IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

(April 9, 1963)

CERTIFIED QUESTION TO THE SUPREME COURT OF THE UNITED STATES AND ACCOMPANYING PAPERS.

INDEX

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CERTIFIED QUESTION FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before TUTTLE, Chief Judge, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

PER CURIAM: The above members of the Court of Appeals for the Fifth Circuit, sitting en banc, being evenly divided in their opinion as to the correct answer to a question of law arising in this cause, and the Court, desiring instruction concerning it for the proper decision of the cause which is now pending before the Court, hereby certifies the following question to the United States Supreme Court:

> 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?

A statement of the nature of the cause and of the facts on which the certified question arises and separate opinions of the members of the court follow.

A statement of the nature of this cause and of the facts on which the certified question arises, as required by Supreme Court Rules 28-29 follows:

The case presents the certified question of law relating to criminal contempt arising out of the case of *James H. Meredith, et al v. Charles Dickson Fair, et al.*, No. 19475. This Court in the opinion of June 25, 1962, in *Meredith v. Fair*, 5 Cir., 1962, 305 F. 2d 343, cert. denied, 1962, — U. S. —, 83 S. Ct., 49, — L. Ed 2d —, reversed the decision of the District Court and remanded it with directions.[1]

[1]On January 12, 1962, this Court at 298 F. 2d 696 affirmed the denial of the preliminary injunction by the District Court and

Thereafter on July 27, 1962, this Court by opinion and order at 306 F. 2d 374, took further action. After setting aside a stay of execution of this Court's mandate pursuant to 28 USCA § 2101 (f) by one of the Judges of this Court, the Court then directed that its mandate be recalled and amended in order to make "explicit the meaning that was implicit in this Court's conclusions as expressed throughout its opinion in this cause dated June 25, 1962." 306 F. 2d 374, 378. The opinion then prescribed the terms of the amended mandate and order. The case was reversed and remanded with directions to the District Court "to grant all relief prayed for * * * and to issue forthwith a permanent injunction against each and all of the defendants-appellees * * * enjoining and compelling each and all of them to admit * * * Meredith, to the University of Mississippi * * *. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi. * * *." This Court then said it would order its own injunction in these terms:

> "Pending 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 by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi, this Court here-

issued the Court's mandate forthwith to permit an early trial on the merits. On February 12, 1962, at 305 F. 2d 341, the Court denied Meredith's application for a preliminary injunction pending appeal from the denial of injunctive relief by the District Court following trial on the merits.

with issues it own preliminary injunction enjoining and compelling each and all of said parties to admit plaintiff-appellant to, and allow his continual attendance at the University of Mississippi, further prohibiting and preventing said parties or any of them from excluding said plaintiff-appellant from attendance to and continued attendance thereafter on the same basis as other students at the University of Mississippi." 306 F. 2d 374, 378.

2. On July 28, 1962, a formal order was entered by this Court in like terms to effectuate the amended mandate and orders to the District Court and providing for the preliminary injunction issued by this Court. This order was also stayed, but on August 4, 1962, this Court vacated the stay or stays granted on July 28 and July 31, 1962.[a]

This order likewise being stayed, the matter was presented by Meredith to Mr. Justice Black, Circuit Justice, who on September 10, 1962, vacated all of these stays with the further order "that the judgment and mandate of the Court of Appeals shall be effective immediately" and "pending final action by this Court on the petition for writ of certiorari" the "respondents be, and they are hereby, enjoined from taking any steps to prevent enforcement of the United States Court of Appeals' judgment and mandate."[a] — U. S. —, 83 S. Ct. 10, — L. Ed. 2d —, 7 Race

[a]Per Curiam opinion August 4, 1962, not yet reported, see Race Relations Law Reporter, Volume 7, Fall 1962, p. 743. The most complete report of the actions and orders taken in connection with this matter is in Volume 7 of Race Relations Reporter; Citations are, therefore, generally to this report.

