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Melvin B. Lewis

JUDICIAL FORGING OF A POLITICAL WEAPON: THE IMPACT OF THE COLD WAR ON THE LAW OF CONTEMPT

MELVIN B. LEWIS*

I. THE ROOTS OF CONTEMPT JURISPRUDENCE

Contempt, in its legal sense, is a concept under whose rubric a court or legislative body punishes acts which impede the performance of its official function. The details of its provenance are unclear. It arose, however, at a time in English history when the powers of the monarch were absolute, and the judicial and parliamentary functions were subservient to royal authority. Thus, a disrespectful act directed toward such a body was defiance of the crown itself, and the contempt power was designed to vindicate royal authority.

In light of the exalted status of the offended institution and its presumptively unimpeachable integrity and objectivity, the exercise of the contempt power was not attended by safeguards against abuse. There was no need for evidence to prove that which the king or his surrogate claimed to know. "In England, in cases of [contempt], the charge could be made by the King in his courts, without any evidence and against all evidence."[1] If no code denounced the specific conduct under consideration, the crown was not constrained by any prohibition against *ex post facto* legislation.

At the time of the adoption of the Magna Carta, the contempt power had been established firmly as a legislative power. English authorities are in conflict as to whether courts were empowered to punish contempt summarily and without process prior to the reign of Elizabeth I.[2] The notes of Justice Wilmot in an aborted, but noteworthy, 1765 proceeding known as *Almon's Case* recite that the power had existed from "immemorial usage and practice" with precedent as ancient "as supports the whole fabric of the common law."[3] Wilmot, who viewed the contempt process as a product of the divine right of kings, asserts that because it predated the Magna

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* Professor Melvin B. Lewis served as a faculty member of The John Marshall Law School, Chicago, Illinois, since 1971 and passed away July 5, 1993.

1. Creekmore v. United States, 237 F. 743, 744 (8th Cir. 1916).

2. SIR JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT viii-ix (1927).

3. RONALD GOLDFARB, THE CONTEMPT POWER 16-17 (1963). The proceedings were dropped after a change of ministry. A contributing factor was the fact that the wrong name had been entered on the writ. *Id.*

Carta, contempt was not affected by the provision within that document prohibiting imprisonment except *per legem terrae*.[4] On that rationale, summary punishment without legal process was deemed a proper part of English jurisprudence in cases of contempt.[5]

Before the nineteenth century, summary contempt power had been exercised by English courts in only three cases,[6] all of them responding to defamation of Lord Mansfield.[7] Contempt judgments were principally employed by Parliament to punish derogatory expressions, circulation of impertinent petitions, and unauthorized disclosure of intracameral debates.[8] During colonial times, the American legislatures exercised a contempt power derived from parliamentary precedent.[9]

Although the United States came into being in an atmosphere of resentment toward monarchial excesses, the contempt remedy was an accepted part of American law at the time of the Revolution. An early Congressional enactment provided, *inter alia*, that federal courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing . . . ."[10] The federal courts construed that statute as conferring upon them a contempt power "according to such established rules and principles of the common law *as were applicable to our situation*."[11] The underscored portion of that quotation must be regarded as suggesting that American political philosophy mandated modification of the English contempt model.

Almost from its inception as a political body, Congress employed the contempt process to punish defiance of its authority. Until 1857,[12] both houses of Congress summarily punished such offenses as scandalous publication, attacks upon its members, and refusal to respond to questions propounded by its committees. Each chamber was autonomous in contempt proceedings, and the courts

4. *Id.* at 17.

5. FOX, *supra* note 2, at 5-8.

6. *Id.* at 16.

7. *Id*; *see* GOLDFARB, *supra* note 3, at 19.

8. *See generally* 13 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 508-09 (A.G. Goodhart & H.G. Hanbury eds., 1952) (describing the various contempt proceedings of Parliament).

9. For an historical view of legislative contempt with an emphasis on the Cold War period, see generally CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES (1959).

10. Judiciary Act of 1789, § 17, 1 Stat. 73, 83 (1789).

11. *Ex parte* Savin, 131 U.S. 267, 276 (1889) (emphasis added).

12. An 1857 statute, 11 Stat. 155 (1857), classified defiance of Congressional subpoenas and refusal to answer questions as misdemeanors. BECK, *supra* note 9, at 7. Although the legislative contempt power still exists as a theoretical proposition, it has fallen into disuse. *Id.* Such contempts now are prosecuted as statutory violations.

granted no relief to persons thus imprisoned.[13]

Popular distaste toward authoritarian practices tended to restrict the republic's use of the contempt remedy. In 1826, a federal judge, James H. Peck, imposed a contempt sentence upon a lawyer who had published a letter in a newspaper which Judge Peck considered libelous against himself.[14] In consequence, Peck was impeached by the House of Representatives and brought to trial before the Senate.[15] The hearings lasted for almost a year[16] and involved, in part, a debate on whether the American judicial contempt power was inherent or a creature of legislation.[17]

Although the Senate acquitted Peck by a vote of twenty-two to twenty-one,[18] Congress reacted with a statute designed to limit the reach of the federal contempt power.[19] That 1831 statute provided:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance . . . to any lawful writ, process, order, rule, decree or command of said courts.[20]

That Statutory provision, with minor stylistic changes, remains in effect to the present day.[21]

Section 2 of the 1831 Statute created the crime of obstruction of justice through threats and bribery. The maximum penalty was a $500 fine or three months of imprisonment. Such offenses were required to be prosecuted by normal criminal procedure rather than through contempt, unless the offenses were committed in the courtroom or an immediately adjacent facility.[22] Statutory criminal prosecution was thereby established as an alternative to some forms of contempt.

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13. *Ex parte* Nugent, 18 F. Cas. 481 (C.C.D.C. 1848) (No. 10,375).

