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

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From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

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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 25, 1957.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concur, dissenting.

This case to me is a shocking instance of the abuse of judicial authority. It is without precedent in the books.

Mrs. Yates, not wanting to be an informer, refused on cross-examination to answer four 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.

For this, her *first* refusal, she was given her *first* sentence and confined in jail for 70 days.[1] 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. The district judge told Mrs. Yates that he intended to treat her refusals to answer as 11 separate criminal contempts, but indicated that he would defer action on the criminal contempt for the *second* refusal for the duration of the trial. The conviction for criminal contempt because of her *second* refusal to testify was affirmed by

[1] The trial judge was not through with Mrs. Yates. In his view, the *first* or "coercive" civil contempt order remained in effect so long as the conviction upon the trial of the main case was pending on appeal. The Court of Appeals ordered her released (*Yates* v. *United States*, 227 F. 2d 844) on the ground that confinement for civil contempt is not permissible after the termination of the trial.

the Court of Appeals (227 F. 2d 851) and is now affirmed by this Court.[2]

First. One reason I would reverse is that this is a transparent attempt to multiply offenses. The one offense which Mrs. Yates committed was her *first* refusal to answer. Her *second* refusal was merely the maintenance of the same position she took at the start of her cross-examination. I do not think a prosecutor should be allowed to multiply the contempts by repeating the questions. The correct rule, I believe, is stated in *United States* v. *Costello,* 198 F. 2d 200, 204.

> "Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute. But when the defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* testimony. In other words, the contempt was total when he stated that he would not testify, and the refusals thereafter to answer specific questions can not be considered as anything more than expressions of his intention to adhere to his earlier statement and as such were not separately punishable."

Or, as stated in *United States* v. *Orman,* 207 F. 2d 148, 160.

> ". . . where the separate questions seek to establish but a single fact, or relate to but a single subject of inquiry, only one penalty for contempt may be imposed."

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[2] 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 could be held only on indictment by a grand jury, or tried only by a jury, or prosecuted without the other procedural safeguards of the Fifth and Sixth Amendments.

Any other rule gives the prosecutor and judge the awful power to create crimes as they choose. 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. Her *second* refusal to answer was merely a failure to purge [3] herself of the first contempt, not a new one.

Second. 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. The district judge in fact attempted to impose a three-year criminal sentence for her *first* refusal to answer; but he was reversed by the Court of Appeals for his failure to give her the necessary

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[3] 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."

notice during the pendency of the trial. *Yates* v. *United States*, 227 F. 2d 848.

What the Court now does is to make the present conviction do service for the invalid conviction for her *first* refusal to testify. This cannot be done unless we are to make a rule to fit this case only.