[a]On September 13, 1962, the District Court entered its injunction reciting that "This matter is now before this Court by virtue of the mandate of the United States Court of Appeals for the Fifth Circuit and the mandate of Mr. Justice Black of September 10, 1962, setting aside all stays • • • and putting into effect the mandates of the Court of Appeals for the Fifth Circuit • • • of July 17, 1962, July 27, 1962 and • • • its final order of August 4, 1962 • • •." Race Relations Law Reporter p. 746.

[a]Also published 7 Race Relations Law Reporter, P. 748.

Relations Law Reporter, Fall 1962, p. 745.

3. On September 18, 1962, this Court (Judges Brown, Wisdom and Bell), after first ascertaining from the District Court that it declined to enter an order in this form, entered its order allowing the United States to appear in the case. The order recited "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 these proceedings • • •," the order then prescribed:

"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 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."[a]

4. On September 20, 1962, the United States filed an application for further injunctive orders. This verified petition brought to the attention of this Court the fact that on September 19, 1962, in *Meadors et al v. James Meredith et al*, the Chancery Court, Second District, Jones County, Mississippi, Cause No. 19365, had issued its injunction against Meredith, the 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 Marshals and Deputy Marshals. The order of the State Court enjoined and prohibited such persons "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; * * *."[5]

The Government's application also advised the Court of the enactment by the Mississippi Legislature approved by the Governor of Mississippi Senate Bill No. 1501, the effect of which made it a criminal offense for a person to "* * * attempt * * * to enroll in any of the institutions" of higher learning specified in the Act.[6] The application likewise informed the Court of the action of the Justice of the Peace Court in Jackson, Mississippi, on September 20, 1962.

On September 20, 1962, this Court (Circuit Judges Brown, Wisdom and Bell) entered its further injunctive order. It recited that "This matter is now before this Court on Petitions for Orders supplementing this Court's Order of July 28, 1962, to (1) restrain the enforcement of S.B. 1501 * * *; (2) restrain any compliance with or enforcement of the injunction issued by the Chancery Court of Jones County, Mississippi, dated September 19, 1962 * * *; (3) restrain the arrest of James Meredith on a conviction had in the Justice of the Peace Court in Jackson, Mississippi, on September 20, 1962 * * *." The court further recited that it "appearing that S.B. 1501; the aforesaid injunction issued by the State Court and the conviction of James Meredith each constitute an interference with and obstruction of this Court's injunction of July 28, 1962." This Court thereupon ordered "that the appellees-respondents, their agents, employees and persons acting in concert with them or persons having actual notice of this order, including law enforcement and public officials in Mississippi, State, County and Municipal * * *" were enjoined and restrained from "(1) enforcing * * * the provisions of S.B. 1501 against James Meredith, or any other persons * * *, (2) taking any steps to effectuate the conviction and sentence on September 20, 1962, in the Justice of the Peace Court in Jackson, Mississippi * * *; or arresting him or any other persons including federal officials or taking * * * any other action which has the purpose or effect of interfering with the enrollment of James Meredith * * *, (3) taking or refraining from taking any action to comply with or to enforce the injunction issued by the Chancery Court of Jones County, Mississippi, on September 19, 1962 * * *." The order concluded with this paragraph: "(4) This order is not intended to limit the authority of the District Court to proceed with respect to the matters referred to in paragraphs (1) and (2) of this order."[7]

[5] This injunction is reported at 7 Race Relations Law Reporter p. 748.

[6] See 7 Race Relations Law Reporter, p. 750.

[7] The order is published in 7 Race Relations Law Reporter, p. 752.

5. On September 21, 1962, the United States, amicus curiae, filed an application seeking an order to show cause why the Board of Trustees and certain administrative officials of the University should not be held in civil contempt.

