South Carolina Law Review

Volume 23 | Issue 3 Article 8

1971

Constitutional Law--Should Legislatures Have the Summary Power to Imprison Persons without Notice or a Hearing

William J. Dean

CONSTITUTIONAL LAW—SHOULD LEGISLATURES HAVE THE SUMMARY POWER TO IMPRISON PERSONS WITHOUT NOTICE OR A HEARING?*

I. INTRODUCTION

The power of American legislative bodies to punish for contempt is derived primarily from the laws and customs of the English House of Commons.[1] The power is exercised to vindicate traditional rights and privileges claimed by legislatures and their members.[2] Whether the House of Commons' power to punish for contempt, including the power to imprison, is a valid precedent for legislatures in this country has been seriously questioned in a leading Supreme Court case on the grounds that the House of Commons was both a court and a legislative body.[3] Indeed, the House of Commons itself has taken both sides of the question of whether it is a court,[4] but it is certain that the House of

† Groppi v. Leslie, 436 F.2d 326 (7th Cir. 1970), *aff'd on rehearing*, 436 F.2d 331 (7th Cir. 1971).

1. POTTS, Power of Legislative Bodies to Punish for Contempt (pts. 1-2), 74 U. PA. L. REV. 691, 780 (1926) [hereinafter cited as POTTS].

2. *Id.* at 692-99.

> Examples of the privileges that are claimed are freedom from arrest; freedom of members from assaults, affronts, insults and libels; freedom of legislatures as a whole from insults and libels; control of election of members; and general inquisitorial powers.

Id. at 700-12.

3. Kilbourn v. Thompson, 103 U.S. 168 (1881). In delivering the opinion of the Court Mr. Justice Miller stated:

> We are of the opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices.

Id. at 189. Yet, later in the opinion Mr. Justice Miller refuted his contention that the House of Commons is a court when he quoted from the opinion of Mr. Justice Cooleridge in *Stockdale v. Hansard*, 9 Ad & E.1, 112 ENG. REP. 1112 (1839):

> The House [of Commons] is not a court of law at all in the sense in which that term can alone be properly applied here. Neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; powers of inquiry and accusation it has, but it decides nothing judically, except where it itself is a party in the case of contempts.

Id. at 198.

4. POTTS at 694-95.

Commons possessed authority to punish directly for contempts without the intervention of the courts, including the power to impose prolonged terms of imprisonment.[5]

Prior to the adoption of our Federal Constitution, some states enacted constitutional provisions which recognized in their legislatures the power to find persons guilty of contempt committed in their presence.[6] Notable examples are the early constitutions of Massachusetts[7] and Maryland.[8] In considering these state constitutions, the United States Supreme Court in *Marshall v. Gordon*[9] stated that the object of the provisions

> could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently, because of the destruction of legislative power which would arise from such acts if such authority was not possessed.[10]

Almost contemporaneously with the adoption of our Federal Constitution similar provisions were written into many other state constitutions.[11] Thus, state legislative bodies have power to imprison

---

5. Marshall v. Gordon, 243 U.S. 521, 533 (1917).

6. Groppi v. Leslie, 44 Wis.2d 282, 292, 171 N.W.2d 192, 196 (1969).

7. MASS. CONST. part 2, chapter 1, § 3, art. 10 (1780) provides in part:

> They [the house of representatives] shall have authority to punish by imprisonment, every person, not a member, who shall be guilty of disrespect to the House, by any disorderly, or contemptuous behavior, in its presence . . . .

8. Marshall v. Gordon, 243 U.S. 521, 534 (1917), *citing*, MD. CONST. 1776, art. 12, which provided in part:

> That the house of delegates may punish by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behavior, or by threats to, or abuse of their members, or by any obstruction to their proceedings. . . .

9. 243 U.S. 521 (1917).

10. *Id.* at 535-36.

