In the

Supreme Court of the United States

C.3

JAMES E. GROPPI,

Petitioner,

v.

No. 70-112

JACK LESLIE, SHERIFF OF DANE COUNTY,

Respondent.

Washington, D. C.
November 10, 1971

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. GROPPI,

Petitioner

v.

JACK LESLIE, SHERIFF OF DANE COUNTY,

Respondent.

No. 70-112

Washington, D.C.

Wednesday, November 10, 1971.

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM M. COFFEY, ESQ., 152 West Wisconsin Avenue; Milwaukee, Wisconsin 53203, for Petitioner.

SVERRE O. TINGLUM, ESQ., Assistant Attorney General of Wisconsin, Madison, Wisconsin, 53702, for Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 112, Groppi against Leslie.

Mr. Coffey, you may proceed.

ORAL ARGUMENT OF WILLIAM M. COFFEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COFFEY: Mr. Chief Justice, and may it please the Court:

This matter is before the Court on a writ of certiorari, United States Court of Appeals for the Seventh Circuit.

The pertinent facts under which this matter arose are as follows:

On October 1, 1969, the Assembly, one of two Houses of the State of Wisconsin legislature, passed a resolution reciting that two days earlier, on September 29, 1969, the Petitioner led a gathering of people which by its presence on the floor of the Assembly, during a meeting, prevented the Assembly from conducting its business. The resolution found that the Petitioner's conduct constituted disorderly conduct in the immediate view of the House, and directly tending to interrupt its proceedings. The resolution then cited the Petitioner for contempt and ordered that he be imprisoned in the Dane County jail for a period of six months or for the balance of the legislative session, whichever was briefer.

The Petitioner was given no notice of the charge against him and was given no hearing of any kind, either before the resolution was passed or after the resolution was passed.

Q Was the Petitioner taken into custody in the House itself, where the disorder was --

MR. COFFEY: No, your Honor, Chief Justice, the disturbance had occurred two days previously.

Q What I was asking, was there any effort to take him into custody at the time he was on the floor?

MR. COFFEY: None at all. None at all. At the time the resolution was passed, the Petitioner was in fact incarcerated in the Dane County jail on a disorderly conduct charge which had been placed against him, arising out of the same conduct dealt with in the legislative resolution. The Petitioner was served with a copy of the resolution and he was then confined in the Dane County jail pursuant to the authority of the resolution. After he was served with a copy of the resolution he instituted various legal action contesting the constitutionality of the procedures employed by the legislature in imprisoning him for six months. Writs of habeas corpus were denied by the circuit court of Dane County, and by the Wisconsin Supreme Court. A petition for writ of habeas corpus was filed in the United States District Court for the Western District of Wisconsin.

A response was filed, and the District Court thereupon released the Petitioner on bail, pending determination of the writ of habeas corpus. Bail had been denied to the Petitioner by both the Circuit Court of Dane County and by the Wisconsin Supreme Court.

All of the petitions for habeas corpus filed by the Petitioner alleged that he had been denied due process of law in that he had been denied the right to be represented by counsel, the right to a trial or a hearing of any kind, the right to compulsory process, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers, and the right to present his defense to the alleged charges.

On April 8, 1970, the District Court held that the Legislative Assembly could not summarily impose a jail sentence for legislative contempt without providing--without first providing the Petitioner some minimal opportunity to appear and respond to the charge. The Court granted the writ and ordered the Petitioner released from any further restraint or custody, pursuant to the resolution.

The Respondent appealed the decision of the District Court, the Seventh Circuit Court of Appeals, and on appeal the judgment of the District Court was reversed. Subsequently the Court of Appeals granted the Petitioner's request for a rehearing en banc, and in a four to three

decision, affirmed the earlier decision of the Court of Appeals.

The issues presented on appeal are whether a legislative body can consistent with due process of law, two days after alleged contemptuous conduct, ex parte imprison a person under its contempt power without giving the person any notice of the charge against him, or any opportunity whatsoever to appear before the legislative body and respond to the charges.

The second issue is whether consistent with the due process clause a person can be found in contempt of a legislative body when the contempt resolution sets forth mere conclusions and fails to set forth any of the underlying facts and circumstances which constituted the alleged contemptuous behavior.

Petitioner respectfully contends that the Wisconsin legislature did not have the power to summarily punish for contempt.

Q Back to your second point, I notice in the opinion, the per curiam opinion of the Supreme Court of Wisconsin, beginning on 109-A of the appendix and the attachment which begins on 113-A of the appendix, the Supreme Court seems to, in reciting the facts, be reciting a fairly detailed statement of facts. Where did that come from?

MR. COFFEY: Your Honor, that was one of the problems that was confronted in the matter, in that no record of these

proceedings was made.

Q I just wondered where this statement of facts came from?

MR. COFFEY: That was judicial notice taken of accounts in the mass media, newspaper and television accounts of what had occurred.

Q Is that indicated anywhere, that that is the source of it?