This Court (Circuit Judges Brown, Wisdom and Bell) on September 21, 1962, entered its show cause order. The order recited that it "appearing from the application of the United States, *amicus curiae*, filed this day, that each of the defendants above named has failed and refused to comply with the terms of this Court's order of July 28, 1962, and are presently persisting in such failure and refusal, • • •." Thereupon the Court ordered that the named trustees "appear personally before this Court on September 24, 1962, at 11 a.m. o'clock in the Courtroom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, to show cause, if any they have, why they should not be held in civil contempt." The order went on to provide, however, that since the Court was advised that the District Court had ordered the named University administrative officials to show cause and that a hearing on the alleged contempt was then fixed for hearing in the District Court for that day (September 21, 1962) the application to that extent was denied.*

6. On September 22, 1962, this Court (Circuit Judges Brown, Wisdom and Bell) entered its further show cause order. The order recited that it "• • • appearing from the verified petition of the United States of America, that [the named administrative officials of the University of Mississippi] together with the other respondents named in this Court's order of September 21, 1962, have failed and refused, and are now failing and refusing, to comply with this Court's order of July 28, 1962, • • • by failing and refusing to enroll and register, and admit to continued attendance at the University of Mississippi, James Howard Meredith • • •." The Court thereupon ordered the named administrative officials "be made additional respondents to the show cause order of this Court of September 21, 1962, and that they show cause, if any they have, on September 24, 1962 • • •" at New Orleans why they should "not be held in civil contempt by reason of their failure and refusal to obey the order of this Court of July 28, 1962, and the other orders of this Court requiring the respondents to register and enroll and admit to continued attendance at the University of Mississippi James Howard Meredith."

*The District Court on September 21, 1962, after hearing found each of the University officials not guilty and discharged the contempt proceedings. 7 Race Relations Law Reporter 754.

7. By a majority vote of all of the active Judges, this Court convened (Judge Cameron absent on account of illness) en banc for the hearing of September 24, 1962, at New Orleans. On that hearing the Court heard extensive testimony bearing upon actions of the Board of Trustees, the administrative officials of the University, Governor Ross Barnett and other governmental officials showing that up to that time Meredith although he had presented himself for admission, had not been admitted to the University as previously ordered by this Court. This evidence included the fact of the Board of Trustees' resolution of September 20, 1962, by which the Board invested Governor Barnett "with the full power, authority, right and discretion of this Board to act upon all matters pertaining to or concerned with the registration or non-registration, admission or non-admission and/or attendance or non-attendance of James

H. Meredith • • • and that a certified copy of this Resolution together with copies of the conflicting injunctions of Honorable S. C. Mize dated September 13, 1962, and Chancellor L. B. Porter dated September 19, 1962 previously served upon the members of this Board, be furnished to the Governor • • • for such course of action as the Governor shall deem legal, fit and proper in the premises."* The evidence also included the Governor's published television speech to the people of Mississippi which included the following statement:

> • • • Therefore, in obedience to legislative and constitutional sanction, I interpose the rights of the Sovereign State of Mississippi to enforce its laws and regulate its internal affairs without interference on the part of the Federal Government or its officers and, in my official capacity as Governor of the State of Mississippi, I hereby make this proclamation:
>
> —Whereas, the United States of America consists of fifty Sovereign States bound together basically for their common welfare; and
>
> —Whereas, the Constitution of the United States of America provides that each state is sovereign with respect to certain rights and powers; and
>
> —Whereas, pursuant to the 10th Amendment to the Constitution of the United States, the powers not specifically delegated to the Federal Government are reserved to the several states; and

*This resolution is published at 7 Race Relations Law Reporter 782.

> —Whereas, the operation of the public school system is one of the powers which was not delegated to the Federal Government, but which was reserved to the respective states pursuant to the terms of the 10th Amendment; and
>
> —Whereas, we are now face to face with the direct usurpation of this power by the Federal Government through the illegal use of the judicial decree:
>
> Now, therefore, I, Ross R. Barnett, as Governor of the Sovereign State of Mississippi, by authority vested in me, do hereby proclaim that the operation of the public schools, universities and colleges of the State of Mississippi is vested in the duly-elected and appointed officials of the State of Mississippi and I hereby direct each of said officials to uphold and enforce the laws duly and legally enacted by the Legislature of the State of Mississippi, regardless of this unwarranted and illegal and arbitrary usurpation of power; and to interpose the State Sovereigntry and themselves between the people of the state and any body-politic seeking to usurp such power.

