DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI
United States v. Barnett/Johnson

Briefs

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 661

THE STATE OF MISSISSIPPI, ET AL., PETITIONERS

v.

JAMES HOWARD MEREDITH AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals has entered no opinions in connection with the orders and judgments sought to be reviewed by the petition for a writ of certiorari.

JURISDICTION

The order designating the United States as *amicus curiae* was entered September 18, 1962. The temporary restraining order was entered by the court of appeals on September 25, 1962. The judgment of civil contempt against petitioners Barnett and Johnson was entered by the court of appeals on September 28 and September 29, respectively. On October 19, 1962, the

court of appeals issued its preliminary injunction. The petition for a writ of certiorari was filed on December 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States had standing to institute proceedings ancillary to the cause of *Meredith* v. *Fair* to protect and effectuate the judgments and orders of the federal courts in that action.

2. Whether the court of appeals had jurisdiction to entertain proceedings ancillary to the case of *Meredith* v. *Fair*.

3. Whether petitioners were validly served in Mississippi with the temporary restraining order issued by the court of appeals in Louisiana.

4. Whether petitioners were amenable to the injunctive process of the court of appeals.

5. Whether the civil contempt proceedings are now moot.

STATUTE AND RULE INVOLVED

The following statute and rule are reprinted in the Appendix, *infra*, pp. 19-21: 28 U.S.C. 547, 28 U.S.C. 1404, 28 U.S.C. 2281, 28 U.S.C. 2284, and Rule 4(c) and 4(f) of the Federal Rules of Civil Procedure.

STATEMENT

On June 25, 1962, the United States Court of Appeals for the Fifth Circuit, in the case of *Meredith* v. *Fair*, 305 F. 2d 343, certiorari denied, 371 U.S. 828, reversed the district court and entered an opinion declaring the right of James H. Meredith to attend the University of Mississippi without discrimination.

On July 28, 1962, the court of appeals, in implementation of its mandate to the district court, issued an order requiring the defendants, their servants, agents, employees, successors, assigns, and all persons acting in concert with them to admit James H. Meredith to the University of Mississippi and to refrain from any act of discrimination relating to his admission and continued attendance. This injunction was to remain in effect until "such time as the District Court has issued and enforced the orders herein required *and until such time as there has been full and actual compliance in good faith with each and all of said orders* • • •." (emphasis added) (R. 44). On September 14, 1962, the district court entered an order in accordance with the mandate of the court of appeals.

On September 18, 1962, the United States moved in the court of appeals for leave to appear as *amicus curiae* in the case of *Meredith* v. *Fair*. The court of appeals granted the motion and entered an order authorizing the United States to appear as *amicus* "with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." (R. 18).

Starting on September 13, 1962, Governor Barnett and other officials of the State of Mississippi had begun to engage in a series of acts designed to frustrate and obstruct the orders of the court of appeals

and of the district court. These included the repeated invocation by Governor Barnett of the doctrine of interposition;[1] prosecution of Meredith for perjury;[2] enactment of a statute making it a misdemeanor to attempt to enroll in an institution of higher learning while a charge of moral turpitude is outstanding;[3] and the filing of various state court actions by the Governor to enjoin Meredith's admission to the University.[4]

[1] On September 13, Governor Barnett invoked the interposition doctrine in a state-wide radio and television broadcast and called upon the people of the state to refuse "in every legal and every constitutional way, and every way and every manner * * * available to submit to illegal usurpation of power by the Kennedy Administration. * * *" (Govt. Ex. 4, Hearing 10/12/62). As we relate *infra*, the Governor several times more "interposed" himself and the "sovereignty of the State of Mississippi" between the University and the federal courts.

[2] On September 14, the District Attorney of Hinds County, Mississippi, instituted this prosecution, and on September 20, the Hinds County court tried Meredith *in absentia*, convicted him, and sentenced him to imprisonment for one year and payment of a $200 fine. An earlier prosecution on the same charge instituted by the same district attorney on May 28, 1962, had been enjoined by the court of appeals on June 12, 1962. The court of appeals enjoined the arrest of Meredith under the conviction arising out of the second prosecution on September 20, 1962 (R. 47).

[3] The statute also made it a misdemeanor to aid and abet in the commission of the offense. Enforcement of the Act against Meredith or any other person in connection with Meredith's admission to the University was enjoined by the court of appeals the day the Act was signed by the Governor as emergency legislation (R. 47).

[4] See Govt. Exs. 8 and 9, Hearing 10/12/62. Earlier, on September 19, 1962, the Chancery court of Jones County, Mississippi, had issued an injunction in a private suit forbidding

On September 20, 1962, Governor Barnett issued a Proclamation directing the Board of Trustees of Institutions of Higher Learning to refuse admission to the University of Mississippi to James Meredith. (Govt. Ex. 7, Hearing 9/28/62.) The Board of Trustees thereupon appointed Governor Barnett Registrar of the University of Mississippi for the purpose of dealing with the registration of James Meredith (Pet. p. A59).

On the afternoon of September 20, 1962, James Meredith presented himself to the University of Mississippi for registration as a student. Governor Barnett refused him admission and delivered to him a Proclamation covering such denial (Govt. Ex. 8, Hearing 9/28/62).

On September 24, 1962, Governor Barnett issued a Proclamation (his fourth) in which he reaffirmed the legal obligation of all public officials of the State of Mississippi not to "acquiesce, impair, waive or surrender any of the rights of the sovereign state of Mississippi," which rights were being directly usurped "by the federal government through the illegal use of judicial decree." Governor Barnett further declared that any arrest or attempt to arrest any state official in the performance of his official duties by any representative of the federal government is illegal, and such

Meredith and the officers of the United States Department of Justice from taking any steps to effect Meredith's admission to the University. In its temporary restraining order of September 25, 1962, the court of appeals enjoined any further proceedings in connection with any of these civil actions (R. 131).

federal representative is "to be summarily arrested and jailed by reason of such illegal acts in violation of this executive order and in violation of the laws of the State of Mississippi." (Govt. Ex. 9, Hearing 9/28/62.)

On September 25, 1962, Governor Barnett directed all sheriffs and all law enforcement officials of the counties and municipalities of the State of Mississippi to proceed "to do all things necessary that the peace and security of the people of the state" would be fully protected (Govt. Ex. 10, Hearing 9/28/62). On that same day the court of appeals, upon motion of the United States, issued a temporary restraining order against petitioners, in essence enjoining them from further obstructing the performance of obligations or the enjoyment of rights under the order of the court entered in *Meredith* v. *Fair* on July 28, 1962, and the order of the district court entered September 13, 1962 (R. 131). This temporary restraining order, together with a notice of hearing on the preliminary injunction (R. 135), was that day served upon petitioners in Mississippi (Govt. Ex. 4, Hearing 9/28/62, pp. 15–16).

On the afternoon of September 25, 1962, James Meredith again attempted to register. Pursuant to the order of the court (Pet. pp. A24, A25–A26), the Registrar of the University was available at the Board's offices in Jackson, but Governor Barnett physically barred Meredith's entry and delivered to him a Proclamation purporting to be a final denial of admission to the University of Mississippi (Govt. Ex. 11, Hearing 9/28/62). Upon motion of the United States, the court of appeals, that evening, issued an order directing Governor Barnett to show cause on September 28, 1962, why he should not be held in civil contempt of the temporary restraining order (R. 163).

On September 26, 1962, James Meredith again presented himself for registration at the University of Mississippi, and again was refused, this time by Lt. Governor Johnson acting on behalf of Governor Barnett. Thereafter, the court of appeals, upon motion of the United States, issued an order directing Lt. Governor Johnson to show cause on September 29, 1962, why he should not be held in civil contempt of the temporary restraining order (R. 175). Pursuant to these orders to show cause, the court of appeals, on September 28 and September 29, 1962, held hearings on the matter of the civil contempt of Governor Barnett and Lt. Governor Johnson, respectively. After receipt of evidence introduced by the United States, and upon failure of either defendant to appear, the court of appeals adjudged Governor Barnett and Lt. Governor Johnson each to be in civil contempt (R. 213, 238).

On September 30, 1962, James Meredith, accompanied by United States Marshals, finally entered the University of Mississippi. On October 19, 1962, after a hearing at which petitioners appeared through counsel but failed to introduce evidence, the court of appeals issued its preliminary injunction (R. 464).

ARGUMENT[1]

1. Petitioners contend that the court of appeals erred in permitting the United States to intervene in the case of *Meredith* v. *Fair*, and in permitting the

[1] Petitioners seek review of sixteen orders entered by the court of appeals in the cases of *Meredith* v. *Fair* and *United States of America* v. *Mississippi* (Pet. pp. 2–4). We find it unnecessary to discuss the following orders:

1) Order (b) (Pet. p. 2), insofar as it was directed to petitioners, merged into the temporary restraining order of September 25, 1962.

2) Orders (c), (e), and (n) (Pet. pp. 3–4) were directed to the Board of Trustees of Institutions of Higher Learning of Mississippi, not parties in this petition.

3) Orders (d), (g), (h), and (j) (Pet. pp. 3–4) were issued on application of the plaintiff in the case of *Meredith* v. *Fair* and do not concern the United States as a party only to the ancillary cause of *United States* v. *Mississippi*.

4) Orders (i) and (k) (Pet. p. 4) which, as Show Cause orders, merged in the judgments of civil contempt, and Order (o) (Pet. p. 4), which merely continued the hearing on the preliminary injunction, are not proper subjects for review by certiorari.

Accordingly, we will address ourselves only to the following orders:

1) Order designating the United States as *amicus curiae*—September 18, 1962.

2) Temporary Restraining Order—September 25, 1962.

3) Judgments of Civil Contempt—September 28 and September 29, 1962.

4) Preliminary Injunction—October 19, 1962.

Petitioners also seek to raise several issues with respect to the sentence conditionally imposed upon them by the court of appeals should they fail to purge their civil contempt. However, since the court of appeals has yet to determine whether petitioners have purged themselves, and, therefore, whether the sentence shall ever be imposed, these questions are prematurely raised. *See Reina* v. *United States*, 364 U.S. 507, 514; cf. *Communist Party* v. *Control Board*, 367 U.S. 1, 71.

United States as intervenor to assert private Fourteenth Amendment rights (Pet. pp. 15, 17, 30). It is evident from these contentions that petitioners misconstrue the role of the United States in these proceedings.

When the United States first appeared as *amicus curiae*[1] before the court of appeals (R. 18), the legal issues between the plaintiff, James H. Meredith, and the defendant University officials and Board of Trustees had been finally adjudicated. 305 F. 2d 343 (C.A. 5). We disclaimed any intent or claim of right to participate in that adjudication or to affect its result. We sought only to preserve and effectuate the judgment, mandate, and orders issued by the court of appeals and the district court in the case of *Meredith* v. *Fair* as against the concerted effort by petitioners to obstruct and frustrate the implementation of those orders (R. 4). Accordingly, when the United States moved for a temporary restraining order against petitioners and, upon violation of that order, proceeded against them in civil contempt, it acted not as intervenor in the case of *Meredith* v. *Fair*, but as moving party asserting a distinct interest in the ancillary proceedings captioned *United States* v. *Mississippi, et al.*

The unique interest of the United States in preserving the integrity of its courts and in protecting

[1] Although we use the term "amicus curiae" because the United States entered the proceeding in aid of the court, we emphasize that the United States was accorded, in various respects, the rights of a party. See Statement, *supra*, p. 3.

their decrees from actual or threatened obstruction is an interest separate and apart from any Fourteenth Amendment or other rights asserted by parties to the original cause. *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed *sub nom. Legislature of Louisiana* v. *United States*, 367 U.S. 908; *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 866 (E.D. La.), affirmed *sub nom. New Orleans* v. *Bush*, 366 U.S. 212. It is not a proprietary or pecuniary interest. See *In re Debs*, 158 U.S. 564, 584. It is, rather, the same interest which the government asserts when it prosecutes obstruction of court orders or criminal contempts. See 18 U.S.C. 401, 18 U.S.C. (Supp. III) 1509.