MR. COFFEY: That is indicated in the opinion, your Honor, of the District Court, in that—the actual language of the District Court I don't know, but that there had been no hearing of any kind, and it was indicated that that was judicial notice of those facts from those media sources.

Q They do say, "We take judicial notice," and then they go on with a fairly detailed statement of what happened in the State Legislature.

MR. COFFEY: That was the only available source of those facts and material at that time, because there had been no evidentiary hearing, either in a court or a legislative body; no record made of the proceeding by the legislature, the only source was the media.

Q Was there any substantial claim that the Petitioner did not know with what he was being charged or that these facts are inaccurate in any way?

MR. COFFEY: I don't believe, Justice, that there is

any contention that the Petitioner was not, in fact, on the floor of the Assembly. I think there may be some contention as to whether or not the Petitioner personally engaged in conduct that was disorderly.

Q Of course your point is, I suppose, he was not given any opportunity to make any such contention?

MR. COFFEY: He was never given such an opportunity to respond in any way to the charge.

Q Do citizens have the privilege of the floor of the legislative houses of the Wisconsin legislature?

MR. COFFEY: In fact during the session, Chief Justice, it was the presence of the people on the floor of the Assembly which was in violation of a rule of the Assembly.

Q It probably warrants a charge of contempt independent of whether it was in fact disorderly, I suppose. I said warrants a charge, not a conviction.

MR. COFFEY: Yes. Well, it was in violation of a rule and they could probably proceed on some basis, but as we've indicated here, we have proceeded throughout these proceedings, that the legislature of the State of Wisconsin, like all legislatures, has a contempt power. The question is what is the scope of that contempt power and what procedures must they follow in exercising the contempt power?

Q I suppose the disorderly conduct charge has never been pursued, is that correct?

MR. COFFEY: No, Chief Justice, as a matter of fact, the day prior to the passing of this resolution by the Assembly, the Petitioner had in fact been charged with disorderly conduct; he in fact after the resolution was issued, had a jury trial on that charge of disorderly conduct, and after the jury had deliberated and was unable to return a verdict, the trial court granted the defendant's motion for dismissal or judgment of acquittal, which they had taken under advisement at conclusion of all of the case. He in fact successfully defended the criminal disorderly conduct charge.

Now, in regard to the summary contempt powers, courts have clearly exercised summary contempt powers. However, the decisions of this Court have always limited the exercise of that power to the very situations where the misconduct is actually observed by the court, and where immediate punishment was necessary to restore order, and to maintain the dignity and authority of the court. Because of the dangers inherent in the summary contempt power, which has been described as perhaps nearest akin to despotic power of any power existing under our form of government, this Court has construed it as an exception to the normal requirements of due process, and has refused to extend it, particularly in Johnson vs. Mississippi, Nayberry vs. Pennsylvania.

This summary power has never before in the history of this country, prior to October 1, 1969, ever been exercised

by a legislative body. Good reason exists for not extending that power to the legislature. First and I think foremost, courts differ significantly from legislatures. It is the duty and the business of courts to determine and decide particular cases free from the exercise of external influence. As Judge Stevens noted in his dissenting opinion on the en banc hearing,"without reflecting adversely on the importance and dignity of the legislative function, it must be recognized that legislators are more responsive to the temporary moods of the body politic than are judges."

And further in this case, in Johnson v. Mississippi, this Court held that a judge who "was so enmeshed in matters involving" a defendant "as to make it appropriate for another judge to sit," and determine the question of his contempt, and indicate, noting that trial before an unbiased judge was essential to due process. In this case, given the responsiveness of the legislatures to pressures or the particular political mood at the time, and also I don't think you can view the Wisconsin Asembly at this point as an unbiased judge.

Q That argument seems to be going to the proposition that there couldn't have been any finding of contempt because certainly trial by a biased judge is deprivation of due process of law, in and of itself, is it not?

MR. COFFEY: Yes, it is, Justice.

Q Yes, but you're not making that argument, are you?

MR. COFFEY: I'm saying that there must be a hearing and I would suggest that it not be before the legislature.

Q It couldn't be before a different legislature very well, could it?

MR. COFFEY: As in the federal system, Justice Stewart, matters are referred to the United States Attorney for prosecution in the judicial process, where the full panoply of procedural due process rights are observed.

Q I didn't understand that your argument went that far, at least from reading your brief; I thought that your argument was confined to the proposition there had to be notice and opportunity to respond, and secondly, that the charges couldn't be conclusive but that yuu were not questioning the basic right of the legislature to find your client in contempt. This legislature under these circumstances.

MR. COFFEY: Well, I think that at this juncture I would say that notice and hearing, even before that legislature, is minimal, but I would think that there is some consideration to the idea that it should not be before the Assembly and that other procedures could be available.