In the course of that hearing the President of the Board of Trustees of Higher Learning announced in open court on behalf of himself and the 12 members of the Board "that the Board was now ready and willing to fully perform all things ordered and directed by the former orders of this Court • • •." Likewise, the Registrar of the University of Mississippi "announced in open court 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 as a student • • • James H. Meredith in accordance with the orders of this Court • • •."

8. At the conclusion of the hearing, the Court en banc entered its order of September 24, 1962.[10]

After reciting the statements by the President of the Board of Trustees and the Registrar quoted in the preceding paragraph, the Court ordered the respondents to "fully and completely comply with all of the terms of the order of this Court dated July 28, 1962, including, but not limited to • • •" specific actions described in subparagraphs a, b, c, d, e. Subparagraph (b) required that the Board "revoke and rescind the action of the Board taken on September 20, 1962, appointing Ross R. Barnett, • • • as the agent of the Board to act upon all matters pertaining to the registration and admission of James H. Meredith." Subparagraph (d) required the Board to instruct the University officials "to register and receive James H. Meredith for actual admission • • •" and attendance at the University. Subparagraph (e) required that the Registrar "be available at Jackson, Mississippi, at the office of the • • • Board of Trustees, at the hours therein specified on September 25, 1962, for the purpose of the registration of the said James H. Meredith and his actual admission to, and the continued attendance thereafter at, the University. The order required counsel for the respondents to advise the Court by 6:00 p.m., September 25, 1962, as to the actions taken to comply with this order.

[10]The order is published in full at 7 Race Relations Law Reporter 755.

9. On the evening of September 24, 1962, the Government presented to this Court an application for a temporary restraining order against the State of Mississippi, Ross R. Barnett, Governor, the Attorney General, the Commissioner of Public Safety, two District Attorneys, various Sheriffs, Chiefs of Police, and all Sheriffs of the Counties of Mississippi. At 8:30 o'clock a.m., September 25, 1962, this Court (Chief Judge Tuttle, Circuit Judges Rives and Wisdom) entered its temporary restraining order.[11] That order recites that it "appearing from the verified petition of the United States, amicus curiae • • • that the State of Mississippi, Ross R. Barnett, Governor [and the others mentioned] • • • threatened to implement and enforce, unless restrained by order of this Court, the provisions of a Resolution of Interposition • • •, the provisions of § 4065.3 of the Mississippi Code, and a proclamation of Ross R. Barnett invoking the doctrine of Interposition • • •; that Paul G. Alexander has instituted two criminal prosecutions against • • • Meredith on account of the efforts of • • • Meredith to enroll in the University • • • pursuant to the orders of this Court; that A. L. Meador, Sr. • • • on September 19, 1962, instituted in the Chancery Court of the Second Judicial District of Jones County, Mississippi, a civil action against • • • Meredith to prevent him from attending the University • • •; that on September 20, 1962, James Howard Meredith, while seeking to enroll at the University • • • in Oxford, Mississippi, pursuant to the orders of this Court, was served with a writ of injunction issued by the Chan-

[11]This restraining order is set out at length in 7 Race Relations Law Reporter 756.

cery Court of Lafayette County, Mississippi at the instance of Ross R. Barnett, enjoining James Howard Meredith from applying to or attending the University of Mississippi; that on September 20, 1962, the State of Mississippi enacted Senate Bill 1501, the effect of which is to punish James Howard Meredith should he seek enrollment in the University • • •." The Court proceeded to find that "the effect of the conduct of the defendants herein named in implementing the policy of the State of Mississippi as proclaimed by Ross R. Barnett will necessarily be to prevent the carrying out of the orders of this Court and of the District Court for the Southern District of Mississippi; and that the acts and conduct of the defendants named in the petition will cause immediate and irreparable injury to the United States consisting of the impairment of the integrity of its judicial processes, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States • • •." On the basis of this, the Court entered its temporary restraining order as to the State of Mississippi, Ross R. Barnett, the Attorney General and others restraining them from:

1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his attending, or seeking to attend, the University of Mississippi;

2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Meredith's enrolling or seeking to enroll, or attending the University of Mississippi;

3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty.