The necessary corollary is that the United States may assert its interest by initiating proceedings ancillary to private litigation. Certainly, there can be no question of standing where, as here, the court in its order admitting the United States has specifically invited it to initiate whatever proceedings may be necessary "to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." (R. 18). See *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.), affirmed *sub nom. Legislature of Louisiana* v. *United States*, 367 U.S. 908; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515; *Faubus* v. *United States*, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 829.[1]

[1] The related contention that the court of appeals erred in permitting the United States to institute proceedings in civil contempt (Pet. p. 49) is equally without merit. The authority of the United States to institute criminal contempt proceedings in no way precludes it from seeking redress through civil contempt. See *McCrone* v. *United States*, 307 U.S. 61; *United States* v. *United Mine Workers*, 330 U.S. 258, 302; *Parker* v. *United States*, 153 F. 2d 66, 71 (C.A. 1). Cf. *In re Debs*, 158 U.S. 564, 581–83. As indicated *supra*, the temporary restraining order which petitioners violated was issued upon motion of the United States in a proceeding initiated by the United States to preserve the integrity of its courts and to prevent deliberate obstruction of their decrees. The United States had a real interest in obtaining compliance with this order—an interest quite apart from its general concern with the prosecution of criminal contempt proceedings to punish violations of all federal court orders.

2. Petitioners contend further that, even if the district court could have acted,[2] the court of appeals was without jurisdiction to entertain the proceedings initiated by the United States (Pet. pp. 18, 31). The full answer is that every court has ancillary jurisdiction to effectuate its own judgments.

Traditionally, an ancillary suit in equity is understood to be one growing out of a prior suit in the same court, dependent upon and instituted for the purpose of obtaining and enforcing the fruits of the judgment in the former suit. *Caspers* v. *Watson*, 132 F. 2d 614, 616 (C.A. 7) certiorari denied, 319 U.S. 757; *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239; *Root* v. *Woolworth*, 150 U.S. 401. The power of an appellate court to conduct proceedings ancillary to the main cause in order to protect and effectuate its

[2] Petitioners do not urge, as indeed they could not, that *every* court was powerless in the face of the grave threat to the integrity of the judicial processes of the United States resulting from the flagrant and repeated flouting of court orders which the record reveals.

judgment or decree is well settled. *Toledo Scale Co.* v. *Computing Scale Co.*, 281 Fed. 488 (C.A. 7), affirmed, 261 U.S. 399; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806; *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527. It makes no difference that the lower court could have achieved the same result by conducting its own ancillary proceedings. *Merrimack River Savings Bank* v. *Clay Center*, *supra*; *Sawyer* v. *Dollar*, *supra*.

Nor was the court of appeals divested of jurisdiction on July 28, 1962, when its mandate issued to the district court. The court specifically reserved jurisdiction by the terms of the injunction issued by it on the same date (R. 44).* Even without the express reservation, the court retained power to conduct further proceedings to protect its decrees after its mandate had issued. *United States* v. *United States District Court*, 334 U.S. 258; *National Brake Co.* v. *Christenson*, 254 U.S. 425; *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), *certiorari denied*, 332 U.S. 813; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806.

Having jurisdiction to act to protect its judgment in this case, the court of appeals necessarily had jurisdiction to act effectively.** Accordingly, it had power to receive evidence, *Toledo Scale Co.* v. *Computing Scale Co.*, 281 Fed. 488 (C.A. 7), affirmed, 261 U.S. 399; *Root Refining Co.* v. *Universal Oil Products*

* This is the injunction which this Court declined to review. See *Mendel* v. *Fair*, certiorari denied, 371 U.S. 828.

** Cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580

Co., 169 F. 2d 514 (C.A. 3), certiorari denied, 332 U.S. 813; to make findings of fact, *ibid*; to issue injunctions, *Toledo Scale Co.* v. *Computing Scale Co.*, *supra*, and to add parties. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580, as implemented on remand, 169 F. 2d 514, 525 (C.A. 3), certiorari denied, 332 U.S. 813; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806; *National Labor Relations Board* v. *Underwood Machinery Co.*, 198 F. 2d 93 (C.A. 1); *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9)."

3. Petitioners further suggest that they were not validly served with the temporary restraining order issued by the court of appeals (Pet. p. 16).

a. It is alleged, first, that service on them in Mississippi of process issued by the court of appeals while sitting in New Orleans violated Rule 4(f) of the Federal Rules of Civil Procedure. (App. 21.) The short answer is that the Federal Rules of Civil Pro-

** Any challenge to the jurisdiction of the court of appeals based on 28 U.S.C. 2281 (App. 19), providing for the formation of a three-judge court, is frivolous (Pet. p. 47). The constitutionality of Mississippi Senate Bill 1501 (Hearing 10-12-62, p. 32) was never called into question, and there could be no substantial question as to the constitutionality of Mississippi's Acts of Interposition, or Governor Barnett's proclamations declaring the supremacy of state law. See *Bailey* v. *Patterson*, 369 U.S. 31, 32; *Cooper* v. *Aaron*, 358 U.S. 1, 18; *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 926 (E.D. La.), stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *Case* v. *Bowles*, 327 U.S. 92, 97; *Ex parte Bransford*, 310 U.S. 354, 361; *Bush* v. *Orleans Parish School Board*, 351 U.S. 948. Cf. *Fowler* v. *United States*, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 829; *Aaron* v. *Cooper*, 261 F. 2d 97 (C.A. 8).

cedure do not apply to the courts of appeals. *Hines v. Royal Indemnity Co.*, 253 F. 2d 111 (C.A. 6); *Bethlehem Shipbuilding Corp. v. National Labor Relations Board*, 120 F. 2d 126 (C.A. 1); *Armour & Co. v. Kloeb*, 109 F. 2d 72 (C.A. 6). *Cf. Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9.

The result is the same if, having fashioned no rule of its own on the matter, the court of appeals applies the Federal Rules of Civil Procedure by analogy, as it may. *Hines v. Royal Indemnity Co.*, 253 F. 2d 111 (C.A. 6); *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), certiorari denied, 332 U.S. 813. Since Rule 4(f) provides that the process of a district court runs throughout the state in which it sits, it logically follows that the process of a court of appeals runs throughout the circuit, just as this Court's process runs nationwide. *United States v. Union Pacific R.R. Co.*, 98 U.S. 569, 603–604. This result is consistent with the principle that the geographical limits on service of process must be broad enough to permit the court to exercise effectively the substantive jurisdiction conferred upon it. See *Continental Bank v. Rock Island Ry.*, 294 U.S. 648; *United States v. Congress Construction Co.*, 222 U.S. 199.[12]

[12] Any attempt by petitioners to challenge the *venue* of the court of appeals is similarly unavailing. By its very terms, Chapter 87 of Title 28 is inapplicable to appellate courts. See particularly 28 U.S.C. 1404 which expressly refers to change of venue in *district courts*. (App. 19.) Moreover, even as to district courts the preferred rule is that original requirements of jurisdiction and venue need not be fulfilled in proceedings ancillary to the main cause. See *Krippendorf v. Hyde*, 110 U.S. 276; *London v. Public Utilities Commission*, 24 Fed. 132 (D. Kan.), reversed on other grounds, 249 U.S. 236; *Higgins v. California Prune & Apricot Growers*, 282 Fed. 550 (C.A. 2), subsequently vacated on other grounds, 3 F. 2d 896 (C.A. 2). See also 1 Moore, *Federal Practice*, pp. 1339–41.

b. Petitioners also challenge the authority of the United States Marshals by whom they were served with process. Petitioners were served in Jackson, Mississippi, by deputy United States Marshals for the Northern and Southern Districts of Mississippi (Gov. Ex. 4, Hearing 9/28/62, pp. 15–16). Petitioners' theory, based on 28 U.S.C. 547(a) (App. 19), is apparently that while the court of appeals was sitting in New Orleans only a marshal for the Eastern District of Louisiana had authority to serve its process. The point is without merit.

Section 547(b) of Title 28 (App. 19), together with Rule 4(e) of the Federal Rules of Civil Procedure (App. 20), permits process to be served either by the marshal of the district in which the court issuing the process is held, or the marshal of the district in which service is made. 2 Moore, *Federal Practice*, p. 920; *Graber v. Graber*, 93 F. Supp. 281 (D. D.C.); *MacNeil v. Gray*, 158 F. Supp. 16 (D. Mass.). The only limitation on the authority of the marshal serving process issued by a United States court for another district is that the process be otherwise valid beyond the territorial limits of the issuing court. *Ibid.* As we have shown, that restriction is inapplicable here.

4. Petitioners further argue that the sovereignty of the State of Mississippi and the official status of the

individual petitioners rendered the court of appeals powerless to act (Pet. pp. 22, 35–46).

With respect to the alleged immunity of the State of Mississippi, the full answer is that the Eleventh Amendment has no application to proceedings instituted by the United States. *Monaco* v. *Mississippi* 292 U.S. 313; *United States* v. *Texas*, 143 U.S. 621; *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 922 (E.D. La.), affirmed, 365 U.S. 569.[15]

Petitioners' claim of immunity for the executive officers of the State of Mississippi is equally insubstantial. *Sterling* v. *Constantin*, 287 U.S. 378, 393, 403; *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569 (state executive, legislative, and judicial officers enjoined); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 879, (E.D. La.), affirmed *sub nom. Legislature of Louisiana* v. *United States*, 367 U.S. 908 (same); *Faubus* v. *United States*, 254 F. 2d 797 (C.A. 8) certiorari denied, 358 U.S. 829 (Governor enjoined).[16]

[15] Nor does Article III require that such proceedings be initiated in this Court. The original jurisdiction of this Court with respect to controversies between the United States and a State is not exclusive, 28 U.S.C. 1251(b)(2). See *Ames* v. *Kansas*, 111 U.S. 449; *United States* v. *California*, 297 U.S. 175, 187; *Case* v. *Bowles*, 327 U.S. 92, 97.

[16] Petitioners also claim that the validity of the acts of state executive officers must be litigated in an independent action and cannot *per se* constitute contempt of a court order issued in private litigation. (Pet. pp. 42–43). Whatever the merit of the argument in different circumstances, it is inappropriate here. A separate proceeding was instituted against petitioners by the United States on September 25, 1962, when they were served with the court of appeals' temporary restraining order, and

Petitioners also contend that the court of appeals lacked power to require petitioners to direct the officers under their jurisdiction to cease interference with the order of the court and to cooperate in maintaining law and order at the University of Mississippi (Pet. pp. 35 *et seq.*). Since affirmative action is often required to purge contempt of a prohibitive decree, (*In re Transamerica Corp.*, 184 F. 2d 319 (C.A. 9), certiorari denied, 340 U.S. 883; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A.D.C.), vacated as moot, 344 U.S. 806), a court must have authority to require the contemnor to purge himself by doing that which in the first instance he was required to do. To contend that petitioners are immune from this rule because of their status as state executive officers is to ignore the holding in *Sterling* v. *Constantin*, *supra*. The court of appeals, having jurisdiction to enjoin petitioners, necessarily had jurisdiction to assure the effectiveness of its decree by requiring petitioners to purge themselves of their violation. See *Sawyer* v. *Dollar*, *supra*; *Lester* v. *Parker*, 225 F. 2d 787 (C.A. 9); *Vaughan* v. *John C. Winston Co.*, 83 F. 2d 370 (C.A. 10); cf. *Felix* v. *Government of the Virgin Islands*, 167 F. Supp. 702 (D.C. Virgin Islands) (Governor mandatorily enjoined).

it was for violation of this order only that they were found by the court of appeals to be in civil contempt. If petitioners had cared to litigate the validity of their acts, they had ample opportunity to do so at the October 12, 1962, hearing on the preliminary injunction—an opportunity which, significantly, they expressly declined to accept. (Hearing 10/12/62, pp. 18–19.) Cf. *Holmes* v. *Danner*, 191 F. Supp. 394, 412–413, 416 (M.D. Ga.), motion to vacate order setting aside stay denied, 364 U.S. 939.

5. Finally, petitioners allege that the entire matter of the civil contempt of Governor Barnett and Lt. Governor Johnson is moot. This is incorrect.