Q By being available, you mean by that that constitutionally the State of Wisconsin has to adopt some kind of, part of federal reference --

MR. COFFEY: I think, Justice, if it's been the

position of the respondent that they cannot afford the petitioner due process, because that would over-burden the legislative system and may draw the legislature to a halt, and I feel that if the legislature is unable to afford due process, then, yes, I would think that constitutionally they are mandated to adopt some other procedure, whereby due process will be afforded.

Q May I ask, Mr. Coffey, I think you answered Mr. Justice Stewart that the facts cited in the Supreme Court per curiam, page 113-A, you thought were obtained from news media?

MR. COFFEY: Yes.

Q I notice on page 61, a proceeding apparently brought by the State against Groppi and others, a statement on page 62-A that the complaint and affidavit attached to this case in substance cites most of the facts stated, the balance having been supplied by testimony, and what precedes that on pages 61-A and 62-A seems to be substantially like that which appears in the per curiam of the Supreme Court at 113-A. Am I wrong?

MR. COFFEY: Justice Brennan, to answer your question, the pages to which you refer are the findings of a circuit judge, Dane County, who had conducted a hearing on the respondent's motion for temporary restraining order, and then there was a hearing on the preliminary. This record, with

this testimony, to my knowledge was not available to the Wisconsin Supreme Court at the time it rendered its decision.

Q Oh, I see. That happened after the decision?

MR. COFFEY: Yes. There was a deferred plea.

Q This decision states October 17, 1969.

MR. COFFEY: Correct, and I believe the action of the Wisconsin Supreme Court was --

Q Hearing was October 6.

MR. COFFEY: Yes, and I believe the action of the Wisconsin Supreme Court in denying--

Q Do we have the hearing of October 6?

MR. COFFEY: I do not know; they are not part of the record, Justice Brennan; the action of the Supreme Court in denying the Petitioner the writ of habeas corpus was October 10.

Q October 10?

MR. COFFEY: Yes.

Q Mr. Coffey, in this connection, I think you conceded that there's no issue of fact about Father Groppi being on the Assembly floor on the day in question? The Wisconsin Supreme Court stated that the occupation of the Assembly by Groppi and the protesters lasted from approximately midday to well toward midnight. Do you go so far as to concede that fact?

MR. COFFEY: Yes, I would concede that fact in that

I know it occurred, Justice Blackmun, but it was never established in any proceeding that I'm aware of, in the Wisconsin Supreme Court being aware that there was sworn testimony; it was obviously reported in the media.

Now, in this particular action, the people let into the Assembly or the people present in the Assembly were in fact there to object to, or make known their objection in regard to legislative action in terms of cutting back welfare payments.

Q You don't contend that they had any right to do that, of course?

MR. COFFEY: No, I do not, Mr. Chief Justice.

Q It isn't necessary to your case?

MR. COFFEY: No, it is not, and I only bring that up because I believe it raises some question as to the ability of the legislature to sit as a fair and impartial judge of the contempt.

Secondly, in terms of legislative contempt, the physical contours of most legislative chambers, along with the comings and goings of people in the legislature during the sessions, the absence of transcribed records make it reasonable, as the District Court found, and as Judge Stevens noted in his dissenting opinion, that there is the room for error in perception and evaluation of the alleged contemptuous conduct which is far greater in a legislative body than in a

court, the restricted area in which a court may make a summary contempt finding.

Additionally, a review of the action taken by the legislature is almost impossible, is extremely difficult if not almost impossible. In the instance case--

Q No review is provided of legislative determinations of that kind, is there?

MR. COFFEY: There was none in this case, Chief Justice Burger, and that is one of the problems, that when the Petitioner filed his petition for a writ of habeas corpus in the Wisconsin Supreme Court, there was authority here, there were cases prior to that time in Wisconsin which indicated that in fact the court would not review a finding of the legislature.

Q Well, to take just that part of your argument about the contours of the room and the other factors about the functioning of the legislative body, then it wouldn't have been feasible on your theory to have tried Justice Samuel Chase for impeachment by the Senate 180 years ago or 170 years ago, or to have tried President Johnson for impeachment a hundred years ago.

MR. COFFEY: The trial for impeachment, I don't see any difficulty.

Q The contours of the room are the same, are they not?

MR. COFFEY: But the people were there taking part and

they were having a trial, but the suggestion is that the contours of the legislative body make it difficult to have uniform perception and evaluation of conduct that is going on in that large an area.

Q You are speaking now of members of the legislative body, in a sense, as the witnesses who observed the event, not of the trial of the man for contempt before the body?

MR. COFFEY: That is correct.

Q I misunderstood your posture. Would you make the same arguments with reference to the unfeasibility of conducting a trial before the body?

MR. COFFEY: No, I would not; I clearly believe a trial could be conducted. I'd hate to see that forced onto the legislative machinery, in that obviously it would cause great disruption of the normal legislative process and if they would have a full-blown trial, but clearly I think the chamber would be a sufficient place to have it done.

Q From your argument I take it the only remedies the State of Wisconsin has against someone occupying the legislature for ten to twelve hours is to make a charge of disorderly conduct, as there was here?

