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LAWYER TROUBLES IN POLITICAL TRIALS

FOWLER HARPER* AND DAVID HABER†

IN the years that have elapsed since the beginning of the war, political trials have not been an uncommon phenomenon in the world. Until the indictment and trial in New York of the eleven Communist leaders,[1] however, we have not, in the United States, had a clean cut example. The Hiss,[2] Coplon [3] and Bridges litigation [4] had sharp political overtones, to be sure, but they were, after all, genuine criminal trials. The Communist trial, on the other hand, came much nearer being a political trial with criminal overtones.

In this trial, defendants were charged with violating the Smith Act [5] by conspiring (1) to organize as the Communist Party of the United States, a society teaching and advocating the overthrow and destruction of the United States Government by force and violence, and (2) to teach and advocate the overthrow of the United States Government by force and violence. The trial began January 17, 1949, and ended with a verdict of guilty being entered against the defendants on October 14 of the same year. On that date Judge Medina also addressed the defendants' lawyers, saying: "Now I turn to some unfinished business." [6] He then read part of a contempt certificate and orders made under Rule 42(a) of the Federal Rules of Criminal Procedure. According to the certificate the lawyers, without a hearing, stood convicted of criminal contempts of court. The orders imposed a sentence of four months in jail on lawyer Crocket, thirty days on lawyer McCabe, and six months on lawyers Sacher, Gladstein, Isserman and the same on defendant Dennis, Counsel *pro se*.

* Professor of Law, Yale Law School.

† Associate Professor of Law, Yale Law School.

1. United States v. Dennis *et al.*, 183 F.2d 201 (2nd Cir. 1950), *cert. granted*, 19 U.S.L. WEEK 3116 (1950).

2. United States v. Hiss, 184 F.2d — (2nd Cir. 1950).

3. United States v. Coplon *et al.*, 88 F.Supp. 910, 912, 915, 921 (S.D. N.Y. 1949).

4. United States v. Bridges *et al.*, 86 F.Supp. 922, 931 (N.D. Cal. 1949); United States v. Bridges *et al.*, 87 F.Supp. 14 (N.D. Cal. 1949); United States v. Bridges *et al.*, 90 F.Supp. 973 (N.D. Cal. 1950) (revocation of citizenship).

5. 54 STAT. 670 (1940), 8 U.S.C. §§ 137, 155, 156a, 451–460 (1946), 18 U.S.C. §§ 2385, 2387.

6. Extract from Stenographer's Minutes, Appendix to Appellant's Brief in the court of Appeals, 81A. Transcript of Record, pp. 16, 121.

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The certificate contained a preamble and forty specifications. The preamble read in part:

> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.
>
> "I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the courtroom, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements and conduct above referred to, I hereby make the entire record part of these proceedings.
>
> "Accordingly, I adjudge the following guilty of the several criminal contempts described below. . . ."

Specification I read:

> "During the entire trial, Messrs. Sacher, Gladstein, Crockett, McCabe, and Isserman, attorneys and counsellors-at-law, and after March 17, 1949, Mr. Dennis, attorney *pro se*, joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster*, et al., C 128–87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attack-

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ing the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities.

"To effect this plan, these defendants in this proceeding contemptuously and without justification

"a. Disregarded numerous warnings of the Court concerning their wilful delaying tactics, except for ironical references thereto;

"b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

"c. Insinuated that there was connivance between the Court and the United States Attorney;

"d. Insisted on objecting one after another to rulings of the Court, despite a ruling on the first day of the trial, repeated several times thereafter, that all objections and exceptions would inure to the benefit of each of their clients unless disclaimed;

"e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering and snickering;

"f. Urged one another on to badger the Court;

"g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;

"h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

"i. Disregarded rulings on the admissibility of evidence so as to endeavor to place before the jury by leading questions the subject matter excluded;

"k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

"l. Accused the Court of racial prejudice without any foundation; and

"m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could be relied upon as a demonstration of the Court's unfitness to preside over the trial." [7]

The remaining specifications consisted of excerpts from the record, which were largely colloquies between the attorneys and the Judge and for the most part illustrated points (a) to (m) under Specification I.

On appeal the Court of Appeals for the Second Circuit consisting of Judges Augustus N. Hand, Jerome Frank and Charles E. Clark upheld Judge Medina's decision except as to Specifications I, XV, and XVIII.[8] Judge Hand favored upholding all the specifications except XV and XVIII which he thought failed to show with sufficient clarity what seemed to be the gist of their charge "that Sacher was attempting to

7. United States v. Sacher et al., 182 F.2d 416, 430–432 (2nd Cir. 1950).

8. *Ibid.*

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mislead the Court." Judge Clark dissented, holding that there should have been a hearing on all charges and that the proceedings should have been remanded for that purpose. Judge Frank agreed with Judge Hand except as to Specification I but noted that this did not affect the result since the sentences under each specification were to run concurrently and were of the same length.

This article will not discuss the question whether these lawyers were or were not guilty of criminal contempt of court on one or more occasions during the trial. Attention here will be focused on the important Constitutional and procedural issue raised by the case. Could Judge Medina proceed in this case, as he did, without notice and hearing and without disqualifying himself?

Broadly speaking, this question focuses attention on one of the troublesome problems arising in Anglo-American jurisprudence—the apparent conflict between the necessity for an orderly administration of justice and the preservation of those safeguards of fair play and substantial justice in criminal proceedings which we ordinarily associate with the liberal, democratic tradition.

To be sure, the very notion of fair play and substantial justice assumes a court, a hearing and an orderly administration. The idea cannot be permitted to destroy itself. Accordingly, when conduct occurs in the courtroom of such a nature as to obstruct orderly judicial procedure, it must be dealt with as the necessities require. There will be occasions when procedure to insure fairness can be preserved only by dealing with those who threaten its destruction by means short of those usually guaranteed to persons accused of ordinary crime. It is on this basis only that any power at all exists to punish for a criminal contempt without a hearing or (even with a hearing) without a jury. And for more than a century, the trend in legislation and decision in the United States has been to confine this authority to "the least possible power adequate to the end proposed." [9] This is the application of the principle of due process of law to contempt cases and the resolution of the apparent conflict between the necessities of orderly judicial administration and the preservation of safeguards for the accused. Thus, any modification in contempt proceedings of the usual safeguards afforded an accused can only be permitted where it is absolutely necessary for the preservation of orderly judicial administration.

Criminal contempt ordinarily results in punishment. In the light of modern scientific theories, punishment for criminal contempt may be

9. Anderson v. Dunn, 6 Wheat. 204, 227 (U.S. 1821). The principle was recently reiterated in *In re* Michael, 326 U.S. 224, 227 (1945). For other statements see also Hough J., in Rosner v. United States, 10 F.2d 675, 676 (2d Cir. 1926); *Ex parte* Hudgings, 249 U.S. 378, 383 (1919); *cf.* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911). These cases are briefly discussed from the perspective here stressed in Nelles, *Summary Power to Punish for Contempt*, 31 COL. L. REV. 956, 958-960 (1931).

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regarded as a vestige of the archaic principle of retribution, that is, the vindication of public right through the suffering of the offender.[10] The question may be raised whether punishment is ever necessary to prevent or terminate an interruption of orderly judicial administration. There is little doubt that in most, indeed, perhaps all cases, the administration of justice can be adequately protected by means other than punishment, as for example, by warnings, prompt use of the marshal, the ejection or threatened ejection of the offender from the courtroom, temporary recess or adjournment. However, the Congress and the Supreme Court have recognized that punishment of contemptuous conduct, may occasionally be necessary to maintain or restore orderly procedure,[11] and this basic assumption will not be questioned here.

In an era when the preservation of individual liberty is a vital issue all over the world, the legislation and case law which have developed on this issue should represent rigidly the outside limits of judicial power to punish for criminal contempt. What is left of safeguards for the accused in the extreme cases should be scrupulously preserved. Any real or apparent deviations should be appraised strictly in the light of the policies involved and the principle of reconciliation of the competing demands of safeguards for the accused and the necessities of orderly judicial administration.

I. Procedure Without Notice and Hearing

Under what circumstances may the court proceed to punish for contempt without notice and hearing? As will be seen, this question involves two issues. First, what are the minimum conditions, if any, required by due process to alleviate the arbitrary results of a denial of notice and hearing where such denial is necessary? Second, what is the nature of the misbehavior that makes necessary the denial of notice and hearing?

The proper procedure for punishing contempt of court is set out in Rule 42 of The Federal Rules of Criminal Procedure, which reads as follows:

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

10. See, *e.g.*, Eliasberg, *Repentance and Remorse in Rehabilitation* in Handbook of Correctional Psychology (1947); Rusche & Kirchheimer, Punishment and Social Structure (1939) cited in Dession, Criminal Law Administration and Public Order 56 n.7 (1948).

11. Compare discussion by Nelles, *Summary Power to Punish for Contempt*, 31 Col. L. Rev. 956 (1931).

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> except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment." [12]

The lawyers, among other things, contended that the judge should not have proceeded under Subdivision (a), that the circumstances called for notice and hearing and the disqualification of the trial judge under Subdivision (b). They claimed on the basis of certain language in the preamble and Specification I that the Judge had not punished them for their specific in-court misconduct as such. Such misconduct was mentioned in the certificate solely as part of the overall charge of conspiracy. This, they argued, constituted the sole contempt of which they were found guilty without a hearing. But steps in the conspiracy might have taken place out of court. The Judge's certificate stated nothing to the contrary. The certificate did not certify, as required by Rule 42(a), that the judge "saw or heard" the contempt, namely the entire conspiracy, nor did it charge that all its essential steps occurred in the "actual presence" of the court. The defendants also claimed that the procedure set forth in Rule 42(a) could not be applied because the actual intention to obstruct justice was an element of their contempt. They contended that whenever a contempt conviction is dependent on an evil intention, due process demands that the accused be allowed an opportunity to defend himself with evidence showing his good faith. Rule 42(a) is not meant to apply under such circumstances.

The defendants challenged the application of Rule 42(a) still further. They pointed out that American judicial tradition has regarded contempt convictions without a hearing as drastic measures to be applied only in those instances where instant conviction is absolutely necessary to insure uninterrupted judicial administration. Here this could not be the case since the judge had waited till near the end of the trial to punish previous misbehavior.[13]

12. Promulgated pursuant to 18 U.S.C. §§ 687, 689 (1946).

13. See Appellant's Brief before Court of Appeals, I A, B and II.

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In terms of the above outlined general analysis of the function of, and limitations on, the contempt power, these arguments come to this: First, the minimum conditions required by due process to alleviate the arbitrary results of a denial of notice and hearing are that every important phase of the alleged contempt must have been heard and seen by the judge in court. In addition, due process does not permit the elimination of a hearing where actual intention to obstruct justice is an essential element of the contempt. A hearing could not be omitted here because the certificate charged a not altogether present, visible and audible conspiracy, including a previously formed intention on the part of the defendants to obstruct the administration of justice. Second, due process permits deviation from the hearing procedure only when the nature of the misbehavior is such that speedy conviction and punishment of the disturber is absolutely necessary for the preservation of orderly judicial administration. Here this was not the case. Judge Medina did not act with dispatch nor did he make any attempt to do so. On the contrary, he deliberately waited till near the end of the trial to punish the offenders. In a number of instances this amounted to a delay of several months between the cited event and the conviction and order of punishment.

Now, these contentions in detail.

THE FIRST CONTENTION: RULE 42(A)'S LIMITED APPLICATION AS A SUBSTITUTE GUARANTY FOR A HEARING:

A casual reader, in looking at Specification I and the Preamble, could get the impression that the judge was saying in part that the lawyers had got together and plotted to disrupt the trial by their courtroom antics. On reflection, it might also occur to him that this planning could not all have been done in the courtroom in front of the judge. Nevertheless the reader might still refuse to take seriously the notion that the trial judge's remarks should somehow bring about a reversal of the convictions. The argument might strike him as too simple on the one hand and too hypertechnical on the other. A glance at the material in the other specifications or previous knowledge of the case might convince him that what the lawyers did was too strong medicine for any judge. "Surely," the reader might think, "the Judge should be allowed to use the full measure of his power where there seems to be such flagrant abuse. A more sophisticated approach to both the certificate and the Rule would certainly show the Judge's action proper!"

Actually, the contrary seems to be true. A thorough analysis tends to indicate that insofar as the lawyers' first contention is concerned, the Judge's action violates guarantees of fair procedure generally extended even to those accused of the vilest crimes. The steps leading

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to this conclusion are neither simple nor hypertechnical. It will be seen that the certificate may be read in several possible but not equally plausible ways. No matter which of these constructions is adopted, the Judge's procedure under Rule 42(a) is improper.

According to one of these constructions both Specification I and the Preamble find the defendants guilty of a conspiracy to obstruct justice through a wilful, calculated and deliberate plan. The remaining specifications are illustrations of this overall charge. The conspiracy deliberately to obstruct justice constitutes the only contempt of which the defendants are held guilty, or an essential element of such contempt or contempts, or, at least important evidence of the degree of guilt which the judge considered. The mere misconduct in court is not what the lawyers were punished for. Their conviction, on this construction, is contrary to Rule 42(a) in two respects. First the conspiracy might have included steps which took place out of court. Second the conspiracy charge rested on a finding of the defendants' actual state of mind.

The history of Rule 42(a) reveals its purpose and indicates that the denial of a hearing here constitutes a serious infringement of due process. There is a fundamental policy behind the Rule's requirement that the contempt be committed in the court's "actual presence" and that the judge certify that he "saw or heard" the misconduct. This requirement means literally that a hearing may be omitted only when all the elements of the contempt occur before a judge sitting on the bench. Then it is a virtual impossibility that a hearing would produce new material for the defense and the traditional guarantees of due process are not greatly infringed. But in this case, a hearing might have produced evidence about what occurred or did not occur out of court as steps in the conspiracy. The fact that the judge saw enough to justify an inference of an agreement does not justify elimination of a hearing. It is precisely as to matters merely inferred that the accused might be able to produce evidence in defense. Again, the element of deliberation, calculation and wilfulness is a subjective aspect of the misconduct which might be inferred from it and other circumstances. However, a hearing might produce evidence showing the good faith with which defendants, perhaps through mistake, ignorance, or poor judgment, committed acts which in fact disturbed the trial. Whether this would ultimately result in acquittal is not relevant here. Even the criminal against whom the evidence appears to be overwhelming is entitled to make a defense.

Another construction of the certificate is that adopted by Judge Hand as the sole way of reading Specification I and one of two alternative ways of reading the Preamble. Under this construction the refer-

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ences to an agreement or conspiracy are read as no more than statements that the misconduct of the defendants was wilful and deliberate. This construction seems forced. In all likelihood it does not reflect the true intentions of the trial judge. His language seems to accuse, convict and punish the defendants for planning and carrying out a sinister plot to obstruct the trial. It is unlikely that he intended to convict and punish the defendants to the extent he did for a less colorful crime. Judge Medina did not act hastily. Presumably his language was measured. Be that as it may, even under Judge Hand's interpretation the deliberate intention to obstruct justice is retained in addition to the overt misconduct as an essential element of the contempt. This intent might have been inferred from what occured in court. But here again, the inference is not enough. As to their state of mind even their testimony alone would be evidence of good faith they could have produced at a hearing.