While civil contempt proceedings necessarily end with a final settlement of the main cause, see *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, such proceedings continue to be relevant so long as the object of the suit has not finally been achieved. See *Yates v. United States*, 227 F. 2d 844, 847 (C.A. 9). To support their claim of mootness petitioners must therefore assume the very fact which the court of appeals has yet to determine, namely, that petitioners have fully complied with the court's decree. Pending a determination of this question by the court of appeals, it cannot be said that the judgment of civil contempt is moot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

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FEBRUARY 1963.

APPENDIX

28 U.S.C. 547 provides in pertinent part:

> (a) The United States marshal of each district shall be the marshal of the district court and of the court of appeals when sitting in his district, and of the Customs Court holding sessions in his district elsewhere than in the Southern and Eastern Districts of New York, and may, in the discretion of the respective courts, be required to attend any session of court.
>
> (b) He shall execute all lawful writs, process and orders issued under authority of the United States, and command all necessary assistance to execute his duties.
>
> • • • • •

28 U.S.C. 1404 provides in pertinent part:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> • • • • •

28 U.S.C. 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge

thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. 2284 provides in pertinent part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> • • • • •

Rule 4 of the Federal Rules of Civil Procedure provides in pertinent part:

> • • • • •
>
> (e) BY WHOM SERVED. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.
>
> • • • • •

> (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.
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> • • • • •

Mr. Greene

No. 107

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA

v.

ROSS R. BARNETT, GOVERNOR OF THE STATE OF MISSISSIPPI, AND PAUL B. JOHNSON, JR., LIEUTENANT GOVERNOR OF THE STATE OF MISSISSIPPI

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The court of appeals being equally divided on the question certified, there is no opinion of the court. The several opinions of the judges (C. 37, 61, 111, 129, 149) are unreported. A related order of the court of appeals (see C. 36) is reported at 316 F. 2d 236.

JURISDICTION

The certificate of the court of appeals was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(3).

QUESTION PRESENTED

The question certified by the court of appeals reads as follows:

"Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which they are charged?"

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent constitutional provisions, statutes, and rules involved are set forth in the Appendix, *infra*, pp. 57–63.

STATEMENT

These proceedings grow out the effort of James Meredith, a Negro, to attend the University of Mississippi. He applied for admission in January, 1961. Rebuffed, he filed a complaint in the United States District Court for the Southern District of Mississippi in May of the same year. Those proceedings, entitled *Meredith* v. *Fair*, have a long history. On December 12, 1961, after several continuances and interruptions of the hearing, the district court denied

a preliminary injunction.[1] 199 F. Supp. 754. The court of appeals, on January 12, 1962, affirmed, but recommended a prompt trial on the merits. 298 F. 2d 696. After trial, on February 3, 1962, the district court denied all relief and dismissed the complaint. 202 F. Supp. 224. On February 12, the court of appeals denied an application for an injunction pending appeal. 305 F. 2d 341. While the case was pending on appeal, Meredith was criminally charged before a Justice of the Peace for Hinds County with false swearing in a voter registration application, and he was arrested. On June 12, 1962, on Meredith's motion, the court of appeals enjoined further prosecution of those proceedings. Finally, on June 25, 1962, the court of appeals rendered its decision, reversing the district court and directing the entry of an injunction requiring the University of Mississippi to admit Meredith. 305 F. 2d 343.

But that was not to be the end of the story. Meredith requested the court of appeals to issue its mandate forthwith. The court declined on July 9. On July 17, 1962, the mandate issued in due course. Promptly, the defendants in the original action moved Judge Cameron (who had not been on the panel) to stay the mandate pending their application for certiorari. On July 18, Judge Cameron granted the requested stay. On July 27, the court of appeals set aside the stay and directed that its mandate be amended and recalled in order to make "explicit the

[1] Certified copies of the orders of the district court and of the court of appeals referred to herein have been lodged with the Clerk of the Court.

meaning that was implicit in [the] [c]ourt's conclusion as expressed through its opinion * * * dated June 25, 1962." 306 F. 2d 374, 378 (C. 3). The amended mandate reversed the judgment and remanded the case to the district court with directions "to grant all relief prayed for * * * and to issue forthwith a permanent injunction against each and all of the defendants-appellees [the University Board of Trustees and University officials] * * * enjoining and compelling each * * * of them to admit * * * Meredith, to the University of Mississippi * * *." The court further directed that "[s]uch injunction shall in terms prevent and prohibit said defendants-appellees * * * from excluding * * * [Meredith] from admission to continued attendance at the University of Mississippi * * *." (C. 3). In implementation of its mandate the court of appeals also stated that it was therewith issuing its own order requiring the Board of Trustees and University officials to admit Meredith to the University of Mississippi and to refrain from any act of discrimination relating to his admission or continued attendance, the injunction to remain in effect until "such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders * * *" (C. 3). On July 28 the court of appeals entered a formal order to that effect.

On July 28 and July 31, Judge Cameron again intervened, staying the court's orders of July 27 and July 28. On August 4, the court of appeals vacated the stays. Judge Cameron issued a fourth stay on

August 6, but, on September 10, Mr. Justice Black vacated all of these stays (C. 4).[2] Finally, on September 13, 1962, the district court entered the injunction.

Meredith was scheduled to enroll at the University on September 20. When it became apparent that there might be obstruction of the courts' decrees, the United States applied to the court of appeals for an order allowing it to appear in the case. That court first ascertained whether the district court would enter such an order and, upon its declination, adjudged (C. 5):

> It appearing from the application of the United States, filed this day, that the interests of the United States in the due administration of justice and the integrity of the processes of its courts should be presented in the proceedings * * *.
>
> It is ordered that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of

[2] The order of Mr. Justice Black further provided "that the judgment and mandate of the Court of Appeals shall be effective immediately" and enjoined the University officials, pending final action by this Court on their petition for writ of certiorari, from taking any steps to prevent enforcement of the judgment and mandate of the court of appeals. 83 S. Ct. 10 (C. 4).

On October 8, 1962, this Court denied a petition for certiorari seeking review of the court of appeals' orders of June 25, July 27, and July 28, 1962. 371 U.S. 828.

Mississippi to accord each court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States."

The foregoing order was entered on September 18. The next day, September 19, the Chancery Court of Jones County, Mississippi, in a proceeding entitled *Meadors* v. *Meredith*, issued an injunction against Meredith, the University Board of Trustees, various University officials, the United States Department of Justice, the Federal Bureau of Investigation, the Office of the Attorney General of the United States, and all United States Deputy Marshals, enjoining each of them "from doing anything or performing any act, the execution of which is intended to enroll and register the Negro, James Meredith, as a student in the University of Mississippi" (C. 6). The federal defendants promptly removed the State court suit to the United States District Court for the Southern District of Mississippi (where *Meredith* v. *Fair* was pending) and there moved for dissolution of the injunction. The district court (acting through both Judge Mize and Judge Cox), declined to enter an immediate order and set the matter for hearing on September 24,[8] three days *after* Meredith's

[8] The district court ultimately vacated the state court injunction on October 2, 1962.

scheduled enrollment under the mandate of the court of appeals. On the same day, September 20, 1962, the United States, as *amicus curiae* in *Meredith* v. *Fair*, moved the district court for a temporary restraining order prohibiting the arrest of Meredith by local officials and enjoining the implementation of a measure passed that morning by the Mississippi Legislature which would have prevented the University officials from enrolling Meredith. The court (both district judges again acting together) enjoined Meredith's arrest on that day, should he present himself for admission as scheduled, but declined all further relief, setting the hearing on the new legislative act for September 24, after the date for admission had passed.

Having failed to obtain an order from the district court implementing the mandate of the court of appeals by clearing the way for Meredith's registration on the date scheduled, the United States applied to the court of appeals for an appropriate order. That court required government counsel to afford the district court a second opportunity to enter the necessary injunction. The district court again declined to act. Then, on the afternoon of September 20, the court of appeals issued its own order enjoining enforcement of the legislative measure and the two State court decrees purporting to bar Meredith's enrollment (C. 6, 7).

Meredith's attempt to register at the University later that afternoon was rebuffed. The same evening—September 20—the United States moved the district court for an order citing the Chancellor, the

Registrar and the Dean of the College of Arts and Sciences of the University to answer for civil contempt. A rule to show cause was issued and a hearing was held on September 21. At the conclusion of the hearing, the district court held all three defendants not guilty of contempt.

On September 21, 1962, the court of appeals, again upon application of the United States as *amicus curiae*, entered an order requiring the Board of Trustees to show cause why its members should not be held in civil contempt for failing and refusing to comply with the court's order of July 28, 1962. On September 22, 1962, also upon application of the United States, the court of appeals entered a further and similar show cause order against certain other named administrative officials of the University of Mississippi (C. 8, 9). On September 24, 1962, the court of appeals convened *en banc* and heard testimony describing the action of the Board of Trustees, the administrative officials of the University, Governor Ross Barnett and other State officials, and showing that, although Meredith had presented himself for admission, he had not been admitted to the University as previously ordered by the court [4] (C. 9).

[4] This evidence included a resolution of the Board of Trustees dated September 20, 1962 by which the Board invested Governor Barnett with "full authority • • • of [the] Board to act upon all matters pertaining to • • • the registration, • • • admission • • • and/or attendance • • • of James H. Meredith" (C. 9-10), and the Governor's published television speech to the people of Mississippi proclaiming "that the operation of the public • • universities • • • of the State of Mississippi is vested in the duly-elected and appointed officials of the State of Mississippi", and directing each such official "to uphold and enforce the laws duly and legally enacted by the Legislature of the State of Mississippi, regardless of • • • [the Federal Government's] unwarranted and illegal and arbitrary usurpation of power; and to interpose the State Sovereignty and themselves between the people of the state and any body-politic seeking to usurp such power" (C. 10-11).

At the hearing on September 24, 1962, the President of the Board of Trustees and the Registrar of the University indicated that they were ready to comply with the orders of the court of appeals. The Registrar announced that he would be available in Jackson, Mississippi not later than 1:00 p.m. on September 25, 1962, for the purpose of registering and admitting Meredith as a student. (C. 11, 12). At the conclusion of the hearing, the court of appeals entered an order requiring compliance with its order of July 28, 1962, and requiring the Board of Trustees both to rescind its action appointing Governor Barnett as agent with respect to Meredith's registration and admission and also to instruct the University officials to register Meredith (C. 12). The order further required the Registrar to be available at Jackson, Mississippi, at the office of the Board of Trustees, at specified hours on September 25, 1962, for the purpose of registering Meredith (C. 12).

On the evening of September 24, 1962, the government presented to the court of appeals an action ancillary to the case of *Meredith* v. *Fair*, entitled *United States* v. *State of Mississippi, et al.*[5] In connection with its complaint in that action, the United

[5] The complaint and subsequent pleadings and orders in the action brought by the United States were captioned as follows:

States applied for, and the court of appeals, on the morning of September 25, issued, a temporary restraining order restraining the State of Mississippi and Governor Barnett, and their agents, employees, officers and successors, together with all persons in active concert or participation with them, from interfering with or obstructing by any means or in any manner the enjoyment of rights or the performance of obligations under the court of appeals' order of July 28, 1962, and the district court's order of September 13, 1962, both of which required the enrollment of Meredith at the University of Mississippi (C. 13–16).

Despite the outstanding court orders, Meredith was prevented from registering at the office of the University Board in Jackson. On the evening of the same day—September 25—the court of appeals entered an order requiring the defendant Barnett to appear personally before the court three days hence to show cause why he should not be held in civil contempt of the temporary restraining order entered by the court of appeals that day (C. 16). On the next day, September 26, Meredith's attempt to enroll at the campus at Oxford was again rebuffed, and the

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No. 19473

JAMES H. MEREDITH, APPELLANT

v.

CHARLES DICKSON FAIR ET AL., APPELLEES

UNITED STATES OF AMERICA, AMICUS CURIAE AND PETITIONER

v.

STATE OF MISSISSIPPI, ET AL., DEFENDANTS

court of appeals entered a similar order to show cause addressed to the defendant Johnson, fixing the time of hearing for September 29, 1962 (C. 17).