IT IS FURTHER ORDERED that Paul G. Alexander and J. Robert Gilfoy be temporarily restrained from proceeding further, serving or enforcing any process or judgment, or arresting

James Howard Meredith in connection with the criminal actions against him in the justice of the Peace Court of Hinds County, Mississippi.

IT IS FURTHER ORDERED that A. L. Meador, Sr., be temporarily restrained from taking any further action or seeking to enforce any judgments entered in the case of A. L. Meador, Sr., v. James Meredith, et al.

IT IS FURTHER ORDERED that Ross R. Barnett be temporarily restrained from enforcing or seeking to enforce against James Howard Meredith, any process or judgment in the case of State of Mississippi, Ex Rel Ross Barnett, Governor v. James H. Meredith.

10. Later that same night, September 25, 1962, this Court (Circuit Judges Rives, Wisdom and Gewin) entered an order requiring Ross R. Barnett to appear "personally before this Court on September 28, 1962, at 10:00 o'clock in the Courtroom of the United States Court of Appeals for the Fifth Circuit, • • • New Orleans, Louisiana, to show cause, if any he has, why he should not be held in civil contempt of the temporary restraining order entered by the Court this day."[12]

This order recited the matters occurring in open court on September 24, and the orders heretofore described issued to the Board of Trustees and the administrative officials of the University and the issuance earlier that day of the temporary restraining order. The order then recited that

[12]This order is reported at 7 Race Relations Law Reporter 750.

it "appearing from the verified application of the United States, amicus curiae herein, that on the afternoon of this day Ross R. Barnett, having been served with a copy of the temporary restraining order • • • having actual knowledge of the terms of that order, deliberately prevented James H. Meredith from entering the office of the Board of Trustees in Jackson, Mississippi at a time when James H. Meredith was seeking to appear before Robert B. Ellis in order to register • • • and that by such conduct Ross R. Barnett did willfully interfere with and obstruct James H. Meredith in the enjoyment of his rights under this Court's order of July 28, 1962, and did willfully interfere with and obstruct Robert B. Ellis in the performance of his obligations under this Court's order of July 28, 1962, all in violation of the terms of the temporary restraining order entered by the Court this day."

11. On the next day, September 26, this Court (Circuit Judges Rives, Brown and Wisdom) entered a similar order to show cause addressed to Lieutenant Governor Paul B. Johnson, Jr. fixing the time of hearing for Saturday, September 29, 1962, at New Orleans.[13]

This order recited that it "appearing from the verified application of the United States, amicus curiae herein, that Paul B. Johnson, Jr. • • • after receiving actual and constructive notice of the terms of this Court's temporary restraining order of September 25, 1962, and while acting in concert and active participation with Ross R. Barnett, • • • prevented James H. Meredith from entering the campus of the University of Mississippi • • • and did thereby

[13]This order is published at 7 Race Relations Law Reporter 760.

prevent James H. Meredith from enrolling in and attending the University * * *" and with the purpose of interfering with this Court's previous orders.