11. *Id.* at 536, n.2, *citing, inter alia*, S.C. CONST., art. 1 § 13 (1790). The present South Carolina constitution retains the original provision recognizing legislative contempt power:

> Each house may punish by imprisonment during its sitting any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who, during the time of its sitting, shall threaten harm to the body or estate of any member for anything said or done in either house, or who shall assault any of them therefor, or who shall assault or arrest any witness or other person ordered

for contempts in their presence,[12] either inherently, from the nature of the body and the necessity for self-preservation, or by a constitutional grant of power.[13]

Yet, no contempt power is expressly delegated by the Constitution, except that given to the House and Senate to punish their own members for disorderly behavior and other contempts.[14] Nevertheless, several United States Supreme Court cases have held that Congress does have limited *implied* powers over contempt. *Anderson v. Dunn*[15] was the first such case to decide that from the power to legislate given by the Constitution to Congress, there is also to be implied the power of Congress to guard and preserve itself from contempts which were direct obstructions to its legislative duties.[16] In *Kilbourn v. Thompson*[17] the Court denied that Congress has similar judicial-legislative power of contempt possessed by the House of Commons, but reserved the question of whether implied authority to deal with contempts exists incidental to the legislative power.[18] The existence of an implied legislative authority to deal with direct contempts was considered again in *In re Chapman*[19] and upheld. The scope of the implied power is narrow, and is limited to punishment of acts which obstruct the performance of legislative duties.[20] Legislative contempt power is frequently exercised as a means to an end; for example, to prevent recurrence of a legislative disturbance. But when a private citizen obstructs the legislative process by his actions, he may be punished even though the obstruction has been removed or removal is impossible; that is, he may be punished for a past act.[21]

---

to attend the house in his going thereto or returning therefrom, or who shall rescue any person arrested by order of the house: *Provided*, That such time of imprisonment shall not in any case extend beyond the session of the General Assembly.

S.C. CONST. art. 3, § 13.

12. *See, e.g., In re* Gunn, 50 Kan. 155, 32 P. 470 (1893); *Ex parte* Dalton, 44 Ohio St. 142, 5 N.E. 136 (1886); *Ex parte* Parker, 74 S.C. 466, 55 S.E. 122 (1906); Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390 (1891).

13. Examples are set out at notes 7 & 8 *supra*.

14. U.S. CONST. art. I, § 5.

15. 19 U.S. (6 Wheat.) 204 (1821).

16. *Id.* at 228. *See* Marshall v. Gordon, 243 U.S. 521, 541-44 (1917).

17. 103 U.S. 168 (1881).

18. *Id.* at 189.

19. 166 U.S. 661 (1897).

20. Jurney v. MacCracken, 294 U.S. 125, 147 (1935); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 232 (1821).

21. Jurney v. MacCracken, 294 U.S. 125, 147-48 (1935). The Court provides an historical basis for its position:

II. GROPPE v. LESLIE

Groppi v. Leslie,[22] a case of first impression, presents the question of whether the judicial power of *summary* punishment and imprisonment for direct contempt is constitutionally exercisable by a legislative body. On October 1, 1969, the Assembly, one of two houses of the Wisconsin state legislature, passed a resolution[23] finding Father James E. Groppi in contempt for "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings".[24] The Assembly resolution ordered Father Groppi imprisoned for the duration of the regular session of the Wisconsin legislature, or for six

---

The power to punish a private citizen for a past and completed act was exerted as early as 1795, and since then has been exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.

22. 436 F.2d 331 (1971).

23. The resolution reads:

1969 Spec. Sess. ASSEMBLY RESOLUTION

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane County jail.

In that James E. Groppi lead a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above cited action by James E. Groppi constituted 'disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings' and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session whichever is briefer, in the Dane County jail and directs the sheriff of Dane County to seize said person and deliver him to the jailer of the Dane County jail; and, be it further

Resolved, That the Assembly directs that a copy of this resultion be transmitted to the Dane County district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

Groppi v. Leslie, 44 Wis. 2d 282, 288-89, n.1, 171 N.W.2d 192, 194, n.1 (1969). Pertinent sections of the Wisconsin Constitution and Wisconsin statutes referred to in the resolution are set out in notes 31 & 32 *infra*.

