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first amendment in the area of border searches, just as it has for the fourth amendment,[52] to uphold administrative censorship of obscenity for any purpose—private or commercial. *Stanley* may well be confined to its facts, so that the right to possess obscenity will remain only a passive right, protecting the possessor's privacy of thought; it will not provide him with an unimpeded right to receive obscene matter.

[52] The requirement for search and seizure in a customs border inspection is not probable cause, but mere suspicion that a violation has occurred. 19 U.S.C. § 482 (1964); 19 U.S.C. § 1582 (1964). *See* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966); Annot., 6 A.L.R. Fed. 317 (1971).

The protection against unreasonable search and seizure guaranteed by the fourth amendment has been held to extend to first-class mail when in the custody of the postal department, however. *See Ex parte* Jackson, 96 U.S. 727 (1877); Oliver v. United States, 239 F.2d 818 (8th Cir. 1957); Annot., 61 A.L.R.2d 1282 (1958).

CONTEMPT

Mayberry v. Pennsylvania, 400 U.S. 455 (1971)

In *Mayberry v. Pennsylvania*[1] the Supreme Court dealt with the judicial options available for ending courtroom disruptions by a defendant. The defendant Mayberry and two others were accused of holding hostages in a state penal institution and of committing prison breach. The defendants acted as counsel *pro se* throughout the trial; their court-appointed counsel was requested by the judge to act in an advisory capacity. During the twenty-one day proceedings, defendant Mayberry complained bitterly of adverse rulings from the bench, attacked the judge verbally and instituted tactics which were intended to disrupt the judge's instructions to the jury. When these latter tactics succeeded, Mayberry was gagged and strait-jacketed. Mayberry, however, continued his disruption and ultimately was removed to an adjoining room from which he listened to the conclusion of the trial over a public address system. At the end of the trial, the jury returned a verdict of guilty on both counts. Before passing sentence, the trial judge summarily cited the defendants for criminal contempt, finding defendant Mayberry guilty of one or more contempts on eleven of the twenty-one days. The judge then sentenced Mayberry to not less than one nor more than two years for each of the eleven contempt citations, the sentences to run consecutively.[2] The contempt sentence was affirmed by the Pennsylvania Supreme Court.[3]

The United States Supreme Court vacated the sentence and remanded the case, holding that a judge who has been verbally attacked in court with personal insults and who chooses to postpone contempt proceedings until the trial's consummation must step down from the ensuing contempt proceedings and allow a neutral judge to adjudicate the contempt.[4] The Court also further refined the alternatives for dealing with contempt which are

[1] 400 U.S. 455 (1971).

[2] The specifications of contempt were:

1. suggesting that the court "has the intentions of railroading us", that the judge was "being like a hatchet man for the state", and calling the trial judge a "dirty son-of-a-bitch," *id.* at 456;

2. telling the judge he didn't know how to rule on questions and that "you ought to be Gilbert and Sullivan the way you sustain the district attorney each time he objects to the questions," *id.* at 457;

3. shouting that the judge, a "dirty, tyrannical old dog," would not railroad him into a life sentence *id.* at 457;

4. requesting the judge to keep his mouth shut when defendant is questioning his own witness, *id.* at 457–58;

5. calling the judge a bum and telling him, "Go to hell. I don't give a good God damn what you suggest, you stumbling dog," *id.* at 458;

6. likening the courtroom to a penitentiary and asserting that the judge was trying to deny him a fair trial, *id.* at 459;

7. repeating the "Gilbert and Sullivan" charge, charging the judge with conducting a "Spanish Inquisition," accusing the judge of railroading him into a life sentence and of "trying to do a good job for the warden," and claiming that the judge was "a nut" who needed "some kind of psychiatric treatment," *id.* at 460;

8. stating, "This is the craziest trial I have ever seen," *id.* at 461;

9. referring to the judge as a fool, *id.* at 461;

10. causing such an uproar as to be ejected from the courtroom several times, *id.* at 461;

11. interrupting the court's charge to the jury, *id.* at 462.

[3] Mayberry Appeal, 434 Pa. 478, 255 A.2d 131 (1969).