14. GOLDFARB, *supra* note 3, at 21; Walter Nelles & Carol Weiss King, *Contempt By Publication In The United States*, 28 COLOM. L. REV. 423-31 (1928). Judge Peck imposed a penalty of 24 hours of confinement, and a suspension from practice in Peck's court for a period of 18 months. Nelles & King, *supra*, at 429. The extent of the hardship imposed by the suspension is a matter of conjecture, since the contemnor may be presumed to have had little enthusiasm for practice in that court. The period of confinement, however, is fairly emblematic of the practices of that era.

15. Nelles & King, *supra* note 14, at 429.

16. *Id*; *see* GOLDFARB, *supra* note 3, at 21.

17. FOX, *supra* note 2, at 202-03.

18. GOLDFARB, *supra* note 3, at 21; Nelles & King, *supra* note 14, at 430.

19. An Act Declaratory of the Law Concerning Contempts of Court, ch. 99, 2 Stat. 487 (1831).

20. *Id.*

21. *See* 18 U.S.C. § 401 (1976) (regarding current codification of Congress' power to punish contempt).

22. *Ex parte* Savin, 131 U.S. 267, 277 (1889).

The modest punishments contemplated by that statutory scheme were representative of the restrained approach of that period. For more than a century, contempt sentences consisted of small fines or confinement for a few days. The contempt prosecution in 1909 of a southern sheriff named Shipp is emblematic of that restraint.[23] The United States Supreme Court had ordered a stay of execution of a condemned prisoner in Shipp's custody.[24] The order excited substantial local resentment.[25] Shipp stood by without interfering while a lynch mob took the prisoner from Shipp's jail and hanged him.[26]

That repugnant act was punished as contempt of the Supreme Court itself. It would be difficult to imagine a more serious contempt. The offense entailed the maximum possible degree of aggravation. The offender was entrusted with a special public duty to obey the order; and the defiance was directed at the highest level of the American judiciary. Shipp's sentence reflected the gravity of his offense as perceived by the customs of that period, incarceration for three months.[27]

II. The Postwar Ascendance of American Anticommunism: An Overview

Almost from the outset of the Russian revolution, American officialdom had considered communism a threat. The Bolsheviks were of particular concern because they both advocated the use of force to achieve a communist society and controlled the Russian Social Democratic Party during the revolutionary period. The Senate had ordered an investigation of Bolshevik propaganda as early as 1919.[28]

As might have been expected, the concept of subversion received an extravagant interpretation. During World War I, a few forlorn Socialists were found operating hand-cranked duplicating devices for the publication of 15,000 copies of a handbill opposing the military draft. They were duly criminalized as a "clear and present danger" to the nation by no less a totemic figure then Oliver Wendell Holmes.[29] A few years later, the Supreme Court, over Holmes' dissent, applied that characterization to the post-war publication of an indecipherable and turgid pamphlet entitled *The Left*

23. United States v. Shipp, 215 U.S. 580 (1909).
24. United States v. Shipp, 214 U.S. 386, 403 (1909).
25. *Id.* at 404.
26. *Id.* at 405.
27. United States v. Shipp, 215 U.S. 580, 582 (1909).
28. *Senate Judiciary Committee Hearings on Bolshevik Propaganda*, 65th Cong., 3d Sess. 7469 (1919).
29. Schenck v. United States, 249 U.S. 47, 53 (1919).

Wing Manifesto.[30]

The American public ultimately came to view the words Russian, Socialist, Communist, and Bolshevik as synonyms. Antipathy toward Bolshevism and Soviet-Communism was based on a literal reading of the Marxist-Leninist view that the ultimate victory of the proletariat, although the inevitable product of Hegelian dialectic, could be attained only through violence.[31]

The ascendancy of the Bolsheviks within the Soviet Union engendered worldwide concern for the preservation of the established order of things. The impact of that concern was felt strongly in the United States. The Palmer raids, directed against suspected subversives during the 1920s, featured official approval of vigilante activity. They were directed largely by John Edgar Hoover, who a few years later would achieve iconic status as the nation's arbiter of ideological rectitude. Deportation of numerous aliens, who were unable to point to a record of support for majoritarian political doctrine, was among the means adopted for the purging of unwelcome dogma.

The Soviet Union entered World War II in a cynical coalition with the Third Reich. That alliance ended when Hitler mounted one of history's least rational ventures: the invasion of Russia while still engaged in warfare against the western powers. Within the United States, antipathy toward communist ideology was largely muted after the Soviet Union became an Allied power.

At the war's end, the American objective was demobilization and resumption of the pursuit of happiness, prosperity, and the production of consumer goods. The Soviet objective was expansion of its sphere of influence. The American tradition of hostility toward Bolshevism was revitalized by Soviet tactics of the type which necessitated the Berlin airlift. American officialdom and public quickly arrived at a consensus: Soviet expansionism must be resisted, and resumption of a peacetime ambience was impossible.

Nation after nation fell within the Soviet orbit, and an atypical form of communist takeover occurred in China. America responded with the Truman Doctrine, proclaiming its determination to resist the further spread of communism in every part of the world. In effect, we were again at war. It was termed a Cold War because of the absence of armed conflict, but that would come soon enough in Korea.

War, regardless of its temperature, is an activity which only a despot can pursue effectively. Spinoza aptly taught that mankind

30. Gitlow v. New York, 268 U.S. 652 (1925).

31. For an illustration of this reasoning, see excerpts from THE LEFT WING MANIFESTO, *in Gitlow*, 263 U.S. at 656 n.23.

invariably will choose tyranny over chaos. In wartime, those often are the only available options.

That proposition is supererogatory in its application to dictatorships. Spinoza's proposition also applies, although less forcefully, to nations which normally profess devotion to the concept of civil liberties. Whether through hysteria or an unhealthy passion for the exercise of power, officialdom frequently reacts with draconian excesses to crises, whether real or imagined. The public often tends to support such actions, thereby vindicating Spinoza's thesis. A dramatic illustration of that tendency during World War II was the dispossession and incarceration of 100,000 native citizens without charges, process or trial, simply because their ancestors had lived in Japan.

