

1-1-1970

On Trial: Judge Julius Hoffman

Timothy B. McGrath

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Timothy B. McGrath, Comment, *On Trial: Judge Julius Hoffman*, 10 SANTA CLARA LAWYER 385 (1970).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol10/iss2/12>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

ON TRIAL: JUDGE JULIUS HOFFMAN

The trial judge needs considerable experience in arriving at a just sentencing decision. To improve judicial proficiency in sentencing, a number of programs have been developed. The Joint Committee for the Effective Administration of Justice assisted in the organization of nearly fifty regional seminars available to almost every trial judge sitting in a state court of general jurisdiction.¹ Institutes devoted entirely to sentencing, which are presently conducted in the federal system, are also used for improving sentencing skills.² Since 1959, the judges of all the federal circuit courts have had an opportunity to participate in at least one institute.³ That it would be highly desirable for all jurisdictions to conduct sentencing institutes to provide a forum for judges to discuss the disparity of sentencing within their courts has been recognized by numerous legal authorities.⁴ Furthermore, that a great deal of unjustified disparity does exist has been amply demonstrated by a multiplicity of studies.⁵ Other illustrations of disparity are described in the findings of the workshop sessions at the Federal Institute on Disparity of Sentences.⁶

Obviously the need for giving judges discretion in sentencing is to permit variation based on relevant differences in offenders. Therefore, a lack of uniformity in sentences is, within certain limits, justifiable. However, sentencing which is unwarranted in its disparity is a denial of the principle of evenhanded administration of criminal law.⁷ Former United States Attorney General Robert H. Jackson put it another way:

It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance; namely, the personality of the particular judge before whom the case happens to come for disposition.⁸

¹ INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL EDUCATION IN THE UNITED STATES, 89-111 (1965).

² 28 U.S.C. § 334 (1964).

³ 37 F.R.D. 115-16 (1965).

⁴ L. YOUNGDAHL, REMARKS OPENING THE SENTENCING INSTITUTE PROGRAM, 35 F.R.D. 387, 390-91 (1964); R. VAN DUSEN, TRENDS IN SENTENCING SINCE 1957 AND AREAS OF SUBSTANTIAL AGREEMENT IN SENTENCING PRINCIPLES, *id.*, at 395 (1964).

⁵ S. RUBIN, CRIMINAL CORRECTION, 116-19 (1963); P. TAPPAN, CRIME, JUSTICE AND CORRECTION, 441-46 (1960).

⁶ SEMINAR AND INSTITUTE ON DISPARITY OF SENTENCES, 30 F.R.D. 401, 429-31 (1961).

⁷ S. RUBIN, DISPARITY AND EQUALITY OF SENTENCES—A CONSTITUTIONAL CHALLENGE, 40 F.R.D. 55 (1966).

⁸ A.B.A. PROTECTION ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—APPELLATE REVIEW OF SENTENCES, 23, 24 (Approved Draft 1968).

It was in the United States District Court for the Northern District of Illinois that a multiplicity of sentences, unwarranted in their disparity, were delivered against defendants in a conspiracy case for contempt. Judge Julius Hoffman between 2:35 and 4:05 P.M. on Wednesday, November 5, 1969, declared a mistrial in a conspiracy trial that included defendant Bobby G. Seale and sentenced this defendant for a term of three months on each of sixteen certified contempts, the sentences to run *consecutively*.⁹ Thus, defendant Seale is to serve four years for sixteen criminal contempts committed during the five-week period between September 24 and November 5, 1969. At the completion of the conspiracy trial five of the remaining defendants and their defense attorneys received contempt sentences to be served *consecutively* that range from six months to four years.¹⁰

The scope of this review is to examine the procedural and substantive regularity of the contempt sentences imposed. It is not a question of whether the various defendants are guilty of contumacious conduct in the courtroom, nor whether they should or should not be punished, nor whether the federal courts have the power to punish them. Rather, the questions are, who should sit in judgment? And what limitations are there to assure rectitude of courtroom proceedings without detracting from judicial discretion by improvident uses of summary contempt procedures? This includes the scope of appellate review as a means of enforcing or revising a trial court judge's use of judicial discretion in summary contempt procedures.