Judge Frank held that Specification I charged a conspiracy and conviction under it could not be sustained. But he construed the certificate so as to uphold the punishment of the defendants under the remaining specifications. He decided that Specification I had no connection with the remaining specifications and therefore did not make those part of the conspiracy charge. It will be seen that this construction is not the most likely one. Judge Frank also eliminated the effect of the preamble by making use of what was Judge Hand's second alternative interpretation. According to both Judges Hand and Frank, the preamble does not find the defendants guilty of a conspiracy and thus convert the charges in the remaining specifications into a mere recapitulation of illustrative incidents in the execution of the plot. On the contrary these remain separate charges. The preamble refers to the conspiracy not as the contempt, or one contempt, or even an element of any contempt, but simply as the type of background material not established at trial which a judge may generally use to determine the length of the sentence once the defendant has been found guilty. It will be shown there is enough in the preamble to suggest that the conspiracy is not an outside circumstance but the entire contempt or at least an essential element of the contempt. Even were the conspiracy merely an outside circumstance, considered only to determine the extent of punishment, the cases show that in contempt proceedings a hearing must be held if evidence to mitigate the punishment might be brought forth. The considerations that permit a deviation from this requirement in many other criminal proceedings are not present in criminal contempt.

These possible alternative constructions will now be considered in detail.

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Construction 1. Rule 42(a) and Conspiracy

(a) The Certificate and the Specifications

It will be recalled that the Judge "would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety," were it not for the fact that "before the trial had progressed very far" he was forced to the conclusion that "the acts and statements to which I am about to refer were the result of an agreement between these defendants deliberately entered into in a cold and calculating manner . . . to do and say these things." He also thought that these things were done and said for the purpose of: "(1) causing such delay as would make it impossible to go on with the trial, (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue." He then went on to say that the "acts, statements, and conduct of each of the defendants . . . constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. . . . Accordingly I adjudge the following guilty of the several criminal contempts." These portions of the preamble seem to indicate that conspiracy was the gist of the contempt of which the defendants were declared guilty under the entire certificate. An actual evil purpose—*i.e.*, in addition to the mere voluntary doing of the overt acts—which is, with some notable exceptions, held essential to the crime of conspiracy, is here explicitly made an element of the crime. The agreement is said to have been "deliberately entered into [by the defendants] in a cold and calculating manner" for a series of specific corrupt and evil purposes.

The Judge's statement at the outset that were it not for the conspiracy and the specific evil intent he would have excused conduct resulting from "heat" and "zeal," conceivably could be regarded as a mere theoretical postulate having no specific reference to the case. However, the phrase "before the trial had progressed very far" seems to be a reference at least to some of the specific incidents of contempt. Subsequent allusion to "the acts and statements to which I am about to refer" or "hereinafter specified" supports the construction that the findings of conspiracy and actual intent to corrupt justice refer to all of the certificate's specifications. The word "accordingly" in the final sentence quoted underscores this by showing that the material in the preamble constitutes a very important portion of the ingredients making up the finding of guilt.

Similarly Specification I states that the defendants "joined in a wil-

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ful, deliberate, and concerted effort to delay and obstruct the trial for the purpose of. . . . To effect this plan, these defendants contemptuously and without justification. . . ." Here the judge lists items a to m, quoted above, which are simply a statement in more general terms of the incidents quoted in the remaining specifications. In other words, Specification I seems to find that the defendants joined in a "concerted effort" or conspiracy which involved a "wilful" and "deliberate" scheme to "delay and obstruct the trial" for a series of contemptuous purposes. It then seems to make the more specific findings a to m a part of the general finding of conspiracy. At the very least, the conspiracy including the actual corrupt purpose becomes an essential element of the charges made in points a to m and presumably of the remaining specifications which they paraphrase. This construction seems further borne out by the fact that the Judge imposed separate but concurrent sentences on the various defendants wherever they were mentioned in any of Specifications II to XL. In each case the sentence equalled the concurrent sentence imposed for their misbehavior in Specification I. This was so although the charges in Specification I were far more serious than those mentioned in any one of the other specifications. This pattern of sentencing suggests that the judge actually treated all the Specifications as part of Specification I.[14] Other possible constructions to support Judge Frank's notion that Specification I has no connection with the other Specifications will be discussed later on.

(b) Rule 42(a) and out-of-court phases of the conspiracy

Once the certificate is construed as above, it appears that the Judge charged a contempt that did not take place entirely in the court's actual presence and that had not been fully seen or heard by him. The agreement or conspiracy is something more than the overt acts which occurred in court. Yet as to the conspiracy, the certificate did not state where or when it originated or that the judge saw or heard every phase of it. It is possible and probable that part of the conspiracy, if any, occurred outside the court and was at best inferred by the judge from the evidence before him. This would not meet the literal requirement of Rule 42(a).

Those whom this result still strikes as arbitrary may seek to avoid it, either by interpreting the rule less strictly, or by construing the certificate differently. Two judges of the Court of Appeals sought to construe the certificate differently and their efforts will be discussed subsequently. Here it will be demonstrated that once the view of the certificate set out above is accepted, a strict application of the rule is the only correct one, not arbitrary but based on sound policies of fairness long part of the conception of due process in the American legal tradition.

14. See Judge Clark's dissent, 182 F.2d 416, 464 n.3 (2d Cir. 1950).

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A literal application of the rule to the certificate as here construed might be thought arbitrary or overly technical because so much of the consequences of the agreement, the really disruptive acts, occurred in court. Surely the rule did not intend to limit the judge's power because what on the surface at least seems like a minor phase of the contempt occurred out of court. A little ingenuity certainly would suggest ways of interpreting the rule more liberally. For example, perhaps the "presence" requirements is satisfied by a sort of constructive "omni-presence" of the judge which extends to all corners of the universe where anything is done that may have a tendency to affect docketed, existing or past trials? Or if this fiction should seem absurd because it would allow no basis for distinguishing between Rules 42(a) and (b), since all contempt must at least have such a tendency, isn't it enough that some consequences of the conspiracy occurred in court especially where these constituted adequate circumstantial proof of the out-of-court conduct? Or could one not borrow a fiction sometimes used in conspiracy law in other contexts, that the conspiracy recurs with every act of its execution? Could not this doctrine be applied here so that when one or more of the acts occur in court then the entire conspiracy is regarded as seen and heard by the judge and as having occurred in his actual presence?

The history of Rule 42(a) indicates that it must be applied strictly; that none of the alternative interpretations mentioned above have validity; and that this position involves more fundamental issues than a mere technical adherence to the rules.

The notes left by draftsmen of the Rule [15] show that it codifies important principles of due process embodied in two leading Supreme Court cases, Ex parte *Terry* [16] and *Cooke* v. *United States*.[17] In the *Terry* case, Mrs. Terry had misbehaved in the courtroom. The judge ordered the marshal to remove her. Terry, an attorney, then and there, while the marshal tried to obey the judge, assaulted and beat the marshal with a gun. Then he fled. Shortly thereafter the judge sentenced him for contempt, without notice and hearing and in absentia. The Supreme Court denied a writ of habeas corpus. Justice Harlan's opinion reads in part:

> "It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government,—that is, in civil and criminal cases,—that 'a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' *Windsor* v. *McVeigh*, 93 U.S. 274, 277. But there is another rule of almost immemorial

15. STEWART, FEDERAL RULES OF CRIMINAL PROCEDURE 336–37 (1945).
16. 128 U.S. 289 (1888).
17. 267 U.S. 517 (1925).

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> antiquity, and universally acknowledged, which is equally vital to personal liberty, and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizens, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law." [18]

The opinion also contains the following quotation from Blackstone.

> "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule." [19]

In the *Cooke* case the judge had received a letter from an attorney who had lost a case before him. Four more of his cases were pending before the same judge. The letter requested that the judge voluntarily disqualify himself in the remaining cases. In disparaging language, it accused the judge of prejudice in the case already lost. The lawyer was sentenced for contempt without notice and hearing. The Supreme Court of the United States reversed. Justice Taft said:

> "The important distinction between the Terry case and the one at bar is that this contempt was not in open court. . . ." [20]
>
> ". . . Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception. . . ." [21]
>
> "Due process of law, therefore, 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

18. 128 U.S. 289, 307 (1888).
19. *Id.* at 307–308.
20. 267 U.S. 517, 535 (1925).
21. *Id.* at 536.

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> 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." [22]

The language from Blackstone and the *Cooke* and *Terry* cases taken together show that a hearing may be dispensed with only if the contempt happens in the "face of the court," in such a way that the judge "saw everything that went on" which gave him close to "perfect knowledge" of the contemptuous behavior and of its effect to "impair its [the court's] authority" and "obstruct the transaction of its business." Presumably under due process, the outer limit for the reduction of the traditional safeguards for the accused is that a hearing may be dispensed with only when the judge's knowledge is so complete that there is virtually no possibility that a hearing would shed any more light on the matter. The most recent authoritative interpretation of the *Cooke* and *Terry* cases by the Supreme Court, In re *Oliver*,[23] confirms this view. Justice Black's opinion read in part:

> "The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, *where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court. . . . If some essential elements of the offense are not personally observed by the judge,* so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the *Cooke* case, *that the accused be accorded notice and a fair hearing as above set out.*" [24]

With this background of Rule 42(a) in mind, there can be little question that the procedure it outlines cannot be followed in this case under the first construction of the certificate. As was stated earlier, possible out-of-court elements of the conspiracy could at best only be inferred by the judge. They were not seen or heard by him in such a manner that no possible proof could be produced at a hearing to show that all or some of the defendants were innocent or deserving of lesser punishment. Each individual defendant might show that he did not participate in the plan or know of it, if it existed, or that he participated to a small or lesser extent and therefore, at least, should be punished less severely. No such problem exists where a defendant attacks a marshal in the courtroom. There the most direct proof of guilt is before the judge. A hearing would give the defendant no more than a

22. *Id.* at 537.
23. 333 U.S. 257 (1948).
24. *Id.* at 275–76. (Emphasis supplied.)

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chance to plea for mercy.[25] Consequently in such a case no substantial diminution of guarantees of due process is involved. But in the present case, the situation seems one where possible evidence contradictory to the judge's inference might be produced at a hearing. Substantial guarantees of due process would be denied by a more summary procedure. Rule 42(a) does not seem to go that far.

Once Rule 42(a) is understood in this light, it is clear that the fundamental policy it embodies cannot be overcome by the mere technical devices suggested above. A judge who is but "constructively" present obviously does not acquire the kind of direct and complete knowledge that would make a hearing nothing but a formality, the elimination of which does no substantial harm. That this strict view of Rule 42, which precludes the "constructive" presence gloss, is in accord with what the Supreme Court specifically intended is brought out by further language in the *Cooke* opinion, set out in the notes.[26] Similarly, the notion that out-of-court behavior brought about in-court consequences from which inferences about out-of-court conduct could properly be made fails to satisfy the requirements of Rule 42(a), since it is precisely

25. Except for the possible standard defense of insanity, which could probably also be brought up in a collateral attack on a no-hearing conviction for contempt.

26. The federal contempt statute in part limits the power of federal courts to sentence for contempt, with or without a hearing, to cases where the misbehavior occurs in the "presence of the court or so near thereto as to obstruct the administration of justice." 18 U.S.C.R. § 401 (1950). Justice Taft in the *Cooke* case made it clear that while the possible broader scope of this statute may define a court's general powers to punish for contempt, it is not the sole limitation where the contempt is punished without a hearing:

> ". . . This is fully brought out in *Savin, Petitioner*, 131 U.S. 267. The contempt there was an effort to deter a witness, in attendance upon a court of the United States in obedience to a subpoena, while he was in a waiting room for witnesses near the courtroom, from testifying and offering him money in the hallway of the courthouse as an inducement. This was held to be 'misbehavior in the presence of the Court' under § 725 R.S. (now § 268 of the Judicial Code). The Court, speaking by Mr. Justice Harlan, said (page 277): 'We are of the opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry*, 128 U.S. 289, 309; whereas, in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by testimony under oath of others, the proper practice is by rule or other process to require the offender to appear and show cause why he should not be punished. 4 Bl.Clm. 286.' This difference between the scope of the words of the statute 'in the presence of the court,' on the one hand, and the meaning of the narrower phrase 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court,' or 'in *facie curiae*,' on the other, is thus clearly indicated and is further elaborated in the opinion." 267 U.S. 517, 535–36 (1925).

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with respect to the conduct inferred that evidence might be produced at a hearing in defense or mitigation of punishment. In the discussion below under the heading "Rule 42(a) and the plotter's evil purpose," reference will be made to further language in the *Cooke* opinion and others which indicates that this is the proper interpretation of the Rule. So too, the legal fiction of a conspiracy which recurs with every act of its execution, as used in other contexts for different reasons,[27] would only on a preposterously formal level meet the basic policy of the Rule. It too would fail to give the defendants a chance to present evidence to counteract inferences from happenings in court about the crime of which they were, in fact, accused.

(c) Rule 42(a) and the plotters' evil purpose.

There is still a further relevant significance to Rule 42(a)'s requirement that all the contempt must have been seen or heard by the judge. The certificate as construed here charged as part of the conspiracy an actual evil purpose. Such a purpose, being a state of mind, could hardly ever be so fully seen or heard by the judge that it could be said with any certainty that a hearing could not possibly produce some evidence of good faith. Consequently, the Rule 42(a) procedure cannot be applied. The discussion here will be in three parts. First, the reader will be presented with a somewhat simplified anatomy of "intent." Second, there will be a further elaboration on reasons why the certificate should be construed as charging an actual evil intent. Third, it will be shown that Rule 42 definitely forecloses the procedure on situations where actual evil intent is part of the contempt.

1) Intent in criminal law is a confused concept rarely clarified and perhaps archaic. It is beyond the scope of this article to add to the general confusion. Here its mere skeleton will simply be borrowed to the extent necessary for the analysis. Intent generally refers to a state of mind, more or less accompanying the doing of an act, that needs to

27. The doctrine is not necessarily quite that broad. It is used to start the statute of limitations over again with the commitment of every new act in furtherance of the conspiracy, *cf.* United States v. Kissel, 173 Fed. 823 (S.D. N.Y. 1909), and to prevent merger of the substantive offense and the conspiracy charge. See Pinkerton v. United States, 328 U.S. 640 (1946).