In many respects, the American public response to the Cold War attained a comparable level of thoughtfulness. The Soviet threat was very real, but paranoia is not too strong a word with which to describe the political orthodoxy of that period. The Cincinnati National League baseball team made its contribution to national security by changing its name from the Reds to the Redlegs. One may presume that in consequence of that demonstration of ideological conformity, their subsequent errors on the playing field were ascribed charitably to athletic ineptitude rather than to subversive malevolence.

It is difficult to recreate in a clinical setting the atmosphere of paranoid xenophobia which characterized that period. Fear of internal subversion intensified abhorrence toward communism. The *Rosenberg* and *Hiss* cases brought the danger into sharp focus, and American communists were viewed as presumptively disloyal. Eventually, all liberal ideology became suspect. The demagoguery of Wisconsin Senator Joseph McCarthy made every expression of dissent vulnerable to challenge as an attempt to advance the interests of the Soviet Union over those of the United States. Nationally televised Congressional hearings in which suspects frequently refused to answer questions concerning past political affiliations, reinforced the general sense that endemic disloyalty had created a peril to the security of the nation. Steps were taken to protect the public from exposure to disloyal doctrine. The sanitizing endeavors included the expulsion from the entertainment industry of persons deemed politically unreliable. Denounced actors were not suffered even to recite without deviation lines written by authors whose loyalty was unquestioned. In every aspect of American society, acceptance required a demonstration of undeviating adherence to majoritarian doctrine.

III. THE *DENNIS* INDICTMENT

By the terms of a 1940 statute commonly known as the Smith Act, it is a felony to:

> [K]nowingly or willfully advocate . . . or teach the duty [or] necessity . . . of overthrowing or destroying any government in the United States by force or violence . . . [or] to organize . . . any society, group or assembly of persons who teach [or] advocate . . . the overthrow or destruction of any government in the United States by force or violence . . . .[32]

In 1948, the federal government charged the leaders of the Communist Party of the United States with conspiracy to violate that statute by organizing the Party as a group "dedicated to the Marxist-Leninist principles of the overthrow and destruction of the government of the United States by force and violence."[33]

The indictment represented a novel development in First Amendment jurisprudence. That Amendment, in relevant part, prohibits all government action "abridging the freedom of speech."[34] Taken literally, that language could prevent government from punishing one who asks another to commit a murder. It has long been accepted, however, that government may criminalize the utterance of words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive [crimes]."[35] In that context, Justice Holmes coined a familiar image of the boundary: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[36]

The *Dennis* indictment did not charge that the defendants had actually taught or advocated the violent overthrow of the government.[37] Instead, it was alleged that they had conspired to do so.[38] In other words, the defendants were charged with having agreed that at some unspecified future time they would teach and advocate violence against the government.[39]

Such an accusation invites many innovative defenses. Those range from the hyper-technical—that the Smith Act might be repealed before the ultimate call for violence would be uttered—to the reasonable proposition—that an agreement to speak is not speech,

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32. The Smith Act, 18 U.S.C. § 10 (1940) (current version at 18 U.S.C. § 2385 (1976)).

33. United States v. Foster, 9 F.R.D. 367, 374-75 (S.D.N.Y. 1949), *aff'd sub. nom.* United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

34. U.S. CONST. amend. I.

35. Schenck v. United States, 249 U.S. 47, 52 (1919).

36. *Id.*

37. Foster, 9 F.R.D. at 374-75.

38. *Id.*

39. *Id.*

and that although the conspiracy may represent a "clear" danger, that danger is far from "present."

This paper considers the impact of the *Dennis* case on the law of contempt. The legalistic quality of the *Dennis* issues is suggested here in summary fashion, for the limited purpose of demonstrating the background of the contempt proceedings.

IV. The Confrontation

The *Dennis* trial fairly may be termed an antagonistic clash between a zealous anti-communist judge, Harold Medina, and eleven headstrong communists represented by politically sympathetic lawyers. Yale Law Professor Fred Rodell has described the trial as "Judge Harold Medina's prosecution of the eleven so-called 'top native Communists.' "[40]

Dennis defendant Gil Green later wrote a book in which he said that the defendants, from the start of the trial, viewed Medina as an adverse partisan.[41] From Green's perspective, "If ever there was a political trial, it was ours,"[42] and the defendants had no "illusions as to how Medina would finally rule on the issue."[43] Judge Medina previously had offered a revealing portrayal of the trial ambience: "And all day in the courtroom the place was full of these Commie sympathizers."[44]

A. The Judge

The indictment was returned on July 20, 1948, in New York City. Judge Harold Medina was an experienced lawyer and a colorful personality, and had been a federal judge for about a year. His official post-*Dennis* biography casts him an heroic mold, citing such activities as service as a volunteer preacher during his senior year at Princeton.[45] That project "began and ended for no reason that the Judge can now [in 1952] recall,"[46] but in the biographer's view it "strongly suggests the sincerity of Harold Medina's beliefs—a sincerity that is equally evident today."[47]

According to the biography, when Medina first entertained the idea of becoming a judge, he refused to apply through normal political channels because "the idea of ingratiating himself with the Democratic district leaders in order to further his aspirations jarred

40. Fred Rodell, Nine Men 302 (1955).
41. Gil Green, Cold War Fugitive 3 (1984).
42. *Id.* at 45.
43. *Id.* at 31.
44. Harold Medina, The Anatomy of Freedom 7 (1959).
45. Hawthorne Daniel, Judge Medina 55 (1952).
46. *Id.*
47. *Id.*

on Medina's sensibilities."[48] Later, however, "quite without Medina's knowledge,"[49] his name was included on a list of persons deemed suitable for appointment to the federal bench.[50] He made no effort to obtain the position stating, "I wouldn't beg or be put under any obligation."[51]

Before setting eyes on the defendants, Medina anticipated trouble. He prepared for the trial by reviewing the experience of a judge who had presided at a World War II sedition trial of persons at the opposite end of the political spectrum from the *Dennis* defendants.[52] "There had been an awful lot of hell-raising in that trial, and he had done a lot of things, and I started reading up on [that] trial."[53]