MR. COFFEY: Yes, they could bring charges under the ordinary criminal code, unlawful assembly and other sorts of criminal offenses; but additionally, I believe that they could certify one, as the Federal Government does to the U.S.

Attorney for contempt, or they could in fact have a hearing--they could in fact have had a hearing. All the District Court said was constitutionally mandated was a minimal opportunity to appear and respond, and all the cases cited in the Respondent's brief of legislative contempt, that is in fact the procedure that was followed. The contemnor was just brought in before the bar of the House or Senate, and advised that the legislative body viewed certain of his conduct as contemptuous, what if anything did he have to say as to why he should not be held in contempt, and that's what the District Court said was constitutionally mandated. The District Court did not conceive of a full-blown trial.

I feel that the Petitioner is entitled to that at a minimumand he may well be entitled to more procedural due process than just that minimal due process.

Q Mr. Coffey, before you sit down or conclude your argument, will you work in, for my benefit, your comments as to the suggestion of mootness of the case?

MR. COFFEY: Yes.

Q Somewhere along the line?

MR. COFFEY: In terms of mootness, the Resolution in addition to holding the Petitioner in contempt, there was also a second part of the Resolution which pursuant to Section 13.27 of the Statutes of the State of Wisconsin, referred the matter to the District Attorney of Dane County. Section

13.27 of the Statutes of the State of Wisconsin, subparagraph 2, provides that "any person who is adjudged guilty"-- I'm sorry, this is on page 24-A of the Petition for Writ. I'm sorry, it is not in the appendix. The statute provides that "any person who is adjudged guilty of any contempt of the legislature or either house thereof, shall be deemed guilty also of a misdemenaor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County and may be fined not more than $200 or imprisoned not more than one year in the county jail."

The legislature assembly that held the Petitioner in contempt adjourned sine die on either January 6 or January 7, 1971. The prosecution contemplated by the Resolution of the Assembly has not been, to this date, commenced, but there is the threat of this prosecution.

I would indicate that I think in terms of collateral estoppel or double jeopardy, there may be some defenses to that prosecution, but there is the threat of that prosecution which I believe would bring this matter under the doctrine of this Court in Sidburn v. New York and Cairfriss v. Le Valle. (phonetic), and I do not wish to suggest that this matter is not moot.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coffey.

Mr. Tinglum.

ORAL ARGUMENT OF SVERRE O. TINGLUM, ESQ.

ON BEHALF OF THE RESPONDENT

MR. TINGLUM: Mr. Chief Justice, may it please the Court, my name is Sverre Tinglum, Assistant Attorney General from Wisconsin, representing the Respondent here today.

Respondent sees the issue before this Court as an extremely narrow issue, and that issue is whether the legislative body, that is state legislature, house of the state legislature or Congress of the United States, or any such legislative body may exercise its contempt power in a summary fashion; that is, in the same manner as courts exercise their contempt powers where there has been contumacious conduct in the immediate presence of the court, tending to obstruct the court's proceedings.

The question is whether the legislature in the case of a direct contempt as contrasted with a constructive contempt, whether it may in the words of the Terry case cited in our brief, proceed upon its own knowledge of the facts and punish the offender without further proof and without issue or trial in any form.

The District Judge who first considered these issues acknowledged that the conduct described in the Assembly's Resolution if it had been committed in open court would justify summary contempt procedure in court, and then the District Judge said, "Now we have to look to see if the legislature has

the same power to proceed summarily as any court would. The District Judge held that the legislature did not have such power. The Court of Appeals for the Seventh Circuit held that it did, reversing the District Judge.

Q What's the problem? How do you answer my problem, which is were the same people there the second day as were there the day that it happened?

MR. TINGLUM: I'm not sure that I understand--

Q You don't know do you? You talk about the body.

MR. TINGLUM: Oh, I'm sorry; I understand your question now, Mr. Justice Marshall.

Q With a judge, there's one judge, but in this legislature, how many were there? How many house members are there?

MR. TINGLUM; There are a hundred.

Q Well, do I assume it's no different from other legislatures, you never have a hundred in two days in a row?

MR. TINGLUM: There is a presumption of regularity of the legislative proceedings.

Q That all one hundred are there?

MR. TINGLUM: That there were a sufficient number there and that all those who voted, witnessed the contumacious conduct.

Q How many were there?

MR. TINGLUM: This is a presumption that

has been acknowledged by this Court.

Q How many were there the day the act occurred?

MR. TINGLUM: I have no idea.

Q Shouldn't we know?

MR. TINGLUM: If the question had been raised as a factual question in this habeas corpus proceeding--the District Court made the assumption that was a question of fact, and he decided that question of fact against the Respondent and it's part of our appeal to the Seventh Circuit. We pointedout to the Seventh Circuit Court of Appeals--

Q I assume that someone that second day only knew it happened by hearsay, in that they were not present on the day it happened, but they did vote?

MR. TINGLUM: I don't think that presumption could be made. That would be presuming an irregularity in legislative procedure.