On September 28, 1962, the court of appeals, sitting *en banc*, heard the order to show cause as to the defendant Barnett. At the conclusion of the hearing the court adjudged that Barnett was in civil contempt and that such contempt was continuing. The court ordered that he should be committed to the custody of the Attorney General of the United States and pay a fine to the United States of $10,000 per day unless, on or before October 2, 1962, at 11:00 a.m., he showed to the court that he was fully complying with the terms of the restraining orders entered on September 25, 1962. Specifically, he was to show that he had notified all law enforcement officers and all other officers under his jurisdiction or command to cease forthwith all resistance to and interference with the orders of the court of appeals and the district court, to maintain law and order at and around the University and to cooperate with the officers and agents of the court of appeals and the district court, to the end that Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as applied to all other students* (C. 20–21).

On September 29, 1962, a three-judge panel of the court of appeals heard the order to show cause addressed to the defendant Johnson; made findings of

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*Judges Jones, Gewin and Bell dissented from that part of the judgment imposing a fine upon the defendant Barnett (C. 21).

fact; adjudged that Johnson was in civil contempt of the temporary restraining order entered September 25, 1962, and that such contempt was continuing; and ordered that Johnson pay a fine to the United States of $5,000 per day unless on or before October 2, 1962, at 11:00 a.m. he showed to the court that from and after the time of the issuance of the order he had been in full compliance with the terms of the restraining order, that he intended to comply in the future, and that he would, when acting as Governor of Mississippi, give the same instructions to all law enforcement officers and all other officers under his jurisdiction and command as the defendant Barnett was required to give under the order of the previous day (C. 21–23).[1]

On October 2, 1962, the defendant Barnett appeared before the court of appeals through his counsel, who

[1] On September 30, 1962, the President of the United States issued a proclamation under 10 U.S.C. 332, 333 and 334, reciting that the Governor of Mississippi and other officials of that State, individually and in unlawful assemblies, combinations and conspiracies, had been willfully obstructing enforcement of orders of the district court and the court of appeals; that such assemblies, combinations and conspiracies obstructed execution of the laws of the United States, impeded the course of justice under those laws, and made it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; that the President had not received from the Governor adequate assurances that the court orders would be obeyed and that law and order would be maintained. The proclamation commanded all persons engaged in such obstructions of justice to cease and desist therefrom and retire peacefully forthwith. The President also issued an executive order as a result of which a large force of United States Marshals and a part of the Army and Air Forces of the United States were employed for the enforcement of the orders of the court of appeals (C. 25–27).

stated that the Governor was in full compliance with the court's orders and would fully comply in the future to the extent of his ability. The matter was then continued until October 12, 1962, for further hearing before the court in *en banc* (C. 23). On October 12, 1962, the defendant Barnett again appeared by counsel, who offered no proof bearing on Governor Barnett's conduct following the contempt judgment, but retracted their statements that the Governor intended to comply with the orders of the court (C. 24). On October 19, 1962, the defendant filed a response through his counsel, to which he attached a statement which he had publicly delivered on October 17, asserting in substance that he reserved the right to determine whether compliance with the court's orders was consistent with his rights and duties as Governor of Mississippi (C. 23–24).

On October 19, 1962, the court of appeals denied a motion filed by the State of Mississippi to dissolve the temporary restraining order and to dismiss the contempt proceedings, and entered a preliminary injunction, noting that the proceeding before the court was ancillary to the original lawsuit and that the court had ample power to proceed against any party, including the State of Mississippi, which was shown to be engaged in a wilful, intentional effort to frustrate the court's injunction (C. 27–31).[2]

[2] On February 18, 1963, after granting the motion of the United States to be added as a party respondent, this Court denied a petition for certiorari seeking review of sixteen orders of the court of appeals entered between September 18 and October 19, 1962, including the order designating the United States as amicus curiae and the temporary restraining order of

Thereafter, on November 15, 1962, the court appointed the Attorney General of the United States and such Attorneys in the Department of Justice as he might designate, to prosecute criminal contempt proceedings against the defendants Barnett and Johnson pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of the court dated September 18, 1962. On January 4, 1963, an order to show cause was issued, on the application of the United States (C. 31–32), reciting that probable cause had been shown for finding defendants guilty of the following acts done "for the purpose of preventing compliance with this Court's order of July 28, 1962, and of the similar order of the United States District Court for the Southern District of Mississippi, entered on September 13, 1962, and * * * in wilful disobedience and defiance of the temporary restraining order of this Court entered on September 25, 1962" (C. 32–34):

> (a) Barnett, on September 25, 1962, wilfully prevented Meredith from entering the Trustee's offices and enrolling as a student;
>
> (b) Johnson, on September 26th, acting under the direction of Barnett, wilfully prevented Meredith from entering the University campus and enrolling as a student;
>
> (c) Barnett and Johnson, on September 27th, not only wilfully failed to take measures to preserve law and order on the University campus but instead encouraged the Mississippi Highway Safety Patrol and various Sheriffs and deputy Sheriffs to prevent Meredith's entry; and
>
> (d) Barnett, on September 30th, knowing that the failure of the Mississippi Highway Safety Patrol to maintain peace and order on the University campus would result in obstruction of the court's order of July 28, 1962, nevertheless wilfully failed to exercise his authority as Governor to maintain law and order.[*]

Defendants then filed ten motions, only one of which—their demand for trial by jury—is relevant here.[**] The court of appeals heard argument *en*

September 25, 1962, which underlies the present contempt proceedings. 372 U.S. 916.

[*] The Chief Judge of the court of appeals then directed the Clerk to assign to the case a new number, No. 20,240, and a new caption, "*United States* v. *Ross R. Barnett and Paul B. Johnson, Jr.*" (C. 34). For the previous caption, see n. 5, *supra*, p. 10.

[**] The motions were as follows:

1. Motion and plea of the State of Mississippi to dismiss the proceeding as being in violation of the Tenth and Eleventh Amendments to the Constitution.
2. Motions of Barnett and Johnson to dismiss all proceedings in original Action No. 20,240 for lack of process.
3. First alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 and all contempt proceedings in cause No. 19,475 based on improper and insufficient application.
4. Second alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 for lack of venue or jurisdiction.
5. Third alternative motions of Barnett and Johnson to dismiss all pending proceedings in Criminal Contempt for lack of Grand Jury presentment or indictment.
6. Demands of Barnett and Johnson for trial by jury.
7. Fourth alternative motions of Barnett and Johnson to dismiss all proceedings in original action No. 20,240 for lack of jurisdiction to summons a constitutional jury.

banc, but without the participation of Judge Hutcheson who was ill (C. 32, 36). The judges, being evenly divided upon the defendants' right to a jury trial, certified the question to this Court. Accompanying the certified question are an opinion of Chief Judge Tuttle and Circuit Judges Rives, Brown and Wisdom, concluding that no jury is required (C. 37), and separate opinions of Judges Cameron (C. 61), Jones (C. 111), Gewin (C. 129) and Bell (C. 149), each concluding that the defendants are entitled to trial by jury.

SUMMARY OF ARGUMENT

I

A statutory right to trial by jury is claimed under 18 U.S.C. 402 and 3691 because the acts of contempt charged also amount to crimes. But, for two independent reasons, the statutes invoked are inapplicable here.

A. Defendants have no right to trial by jury in the premises because the order allegedly violated was issued by a court of appeals. The statutes relied on grant a right to jury trial only in cases of contempt of a district court order. The text itself is explicit on

8. Motions of Barnett and Johnson for severance.

9. Motion of Johnson to strike the third charge contained in the order to show cause of date January 4, 1963.

10. Motion of Barnett to strike the third and fourth charges contained in the order to show cause of date January 4, 1963.

After oral argument, a majority of the members of the court sustained a motion of the United States to strike the motion and plea numbered 1, overruled or denied the motions numbered 2, 3, 4, 5 and 7, and reserved its ruling on the motions numbered 8, 9 and 10 (see 316 F. 2d 256).

the point. Nor is the language of the statutes inadvertent. The legislative history is plain that the exclusion of court of appeals proceedings from the jury trial requirement was purposeful. The exception reflects the practical difficulties of holding a trial by jury at the appellate level, and recognizes the fact that courts of appeals, sitting in panels of several judges, will not abuse their contempt power. If any doubt remains, the structure of the original statute, outlining the jury trial procedure in terms of the existing district court practice in other cases, makes it unmistakably clear that Congress deliberately restricted the requirement of trial by jury to contempts of district court orders. Finally, there is no merit to the suggestion that the court of appeals was here acting as a district court and must accordingly follow the district court procedure. The court was exercising its ancillary jurisdiction to effectuate its own orders, entered on appeal. The court of appeals acted out of compelling necessity, after the district court denied relief.

B. Defendants have no statutory right to trial by jury for the further reason that the order they are charged with disobeying was entered in an action brought and prosecuted by the United States, and the statutes invoked expressly exempt such cases from the jury trial requirement. While the United States intervened in a pending private suit, nominally as *amicus curiae*, it was accorded the prerogatives of a party and it has, from the beginning, asserted its in-

dependent interest in preserving the integrity of the judicial system and vindicating the authority of its courts, as it plainly had a right to do. In every meaningful sense, the order which defendants are alleged to have violated was entered in a proceeding "brought or prosecuted" by the United States. Arguments invoking procedural niceties cannot alter that basic fact. For the exemption from the jury trial requirement in favor of the United States is not a technical rule. As the legislative history shows, the provision reflects the fundamental distinction between private litigation and proceedings to vindicate a public right. For good reasons, Congress chose to exempt the United States from the hazards of trial by jury when the injunctive orders it had secured were wilfully disobeyed.

II

There is no constitutional right to trial by jury in contempt proceedings. *Green* v. *United States*, 356 U.S. 165, forecloses that claim. Indeed, throughout centuries of Anglo-American history, it has been deemed essential to permit a court (perhaps especially an appellate court) to adjudge contempts of its own orders. The dignity of the judiciary and the effective functioning of the judicial system require no less. Such was the original understanding, and there is no occasion to reconsider the rule in this case.

ARGUMENT

In this extraordinary case the defendants are charged with criminal contempt of a federal court order. Although the alleged contemnors are the Governor and Lieutenant Governor of a State, they stand before the bar on the same footing with other citizens. Just as the highest executive officials of a State are obligated to obey federal authority, *Cooper* v. *Aaron*, 358 U.S. 1, 18–19; *Sterling* v. *Constantin*, 287 U.S. 378, 397–398, so are they entitled, when charged with flouting that authority, to the same rights and privileges—no more and no less—as the law confers upon ordinary citizens.

Defendants claim a right to trial by jury upon the ground that the alleged contempts are also crimes under 18 U.S.C. 242 and 1509. They base the claim upon statutory provisions derived from the Clayton Act, 38 Stat. 730, 738, 739 (now 18 U.S.C. 402, 3691) and, alternatively, upon the Constitution. But as we show below, the statute does not apply for two reasons: first, because it governs only prosecutions for contempt of an order "of any district court of the United States," whereas this is a proceeding for contempt of an order of a court of appeals; and second, because the statute excepts contempts committed in disobedience of an order entered "in any suit or action brought or prosecuted in the name of, or on behalf of the United States," and defendants are charged with wilful disobedience of such an order. The constitutional claim is foreclosed by *Green* v. *United States*, 356 U.S. 165.

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I

DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY

A. DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY BECAUSE THE CHARGES ARE OF WILFUL DISOBEDIENCE OF AN ORDER OF A COURT OF APPEALS

1. The plain meaning of the words of 18 U.S.C. 402 and 3691 limits the statutory right of trial by jury to contempts of orders of a district court.

The historic practice in the United States, as at common law, has been to try contempts of court before a judge sitting without a jury. The only relevant statutes modifying the general rule are 18 U.S.C. 402 and 3691.[11] Section 402 provides that any person wilfully disobeying any lawful order—

> of any district court of the United States or any court of the District of Columbia,

if the act done is also a criminal offense, shall be prosecuted as provided in Section 3691, which grants a right to jury trial in those cases. Section 402 then excepts contempts committed in the presence of the court or consisting of disobedience of an order made in an action brought or prosecuted in the name of the United States, and concludes with the declaration that these exceptions—

> and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.[12]

Contempts consisting of disobedience of an order of a court of appeals are not specifically embraced in Section 402 and therefore may be punished in conformity with the established usage of trying the issues to the court. Section 402 is, by its own terms, confined to disobedience of the orders "of any district court of the United States or any court of the District of Columbia." At least insofar as courts outside the District of Columbia are concerned, this phrase cannot be made to include a court of appeals without distorting the plain meaning of the words.