His biographer portrays Medina's courtroom presence in an heroic image: "Judge Medina entered, serious and dignified in his black robe . . . . The Judge sat erect in his leather-upholstered chair, with the American flag and the great seal of the United States behind him, vividly bright against the somber paneling."[54]

The relationship between Medina and the FBI, which supplied the prosecution evidence in the Dennis trial, may fairly be described as symbiotic. Throughout the trial, Medina passed judgment on FBI evidence while being guarded by FBI agents,[55] a situation which would challenge the objectivity of any judge. His biography, however, states that he was guarded by "police," and makes no mention of FBI participation.[56]

Immediately following conclusion of the trial, FBI Director J. Edgar Hoover wrote a letter to Medina congratulating him "on the outstanding manner in which [he] conducted the trial"[57] and added, "Your fair and impartial conduct of this trial certainly deserves a prominent place in the annals of American jurisprudence."[58] The FBI's file copy of the letter, dated October 17, 1949, bears a supplementary statement in different typescript: "NOTE: According to current information the eleven Communist defendants are scheduled to be sentenced on October 21, 1949."[59] The ensuing sentences were not stigmatized by an excess of compassion.

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48. *Id.* at 206-07.
49. *Id.* at 207.
50. DANIEL, *supra* note 45, at 207-08.
51. *Id.* at 210-11.
52. MEDINA, *supra* note 44, at 2.
53. *Id.*
54. DANIEL, *supra* note 45, at 285.
55. MEDINA, *supra* note 44, at 2-3.
56. DANIEL, *supra* note 45, at 234.
57. Letter from Judge Medina to Herbert Hoover (Nov. 11, 1949) (obtained from the FBI through the Freedom of Information Act ("FOIA") request).
58. *Id.*
59. *Id.*

After the sentencing, Medina responded thanking Hoover for his letter and "especially for the protection I received during the past few months from your very personable and efficient young men . . . . [B]oth Mrs. Medina and I really miss them."[60]

At an informal party in the chambers of a Michigan judge months after the trial had ended, Judge Medina gave an informal talk to court officers and FBI agents at which he described the trial "in a very entertaining manner."[61] He also praised the FBI as "the outstanding development in law enforcement in our generation."[62] Informed of that compliment, FBI Director J. Edgar Hoover wrote Judge Medina a letter of thanks: "Needless to say I am very gratified and want to write a personal note expressing my appreciation . . . [I hope] that the Bench of our courts will be honored by your presence for years to come."[63] Medina responded with a short note: "You may rest assured that I never miss a chance to give the FBI a good pat on the back."[64]

On March 10, 1952, the United States Supreme Court affirmed the contempt judgments which Medina had imposed in the *Dennis* case.[65] On the following day, the Special Agent in Charge of the FBI's New York office made a telephone call to its Washington headquarters, stating that Judge Medina had asked for renewed protection from the FBI.[66] Although guard duties had been shared with the New York City police department during the trial, "Judge Medina did not mention the NYC Police Department in connection with his request. He further indicated that he was anxious for this protection at once."[67]

The *Dennis* trial brought Medina to national prominence. He became something of a folk hero and achieved celebrity stature as a symbol of resistance to communism. His biographer states that he received thousands of congratulatory messages, many from luminaries in the fields of politics, entertainment, literature, and even

60. *Id.*

61. Memorandum from Special Agent in Charge of the Detroit FBI office to Director Hoover (Oct. 2, 1950) (obtained through FOIA request). Although the information was furnished during 1984, the names of the agents who attended the party were deleted in the interest of effective law enforcement.

62. *Id.*

63. Letter from Herbert Hoover to Judge Harold Medina (Oct. 6, 1950) (obtained through FOIA request).

64. Letter from Judge Harold Medina to Herbert Hoover (Oct. 17, 1950) (obtained through FOIA request).

65. Sacher v. United States, 343 U.S. 1 (1952).

66. FBI Office Memorandum from Special Agent in Charge of the New York FBI office (Mar. 11, 1952) (obtained through FOIA request). The memorandum recites that Medina's request was made to an FBI agent with whom he had been conversing that morning "in connection with another matter." *Id.* The agent's name was deleted from the copy of the memorandum which the FBI furnished in 1984, presumably to prevent a compromise of security. *Id.*

67. *Id.*

the clergy.[68] Most, however, came from persons whom Medina described as "the little people who really make up America."[69]

In 1951, he was nominated for elevation to the Court of Appeals for the Second Circuit (New York area). The processing of such nominations required a background check by the FBI. Hoover promptly wrote to Medina to extend his "personal congratulations on your nomination."[70] The FBI copy of this letter also contains a supplementary notation: "NOTE: Judge Medina was investigated in 1947 . . . . Results were favorable. Since that time, relations have been cordial."[71] His promotion was quickly confirmed.

B. The Defense

The defense lawyers varied widely in the degree of legal skill exhibited during the trial. Their selection appears to have been based at least as firmly on ideological affinity with their clients as on their capacity for defending a complex federal criminal case. It would be surprising to learn that the defendants exercised independent judgment in their choice of lawyers. Classification of the Communist Party as a criminal conspiracy is fairly open to challenge from a constitutional perspective. It cannot be doubted, however, that the Party was a monolithic organization, and that the *Dennis* defendants accepted Party discipline.