24. *Id.*

months, whichever occurred earlier. Following adoption of the Assembly resolution, a copy was served upon Groppi and he was imprisoned in the Dane County Jail. He was given no notice or specification of the charge against him, nor was any hearing held prior to service of the copy upon him. His application for a writ of habeas corpus was denied by the circuit court for Dane County and again by the Supreme Court of Wisconsin which held that the Assembly exercised its contempt power validly in finding Groppi in contempt.[25] An order granting a writ of habeas corpus was issued by the federal district court which held that Groppi had been denied procedural rights guaranteed him by the due process clause of the fourteenth amendment.[26] The court concluded that "such punishment may not be imposed by a legislature without at least providing the accused with some minimal opportunity to appear and to respond to a charge".[27] The Court of Appeals for the Seventh Circuit reversed the federal district court's order and held, on the factual basis presented,[28] that a legislature may properly punish summarily for contempt.[29] On petition for rehearing en banc the court affirmed its prior decision.[30]

III. PROCEDURAL DUE PROCESS

The Assembly action to punish Groppi for contempt was taken

25. Groppi v. Leslie, 44 Wis. 2d 282, 300, 171 N.W.2d 192, 200 (1969).

26. Groppi v. Leslie, 311 F. Supp. 772 (W.D. Wis. 1970).

27. *Id.* at 777.

28. Groppi's conduct which led to the Assembly resolution was stated in the opinion of the Wisconsin Supreme Court:

> On September 29, 1969, during a regular meeting of the Assembly just prior to the commencement of a special session called by the governor, James E. Groppi led a crowd of noisy protestors into the state capitol building and proceeded to "take over" the Assembly Chamber to protest his disagreement with cuts in the state budget for certain welfare programs. The Assembly was unable to proceed with its legislative duties. We take judicial notice that Groppi publicly stated in the Assembly to his cheering supporters, in effect, that they had captured the capitol and intended to stay until they got what they wanted, and that Groppi vowed from the speaker's stand in the Assembly to remain there until the legislature restored funds for welfare recipients. The occupation of the Assembly by Groppi and the protestors lasted from approximately midday to well toward midnight. Thereafter the protestors were kept out of the state capitol building by police, sheriffs, and the national guard.

Groppi v. Leslie, 44 Wis. 2d 282, 288, 171 N.W.2d 192, 194 (1969).

29. Groppi v. Leslie, 436 F.2d 326, 328 (7th Cir. 1970).

30. Groppi v. Leslie, 436 F.2d 331, 332 (7th Cir. 1971).

pursuant to article 4, section 8 of the Wisconsin Constitution[31] and sections 13.26(1)(b) and (2), and 13.27(1) of Wisconsin statutes.[32] These provisions are silent on procedural rules to be followed by the Houses when punishing contempts. The question, therefore, arises whether Groppi was denied due process of law when he was ordered imprisoned for a maximum of six months, without formal charges, notice or hearing, for his disorderly conduct in the immediate view of the House and tending to interrupt its proceedings.

A. Contempt Powers of Courts vs. Legislatures

The answer, of course, reaches to the ultimate issue of whether the judicial power of summary punishment for direct contempts is constitutionally exercisable by a legislative body. Certainly the Wisconsin Assembly has the authority[33] and the constitutional power[34] to imprison a contemnor for contempt. Courts, as well, have the power to punish for contempt, and, for direct contempts committed in the presence of the court, the judge has the power to impose punishment summarily, that is, without notice or a hearing.[35] However, for a court to exercise such power of summary contempt "the court-disturbing misconduct must not only occur in the court's immediate presence, but

31. WIS. CONST. art. 4, § 8 provides in part that "Each house may determine the rules of its own proceedings, [and may] punish for contempt and disorderly behavior. . . ."

32. WIS. STAT. § 13.26 (1)(b), (2) (1955) provides:

> (1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:
>
> . . . .
>
> (b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.
>
> (2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature.

WIS. STAT. § 13.27(1) (1955) provides:

> (1) Whenever either house of the legislature orders the impronment of any person for contempt under s.13.26 such person shall be committed to the Dane County jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

33. *Id.*

34. Jurney v. MacCracken, 294 U.S. 125 (1935). A discussion of the constitutionality of the power is contained in the introduction to this paper.

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

. . . the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct".[36] Except in the foregoing narrowly limited category of contempts, a defendant charged with contempt is entitled to notice of the charges, an opportunity for a hearing, and representation by counsel.[37]

There are no reported historical precedents for the exercise of summary contempt power by the legislature, nor are there any reported decisions holding that the legislature does not have summary contempt power.[38] In the numerous state[39] and federal[40] cases where the constitutionality of legislative power to punish for contempt has been questioned, the accused has had notice of the charge, and an opportunity to appear before the house or senate to answer the charge or to purge himself.