AUTHORITY AND PROCEDURE FOR SUMMARY CONTEMPT

A federal district court judge has the power to punish the misbehavior of any person in his presence or so near thereto as to interfere with the administration of justice.¹¹ Such contemptuous conduct may be punished summarily where the presiding judge certifies that he saw or heard the conduct and that the acts constituting the contempt were committed in the actual presence of the court.¹² From the very nature of their institution the courts of the United States possess the power to punish for contempts in order that their

⁹ United States v. Dellinger, 69 CR 180 U.S. Dist. Ct. for the No. Dist. of Ill.—East. Div. (1970). A mistrial in this case was declared as to defendant Seale on November 5, 1969.

¹⁰ *Id.* At the conclusion of the trial, but before a verdict had been returned by the jury, the remaining contempt sentences were summarily meted out.

¹¹ 18 U.S.C. § 401 (1964).

¹² FED. R. CRIM. P. 42. There is no limitation on the sentence that can be imposed by statute by a federal district court judge.

lawful judgments may be respected and enforced.¹³ The statutory intent is to safeguard constitutional procedures by limiting courts in contempt cases to the least possible power adequate to the protection of justice against immediate interruption of its business.¹⁴ Put another way, the power of the district courts should be exercised only to insure decorum in the court, loyalty of its officers, and to enforce obedience to their lawful orders, decrees and judgments.¹⁵ Sentences for criminal contempt are punitive in their nature so as to vindicate the authority of the court.¹⁶ There are a great many types of offenses, ranging from disrespect for the court to acts otherwise criminal, for which a person may be found in contempt.¹⁷ Contempt proceedings are not controlled by the limitations of the Constitution upon ordinary criminal prosecutions¹⁸ so that they are not subject to the right to trial by jury.¹⁹ Thus, a defendant charged with criminal contempt for having used abusive language directed against the court during trial is not entitled to a jury trial.²⁰ The defendants in the immediate case were convicted of multiple counts of criminal contempt in the presence of the court room and, henceforth, comments will be restricted to that type of contempt.²¹

The fact that criminal contempt in the presence of court is summarily dealt with does not require an immediate sentencing.²² That the trial judge does not act at once, upon the occurrence of each incident, and waits until the completion of the trial, does not preclude the trial judge from summarily punishing the alleged contemptuous conduct.²³ Except for defendant Seale, this was the procedure followed by Judge Hoffman. It should be noted that Judge Hoffman, like any other federal district judge, is allowed by statute to reduce an imposed sentence within sixty days of the termination of the contempt proceedings.²⁴

¹³ *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894).

¹⁴ *In re Michael*, 326 U.S. 224, 227 (1945).

¹⁵ *Berry v. Midtown Service Corp.*, 104 F.2d 107 (2d Cir. 1939).

¹⁶ *Harris v. United States*, 382 U.S. 162 (1965); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Field v. United States*, 193 F.2d 86 (2d Cir. 1951).

¹⁷ 18 U.S.C. §§ 401-02 (1964).

¹⁸ *Camarota v. United States*, 111 F.2d 243, 246 (3d Cir. 1940).

¹⁹ *Eilenbecker v. District Court*, 134 U.S. 31 (1890).

²⁰ *United States v. Schiffer*, 351 F.2d 91 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1965), *rehearing denied*, 385 U.S. 890 (1965).

²¹ FED. R. CRIM. P. 42.

²² *In re Osborne*, 344 F.2d 611, 616 (9th Cir. 1965).

²³ *Sacher v. United States*, 343 U.S. 1, 11 (1952), *rehearing denied*, 343 U.S. 931 (1952).

²⁴ *Flores v. United States*, 238 F.2d 758 (9th Cir. 1956); *Miller v. United States*, 224 F.2d 561 (5th Cir. 1955); FED. R. CRIM. P. 35.