Q Well, do you consider that regularity means there are a hundred people there every day?

MR. TINGLUM: No.

Q You don't assume that?

MR. TINGLUM: No.

Q Please don't ask me to assume it.

MR. TINGLUM: All I am saying is that there is a presumption of regularity of legislative proceedings.

Q Well, that's not what is before me now, is the

regularity of the legislative proceeding, it's the regularity of a contempt action which puts a man in jail.

MR. TINGLUM: Yes, sir.

Q Well, that regularity, I can't assume things into that.

MR. TINGLUM: I think until the question is raised, it must be presumed.

Q Raised by whom?

MR. TINGLUM: Raised by--

Q Are you trying to uphold this or not?

MR. TINGLUM: Yes, sir.

Q Well, I'm asking the question, is there anything in the record to show that the people who voted on this knew and were present when the motion occurred?

MR. TINGLUM: No.

Q There is a presumption, I suppose, only that there was a quorum on each day, something of that kind?

MR. TINGLUM: Yes, I think there is such a presumption and I think there is a further presumption that has been acknowledged by this court as a presumption of the regularity of proceedings which would include--

Q No, that is not what Mr. Marshall says; presumption of regularity certainly doesn't embrace the presumption that every single one of the one hundred legislators was in the hall on each of the two days. That has nothing to do with the

presumption of regularity.

What is a quorum in Wisconsin?

MR. TINGLUM: A majority.

Q So 51 could have been there one day and 51 the next day, and this means of the two days, it would only possibly have been one person who was there both days.

MR. TINGLUM: That is possible.

This, as we pointed out to the Court of Appeals, was not a non-issue of fact; that the District Court assumed to determine without giving the State an opportunity to prove in an evidentiary hearing that in fact the legislators who did vote for the contempt Resolution were, in fact, present on the day that the contempt took place; were, in fact, those who voted for the contempt Resolution.

Q Well, I thought the whole point of the Petitioner's second proposition was that until there was a detailed statement of what the alleged contempt consisted of, people voting on the contempt would not have known what it was. The indication of that is that they weren't there, and didn't see it with their own eyes two days earlier.

MR. TINGLUM: I don't understand that to be Petitioner's argument. That may be what he is driving at.

Q That is the implication of his argument.

MR. TINGLUM: I interpret Petitioner's argument to be that the Resolution failed to state sufficient probable

cause, as this Court has interpreted probable cause, and this appears in Judge Kiley's dissent in the Court of Appeals.

Q "It sets forth mere conclusions and fails to set forth any underlying facts and circumstances which constituted the alleged contemptuous behavior." Now I had assumed that the implication of that whole argument is there were people who voted on this who didn't see this with their own eyes; otherwise, the argument doesn't amount to anything. I thought that point did raise a factual issue.

MR. TINGLUM: I had never understood that to be Petitioner's argument. There was no such allegation in the original petition in the District Court. This sort of recitation of fact as to who voted and who saw has never appeared, to my knowledge, in any resolution of contempt passed by any legislative body at any time, and it has never been required by any court at any time.

This I see as a non-issue. I take it to be conceded, I believe to be conceded by the Petitioner, that a legislative body such as a house of the State Legislature has the power to punish; it is a house having authority to commit for contempt. Example precedent for that is in cases cited in both briefs. I take it to be a non-issue that there have been very grave and serious abuses of the parliamentary powers of contempt in the past. The amicus brief dwells at some length on this, and I am certain if there had been a search made, even more

grievous abuses could have been cited than were recited in the briefs. However, I do not see that as an issue in this case, because what has happened in the past, this Court has said that simple abuses of a power are not reason for denying its existence.

Another thing that is conceded and is not at issue in this case is that the contempt power, particularly this summary contempt power, is an extremely delicate power to be used sparingly as this Court has said, and is to be exercised with the greatest sense of responsibility. This is conceded.

There is another non-issue in this case, and that is the constitutionality of Wisconsin's legislative contempt statute, that is the statute which was referred to by counsel, Section 13.26. The issue of the constitutionality of that statute was litigated in a companion case to this one, the Froelich case, and there a three-judge District Court ruled that the statute was constitutional, that it was not vague, over-broad, that it did not call for involuntary servitude, and other issues. There was no appeal from that decision by the three-judge District Court.

This case here, incidentally, is a spin-off from that case. This case started as a Federal Civil Rights action for declaratory judgment, and then when the Federal District Judge ruled that the portion of that action, the

request for injunction actually was a request for habeas corpus relief, then this case, Groppi v. Leslie became a spin-off of Groppi v. Froelich, and proceeded as a habeas case.

Also conceded, and I state to be a non-issue in this case, that a legislative body has other courses it may follow in event of a direct disorderly contempt of its proceedings. It may refer the matter to the courts. In the Watkins case, this Court observed that Congress has rarely exercised its contempt powers but had preferred, at that time, to refer matters of contempt to the United States Attorney for prosecution. There's no issue about this.