The Supreme Court's reluctance to extend the recurring conspiracy theory to contempt cases is indicated by Pendergast v. United States, 317 U.S. 412 (1943). There the government sought to establish a contempt consisting of misrepresentation by the contemnor to a Federal court. The actual misrepresentation had occurred in court and met all the requirements of "presence" contained in the federal contempt statute. But the statute of limitations had run since that time. The government claimed that the misrepresentation was part of an illegal conspiracy which continued after the particular misrepresentation. The Supreme Court held the contempt prosecution barred by the statute of limitations. It stated that the conspiracy could not be charged as the offense because it was not committed in the presence of the court. The Court was unwilling to stretch the "presence" requirement of the statute because the contempt was a result of the conspiracy.

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be proved before criminal liability for certain crimes or degrees of crimes is established. Certain crimes do not involve such a mental element at all. Others are said to require it but it is considered to be conclusively presumed from the doing of certain acts. In those situations the mental element is of course purely fictitious. In those crimes where some state of mind needs to be shown, its description has a wide range. It may mean that the accused generally wanted to do something that was harmful to society or other individuals with or without knowledge that it was either against the mores or the law. It may mean that he simply wanted to do the specific overt act with or without knowledge that it would do harm, was against the mores or against the law. And it may mean that the accused wanted the act to produce specific harms, violations of the mores or violations of the law. The particulars of the state of mind that need be shown will depend on the substantive law of the particular crime. Where crimes require the showing of some state of mind among the types broadly outlined above it may of course be inferred from circumstantial evidence. Sometimes the burden of proof remains on the prosecution all the way. Sometimes, once the prosecution shows a certain amount of circumstantial evidence the burden of proof shifts to the defense to show absence of the requisite state of mind.[28]

Modern sophisticates might question the utility of the concept. On one level they might feel that the law should be more objective, less subject to standards that cannot be easily stated in concrete operational terms. Closely connected with this, they might ponder on the impossibility of ever discovering an accused's actual state of mind, especially at a trial. The techniques of psychoanalysis might add to their wonder about this. Modern findings about societal cause of crime may make the whole notion seem totally archaic, and useless except for devising specific methods for the criminal's rehabilitation and cure, which is an issue generally not before the judge and jury during determinations of guilt or innocence. The authors are aware of these considerations and do not necessarily look with disfavor upon further reexamination of the entire concept. They feel, however, that simply to disregard the concept in a particular case would not accomplish this end, but would result in denying the defendants a right to a hearing they would otherwise have. Hereafter it will be shown that the cases specifically point to such a right. At this point it will suffice to say that whenever a state of mind of the type set out above is an ele-

28. See generally, Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); HALL, PRINCIPLES OF CRIMINAL LAW chs. 5, 6, 7, 11 (1947); Sayre, *Mens Rea*, 45 HARV. L. REV. 9, 74 (1945); Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 72–5, 78–84 (1933). On possible unconstitutionality of statutes eliminating *mens rea* see Note, 24 IND. L.J. 8 (1948). On burden of proof see Campbell, *Criminal Law: Mens Rea and the Burden of Proof*, 22 N.Z.L.J. 161 (1946).

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ment of the crime its practical significance is that no amount of circumstantial evidence will ever conclusively foreclose the defendants from offering to the judge or jury evidence of the absence of such state of mind. Moreover all external evidence will be judged not against a standard expressed in external evidence terms but against a vaguer standard expressed in "state of mind" terms allowing much more play to the personal feelings of the trier of facts. Here this is very important. For, as will appear more fully below, if the Rule 42(a) procedure is inapplicable, it means not only that the lawyers could introduce evidence as to their state of mind, but also that under Rule 42(b) a new judge tries the contempt.

2) The certificate here charged the type of contempt that required proof of a state of mind. The nature of this state of mind is more or less described in the certificate. In part it flows from the conspiracy charge itself. It is generally thought that there can be no conviction for criminal conspiracy unless there is a showing of the participants' consciously desiring to do some harm, to violate the mores or the law.[29] True there are notable exceptions and the matter is in some dispute. But here there can hardly be any dispute in view of specific language in the certificate and in view of the judge's remarks during the trial, of which samples appear in the notes.[30] All of these point clearly to a charge and finding that these defendants consciously wanted to do what they did, not simply to help their clients but to delay and obstruct the trial, ruin the health of the judge and so on. Conceivably the overt acts in the courtroom themselves would have constituted a contempt. This is how, for example, Terry's case could be regarded. Had the certificate here simply contained the formal charge of "intent to obstruct justice," as was true in Terry's case, it could be treated as requiring a mental state, conclusively presumed from certain overt

29. See People v. Powell, 63 N.Y. 88 (1875). *Cf.* American Tobacco Co. v. United States, 328 U.S. 781 (1946).

30. "There has been a wilful, deliberate and concerted effort here to delay the proceedings. . . . At first, I couldn't think it possible, and then it began to dawn on me that maybe that is what was going on. And I mentioned it two or three times but it did not seem to have any effect. And finally it has come to my mind that such is the fact and I so find. . . . I might just as well let you know that this dragging on, slowing down process that I have observed and have now found to be a deliberate and concerted effort, is one of the reasons for my rulings and will be from now on. . . ." Challenge Transcript, p. 2839.

On February 10th Judge Medina said:

"The finding made the other day was based not only upon occurrences that appear in the minutes but what I have observed in the conduct of counsel before me here, sneering, snickering, obvious indications of one to another to get up, it is your turn now, go at it next, keep this thing going, and so on." Certainly, at least on this kind of reading of the mind from gestures not directly part of the overt misconduct, rebuttal would seem to be in order.

On February 11th he said: "The effect of it all is confirming my view that there has been this deliberate effort here to make a mockery of justice and to, in effect and in the aggregate, sabotage the administration of justice, and I just won't have it."

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acts and therefore entirely fictitious. The question would then have been whether Judge Medina erred in regarding the overt acts without the mental element as contemptuous at all or as contemptuous to the degree that called for the punishment he inflicted. But here this question is not reached, because whether Judge Medina could have charged the lawyers and found them guilty of contempt for doing the overt acts alone, he did not choose to do so, but charged them instead with a contempt which he defined as consisting of overt acts coupled with a state of mind consisting of conscious evil design. He thus made proof of this state of mind prerequisite to conviction; or at least relevant to the degree of guilt.

Certain decisions, moreover, show that this view of the certificate should probably be favored as generally more in accord with American traditional judicial regard for the independence of the bar. True, lawyers have from time to time behaved so badly and obstructively in court that their very behavior, regardless of specific evil purpose, was sufficient to support a contempt conviction.[31] But it has generally been emphasized that where the contempt consisted of activities which, no matter how mistaken or obstructive, *might* have been undertaken as part of honest if too vigorous representation of the client, then actual evil purpose becomes a necessary part of the proof of guilt, or in any event affects the extent of punishment. Otherwise courage and vigor on the part of lawyers would become too hazardous and the bar's independence would be jeopardized.

This view is adequately stated in Chief Justice Fuller's opinion In re *Watts and Sachs* [32] where attorneys had been held in contempt of a bankruptcy court for giving erroneous advice that resulted in a state court reasserting its jurisdiction over proceedings then in the federal court:

> "It is the action of the state court that was complained of, and the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.
> "But here we do not have the ordinary case of advice to clients, but the case of judicial action alleged to have been induced by the advice complained of. The theory of the condemnation is that of conspiracy between the state court and the attorneys to obstruct

31. This was true in *Terry's* case. See also Jones v. United States, 151 F.2d 289 (D.C. Cir. 1945) (person acting as attorney pro se).

32. 190 U.S. 1 (1902).

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the administration of justice and to bring the authority of the United States Court in contempt.

* * *

"They could not be found guilty because they believed and declared their belief that the state court had jurisdiction and the District Court had not. Granting that they were mistaken it does not follow that their mistaken conviction constituted contempt.

* * *

"What evidence is there that these attorneys, or either of them, gave any advice or took any action in *bad faith*, not in the honest discharge of their duty as counsel, but with the *deliberate intent* to have the Federal Court set at defiance and its orders treated with contempt? (italics supplied)

* * *

". . . [W]ant of intention to commit contempt is entitled to great weight in such circumstances.

* * *

"State courts are entitled to the assistance of the gentlemen of the bar in the maintenance of their dignity and jurisdiction, and the fearless discharge of their duty by the latter should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance." [33]

Another good statement indicating that actual evil intent frequently is a crucial issue in contempts by lawyers was made by the Ninth Circuit in *Caldwell v. United States* [34] in reversing a conviction of an attorney for contempt, where the misconduct consisted of repeating questions after the judge had sustained objections.

"Undoubtedly in both questions counsel was seeking the same end, but unless a ruling is amplified by an explanation of the reasons therefor attorneys especially in the course of rapid cross-examination often put a question in different form, as a matter of caution, and with no desire . . . to be contumacious. If counsel here reasonably believed the subject material, it was his right, if not his duty, to disclose specifically what he expected to show, either by an offer of proof or by a question substantially in the form of that asked, at the option of the court.

* * *

". . . [O]nly in one instance, so far as we have been able to find, . . . did the court in ruling suggest that the second question was intended for the same purpose, . . . and then without any admonition or direction to abstain from a like practice in the future. Thus suddenly to punish for conduct of doubtful propriety only, where

33. *Id.* at 29–35.

34. 28 F.2d 684 (9th Cir. 1928).

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> the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client." [35]

Of course in the *Caldwell* case the circumstantial evidence itself did not seem to indicate an actual evil intention. In the Communist lawyers' case, many might feel, as Judge Hand did, that such intention could be inferred. Of course it could. But that is not enough, as the *Cooke* and other cases show, to dispense with the requirements of due process that the accused be afforded a hearing whenever actual evil purpose is made part of the contempt. The *Watts* and *Caldwell* cases show that where the contempt of lawyers consists of advice to clients, cross-examination or other action, even if mistaken and disturbing, which purports to be on behalf of a client, then the actual evil intenttion is a crucial element of the contempt or relevant to the degree of guilt and consequent extent of punishment. The policy is clear: to protect honest lawyers against punishment for excessive zeal and thus preserve the independence of the bar.

As has been suggested, it could be argued that the overt acts mentioned in the certificate, although consisting largely, as Judge Clark put it in his dissent,[36] "of pressing a colloquy with the judge—in which the judge participated—to the point of exasperation," come closer to those cases in which the act itself, however saintly the purpose, is conclusive proof of guilt, than to those which require separate proof of actual design to obstruct justice. But it is precisely on this point that Judge Medina's conspiracy charge and explicit findings of evil intent are significant. So too, his statement that he would not have punished these defendants, (at least for part of the misconduct), had it not been for the "agreement," takes on added significance. In other words, the language of the certificate, and his courtroom remarks referred to above, understood in the light of the general policy of making actual evil intention an element in punishing lawyers for contempt, point to the conclusion that the evil intention to obstruct justice was an essential element of the lawyers' contempt or was regarded by the judge as pertinent to the degree of guilt and thus to the severity of the punishment.

3) And now to Rule 42(a) and the necessity for a hearing. The following excerpt from Justice Taft's opinion ordering a hearing in the *Cooke* case tells the story.

> "The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this, where the intention with which acts of contempt

35. *Ibid.* See also May Hosiery Mills v. United States, 64 F.2d 450, 453 (9th Cir. 1933) and cases there cited; Sprinkle v. Davis, 111 F.2d 925, 930 (4th Cir. 1940).

36. 182 F.2d 416, 466 (2nd Cir. 1950).

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> have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of the defense." [37]

A New York case, Matter of *Rotwein*,[38] in which the late Judge Lehman wrote the opinion, also proves instructive. The New York contempt statute provides that a contempt committed "in the immediate view and presence of the Court" may be punished without a hearing. An attorney, while moving for a new trial, had accused the judge of prejudice against borrowers from finance companies "possibly by virtue of a prior connection as attorney for a finance company." The trial judge without a hearing sentenced the attorney for contempt. The Court of Appeals reversed. Judge Lehman's opinion read in part:

> "A statement which might impair respect for the judge can hardly constitute 'disorderly, contemptuous or insolent behavior' within the meaning of the statute, if it is made by the attorney in good faith to protect the interests of his client, and in the honest belief that it is relevant, and without reckless disregard of the truth or intent 'to impair the respect due to' the court. . . . Before the Trial Judge could punish the attorney for contempt of court, he was bound to afford an opportunity to the attorney to present evidence which might indicate the attorney's good faith or which might furnish justification for his statements." [39]

In other words, these opinions point up the further significance of Rule 42(a)'s requirement that *all* the contempt must have been seen or heard by the judge. This is a minimum substitute requirement for the usual hearing and limits the more summary procedure to cases where a hearing could not produce new evidence in defense. It cannot apply where the actual state of mind, the evil intention, is part of the contempt. Such state of mind could hardly ever be so fully before the judge that evidence showing good faith might not be produced at a hearing.

Judge Clark's opinion states the conclusions reached thus far succinctly and eloquently:

> "Due process, however, accords a hearing to those believed to be clearly guilty as well as to those having a good possibility of acquittal. Moreover, on the issue which has become crucial—that of a conspiracy to obstruct justice—I do not see how we can be sure. Upon such an issue the matter of intent looms so large; indeed, the whole question as to the difference between acts done in hot or cold blood can hardly fail to take on a different significance in the light of testimony, subjected to proper cross-examination, of the parties

37. 267 U.S. 517, 538 (1925).
38. 291 N.Y. 116 (1943).
39. *Id.* at 123–124.

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as to their purposes, and what they had agreed to in trial preparation and what was not discussed. We must bear in mind that over and over again the charge consists of pressing a colloquy with the judge—in which the judge participated—to the point of exasperation. I do not see how we can conclude that this was obviously all a matter planned before the start of each colloquy. Moreover, the issue was not alone that of the existence of the conspiracy, but also of the participation of each in one if proven. A hearing was necessary at least to settle the degrees of guilt; quite possibly it would result in much heavier penalties to some than were actually given. A hearing therefore seems to me a prerequisite to punishment as a matter of law." [40]

Construction 2: Conspiracy equals actual intention.

The following is one of two of Judge Hand's alternative constructions of the preamble:

"The appellants argue that the judge punished them because he found they were engaged in a conspiracy though he could not have witnessed the actual making of a joint agreement. But if the appellants' conduct described in the certificate was contemptuous and obstructive and involved contumacious acts at the trial, those acts were committed within the judge's sight and hearing. The judge's conclusion that they were the result of an agreement meant no more than that they were deliberate, and it was quite unimportant whether he believed that a prior conspiracy had been entered into. Indeed he never said that such a conspiracy had been formed. He saw and heard the appellants deliberately delaying the trial, disregarding his orders, and accusing him of wrong doing and corruption. This was enough to show wilful obstruction of the trial. There is nothing in his article indicating that there were any acts other than those which he saw and heard that determined his conclusions." [41]

The following is his view of Specification I:

"The record appears to justify the findings in Specification I of the Certificate that the appellants 'joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial . . . for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute. . . .' It likewise bears out the findings of obstructive and contemptuous conduct with which the defendants are charged in subdivisions *a* to *m* of that specification. There seems to have been ample reason for the court's conclusion that the attacks on Judge Knox and the other judges of the South-

40. 182 F.2d 416, 465, 466 (2nd Cir. 1950).