Section 3691 emphasizes the limitation. Omitting portions not relevant to this branch of the argument, it provides—

> Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

Here again we find a careful limitation to specified contempts of the orders of a district court.

[11] Whether or not it governs criminal contempt proceedings in the courts of appeals, Rule 42(b) of the Rules of Criminal Procedure cannot affect the defendants' statutory right to trial by jury, for the Rule directs jury trial only where "an act of Congress so provides." Other statutes directing trial by jury of contempt proceedings, under certain circumstances, in particular classes of cases are obviously inapplicable here. *See, e.g.*, 18 U.S.C. 3691 (labor disputes); 29 U.S.C. 528 (Labor Reform Law of 1959); 42 U.S.C. 1995 (voting rights).

[12] The full text of Section 402 appears at pp. 58–59, *infra*.

Even if the words stood alone one could not indulge the gratuitous assumption that these apparently carefully-drawn limitations were only the result of inadvertence. The courts of appeals antedate the original statute as well as the revision. But we need not rely upon the words alone. The plain meaning of the words is confirmed by the legislative history which shows beyond a peradventure that Congress limited Sections 402 and 3691 to the district courts, not by accident but because it desired not to require a jury for trial of alleged contempt of an order of an appellate court.

2. *The legislative history shows that Congress intended to exclude from the requirement of trial by jury contempts consisting of disobedience of an order of a court of appeals.*

Sections 402 and 3691 of the Criminal Code derive from Sections 21, 22, and 24 of the Clayton Act, 38 Stat. 730, 738, 739. See Reviser's Note to 18 U.S.C. 402.[*] Specifically, Section 21 of the Clayton Act (App., *infra*, p. 61) is the source of the language in the first paragraph of the two Criminal Code provisions limiting the subject matter to cases of disobedience of orders issued by district courts which constitute a criminal offense. Section 22 (App., *infra*, pp. 61–62) established the procedure. It conferred the right to trial by jury now incorporated in 18 U.S.C. 3691 and fixed the penalty as now provided in the second paragraph of Section 402. Finally, Section 24 (App., *infra*, p. 63), in language reproduced in the last paragraph of both Sections 402 and 3691, exempted contempts committed in, or near, the presence of the court and those resulting from disobedience of an order issued "in any suit or action brought or prosecuted in the name of, or on behalf of, the United States," providing (as does 18 U.S.C. 402 today) that such contempts and all others not covered might be punished "in conformity to the usages at law and in equity now prevailing." Accordingly, we turn to the history of those Clayton Act provisions.

[*] As the Note makes clear, the origin of these Criminal Code provisions does not restrict their application to Clayton Act cases. Though otherwise narrow in scope, Sections 402 and 3691 govern criminal proceedings without regard to the nature of the underlying cause of action.

The story begins with several early attempts to provide for trial by jury in criminal contempt cases. The first was a bill introduced in 1896 by Senator Hill of New York (S. 2984, 54th Cong., 1st Sess.) which passed the Senate but died in the House. See S. Rep. No. 827, 54th Cong., 1st Sess.; 28 Cong. Rec. 6320, 6443. There followed a series of similar measures sponsored by Congressman Bartlett. See Frankfurter and Greene, *The Labor Injunction*, pp. 190–194. Then came another unsuccessful effort initiated by Representative Clayton in 1911 (H.R. 13578, 62nd Cong., 1st Sess.). Both the Hill and Clayton bills made the jury trial requirement applicable "in all courts of the United States except the Supreme Court." See Hearings on Contempt of Court before the House Committee on the Judiciary, December 7, 8, 9, and 11, 1911, 62nd Cong., 2d Sess., pp. 4, 10. The Clayton bill met opposition on several grounds. Among other things, it was criticised for providing trial by jury in appellate courts which had no juries. Representative Clayton accordingly

redrew his proposal and submitted a second bill at the Second Session of the Sixty-Second Congress (H.R. 13578).[24] This time he made it clear that the requirement of a jury trial applied only to trial courts. Mr. Clayton himself explained (48 Cong. Rec. 8778):

> I want to refer as briefly as I may to some objections that were made to the bill that I introduced which followed in the same fashion the Hill bill. • • •
>
> The next criticism was that it provided for contempt in courts where there were no jurors. We answered that by confining the operation in this bill to the circuit courts, to the courts where there are juries and *we exempt its operation in the courts of appellate jurisdiction.* We met that criticism in that way. There has been none that I know of or little, if any, complaint made against abuse of the process of

[24] Another criticism leveled at the first Clayton contempt bill was that it purported to require trial by jury even where the contempt did not also constitute a criminal offense. Defending his second bill, Clayton noted that he had met this objection (48 Cong. Rec. 8778): "• • • The first criticism that was made upon that bill and upon the Hill bill, in the hearings had before the committee, was that the bill might be considered as in pari materia section 268 of the judiciary code, formerly section 725 of the Revised Statutes. I think I violate no confidence when I say that that criticism came from the Attorney General of the United States. In framing this bill which is now before the House we met that criticism and obviated it. An examination of this bill will show that section 268 stands independently, and that this bill adds to the law by providing that in cases of a criminal nature, and of a criminal nature only, shall there be a right of trial by jury."

A further objection related to the applicability of the bill to contempts of orders obtained by the United States. See *infra*, p. 41, n. 24.

> contempt by appellate courts. It has been in the district courts, in the circuit courts, in the courts of first instance, where this abuse has occurred, and this bill limits it in effect to the operation of those courts of first instance where the abuses have occurred and do now occur. [Emphasis added.]"

Representative Clayton's statement was confirmed by two other spokesmen for the bill, both members of the House Judiciary Committee which considered and reported the bill—Representative Floyd of Arkansas and Representative Davis of West Virginia. Representative Floyd said on the floor of the House (48 Cong. Rec. 8780):

> It [the bill] is also limited to proceedings in the district courts of the United States, which courts have proper machinery for juries. • • •

Representative Davis said (48 Cong. Rec. App. 314):

> It is also to be observed that the bill is to be confined to the district courts of the United States, which have constantly at hand the neces-

[25] It is clear from Clayton's statement that in speaking of "circuit courts," he was referring to the old circuit courts, and not to the courts of appeals. The jurisdiction of the old circuit courts was both trial and appellate until the Evarts Act of 1891 eliminated their appellate jurisdiction. Act of March 3, 1891, 26 Stat. 826. For twenty years there were two sets of federal trial courts—the district courts and the circuit courts. The circuit courts were abolished by the Judicial Code of 1911, Act of March 3, 1911, § 289, 36 Stat. 1087, 1167, which transferred their functions and powers to the district courts. See Hart and Wechsler, *The Federal Courts and the Federal System*, p. 46 (1953). Thus, in 1912, when Representative Clayton uttered the language quoted in the text, there were no circuit courts. Clayton's meaning, however—that his bill was confined to trial courts and did not extend to appellate courts—is unmistakable.

sary machinery for the conduct of a jury trial and which are in all things subject to legislative regulation."

See also 48 Cong. Rec. 8794; 8802; App. p. 318.

While the bill under discussion was defeated in the Senate, its provisions were revived the next year and incorporated in the bill which became the Clayton Act (H.R. 15657, 63rd Cong., 2d Sess.). Indeed, in approving the final Clayton bill, the Senate Committee (S. Rep. No. 698, 63rd Cong., 2d Sess., p. 18) merely referred back to the House Report on the Clayton contempt bill of the previous year (H. Rep. 612, 62nd Cong., 2d Sess.) stating:

> The remaining sections of the bill, 15 to 23, inclusive, are substantially the same as the provisions of the two separate bills (H.R. 23987 and H.R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. They deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court. The reports upon these bills made to the House in the last Congress are comprehensive and explain in detail

[*] In pointing out that the district courts were "in all things subject to legislative regulation", Representative Davis was alluding to the doubt which then existed, and still exists, as to whether Congress constitutionally may require trial by jury in contempt cases arising out of disobedience to orders of this Court, which derives its existence and powers from the Constitution. See *Ex parte Robinson*, 19 Wall. 505, 510; Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010.

> their purpose, and for convenience are adopted as a part of this report.

The objections to requiring trial by jury in a court of appeals, while not insuperable, were real. Appellate courts have no juries, as several congressmen recognized, and no regular procedure for summoning a venire. Their geographical jurisdiction is different from the confines of the judicial districts from which juries are usually summoned. Any trial before an appellate court sitting with a jury would be awkward and time-consuming. Would each of the three judges (or today each of a full bench of nine judges) have the privilege of questioning witnesses, participate in the rulings on evidence and give instructions to the jury? Conversely, it was difficult, if not impossible, to make a case for the need for jury trials in appellate courts. The participation of at least three judges in any court of appeals would be substantial assurance against the risk of arbitrariness or prejudice such as might occasionally be evidenced by a single judge. The cases in which some congressmen felt that the power to punish for contempt might be abused—prosecutions for picketing, trespass, assault and battery and other instances of violence in disobedience of an injunction in a labor dispute—would seldom, if ever, arise in an appellate court.

In sum, the legislative history of the Clayton Act plainly shows that the language confining the jury trial requirement to contempt cases involving district court orders was intentionally designed to exclude the courts of appeals.

2. The statute contains other internal evidence of intent to exclude from the requirement of trial by jury contempts of orders of a court of appeals.

In providing for trial by jury Section 22 of the Clayton Act spoke of impaneling a jury from the jurors "then in attendance" or the summoning of jurors "as provided by law" and their selection and impaneling "as upon a trial for misdemeanor." 38 Stat. 739 (App., *infra*, pp. 61–63). Then, as now, no provision was made for the selection or impaneling of jurors in the courts of appeals. The governing statutes, all antedating the Clayton Act (see 36 Stat. 1165), speak of "the judicial district" (28 U.S.C. 1861), "a district judge" (28 U.S.C. 1863), "the district" (28 U.S.C. 1864; 1865), "district court" (28 U.S.C. 1866), "any district court" (28 U.S.C. 1869), "district courts" (28 U.S.C. 1871).

Similarly, Section 23 of the Clayton Act provided that "any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases." 38 Stat. 739 (App., *infra*, p. 63). Since Congress had long since abolished the writ of error for the review of decisions of the courts of appeals in criminal cases and substituted discretionary review by certiorari (26 Stat. 826), that provision could operate only with respect to district courts.

Nor can it be supposed that the drafters of the Clayton Act ignored the possibility of contempt of appellate court orders. Section 11 (38 Stat. 734–736) expressly referred to the circuit courts of appeals in conferring power upon them to enforce orders of the

Interstate Commerce Commission, the Federal Reserve Board and the Federal Trade Commission; and it must have been contemplated that disobedience of the enforcement decree might give rise to contempt proceedings.

The plain fact is that the jury trial provision was intentionally restricted to district court proceedings. Then, as now, Congress well knew how to provide for all courts.[11] Section 20 of the Clayton Act (App., *infra*, pp. 60–61) curbing the power to issue injunctions in labor disputes explicity applied to "any court of the United States." In the face of the predecessor of Section 401 of the Criminal Code which authorized any "court of the United States" to punish contempt of its orders,[12] the limiting language in what is now Section 402 was unmistakably deliberate.

The defendants urged below that the jury trial requirement of Section 402, while not in terms applicable to contempt proceedings before courts of appeals

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[11] See, *e.g.*, the provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 528:

"No person shall be punished for any criminal contempt allegedly committed outside the immediate presence of the court in connection with any civil action prosecuted * * * *in any court of the United States* under the provisions of this chapter unless the facts constituting such criminal contempt are established by the verdict of the jury in a proceeding in the district court of the United States, which jury shall be chosen and empaneled in the manner prescribed by the law governing trial juries in criminal prosecutions in the district courts of the United States." (Emphasis added.)