CASE LAW LIMITATIONS ON SUMMARY CONTEMPT SENTENCES

What is complained of in the immediate case is the quantitative time involved in the sentences, that is, those sentences that exceed six months in total duration. In the not too distant past a four-year sentence for a single criminal contempt for failing to respond to a surrender order was upheld as being a reasonable exercise of judicial discretion.²⁵ Two years later the Supreme Court affirmed that there was no statutory authority prohibiting the imposition of a sentence of more than one year for criminal contempt.²⁶ The Court, in *Brown v. United States*,²⁷ in a five-to-four decision, upheld a fifteen-month sentence for criminal contempt even though the sentence was in excess of the maximum punishment authorized for the crime of which defendant was being questioned.²⁸ The dissent in the *Brown* case is significant because it was to be the basis for limiting future summary contempt sentences and because the divided court showed its increasing sensitivity to lengthy sentences without a trial by jury.²⁹ This was shown by the Court's subsequent reduction to six months of a one-year criminal contempt sentence, stating that the power to exercise punishment should be exercised with restraint.³⁰

During 1964, the Court again wrestled with the problem of limiting the time duration of criminal contempt sentences and indicated that the punishment which may be imposed after a non-jury contempt conviction is limited to that which is allowed for petty offenses.³¹ Relying on this decision, the United States District Court of Appeals for the District of Columbia applied the District of Columbia Code criteria for non-jury trials as being any offense punishable by ninety days or less.³² Since each federal district court judge might apply a local state criteria for non-jury trials, then the maximum punishment for criminal contempt would vary from state to state depending on how each state defined petty offenses. The following year the Court again confronted the issue of limiting summary contempt sentences and stated that it was the least possible

²⁵ *United States v. Thompson*, 117 F. Supp. 685 (S.D. N.Y. 1953), *aff'd per curiam*, 214 F.2d 545 (2d Cir. 1954).

²⁶ *United States v. Green*, 140 F. Supp. 117, 121 (S.D. N.Y. 1956), *aff'd*, 356 U.S. 165 (1958).

²⁷ 359 U.S. 41 (1959).

²⁸ *Id.*

²⁹ *Id.* at 53-63 (Warren, C.J.).

³⁰ *United States v. Levine*, 288 F.2d 272 (2d Cir. 1961). The Court strained to find that there were mitigating circumstances to warrant the reduction.

³¹ *United States v. Barnett*, 376 U.S. 681, 695 n.12 (1964).

³² *Rollerson v. United States*, 343 F.2d 269, 277-78 (D.C. Cir. 1964); D.C. Code § 11-715(a) (1961).

power to adequately obtain the purpose sought.³³ The Court's language was at best a retreat from the petty offense limitation since it is broad enough to allow a judge to impose any sentence of his choice. For example, in the case under review, Judge Hoffman's contempt sentences are within the broad language above so long as he certifies that they are the least possible to adequately obtain the purpose sought—restoring the dignity of the court. However, the petty offense limitation laid down by the Supreme Court a year earlier would place a definite limitation upon the sentences imposed. Furthermore, the above language is similar to that already in existence for over a decade.³⁴

The need for a clear and precise rule for placing a limitation on summary contempt proceedings in federal courts was apparent. In *Cheff v. Schnackenberg*³⁵ the Supreme Court laid down such a rule for federal courts to follow in sentencing criminal contempts. The Court reasoned that since petty offenses have always been summarily punished without a jury³⁶ and since any sentence of six months or less qualified as petty, then *any* sentence exceeding six months could not be imposed by a federal court without a jury trial or waiver thereof by the defendant.³⁷ The Court specifically noted that it was laying down a new rule under its supervisory power and that the new ruling was not to interfere with the power of a reviewing court to revise sentences in criminal contempt cases.³⁸ The language of the Court suggests that it is not only reserving the right in itself to further review and revise sentences; but also, it is encouraging appellate courts to revise sentencing on review, at least in criminal contempt cases. Some appellate courts, relying on the petty offense limitation in *Cheff*, have merely reduced contempt sentences to six months where they have been in excess thereof,³⁹ while at least one other reviewing court has made a substantial revision in the sentences imposed.⁴⁰

³³ *Harris v. United States*, 382 U.S. 162 (1965). This case specifically overrules *Brown v. United States*, 359 U.S. 41 (1959).