Q Does the legislative body of Wisconsin have a statute expressly authorizing this--

MR. TINGLUM: Yes, it has.

Q That's not this 13.27?

MR. TINGLUM: Yes, that's what I am referring to.

Q Well, I thought this applied only to the case of one actually adjudged guilty by the house?

MR. TINGLUM: Yes, I'm sorry, Mr. Justice Brennan, what I was thinking of was the disorderly conduct statute. Yes, disorderly conduct occurring anywhere within the State may be prosecuted, and the Assembly could have treated this simply as a case of disorderly conduct--

Q Under the general statute?

MR. TINGLUM: Yes, under the general statute.

Q That statute is express, isn't it, authorizes reference expressly in the cases of contempt found by the house?

MR. TINGLUM: Wisconsin has no parallel to that statute.

Q Was he in jail for disorderly conduct at this time or about the same business?

MR. TINGLUM: No. That arrest was made, as I remember, made at a later time.

Q For conduct occurring where?

MR. TINGLUM: On the Assembly's floor.

Q The same conduct?

MR. TINGLUM: Yes, the same conduct.

Q Your response, I think, was a little confusing. To be sure that we have it clear, he was at the time of the contempt citation, he was in custody on a disorderly conduct charge for the same conduct that the legislature was dealing with?

MR. TINGLUM: Exactly the same.

Q That case ended in a mistrial and was followed by dismissal?

MR. TINGLUM: That's correct.

I'm sorry--I didn't intend to mislead--it was exactly the same conduct as was tried in the disorderly conduct case, under the statute.

Q He was just under a charge, and he hadn't been convicted?

MR. TINGLUM: That's correct. He was never convicted of disorderly conduct in the court. As Mr. Chief Justice Burger pointed out, there never was--there was a mistrial and never any new trial.

Q He has a charge still hanging over him, though, has he not?

MR. TINGLUM: Conceivably there could be a charge under Section 13.27 of the statutes. There was a mistrial.

Q But were the charges dismissed?

MR. TINGLUM: Yes, it was dismissed.

Q Well, 13.27 requires a prior resolution convicting of contempt?

MR. TINGLUM: Yes.

Q So this case isn't moot?

MR. TINGLUM: The State has never contended that it is moot. I would feel that as long as the possibility exists that someone could prefer charges under Section 13.27, I would feel that under Carabiss v. Le Valle (phonetic), that there was sufficient interest left here in the Petitioner and sufficient hazard involved, at least theoretically.

Q Is there a statute of limitations applicable to 13.27?

MR. TINGLUM: I know of none.

Q But certainly wouldn't there be almost insurmountable double jeopardy problems?

MR. TINGLUM: Oh, absolutely, yes. That is my opinion; it is not in issue here, but that would be my opinion.

Q Well, if that's so, why isn't it moot?

If we sustain this Resolution, as you want us to do, and if there was a problem of double jeopardy, nothing else could happen anyway.

MR. TINGLUM: That's correct.

Q So it does make it a little bit of a sort of empty argument, doesn't it?

MR. TINGLUM: As I understand Carabiss v. Le Valle (phonetic), and the principles in that case, if there is a theoretical possibility that a previous judgment, if allowed to stand, could work to someone's disadvantage in the future, then the issue is not moot.

Q Well, there would be no disadvantage, if he couldn't be tried.

MR. TINGLUM: But that issue is not before the Court at this time, and all I can say is that in my personal opinion, yes, there would be--

Q You could argue mootness on that ground.

MR. TINGLUM: I don't believe under the cases that have been cited by this Court, that I can. I am not urging

that.

Q In other words, you are not arguing mootness?

MR. TINGLUM: I am not.

Q This is why I raised the question with Mr. Coffey a little while ago. I want to be sure about your position. You are not arguing mootness.

MR. TINGLUM: That is correct.

It is also a non-issue in this case that the Assembly could have taken different courses of action, as Congress has the power to take different courses of action when in contempt cases. The question before this Court is whether the Constitution requires that a legislative body must take some different course of action; whether it must refrain and ignore the contempt altogether, or whether it must rely on general criminal statutes, or whether it must somehow refer the matter to the executive, rely upon executive or upon the judiciary to vindicate its authority.

It is also a non-issue in this case that if this had been a case of indirect or constructive contempt, obviously the procedure followed by the Assembly would have been invalid. There are a good manyof the cases cited in both of the briefs, in Petitioner's brief and Respondent's brief, which refer to cases of indirect, constructive contempt, where the legislative bodies have brought the contemner before the bar of the House or of the Senate, and there have heard evidence of what

occurred outside the legislative halls. These are constructive contempt cases; this is not. This is a direct contempt case involving disorderly conduct.

Q Is there anything in the record to show why the Resolution was not passed the same day?

MR. TINGLUM: None.

Q Well, there's an indication in the opinion, the Supreme Court of the State placed on judicial notice that the legislature couldn't act that day, there was so much disruption.