The Wisconsin Supreme Court declined to analogize the judicial power of courts to punish for direct contempt with the assembly's summary action.[41] Instead, that court justified the exercise of summary contempt power by the assembly on dual grounds; first, that legislative bodies historically have had power to punish for contempt, and second, that such actions of the legislature are reviewable by the courts and subject to correction.[42] After noting that Groppi had sought a hearing only on issues that dealt primarily with procedure and not on the *merits* of the contempt issue, the court concluded that

> due process is satisfied when the courts are open to determine promptly any question concerning the merits of a contempt found

36. *In re* Oliver, 333 U.S. 257, 274-75 (1948), *citing*, Cooke v. United States, 267 U.S. 517 (1925). The Court further specified that:

> The narrow exception to . . . due process requirements [of notice, hearing, and right to counsel] 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, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

333 U.S. at 275.

37. *See* Holt v. Virginia, 381 U.S. 131 (1965); *In re* Oliver, 333 U.S. 257 (1948); Cooke v. United States, 267 U.S. 517 (1925).

38. Groppi v. Leslie, 436 F.2d 326, 328 (7th Cir. 1970).

39. *Supra* note 21.

40. *See, e.g.*, Jurney v. MacCracken, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

41. Groppi v. Leslie, 44 Wis. 2d 282, 295-96, 171 N.W.2d 192, 197-98 (1969).

42. *Id.*

to have been committed by summary process before a legislature for contempt committed in its presence.[43]

The federal district court did draw an analogy between courts and legislatures with respect to their power to punish direct contempts in order to reach the constitutionality of the assembly's action. The court first used the test enunciated in *Oliver*[44] to question "whether 'all of the essential elements of misconduct' [Groppi's acts on September 29] occurred 'under the eye of' the members who voted affirmatively October 1, and were 'actually observed' by those members."[45] The resolution ordering imprisonment and the records of the court proceedings do not indicate whether the acts of September 29 were observed by the October 1 voters. Thus, the *Oliver* test was not met.[46] The court, while expressing skepticism as to the desirability of recognizing summary contempt power even in the courts, distinguishes between the presentation of factual situations in courtrooms and legislative chambers as a basis of denying extension of the judicial contempt power to a legislature. The difference in physical contours between most courts and legislative chambers, and the improbability that all members present in a legislative body would share a uniform perception of an incident, led the court to conclude that "the room for error inherent in the response of a large group is so great as to require that it observe some minimal procedures before it invokes [summary contempt] power".[47]

The Court of Appeals for the Seventh Circuit rejected both arguments advanced by the federal district court. In so doing, it relied on the Wisconsin Supreme Court decision which stated that factual matters such as erroneous perceptivity would be subject to review in the state courts.[48] In fact, Groppi had not sought a hearing in the Wisconsin state courts or elsewhere on the merits of the contempt issue, nor did he offer any defense or denial of the act cited in the resolution,

43. 44 Wis. 2d at 297, 171 N.W.2d at 198-99.

44. *Supra* note 36.

45. Groppi v. Leslie, 311 F. Supp. 772, 777 (W.D. Wis. 1970).

46. *Id.* The *Oliver* test is complemented by Rule 42(a), Federal Rules of Criminal Procedure, which provides:

> A criminal contempt may be punished summarily if a judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

47. *Id.*

48. Groppi v. Leslie, 436 F.2d 326, 330 (7th Cir. 1970).

even though the Wisconsin Supreme Court allowed Groppi to amend his complaint to present any matters in issue. Therefore, the questions concerning which of the assembly members who voted for the resolution had seen Groppi's acts two days earlier, and the factual basis of perceptivity of witnesses were issues created by the federal district court, and were not properly before the court on appeal.[49] For the purpose of the appeal the court considered only the bare allegations of the resolution that Groppi led a gathering of people onto the floor of the assembly and thereby prevented the assembly from conducting public business.[50] In holding that the legislature may properly punish summarily for contempt the court reasoned that