41. *Id.* at 420.

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> ern District and on the jury system, the Justice Department, the police, the newspapers and the President of the United States were launched with a similar purpose to divert the jury from the real issues, and to convert the case into a trial of the Government, rather than the indicted defendants." [42]

In other words, Judge Hand believes that the preamble and Specification I do not charge or find possible out-of-court conspiracy. He seems to construe the reference to the "agreement" in the preamble as a finding that defendants' conduct was wilful and deliberate obstruction of the trial. He seemingly disposes of the reference to "joined . . . in a concerted effort" in Specification I in a similar way, without specifically discussing the issue. Finally, he concludes that since there was ample evidence in the record to justify the findings of wilful and deliberate contemptuous conduct and since Judge Medina based his findings entirely on what occurred in court the conviction must be upheld.

Perhaps Judge Hand's construction was simply an attempt to correct a technical slip made by an overzealous judge. Judge Medina might have intended the conspiracy charge, yet dropped it had he known the legal difficulties involved, and punished the defendants just as extensively on the basis of what actually happened in court without relying on further inference. Or Judge Medina might not have intended to charge a conspiracy but simply used some superfluous rhetoric which ultimately proved a little embarrassing. This kind of speculation by an appellate court is unusual, to say the least, in a criminal case involving serious charges of gross misconduct against attorneys. And yet what other basis could Judge Hand have for treating a whole series of special words such as "agreement entered into in a cold and calculating manner" and "joint effort" as if they meant simply "deliberate and wilful"? The construction seems especially forced with respect to the preamble where, as was shown above, at least some weight ought to have been given to the language at the beginning that the Judge would have overlooked misconduct resulting from mere "heat" or "zeal" had he not "before the trial had progressed very far . . . been reluctantly forced to the conclusion" that the contumacious "acts and statements" were the "result of an agreement." This, as has been indicated, would seem to show that the conspiracy was an element of the misbehavior for which he actually had punished the defendants; indeed it indicates that, with respect at least to some of the misconduct, if not all, the judge would not have seen fit to punish these defendants at all had it not been for the conspiracy. With this in mind the construction of the reference to an agreement or joint effort as meaning merely "deliberate and wilful obstruction of the trial" seems to contradict what amounts to Judge Medina's explicit

42. *Id.* at 421.

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intention. In some ways it might be said to come close to a retrial of the defendants under different charges on the appellate level.

Moreover, it seems clear that even if Judge Hand's construction is adopted he has not succeeded in demonstrating that Rule 42(a) was properly applied. His construction does not eliminate the explicit language charging actual evil intent. On the contrary, though it eliminates the conspiracy charge and thus also the extent to which an actual evil intention was attributable to conspiracy alone, it converts this charge into additional explicit allegations of evil purpose. Thus, actual intention still seems to have remained an essential element of the crime of which Judge Medina held the defendants guilty, or, at least relevant thereto, affecting the degree of guilt and consequent extent of punishment.[43] As has been shown, due process under such circumstances requires a hearing at which defendants are given an opportunity to show their good faith.

Construction 3: The conspiracy as a circumstance affecting the punishment.

Judge Frank decided that Specification I charged and found an out-of-court conspiracy and that consequently the Rule 42(a)-procedure was improperly applied to it.[44] He thought, however, that the conviction could stand on the basis of the other specifications which imposed sentences as extensive, running concurrently with those imposed under Specification I. In order to reach this conclusion, Judge Frank by his own standards had to eliminate the conspiracy charge insofar as it might be considered part of the other specifications either on the theory that they were illustrative of Specification I, or on the theory that they were affected by the overall charge made in the preamble.

43. At several points in the opinion Judge Hand specifically characterizes the purpose behind the acts of the individual defendants, thus indicating that this was part of the crime as he understood it. Thus in 182 F.2d at 422 the opinion reads: ". . . The repeated questions appear to have involved obstructive and dilatory tactics. . . . One has only to read these and many other arguments against the judge's rulings to be convinced that the conduct of the appellants was concerted and wilfully obstructive." See also Judge Medina's statements *supra* note 30. On p. 423, Judge Hand quotes the following statement by Judge Medina: "observed a number of things here which have impressed me as having been done solely for purposes of delay, perhaps to drag out their case, for an indefinite period. . . . Now for example I have observed as to exhibits, that an extremely long time is taken for the passing around of the exhibits, turning them over and over. . . ."

44. 182 F.2d 416, 455 (1950): "Specification I . . . I think charges something in the nature of a conspiracy. . . . Although what happened in the Judge's presence was powerful evidence of such an agreement, the agreement itself, if there was one, presumably was made out of court; at any rate it cannot be conclusively presumed that it was made in the judge's presence. . . . In those circumstances, the Judge, I think, could not properly sentence the lawyers under Specification I without a hearing, at which they would have the opportunity to offer evidence tending to show that they had not entered into a conspiracy."

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Judge Frank cryptically disposed of any connection between Specification I and the other specifications:

> "So far as these Specifications are concerned—since they all charge acts in the court-room, seen and heard by the judge—the question of conspiracy is wholly irrelevant, because Specification I, being distinct and separate, cannot be read into those other Specifications." [45]

Of course, it is possible that Judge Medina meant to make two charges, the first a conspiracy to commit the overt acts, or by Judge Hand's construction, the doing of the overt acts with actual evil purpose; the second the overt acts themselves, divorced from conspiracy or evil purpose. This interpretation, which is probably the basis of Judge Frank's conclusion, does not at first glance seem improbable. On the contrary, it seems to be quite in keeping with the organization of the certificate under separate specifications.

Still there remains the fact that the punishment of the lawyers under each specification which clearly seemed to charge a lesser crime was the same as the punishment under Specification I. The fact that McCabe whose actual participation was slight was still punished quite heavily, and that Dennis, a nonlawyer, was given a severe penalty, supports the notion that they were treated as co-conspirators.[46] Moreover, the preamble seems to connect everything to the conspiracy with its actual evil intent. Therein there is also the intimation that at least some of the overt acts would not have been punished were it not for the agreement. Judge Frank's view of the relation between Specification I and the other specifications makes the rest of these specifications somewhat inconsistent with the preamble.

Even the elimination of any connection between Specification I and the rest of the specifications, does not of course remove the direct effect of the preamble on those specifications. Its position in the certificate would suggest that its characterization of the contempts referred to all the specifications in the certificate. Judge Frank did not adopt Judge Hand's first alternative construction of the preamble which was discussed above; instead, he adopted Judge Hand's second alternative.

Judge Hand stated:

> "Even if . . . [the judge] . . . regarded the appellants' conduct as the result of an agreement made outside the courtroom, that view is unimportant and would not limit his power to impose a summary punishment for contempt. His punishment could no more be revised because he held that view than could a sentence for an ordinary crime be reversed because the judge felt and said that a defendant had shown himself such an undesirable citizen in other

45. 182 F.2d 416, 455 (1950).

46. See note 14 *supra*.

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transactions as to merit the imposition of unusually severe treatment. His reason for the length of the sentence would not affect its validity and should be ignored on appeal." [47]

Judge Frank's version was as follows:

"Nor, I think, was the conspiracy charge imported into them by the trial judge's preliminary remarks. For I agree with Judge Hand that we should ignore those remarks as superfluous, since they are but the equivalent of the action of a trial judge who (after a defendant has been properly held guilty) fixes a long sentence—within the permitted statutory limits—due to his belief that the defendant, out of court and without reference to the case on trial, had misbehaved. It has been held that such a belief has no bearing on the propriety of the sentence itself." [48]

For Judge Frank, this view was especially peculiar because he held that in Specification I the Judge charged the outside conspiracy as one of the contempts. Yet in the preamble what seemed to be even more explicit language became simply a circumstance of the punishment. Such a construction of the conspiracy, as merely a circumstance affecting the extent of punishment regardless of the question of guilt or innocence, seems inconsistent with the final sentence of the preamble: "*Accordingly*, I adjudge the following *guilty* of the several criminal contempts described below." This statement tends to indicate that Judge Medina regarded the agreement charged in the preamble as affecting the question of guilt or innocence, or at least of degree of guilt. Again here the earlier statement, that were it not for the conspiracy, conduct resulting from the "heat of controversy" and "zeal in the defense" would have been overlooked, would tend to indicate that the conspiracy charge or at least actual evil purpose was in the trial judge's mind an essential element of the offense—or offenses—or, alternatively, relevant to the degree of their guilt.

Even had the Judge's certificate stated in so many words that the conspiracy was merely an element pertinent to the extent of punishment and not relevant to the question of guilt or innocence there would be grave doubt about the validity of the procedure. The general trend and philosophy in the United States to limit strictly the contempt power of the courts has already been mentioned. It would be a weak principle, indeed, if it could so easily be circumvented. Punishment without hearing and notice of misbehavior in court which might ordinarily be punished by a small fine, could be blown up beyond all conceivable proportions by linking it with out-of-court behavior which otherwise would require a hearing, under the pretext that the out-of-court behavior was merely a circumstance affecting the punishment.

47. 182 F.2d 416, 420–421 (1950).

48. *Id.* at 455–456.

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But there are more serious doubts about the analogy with which Judges Hand and Frank so cavalierly made so large a hole in the dyke constructed as a safeguard against judicial tyranny. The cases alluded to by Judge Hand and cited by Judge Frank deal with procedures under which the judge in a criminal case is given a great deal of discretion in fixing punishment, regardless of the degree of guilt of the accused in the particular case. As was clearly pointed out in *Williams v. New York*,[49] cited by Judge Frank, the modern justification for criminal statutes giving such discretion to the judge is that treatment of the criminal should be geared to the individual characteristics of the offender. The incurable should be segregated as long as possible so that he may do no further harm to society, but the curable should, if possible, be given the kind of treatment, within the limits of the institutions available, which would be most likely to rehabilitate him. Consequently, the enlightened judge before sentencing takes into consideration the offender's home environment, psychological characteristics, his criminal record and other factors, to help him form a picture of the personality of the offender.[50]

All of this is of little relevance to the contempt procedure at issue in the Foley Square case. The procedure to punish for contempts without notice and hearing is not designed to deal with segregation and cure of criminals. Its only object is to give the judge a weapon to assure day to day uninterrupted orderly judicial administration. On-the-spot immediate punishment is an emergency measure, designed to restrain the offender from continuing and to deter him and others immediately from further offenses disrupting the administration of justice. The

49. 337 U.S. 241 (1949).

50. Justice Black's opinion in part reads as follows:

". . . Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. 36 Stat. 918, 18 U.S.C. §§ 714, 716, now §§ 4202, 4203. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." *Id.* at 248–9 (Footnotes omitted).

Except for the older cases, which simply accepted discretion in the Court without much analysis, the other cases cited by Judge Frank move toward the rationale of the *Williams*

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problems of long-range rehabilitation, cure and segregation of criminals are generally not involved. In any event, the relevance of these issues to the punishment of lawyers who, up to the point where they allegedly committed the contempt, appeared to have been accredited members of the bar, seems hard to understand.

This difference is also reflected in the kind of material involved in the cases Judges Hand and Frank used to support their view. It must be background material, designed to enable the judge to fix more or less scientifically the exact sentence within broader limits which have been determined by considerations of degree of guilt. The substance of the alleged conspiracy is not such as to throw much light on the underlying personalities of these lawyers.[51] And if the conspiracy is taken to have been inferred entirely from what happened in the courtroom, as Judge Hand strongly intimates, it tends to lose more of the aspects of scientific background material and takes on rather the characteristics of a bootstrap by which a trial judge justified the extent of retribution meted out to the offenders.

Moreover, Justice Taft's opinion in the *Cooke* case seems to foreclose circumvention of the requirement for a hearing in contempt proceedings on the ground that such material is personality background to enable the judge to help fix the sentence:

> "Due process of law in the prosecution of contempt, . . . includes . . . the right to call witnesses . . . relevant either to the issue of complete exculpation or in extenuation of the offense or *in mitigation of the penalty to be imposed.*" [52]

THE SECOND CONTENTION: THE NECESSITY FOR SPEEDY PUNISHMENT AS A MINIMUM REQUIREMENT OF DUE PROCESS

Especially, once it is assumed, as it was by the Court of Appeals, that the trial judge did not punish the lawyers for a continuing conspiracy that concluded at the end of the trial, the punishment without

case. It should also be pointed out that most of the cases involved verdicts, so that the function of finding guilt and innocence and the function of determining the extent of the sentence rested in different individuals.

51. This could be looked at in still another way. The conspiracy and evil intent is the type of evidence that could easily be made relevant to the degree of guilt in some charge of contempt. Thus, if the certificate really charged the conspiracy it is clear that evidence concerning it is relevant to a finding of guilt. Does the *Williams* case really go so far as to permit elimination of a full hearing and cross-examination on this evidence by permitting the certificate to be drawn to exclude conspiracy as an element of the contempt, while allowing its consideration as outside circumstance permitting the fixing of a sentence as high as would have been fixed had the conspiracy been made an element of the contempt? In other words suppose the maximum sentence permitted for first degree murder and second degree murder is the same. Could a defendant be tried for second degree murder and the judge be allowed to consider premeditation as an outside circumstance permitting him to impose the maximum sentence?

52. 267 U.S. 517, 537 (1925) (Emphasis supplied). There seems to be no qualification that this refers only to the extent that the penalty depends on degrees of guilt.

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a hearing is open to further question. The judge did not punish the lawyers on the spot when they committed the contempt but instead postponed their conviction, apparently as a matter of deliberate policy, until the very end of the trial. It will be recalled that he stated in the preamble that "to have done otherwise would inevitably have broken up the trial and thus served the ends which defendants tried so hard to obtain." The lawyers' contention amounted to this: When there is such deliberate delay, punishment without a hearing is improper because the extraordinary power to punish in this way is designed for cases where immediate punishment only would stop the disruption of the trial and assure uninterrupted further administration of justice. The punishment, they contended, must follow instantly upon the committing of the contempt. At any rate, it could not be delayed till the very end of the trial where speedy punishment could have no possible bearing on the need for continuing the proceeding. The argument in terms of our analysis is somewhat as follows:

In weighing the need for orderly administration of justice against the policy of preserving safeguards for the accused, the elimination of the safeguard of a hearing is so drastic a step that it is justified only by an emergency making the elimination of the hearing absolutely necessary to continued judicial administration. The one factor involved in the elimination of a hearing that has a direct relation to such absolute necessity is speed. Other results, as for example, that possible future offenders might be deterred because such forceful procedure will constitute greater punishment, must be achieved by other means, for example, by inflicting longer sentences or imposing heavier fines. To be sure, the occasion might arise when either immediate conviction with postponed punishment or immediate conviction and immediate punishment might be required to shock the offender, and perhaps his cohorts, into submission. A mere warning might not suffice. The interruption might continue or be repeated. Even the direct application of force, such as the marshal ordering or even pushing the offensive person back into his seat, might be resisted were it not for the psychological effect of the instant conviction and in some cases immediate punishment. But where a warning would suffice, or where immediate conviction or instant conviction and punishment would have the effect of further disturbing the proceedings and delay until a later time is deemed advisable as a means of avoiding such disturbance, no necessity for doing away with a hearing exists and conviction and punishment without a hearing is improper.