[4] 400 U.S. at 463–64.

available to the trial court from the "arsenal of authority" first set forth in *Illinois v. Allen*.[5]

An understanding of Mayberry's impact upon the law of criminal contempt requires first an examination of those cases which preceded *Mayberry* and upon which it rests. It is well-settled law that in order to prevent a breakdown of the judicial process, courts have the power to summarily punish contemnors for contempts of court which constitute personal attacks upon the trial judge.[6] As early as 1888, the Supreme Court in *Ex parte Terry*[7] sanctioned a court's power to proceed upon its own knowledge of contempt committed in open court and to punish summarily for that contempt.[8] In *Cooke v. United States*,[9] the Court declared that summary punishment of direct contempt does not mandate adherence to traditional notions of due process of law. The Court stated, "there is no need of evidence or assistance of counsel before punishment, because the court has seen the offense."[10] The court determined, however, that contempt not *in facie curae* demands the same procedural safeguards as any other criminal offense.[11]

The contemnor in *Cooke*, an attorney, requested by letter that the presiding judge disqualify himself from the case, whereupon the attorney was summarily cited for out-of-court contempt. The Supreme Court reversed, holding that since the contempt was not one in open court, due process of law required that the accused be advised of the charges against him, provided with assistance of counsel if requested, and afforded the right to call witnesses in his own behalf.[12] In dictum the Court recommended that another judge preside over delayed summary contempt proceedings at the close of trial.[13]

In *Sacher v. United States*[14] the Court spoke further on the power of summary punishment for acts of direct contempt. *Sacher* involved specifications of contempt against attorneys for eleven Communist party leaders for disruptive actions during the trial of *Dennis v. United States*.[15] Although the contemnors conceded that they might have been punished summarily if the trial judge had acted instantly, they contended that the power of summary punishment expired when the judge failed to cite them for contempt until after the verdict. The Supreme Court, in enforcing the procedure authorized by Federal Rule of Criminal Procedure 42(a),[16] held that a trial judge may punish

[5] 397 U.S. 337 (1970). In *Allen* the court explicitly held that

> [a] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nonetheless insists on conducting himself in a manner so disorderly . . . that his trial cannot be carried on with him in the courtroom.

Id. at 343.

The Court gave trial judges at least three options in such cases: to bind and gag the defendant, to cite him for contempt, or to take him from the courtroom until he promises to conduct himself properly. Each of these situations was present in *Mayberry*. As Justice Douglas pointed out, however, Illinois v. Allen was decided after the Pennsylvania Supreme Court affirmed the Mayberry contempt conviction. 400 U.S. at 463. *See also* Flaum & Thompson, *The Case of the Disruptive Defendant*, 61 J. CRIM. L.C. & P. S. 327 (1970).

[6] *See* 400 U.S. at 463; Ungar v. Sarafite, 376 U.S. 575, 593 n. 1 (1964) (Douglas, J., dissenting); Sachar v. United States, 343 U.S. 1, 36–37 (1952) (Frankfurter, J., dissenting).

[7] 128 U.S. 289 (1888).

[8] *Id.* at 293.

[9] 267 U.S. 517 (1925).

[10] *Id.* at 534–35.

[11] The Court has emphasized since *Cooke* that only "open contempts" are exempted from these due process requirements. *In re* Oliver, 333 U.S. 257 (1948), presented the summary contempt citation of a witness by a judge conducting a then-permissible "one man grand jury," the witness having given testimony that "didn't jell." Reversing the six-month sentence, the Supreme Court found that this situation did not constitute an open contempt:

> [T]he narrow exception to . . . 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.

Id. at 275–76.

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

Cooke v. United States, 267 U.S. at 537.

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

Id. at 539.

[14] 343 U.S. 1 (1951).

[15] 341 U.S. 494 (1951).

[16] FED. R. CRIM. P. 42(a) reads:

> (a). Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct consti-

summarily either at the time of the contempt, or if required by the exigencies of the trial, at the end of the trial.[17] The Court cautioned that to summon before the bench a lawyer representing a client in a pending case and pronounce him guilty of contempt is "not unlikely to prejudice his client." [18]

Mr. Justice Frankfurter dissented, stating that the trial judge had become too embroiled in controversy with the contemnors to rule impartially on the charges of contempt. Frankfurter found it highly improper to permit the trial court to be both accuser and judge in a separate proceeding where he had been personally outraged by the contemnor.[19] Mr. Justice Frankfurter's dissenting language in *Sacher* was adopted by the Court in *Offutt v. United States*.[20] The Court there examined the question of whether a judge who is "personally involved" in the contempt may remain in the case at all. The Court held that the district judge was not qualified to sentence for contempt "where the contempt charged is entangled with the judge's personal feeling against the lawyer." [21]

