Court were to hold that a six-months rule existed, a jury trial should be granted in this case. The basis of this argument was that "the entitlement to a jury trial should attach at the time the sentence is originally imposed" and that, therefore, "the right to a jury trial should not be able to be defeated, as it was here, by subsequent modification of the sentence on the part of the trial judge or the reviewing court to bring it within a 'six month rule.' "\footnote{Brief for Petitioner, supra note 240, at 28-29. Taylor made two other broad arguments regarding the right to a jury trial in contempt cases. His lawyers asked the Court to rule that criminal contempt by its very nature should be regarded as a serious offense calling for a jury trial. Taylor claimed that a contumacious offense, as an offense against the court and judge, called for a jury in all such cases to ensure impartiality. Further Taylor asked the Justices to hold that the threat of imprisonment itself was sufficient to establish an offense as serious, thus entitling the accused to a jury trial. See Argersinger v. Hamlin, 407 U.S. 26 (1972).} In response, the attorneys for Judge Hayes argued that, since six months was the penalty actually imposed, the contempt was simply not serious. Consequently, based on a sentence within the six-month line, no right to a jury trial should be recognized. The judge asserted that six months was indeed the fixed line of demarcation as to seriousness, and that the initial imposition of a more lengthy sentence and a subsequent reduction by the appellate court did not establish a jury trial right nor fix the offense as serious.\footnote{Brief for Respondent at 33-35, Taylor v. Hayes, 418 U.S. 488 (1974) [hereinafter cited as Brief for Respondent].}

Judge Hayes argued at some length concerning the right of an appellate court to modify a trial court judgment, apparently insisting that in essence the original sentence amounted to no more than a "clerical mistake" as to certain details.

Justice White's opinion on the jury trial issue substantially rejected Taylor's arguments. At the outset, the Court refused
to hold that all criminal contempts must be tried to a jury. In addition, the Court indicated that it would not accept Taylor’s assertion that there was no six-month rule.

Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute.\textsuperscript{2}\textsuperscript{4}\textsuperscript{4}

The Court concluded that although the initially imposed sentence was in excess of six months, by the later modification of the judgment, the total sentence imposed was six months. As a result, the contempt citations "constituted petty offenses and trial by jury was not required."\textsuperscript{2}\textsuperscript{4}\textsuperscript{5} Thus, according to Justice White’s opinion, the majority of the Court "remain firmly committed to the proposition that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved."\textsuperscript{2}\textsuperscript{4}\textsuperscript{6}

As the Court’s grant of certiorari had indicated, an issue of some concern was the use of appellate modification to bring the contempt sentences within the six-month limit, thereby avoiding a jury trial. Taylor had argued that once a sentence in excess of six months was imposed, the right to a jury trial attached and could not be defeated by appellate review or alteration. The majority opinion, however, rejected the claim that a reviewing court could not remove the right to a jury trial by modifying the imposed penalty.

It is argued that a State should not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial. The thrust of our decisions, however, is to the contrary: in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the

\textsuperscript{2}\textsuperscript{4}\textsuperscript{4} 418 U.S. 488, 494 (1974).
\textsuperscript{2}\textsuperscript{4}\textsuperscript{5} Id. at 495-96.
\textsuperscript{2}\textsuperscript{4}\textsuperscript{6} Id. at 496.
State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury. . . . In either case, the State itself has determined that the contempt is not so serious as to warrant more than a six months sentence.27

The validity of the majority's reasoning on the issue of modification has been questioned.248 In his dissent, Justice Marshall specifically rejected denial of the right to jury trial by appellate modification.249 Justice Marshall indicated that the initial sentence of almost four and a half years in prison "marked the contempt charges against petitioner as 'serious' rather than 'petty' and called into play petitioner's Sixth Amendment right to a jury trial."250 Characterizing Judge Hayes' subsequent reduction of the sentence as "a transparent effort to circumvent this Court's Sixth Amendment decisions and to save his summary conviction of petitioner without the necessity of airing the charges before an impartial jury," the dissenting Justice concluded that Taylor could not "be deprived of his Sixth Amendment right to jury trial, once it attached through the imposition of a substantial sentence, by the subsequent action of the trial court or an appellate court in reducing the sentence."251

Justice Marshall also deplored the solidification of the "six-month rule" apparent in Justice White's opinion. He described the decision as "an extraordinarily rigid and wooden application of the six-month rule," believing that the majority's stance changed the nature of the rule from one based on reason to one largely arbitrary in result.252