That proposition is confirmed forcefully by *Dennis* Defendant Green. He recites that after the convictions had been affirmed on appeal, the Party concluded that it would have "to work in a twilight zone of semi-legality—at best."[72] The Party's National Board, therefore, decided "that a majority of the defendants would begin doing their time, while a smaller number remained outside of prison to work in an underground capacity. All defendants were urged to prepare for either eventuality."[73]

On the weekend before the defendants were required to surrender, a farewell party was held at the office of the Party newspaper, *Daily Worker*. During that party, Green "was called aside by a member of the Secretariat and told I was one of those chosen not to surrender on Monday."[74] Reluctantly, Green obeyed the order.[75]

Throughout the trial the defense attempted to show that the Party was a legitimate and constitutionally protected political or-

68. DANIEL, *supra* note 45, at 293.
69. *Id.*
70. Letter from Herbert Hoover to Judge Harold Medina (June 12, 1951) (obtained through FOIA request).
71. *Id.*
72. GREEN, *supra* note 41, at 57.
73. *Id.* at 58.
74. *Id.* at 59.
75. *Id.*

ganization. That defense of the Party was consistent with a claim of innocence on behalf of the individual defendants. It was the prosecution thesis that the defendants were guilty because the Party, which they had formed, was a criminal organization. The prosecution's reliance on classic Marxist doctrine to prove defendants' violent intent, invited a defense designed to show that the defendants' acts and statements did not contemplate violence and were constitutionally proper political activities protected by the First Amendment.

The defendants' trial tactics, however, were at least equally consistent with an attempt to use the trial as a sounding board for their demand for establishment of a society based on their notion of social justice. They presented an extensive attack on the system for selection of both grand jurors and trial jurors, claiming that the procedure was biased against the economically and racially disfavored. Given many chances to make a record showing of judicial bias, they forfeited most of those opportunities by electing to engage the trial court in quarrelsome bickering. Often in the presence of the jury, they attacked other judges, the media, the Department of Justice, and other federal officials including the President. No thoughtful lawyer would have believed that such tactics would persuade the jury to acquit. A reading of the turgid trial record instills the conjecture that the defense may have abandoned hope for an acquittal and was engaged in an attempt to provoke a mistrial.

C. The Opening Round

It is not the purpose of this paper to present a complete study of the *Dennis* trial dynamic. Justice could be done to such an undertaking only through a book-length analysis. The litigation encompasses many thousands of pages of trial records and more than a dozen appellate judgments. Various aspects of the case were considered in no less than five formal opinions by the United States Supreme Court.[76]

The present undertaking is limited to an attempt to impart a sense of the context in which the *Dennis* contempt proceedings arose, and an appreciation of the extent to which the attitudes and personalities of the actors responded to, and ultimately reinforced, the political temper of the times.

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76. Green v. United States, 356 U.S. 165 (1958) (affirming contempt convictions based on failure to surrender to serve the Smith Act sentences); Sacher v. Ass'n of the Bar of New York, 347 U.S. 388 (1954) (declining to disbar another *Dennis* lawyer); *In re* Isserman, 345 U.S. 286 (1953) (disbarring one of the *Dennis* lawyers for trial misconduct); Sacher v. United States, 343 U.S. 1 (1952) (affirming the contempt convictions based on trial misconduct); Dennis v. United States, 341 U.S. 494 (1951) (affirming the Smith Act convictions).

The *Dennis* defendants initially mounted a multi-phased attack on the proceeding, with challenges against jury selection procedures, the constitutional validity of the charge, and the sufficiency of the indictment. At the arraignment, the defense lawyers requested a period of ninety days within which to prepare their pre-trial motions. Judge Medina looked at the indictment and reacted with shock: "Why, these men are charged with conspiracy to teach and advocate the overthrow of the government by force and violence."[77]

The defense lawyers emphasized the difficulty and complexity of the case. Judge Medina responded:

> If the difficulty and complexity has to do with over-throwing the government by force, I should think that public policy might require that the matter be given prompt attention and not just held off indefinitely when perhaps there may be some more of these fellows up to that sort of thing.[78]

Judge Medina was not impressed when the defense lawyers pointed out that no act of force, violence, or attempt to overthrow the government had been charged. His answer was succinct: "No, they want to wait until they get everything set and then the acts will come."[79]

Based on Medina's remarks, the defendants asked him to disqualify himself on grounds of prejudice against the defendants. Their request was denied. They then asked the Court of Appeals to remove Medina. That court denied their request, pointing out that the prosecutor had prefaced his argument before Judge Medina with the words, "If it be a fact that these men have done what the indictment charges."[80] Judge Medina's comments, however, had not been given in the context of a similar qualifying hypothesis.

The defendants, in turn, paid little heed to the notion of judicial decorum during their appearances before Medina. They frequently argued on their own behalf, sometimes in a boisterous manner, against his rulings.[81]

D. The Contempt Judgments

The trial proceeded in an atmosphere of overt mutual hostility. After weeks of unseemly wrangling between the judge and the defense, four of the defendants were jailed in mid-trial. One defendant, Gates, was confined for refusing to answer a question on cross-

77. DANIEL, *supra* note 45, at 218.
78. Foster v. Medina, 170 F.2d 632, 633 (2d Cir. 1949).
79. *Id.*
80. *Id.*
81. *See, e.g.*, United States v. Sacher, 9 F.R.D. 394, 409 (S.D.N.Y. 1950); United States v. Sacher, 182 F.2d 416, 444-45 (1950) (contempt count XXVII).

examination.[82] Two others, Hall and Winston, were imprisoned for protesting the action against Gates.[83] The fourth, Gil Green, subsequently the author of *Cold War Fugitive,*[84] was incarcerated when Judge Medina excluded a document which the defense tried to introduce during Green's testimony. At that time, Green stated "in an angry, sarcastic manner, 'I thought we were going to be given a chance to prove our case. That article was germane to the very heart of the issue.' "[85] As a witness, Green had no right to argue the question of admissibility of the document. The incarceration was affirmed, however, because Judge Medina had certified that the statement had been made "in an angry, sarcastic manner"; because Green had made other unspecified statements "beyond the scope of responsive answers when, and as, he pleased"; and because he had participated in the Hall-Winston outburst.[86]

Ultimately, all defendants were convicted of Smith Act violations. Each received a sentence of five years imprisonment and a $10,000 fine with the exception of one defendant who, because he had received the Distinguished Service Cross during World War II, was sentenced to three years imprisonment and a $10,000 fine.[87]

Immediately after the jury had returned its verdict, Judge Medina stated, "Now I turn to some unfinished business." He read portions of a lengthy order holding the defense lawyers in contempt, which he had prepared in advance of the verdict. He proceeded to impose prison sentences upon each of them, without permitting them to speak in their own behalf or holding any form of hearing.[88] The sentences ranged from thirty days to six months.[89]