The question of "necessity," of course, is not a question of black or white. On the contrary, it is a complex criterion the application of which involves consideration of a number of factors. It must be understood as a pragmatic standard. To be sure, the judge might be able to stagger through a trial by having a recalcitrant lawyer strapped to the

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chair with a gag over his mouth except when the judge is willing to let him speak. Practical necessity, obviously, does not require resort to such fantastic alternatives. The court's judgment as to when summary procedure is necessary must rest on many considerations, including his estimate of the potential contemnors' sense of professional ethics, taste, sincerity, amenability to milder disciplinary measures and the courtroom mores of the community, to mention but a few. "Necessity" to punish for contempt by summary procedure is a relative term and is to be interpreted in the light of the reasonable use of the alternative means at hand and a reasonable anticipation of their effect to insure orderly judicial administration.

(a) Legal Basis of the Need for Speed

The *Oliver*, *Cooke*, and *Terry* opinions give support to the contention that the necessity which requires the elimination of notice and hearing is the need for speed of conviction and punishment.

Justice Taft stated in the *Cooke* case:

> "We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice' as Blackstone has it, is not *instantly suppressed and punished*, demoralization of the court's authority will follow. . . . The need for *immediate penal vindication* of the dignity of the court created it." [53]

Justice Black in the *Oliver* case quoted this portion of the *Cooke* opinion on this point as follows:

> "Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court' and such a flagrant defiance of the person and presence of the judge before the public 'that, if not *instantly suppressed and punished*, demoralization of the court's authority will follow.' " [54]

He then goes on to say:

> "The narrow exception to these due process requirements includes only charges of misconduct, in open court. . . . where *immediate punishment* is essential to prevent 'demoralization of the court's authority' before the public." [55]

He characterized the *Terry* rule as based on the belief "that a court's *business could not be conducted* unless it could suppress disturbance within the courtroom by *immediate* punishment." [56]

53. Cooke v. United States, 267 U.S. 517, 536 (1925). (Emphasis supplied).
54. *In re* Oliver, 333 U.S. 257, 275 (1948). (Emphasis supplied).
55. *Id.* at 275 (Emphasis supplied).
56. *Id.* at 274 (Emphasis supplied).

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Judges Hand and Frank did not believe that the cases permitted the non-hearing procedure only where instant or speedy conviction and punishment was required. Since this phase of their opinion rests to a large extent on an analysis of the *Terry* case, a fuller statement of that case is here set out:

Terry, an attorney, in attempting to resist a court order expelling his wife proceeded to beat the marshal and assault him with a deadly weapon. Thereafter he voluntarily left the courtroom and with a drawn knife forced his way into another room in the same building then occupied by the marshal and in which Terry's wife was being held. Terry's contempt had interrupted Judge Field's reading of his opinion. After the interruption Judge Field proceeded with the opinion. Then an order was made finding Terry guilty of contempt and containing directions for his imprisonment. A petition for habeas corpus was based on the following grounds:
"1. That the order was made in his [Terry's] absence; 2. That it was made without his having had any previous notice of the intention of the court or taking any steps whatever in relation to the matters referred to in the order; 3. That it was made without giving him any opportunity of being first heard in defense of the charges therein made against him." [57] Grounds 2 and 3 generally raised the question that has been discussed here whether the contempt was of the type that could be punished without notice and hearing. The court did not have occasion to rule directly on whether delayed conviction and punishment could ever be had without a hearing. But in holding the no-hearing procedure legal in *Terry's* case, it consistently assumed that this procedure occurs only where there is a need for instant conviction and punishment.

> "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 or 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 offence or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment." [58]

57. *Ex parte* Terry, 128 U.S. 289, 306 (1888).

58. *Id.* at 309, 310 (Emphasis supplied). The conclusive presumption in favor of the findings that showed the necessity for the summary action is due to the fact that this case came to the court by original petition for habeas corpus on which the scope of review was limited to question of "jurisdiction." "As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, these facts cannot be reexamined and questioned in this collateral proceeding." *Id.* at 305.

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> "It was within the discretion of that [trial] court, whose dignity he [Terry] had insulted, and whose authority he has openly defied, to determine whether it should, upon its own view of what occurred, proceed *at once* to punish him, or *postpone action* until he was arrested upon process, brought back into its presence, and *permitted to make defense.*" [59]

Ground 1 raised the further question of whether the court did not lose jurisdiction over the person to punish Terry after he had left the courtroom. The Supreme Court held that the Circuit Court did not lose jurisdiction in this case because the order of commitment was so immediate that it "took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the courtroom in the immediate presence of the judges." [60]

The Court left open one question:

> "Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned, is a question not necessary to be considered on the present hearing." [61]

Judge Hand's opinion starts with the notion that this question left open in *Terry's* case was the issue he was considering in the Foley Square case:

> "We now reach the appellants' second objection based on their contention that the judge could only impose summary punishment immediately upon the commission of their acts of contempt. The validity of such an objection was left open in Ex parte Terry, 128 U.S. at 314. . . . It has expressly left open the question whether, where a judge has power to punish without notice and in open court, he must impose sentence immediately after the contempt is committed. This is the question before us." [62]

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59. *Id.* at 313.

60. *Id.* at 314.

61. *Ibid.*

62. United States v. Sacher, 182 F.2d 416, 428, 429 (2nd Cir. 1950). The judge after citing *Terry's* case also referred to Pendergast v. United States, 317 U.S. 412, 419. The Court there stated: "*Ex parte Terry* . . . sanctioned summary punishment for 'direct contempts' committed in the 'presence' of the court. The question whether that procedure could be followed 'at a subsequent term, or at a subsequent day of the same term' was especially reserved." There is nothing in the discussion of *Terry's* case which follows that requires a different characterization of the question left open. It should be noted that

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Judge Hand's statement is not literally correct, for the Supreme Court left open "expressly" only a question concerned with the problems involved in Ground 1 of the petition for habeas corpus. The question there raised was generally whether Terry could be ordered committed in his absence, and in answering this question in the affirmative as far as Terry's case was concerned, the Court left open the question of whether in another case where the delay was to the next day or the next term the court could still retain personal jurisdiction without first bringing the accused into its presence and granting him a hearing. This question of power to order punishment of the accused in his absence was not the question before the Court in the Foley Square case. The issue in that case was the one raised by Grounds 2 and 3 of the petition in the *Terry* case—whether the accused could be convicted and punished without notice and hearing. The specific issue of the effect of delayed conviction and punishment and the requirement of notice and hearing was not the question left open in *Terry's* case. It never was directly before the court because the conviction was considered immediate. Indeed, the court seemed to assume throughout that it was the need for such immediate conviction and punishment that justified the no-hearing procedure. In its discussion, the court consistently linked denial of a hearing with immediate conviction and punishment without indicating that deliberately delayed conviction and punishment without a hearing might be legal. Of course, this is not a holding that delay would make conviction and punishment without a hearing improper, but it contradicts the notion that this question was "expressly" left open in *Terry's* case.

Still, Judge Hand may have a point. If conviction or punishment could never take place at a subsequent day or term without a hearing, the question of the necessity of reacquiring jurisdiction over the person would be settled. For then the accused would have to be brought before the judge for the required hearings and the court would thus clearly reacquire personal jurisdiction. So by the very fact that the jurisdictional question is left open, it seems that the question of conviction and punishment on a subsequent date without a hearing is also left open. But even this does not necessarily support Judge Hand's position. For it need not follow that the portions of the opinion in *Terry's* case, which link the no-hearing procedure with immediate conviction and punishment, are to be ignored. Such statements still tend to indicate that a hearing may be omitted only when speedy conviction and

Judge Hand was incorrect in stating that the question was left open "again in Pendergast v. United States. . . ." The *Pendergast* case at most can be said to involve authoritative discussion of *Terry's* case, not an explicit reservation of decision on the question by the court, for the court explicitly went on to say: "That is a procedural problem peculiar to direct contempts in the face of the court . . . and obviously has no relevancy to the problem of the Statute of Limitations."

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punishment is required to subdue an offender and thus assure orderly administration of justice. If this is the case at the time the contempt is committed, it may also be the case where the offender escapes but is later apprehended under a warrant. He may still be too obstreperous and dangerous for the courtroom. There might be express threats or generally known indications that associates or fellow conspirators would come to his aid.[63] Immediate conviction and punishment for the original contempt might be regarded as necessary to prevent further contemptuous conduct and thus assure the continued orderly administration of justice. From this point of view, the question left open by the Supreme Court, in so far as it involved the no-hearing procedure, was simply this: if at the time of apprehension on a subsequent day or a subsequent term, there still exists a necessity for an immediate conviction and punishment of an earlier contempt, may the court proceed without a hearing? Or must the court give a hearing as to the earlier offense and handle the emergency by immediate punishment of the new contempts if they occur?[64] On this point, the Supreme Court would not commit itself.

But this was not the question involved in the Foley Square case. There, there was no showing or claim that immediate conviction and punishment was needed to assure preservation of the continued administration of justice at the time the offenses (if they are treated as separate offenses) were committed. There was no impossibility, such as the offenders' absenting themselves from the court, that prevented the judge from proceeding immediately against them. On the contrary, their conviction and punishment was delayed because the judge thought, as the certificate indicates, that such a procedure would disrupt rather than assure the continued orderly administration of justice. He must have felt that his threats and warnings would enable him to keep the trial going, perhaps not in an ideal way, but at least in a feasible way. As it turned out, of course, his prediction was correct. When, almost at the end of the proceedings, the lawyers were without a hearing convicted for their earlier offenses, there was again no showing or claim that they were at that time behaving in such a way that the subduing effect of immediate conviction and punishment was required. Thus, throughout the proceedings, none of the elements that would bring into play the question left open in the *Terry* case was involved in the Foley Square case.[65] Under such circumstances, the first part

63. This would raise the question of to what extent the Judge can take evidence not before him into consideration to determine that there is a need for speed.

64. It should be noted that in a sense this would force the court to use additional punishment where one punishment instantly imposed might suffice. It would still deprive him of a hearing for the new punishment, which would be the price he would pay to get a hearing for the old. In such a situation it would be difficult to say which procedure would be more in accord with due process.

65. For further remarks on this point see notes 69 and 80 *infra*.

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of the *Terry* opinion indicates a hearing is required and the question left open implies nothing to the contrary.

The "question left open" can be looked at in still another way. Where the offender escapes instant punishment by flight, should he benefit by that fact and be granted a hearing? Perhaps not. Still, this is not the question involved in the Foley Square case. For there it was the fact that the offenders were attorneys, not their further contempts which made the delay of their conviction and punishment especially in keeping with the necessities of justice.

Of course, Judge Hand's entire argument about the question left open in *Terry's* case does not meet the argument that the *Cooke* and *Oliver* cases seem to interpret the *Terry* case as linking the no-hearing procedure with the need for speed. Yet about the *Oliver* case all Judge Hand says is: "Nor do we think that the language of the Supreme Court in *In re Oliver* . . . contemplates the limitation which appellants' counsel contend for." [66] This remark is preceded by a statement to the effect that Justice Taft in the *Cooke* case in speaking of " 'immediate penal vindication of the dignity of the court' " meant "as speedy vindication as was practicable under the circumstances, and could not have required steps which would have broken up the trial or frustrated the powers of the judge to vindicate his authority after it had been flouted in open court." [67] Of course Justice Taft did not mean to force the judge to break up the trial. But it is obvious that a hearing in the Foley Square case at the end of the proceedings would not break up the proceedings. Even more severe procedures during the trial would have been possible if needed without necessarily breaking the trial up. On the other hand, if these attorneys had wanted to break up the trial at any cost, they could, for example, have insisted on throwing inkwells at the judge in the middle of the trial, and no procedure would have assured the trial's continuation.[68]

Judge Frank, too, tried to dispose of the significant language of the *Cooke* and *Oliver* cases,[69] About the *Cooke* case he said no more than: "The Cooke case related to out-of-court contempt." [70] And so it did, but in discussing out-of-court contempt, the Supreme Court dis-

66. United States v. Sacher, 182 F.2d 416, 429 (2nd Cir. 1950).

67. *Id.* at 429.

68. For further remarks on this point see page 45 *infra.*

69. Judge Frank thought that the question left open in *Terry's* case was probably not involved in the Foley Square case: "Whether the question is present in this case may be doubted. If it were, I think the Supreme Court would answer that the judge retained jurisdiction of the person of the several lawyers. For, although they left the courtroom after committing the contempts, they voluntarily returned, in connection with their obligations to their clients, in the same case, so that, in that manner and for that purpose, the lawyers were present in the court when the judge charged and sentenced them." United States v. Sacher, 182 F.2d 416, 461 (2nd Cir. 1950).

70. *Id.* at 462.

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tinguished it from contempt in the face of the court and stated that the procedure sanctioned in the *Terry* case was there permitted because there was a danger to the continued administration of justice unless the offense was instantly punished. To be sure, the *Cooke* case is not a holding on the point but it is an authoritative interpretation of the *Terry* case and can hardly be brushed aside so lightheartedly. Again the *Oliver* case is distinguished by Judge Frank in part [71] on the ground that it involved conviction of the contemnor without a hearing on the basis of evidence by witnesses who testified in the contemnor's absence. The major reason for the reversal of the conviction was that this was not a contempt seen and heard by the judge.[72] But the fact that this was the major point of the case does not make utterly meaningless the court's discussion of *Terry's* case as an instance where immediate punishment was needed to prevent the demoralization of the court's authority.

(b) Retribution and Deterrence of Future Offenders in Future Cases.

Having eliminated the notion that the *Terry* case and others showed that only the necessity for speed justified the no-hearing procedure, Judge Hand then attacked the view that it is the only function of conviction and punishment without a hearing to prevent misconduct or deter interruption of the immediate proceedings.

> ". . . No summary punishment can prevent obstructive acts already completed inasmuch as it must follow them. . . . In the *Terry* case the misconduct was complete and the particular case was over, so that summary punishment was not necessary to enable the court 'to go on with' its work, yet it was imposed." [73]

What then is the justification for the admitted extraordinary no-hearing procedure? Judge Hand puts it this way:

> "We are in no way indicating that a lax, importunate exercise of it ought to be sanctioned. We merely hold that the acts of these appellants are intolerably obstructive to an orderly trial and *merited* a summary punishment. . . ." [74]

The underscored word is the important one. For if the no-hearing contempt proceeding is not designed simply to prevent or deter disruption of the immediate proceedings then the word "merited" suggests that elimination of a hearing is an additional punishment inflicted on the defendants for their intolerable behavior either as sheer retribution or in order to deter the defendants or like offenders at some future

71. For a further distinction of the *Oliver* case see page 39 *infra*.

72. United States v. Sacher, 182 F.2d 416, 462 (2nd Cir. 1950).

73. *Id.* at 429.