Q [illegible] Yes, from twelve noon until approximately midnight, the legislature was in effect ousted from its own chamber. Is that not the case in this record?

MR. TINGLUM: Yes, it appears in the record. There has been no evidentiary hearing, so it has not been developed in that fashion.

Q What happened the next day?

MR. TINGLUM: I'd have to go outside the record to tell you Mr. Justice Marshall.

Q I don't want you to go outside the record. I just want to know is there anything in the record to show why it took two days? We now have one day explained, but there is no explanation for the next day.

MR. TINGLUM: Nothing. Nothing at all.

Q Is there anything in the record to show what was

brought before the House or was it just the Resolution? Was there discussion?

MR. TINGLUM: There is nothing in the record to show the debate. That is not recited in the Resolution.

Q Were the two days September 29 and October 1 over a week end?

MR. TINGLUM: September 29 was a Monday. That was the day on which the legislature was to convene in special session.

Q So it was right at the start of a session?

MR. TINGLUM: Right at the start of the session. As a matter of fact, I can't say it was at the start of the session, because the session did not start on the day it was to have started.

I have talked about the non-issues, and the issue as I see it again, is a very narrow one: Does the Constitution command that a legislative body exercise its contempt power different from the manner in which a court is entitled to exercise the same power? There are no cases in point, at least neither of the parties to this action have been able to find a case precisely in point. Most cases discussing incidents of legislative contempt are cases of constructive or indirect contempt, where, as I said previously, the contemner is brought before the bar because the House has not seen the conduct with its own eyes. In some of the cases discussing

legislative contempt, it is apparent that a summary procedure was in fact followed, but there has never been any discussion of that in any of the cases that have arisen.

Q Would Wisconsin's position be the same if a lapse of time, instead of two days, had been two months?

MR. TINGLUM: I think yes, Wisconsin's case would be much weaker.

Q Why would it be weaker?

MR. TINGLUM: Because without anything in the record to explain the delay, I think there would be--it would be just that much more difficult to explain a delay of that magnitude.

Q I didn't understand that Wisconsin's position was that you had to explain anything?

MR. TINGLUM: We don't, not as far as the two days are concerned.

Q I don't understand why, if you don't have to explain two days, you would have to explain two months.

MR. TINGLUM: I believe in the first place that there have been instances, decisions by this Court, for example in the Terry case, ex parte Terry, in re Maury, which is a Second Circuit case, that there have been delays, unexplained, in the record, and this Court has said that short delays do not have to be explained. For example, in the Terry case, I believe there was a delay of one day. The disorderly conduct

occurred in open court on one day and the contempt citation did not come out until the next day. The Court said this delay is trivial.

Q There has been some reference to the procedure followed by Judge Medina in contempt cases that occurred during a prolonged trial in New York years ago. Now, suppose hypothetically that the legislature decided deliberately to postpone the action on the contempt until the last day of the session or the last week of the session, in order to let tempers cool and get a more objective view, wouldn't that be a perfectly valid reason for waiting 30 days or 60 days or 90 days, and who is to complain about that kind of delay for that reason?

MR. TINGLUM: Well, if you delay to that extent, that would seem to undermine the Assembly's position that it needed protection, that it had the authority to remove this source of disturbance.

Q That's only one of the reasons for the contempt powers, isn't it?

MR. TINGLUM: Yes.

Q It isn't the whole basis for giving a legislative body contempt power.

MR. TINGLUM: It is not. There is self-preservation and there is what has been called by the courts vindication of the body's authority, which --

Q And to give an example to someone of a deterrent to future similar conduct by others.

MR. TINGLUM: It has never been mentioned in any case I've seen, but I think as a matter of logic and common sense, yes, deterrence plays a very large part in this.

There was a case where the United States Senate proceeded summarily in Ex Parte Nugent, cited in Respondent's brief, where the debate and the deliberations leading up to the contempt resolution, and the contempt resolution itself, were conducted in secret. There again, and the Circuit Court for the District of Columbia at that time held that this was a proper procedure, but the precise point that we have here, that is, whether or not the legislature has any less power than the courts around the nation, to proceed in a proper case in summary fashion, has never been expressly discussed and decided by any court, but the closest decision that I know that comes to it is Marshall v. Gordon. There there is some dicta that suggest that the power the courts have to exercise summary contempt powers proceeds from the same source, and that both the legislatures and the courts have identical summary contempt powers.

The District Judge said, all right, there are no cases, there's nothing to guide this court. I am going to look to see if there are any reasons in logic or in the factual circumstances of the two bodies, that is the court and

legislature, to warrant different treatment before the law, and the District Judge said, well, there were so many people observing disorderly conduct in the legislative chamber that you could have a good deal of confusion of just what took place, whereas in a court you have only one judge looking, it's easier, and you won't have that confusion.

The District Judge said also, a second point, that there is no transcript of the proceeding in a legislative chamber, whereas there is in court.