³⁴ *Widger v. United States*, 244 F.2d 103 (5th Cir. 1957); *Yates v. United States*, 227 F.2d 848 (9th Cir. 1955). When a federal court proceeds under FED. R. CRIM. P. 42(a), it must be careful to observe procedural safeguards, and that power must be narrowly construed when exercised.

³⁵ 384 U.S. 373 (1966).

³⁶ See 18 U.S.C. § 1 (1964) for definition of petty offenses.

³⁷ 384 U.S. at 380.

³⁸ *Id.* at 375-76.

³⁹ *United States v. Temple*, 372 F.2d 795 (4th Cir. 1966), *cert. denied*, 386 U.S. 961 (1967); *United States v. Harris*, 367 F.2d 826 (2d Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967).

⁴⁰ *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967). In this case, corporation directors who wilfully disobeyed a court restraining order were given fines ranging from \$1,000 to \$5,000, but the court of

Placing aside for the moment the problem of *consecutive sentences*, the very least that may be deduced from the above discussion is that sentences in *United States v. Dellinger* exceeding six months will be reduced to a maximum of six months. The very most to be expected is a substantial reduction in the imposed sentences for all the contemnners upon appellate review.

The importance of the *Cheff* decision was demonstrated in 1968 when the Court applied it retroactively; and where a defendant had served more than six months for criminal contempt without a jury trial or waiver thereof, the time was to be applied toward any other sentence that defendant might be serving.⁴¹ A two-year summary contempt sentence by an Illinois state court prompted the Court to extend the right to a jury trial for contempt to the state courts where the sentence exceeded six months.⁴² The opinion declared that prosecutions for contempts of more than six months are subject to the jury trial provisions of Article III, Section 2, of the Federal Constitution and the sixth amendment, which is binding upon the states by the due process clause of the fourteenth amendment.⁴³ Here the Court reaffirmed prior decisions that there is no need for a jury trial in contempt proceedings, but if the sentence is too severe, then the upholding of such a sentence would be an unacceptable construction of the Constitution.⁴⁴

CONSECUTIVE CONTEMPT SENTENCES

Perhaps the sentence imposed upon the defendants in the case under review is within the rulings of the Supreme Court. No single contempt sentence imposed by presiding Judge Hoffman exceeds the six-month maximum which would have required a jury trial. Rather it is the combined total of the contempt sentences which exceeds the six-month period. To draw such a conclusion would be to overlook the basic premise which permeates the recent holdings of the Supreme Court. In *Cheff*, the Court was primarily concerned with a defendant being summarily sentenced to imprisonment for criminal contempt for a period of more than six months without having been given the opportunity of a jury trial.⁴⁵ There is an implicit requirement in recent opinions regarding contempt that the judge's discre-

appeals reduced the fines by 90 per cent. The court stated that there is an implicit requirement that discretionary authority be exercised with restraint.

⁴¹ *Mirra v. United States*, 402 F.2d 888, 889 (2d Cir. 1968).

⁴² *Bloom v. Illinois*, 391 U.S. 194 (1968).

⁴³ *Id.* at 198.

⁴⁴ *Id.*

⁴⁵ See text accompanying notes 35-37 *supra*.

tionary authority be exercised with restraint.⁴⁶ Furthermore, there is no precedent for attaching sentences consecutively to achieve the gross disparity reached in the instant case.⁴⁷ Finally, in *Frank v. United States*⁴⁸ the Court noted that it is the severity of the sentence *actually imposed* that the reviewing courts look to in deciding on whether there has been an abuse of discretionary judgment by the district judge.

There are four separate considerations that should be kept in mind to determine the validity of attaching consecutive summary contempt sentences to achieve a total sentence of more than six months without a jury trial. These considerations, dealt with in the above paragraph, are: One, the Court's concern in *Cheff* over summarily sentencing a defendant to more than six months imprisonment without a jury trial; two, the implicit requirement that judicial discretion in contempt proceedings be exercised with restraint; three, the lack of any precedent for attaching consecutive contempt sentences to achieve summary imprisonment of more than six months; four, the very recent holding in *Frank* that the Court will look to the sentence actually imposed to determine if there has been an abuse of discretionary judgment. Each consideration taken by itself presents a weighty argument that Judge Hoffman may have gone beyond the limitations of his discretionary authority; but when all four considerations are viewed together the conclusion is inescapable that Judge Hoffman has indeed abused his discretionary authority by imposing sentences of up to four years in duration.