12. On September 28, 1962, this Court sitting en banc (Judge Cameron not sitting) heard the order to show cause as to Ross R. Barnett. It heard witnesses in open court including documentary evidence consisting of moving picture newsreel pictures of the occurrences by Ross R. Barnett during the efforts of James H. Meredith to enter the offices of the University of Mississippi at Jackson, Mississippi, for the purpose of registering and attending the University. This evidence included a copy of the terms of the Governor's proclamation addressed to James H. Meredith on September 25, 1962.[14] It proclaimed:

> I, Ross R. Barnett, Governor of the State of Mississippi, having heretofore by proclamation, acting under the police powers of the State of Mississippi, interposed the sovereignty of this State on September 20, 1962, denied to you, James H. Meredith, admission to the University of Mississippi under such proclamation and for such reasons, do hereby finally deny you admission to the University of Mississippi.

At the conclusion of these hearings on September 28, the Court entered its order, findings of fact and conclusions of law and judgment of civil contempt.[15]

[14] This proclamation is published in 7 Race Relations Law Reporter 750.

[15] This order is set out in full in 7 Race Relations Law Reporter 761. Petition for writ of certiorari as to this order was denied by the Supreme Court in February, 1963. — U. S. —, — U. S. L. W. —

The order recited that though required to appear in person, Ross R. Barnett failed to appear or respond in person or by counsel, but that upon hearing the evidence, it made its findings of fact based thereon, as follows:

1. Since this Court entered its order of July 28, 1962, and the District Court for the Southern District of Mississippi entered its order on September 13, 1962, requiring the admission of James H. Meredith to the University of Mississippi, Ross R. Barnett, as Governor of the State of Mississippi, has issued a series of proclamations calling upon all officials of the state to prevent and obstruct the carrying out of the Court's orders with respect to the admission of James H. Meredith to the University. Two of these proclamations were issued by Ross R. Barnett on September 24 and September 25, 1962.

2. On September 25, 1962, this Court entered its temporary restraining orders restraining Ross R. Barnett from interfering with or obstructing in any manner or by any means the enjoyment of rights or the performance of obligations under this Court's order of July 28, 1962 and the order of the District Court of September 13, 1962.

3. At approximately 4:30 P.M. on September 25, 1962, Ross R. Barnett, having full knowledge of the existence and terms of this Court's temporary restraining orders, went to the office of the Board of Trustees of Institutions of Higher Learning to Jackson, Mississippi at a time when James

H. Meredith was due to appear at the office to be enrolled as a student in the University of Mississippi, pursuant to the order of this Court. When James H. Meredith arrived at the office and sought to enter for the purpose of enrolling, Ross R. Barnett deliberately prevented him from entering and told him that his application for enrollment was denied by Ross R. Barnett.

4. On September 26, 1962, James H. Meredith sought to enter the campus of the University of Mississippi in Oxford, Mississippi. He was prevented from entering by Paul B. Johnson, Jr., Lieutenant Governor of the State of Mississippi, acting pursuant to the instructions and under the authorization of Ross R. Barnett.

5. The conduct of Ross R. Barnett in preventing James H. Meredith from enrolling as a student in the University of Mississippi has been with the deliberate and announced purpose of preventing compliance with the orders of this and other federal courts.

On the basis of these findings, this Court concluded that "Ross R. Barnett is in contempt of the temporary restraining orders entered by this Court on September 25, 1962," and it thereupon "ordered, adjudged and decreed that: Ross R. Barnett is in civil contempt • • •; that such contempt is continuing; • • •," and thereafter civil sanctions were imposed in the following terms:

• • • Ross R. Barnett shall be committed to and

remain in the custody of the Attorney General of the United States and shall pay a fine to the United States of $10,000 per day unless on or before Tuesday, October 2nd, 1962 at 11:00 A.M. he shows to this Court that he [is] fully complying with the terms of the restraining orders, and that he has notified all law enforcement officers and all other officers under his jurisdiction or command:

> (a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;
>
> (b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.

Judge Jones, Gewin and Bell dissented from that part of the judgment imposing a fine upon Governor Barnett.

13. On Saturday, September 29, 1962, this Court (Circuit Judges Rives, Brown and Wisdom) heard the order to show cause addressed to Lieutenant Governor Paul B.

