To: The Chief Justice
Mr. Justice Black
Mr. Justice Frankfurter
Mr. Justice Burton
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker

SUPREME COURT OF THE UNITED STATES

Douglas, J.

Circulated: 11-7-57

Recirculated: _____

No. 2.—October Term, 1957.

Oleta O'Connor Yates, Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1957.]

Mr. Justice Douglas, dissenting.

This case to me is a shocking instance of the abuse of judicial authority. It is without precedent in the books. It reflects, I fear, a rule made for this case only. As such it is capricious and discriminatory.

Mrs. Yates, not wanting to be an informer, refused on cross-examination to answer 4 questions concerning alleged Communists; and for that refusal she was confined in jail for 70 days. On this, the first day of her cross-examination, she made her position clear. She would refuse to answer any questions concerning the Communist Party affiliations of any co-defendant who had rested his case or any other person who might be subject to persecution by such a disclosure. Consistent with this position, she testified concerning the Party affiliations of co-defendants who had not rested their cases. The questions she refused to answer concerned the Party affiliations of Glickson, an alleged co-conspirator not under indictment, and Spector, a co-defendant who had previously rested his case. On the third day of her cross-examination she was asked 11 more questions along the same line and, adhering to her original position, remained adamant in her refusal to answer questions concerning the Communist affiliations of living persons and of co-defendants who had rested their cases. The district judge indicated to Mrs. Yates that he intended to treat her refusals to answer as 11 separate criminal contempts. At that

time, Mrs. Yates was still in jail pursuant to the previous adjudication of civil contempt. The district judge indicated that he would defer action on the criminal contempt for the duration of the trial.

Mrs. Yates remained jailed until the end of the trial—about 43 days. On August 8, 1952, she appeared before the trial judge on the charge of criminal contempt.[1] For her second refusal to testify, he sentenced her to 11 concurrent 1-year sentences to follow her release from the 5-year term of imprisonment imposed in the main trial. Despite the criminal sentence, the district judge offered to accept Mrs. Yates' answers to the 11 questions at any time within 60 days and release her. He said, "I think in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances." She remained in jail until August 30, when she furnished bail pursuant to an order of the Court of Appeals.

But the judge who ordered her release required Mrs. Yates to appear once more before the trial judge—this time on the question of her civil contempt. Mrs. Yates appeared before the trial judge for the second time on September 3, and he ordered that Mrs. Yates be arrested a second time. In his view, the "coercive" civil contempt order remained in effect so long as the conviction upon the trial of the main case was pending on appeal. Mrs. Yates surrendered to the United States Marshal on September 4. The next day, the Court of Appeals ordered that she be released on $1,000 bail pending appeal.

The trial judge was not yet through with Mrs. Yates, although she had twice been ordered released by the

[1] Petitioner has not urged that this charge of criminal contempt should have been tried before some other judge. Cf. *Offutt* v. *United States*, 348 U. S. 11. Nor has petitioner contended that she was entitled to a jury trial on the charge of criminal contempt which the Court today holds is not subject to any statutory limit as to the punishment which the district judge might have imposed.

Court of Appeals. He was determined that she would remain in jail until she answered the four questions asked on the first day of her cross-examination. This time she was to go to jail on a charge of criminal contempt based upon her first refusal to testify. Although he had not notified her during the pendency of the trial that he intended to treat her first refusal to testify as a criminal contempt, and although the trial had been concluded over one month earlier, Mrs. Yates appeared before the trial judge for a third time on September 8. She protested, "I am under the impression that I have already been sentenced and I am at a loss to understand how many times you can be sentenced for the same thing." This time the trial judge imposed concurrent sentences of three years for four offenses. Again, he "humanely" offered to accept answers to the questions as grounds for modifying the sentence, but refused an application for bail pending appeal. Mrs. Yates went to jail for a third time. Three days later, the Court of Appeals ordered her released pending appeal. The district judge had now exhausted all possible procedures to keep Mrs. Yates in jail until she answered the line of government questions. He issued an amended order on November 12, ordering that the three-year term of imprisonment follow the five-year sentence and run concurrently with the one-year sentence which he had previously imposed for the second refusal.