DISQUALIFICATION OF JUDGE IN CONTEMPT PROCEEDINGS

There are certain situations in which a trial court judge, whether state or federal, is not qualified to preside over a summary proceeding for criminal contempt. The general rule followed by

⁴⁶ *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

⁴⁷ In *United States v. Sacher*, 9 F.R.D. 394 (S.D. N.Y. 1949), *aff'd*, 182 F.2d 416, 418-31 (2d Cir. 1950), criminal contempts ranged from five to twenty-three counts against defendants and their counsels during a trial for conspiracy to overthrow the government. The sentences were from thirty days to six months to be served "concurrently." In *Offutt v. United States*, 208 F.2d 842 (D.C. Cir. 1953), *rev'd*, 348 U.S. 11 (1954), the district court judge cited the defendant for twelve counts of contempt in the presence of the court of which four were upheld, and the sentence was reduced from ten days to forty-eight hours. In the case of *In re Du Boyce*, 241 F.2d 855 (3d Cir. 1957), defendant was arrogant and her complete misconception of judicial procedure culminated in disorderly conduct and defiance of trial judge, resulting in a \$50 fine with suspended jail sentence of 15 days. The appellate court praised the trial judge for his patience and objectivity.

⁴⁸ 89 S. Ct. 1503, 1505-06 (1969).

state and federal courts, as stated in *Patterson v. Colorado*,⁴⁹ is that a direct contempt against the court is not sufficient grounds in itself to disqualify a judge from presiding over the contempt proceeding.⁵⁰ An elaboration on the rule properly points out that if it were not followed, the power of a judge to summarily punish contemptuous conduct in his presence would be nullified.⁵¹ However, when the contempt charged involves criticism of or disrespect to a judge, that judge may be disqualified from sitting in judgment of and sentencing the contemners.⁵² The Supreme Court's suggested procedure for such a judge to follow is to request the Chief Judge of the district court to assign another judge to hear the charge and make an impartial determination thereof.⁵³ This would insure the defendant a fair and just hearing and sentence if needed. Should the transcripts of the instant case show that some or all of the contempt charges resulted from criticism of or disrespect to Judge Hoffman, then it may be determined on appeal that he was acting in revenge rather than in the best interest of justice. In the case of defendant Bobby Seale, the transcripts reveal that almost every contempt charge involved a critical exchange between the defendant and the judge.⁵⁴ As to this defendant, the judge ought to have disqualified himself.

One must keep in mind that the purpose of the power to summarily punish for contemptuous conduct in the courtroom is to vindicate the dignity of the court and to restore decorum.⁵⁵ Hence, if a judge uses his discretionary summary contempt power in a proper manner to enforce obedience and order in his courtroom, then this would seemingly be a correct usage of his authority. However, where the judge waits until the termination of the trial, as in the case herein under review, then it is doubtful that he is qualified to sit in judgment since the purpose of restoring order in the courtroom is no longer present.⁵⁶ It is a fair conclusion to note that because of the failure of immediate sentencing in the instant case, any doubt as to the propriety of Judge Hoffman's sitting in judgment should be resolved against him and in favor of the defendants.

⁴⁹ 205 U.S. 454 (1907).

⁵⁰ *Id.* at 463; *see* *Parmelee Transportation Co. v. Keeshin*, 294 F.2d 310 (7th Cir. 1961).

⁵¹ *Sacher v. United States*, 343 U.S. 1 (1952), *rehearing denied*, 343 U.S. 931 (1952).

⁵² *United States v. Bradt*, 294 F.2d 879 (6th Cir. 1961).

⁵³ *Offutt v. United States*, 348 U.S. 11, 12 (1954), *rev'g* 208 F. Supp. 842 (D.C. Cir. 1953).

⁵⁴ *See* note 9 *supra*.

⁵⁵ *See* note 15 *supra*, and accompanying text.

⁵⁶ *See* Annot., 64 A.L.R.2d 593, 620 (1959).