Johnson, Jr., and after hearings and findings of fact entered its order holding Paul B. Johnson, Jr. in contempt and imposing civil sanctions.[9] This order and the sanctions imposed were stated as follows:

> Paul B. Johnson, Jr. is in civil contempt of the temporary restraining order of this Court entered on September 25, 1962 upon application of the United States, amicus curiae, that such contempt is continuing and that Paul B. Johnson, Jr. shall pay a fine to the United States of $5,000.00 per day unless on or before October 2, 1962 at 11:00 A.M. he shows to this Court that from and after the time of the issuance of this order he has been, and is, in full compliance with the terms of the restraining order, that he intends to do so in the future and that he will, during any periods of time that he is acting for on on behalf of, or in the name, place and stead of, or with the authority or power of, or as Governor of the State of Mississippi, notify all law enforcement officers and all other officers under his jurisdiction or command:
>
> (a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;
>
> (b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith shall be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students.
>
> In the event that Paul B. Johnson, Jr., while acting for, or on behalf of, or in the name, place or stead of, or with the authority or power of, or as Governor of the State of Mississippi fails at any time to take steps set forth in sub-paragraphs (a) and (b) he shall, on a finding of such fact by the Court, be committed to the custody of the Attorney General and shall pay a fine to the United States of $10,000.00 per day, such daily fine and imprisonment to continue during such period as he fails to purge himself of such contempt.

14. On October 2, 1962, pursuant to the time fixed in the contempt order of September 28, 1962, Governor Ross R. Barnett appeared before this Court through his counsel. In answer to questions from the Court, counsel stated that Governor Barnett was in full compliance with the Court's orders and would fully comply with the orders of the Court in the future to the extent to which he was able to do so. Upon this representation being made, the matter was continued until October 12, 1962, for further hearing before the Court en banc.

[9]This order is published at 7 Race Relations Law Reporter 762.

15. On October 12 in New Orleans the Court en banc (Judges Hutcheson and Cameron not sitting) held a further hearing on whether Governor Ross R. Barnett and Paul B. Johnson, Jr. had purged themselves. Submitted also was the motion filed by the State of Mississippi to dissolve the temporary restraining order and to dismiss the pending contempt proceedings. In connection with the question of whether he had purged himself of the civil contempt as previously adjudged, Respondent Barnett did not appear in person on October 12, but again he appeared by counsel. Counsel offered no proof, either by affidavit, oral testimony, or otherwise, bearing on the conduct of respondent following the contempt judgment. However, on that date counsel for Governor Barnett retracted their statements that Governor Barnett intended in the future fully to comply so far as he was able with the orders of the Court. Moreover, on October 19th Governor Barnett filed a response through his counsel to which he attached a statement which he had publicly delivered on October 17. The substance and effect of this statement, and thus the substance and effect of Respondent's posture before this Court is that Governor Barnett will and must reserve the right to determine whether compliance with, and enforcement of, this Court's orders are consistent with his duties, rights and obligations as Governor of the State of Mississippi.[17]

[17]The full statement follows:

I have never taken the position that I have purged myself, nor have I authorized anyone to take such a position on my behalf. My position is that I have upheld the law and am not in contempt of any Court.

It is my position that my first obligation as the Governor of Mississippi, is to my oath of office to uphold the Constitution and Laws of Mississippi and the Constitution of the United States, and to preserve law and order. The people of Mississippi built this University and their schools at great sacrifice. These properties and their control belong to the State, and the Supreme Court of the United States has expressly so ruled in Waugh v. University of Mississippi, 237 U. S. 589.

All of the actions that I have taken were taken because of my duty to obey my oath as Governor, and as long as I am the Governor of this State, all actions that I will take in the future will be in obedience of this oath.