As applied to the trial conduct of members of the bar, Medina's sentences had no precedent. Professor Rodell treats the action as freakish: "Judge Medina sentenced the Communists' *lawyers,*"[90] he writes, underscoring the word.[91]

A judge who imposes summary contempt punishment is required to prepare a certificate reciting the facts which constituted

82. United States v. Gates, 176 F.2d 78 (2d Cir. 1949). Gates had given testimony concerning a pamphlet which he had prepared. *Id.* at 79. On cross-examination he was asked for the names of the persons who had assisted in its preparation. *Id.* He refused to answer on First amendment (freedom of speech and association) and Fifth amendment (self-incrimination) grounds, and persisted after being ordered to answer, stating that he did not want to be a "stool pigeon." *Id.*

83. United States v. Hall, 176 F.2d 163, 165 (2d Cir. 1949).

84. *See generally* GREEN, *supra* note 41.

85. United States v. Green, 176 F.2d 169, 171 (2d Cir. 1949).

86. *Id.* at 172.

87. DANIEL, *supra* note 45, at 292.

88. Sacher v. United States, 343 U.S. 1, 14 (1952) (Black, J., dissenting).

89. United States v. Sacher, 182 F.2d 416, 418 (2d Cir. 1949).

90. RODELL, *supra* note 40, at 320.

91. *Id.*

the contempt.[92] The purpose of the certificate is to enable a reviewing court to decide whether the contempt judgment is legally justified. Judge Medina's order was prepared in compliance with that requirement, and was later published as a formal federal decision.[93]

The transcript presents a trial dynamic which may be interpreted as a series of disrespectful statements directed against Judge Medina by defense counsel. With equal legitimacy, the transcript may be viewed as a series of denigrating and intemperate comments directed against defense counsel by the judge. One can gain a sense of the flavor of the trial by comparing the defense comments quoted in Judge Medina's contempt certificate with his own statements preceding those comments. Dissenting from the Supreme Court's affirmance of the contempt convictions,[94] Justice Felix Frankfurter undertook a comparison between the defense remarks which Judge Medina found to be contemptuous and the statements by Judge Medina which preceded those remarks. The contrast is enlightening.

For example, defense lawyer Louis McCabe was held in contempt for stating that the judge's accusations of defense misconduct seemed always to come at times corresponding to newspaper deadlines. Judge Medina's certificate paints the episode as a gratuitous insult.[95] Justice Frankfurter points out that it was preceded by defense objections to judicial interruptions, to which Medina's colorful response included such inelegances as, "If you don't like it you can lump it," and a refusal "to sit here like a bump on a log."[96]

A contempt citation against another defense lawyer, Harry Sacher, was based on Judge Medina's finding that he had commenced a legal argument without permission, had shouted, and had desisted only when advised "that he was proceeding in direct and wilful disobedience of the direction of the court."[97] Justice Frankfurter quotes the preceding portion of the transcript which shows that Judge Medina had called Sacher a liar and added, "I do not take your word for anything."[98] The Court of Appeals for the Sec-

92. Although such a certificate is an indispensable element of due process, in federal proceedings it also is required by FED. R. CRIM. P. 42(a).

93. United States v. Sacher, 9 F.R.D. 394 (S.D.N.Y. 1949). The certificate also appears as an appendix to the opinion of the court of appeals affirming the contempt convictions in United States v. Sacher, 182 F.2d 416, 430 (2d Cir. 1950).

94. Sacher v. United States, 343 U.S. 1, 23 (1952) (Frankfurter, J., dissenting).

95. United States v. Sacher, 9 F.R.D. 394, 400 (S.D.N.Y. 1949); 182 F.2d 416, 436 (2d Cir. 1950) (contempt citation IX).

96. *Sacher*, 343 U.S. at 62-63.

97. United States v. Sacher, 9 F.R.D. 394, 410 (S.D.N.Y. 1949); 182 F.2d 416, 445 (2d Cir. 1950) (contempt citation XXVII).

98. *Sacher*, 343 U.S. at 80.

ond Circuit held that the record did not support Medina's claim that Sacher had lied, although it affirmed Sacher's contempt sentence on other counts.[99]

Frankfurter's opinion provides an extensive comparison between the portions of the trial transcript selected by Medina as grounds for contempt judgments, and the portions preceding those excerpts which tend to demonstrate judicial provocation. The lesson which emerges is that when one's adversary is also the referee it is useless to protest that he struck the first blow.

After the contempt judgments were pronounced, Sacher made a statement which Justice Hugo Black found "relevant and dignified."[100] Medina responded by calling it "brazen" and "mealy-mouth."[101] Commenting on that episode, Black remarked that Sacher's "decorum and dignity . . . loses nothing by comparison with others."[102]

In its subsequent affirmance of the Smith Act convictions, the court of appeals made an observation in support of Medina's conduct which might, with equal logic, have provided the basis for setting aside the contempt judgments: "True, it does not follow, because the attorneys misbehaved that the judge may not have done so too . . . . Nevertheless, the question of their misbehavior and his misconduct cannot be entirely separated."[103]

E. The Appeal from the Contempt Judgments

An appeal from a contempt judgment is among the most challenging undertakings known to advocacy. Unless the record clearly shows that the trial court lacked jurisdiction or that its legal conclusions do not follow from its recitations of fact, the contempt judgment is almost certain to be affirmed.