On those two points, the District Court held that the legislature did not have summary contempt powers. The Seventh Circuit Court of Appeals disagreed and I think rightly so, because if it is true thatone pair of eyes is better than several pairs of eyes, then of course one juror is better than many jurors, Appellate courts, for example, would not be able to observe properly, according to the District Judge's theory, wouldn't be able to observe a direct contempt.

The differences that are pointed out in the Respondent's brief between courts and legislatures are such that the legislature should have summary contempt powers at least equal to those possessed by the courts, because there are probably upwards of five thousand judges in this country who possess summary contempt powers; there are only fifty legislatures. When you stop a legislature, there is no other

body that can pick up the ball and run with it and do the work of that legislature. It stops. And a continual week by week disturbance in a legislature would forever stop that legislature.

Furthermore, a legislative body when it is proceeding to act upon a contempt, acts publicly, there is publicity, there is deliberation. Usually in a two-party political system you can expect debate before action is taken. There are certainly similarities between legislatures and courts that again call for similar treatment, similar powers of self-preservation. They have been cited--cases have been cited going back to parliamentary times in England, colonial times in this country, Anderson v. Dunn, up to Marshall v. Gordon, and Jurney v. MacCracken, where this Court has said that the legislature is just as vulnerable as any court to attack and disruption, so this has been acknowledged by this Court many times that it is essential to preserve the independence of a legislative body, and you cannot force the legislature to rely upon the sometimes hostile judiciary or an unfriendly executive, taking those words from United States v. Johnson.

There is certainly a need on the part of the legislature as great as in the courts, to continue to function and to continue the dialogue that takes place in a legislature. There aren't differences that warrant denial of this power

to a legislature, and the similarities between the two forums call for and demonstrate that both bodies must have equal powers to protect themselves from attack.

The contempt power is a radical power, it's drastic, it's subject to great abuse and is very properly limited, and back in 1848, the Wisconsin Legislature did very severely limit the contempt power of the houses of the legislature. It described a very, very narrow area in which the legislature could act upon a direct contempt; only where there has been disorderly conduct on the floor of the house, in the immediate view of the house, and which directly tends to disrupt can the legislature act summarily.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

You have four minutes left, Mr. Coffey.

REBUTTAL ARGUMENT OF WILLIAM M. COFFEY, ESQ.

ON BEHALF OF THE PETITIONER

MR. COFFEY: Mr. Chief Justice, the inquiry, the Respondent has conceded that the summary contempt power is a very great power, subject to abuse. In the instant case, there is no way the Petitioner has ever been able to get a review of the factual basis on which the legislature acted. The Wisconsin Supreme Court in denying the writ of petition for habeas corpus suggested that some type of judicial review was available. We filed a petition for rehearing in the

Wisconsin Supreme Court, and requested, indicated that their opinion indicated such judicial review was available, while the authority we had found indicated to the contrary. Would the Court please advise the Petitioner what kind of hearing was available to him, and grant him that hearing.

But even assuming he could have gotten a hearing at that time, I think we must recognize the hearing comes too late. The Petitioner was already in jail pursuant to the contempt Resolution, and at that point he had been denied bail and I don't believe he should have his right to a hearing on factual basis of the contempt after he is already in jail. I think the hearing should precede the right of anyone to place him in custody. I suggest that as the District Court held, that at a very minimum the Petitioner was entitled to be given notice of the charges against him and be given an opportunity to respond to them.

Thank you.

Q Mr. Coffey, do you suggest that judicial review of the legislative contempt determination would be available, for example, on the weight of the evidence or just on procedural regularity?

MR. COFFEY: I would suggest, Mr. Chief Justice, it has to be available on both, or there would be no basis on which to check the arbitrary exercise of power by the legislature.

Q What you are suggesting, then, is that judicial branch would have the power to redetermine the facts, as distinguished from passing merely on procedural regularity of the contempt process?

MR. COFFEY: I think that is essential, Mr. Chief Justice, or there is no check on completely arbitrary incarceration of people that displease the legislative body, and there has to be a check on that kind of power, yes.

Q Isn't that what the Supreme Court of Wisconsin said is available, page 123-A of the appendix?

MR. COFFEY: It seems to say that's what is available and the review procedure is not available.

Q The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense, implying that had you presented problems on the merits, they would have reviewed it.

MR. COFFEY: They did suggest that, which is contrary, as the District Court opinion noted, was contrary to the existing case law in Wisconsin at the time, and when the Petitioner asked for that hearing, the motion for rehearing was denied without hearing and without comment.

Q Is it not contrary to the general line of authority of both the English and early American cases also, the review of the merits?

MR. COFFEY: Yes, it is, Mr. Chief Justice.

Q So this probably reasonably falls within the category of dicta by the court in the Wisconsin case, does it not?

MR. COFFEY: Either that, or an overruling of other authority without expressly doing so, yes.

Q And where it was not necessary to reach the point?

MR. COFFEY: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coffey. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:02 a.m. the case was submitted.)