27 Id.
248 In Note, 1967 DUKE L.J. 632, supra note 14, at 661-62, the author argues that the imposition of a "non-petty" punishment conclusively determines that the contempt involved is serious enough to require a jury trial and that this right to a jury trial should not be avoided by appellate modification of the initially imposed sentence. To hold otherwise would seem illogical and arbitrary.
249 418 U.S. at 504 (Marshall, J., dissenting in part). Note also that Justice Douglas did not join the majority in its decision denying Taylor a jury trial.
250 Id.
251 Id.
252 Id. Justice Marshall felt that the arbitrariness of the solidified rule was apparent in the circumstances of this case:
The very fact that such a substantial contempt sentence was imposed, and
The majority in *Taylor v. Hayes*, however, was not moved by these arguments. The Court's holding seems to establish the six-month rule as the definite line in determining whether an offense is serious or petty for jury trial purposes. The opinion allows the modification and reduction of an initially imposed sentence, even where such alteration is specifically designed to cut off the right to a jury trial. Finally, the opinion makes it clear that a jury trial is not required in all cases of criminal contempt. In light of the discussion above, the Court's posture on these points, particularly with regard to the reduction-modification issue, seems erroneous.

The *Taylor* case did not answer the multiple contempt sentence-aggregation issue which had earlier been part of the dispute, and which was, to this time, resolved primarily by *United States v. Seale*. In *Codispoti v. Pennsylvania*, decided on the same day as *Taylor v. Hayes*, the Supreme Court resolved this issue.

In *Codispoti* the Court adopted essentially the position of the *Seale* court, requiring that when the trial judge postpones until after the trial the punishment of the accused or an attorney for multiple contumacious acts, if the imposed sentences to be served exceed six months in prison, then a jury trial must be permitted. Justice White's opinion for the majority indicated that part of the rationale behind requiring this cumulation for post-trial contempt sentences was a fear of arbitrary judicial conduct. Likewise, the Court's stance was that, in effect, the supposedly separate sentences imposed constituted a single unit, calling for aggregation of the individual sentences to determine the penalty actually imposed. As in the *Seale* case, the majority of the Supreme Court made a crucial distinction here between post-trial sentencing and multiple contempt citations imposed and punished during the course of the trial.

---

then reduced to the six-month maximum should be a warning to us that the fairness of the process which petitioner has received is suspect, and that the contempt charges involved here especially require the scrutiny of a jury trial.

*Id.* at 505.

253 461 F.2d 345 (7th Cir. 1972).


255 *Id.* at 512.

256 *Id.* at 517.
Adopting the reasoning in *Seale* that to require cumulation of those contempt sentences meted out as the trial progresses would hinder the trial judge in controlling the courtroom, the Justices concluded that in such a case aggregation of the separate sentences was not demanded.\(^{257}\) Thus, in *Codispoti* the Court held that if a judge acts during trial, he may cite an individual for contempt several times, impose for each contempt a penalty of up to six months, and direct that the sentences be served consecutively, without necessitating a jury trial. Where, however, the judge delays punishment until the end of trial, then to avoid arbitrary judicial action, cumulation is necessary. In its closing remarks, the Court rejected the suggestion that its opinion would encourage trial judges to act during trial to punish for contempt rather than at the close of the trial, when the judge may in fact be in a calmer and more appropriate position to assess the seriousness of the contemptuous conduct.\(^{258}\) Justice White suggested that appellate review could, in any case, remedy any arbitrary action by the judge during the trial.\(^{259}\)

As discussed previously, certain authorities, including the authors of *Disorder in the Court*,\(^{260}\) dispute the validity of this sort of distinction in determining the right to a jury trial. As in *Taylor*, Justice Marshall filed a separate opinion. In that opinion, he disputed the majority's efforts to distinguish between contempt citations during the trial and those following the trial.\(^{261}\) Feeling that the sixth amendment right should be applicable in either situation, Justice Marshall rejected the view that the potential for arbitrary action was present only when the judge waits until after the trial to punish for contempt, stating:

> I completely fail to see how there is any less likelihood of such arbitrary action by a judge when he acts summarily to punish each allegedly contemptuous act by a defendant as it occurs rather than awaiting the end of trial to try the contempts.