74. *Ibid.*

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occasion. It serves somewhat the same function as a higher fine or longer period of imprisonment at the end of a contempt hearing would serve.

Judge Frank in his opinion makes these points very explicit. At the very outset he states:

> ". . . They tried to throw a wrench in the machinery of justice. Whatever may have been their purpose, their acts might have made a trial of their clients impossible. Not to punish such behavior summarily, but, instead, to require a long trial of these lawyers, might well be to encourage that sort of behavior. The summary punishment here will tend to deter imitation of that behavior in other trials. . . . We affirm for the plain reason that the crude antics of these lawyers, if copied by lawyers in other cases, would almost surely disrupt trials." [75]

Although Judge Frank then briefly goes on to state that the "gravity of the lawyers' misbehavior does not settle the question whether punishment by summary procedure was legally permissible," [76] he quickly returns to this point in his discussion of the legality of delayed conviction and punishment without a hearing. First he states that "the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior . . . since its effect is wholly prospective. . . ." [77] He concluded that therefore it must be justified solely by the fact that "it will tend to prevent future misconduct—either (1) in the future course of the same case or (2) in other future cases." [78] He stresses especially the function of deterring misconduct in future cases and makes up his own horror story of what the consequences might be if this were not conceded to be a legitimate role of the non-hearing procedure: Suppose a criminal case was fully over and "while the judge was waiting, in open court for another case to be called, someone in the courtroom shouting that the judge was a tyrant threw an inkwell at him." If one took seriously the notion that future case deterring effect was not a legitimate function of the no-hearing procedure the court would have to give the inkwell thrower a hearing before another judge "because the offense could not possibly disturb any case pending before the court." [79] Judge Frank then turns to *Terry's* case and stresses the point made by Judge Hand that the judge there did not order the commitment of Terry till the case was over. He draws the conclusion that "if, then, an exclusively in-future-cases-deterring effect does not suffice to sustain a summary contempt pro-

75. *Id.* at 454.
76. *Id.* at 455.
77. *Id.* at 456.
78. *Ibid.*
79. *Id.* at 457. See note 85 *infra.*

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ceeding, Terry's case was wrongly decided." [80] He even draws support from the following sentence in the opinion in *In re Oliver*, which involved a contempt in a secret one-man grand jury proceeding: " 'Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public.' " [81] This, Judge Frank felt, showed that summary punishment is justified where the public nature of the trial might encourage others to imitate the offenders at some future time. To the argument that demoralization "represents the rationale for punishment, not for the method by which it is imposed," he replies that the court in *Oliver's* case held that, "because there was no demoralization of the court's authority 'before the public,' summary punishment—but, by no means, every other form of punishment for contempt—was improper." [82] It seems clear that in Judge Frank's view the no-hearing procedure is part of the punishment imposed for a serious contempt committed in public. The possibility that a grave contempt in public will breed future misbehavior unless severely dealt with justifies the elimination of a hearing. This is as much part of the punishment and varies as much with the gravity of the offense (once it is committed in public) as would a heavier fine or longer jail sentence.

Judge Frank's concluding remarks on this phase of his opinion leave little doubt that this is what he had in mind:

> "Criminologists disagree concerning the extent to which punishing one man deters other men. But there is general agreement that, in some instances at least, punishment acts both directly, as a preventative example to others, and indirectly as a means of creating or strengthening social habits of conduct. There can be little doubt that summary punishment of contempt in a case like this, will have both effects." [83]

80. *Id.* at 457–58. Judge Frank first stresses the fact that in *Terry's* case the improper conduct was not immediately punished. "The presiding judge resumed his reading of the court's opinion. When he finished that reading that case terminated. Only then did the court cite and summarily sentence Terry for contempt." He then states: "It is said, in an attempted distinction of Terry's case, that there the delay was short while here it was long." And it finally turns out that he makes nothing new of the point: "I fail to understand how the shortness, in Terry's case of the interval between misconduct and punishment can support the in-the-very-same case argument. For that shortness cannot alter the basic fact that in Terry's case the summary punishment could not . . . prevent anyone from interfering with . . . the very case." That is the same point about the occurrence of the punishment at the end of the trial, which does not depend upon whether there is a delay or not. One fails to see then why Judge Frank stresses the delay in *Terry's* case. Moreover, as was seen, see page 33 *supra*, the court in *Terry's* case treated the slight delay as minimal. This might provide an argument in a case where there is slight delay, but it does not negate the general principle of permitting the no-hearing procedure only where there is need for speed and helps not at all where the delay was as long as in the *Foley Square* case.

81. *Id.* at 458.

82. *Ibid.*

83. *Ibid.*

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All this array of legal and policy considerations brought forth by Judges Hand and Frank, on analysis, seems to have little sound foundation and to carry with it hazards which are startling to say the least. First, the argument seems to be that because conviction and punishment can never prevent the crime for which it is imposed and since Terry was actually convicted at the end of the trial, the no-hearing procedure must have among its legitimate justifications the deterring of future offenders in future cases. But although conviction and punishment cannot prevent the crime that has occurred, its deterrent effect may be to stop the same offender from continuing his present activities at the present time, not at some future time. Similarly, although in *Terry's* case the trial was over, it would seem that immediate conviction and punishment might have been of great aid in subduing Terry, whose continued absence indicated that he was still in the process of disrupting the orderly administration of justice. Indeed the Supreme Court stated that "his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offense, and to make it plain that consistently with the public interests, there should be no delay, upon the part of the court, in exerting its power to punish." [84] The fact that speed may be required, as in *Terry's* case or as in Judge Frank's inkwell thrower's case, to arrest a continued threat to the judge's opening or conduct of the next case does not mean that the no-hearing procedure can be justified as a specific punishment to deter not only the same offender but all like-minded future offenders in future cases. Neither the facts in *Terry's* case nor Judge Frank's inkwell case require such a sweeping conclusion. All they illustrate is that no oversimplified mechanical rule, such as one which would permit summary procedure only to prevent disruption of the same case, is workable. But they do not show that the no-hearing procedure can be used, where the need for speed to assure continued orderly judicial administration does not exist at all. Thus, if there had been any showing or even claim in the Foley Square case that the offenders were still engaged in offensive behavior or threatening the continued administration of justice at the time of their convictions, the no-hearing procedure would no doubt have been justified. But this was not the case.[85]

84. *Ex parte* Terry, 128 U.S. 289, 311 (1888).

85. Judge Frank's error stems from his setting up the lawyers' arguments in two alternative forms, as part of an analysis to "expose its fallacies." First: Delay is bad if it is to the end of the case, because summary punishment is designed only to deter offenses in the same case. His inkwell thrower's case is designed to meet this argument. He even goes so far as to point out that the argument doesn't apply to the *Foley Square* case because the case wasn't over. Motions for a new trial and arrest of judgment were argued a week later. Second: The no-hearing procedure may not occur if there is any postponement at all "*even when the delay is not until the case's end.*" (Italics supplied.) United States v. Sacher, 182 F.2d 416, 459 (2nd Cir. 1950). In meeting this portion of the argument he never bothers to return to the inkwell thrower's case, probably because the "even when the delay is not

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Judge Frank's argument from the *Oliver* case, though a possible interpretation of the language in that case, seems not to be a plausible one. Here Judge Frank chooses to ignore the other language in *Oliver's* case, which links the no-hearing procedure with instant or immediate conviction and punishment. Had he taken that language fully into consideration, and read the statement about "demoralization of the court's authority" in its context it should have been clear that what the Court was saying was not that the no-hearing procedure is designed to deter others from disrupting future trials, but rather that speed is especially necessary when the proceeding is a public one because if a court does not quickly manage to restore order, its institutional effectiveness will be impaired or destroyed. Where the proceeding is secret, the court has somewhat more leeway and can take more time in its attempts to restore order before there would be any dangerous effect on the public. There is no suggestion whatsoever that the no-hearing procedure may be used where the proceedings are public and order can be restored without speedy conviction and punishment. The public or secret nature of the proceedings serves simply as an index of the need for speed and is not independently determinative of the legality of the no-hearing procedure.

Finally, and most important, the policy behind Judges Hand's and Frank's reasoning is extremely dangerous to fair judicial procedure in American courts. For once the elimination of notice and hearing is made part of the punishment, it follows that the more serious the offense one is accused of, the less likely is the chance of a hearing at which he can defend himself. Due process of law has always tended in the other direction: the more serious the crime charged, the more reason for making sure through meticulous judicial safeguards, such as notice and hearing, that no mistake is ultimately made. The opposite notion, as contained in Judge Frank's and Judge Hand's opinions has frightening implications.[86]

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until the case's end" formula clearly would not permit any more sensible disposition of the inkwell thrower's case than the first alternative form of the argument. Even if Judge Frank were correct in so narrowly characterizing the lawyers' arguments, this does not exhaust the issues presented by the case. That the two alternatives, in light of the language in *Terry's*, *Cooke's* and *Oliver's* cases, clearly suggest the possibility of a third: The punishment is justified by the need for speed and must be instant whether designed to prevent disruption of the same case or not.

86. It is true that *Terry's* case contains language that could be taken to mean that the no-hearing procedure is part of the punishment. The sentence quoted page 40 *supra*, says there should be no delay because the hearing without apology might "justly be held to *aggravate the offense.*" So the court says in the excerpt cited on page 32 *supra* that the "*ends of justice* demanded immediate action . . . that no explanation could disprove . . . that he had committed such contempt of its authority and dignity as *deserved* instant punishment." Again this is a possible interpretation but not likely in view of the fact that it goes so much against the grain of well established principles of fairness. For material indicating that in the English Common Law there was a tendency to try the more serious contempts

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(c) Impossibility and Unfairness of Making the Need for Speed a Prerequisite for the No-Hearing Procedure.

As their final basis for rejecting the notion that the need for speed was the only justification for conviction and punishment without a hearing, Judges Hand and Frank proposed that this would result in procedures that are both unworkable and unfair.

Judge Hand put it briefly: ". . . he [the judge] took no immediate action to punish them for contempt. If he had done so, the result would have been to have indicted defendants without effective counsel or with the necessity of choosing new counsel—a procedure involving interminable delay. He therefore abstained from any immediate punishment but again and again warned the appellants that their conduct was improper." [87] In a case like the present he thought "it would have been necessary either to abandon all attempts to curb disorderly and contemptuous conduct or very seriously to interfere with the progress of the trial. The course adopted by Judge Medina warned the appellants that they were misconducting themselves at their peril. It tended to prevent further obstruction, and also demonstrated that its orders and warnings were not in vain by punishing the offenders after the verdict was recorded, for flouting its authority. Any other treatment of the contemptuous action would have been self-defeating." [88]

The most obvious answer to Judge Hand's point is that the lawyers did not ask the Court of Appeals to rule that the judge should have convicted and punished them without a hearing instantly after they committed each offense. Instead they contended broadly that since such instant conviction and punishment was apparently not necessary, and since the method of warnings of which Judge Hand apparently approved seemed to suffice to let the trial reach near completion, there was no need for the sudden speedy procedure at this point. There is nothing in Judge Hand's argument that suggests such a need except what was suggested in the excerpts analyzed above, which would make the no-hearing procedure part of the retribution or serve the function of deterring future offenders in future cases.

Judge Frank, in elaborating on Judge Hand's position, stated in part that the argument that "summary punishment must be instanter . . . puts a premium on hasty action. It means that the judge may act summarily only when he is least likely to be poised and temperate, that only then may he act without a hearing. . . . We are asked by appellants to believe that the constitutional safeguards of judicial justice in the case of open court contempts will be best preserved, and

by jury see Nelles, *Summary Power to Punish for Contempt*, 31 COL. L. REV. 956, 959, n. 10 (1931).

87. United States v. Sacher, 182 F.2d 416, 428 (2nd Cir. 1950).

88. *Id.* at 429.

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that 'dictatorial authority' in the punishment of such contempts will be best avoided, if . . . we instruct trial judges that summary punishment of such contempts must invariably be imposed at once, which means that trial judges may punish such contempts when—and only when—they act in hot blood, *i.e.*, in circumstances promoting, to the utmost, impatient, ill-considered judgment. We cannot accept that view. For it seems exactly upside down." [89] In Judge Frank's view the only workable rule seems to be to give the trial judge complete discretion to proceed summarily or to direct a hearing.

Actually, it appears that Judge Frank's view is upside down. For even though he understood the lawyers to state what he said they stated, he does not meet the underlying issue by beating down this straw man.[90] The underlying issue is not whether judges should be required to act in haste, but whether judges should be allowed to convict and punish without a hearing where no haste is necessary.

Several courses may be open to a judge in a case of the Foley Square type. He may simply warn the offender and try him subsequently, giving him full notice and hearing. If the facts at the time of the offense show that the judge exercising reasonable discretion could not properly have found that this procedure would be insufficient to assure the continued administration of justice, then the warning and subsequent conviction and punishment is the only procedure open to the judge and no hasty summary conviction in "hot-blood" would stand up on appeal.

Suppose, unlike what actually happened in the Foley Square case, warnings prove totally useless. Still, the judge does not necessarily have to break up the trial. He might, after carefully considering the factors set out at the outset of this section of the article, decide that there was a necessity to convict on the spot and postpone execution of the punishment, as was done to the attorney in the Bridges case.[91] This immediate conviction, without immediate execution of the punishment, might produce the necessary shock to subdue the offender. The trial could then go on, and the lawyers would be punished at the end of the trial.

Judge Frank states that to "the extent that that practice would have been in the interest of fairness, by way of warning to the lawyers, what the judge did here was the equivalent." [92] But the no-hearing, immediate conviction with postponed punishment technique can only be

89. *Id.* at 459.

90. See also note 86 *supra.*

91. Hallihan v. United States, 182 F.2d 880 (9th Cir. 1950). This aspect of the procedure is not discussed; the defense attorney was found guilty of contempt on November 22, 1949, but was granted stay of execution till completion of the trial. See *Summary Contempt: A Sword or a Shield?*, 2 STAN. L. REV. 763, 769, n. 35 (1950).