The reason is obvious. It is difficult if not impossible to recreate the atmosphere of a proceeding by reading the typed record of that proceeding. Reading *Hamlet* will not enable one to visualize Sir Lawrence Olivier's performance in its title role. Reviewing courts do not hear evidence concerning the events which occurred at trial. They simply accept the trial judge's written statement describing those events. Such statements cannot be contradicted. The trial judge's certification has been regarded as conclusive from the earliest days of English appellate review. It follows that, although counsel may argue with a trial judge, the judge can win any argument by exercising his contempt power. Thus, a record

99. *Sacher*, 182 F.2d 424-25 (2d Cir. 1950).
100. *Sacher*, 343 U.S. at 17 (Black, J., dissenting).
101. *Id.*
102. *Id.* Footnote 4 on that page contains the portion of Sacher's statement which preceded Judge Medina's interruption. *Id.* at 17 n.4.
103. United States v. Dennis, 183 F.2d 201, 225 (2d Cir. 1950).

statement, not contemptuous *per se*, can become so if the trial judge certifies that it was made "in a sarcastic and impertinent manner."[104]

A further impediment to appeal is the natural empathy of judges of reviewing courts toward their colleagues in the lower courts. Many, if not most, appellate judges began their judicial careers in the trial courts and are keenly alert to the problems confronting judges who preside in those courts.

The *Dennis* defendants were faced with an additional handicap. At that time, the word "communist" was an epithet and actionable as defamation.[105] Courts were not anxious to indulge such persons with technical niceties.

If one's inquiry be limited to the face of Judge Medina's certificate, the *Dennis* defense lawyers were guilty of contempt. The court of appeals correctly so held,[106] adding that judicial provocation will not justify a contemptuous retaliation; the only remedy is through appeal.[107]

The Court of Appeals for the Second Circuit also considered the contention that the contempt proceedings were procedurally defective. As previously noted, the judgments were pronounced without notice and without an opportunity for response. Notice and an opportunity to be heard traditionally have been regarded as the basic elements of due process of law.[108] The concept of summary contempt punishment has been justified on the premise that immediate action may be required in order to prevent disruption of the proceeding. The *Dennis* defense lawyers were not punished until the trial had been concluded. There was no arguable need to dispense with notice and hearing. The United States Supreme Court had never decided whether the power to impose summary punishment was limited to situations requiring immediate action. Resolving the issue in the context of the prosecution of subversion, the court of appeals cited marginal authority and held, with one judge dissenting, that the contempt power had been exercised with reasonable promptness and that to have imposed punishment earlier might have disrupted the trial.[109]

The Supreme Court initially declined to review the case, but then granted certiorari limited to the procedural issue because of its perception of "the importance of clarifying the permissible prac-

104. *E.g.*, *Sacher*, 9 F.R.D. at 401, 404 (contempt count XI); *Sacher*, 182 F.2d 437, 439 (count XVII).

105. *See, e.g.*, Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (E.D. Ill. 1969); Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974).

106. United States v. Sacher, 182 F.2d 416, 418-28 (2d Cir. 1950).

107. *Id.* at 430.

108. *See, e.g.*, Holden v. Hardy, 169 U.S. 366, 389-91 (1898).

109. *Sacher*, 182 F.2d at 429-30.

tice in [contempt] cases."[110] The Court resolved the issue by holding that summary contempt may be imposed in any case in which the offense occurs in the presence of the judge, and that the judge in his discretion may elect to act immediately or to wait until his action will not prejudice the trial.[111] Justices Black, Frankfurter, and Douglas dissented on the procedural issue. As previously noted here, Black and Frankfurter went further, making a detailed analysis of the fifteen-volume trial record. Frankfurter described the proceeding as:

> [M]ore suggestive of an undisciplined debating society than of the hush and solemnity of a court of justice. Too often counsel were encouraged to vie with the court in dialectic, in repartee and banter . . . . [Judge Medina] failed to exercise the moral authority of a court possessed of a great tradition. He indulged [defense counsel], sometimes resignedly, sometimes playfully, in lengthy speeches.[112]

The outcome, however, was that one of the debaters was able to incarcerate the others. In approving that result, the Supreme Court undertook to respond to the concerns of those who feared that lawyers representing unpopular clients might become special targets of mediatropic judges. Given the *Sacher-Dennis* result, however, the consolation extended by the Court to the legal profession may consist more in form than in substance:

> The profession knows that no lawyer is at the mercy of a single federal trial judge. . . . [T]his Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of advocate on behalf of any person whomsoever.[113]

The Supreme Court held that the fact that the *Dennis* counsel had not been yet served their contempt sentences demonstrated the availability of reflective consideration in contempt cases.[114] Those lawyers had avoided incarceration pending review, however, only because Judge Medina elected to grant bail, perhaps to avoid legal complications in the defendants' post-trial motions and appeals. In current practice, bail on appeal from summary contempt judgments is the exception rather than the rule.[115]

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110. Sacher v. United States, 343 U.S. 1, 4-5 (1952).

111. *Id.* at 11.

112. *Id.* at 38.

113. *Id.* at 12-13.

114. *Id.*

115. Even at that time, there was no right to bail in contempt proceedings. Bail pending appeal was denied in a different *Dennis*-related contempt case. Field v. United States, 193 F.2d 86 (2d Cir. 1951). The Supreme Court's reassurance may be viewed as directed exclusively to the legal profession, and *Field* did not involve contempt by a lawyer. There was, however, no precedent upon which to base a prediction that lawyers would be treated differently from others.

The Court also took note of the extensive legal and judicial experience of the judges of the court of appeals who reviewed the contempt convictions.[116] But as previously noted, the appellate judges proceeded from the premise that Judge Medina's contempt certificate was unimpeachable.

Thus, the appellate protective mechanism cited by the Supreme Court may be ephemeral in most cases. Reliance upon the Court's offer of its own protection is likely to be even more unrealistic. It is the very rare petition for review which is granted by that Court, and the procedures for obtaining that review are cumbersome. It also is worthy of note that the Court's offer of protection was extended in the same opinion which affirmed the convictions of the *Dennis* lawyers, although two members of the Court believed that those convictions were unjustified.

V. Contempt Becomes a Felony

At the time of the *Dennis* prosecution, there was no federal statute which criminalized bail-jumping.[117] When the absconding *Dennis* defendants were apprehended, they were charged with contempt of court on the theory that their failure to appear constituted defiance of an order of court. That was an innovative employment of the contempt remedy; at common law, bail-jumping was not considered contempt, and there was no precedent for so treating the offense.[118]

By that time, Judge Medina was sitting on the Court of Appeals for the Second Circuit. The contempts were not processed in a summary manner because the facts were not known to the judge then presiding. In keeping with the contempt practice at that time, however, the defendants were denied jury trials.