\(^{257}\) *Id.* at 514.

\(^{258}\) *Id.* at 517.

\(^{259}\) *Id.*

\(^{260}\) *Disorder, supra* note 14.

\(^{261}\) 418 U.S. at 519-20.
Indeed, the Court’s suggestion provides an incentive for a trial judge to act in the heat of the moment, and thus encourages the very arbitrary action which it is the purpose of the Sixth Amendment to eliminate.\textsuperscript{262}

Justice Marshall agreed with the Court that the penalty actually imposed, \textit{i.e.}, the total penalty imposed, should determine the seriousness of the offense, but would not accept the Court’s effort to limit this rule only to post-trial situations. While he acknowledged the importance of judicial control of the courtroom, the basis of the majority’s position, Justice Marshall felt that this need was insufficient to permit such a disregard of constitutional rights.\textsuperscript{263} In closing, Justice Marshall indicated that control of the courtroom could be achieved by other devices, and that “there is no ‘overriding necessity’ for repeated use of the summary contempt power against a criminal defendant to maintain order in the courtroom.”\textsuperscript{264}

D. \textit{The Statutory Right to a Jury Trial}

Daniel Taylor’s claimed right to a jury trial was buttressed by sources in addition to the Constitution. Kentucky statutory law also granted Taylor the right to a jury trial.\textsuperscript{265} The Court of Appeals, however, negated this right by ruling that the statute requiring a jury trial was unconstitutional as a “material interference with the administration of justice.”\textsuperscript{266}

The Kentucky statute requiring a jury trial in criminal contempt cases where punishment exceeds a $30 fine or 30 hours in jail dates to 1793.\textsuperscript{267} On December 19 of that year an act was passed “more effectually to secure the Constitutional Rights and Privileges of the Citizens of this Commonwealth.”\textsuperscript{268} The act specified that no judge could punish an individual for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{262} Id. at 519.
\item \textsuperscript{263} Id. at 520-22.
\item \textsuperscript{264} Id.
\item \textsuperscript{265} KRS § 432.260(1) (1972), which provides: “A court shall not impose a fine of more than thirty dollars ($30.00) or imprison for more than thirty (30) hours for contempt without the intervention of a jury.”
\item \textsuperscript{266} 494 S.W.2d 737, 745 (Ky. 1973).
\item \textsuperscript{267} 1 LAWS OF KENTUCKY 507 (1799); 1 LITTELL, STATUTE LAW OF KENTUCKY 198 (1809).
\item \textsuperscript{268} 1 LAWS OF KENTUCKY 506 (1799).
\end{itemize}
\end{footnotesize}
contempt by a fine in excess of ten pounds or imprisonment exceeding one day without a jury trial.\textsuperscript{289} The clear intent of this 180-year-old provision was to protect the accused individual from the arbitrary punishment of an offended judge. Throughout its history, however, this legislative limitation upon the summary contempt power had been questioned by the Commonwealth's judiciary.\textsuperscript{270}

The Court of Appeals first questioned the validity of the law in the 1874 case, \textit{In re Woolley}. "We will not in this case determine," the Court said:

whether under the Constitution, the legislative department, under the guise of regulating proceedings in cases of contempts, can take from the judiciary the power to preserve its independence and equality by protecting itself against insults and indignities. The right of self-preservation is an inherent right in the courts. It is not derived from the legislature and cannot be made to depend upon legislative will.\textsuperscript{271}

In contrast to the legislative concern for protection of the individual and avoidance of an unfettered arbitrary power, the Court in \textit{Woolley} emphasized protection of the dignity, and the very existence, of an independent and vital judiciary. In terms of statutory limitations on the summary contempt power, these

\textsuperscript{289} In the preamble to this act, the rationale behind the limitations was set forth:

Whereas the government of this state is a free republican government, instituted for peace, safety, and happiness of the people, and it being contrary to these principles that any man or body of men should have or exercise in any case, an unlimited arbitrary power to fine and imprison for offenses against him or themselves in any capacity whatever. And whereas it is declared in the bill of rights, that the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty, which right would be rendered altogether dangerous and ineffectual, if the person or persons who might suppose him or themselves offended in any capacity, were to possess the power to judge of the offense and inflict the punishment. And whereas the trial by jury in all penal, as well as criminal cases, is both a safe and adequate mode of investigation and decision, and should only be suspended in cases of the most absolute necessity. \textit{[Be it enacted.]}\textsuperscript{272}

\textit{Id. at} 506-07.