92. United States v. Sacher, 182 F.2d 416, 459 (2nd Cir. 1950).

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used if the facts show a necessity to use that procedure to assure the continued administration of justice. Had Judge Medina actually proceeded by convicting immediately and postponing execution of sentence until after the trial, he might very well have been upheld because on the basis of the record to that point it might have been reasonable to conclude that this procedure was necessary to assure continuation of the trial. While such allowances should ordinarily be made for the limits of judicial clairvoyance, in the Foley Square case we can eliminate the crystal ball. The fact that the trial actually continued with no more than warnings and the contempts became less as it went along confirmed Judge Medina's "perspicacity." On this basis the conviction, although it might have been upheld originally, could not be upheld retroactively by translating the warning procedure into an equivalent of the conviction procedure, as Judge Frank suggested.[93]

Related to these considerations there is still another respect in which the procedure of immediate conviction and postponed punishment differs from warnings followed by subsequent conviction and punishment. If the judge undertakes the responsibility of immediately convicting the offender, he necessarily approaches his task with greater solemnity for he must consider carefully, at the risk of possible reversal, whether the acts justify the need for the speedy conviction. This, of course, is not involved in warnings. It therefore cannot be known whether Judge Medina actually would have been willing to convict these defendants as frequently as he warned them.[94]

Judge Clark hit these points hard:

> "If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us. It does not seem to me appropriate or fruitful to try now to speculate how we might then have decided. The point is that the judge actually decided otherwise, and with perspicacity if we may conclude from the outcome. Since he did decide to postpone action, our review must be centered upon the legal consequences of that decision in the light of the precedents; these are not properly to be reshaped or reversed by speculation as to a different course he might have taken." [95]

93. Perhaps in balancing the equation of necessity, see page 4 *supra*, it might be said that an earlier conviction would be justified because it would have drastically reduced the ultimate number of contempts. But this judgment too cannot be made at the end of the proceedings where the first conviction never does occur and the invitation to further contempts is consequently more open. It would mean that one upholds the conviction on six contempts on the theory that had the first conviction actually taken place on the spot the other five contempts would never have occurred, had the second conviction occurred right there and then the remaining four contempts would never have occurred and so on.

94. See note 93 *supra*.

95. United States v. Sacher, 182 F.2d 416, 465 (2d Cir. 1950).

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As further proof of the inadequacy of any other procedure than that followed by Judge Medina, Judge Frank's ever-lively imagination suggests how the no-hearing conviction with deferred punishment procedure might be abused:

> "Had the judge, in each instance, cited and sentenced immediately —although deferring execution—he would have been obliged to stop this trial more than thirty times, in order to prepare, pursuant to Rule 42(a) written orders specifying, in each instance, the particular contempt. Moreover, in such instance, the sentenced lawyer would doubtless immediately have appealed, and would have had the right to argue the appeal *pro se*. The trial judge would then have had to adjourn the trial at least thirty times to allow the lawyers to prepare and argue those appeals." [96]

This statement illustrates graphically the misconception inherent in Judge Frank's thinking which stems from equating the warning procedure with the immediate conviction procedure. He overlooks the possibility that immediate conviction might have stopped or at least slowed down further contempts.[97]

Of course, the reader might say: "But suppose these men were out to delay the trial, to obtain a mistrial, immediate conviction and postponed punishment might not have achieved anything." That may be so. Lawyers really out to disrupt the trial at any cost can do so. The judge then would have no alternative but to jail them on the spot; and a new trial might have to be granted. This might have to be repeated until orderly lawyers are found. No less drastic procedure would do any good under such circumstances. Certainly not the procedure Judge Medina adopted here; nor as Judges Hand and Frank seem to think, would the fact that such procedure were available be more effective than the threat of a heavier fine or heavier jail sentence. And it is, after all, Judge Medina's denial of a hearing at the time he did so that must be justified. In a frantic effort to grasp something that would do so, Judge Frank makes the following point which the authors will simply state and let it go at that:

> "In making up his mind, he could properly take into account that a trial would be long drawn out. What would be the protracted nature of the defense at such a trial was pretty clearly indicated by defendant Gladstein. . . . That a poll be taken 'of the members of the jury and the people of the press' and of others in the courtroom as to whether the judge had used 'a badgering bullying and blustering tone' in addressing a witness. . . ." etc., etc.[98]

96. *Id.* at 459.

97. See note 93 *supra*.

98. United States v. Sacher, 182 F.2d 416, 461 (2d Cir. 1950). The court also relied on one federal Circuit Court case and several state court cases. In *In re* Maury, 205 Fed. 626 (9th Cir. 1913), the lawyer was punished a day after his contempt, while the jury was

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II. Some Further Considerations

The argument that Judge Medina exceeded the limitations on the contempt power contained in the Federal rule gains further weight when his conduct is considered in the light of restrictions of the Act of Congress set forth below. A serious question may be raised as to whether he did not violate the statute which specifies the situations in which a judge may punish certain misbehavior without a jury trial (with or without a hearing). In other words, it raises the question could these lawyers be punished at all without a trial by jury.

The present statutory limitations on the contempt power of the Federal Courts are contained in Section 401, U.S. Code, Tit. 18 which reads: "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

Section 401, U.S. Code, Tit. 18 is the present version of Section 1 of an Act of Congress passed in 1831.[99] The history of the abuse of the contempt power which led to the enactment of the 1831 statute has been thoroughly discussed elsewhere.[100] A brief summary will suffice here. It will be recalled that the federal statute was modeled partly after earlier Pennsylvania [101] and New York legislation [102] and was probably much influenced by the views of Edward Livingston.[103] This eminent legal reformer wanted to eliminate the contempt power as a

out to consider its verdict. He was convicted only after he was permitted to speak in his own behalf. Middlebrook v. State, 43 Conn. 257 (1876), and *In re* Willis, 94 Wash. 180, 162 Pac. 38 (1917) involved delay due to the contemnor's flight from the courtroom. *In re* Cary, 165 Minn. 203, 206 N.W. 402 (1925), quoted at length by Judge Hand, does seem to say that while promptness is required, a delay in the case of an attorney until the end of the trial might under certain circumstances be warranted. The proposition is in no way thought out, and *Terry's* case is cited as authority. None of these cases, of course, is binding authority on the Court of Appeals for the Second Circuit.

99. The Federal Act of March 2, 1831, c. 98; 4 Stat. 487, § 1 (1831).

100. Fox, Contempt of Court ch. 9 (1927); Thomas, Problems of Contempt of Court (1934); Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev 1010 (1924); Nelles & King, *Contempt by Publication*, 28 Col. L. Rev. 401, 525 (1928); Nelles, *The Summary Power to Punish for Contempt*, 31 Col. L. Rev. 956 (1931).

101. 1808–09 Pa. Acts, c. 78, p. 146.

102. N.Y. Rev. Stats. of 1829, Part iii, ch. iii, tit. 2, art. 1, § 10. See also Part iii, ch. viii, tit. xiii, sec. 1 (civil contempts) and Pt. iv, ch. i, tit. iv, art. 2, and tit. vi, §§ 17, 18 (making ordinary criminal procedure available to punish offenses previously punishable by summary procedure). Nelles & King, *supra* note 100, at 528–29.

103. *Id.* at 418–422; Nelles, *supra* note 100, at 963–67 *et seq.*

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means of punishing disturbers and believed that summary powers should be used simply to prevent interference with proceedings, leaving punishment to result from a subsequent jury trial.[104] While neither the state nor federal legislation went so far in restricting contempt powers, an attempt was made by appropriate language to prevent the repetition of past abuses which had been directly responsible for the enactment of these laws.

In Pennsylvania there had been three such incidents.[105] In each a party in a judicial proceeding had been punished without a jury for contempt. The misbehavior consisted of publishing outside of court critical statements charging malice and prejudice on the part of the judge. Behind at least two of the cases there was a definite undercurrent of a political controversy between Republicans and Federalists. After impeachment proceedings against some of the judges, which almost succeeded,[106] Pennsylvania passed its statute which limited contempt punishment to misconduct of court officers, disobedience of process and misbehavior "in the presence of the court obstructing the administration of justice." It further specifically forbade non-jury punishment for critical publication.[107]

In New York, Chancellor Kent and two other Justices had permitted the use of the contempt power to convict and punish without a jury a master in Chancery, presumably an officer of the Court, for illegally practicing as a solicitor,[108] despite the fact that such illegal practice was under New York law an indictable offense triable by jury.[109] The New York Court for the Trial of Impeachments and the Correction of Errors, composed of the Chancellor, the Justices and the members of the State Senate, discharged the matter.[110] It has been suggested that it was probably because of this popular tribunal that it became unnecessary to remedy the situation by immediate legislation.[111] But under the influence of Livingston, legislation was eventually passed which limited non-jury contempts to publications of false or grossly inaccurate reports of judicial proceedings, resistance to process, refusal

104. *Ibid.;* 1 COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 264 *et seq.* (1873).

105. Respublica v. Oswald, 1 Dall. 319 (U.S. 1788); Hollingsworth v. Duane, Wall C.C. 77, 78 (1801); Baynard and Petit v. Passmore, 3 Yeates 439 (Pa. 1802); Respublica v. Passmore, 3 Yeates 441 (Pa. 1802). The cases are discussed in Nelles & King, *supra* note 100, at 409–15.

106. WILLIAM HAMILTON, REPORT OF THE TRIAL AND ACQUITTAL OF SHIPPEN, C.J., AND YEATES AND SMITH, JJ. (1805); Nelles & King, *supra* note 100, at 414.

107. See note 101 *supra.*

108. Case of J.V.N. Yates, 4 Johns. 316 (N.Y. 1809).

109. Nelles & King, *supra* note 100, at 416.

110. 6 Johns. 337 (N.Y. 1810). Nelles & King, *supra* note 100, at 416, make this significant point: "It is believed that the decision was sound upon this ground at least: that the statute under which Yates' offense was indictable had ousted *pro tanto* the ancient summary disciplinary jurisdiction of the Chancellor over officers of his court."

111. *Id.* at 418.

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of witnesses to answer proper questions, breaches of the peace tending to interrupt the court's proceedings, and "disorderly, contemptuous or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority." [112]

The most notorious federal incident of judicial abuse was the famous Peck-Lawless case which occurred against a colorful political background of disputed land claims following the Louisiana purchase. District Judge Peck had imprisoned and disbarred attorney Lawless for publishing critical remarks about one of his opinions while the case was on appeal. Impeachment proceedings were brought against the Judge. Though Judge Peck was acquitted,[113] Congress changed the earlier Act of 1789 which simply had empowered federal courts to punish all "contempts of authority in any cause or hearing before the same" to the language substantially as set out above.[114]

Clause (3) of Section 401 is not involved in this case since it seems to pertain to the disobedience of formal orders or decrees. Clauses (1) and (2), however, raise questions as to the validity of Judge Medina's action.

1. Clause (1) of Section 401

The phrase in Clause (1), "in its presence or so near thereto as to obstruct the administration of justice" is not as restrictive as the language of Rule 42(a) that "he [the judge] saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Nevertheless, under its interpretation by the Supreme Court, the statute still imposes important limitations which at least throw serious doubt on Judge Medina's action insofar as the certificate can be construed to charge a conspiracy which originated out of court.

At first the statute was taken as a serious limitation on the contempt power of the Federal courts.[115] But later in *Toledo Newspaper Co.* v. *United States*,[116] the Supreme Court declared that the statute

112. *Id.* at 418–21. See note 102 *supra*.

113. The vote was 22 to 21. STANSBURY, TRIAL OF JAMES H. PECK 474 (1833).

114. See page 47 *supra*.

115. United States v. Holmes, Fed. Cas. No. 15, 383, 363 (1842); *Ex parte* Poulson, Fed. Cas. No. 11, 350 (1835); United States v. New Bedford Bridge, Fed. Cas. No. 15, 867 (1847); United States v. Emerson, Fed. Cas. No. 15, 050 (1831) cited by Mr. Justice Douglas in Nye v. United States, 313 U.S. 33, 48 (1941). See also *Ex parte* Robinson, 19 Wall. 505, 510–11 (U.S. 1873); Nelles & King, *supra* note 100, at 532 n.28. On the constitutionality of the statute see Frankfurter & Landis, *Power of Congress over Procedures in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); 19 U. OF CHI. L. REV. 669, 678 (1948).

116. 247 U.S. 402 (1918). The City of Toledo had passed a controversial ordinance providing that the Toledo Railway and Light Company could only charge a three cent fare from day to day. The city had also refused to renew the company's franchise. The creditors of the company and the company brought suit seeking to enjoin the city from enforcing the ordinance. The Toledo News-Bee attacked the position taken by the creditors and the

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"conferred no power not already granted and imposed no limitations not already existing" and concluded that the words "so near thereto" do not limit the power to misbehavior near the court in a geographical sense but on the contrary "recognized and sanctioned . . . the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power . . . by summarily treating such acts as a contempt and punishing accordingly." [117] However, in *Nye* v. *United States*,[118] the Supreme Court overruled the *Toledo Newspaper* case. Mr. Justice Douglas stated:

> "The question is whether the words 'so near thereto' have a geographical or causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. . . . The phrase 'so near thereto as to obstruct the administration of justice' likewise connotes that the misbehavior must be in the vicinity of the court. . . . It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context juxtaposed to 'presence' suggests physical proximity not relevancy. . . . There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence' of the Court. . . . If 'so near thereto' be given a causal meaning, then § 268 [Section 401(1), Tit. 18] by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. . . . If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' . . . then the conditions which Congress sought to alleviate in 1831 have largely been restored. . . . We cannot by the process of interpretation obliterate the distinctions which Congress drew." [119]

From this it seems fairly clear that insofar as Judge Medina relied on the out-of-court agreement as the misbehavior for which these defendants were punished, the summary punishment was not within his power under Clause (1) of Section 401. It nowhere appeared in his charge or elsewhere that the agreement took place in the geographic vicinity of the court.

Here again, it might be argued that since the consequences of the agreement occurred in court, the misbehavior charged, even insofar as it included the agreement, occurred "in the presence of the court" or "so near thereto as to obstruct the administration of justice" within

company and also attacked an order attaching one Quinlivan for contempt for making speeches about the case before a labor union, and a court order attaching the managing editor of the News-Bee for contempt. Both the Newspaper company and the editor were punished by way of fine. The Supreme Court upheld the conviction.

117. 247 U.S. 402, 418–19 (1918).

118. 313 U.S. 33 (1941).

119. *Id.* at 48–50.

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the meaning of the statute. But the facts and decision in the *Nye* case as well as several other cases decided by the federal courts since the *Nye* decision, seem to foreclose this possible circumvention of the restriction imposed by the statute. In the *Nye* case, the defendant had sought to terminate an administrator's suit for wrongful death in a federal district court by corruptly inducing a feeble and illiterate administrator, named Elmore, to drop the action. Mr. Justice Douglas commented as follows:

> "The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. . . . The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the 'presence' of the court or 'near thereto.' *So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.*
>
> "We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed. . . . The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting the quiet and order or actually interrupting the court in the conduct of its business. . . . Hence it was not embraced within [Section 401]. . . ."[120]

An argument based on the ever recurring conspiracy theory would have no more validity here than under Rule 42. Again, it would be an importation of a fiction from an unrelated context to open a wide loophole which would allow the undue expansion of a power which it has been the policy of the Supreme Court and the Congress to restrict.[121]

120. *Id.* at 52 (emphasis supplied). See also Wimberly v. United States, 119 F.2d 713 (5th Cir. 1941).