APPELLATE REVIEW OF DISCRETION AND SENTENCING AT TRIAL COURT

It should be obvious that the case under review will be appealed to the higher courts; so it is advantageous to note some of the traditional hurdles in the judicial process that must be overcome or confronted. The federal appellate courts once had statutory authority to review sentences, but this authority was implicitly withdrawn when the statute was revised.⁵⁷ That a person may appeal from a contempt sentence is clear;⁵⁸ but that the sentence will be reviewed is doubtful.⁵⁹ Appellate courts, because of their lack of explicit authority to review a trial court judge's discretion in sentencing, have oftentimes come to anomalous decisions on procedural or substantive law so as to reverse harsh sentences.⁶⁰ The fact that some judges have a reputation for their character and that it affects their sentencing is supported by the testimony of the former Director of Federal Prisons:

That some judges are arbitrary and even sadistic in their sentencing practices is notoriously a matter of record. By reason of senility or a virtually pathological emotional complex some judges summarily impose the maximum . . . on certain . . . or all types of crimes I know of one judge who continued to sit on the bench and sentence defendants to prison while he was undergoing shock treatments for mental illness.⁶¹

⁵⁷ AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—APPELLATE REVIEW OF SENTENCES, 14 (Approved Draft 1968).

⁵⁸ Kaplan v. United States, 234 F.2d 345 (8th Cir. 1956).

⁵⁹ See United States v. Martell, 335 F.2d 764, 767-68 (4th Cir. 1964); Smith v. United States, 273 F.2d 462, 468-69 (10th Cir. 1959) (dissenting opinion); United States v. Rosenberg, 195 F.2d 583, 604-07 (2d Cir. 1952). These cases held they lacked the power to review the merits of a sentence. Wilson v. United States, 26 F.2d 215 (8th Cir. 1928), which stated that review is confined to errors of law; Shibley v. United States, 236 F.2d 238 (9th Cir. 1956), *cert. denied*, 352 U.S. 873 (1956), *rehearing denied*, 352 U.S. 919 (1956); MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1951); Moore v. United States, 150 F.2d 323 (10th Cir. 1945); Huffman v. United States, 148 F.2d 943 (10th Cir. 1945); Keeney v. United States, 17 F.2d 976 (7th Cir. 1927), holding that contempt sentences will not be disturbed in the absence of an abuse of discretion; Robles v. United States, 279 F.2d 401 (9th Cir. 1960), which held that the severity of punishment for contempt is within the sound discretion of the trial court.

⁶⁰ APPELLATE REVIEW OF SENTENCES: A SYMPOSIUM AT THE JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, 32 F.R.D. 249, 289-90 (1962) [hereinafter cited as SYMPOSIUM]. Former Chief Judge of the Fourth Circuit Simon E. Sobeloff put it this way: "Many appeals are docketed today only because of the severity of the sentence pronounced in the district court and since the appellate tribunal cannot tackle the real issue in a forthright manner, it may, and often does, in its endeavor to strike down a harsh penalty, give the law a strained construction liable to work havoc in future cases." *Id.* at 271.

⁶¹ A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: APPELLATE REVIEW OF SENTENCES, 23, 24 (Approved Draft 1968).

To say of these jurisdictions that in no other area of our law does one man exercise such unrestricted power and in no other country in the *free* world is this condition permitted is not an overstatement.⁶²

CONCLUSION

A substantive reading of the above paragraph should shock the conscience of any free man. Former United States Attorney General Robert Kennedy ranked sentence disparity as one of our foremost problems almost ten years ago.⁶³ Yet, in the case under review, we are confronted with one district court judge who is attempting to broaden judicial discretion in the area of summary contempt sentences. This is one facet of trial court discretion in sentencing that, at the very least, ought to be held in check by making a six-month sentence without a jury trial, or waiver thereof, the *absolute* maximum. It is not equality of sentencing that is needed, rather it is the need for equality in the philosophies of judges handing down sentences.⁶⁴ There is a real need for legislation which would enable appellate courts, both state and federal, to review sentencing.⁶⁵ Nevertheless, even without enabling legislation the Supreme Court holding in *Cheff* seems to give the requisite authority to courts to review contempt sentences.⁶⁶

RECOMMENDATIONS: GENERAL AND SPECIFIC

There are these general recommendations: First, federal district judges throughout the United States ought to make an increased use of the judicial institutes for just sentencing practice until sentence disparity has been significantly alleviated.⁶⁷ At the same time, the second recommendation would be for appellate courts, both state and federal, to assume a more responsible posture by reviewing sentences. This could be done under one interpretation of *Cheff*.⁶⁸ Third, at the earliest opportune moment, the Supreme Court ought to formulate a procedure for appellate courts to review

⁶² SYMPOSIUM at 265 (remarks of Judge Sobeloff).