[12] Then Section 268 of the Judicial Code, 36 Stat. 1163, derived from the Act of March 2, 1831, 4 Stat. 487, of which this Court said that it "applies to all courts." *Ex parte Robinson*, 19 Wall. 505, 510–511.

generally, does encompass such proceedings in the Court of Appeals for the District of Columbia Circuit, pointing out that the jury trial requirement applies to "any court of the District of Columbia." From this premise, the defendants contended that the language "any court of the District of Columbia" must include all of the other ten courts of appeals under Article IV, Section 2, Clause 1, of the Constitution, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The argument is without merit. The words relied on—"or any court of the District of Columbia"—appeared for the first time, without comment, in the second committee print of the final Clayton Act bill (H.R. 15657, 63rd Cong.) which, in this provision (ultimately Section 21) otherwise tracked the contempt bill introduced by Representative Clayton the year before. See Hearings before the House Committee on the Judiciary on Trust Legislation, 63rd Cong., 2d Sess., p. 1864, 1884 (1913-14). No reason for this change appears in the legislative history of the bill. In view of what had gone before, it is hardly to be supposed that Mr. Clayton, or the House, was now disingenuously reversing the decision to exclude appellate courts from the jury trial requirement. Obviously, the addition was meant to accomplish no such important alteration.

The proper explanation is simple. The Judiciary Committee merely wished to include the trial courts in the District of Columbia, which would *not* have been covered by the language "any district court of

the United States" for two reasons: (1) in 1914, the jurisdiction now exercised by the United States District Court for the District of Columbia was vested in a tribunal called the Supreme Court of the District of Columbia;[18] and (2) there were then, as now, inferior courts in the District of Columbia which were subject nonetheless to congressional legislative jurisdiction, *i.e.* the police and municipal courts.[19]

The subsequent course of the Clayton Act bill shows that no great change had been worked by this amendment. When the amended bill reached the Senate, Senator Sterling of South Dakota, an opponent, argued that most contempt cases would "arise not in the law court where a jury may be more readily found, or where there is a jury in attendance upon the court, but • • • in equity cases where there is no jury • • •". Senator Chilton of West Virginia, a member of the Judiciary Committee, replied (51 Cong. Rec. 14374):

> The Senator from South Dakota is clearly mistaken, because this provision refers to Federal courts, and all the Federal district courts have juries.

See also the statement of Senator Jones (51 Cong. Rec. 14414):

> • • • before any person can be tried by a jury upon the charge of having violated a decree or

[18] In 1936—twenty two years later—the name was changed to the District Court of the United States for the District of Columbia, and subsequently to its present name (the United States District Court for the District of Columbia). Historical and Revision notes following 28 U.S.C. 44.

[19] These courts subsequently were consolidated into the Municipal Court for the District of Columbia, now called the District of Columbia Court of General Sessions.

order of the court, the act with which he is charged as being in contempt must be, in and of itself, a crime and contrary to some law of the United States or the law of some State. ***This applies also only to orders of the district courts; contempts of orders of all other courts must be had as now.*** [Emphasis added].

4. *The injunction which defendants are charged with violating was entered by the court of appeals pursuant to its appellate jurisdiction.*

Judge Bell suggested below that the court of appeals "must abide [by] the statutes applicable to the District Court" when it acts "as a District Court" (C. 165). The fact is, however, that the court below was not acting as a district court, either in issuing the order of September 25, 1962, or in hearing the contempt proceedings. The court was acting as a court of appeals, exercising ancillary jurisdiction to effectuate its own judgment, entered in an appeal from a district court order. The power of an appellate court to conduct proceedings ancillary to the main cause in order to protect and effectuate its judgment or decree is well settled. *Toledo Scale Co.* v. *Computing Scale Co.*, 281 Fed. 488 (C.A. 7), affirmed, 261 U.S. 399; *Sawyer* v. *Dollar*, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806; *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527. It makes no difference that the lower court could have achieved the same result by conducting its own ancillary proceedings. *Merrimack River Savings Bank* v. *Clay Center, supra; Sawyer* v. *Dollar, supra.*

The United States did not purposively by-pass the district court, nor did the court of appeals usurp the jurisdiction of the lower court. The history, fully recited in the Statement, *supra*, amply demonstrates the unusual circumstances which compelled resort to the processes of the appellate court. For a time, the district court was rendered powerless by the series of stays issued by Judge Cameron. Later, the district court declined to enter appropriate decrees and the operative orders were issued, in effect, on appeal, after the district court had denied relief. In the circumstances, unless the judicial process was to founder and justice go defeated, the court of appeals had to act. Its intervention, after long forbearance, was, we submit, [redacted], wholly proper.[n]

B. DEFENDANTS HAVE NO STATUTORY RIGHT TO TRIAL BY JURY BECAUSE THE CHARGES ARE OF WILFUL DISOBEDIENCE OF AN ORDER ENTERED IN AN ACTION BROUGHT AND PROSECUTED IN THE NAME OF THE UNITED STATES

There is an additional and independent ground for rejecting the defendants' statutory argument. As we have already noted, both Section 402 and Section 3691 of the Criminal Code expressly exempt from the jury trial requirement "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf

[n] Even if it were debatable whether the court of appeals should have itself issued the restraining order alleged to have been violated, the order, once issued, could not be disregarded with impunity. *United States* v. *United Mine Workers*, 330 U.S. 258.

of, the United States." The instant case falls within that exception.[22]

1. *The injunction violated by defendants was entered in an ancillary action brought and prosecuted by the United States asserting its independent sovereign interest in preserving the integrity of the judicial process.*

By its order of September 18, 1962 (C. 5), the court of appeals directed "that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court • • • with the right to submit pleadings, evidence, arguments and briefs *and to initiate such further proceedings, including proceedings for injunctive relief* and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States" (emphasis added). Pursuant to this order, the United States, on September 24, 1962, filed an action in the court of appeals (ancillary to the case of *Meredith* v. *Fair*), subtitled *"United States* v. *Mississippi, et al."*, and sought a temporary restraining order. It was in this action that the court of appeals, on September 25, 1962, issued the temporary restraining order which the defendants are charged with willfully disobeying (C. 31–34). The sole party moving for the issuance of the temporary restraining order was the United States.

The papers filed by the United States on September 24, 1962, were not a mere brief in support of an action brought by someone else. To be sure, the action entitled "*United States* v. *Mississippi, et al.*" was given the same number as the action entitled "*Meredith* v. *Fair*," and both captions appeared at the head of the temporary restraining order. This fact, however, merely emphasizes the ancillary nature of the action. It does not detract from its status as an action.

The critical fact is that in instituting and prosecuting those proceedings the United States was asserting

[22] The provisions of Section 402 and 3691 exempting contempts of orders entered in actions brought by the United States have been broadly construed in favor of the United States so as not to require trial by jury where the case fairly can be said to be within the scope of the exemption. Cf. *United States* v. *Grand Flower & Ornament Co.*, 47 F. Supp. 256, 257 (S.D. N.Y.), where the court held that no jury trial was required in a contempt proceeding based on violation of a consent decree in a Fair Labor Standards Act proceeding brought by the Administrator of the Wage and Hour Division because the latter proceeding was prosecuted "on behalf of the United States." Accord, *Walling* v. *Men's Hats*, 61 F. Supp. 803, 804 (D. Md.). See also *Sacopton* v. *United States*, 231 Fed. 205, 210 (C.A. 6), where the court held the exception applicable to a contempt proceeding based upon violation of an order of commitment entered in a criminal prosecution brought by the United States. Conversely, the provisions of 402 and 3691 requiring jury trial are "of narrow scope" and "carefully limited to the cases of contempt specifically defined." *Michaelson* v. *United States*, 266 U.S. 42, 66; *United States* v. *Goldman*, 277 U.S. 229, 238; *Russell* v. *United States*, 86 F. 2d 389, 393 (C.A. 8); *Donato* v. *United States*, 48 F. 2d 142, 143 (C.A. 3); *McGibbony* v. *Lancaster*, 286 Fed. 129, 131 (C.A. 5); Cf. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 471-2; *National Labor Relations Board* v. *Red Arrow Freight Lines*, 193 F. 2d 979 (C.A. 5). Compare the remarks of Representative Clayton, who said of the Clayton contempt bill on the floor of the House: "This bill is narrow in its scope." 48 Cong. Rec. 8677. Indeed, the issue in the *Michaelson* case was whether Congress constitutionally could enact the jury trial provisions of the Clayton Act, in view of the inherent nature of the contempt power.

an interest of its own separate and distinct from that of the plaintiff in the original action. The interest of the United States was the sovereign's independent concern for preserving the integrity of its courts and vindicating their authority. The special character of the government's concern was noted in the order designating the United States a party and was repeatedly emphasized throughout its participation." The

"The President's report to the nation on September 30, 1962, shortly after Meredith's entry onto the University campus, makes clear the role of the United States as protector of the judicial process rather than protagonist in the underlying suit (Public Papers of the President, 1962, pp. 726–727):

"• • • [O]ur Nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny. The law which we obey includes the final rulings of the courts, as well as the enactments of our legislative bodies. Even among law-abiding men few laws are universally loved, but they are uniformly respected and not resisted.

"Americans are free, in short, to disagree with the law but not to disobey it. For in a government of laws and not of men, no man, however prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law. If this country should ever reach the point where any man or group of men by force or threat of force could long defy the commands of our court and our Constitution, then no law would stand free from doubt, no judge would be sure of his writ, and no citizen would be safe from his neighbors.

"In this case in which the United States Government was not until recently involved, Mr. Meredith brought a private suit in Federal court against those who were excluding him from the University. A series of Federal courts all the way to the Supreme Court repeatedly ordered Mr. Meredith's admission to the University. When these orders were defied, and those who sought to implement them threatened with arrest and violence, the United States Court of Appeals • • • made clear the fact that the enforcement of its order had become an obligation of the United States Government. Even though this Government had not originally been a party to the case, my responsibility as President was therefore inescapable. I accept it. My obligation under the Constitution and the statutes of the United States was and is to implement the orders of the court with whatever means are necessary, and with as little force and civil disorder as the circumstances permit.

"It was for this reason that I federalized the Mississippi National Guard as the most appropriate instrument, should any be needed, to preserve law and order while United States marshals carried out the orders of the court and prepared to back them up with whatever other civil or military enforcement might have been required."

designation of the United States as "amicus curiae" in the order of September 18, 1962, cannot obscure this essential fact. The substance of the order, not the name, is controlling where the order spells out the rights and authority the party is given. Here, the order explicitly conferred upon the United States all the privileges and authority of a party including the right to initiate proceedings for injunctive relief (C. 3). The United States was designated in the same manner in *Faubus* v. *United States*, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 829, where, to prevent obstruction of school desegregation decrees in Little Rock, Arkansas, the United States obtained an injunction against new defendants pursuant to ancillary jurisdiction. The court said (254 F. 2d at 805):

> In our opinion, the status of the Attorney General and the United States Attorney was something more than that of mere amici curiae in private litigation. They were acting under the authority and direction of the court to take such action as was necessary to prevent its

orders and judgments from being frustrated and to represent the public interest in the due administration of justice.

See also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 866 n. 9 (E.D. La.), affirmed *sub nom. New Orleans* v. *Bush*, 366 U.S. 212; *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed sub nom. *Denny* v. *Bush*, 367 U.S. 908; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515; Cf. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 519–21, 537 (C.A. 3).

The standing of the United States to assert its independent sovereign interest in such a context is also beyond dispute. *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed *sub nom. Denny* v. *Bush*, 367 U.S. 908. Indeed, in this very litigation, this Court has recognized the position of the United States as a party, first by granting a motion of the United States to be named a party respondent on a petition for certiorari and then by declining to review not only the order of the court of appeals designating the United States *amicus curiae* but also the restraining order of September 25, 1962, the alleged violation of which gave rise to the charges of contempt. 372 U.S. 916.