Sentences of three years and more were imposed.[119] Those sentences squarely posed the constitutional issue whether contempt penalties exceeding one year can be imposed without affording the contemnor the constitutional protection granted to persons accused of felonies. Those rights include prohibition of prosecutions unless commenced by grand jury indictment, and the right to trial by jury.

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116. Sacher v. United States, 343 U.S. 1, 13 (1952).

117. A statute penalizing bail-jumping was enacted in 1954. Immunity Act of 1954, 68 Stat. 747 (codified as amended 18 U.S.C. § 3486). Its purpose was "to fill the void." 1984 U.S.C.C.A.N. (68 Stat.) 3213.

118. *See* United States v. Hall, 198 F.2d 726, 727-28 (2d Cir. 1952).

119. Green v. United States, 356 U.S. 165 (1958) (imposing sentence of three years); United States v. Thompson, 214 F.2d 545 (2d Cir. 1954) (imposing sentence of four years); United States v. Hall, 198 F.2d 726 (2d Cir. 1952) (imposing sentence of three years).

The contemnors appealed to the Supreme Court.[120] In doing so, they did not claim an entitlement to trial by jury.[121] Their principal arguments were that contempt sentences could not lawfully exceed one year, but that if greater sentences are to be authorized the contempt charge can only be made by grand jury indictment.

The Supreme Court denied both claims. It held that a one-year limitation was unjustified because the relevant statute authorized federal courts to punish contempt "at its discretion."[122] It also rejected the grand jury argument, holding that it would be anomalous to apply the Fifth Amendment grand jury clause to cases not covered by the Sixth Amendment provision for jury trial.[123] Finally, it specifically approved the three-year sentences as a proper exercise of the trial court's discretion.[124]

VI. Contempt Process Becomes a Weapon for Unmasking Communist Sympathizers

Bail for the *Dennis* defendants had been provided by the "Bail Fund of the Civil Rights Congress of New York." One of the three trustees of the Fund included Dashiell Hammett,[125] a well-known author of detective stories. Contributions had been solicited through an appeal to concern for civil liberties, and with a promise of anonymity. The latter assurance had been essential since a contribution to a fund for the benefit of accused communists would be regarded by many as ground for questioning the contributor's loyalty to the United States.

When four of the defendants failed to surrender as required, the Fund forfeited the amount of their bail. The trustees of the Fund, however, were summoned to court, ordered to produce the records of the Fund, and questioned concerning the identity of the contributors. On their refusal to answer and produce records, they were sentenced to imprisonment for six months or until they would comply with the order.[126]

The rationale of the questioning was that the Fund contributors might know where the absconding defendants were hiding. That notion seems questionable since public questioning of those contributors would be sufficient in itself to assure that the absconding defendants would simply move to a place of which the contributors had no knowledge. It seems very probable that disclosure of

120. Green v. United States, 356 U.S. 165 (1958).
121. *Id.* at 183.
122. *Id.* at 182.
123. *Id.* at 184-85.
124. *Id.* at 188-89.
125. *See* United States v. Field, 193 F.2d 92, 93 (2d Cir. 1951).
126. *Id.* at 94.

the names would have been followed by public questioning of the contributors before a court or congressional committee.

In conducting the inquiry, the court was acting in effect as a "one-man grand jury," a practice which had been held improper in earlier cases. The court of appeals distinguished those cases from the Bail Fund situation on the basis that the judge had a right to investigate the reasons for disobedience of his order that the *Dennis* defendants surrender to serve their Smith Act sentences.[127]

A federal grand jury commenced a companion inquiry, seeking the same information. Again, the trustees refused to cooperate and received six-month contempt sentences which were affirmed on appeal.[128]

The contempt proceedings against one Abner Green[129] are of interest in this connection. Abner Green, who had no known relationship to *Dennis* defendant Gil Green, was an officer of the Bail Fund. He also had an official position with a different organization entitled The American Committee for the Foreign Born. Because he held office in both entities, the grand jury asked for records of both. On his failure to comply, he received a six month contempt sentence. His protest that the Foreign Born records were not material to the grand jury's *Dennis*-based inquiry was rejected with the observation that a grand jury witness is not entitled to raise the question of materiality, and that in any event the Court was "convinced that the documents here sought were material."[130]

VII. The Significance of the *Dennis-Sacher* Contempts

The *Dennis* litigation occurred during the transition from the Vinson to the Warren Era. In only one respect, however, have the principles enunciated in the *Dennis* contempts been reversed. In *Bloom v. Illinois*,[131] the Court adopted the view expressed by Justice Black as a dissenter in *Sacher*[132] by granting to persons accused of contempt the right to a jury trial if the sentence is to exceed six months. As a result, at the commencement of a contempt prosecution, the court must determine whether a sentence exceeding six months will be sought. If so, the alleged contemnor must be offered a jury trial.

The only other restriction on the length of a contempt sentence is the Eighth Amendment prohibition against "cruel and unusual punishments."[133] The threshold of cruelty has not been delineated

127. *Id.* at 96.
128. United States v. Field, 193 F.2d 109 (2d Cir. 1951).
129. Green v. United States, 193 F.2d 111 (2d Cir. 1951).
130. *Id.* at 113.
131. 391 U.S. 194 (1968).
132. Sacher v. United States, 343 U.S. 1, 14, 20 (1952) (Black, J., dissenting).
133. U.S. Const. amend. VIII.

for purposes of that provision, but it is clear that a four year sentence is not improper *per se*.

The most durable impact of the *Dennis* contempts is the enhanced potential for abuse of the contempt power, with consequent vulnerability of litigants to the idiosyncratic reaction of a trial judge. The most durable lesson is that the judicial system may not always serve as a protector of individual rights.