In *Illinois v. Allen*[22] the Supreme Court resolved the question of whether an accused can claim the benefit of confrontation while engaging in actions rendering completion of his trial impossible. The confrontation clause of the sixth amendement, applicable to state proceedings, had theretofore been viewed as granting the defendant the right to be present at every stage of the trial.[23] The *Allen* Court explicitly held that a defendant who continues to engage in disruptive behavior, after proper warnings, can lose the right to remain in the courtroom. Therefore, remanding a defendant to custody, binding and gagging an unruly defendant, and removing the defendant from the courtroom were added to the options of summary and delayed contempt.[24]

The issues raised in *Mayberry* were meticulously examined by the Pennsylvania Supreme Court. That court denied the necessity of a jury trial for Mayberry's contempt sentence[25] and ruled that the trial judge had the plenary power to summarily punish the defendant under *Ex parte Terry* and *Cooke v. United States*.[26] The court split, however, on the question of cruel and unusual punishment. While the majority dismissed the contention, noting that such acts in open court are intended to disrupt,[27] Judge O'Brien, dissenting, posited that it would be more realistic to view all the disruptive acts as a single contempt. O'Brien would therefore have found the eleven to twenty-two-year sentence cruel and unusual.[28] Finally, the Pennsylvania court dealt with the question of whether the trial judge had a duty to warn Mayberry each time his conduct became contumacious. The court asserted that even a layman would have known that his conduct was in contempt of court, so due process did not require that the court give separate warnings.[29]

In vacating the sentence, Justice Douglas's majority opinion stated that where a "vilified judge" waits until the end of a trial to sentence a defendant for contempt, he should permit another judge

tuting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[17] 343 U.S. at 11.

[18] *Id.* at 9–10.

[19] *Id.* at 28 (dissenting opinion of Frankfurter, J.).

[20] 348 U.S. 11 (1954).

[21] *Id.* at 12–14. In Ungar v. Sarafite, 376 U.S. 575 (1964), however, the Court found no bias. In distinguishing its decision in *Offutt*, the Court reasoned that the contemnor's disruptive commentary did not carry such "potential for bias" as to require the judge's disqualification. 376 U.S. at 584.

[22] 397 U.S. 337 1970.

[23] The confrontation clause of the sixth amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." This clause is obligatory to state proceedings under Pointer v. Texas, 380 U.S. 400 (1965). In reversing the Seventh Circuit's view that the right to be present at trial is "absolute," 413 F.2d 232 (1969), the Court in *Allen* stated: "We cannot agree that the Sixth Amendment . . . or any . . . cases of this Court so handicap a judge at trial." 397 U.S. at 342.

[24] Mr. Justice Harlan, in his concurring opinion, indicated that if the Court's decision in Illinois v. Allen had been available at the time of Mayberry's trial, the trial judge could have dealt with the contemnor's disruptive tactics by stopping the trial and citing the defendant for contempt, even though the contempts were "personal." 400 U.S. at 469.

[25] The court conceded that a jury trial would have been necessary under Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), were those cases not inapplicable as prospective under DeStefano v. Woods, 392 U.S. 631 (1968). Mayberry Appeal, 434 Pa. at 482, 255 A.2d at 133.

[26] 434 Pa. at 483–84, 255 A.2d at 134.

[27] The instant record is replete with instance after instance of contumacious conduct on Mayberry's part. Moreover, it is evident beyond question that such conduct was not only in defiance of the court and its dignity but was planned with a view to disrupting the orderly process of the trial and preventing and obstructing the proper administration of justice.

Under the instant circumstances, we conclude that the imposition of eleven one-to-two-year sentences is not cruel and unusual punishment. *Id.* at 485–86, 255 A.2d at 135.

[28] *Id.* at 487–88, 255 A.2d at 137.