It may be argued that we reach the conclusion that the order of September 25, 1962, was entered in an action "brought or prosecuted by the United States" only by ignoring the formal rules of procedure. Thus, Judge Gewin asserted that the United States should have applied for leave to intervene in the district court, and apparently challenges the validity of the order constituting the United States an *amicus curiae* with power to initiate further proceedings (C. 136–137). See also the opinions of Judge Bell (C. 158, n. 5) and Judge Cameron (C. 87). This contention—urged as error in the petition for certiorari in *Mississippi* v. *Meredith*, No. 661, O.T. 1962, certiorari denied, 372 U.S. 916—ignores the cases cited above in which the United States has participated in similar fashion and in which such participation has been sustained over similar objections. It also disregards the fact that the Federal Rules of Civil Procedure do not apply to the courts of appeals. Rule 1, Fed. R. Civ. P.; *Hines* v. *Royal Indemnity Co.*, 253 F. 2d 111 (C.A. 6); *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 120 F. 2d 126 (C.A. 1); *Armour & Co.* v. *Kloeb*, 109 F. 2d 72 (C.A. 6). Cf. *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9. The court of appeals did not act until it had ascertained that the district court would not admit the United States as a party (C. 5). The pressure of time compelled resort to the extraordinary processes available under the "all writs" statute (28 U.S.C. 1651) unless the mandate of the court of appeals was to be set at naught for another academic term. The defendants had the opportunity to challenge the propriety of the government's participation in the case; they repeatedly did so, and the court of appeals rejected their contentions. Every procedural right was thereby preserved.

It is equally irrelevant that the papers filed by the United States were given the same number as *Meredith* v. *Fair* and the restraining order bore that caption as well as the caption *United States* v. *Missis-*

sippi. These circumstances merely indicate the ancillary nature of the action instituted by the United States. Though ancillary, it was, as we have shown, brought by the United States in its own right and subject to its separate direction and control. These essential characteristics, not procedural niceties, determine whether an order was "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States," within the meaning of 18 U.S.C. 402 and 3691.

2. *The statutory exception extends to any decree obtained by the United States in an action brought or prosecuted to assert a separate sovereign interest.*

The provisions of the Clayton Act requiring trial by jury where the alleged contempt would also constitute a crime were aimed at the "blanket midnight injunctions" obtained by employers in labor disputes. See 48 Cong. Rec. 8779, 8785 (remarks of Rep. Clayton); 48 Cong. Rec. 8780 (remarks of Rep. Floyd). Congress drew a sharp distinction between private litigation, where it required a jury, and proceedings to vindicate a public right, which it excepted. The reasons which influenced Congress are apparent. Where the United States is proceeding to enforce a public right, the defendant is afforded the safeguard of an independent and impartial determination by public officials before the proceeding is instituted—a safeguard not available in private litigation. In that situation, it was thought, the United States should have the full range of sanctions for vindicating judicial orders unmitigated by a jury's powers of dispensation.

The very language of 18 U.S.C. 402 and 3691 suggests that it is concerned with the substance of the United States' prosecution of a public right rather than procedural niceties. The exception covers an order in any "suit *or* action." It may be one "brought *or* prosecuted" by the United States, a disjunctive that strongly implies that the United States need not have been a party from the beginning. And the exception is applicable whether the proceeding be "in the name of, *or* on behalf of, the United States." Congress was seeking broadly to except the vindication of a public interest.

What is suggested by the words is demonstrated by the legislative history. The exception in favor of the United States originated with a suggestion of the Attorney General that jury trial would handicap the courts in enforcing decrees dissolving combinations in restraint of trade.* The language of the exception, however, is not limited to antitrust cases, and the legislative history shows that its broad scope was intentional. The following colloquy between Representative Longworth and Representative Clayton is instructive (48 Cong. Rec. 8779):

* When the Clayton contempt bill was first being considered in the House, Representative Clayton stated (48 Cong. Rec. 8778, 62nd Cong., 2d Sess.):

"The next objection that was made to it was that it would probably detract from the powers of the courts to enforce their decrees of dissolution of combinations denounced by the antitrust law. I violate no confidence when I say that that was the criticism of the chief legal officer of the present administration, Attorney General Wickersham. We have met that objection by providing in this bill that it shall not apply in any case where the United States is the party complainant. * * *"

Mr. LONGWORTH. Suppose a case like this, where there was a strike on a railroad engaged in interstate commerce, and the United States courts should enjoin interference with the free passage of trains, say, in and out of a station?

Mr. CLAYTON. The bill on its face says that in any case where the United States is the complainant it has no application. • • •

See also *Id.*, p. 8785 (remarks of Representative Clayton); *Id.*, p. 8780 and *Id.*, Appendix, p. 314 (remarks of Representatives Floyd and Davis, members of the House Judiciary Committee).

More significantly, Senator Walsh of the Senate Judiciary Committee, Senate spokesman for H.R. 15657, 63rd Cong., 2d Sess. (the bill which became the Clayton Act) stated on the floor of the Senate (51 Cong. Rec. 14377):

> *There is a proper distinction between a suit brought by a private individual or a private corporation for the vindication and establishment of a mere private right and a suit brought by the Government, representing the whole body of the people, to safeguard and protect a public right.* Section 22 gives expression to that difference, which everybody will recognize. • • • [Emphasis added.]

Similarly, Representative Clayton said of the Clayton contempt bill in the previous Congress (48 Cong. Rec. 8779):

> It [the bill] does not intend to detract and does not detract one iota from the power, the majesty, and the dignity of the United States. *The Government of the United States has under this bill every power*, even when it becomes a law, *to enforce its judgments and its demands that it has now* [emphasis added].[28]

We conclude that the United States was in every meaningful sense the "suitor" prosecuting the proceedings which led to the issuance of the restraining order here involved. It is irrelevant that the government intervened in the pending litigation and invoked the court's ancillary jurisdiction instead of initiating a wholly new proceeding. Cf. *United States* v. *Louisiana*, reported with *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La.), stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *United States* v. *Wallace*, decided June 5, 1963 (N.D. Ala.). The crucial consideration is that the order which defendants are charged with violating was entered on the independent application of the United States, acting to protect its own rights in assuring the administration of justice and vindicating the authority of its courts. The rationale of the rule is that when "the rights • • • of the United States" are at stake, the special statutory restrictions on the contempt power are out of place. *Hill* v. *United States ex. Rel. Weiner*, 300 U.S. 105, 109;[29] *United States* v. *Goldman*, 277 U.S. 229. As one district judge

[28] Although there were statements in debate to the effect that no jury trial is required where the United States is a "party" (*e.g.*, 48 Cong. Rec. 8780, 8785; 51 Cong. Rec. 9669, 9672, 14413, 15943, 15946), this characterization merely was a shorthand way of describing the exception, for normally the United States is the original plaintiff. The precise question involved here did not arise in the course of the legislative history.

[29] In *Hill*, the Court held that the provision of § 22 of the Clayton Act fixing a term of six months as the maximum pen-

summed it up with particular reference to the jury trial requirement: " • • • the lawmakers may have been quite willing to experiment with juries in certain kinds of contempt cases growing out of private disputes • • • and wholly unwilling to make a similar experiment in cases involving the rights of the government." "It is beyond question wise, politic, salutary, that the government's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro*, 290 Fed. 214, 222–223 (W.D. Va.), affirmed, 290 Fed. 906 (C.A. 4).

II

DEFENDANTS HAVE NO CONSTITUTIONAL RIGHT TO JURY TRIAL.

1. In *Green* v. *United States*, 356 U.S. 165—decided in 1958—this Court exhaustively considered the question of whether a person charged with criminal contempt for violating a court order has a constitutional right to trial by jury. The petitioners in *Green* were convicted of violating the Smith Act [7] and sentenced to pay a fine and to five years' imprisonment. This Court affirmed the convictions. *Dennis* v. *United States*, 341 U.S. 494. Following affirmance, the district court signed an order requiring the petitioners, who had been enlarged on bail, to surrender for the the execution of their sentences. The United States instituted criminal contempt proceedings against the petitioners in the district court for willful disobedience of the surrender order. Pursuant to Rule 42(b), Fed. R. Crim. P., these proceedings were tried to the court without a jury. Each petitioner was convicted and sentenced to three years, and the convictions were affirmed by the Court of Appeals for the Second Circuit. This Court granted certiorari and affirmed.

Among the grounds argued for reversal in *Green* was the contention that proceedings for criminal contempt, if they could result in a prison sentence of more than one year, must be based on grand jury indictment under the clause of the Fifth Amendment which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury • • •." The Court, however, stated that "this assertion cannot be considered in isolation from the general status of contempt under the Constitution, whether subject to 'infamous' punishment or not. The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." 356 U.S. at 183.

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alty of imprisonment for contempt, was limited to prosecutions arising out of cases instituted by private litigants and was inapplicable to contempts arising out of suits brought or prosecuted in the name of, or in behalf of, the United States. The Court further held that the due process clause of the Fifth Amendment did not preclude Congress from prescribing a heavier penalty for an offense involving "*the rights* and property *of the United States* than for a like offense involving the rights or property of a private person," 300 U.S. 105, 109 (emphasis added).

[7] 18 U.S.C. 371, 2385.

In *Green*, this Court listed its prior major decisions discussing the relationship between criminal contempts and jury trial and concluding or assuming that criminal contempts are not subject to jury trial (*ibid*). *In re Savin*, 131 U.S. 267, 278; *Eilenbecker* v. *District Court of Plymouth County*, 134 U.S. 31, 39; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 489; *In re Debs*, 158 U.S. 564, 594–596; *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 336–337; *Gompers* v. *United States*, 233 U.S. 604, 610–611; *Ex parte Hudgings*, 249 U.S. 378, 383; *Michaelson* v. *United States*, 266 U.S. 42, 67; *United States* v. *United Mine Workers*, 330 U.S. 258, 298. Several of these cases, the Court pointed out, involved review of contempt convictions arising out of disobedience to court orders. See *In re Debs*, *supra*; *Gompers* v. *United States*, *supra*, and *United States* v. *United Mine Workers*, *supra*." The Court declared that

"[i]t would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are 'infamous crimes' under the Fifth Amendment although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2 and the Sixth Amendment."[3] 356 U.S. at 184–185. Reviewing English and American historical practice, the Court

[2] Mr. Justice Frankfurter, concurring, cited forty cases in this Court, "not to mention the vast mass of decisions in the lower federal courts," in which the power to punish summarily (without the intervention of a jury), had been accepted without question (356 U.S. at 190, 191). *Ex parte Kearney*, 7 Wheat. 38; *In re Chiles*, 22 Wall. 157; *Ex parte Terry*, 128 U.S. 289; *In re Savin*, 131 U.S. 267; *In re Cuddy*, 131 U.S. 280; *In re Swan*, 150 U.S. 637; *In re Debs*, 158 U.S. 564; *Brown* v. *Walker*, 161 U.S. 591; *In re Lennon*, 166 U.S. 548; *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324; *Nelson* v. *United States*, 201 U.S. 92; *United States* v. *Shipp*, 203 U.S. 563, 214 U.S. 386; *Ex parte Young*, 209 U.S. 123; *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402; *Blair* v. *United States*, 250 U.S. 273; *Craig* v. *Hecht*, 263 U.S. 255; *Brown* v. *United States*, 276 U.S. 134; *Sinclair* v. *United States*, 279 U.S. 749; *Blackmer* v. *United States*, 284 U.S. 421; *Clark* v. *United States*, 289 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Rogers* v. *United States*, 340 U.S. 367; *Sacher* v. *United States*, 343 U.S. 1; *Nilva* v. *United States*, 352 U.S. 385; *Yates* v. *United States*, 355 U.S. 66; *Ex parte Robinson*, 19 Wall. 505; *In re Burrus*, 136 U.S. 586; *Wilson* v. *North Carolina*, 169 U.S. 586; *In re Watts*, 190 U.S. 1; *Baglin* v. *Cusenier Co.*, 221 U.S. 580; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *Ex parte Hudgings*, 249 U.S. 378; *Cooke* v. *United States*, 267 U.S. 517; *Nye* v. *United States*, 313 U.S. 33; *Pendergast* v. *United States*, 317 U.S. 412; *United States* v. *White*, 322 U.S. 694; *In re Michael*, 326 U.S. 224; *Blau* v. *United States*, 340 U.S. 332; *Hoffman* v. *United States*, 341 U.S. 479; *Cammer* v. *United States*, 350 U.S. 399. Mr. Justice Frankfurter called the roll of 53 Justices of this Court who had sustained the exercise of the power to punish summarily, *i.e.*, without the intervention of a jury, for contempt, including Chief Justices Marshall, Waite, White, Hughes, and Stone, and Justices Story, Holmes, Brandeis and Cardozo.