⁶³ R. KENNEDY, SEMINAR & INSTITUTE ON DISPARITY OF SENTENCES, 30 F.R.D. 422, 425 (1961).

⁶⁴ *Id.* at 426.

⁶⁵ Levine, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966); Youngdahl, *Development and Accomplishments of Sentencing Institutes in the Federal Judicial System*, 45 NEB. L. REV. 513 (1966); S. RUBIN, DISPARITY AND EQUALITY OF SENTENCES—A CONSTITUTIONAL CHALLENGE, 40 F.R.D. 55 (1966). See also 28 U.S.C. § 334 (1964).

⁶⁶ See note 38 and accompanying text *supra*.

⁶⁷ See notes 1, 2, & 3 and accompanying text *supra*.

⁶⁸ See notes 39 & 40 and accompanying text *supra*.

sentences, pursuant to its power to supervise inferior court decisions.⁶⁹

The concluding procedural recommendations are specific in nature and are applied to the instant case.

The Supreme Court's appellate jurisdiction is severely limited over district courts in criminal cases, precluding an examination of the contempt sentences by direct appeal.⁷⁰ However, the Court's certiorari jurisdiction is plenary in scope⁷¹ and may be exercised "before or after rendition of judgment" by a court of appeals.⁷² The only requirement is that the case be docketed in the appellate court.⁷³ Thus, a writ of certiorari would be the speediest method to get a determination and resolve the issues raised.

There remains yet another way for the Supreme Court to obtain jurisdiction over the case before an appellate court has made a determination. At any time where a court of appeal desires instructions on a question of law in a criminal case it may do so by means of certification.⁷⁴ Hence, an appellate court that is troubled over the lawfulness of imprisoning a contemner for more than six months without a jury trial, or waiver thereof, may certify the question to the Supreme Court for instructions. The Court may then require the entire record to be sent up for a decision on the entire case or it may give binding instructions for the appellate court to follow.⁷⁵ In actuality this gives an appellate court a way out from coming to grips with the matter of a trial court judge's discretion in sentencing for contempt.

It does seem, however, that the final decision will rest with the Supreme Court. The justices should find that no person can be summarily imprisoned without a jury trial, or waiver thereof, for more

⁶⁹ U.S. CONST. art. III, § 1; 28 U.S.C. §§ 1251-57 (1964); 18 U.S.C. § 3731 (1964).

⁷⁰ 28 U.S.C. § 1252 (1964) limits appellate review by the Supreme Court of district courts to cases where a federal statute has been held unconstitutional, while 18 U.S.C. § 3731 (1964) allows review only on certain types of judgments adverse to the United States.

⁷¹ 28 U.S.C. § 1254(1) (1964).

⁷² *Id.*

⁷³ *Id.* § 2101(e). A writ of certiorari "will be granted only upon a showing that the cause is of such imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement in the court." SUPREME CT. R. 20. Furthermore, the Court may vacate or summarily reverse the judgment below at the time it grants certiorari if a majority of the justices believe oral argument to be unnecessary because the lower court's decision is clearly erroneous. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 220 (4th ed. 1969).

⁷⁴ 28 U.S.C. § 1254(3) (1964).

⁷⁵ *Id.*

than six months. If it is decided that Judge Hoffman's personal feelings entered into the contempt sentences, then the sentences should all be substantially modified or remanded for a hearing by an impartial judge. It is not difficult for one to believe that the hoped-for gains from a prosecution of this kind would be lost unless it were demonstrated that the American legal process could accomplish justice.

Timothy B. McGrath