> [t]he court below was of the opinion that the minimal requirements of procedural due process could be provided by the legislature with little delay, presumably referring to a legislative hearing . . . . [B]ut we cannot be unmindful of the protracted nature of court proceedings which involve a *cause celebre*. The courts . . . are essentially designed to devote the necessary time. The legislature is not . . . . [C]onceivably a full legislative hearing could cause the work of the body to grind to a halt for several weeks. We find such a contemplation intolerable on the American scene.[51]

B. Due Process Requirements

It has been said that "due process of law" does not necessarily mean a judicial hearing.[52] Due process need not fit a particular form or follow a set procedural pattern; rather, due process need only protect substantive rights. The Court in *Cafeteria & Restaurant Workers Local 473 v. McElroy*[53] said that consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.[54] The Court in *McElroy* then held that the action of the commander of a military installation revoking the security clearance of the plaintiff-civilian, thus denying her access to her private employment on the installation, did not violate due process, even

49. *Id.*
50. *Id.* at 328.
51. *Id.* at 328-29.
52. Palmer v. McMahon, 133 U.S. 660, 668 (1890).
53. 367 U.S. 886 (1961).
54. *Id.* at 895.

though the petitioner was afforded no notice or hearing.[55] However, an important consideration for the Court in reaching this decision was the fact that the petitioner was free to find employment elsewhere. And in *Hannah v. Larche*[56] the Court said that "[d]ue process is an elusive concept. Its exact boundaries are undefinable, and its concept varies according to specific factual contexts."[57] Thus, when a government agency adjudication or ruling directly affects the legal rights of an individual, the agency must use procedures which traditionally have been associated with judicial due process.[58] But whether a specific right prevails in a given proceeding depends on many factors. Consideration must be given to the nature of the alleged rights involved, the nature of the proceeding, the resulting benefits to the indivual, and the possible burdens to the proceedings.[59] In *Jenkins v. McKeithen*,[60] a case concerning the constitutionality of a Louisiana statute creating the Labor-Management Commission of Inquiry, the Court held that the right to cross-examine witnesses is a fundamental aspect of procedural due process.[61] In the factual context presented, where the Commission allegedly finds a person guilty of a crime due process requires that the person being investigated have the right to confront and cross-examine witnesses against him.[62] In a petition seeking habeas corpus, the court in *Kritsby v. McGinnis*[63] held that a hearing held about ten days following a prison protest with only the prisoner and principal keeper as disciplinary authority and judge, allegedly resulting in summary disposition, denied the prisoner his right to due process. Thus, a hearing, to accord with due process, must be given at a meaningful time and in a meaningful manner.[64] And the right to be heard before being condemned to suffer grievous loss of any kind has been characterized as a principle of our society.[65]

55. *Id.* at 898-99.
56. 363 U.S. 420 (1960).
57. *Id.* at 442.
58. *Id.*
59. *Id.*
60. 395 U.S. 411 (1969).
61. *Id.* at 428.
62. *Id., Cf. Pointer v. Texas*, 380 U.S. 400 (1965), which held that the sixth amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the fourteenth amendment.
63. 313 F. Supp. 1247 (N.D. N.Y. 1970).
64. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
65. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).

It would seem that the foregoing authorities would support the federal district court's reasoning and conclusion that the legislature should not have punished Groppi without first according him some minimal opportunity to appear and to respond to a charge. But the Wisconsin Supreme Court classified the legislative power of contempt as more in the nature of a civil contempt.[66] The implication is apparent from the court decision that traditional judicial due process, including the right to notice and a hearing, would not be mandatory. However, both the federal district court[67] and the Court of Appeals for the Seventh Circuit[68] differed with the state court and recognized that legislatures do impose sanctions for the purpose of punishing for a past deed as well as for preventing further obstructions to legislative functions. The former is the same objective found in punishing for most crimes, and a direct obstruction to the legislative process would be a criminal contempt. In reaching its decision in *Bloom v. Illinois*[69] the United States Supreme Court declared that "criminal contempt is a crime in the ordinary sense".[70] The Court held in *Bloom* that the Constitution is properly to be construed as guaranteeing a right to jury trial in state court prosecutions for serious criminal contempts.[71] Despite the fact that Groppi's disruption of the Wisconsin Assembly was a criminal contempt, he is not entitled to jury trial pursuant to *Bloom* as the punishment provided for in the resolution could not in any event have exceeded six months.[72] It should be noted that the *Bloom* decision appears to conflict with Rule 42(a) of the Federal Rules of Criminal Procedure.[73] However, the Court implied that all contempts for disorder in a courtroom would be petty crimes, which are not entitled to jury trials.[74] But whether disorders "under the eye of the court" are always petty offenses is yet to be decided.

