

## Sec. 1—Judicial Power, Courts, Judges

lation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious, as well as is the necessity for protection of the equally important right to a fair trial.<sup>210</sup>

***Due Process Limitations on Contempt Power: Right to Notice and to a Hearing Versus Summary Punishment.***—

Misbehavior in the course of a trial may be punished summarily by the trial judge. In *Ex parte Terry*,<sup>211</sup> the Court denied *habeas corpus* relief to a litigant who had been jailed for assaulting a United States marshal in the presence of the court. In *Cooke v. United States*,<sup>212</sup> however, the Court remanded for further proceedings a judgment jailing an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of *Terry*, Chief Justice Taft, speaking for the unanimous Court, said: “The important distinction . . . is that this contempt was not in open court. . . . To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court’s dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law.”<sup>213</sup>

As to the timeliness of summary punishment, the Court, in *Sacher v. United States*,<sup>214</sup> at first construed Rule 42(a) of the Federal Rules of Criminal Procedure, which was designed to afford judges clearer guidelines as to the exercise of their contempt power, to allow “the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.”<sup>215</sup> Subsequently, however, interpreting the Due Process Clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of

<sup>210</sup> For another approach, bar rules regulating the speech of counsel and the First Amendment standard, see *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

<sup>211</sup> 128 U.S. 289 (1888).

<sup>212</sup> 267 U.S. 517 (1925).

<sup>213</sup> 267 U.S. at 535, 534.

<sup>214</sup> 343 U.S. 1 (1952).

<sup>215</sup> 343 U.S. at 11.