\textsuperscript{270} For general background on the right of the legislature to regulate the contempt power of courts, see Annot., 121 A.L.R. 215 (1939).

\textsuperscript{271} 74 Ky. (11 Bush) 95, 111 (1875).
arguments represent the basic conflicting positions.

Although the Kentucky Court of Appeals expressed doubt as to the validity of the jury trial statute in Woolley, just eight years later, in Arnold v. Commonwealth,272 the Court indicated: "While the right to punish for contempt is with the court, we are not prepared to say that it is not subject in some degree to legislative control."273 The Court found the jury trial requirement was "in no manner objectionable."274 Subsequent cases followed the reasoning of Arnold in support of this legislative limitation.275 Thus, in 1933 one commentator was led to remark that "the constitutionality of the statute . . . is definitely established."276

In recent years, however, the Kentucky Court of Appeals had begun to oppose such legislative curtailments of judicial contempt powers.277 Finally, in Taylor v. Hayes, the Court of Appeals concluded that the statutory requirement of a jury trial in the case of a criminal contempt citation, where the judge sought to impose more than a minor penalty, was an unconstitutional obstruction of justice.278 This conclusion was

---

272 80 Ky. 300 (1882).
273 Id. at 302.
274 Id.
275 Armstrong v. Bryan, 273 S.W.2d 835 (Ky. 1954); Crook v. Schumann, 167 S.W.2d 836 (Ky. 1942); Talbott v. Commonwealth, 270 S.W. 32 (Ky. 1925); Green v. Commonwealth, 264 S.W. 1084 (Ky. 1924); Riley v. Wallace, 222 S.W. 1085 (Ky. 1920); Richardson v. Commonwealth, 133 S.W. 213 (Ky. 1911). All of these cases lend support to the legislative limitation of a judge's summary contempt powers. For a somewhat different position, however, see Cappa v. Gore, 21 S.W.2d 266 (Ky. 1929).
277 Otis v. Meade, 483 S.W.2d 161 (Ky. 1972); Miller v. Stephenson, 474 S.W.2d 372 (Ky. 1971); Arnett v. Meade, 482 S.W.2d 940 (Ky. 1971); Levisa Stone Corp. v. Hays, 429 S.W.2d 413 (Ky. 1968); Teamster Local No. 783 v. Coca Cola Bottling Co., 418 S.W.2d 228 (Ky. 1967).

The Arnett case is of particular importance here because it is cited in Taylor as setting forth the Court's reasoning on the constitutionality of KRS § 432.260. In Arnett, KRS § 421.140 was in question. This statute limited punishment for civil contempt to a fine of $30.00 and imprisonment of 24 hours. The Arnett court, in ruling the statute unconstitutional, said:

The general rule is that any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. However, the rule is subject to the qualification that the legislature may put reasonable restrictions upon constitutional functions of the court, provided that such restrictions do not defeat or materially impair the exercise of those functions.

462 S.W.2d at 946 (italics in original).
reached despite the fact that the statute did not deprive the courts of any inherent power to punish for contempt, but simply required the courts, before exercising this power beyond a certain point, to submit the case to an impartial jury. The court’s power to punish had remained intact. Nevertheless, the court chose to invalidate the statute.

At first blush the Court’s conclusions seem acceptable in light of the reasoning of earlier decisions. Upon closer inspection, however, it becomes apparent that the Court’s decision is faulty and very disturbing. What the Court holds in Taylor is that the summary power to deal with contempt is necessary for the administration of justice, and that the intervention of a jury constitutes an obstruction of justice. In a state where trial by jury is held to be constitutionally “sacred” and “inviolate,” such an assertion by the Commonwealth’s highest court appears to be a remarkable deviation from the basic tenets of our judicial system. Further, to view the requirement of a jury trial as a material interference with justice, flies in the face of the Supreme Court’s Bloom decision. Lastly, it is interesting to note that while the Kentucky Court was in the process of rejecting a 180-year-old statutory limit on judicial contempt powers by choosing to uphold summary contempt powers, other states have done just the reverse. In this context then,
the Court's decision in Taylor that the requirement of a jury trial in certain cases of criminal contempt causes a "material interference with the administration of justice" seems unfortunate and wholly incorrect.