---

66. Groppi v. Leslie, 44 Wis. 2d 282, 296, 171 N.W.2d 192, 198 (1969).

67. 311 F. Supp. at 780.

68. 436 F.2d at 329.

69. 391 U.S. 194 (1968). Bloom was charged with contempt of court for filing a spurious will for probate. Bloom's request for jury trial was denied, he was found guilty of criminal contempt, and sentenced to imprisonment for 24 months.

70. *Id.* at 201.

71. *Id.* at 198. *See* Duncan v. Louisiana 391 U.S. 145 (1968), which held that "the Fourteenth Amendment guarantees a right to jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.* at 149.

72. Groppi v. Leslie, 436 F.2d 326, 330 (7th Cir. 1970); Groppi v. Leslie, 44 Wis. 2d 282, 298, 171 N.W.2d 192, 199 (1969).

73. *Supra* note 46.

74. 391 U.S. at 210.

III. CONCLUSION

Whether Groppi should be accorded due process in the form of rights to notice, a hearing, counsel and confrontation of witness as is customarily given an accused in a criminal action will remain an open question until decided by the United States Supreme Court. The *Groppi* case is unique, as demonstrated by the lack of authority either sustaining or denying summary contempt power to legislatures. This is also suggested by the fact that

> instances of leading a gathering of people on to the floor of legislative halls and preventing the legislature from conducting public business are extremely rare if not virtually non-existent to this time in the United States.[75]

If it is conceded that a legislature has power similar to that of the courts to punish summarily for direct contempts, the recent decision of *Mayberry v. Pennsylvania*[76] may support Groppi's contention that he is entitled to some minimal opportunity to appear at a separate hearing. In *Mayberry* a Pennsylvania criminal defendant, who repeatedly insulted and vilified the trial judge and disrupted courtroom proceedings, and who was found guilty of the criminal charge against him on a Friday, was summarily sentenced by the trial judge to eleven to twenty-two years imprisonment for contempt on the following Monday during imposition of sentence for the criminal offense. The United States Supreme Court held that by reason of the due process clause of the fourteenth amendment, a defendant in a criminal contempt of court proceeding should be given a public trial before a judge other than the one reviled by the contemnor.

The question of whether Groppi is entitled to a hearing simply provokes the rhetorical question of "what is there to hear?" Groppi did not deny that his acts were contemptuous or that he did in fact obstruct the legislature, even when given such an opportunity in the state courts. The rationale of the court of appeals in reaching its decision on the narrow issue involving direct interference with "conducting public business" in "the immediate view of the legislative body" was cogently expressed:

> We share the laudable concern of the district court for the full protection of procedural rights guaranteed to the individual by the

75. 436 F.2d at 328.
76. 397 U.S. 1020 (1971).

> due process clause of the Fourteenth Amendment. In essence, however, we have in the case before us a situation in which we must balance claimed constitutional procedural rights of the individual citizen against the welfare of the citizenry as a whole. We find the scales weighted in favor of the citizenry. In so doing we do not feel we are adopting an alarmist view in recognizing validity in the respondent's position that protracted and frequent legislative trials, if necessary, could easily and realistically become a favorite tool in the politics of confrontation and obstruction, and representative government (whatever its present faults) would go down to defeat.
>
> We reach with some reluctance any decision which appears even remotely to achieve an eroding effect on basic civil liberties as guaranteed by our constitution; but believing, as we do, that illegal and physically forcible interference with properly functioning governmental institutions would pose the real risk of being eventually accompanied by the abolition, rather than the erosion, of the individual constitutional liberties, we are unable to reach any other result in the case before us.[77]

For the reasons expressed, the decision of the court of appeals holding that the legislature may constitutionally exercise the judicial power of summary contempt over direct contempts should be affirmed if certiorari is granted by the United States Supreme Court.

WILLIAM J. DEAN

77. 436 F.2d at 330-31.