Decisions of this Court subsequent to *Green* also assume that no constitutional right to trial by jury exists in criminal contempt cases. See *Brown* v. *United States*, 356 U.S. 148; *Yates* v. *United States*, 356 U.S. 363; *Brown* v. *United States*, 359 U.S. 41; *Levine* v. *United States*, 362 U.S. 610; *Reina* v. *United States*, 364 U.S. 507; *Piemonte* v. *United States*, 367 U.S. 556.

[3] Article III, § 2, provides in pertinent part that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury • • •." The Sixth Amendment provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed • • •."

concluded that "[t]he principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions." *Id.* at 187.

2. In light of this Court's recent ruling in *Green*, we shall not reargue the constitutional question at length. In this connection, we respectfully refer the Court to the government's brief in *Green* v. *United States*, Oct. Term, 1957, No. 100, particularly to the historical materials there collected (pp. 63–76). We would, however, add several observations, which emphasize, in our view, the importance of the principles confirmed in *Green*.

The constitutional guarantee of trial by jury, when applicable, includes the requirement that the verdict be unanimous. *Maxwell* v. *Dow*, 176 U.S. 581, 586; *Andres* v. *United States*, 333 U.S. 740. Thus, if a jury trial were required in order to punish disobedience of a judicial writ or decree, a single juror lacking in sympathy with the underlying order could render it ineffective.[*] The danger of such a result is particularly apparent in those instances in which the issues resolved by the court's order command strong public feeling.

While the Constitution is silent on the subject of contempt, and while, so far as we have been able to ascertain, the subject was not raised at the constitutional convention, at the ratifying conventions of the States, or at the time of the adoption and ratification of the Bill of Rights, there are certainly persuasive indications that the framers of the Constitution wished to insulate the functions of the federal judiciary in safeguarding constitutional and other federal rights from the passion of factions within the community. This was one of the principal purposes of Article III, Section 1, of the Constitution, which provides that federal judges are to hold their offices during good behavior. Speaking of this Section in The Federalist No. 78, Hamilton wrote:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which * * * have a tendency * * * to occasion * * * serious oppression of the minor party in the community. * * * [I]t is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.
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> * * * * *

[*] Should this occur, the court would have no recourse. To be sure, civil contempt proceedings may be available in certain instances, *e.g.*, where the court's order affirmatively requires the doing of an act, or where the injury accomplished by the violation of a negative restraining order can be undone. But civil contempt simply gives the defendant, on pain of punishment, another chance to comply with the court's order. There are many cases, moreover, in which the violation of a restraining order would cause irreparable injury which could not be remedied by future compliance or by any other act, and where vindication of the court's authority depends entirely upon the institution of criminal contempt proceedings.

> The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; * * * *Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts;* as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. [Emphasis added.]

The independence of the federal courts, so carefully preserved by such constitutional requirements as life tenure and the ban on diminution of judicial compensation, would be seriously undermined if their orders could be nullified by an unsympathetic jury. The present case forcefully illustrates the point. If the elected leaders of a State are capable of treating federal court orders with the disrespect which this record reflects, what prospect is there that those whom they lead will disregard their example, or will be more independent or more courageous?"

[11] On the other hand, the problem of protecting minority rights from encroachment by a majority is not typically presented in the criminal law. The basic function of the criminal law is to protect the majority against the depredations of the few. Although there may be circumstances in which a jury disagrees with the philosophy of a criminal statute and acquits for that reason, we are normally willing to pay the price for this behavior since the acquittal presumably reflects a community consensus that the law is unjust and that the defendant should not be punished. Such nullification, however, does not typically involve the abrogation of a constitutional right. Civil rights statutes, prohibiting governmental officials from denying constitutional rights, see 18 U.S.C. 242; 243, are exceptions. The overwhelming majority of criminal statutes are directed at private conduct.

The authority of this Court, as well as other federal courts, rests upon effective use of the contempt power to vindicate the court's mandate. This Court customarily issues mandamus and other orders under the all-writs statute (28 U.S.C. 1651) and various kinds of stay or injunctive orders for the purpose of preserving its jurisdiction pending disposition of a case.[12] For example, the Court, or one of its Justices, not infrequently stays the execution of a prisoner by state prison authorities while the Court is considering the prisoner's case. Violation of such an order is punishable by contempt. Thus, in *United States* v. *Shipp*, 203 U.S. 563, after a stay of execution had been issued by this Court, a sheriff was charged with delivering the prisoner—a Negro accused of raping a white woman—into the hands of a local mob which lynched him. This Court then instituted contempt proceedings, and took testimony through a commissioner whom it appointed specially (214 U.S. 386, 471). On the basis of the written record of this testimony, the Court, after argument, adjudged the defendants guilty (214 U.S. 386) and sentenced several of them to imprisonment (215 U.S. 580). If the defendants in the *Shipp* case had had a constitutional right to trial by jury, they would have been tried in Tennessee, where the lynching occurred.[13] One can only speculate

[12] Mr. Justice Black issued an injunction in this very case when he vacated the stay orders entered by Judge Cameron (C. 4).

[13] Art. III, Section 2, Clause 3, provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; *and such Trial shall be held in the State where the said Crimes shall have been committed*" (emphasis added). The Sixth

whether in such circumstances this Court's authority would have been vindicated.

More than a century ago, moreover, this Court observed that the conduct of a trial by jury in this Court, even in the limited class of cases involving original actions at law against citizens of the United States, "embarrass[es] and retard[s] the business of this [C]ourt." *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 588. The point has even greater force today, when the Court's caseload has increased greatly. The result of overruling the *Green* case would be to enhance the prospect of a lengthy jury trial lasting days and possibly weeks, interrupting the consideration of the Court's vital business. As the *Shipp* case reflects, orders of appellate courts, like orders of trial courts, are at times disobeyed.[9] The *Shipp* case is but one instance in which an order of this Court has been violated. Indeed, the order of Mr. Justice Black was flouted in this very case. See also, *e.g.*, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 12, where an Indian named Corn Tassell was executed by Georgia authorities in defiance of a writ of error allowed by the Chief Justice of this Court."

Finally, we emphasize that in trying a defendant for contempt by disobedience of court order, "[t]he court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case." *United States* v. *Shipp*, 203 U.S. 563, 574 (Mr. Justice Holmes, speaking for the Court)." A defend-

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Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed*" (emphasis added).

[9] Statements in the opinions below to the effect that this is the first case in which criminal contempt proceedings have been instituted in a court of appeals for violation of a court of appeals order (C. 45, 61) are incorrect. *See, e.g., In re Alexander McKenzie*, 180 U.S. 536, 538; *Tornanses* v. *Melsing*, 106 Fed. 775, 790 (C.C.A. 9); *In re Whitney & Company*, 273 F. 2d 211 (C.A. 9); *In re Dolcin Corp.*, 247 F. 2d 524 (C.A. D.C.), certiorari denied, 353 U.S. 988; *In re Dorr*, 195 F. 2d 766, 770 (C.A. D.C.); *National Labor Relations Board* v. *Red Arrow Freight Lines*, 193 F. 2d 979 (C.A. 5); *Doods* v. *Local 1250*, 173 F. 2d 764 (C.A. 2); *Federal Trade Commission* v. *Hoboken White Lead & Color Works, Inc.*, 67 F. 2d 531 (C.A. 2). See also the following cases not reported in the federal reporter system: *In re Edwin G. Axel*, 6 Stat. & Ct. Dec. of F.T.C. 816 (C.A. 3); *In re Trade Union Courier Publishing Corp., et al.*, 6 Stat. & Ct. Dec. of F.T.C. 750 (C.A. 3); *In re P. Lorillard Company*, 6 Stat. & Ct. Dec. of F.T.C. 420 (C.A. 4); *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 2 Stat. & Ct Dec of F.T.C. 402 (C.A. 9); *In the matter of Louis Leavitt*, 2 Stat. & Ct. Dec. of F.T.C. 334 (C.A. 2); *Louis Leavitt* v. *Federal Trade Commission*, 1 Stat. & Ct. Dec. of F.T.C. 582 (C.A. 2). All of these cases were tried without a jury.

[10] The *Cherokee Nation* case is discussed in 2 Warren, *The Supreme Court in United States History*, pp. 189–239.

[11] The present contempt does not involve "disrespect to or criticism of a judge" within the meaning of Rule 42(b) of the Rules of Criminal Procedure; nor does it arise out of a conflict in which the court became "personally embroiled" with the contemnor, as in *Offutt* v. *United States*, 348 U.S. 11, 17. See, also, the dissenting opinions of Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas in *Sacher* v. *United States*, 343 U.S. 1, 14–17, 23–42, 89. On the contrary, here the defendants are charged with disobedience of a written order involving no confrontation between court and contemnor. Accordingly, the traditional grounds for disqualifying the judges whose order was allegedly violated are inapplicable. Nor does the participation of the judges in the civil contempt proceedings against these defendants require their recusation, as one of the opinions below suggests (C. 123–127). We think it unnecessary to argue the ability of the court to distinguish the

ant in such a case receives the full protection of due process." He is presumed to be innocent, his guilt must be proved beyond a reasonable doubt, and he cannot be compelled to testify against himself. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444; *Michaelson* v. *United States*, 266 U.S. 42, 66. He receives notice of and has a reasonable opportunity to meet the charges against him, and has the right to counsel and the right to present his own witnesses and

differing elements involved in the criminal contempt proceedings and to approach the present case with a fresh mind, free of its findings in the prior civil contempt proceedings. In any event, the qualification of the judges cannot justify the transfer of the contempt hearing to the district court, which some of the opinions below seem to suggest (see C. 95–97, 123–127, 144–147, 164–167). The court whose order is involved must itself vindicate its authority. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 326; *In re Debs*, 158 U.S. 564, 594–596; *Ex Parte Tillinghast*, 4 Pet. 108. If need be, the chief judge of the court of appeals may assign district judges of the circuit to sit on the court of appeals, 28 U.S.C. 292(a), or he may request the Chief Justice to assign circuit or district judges from other circuits to compose the court. 28 U.S.C. 291(a), 292(c).

"In *Hawaii* v. *Mankichi*, 190 U.S. 197, 218, the Court held that the right to jury trial is not "fundamental" in nature and hence did not extend to the territories of the United States. Nor does it extend to state prosecutions through the due process clause of the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516. There is no right to trial by jury in a proceeding to deport an alien, *Turner* v. *Williams*, 194 U.S. 279; in a disbarment proceeding of an attorney, *Ex parte Wall*, 107 U.S. 265; in the extradition of an alien, *Ex parte La Mantia*, 206 Fed. 230 (S.D. N.Y.); in the court-martial of persons under military jurisdiction, *Kahn* v. *Anderson*, 255 U.S. 1; in cases of espionage and sabotage by enemies of the United States, *Ex parte Quirin*, 317 U.S. 1; in suits by the Government to recover a fine for violation of statutory requirements, *U.S.* v. *Zucker*, 161 U.S. 475; in criminal prosecutions for petty offenses, *District of Columbia* v. *Clarens*, 330 U.S. 617;

or to cross-examine others, *Cooke* v. *United States*, 267 U.S. 517, 537.

Throughout Anglo-American history contempt proceedings designed to impose sanctions for violation of the process or orders of the courts have been regarded as *sui generis* and hence not subject to all of the requirements attendant upon the conduct of ordinary criminal proceedings. More particularly, it has been thought essential to the dignity and to the effective functioning of the judiciary that the courts have power to vindicate directly their lawful decrees and that such enforcement should not be subject to the hazard that individual jurors might be unsympathetic. The reasons behind the original understanding have not changed. There is accordingly no warrant, now, to alter the traditional law of contempt. Certainly, the high office of the defendants in this case gives no occasion to fashion a special rule. "No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States* v. *Lee*, 106 U.S. 196, 220.

CONCLUSION

It is respectfully submitted that the question certified by the court of appeals should be answered in the negative.

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AUGUST 1963.

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, § 2, Par. 3 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its dis-

cretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 402 provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.
>
> This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U.S.C. 3691 provides:

> Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.
>
> This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

Rule 42(b) of the Federal Rules of Criminal Procedure provides:

> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order

of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Section 20 through 24 of the Clayton Act provided (38 Stat. 730, 738–740):

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be

not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.