All three contempt proceedings went before the Court of Appeals. The order holding Mrs. Yates in confinement for civil contempt after the termination of the trial was reversed. *Yates* v. *United States,* 227 F. 2d 844. The judgment of criminal contempt for her first refusal to testify was reversed. *Yates* v. *United States,* 227 F. 2d 848. The one-year sentence for criminal contempt because of her second refusal to testify was affirmed by the Court of Appeals (227 F. 2d 851) and is now affirmed by this Court.

The result is that Mrs. Yates suffers two jail sentences for a single offense. I put it that way since the Court concedes that contempt cannot be multiplied by asking a recalcitrant witness variations of the same question to which an answer was once refused.

But this dual punishment is justified on the ground that the first sentence was civil contempt, while the second was criminal.

The cases draw the line between civil contempt which is coercive and criminal contempt which is punishment. *Penfield Co.* v. *S. E. C.*, 330 U. S. 585; *Maggio* v. *Zeitz*, 333 U. S. 56; *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187. Criminal contempt is to vindicate the public interest; civil contempt is to compel the contemner to do what the law requires him to do. In the former, he is committed to jail without qualification; in the latter he carries the keys to the jail in his pocket, for if he answers he gets out. *Penfield Co.* v. *S. E. C.*, *supra*, p. 590. Yet when all this is said and the differences between civil and criminal contempt conceded, the fact remains that Mrs. Yates goes to jail twice for one offense. That one offense was her first refusal to answer. Because of the prosecutor's efforts to multiply the offense by continuing the line of questions, Mrs. Yates' second refusal to answer, following consistently the position she had made clear to the court upon the first day of her cross-examination, was not a contempt. *United States* v. *Costello*, 198 F. 2d 200, 204; *United States* v. *Orman*, 207 F. 2d 148, 160. As the Court stated in *United States* v. *Costello*, *supra*, p. 204 ". . . the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions cannot be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

The act for which this lady goes to jail was no more than the failure to purge herself of the contempt she

had committed on the first day of her cross-examination.[2] Mrs. Yates might have been subjected to criminal penalties as well as civil coercion for the contempt she committed upon her first refusal to testify. See *Penfield Co.* v. *S. E. C.*, 330 U. S. 585; *United States* v. *United Mine Workers*, 330 U. S. 258; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418. As already stated, the district judge in fact attempted to impose an additional three-year sentence; but he was reversed by the Court of Appeals for his failure to notify Mrs. Yates, during the pendency of the trial, that he intended to treat her refusal to testify as criminal. *Yates* v. *United States*, 227 F. 2d 848. With the end of the trial, the time to treat the one offense which Mrs. Yates had committed as both civil and criminal contempt had passed. Her second refusal to answer was a failure to purge herself of the first contempt, not a new one. For this she may not be punished unless we are to make a rule to fit this case and this case only.

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[2] This is apparent from what transpired when Mrs. Yates appeared before the trial judge in this case:

"I had hoped by this time that Mrs. Yates might be willing to purge herself; that she might be prompted to do so.

". . . as I view it, the court, in its discretion, might treat answers now to the questions as a vindication of judicial authority and treat it as purged.

"I take it from the defendant's statement that she is as adamant now as she was the day the questions were put.

"I hope Mrs. Yates will yet purge herself. I think, in offering to accept her answers now as a purge is a humane, merciful thing to do under the circumstances.

"I am not interested in imprisoning Mrs. Yates. I am interested in vindicating the authority of this court, which I feel must be vindicated when anyone wilfully refuses to obey a lawful order of the court.

"If she at any time within 60 days, while I have the authority to modify this sentence under the Rules, wishes to purge herself, I will be inclined even at that late date to accept her submission to the authority of the court."