[29] *Id.* at 486, 255 A.2d at 135.

to preside over the contempt hearing.[30] Justice Douglas reasoned that the "fair administration of justice" would be served by the recusation of a judge subject to personal abuse, where a vengeful judge might prejudice the contumacious defendant's fourteenth amendment right to due process.[31]

More broadly, *Mayberry* was based upon the view that "[j]ustice must satisfy the appearance of justice," as expressed in *Offutt v. United States*.[32] Essential elements to promote "the appearance of justice" in the instant case were the length of the sentence and the actions of the trial judge. Apparently, Justice Douglas used the "appearance of justice" standard to describe the "requirement" of the fourteenth amendment. In *Mayberry* both the length of the sentence and the "image" of an abused judge seeking revenge did not meet the "appearance of justice;" however, Justice Douglas and Justice Harlan disagreed about the seriousness of each factor. Justice Douglas stressed the concept of image:

> A judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.[33]

In his concurring opinion, Mr. Justice Harlan focused on the length of the sentences:

> These contempt convictions must be regarded as infected by the fact that the unprecedented long sentence of 22 years which they carried was imposed by a judge who himself had been the victim of petitioner's shockingly abusive conduct. *That circumstance seems to me to deprive the contempt proceeding of the appearance of even-handed justice which is the core of due process.*[34]

Given the broad principles in the area of due process and the divergence of the views of Justices Douglas and Harlan, lower courts will have to consider both factors carefully to apply the *Mayberry* ruling accurately to other fact situations.[35]

A basic question in *Mayberry* was whether the option to postpone contempt proceedings is an effective method for restraining unruly defendants. Justice Douglas qualified his reluctance to use summary contempt power when he stated that "[i]nstant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved." [36] Yet Mr. Justice Black, in a one-sentence concurring opinion, rejected the possibility that the judge could have convicted Mayberry of contempt instantaneously with the outburst.[37] Chief Justice Burger, also concurring, noted that "[t]he contempt . . . is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the particular trial or undermining the process of justice." He asserted, in reference to the *Allen* "arsenal of authority," that "[s]ummary removal from the courtroom is the really effective remedy." [38] The Chief Justice added that obstruction of justice statutes, where available, might also prove effective.[39] Due to the disagreement among the Justices as to the most effective means for controlling a disruptive defendant, it is not at all clear how useful the option offered in *Mayberry* would be in applicable cases.

Knox v. Municipal Court of Des Moines[40] is a recent state court decision that illustrates the problem of a defendant who insults the alternate neutral judge who presides at the contempt hearing as well as the trial judge. In *Knox* a defendant

[30] 400 U.S. at 465.

[31] *Id.*

[32] 348 U.S. 11, 17 (1954), quoted in 400 U.S. at 465.

[33] 400 U.S. 465. Justice Douglas later elaborated on the image concept:

> Many of the words leveled at the judge in the instant case were highly personal aspersions, even fighting words. . . . Insults of that kind are apt to strike at the most vulnerable and human qualities of a judge's temperament. . . . In the present case . . . the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.

Id. at 466.

[34] *Id.* at 469 (emphasis added).

[35] It is clear, however, that outside factors may make a situation so prejudicial as to demand that a trial judge recuse himself in a post-trial contempt proceeding. In Johnson v. Mississippi, 403 U.S. 212 (1971), a post-*Mayberry* case, a civil rights worker was summarily cited for contempt at trial. The judge, however, although present in the courtroom at the time of the alleged contumacious behavior, became aware of the actions through second-hand reports. Although noting that such judicial action directly conflicted with *Oliver*, the Court proceeded to point out that the judge had been the losing party in several suits filed by the civil rights worker. Citing *Mayberry*, the Court demanded a trial on the contempt charges, noting that "Trial before an unbiased judge is essential to due process." 403 U.S. at 216.

[36] 400 U.S. at 463.

[37] *Id.* at 466. Mr. Justice Black believed that Mayberry could not be punished summarily without a jury trial.

[38] *Id.* at 467.

[39] *Id.* at 468.