Justice Black once dealt with the sort of argument relied upon by the Court of Appeals, i.e., that summary powers absent a jury trial to decide contempts were necessary. This argument, he felt:

[A]ppears to rest on the assumption that the regular criminal processes, including trial by petit jury and indictment by grand jury, will not result in conviction and punishment of a fair share of those guilty of violating court orders, are unduly slow and cumbersome, and by intervening between the court and punishment for those who disobey its mandates somehow distracts from its dignity and prestige. Obviously this argument reflects substantial disrespect for the institution of trial by jury, although this method of trial is—and has been for centuries—an integral and highly esteemed part of our system of criminal justice enshrined in the Constitution itself.\(^{232}\)

The impact of the Kentucky Court's decision to invalidate the statutory requirement of a jury trial in contempt cases casts at least a partial shadow over the institution of trial by jury in Kentucky. This decision appears unacceptable. One is left with the distinct feeling that the Court of Appeals desired to avoid permitting a jury trial in the case, both on a constitutional and a statutory level, and was willing to go quite far in order to achieve that end. The Supreme Court's decision on the constitutional right to a jury trial appears equally unacceptable, in that it allows courts to side-step an accused's right to a jury trial by modification of the trial judge's original sentence. Judicial fears of a loss of control should be set aside. Contemptuous conduct by attorneys is not frequent, and other devices exist by which a judge may preserve order in his court. Focusing on the need for basic fairness, the better decision, from both statutory and constitutional viewpoints, would have been to remand the case for consideration by a jury.

VI. SUMMARY AND CONCLUSIONS

The recent decision by the United States Supreme Court in *Taylor v. Hayes*\(^a\) deals with several facets of criminal contempt which are of considerable importance to the trial attorney. The current law of contempt, as it applies to attorneys, can be briefly summarized as follows.

*What constitutes contempt:* It appears that for an attorney’s conduct to be contemptuous some form of obstruction of the court is necessary. Zealous representation of a client, mere disrespect as a by-product of a hotly contested case, or unintended transgression of a court’s directive should not result in a contempt citation. Such a penalty, which can so seriously affect the trial attorney and his client, should be reserved for those situations in which the attorney acts with some knowledge and intent that his conduct will obstruct the judicial process; it should not be utilized where he acts out of a good faith desire to protect the interests of his client. Court decisions indicate that in our adjudicatory system, the participants, judges and lawyers alike, should be able to withstand the harshness of the trial situation without becoming offended. At the same time, the participants owe a duty to the system and to all the parties involved to act with propriety and respect and to always seek truth and justice. When the attorney knowingly frustrates the ends of justice, a contempt citation is appropriate and necessary; otherwise, a contempt citation is mistaken.

*The right to notice and a hearing:* The Supreme Court’s decision in *Taylor v. Hayes* establishes that if a trial judge waits until the end of a trial to punish for contempt, the alleged contemnor, whether he is an attorney or not, should be given notice of the specific charges against him and an opportunity for a hearing. Apparently, however, if the trial judge acts during the trial to punish for contempt, he can impose punishment without affording the accused contemnor notice or a hearing. In order to avoid prejudicing his client, an attorney cited for contempt is usually not dealt with until the close of the trial.

---

\(^a\) 418 U.S. 488 (1974).
\(^b\) 348 U.S. 11 (1954).
\(^c\) 405 U.S. 212 (1971).
Thus, the attorney generally will be provided notice and a hearing.

_The right to have an impartial judge:_ In _Taylor v. Hayes_ the Supreme Court preserves the existing law in this area established by such cases as _Offutt_,54 _Johnson_ and _Mayberry_. The rule appears to be that, unless it can be shown that the trial judge acted in open conflict with the alleged contemnor, demonstrated marked bias towards him or was so grossly insulted that bias must be presumed, the judge citing for contempt may also decide guilt or innocence and the appropriate punishment for the contemnor.