121. See in addition to the *Pendergast* case, *supra* note 62, the Pennsylvania case of Mark's Appeal, 144 Pa. Super. 556 (1941), where the court seemed to stress that the summary contempt power could not be used where the alleged conspiracy was planned out of court. The question may be raised what connection is there between the necessities for orderly procedure and the "geographical vicinity" test. What greater necessity is there for dispensing with a jury trial when a witness has been bribed in the waiting room rather than in his hotel room?

The answer to this question may be discovered by considering a more fundamental one. What necessity can there ever be for dispensing with a jury trial but not with a hearing? Here again, the timing factor may be controlling. There may well be situations where the necessity for terminating the interruption and restoring orderly judicial procedure is such as not to permit of the delay involved in examining a jury and conducting a trial before it, although not such as to justify dispensing with the more expeditious procedure of a hearing before a judge. Another explanation for dispensing with a jury trial but not with a hearing may rest in the notion that in certain situations the independence of the tribunal must be protected against the passing passions of the moment even as they might be reflected in a jury's verdict.

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Similarly, a construction of the certificate which regards the agreement, not as part of any contempt, but merely as a circumstance of in-court misbehavior, influencing the extent of the punishment is as fallacious here as under the Federal Rule.

2. Clause (2) of Section 401

The question remains whether Judge Medina's action is authorized under Clause (2) of Section 401 which empowers the court to punish the misbehavior of officers of the court in "official transactions." Is this provision limited by the *Nye* case or may officers in their "official transactions" be punished even though the misbehavior does not occur in the presence of or in the geographical vicinity of the court. Unfortunately, there is no authoritative answer to this question. Little is known of the actual congressional intent since there were no published debates concerning the act of 1831.[122] It should be remembered, however, that the *Peck* case which in part precipitated the passage of the act, involved a critical publication by a lawyer about a judge who had tried one of his cases which was still pending on appeal. Too broad an interpretation of the "misbehavior of officers" clause would mean that a lawyer in a similar situation could be punished for contempt without a jury trial. This, probably, was not the intention of Congress. Was, then, the intention of Congress such as to authorize punishment for out-of-court misbehavior in connection with the preparation by a lawyer of his client's case? In other words, is such misconduct included within the meaning of Clause (2) of Section 401?

Since the *Nye* case there have been a series of federal cases which have thrown some light on the "misbehavior of officers" clause. In In re *Michael*,[123] a trustee in bankruptcy had been held in contempt for testifying falsely before a grand jury in the course of a general investigation of frauds against the government. It was argued before the Supreme Court of the United States that even though no further necessary element of obstruction except perjury was "clearly shown," the defendant here ought to be convicted without a jury trial because he was an officer of the Court. Mr. Justice Black had this to say:

On the basis of these considerations, it might be thought that the court in each case raising the issue of dispensing with a jury trial, would have to consider criteria so difficult of application and would have so wide a latitude for judgment as to prove unduly dangerous if the judge were unscrupulous or unwise. Probably for this reason, a more measurable standard has been evolved. The principle thus seems to have crystallized in a rough and ready but workable rule of thumb, the "geographical vicinity" test, as explained by Justice Douglas in the *Nye* case. It is apparently based on the presumption that misconduct which occurs in the geographical vicinity of the court is the type of interruption which will require action so prompt as to make necessary the elimination of jury trial. The test also provides for the statute the same type of concrete standard as the "seen and heard" and "actual presence" portions of the test under Rule 42(a).

122. See THOMAS, PROBLEMS OF CONTEMPT OF COURT 55 (1934).

123. 326 U.S. 224 (1945).

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> "Nor can the conviction be upheld under that part of Sec. 268 [Section 401, Title 18] which authorizes punishment for contempts which consist of 'the misbehavior of any of the officers of said courts in their official transactions.' While the petitioner was a trustee, and we may assume an officer of the Court within the statutory meaning, he was not engaged in an 'official transaction' as trustee when he testified before the Grand Jury in the course of a general inquiry. Whether he could be punished for contempt for giving perjured testimony in the course of proceedings directly involving administration of the estate is another matter not now before us." [124]

This case can hardly be taken to be a holding on the precise Foley Square situation. But it does indicate that the Supreme Court tends to interpret the clause restrictively and in the light of the purpose of the 1831 legislation, which as has been shown is to limit the contempt power to the minimum necessary to preserve order. Another recent case to be noted is *Klein* v. *United States*.[125] There Klein, an attorney in the famous World War II seditionist trial, asked the Judge to be excused from continuing to represent his client in the case and left without getting leave from the Court. He was held in contempt. The Court of Appeals for the District of Columbia reversed on the ground that the attorney's misbehavior was not in the "presence" of the Court or "so near thereto" as to obstruct the administration of justice. In commenting on the applicability of the "misbehavior of officer" clause, it simply stated that clause 2 of § 401 was "clearly" inapplicable. Again in *Schmidt* v. *United States*,[126] an attorney had filed false affidavits with the Clerk of the District Court while the Court was not in session. The Circuit Court of Appeal for the Sixth Circuit held without extensive discussion that the misbehavior was not contemptuous as "misbehavior" of an officer of the court in his "official transactions."

On the basis of these cases we can conclude at least that there is a great deal of doubt whether the "misbehavior of officer" clause can be applied to the lawyers in the Foley Square trial insofar as the contempt consisted of misbehavior which was a part of the out-of-court and presumably pre-trial preparation of their case. Of course, if the alleged out-of-court agreement had no connection with the preparation of the case or the conduct of the litigation, it is clear that clause (2) is inapplicable. Any time the contempt power is applied against a lawyer, not only does it affect his interests but it may also impair the interest of his client in that vigorous and full advocacy which is one of his traditional rights. This would suggest the desirability of a more careful and perhaps restricted use of the contempt power against lawyers than against others. A construction of clause (2) of Section 401 so that it

124. *Id.* at 229.
125. 151 F.2d 286 (D.C. Cir. 1945).
126. 124 F.2d 177 (6th Cir. 1941).

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applies to lawyers in their out-of-court preparation of litigation would do precisely the opposite.[127]

3. Appropriate Procedure Against These Lawyers

From what has been said, it appears highly doubtful that the lawyers in the Foley Square trial could be punished under Section 401 of Title 18 which states the conditions under which Federal courts may punish for contempt without a jury trial. It does not follow, however, that they could not be prosecuted under existing legislation of Congress. The second section of the Act of 1831 (now section 1503 of Title 18) provides as follows:

> "That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats of force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence." [128]

This section has been repeatedly applied to various conspiracies [129] to obstruct the administration of justice and there is little doubt that it would be applicable to the type of agreement charged by Judge Medina. By its very language it is applicable to the individual charges. It thus appears that Congress intended to make the type of alleged misbehavior involved in the Foley Square trial punishable by jury trial. This is a further indication that it ought not to be punished by contempt unless there is both the clearest showing of necessity as well as compliance with the letter of the contempt authorization in Section (1).

127. Nelles, *The Summary Power to Punish for Contempt*, 31 COL. L. REV. 956 (1931) states at 964: "The Court, like the general of an army must maintain discipline among subordinates. . . . Except with respect to attorneys, as to whose discipline there has grown up a distinct and satisfactory body of law and practice. Its use is mainly *in Terrorem*. It rarely encroaches upon the domain of ordinary criminal proceedings. It seems appropriate that an embezzling receiver should be committed until he makes good his defalcations, if he is able. But should his criminal punishment be imposed in a summary proceeding?"

128. Act of March 2, 1831, c. 98, 4 STAT. 487, § 2 (1831). 18 U.S.C. §§ 1501, 1504–6 (1946) have elaborated the old statute by making specific crimes out of assault on process server, resistance to extradition agent, influencing juror by writing, influencing or injuring witness before agencies and committees, theft or alteration or records and process and false bail.

129. See, for example, United States v. Johnson, 165 F.2d 42 (3d Cir. 1942), *cert. denied*, 332 U.S. 852 (1948), *motion granted*, 68 S.Ct. 357 (1948), *rehearing denied*, 68 S.Ct. 457 (1948); United States v. Manton, 107 F.2d 834 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940); Craig v. United States, 81 F.2d 816 (9th Cir. 1936), 298 U.S. 690 (1936), *rehearing denied*, 299 U.S. 620 (1936). The prosecution would be under the general conspiracy statute. 18 U.S.C. § 371 (1948).

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As Mr. Justice Douglas states in *Nye* v. *United States*, unless the distinction between § 1 and § 2 of the Act of 1831 is clearly kept in mind, "[t]he result will be that the offenses which Congress designated as true crimes under § 2 . . . will be absorbed as contempts wherever they may take place." [130]

It thus appears that the Federal statute, by its terms, provides a procedure for dealing with misconduct such as was charged against the Foley Square lawyers and that there is grave doubt, under other provisions, whether trial by jury can be dispensed with. These doubts may or may not turn out eventually to be well founded. Their existence at this time, however, lends strength to the argument that the stricter provisions of Rule 42 should not be so loosely construed as to dispense even with a hearing. In a case such as this where there is serious doubt whether the policy of our law permits the elimination of a jury trial, there ought to be far less doubt that at the very least a hearing is required.

Judge Medina's error in failing to accord these lawyers a hearing under Rule 42(a) is compounded by his failure to accord them the specific safeguards assured by Rule 42(b). As will be recalled, Rule 42(b) not only deals with the necessity for notice and hearing, but with another element of due process of law, the impartiality of the tribunal: "If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." This provision, of course, is of the utmost importance, particularly in a case where the relations between counsel and the judge, as evidenced by many acrimonious exchanges, are such as to "blur judicial impartiality." [131] Chief Justice Taft said:

> "[T]his 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. Of course, where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal

130. 313 U.S. 33, 49–50 (1941). On the possible effect of such criminal provisions on the scope of the contempt power over "officers of the court" see note 110 *supra*. There is of course, also the possibility of disbarment as a means of disciplining lawyers.

131. See Schmidt v. United States, 115 F.2d 394, 397 (6th Cir. 1940).

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> attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." [132]

There is no doubt but what Judge Medina was presented with "difficult questions." It is not apparent, however, that, almost at the end of the trial when the contempt findings were made, conditions were "impracticable" or that the delay involved in notice, hearing and the designation of another judge would have injured "public or private right."

The contempt certificate, with the many colloquies between counsel and the judge, leaves no doubt that the lawyers made repeated personal attacks on the judge. And although this is enough to make applicable the disqualification provision of Rule 42(b), the record also discloses that the judge was affected by such attacks in the precise way which has made these provisions necessary. Judge Medina was piqued.[133]

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132. Cooke v. United States, 267 U.S. 517, 539 (1925).

133. Whether Judge Medina's anger was justified by the insistent interruptions of defense counsel is, of course, not relevant to the issues discussed here. The point of Rule 42(b) is that the judge cannot be impartial when he is moved by passions. Justified anger, no less than personal petulance, requires the disqualification of the judge concerned. See text *supra*.

That Judge Medina often felt personal anger is clear from the contempt citations themselves. The following excerpt is drawn from Specification XXXII, 182 F.2d at 447–48, which reads in part:

"On August 3, 1949, during the direct examination of the witness Geraldyne Lightfoot by Isserman, she was asked a question to which the Government objected. The Court undertook to elicit the information sought by a direct question. In order to forestall an answer, Messrs. Isserman and Gladstein provoked a disorderly disturbance and succeeded in preventing an answer to the question, as follows (Tr. 11, 269–11, 274):

"The Court: Mrs. Lightfoot, in this matter of the strategy of the workers, did you discuss the dictatorship of the proletariat, imperialism, and just and unjust wars, and things of that kind, or were they not mentioned?

"Mr. Isserman: I object to the question.

"The Court: Overruled.

"The Witness: Under topic 3—under topic C—

"The Court: You will answer that question yes or no or state that you cannot answer it.

"Mr. Gladstein: I object to the Court's tone and manner of badgering the witness.

"The Court: There is nothing about my tone, and you will please sit down.

"Mr. Gladstein: I desire to make an objection.

"The Court: Mr. Marshal, will you just—(To the reporter) Read the question to the witness.

"We will have no more monkey business here.

"Mr. Gladstein: I object to the ruling.

"Mr. Isserman: I object to the Court's remark.

"The Court: You will sit down, Mr. Gladstein.

"Mr. Isserman: And I want to register an objection to the Court's ruling.

"The Court: Very well.

"Mr. Isserman: As prejudicial to the conduct of the case and to the defense and making the defense impossible.

"The Court: When I desire to ask a question, I am going to ask it. I am through with the interference of counsel.

"Now go ahead and read the question, Mr. Reporter.

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"Mr. Isserman: May I ask the Court a question?

"The Court: You may not. (Question read.)

"Mr. Isserman: I object to that question.

"The Court: Overruled.

A. Under C I discussed—

"The Court: Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now, which was it? You did discuss them or you did not discuss them?

"Mr. Isserman: I object to that question.

"The Court: Overruled.

"Mr. Gladstein: Your Honor—

"The Court: Overruled. I don't want to hear anything from you, Mr. Gladstein.

[There followed a brief interchange between the Court and the witness, and then a further objection by Mr. Isserman. The Court agreed to rephrase his question:]

"The Court: I will reform my question.

"Did you mention to the class in that lecture the subject of the dictatorship of the Proletariat?

"The Witness: I didn't mention it at that lecture—

"Mr. Isserman: Just a minute. First of all I wish to object to your Honor's question—

"The Court: Mr. Isserman, I am not going to have any interference here. Now you will just go over there and sit down and then you can say what you want to say afterwards.

"Now, Mr. Marshal, just escort Mr. Isserman over to the seat.

"Mr. Isserman: I would like to make an objection to your Honor's question. Am I allowed to do it?

"The Court: You have made it. Go back and sit down there. (The marshal escorts Mr. Isserman to the seat.) (Mr. Isserman rises.)

"Mr. Isserman: Well, I rise now to object to your Honor's question.

"The Court: Overruled. (Mr. Isserman is seated.)

"The Court: Now, Mrs. Lightfoot, you will give me a direct and responsive answer to that question. In that lecture did you discuss the subject—did you mention the subject of the dictatorship of the Proletariat?

"Mr. Isserman: I object to that question.

"The Court: Overruled.

"Mr. Marshal, will you show Mr. Isserman to his seat?

"Mr. Isserman: May I not stand at this point?

"The Court: You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more.

"Mr. Isserman: I am not aware of any contemptuous conduct.

"The Court: Well, you will be aware, all right.

"Mr. Isserman: I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible.

"The Court: Mr. Marshal, get busy. (Mr. Isserman sits down.)

"The Court (to witness): Now answer that question.

"Mr. Isserman: I object to that.

"The Court: Overruled.

"The Witness: The question—may I hear the question again now; after so much I do not remember it.

"The Court: The reporter will read it—or I will ask you again:

"In that lecture did you mention the subject of the dictatorship of the proletariat?

"Mr. Isserman: I object to that question.

"The Court: Overruled.

"A. In the beginning of that—

"The Court: All right, I sustain the objection to that question. We will have no more of it.

"Go ahead with your next question, Mr. Isserman."

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