[40] — Ia. —, 185 N.W.2d 705 (1971).

accused of operating a motor vehicle with a suspended license was openly antagonistic to the trial judge and culminated his contumacious conduct by spitting at the judge after being sentenced. Although the judge sentenced the defendant to five of a possible thirty days for the traffic offense, he still chose to transfer the contempt hearing to another judge. Defendant Knox, however, was again so disruptive that he was summarily cited for contempt at the hearing; the second judge also sentenced him to six months after trial for the first contempt.[41] The Iowa Supreme Court affirmed the decision 4-3. The dissenters objected that Knox's behavior in causing the first contempt should not have been heard by the second judge, since the second judge had himself been vilified at the preliminary hearing. The dissenters argued that according to *Mayberry*, the first contempt should have been heard before a third judge after the defendant vilified the second judge.[42] The facts in *Knox* indicate that use of the *Mayberry* option with a determinedly disruptive defendant wastes the court's time because the defendant can continue to abuse each succeeding judge at each contempt hearing.[43]

Another problem that arises from *Mayberry* concerns the duty of the trial judge to warn the defendant that his conduct may be contumacious. The trial judge in the *Mayberry* case did not caution the defendant at any point during the eleven contemptuous incidents. Dismissing Mayberry's argument that he should have been warned by the trial judge immediately after each contemptuous outburst, the Pennsylvania Supreme Court reasoned that the defendant was aware of his outrageous conduct and deliberately planned it to be disruptive.[44] The Pennsylvania court's rationale, however, begs the question of whether the "fair administration of justice" or "the appearance of justice" demands that the defendant be warned of the possible ramifications of his actions. To be sentenced without warning to a possible twenty-two year sentence for engaging in disruptive conduct, on the theory that the defendant's willful behavior satisfied the due process requirement of notice, emphasizes Justice Harlan's concern that the length of the sentence must satisfy "the appearance of even-handed justice."

In *Mayberry* the Court failed to consider the length of sentence imposed and the related question of the contemnor's right to jury trial before a new judge. In *Cheff v. Schnackenberg*[45] the Court, exercising its supervisory power over the federal courts, required that a criminal contempt sentence exceeding six months be tried by a jury. *Duncan v. Louisiana*[46] provided that under the due process clause of the fourteenth amendment a defendant is entitled to a jury trial in any serious criminal case. Applying the petty crime-serious crime distinction to criminal contempt, the Supreme Court held in *Bloom v. Illinois*[47] that the sixth amendment's right of trial by jury is guaranteed in cases of "serious contempt." Postponement of sentencing for contempt until the end of trial before a fellow judge should not deprive the contemnor of a jury trial when the risk, as in *Mayberry*, greatly exceeds the six-month limitation imposed in *Cheff*. Yet Chief Justice Burger's concurring language that "our holding that contempt cases with penalties of the magnitude imposed here should be heard by another judge," [48] implies that such sentences can be meted out under the procedure outlined in *Mayberry* without affording the contemnor a trial by jury.[49]

The policy of having a judge who has been personally abused by a defendant step down in favor of a neutral judge was expressed initially in the *Cooke* decision as dictum.[50] In *Mayberry* the

[41] The second judge also summarily sentenced the defendant to six months for the second contempt.

[42] *Id.* at—, 185 N.W.2d at 717.

[43] Assuming *arguendo* that the verbal attacks directed at the second judge, combined with his later sentencing of Knox to the maximum statutory penalty, made him unqualified to sit at the contempt hearing for the original contempt, the Iowa court's failure to remand before a third judge was error under *Mayberry*.

[44] Mayberry Appeal, 434 Pa. at 488–89, 255 A.2d at 135. The court stated: "He knew his conduct was outrageous and he deliberately planned such a course of conduct."

[45] 384 U.S. 373 (1966).

[46] 391 U.S. 145 (1968).

[47] 391 U.S. 194 (1968). Under Baldwin v. New York, 399 U.S. 66, 68 (1970), statutory authorization of a penalty in excess of six months is a "serious" criminal offense, requiring a jury trial. *Baldwin*, however, has limited applicability in cases of federal contempt and in states such as Pennsylvania, where there is no statutorily established maximum sentence for direct criminal contempts. *See* Commonwealth v. Snyder, — Pa. —, 275 A.2d 312 (1971), in which the court suggests looking to the actual sentence imposed where no statutory maximum exists. *Id.* at —, 275 A.2d at 317 (1971).

[48] 400 U.S. at 469.

[49] *See* note 25 *supra* and accompanying text, where the Pennsylvania Supreme Court acknowledged that a jury trial would be required if *Duncan* and *Bloom* had been applied retroactively, each count being greater than six months

[50] *See* note 13 *supra*.