_The right to trial by jury:_ The position taken by Justice White in _Taylor_ and _Codispoti_ seems to solidify the six-month rule of _Bloom_. Further, the ruling in _Taylor_ clearly permits a court to avoid a jury trial by the modification or reduction of the sentence initially imposed by the trial judge. Thus, even if the trial court imposes a penalty in excess of six months, the trial judge or the appellate court can avoid a jury trial by reducing the sentence to conform to the six-month limitation of _Bloom_. The decision in _Codispoti_ clearly adopts the position taken by the Seventh Circuit in _Seale_, requiring the cumulation of multiple contempt sentences imposed at the end of trial to determine the accused's right to a jury trial. However, the court has rejected cumulation of contempt sentences imposed during the trial. Thus, as with the right to notice and hearing, the right to a jury trial may hinge on whether sentence is imposed during or after the trial. The rationale behind this distinction is to permit the trial judge to maintain control of the courtroom. _Taylor_ and _Codispoti_ hold that criminal contempt is not an offense requiring a jury trial regardless of the penalty imposed and that the risk of imprisonment alone does not require trial by jury. The Court's decisions continue to uphold summary procedures, with the most significant new limitations coming in the form of rules for notice and hearing and the requirement of sentence aggregation in certain cases.

---

54 400 U.S. 455 (1971).
59 461 F.2d 345 (7th Cir. 1972).
There can be no question that a trial judge must have effective tools with which to preserve order and insure justice in the proceedings before him. To deny this would be to emasculate the judiciary. But, acknowledging the need for an effective power in the trial judge does not mandate that the power be so structured as to deny or suspend procedural requirements and due process principles essential to our system of justice. This is especially true in the case of trial attorneys, who, by their dual roles in our system, are placed in a conflicting position in which they may easily fall into contempt. The need to punish an attorney, or anyone else, for contemptuous conduct does not mean that the procedure followed must be summary in nature.

The Supreme Court's remand of the Kentucky Court of Appeals decision in *Taylor v. Hayes* was fortunate, for it seems clear that the Kentucky Court's decision was simply wrong. Apparently, the Court of Appeals was too concerned with what was seen as Taylor's "obvious guilt" and not with the procedures followed in the case to determine that guilt. The law of contempt following the Supreme Court's decision in *Taylor* and *Codispoti* is better than before, particularly in the areas of requiring notice, a hearing, and aggregation of multiple contempt sentences. However, the Court's decisions do not go far enough. The Court's insistence on drawing a distinction between contempt penalties imposed during the trial and those imposed after the trial, in determining the right to notice and a hearing as well as the right to a jury trial, is erroneous. Such a distinction has no logical basis and there is no evidence to show that the distinction is justified by the need for courtroom control. Moreover, the Court's retention of the *Offutt-Mayberry* standards of judicial disqualification seems unfortunate. Due process and fairness demand that the judge who cites for contempt committed in his presence should not be the judge of guilt or innocence in the case. This is true whether or not the citing judge was "personally embroiled" or grossly in-

---

20 See Justice Frankfurter's dissent in *Sacher v. United States*, 343 U.S. 1, 27-28 (1952), where he emphasizes that a court's concern should be with the procedures by which guilt is assessed and not simply with the view that the accused's guilt is in fact unquestionable.
sulted. In addition, the constitutional right to set the contempt case before a jury should not be subject to the avoidance by appellate modification permitted in Taylor. Such a right should attach with the initial imposition of a sentence exceeding six months in prison. The six-month rule also merits reconsideration, for although the penalty actually imposed may serve as a useful gauge of the seriousness of an offense, the “objective criteria of seriousness” peculiar to the individual case might otherwise reveal the need for consideration of the issues by a jury. Finally, some consideration should be given to a renewed effort to place statutory limits upon the Kentucky courts’ summary contempt powers. Perhaps statutory provisions with more realistic limits than $30 or 30 hours in jail without a jury would be more acceptable to the Kentucky Court. Such a statute should not be designed to hinder the courts, but to balance the courts’ need for control with the equally significant need to preserve fairness and individual rights.

The summary contempt power is an unnecessary and unfair aberration in our system of justice. It is a threat of great significance to the trial attorney. While undoubtedly a judge must have the power to deal with misconduct before him, the power to deal with this in a summary fashion is simply unjustifiable. The Supreme Court’s decision in the case of Taylor v. Hayes goes at least part-way in tempering this power. In the future it can only be hoped that other needed changes will be made in the law of contempt.

W. Eugene Basanta

291 The Court of Appeals decision in Arnett v. Meade, 462 S.W.2d 940, 946 (Ky. 1971), discussed supra note 277, indicates that “reasonable restrictions” upon the judiciary’s contempt powers by way of statutory provisions might well be acceptable to the Court. The Kentucky General Assembly certainly should give some consideration to this.