I conscientiously believe that it is my duty, as Governor, deliberately, solemnly, and fully, and free from the control or interference of anyone to exercise, according to my own judgment and my own discretion, the duties the people have entrusted to me as their Governor. I would not be faithful to my oath of office, should I surrender to any Federal or other Courts the rights to exercise those discretionary powers the law has placed in me, to maintain law and order, to prevent a breach of the peace, violence or bloodshed, and my discretion must remain free. I shall ever and eternally stand for the exercise of my own discretion in my own right, and shall repudiate the right of anyone to take that discretion away from me and exercise it in my behalf. The Constitutions of the United States and the State of Mississippi provide for the separation of the Judicial, Executive and Legislative functions. The people have never given any right to any one of these departments to act for the other.

If any act that I have done as Governor or any act I shall do as Governor in the future causes any person to believe that I have violated his right, the Courts are open to challenge me again in a proper court proceeding. Mississippi has not yet had her day in Court.

My position is based upon the Constitution of the United States and the Constitution and Laws of the State of Mississippi. My every decision in this matter has been formed after careful and deliberate consideration of what I believe to be the law. I have not changed my position in the slightest degree. I shall never apologize for anything I have said or done in this regard because I have acted in good faith in discharging the duties entrusted to me. My conscience is clear. I am moved only by deep and abiding affection for the welfare of all the people of Mississippi. I shall ever keep the faith that the people of Mississippi have entrusted to me as their Governor.

However, the record shows that he did, in fact, between the contempt order of the Court on September 28, 1962, and the hearing on October 2, 1962, cease the physical resistance to the order of the Court directing the admission of James H. Meredith as a student at the University, which he had previously interposed personally and through other state officials. On the 30th day of September, 1962, the

President of the United States issued a proclamation in the following language:

> Whereas the Governor of the State of Mississippi and certain law enforcement officers and other officials of that State, and other persons, individually and in unlawful assemblies, combinations and conspiracies, have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit; and
>
> Whereas such unlawful assemblies, combinations and conspiracies oppose and obstruct the execution of the laws of the United States, impede the course of justice under those laws and make it impracticable to enforce those laws in the State of Mississippi by the ordinary course of judicial proceedings; and
>
> Whereas I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained;
>
> Now, therefore, I, John F. Kennedy, President of the United States, under and by virtue of the authority vested in me by the Constitution and laws of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstructions of justice to cease and desist therefrom and to disperse and retire peacefully forthwith.
>
> In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.
>
> Done at the city of Washington this 30th day of September in the year of our Lord Nineteen Hundred and Sixty-Two, and of the independence of the United States of America the One Hundred and Eighty-Seventh.
>
> s JOHN F. KENNEDY

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 our orders.

16. At that hearing the Court also considered the motion to dissolve the temporary restraining order and the motions of the United States to enter a preliminary injunction. The Court again heard and received all of the evidence that had previously been offered at the hearing of September 28 and 29.

17. On October 19, 1962, a majority of this Court en banc (Judges Hutcheson and Cameron not sitting and

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17. On October 19, 1962, a majority of this Court en banc (Judges Hutcheson and Cameron not sitting and

Judges Gewin and Bell stating that they thought the matter should be remanded to the District Court for further proceedings) entered its preliminary injunction. The seven members of the Court unanimously concluded.

> The posture of this case at the time this motion for temporary injunction and the accompanying motion for temporary restraining order were filed, is that this Court had issued its injunction, above referred to, prohibiting the officials of the University and the Trustees of the Institutions of Higher Learning of the State of Mississippi from interfering with the admission of James H. Meredith and his continuance as a student in the University of Mississippi, and also prohibiting certain of the defendants now before the Court from further prosecuting criminal proceedings against the said Meredith; whereupon, it was alleged in this petition, the State of Mississippi, through its official state policy, pursuant to actions of its Legislature, and through the actions of its Governor by proclamation, and all of the other respondents, were then engaged in actively frustrating the execution of this Court's injunction against the officials of the University. This proceeding, therefore, is purely ancillary to the original lawsuit, and this Court has ample power to proceed against any party, including the State of Mississippi, which is shown to be engaged in a wilful, intentional effort to frustrate this Court's injunction.
>
> The motion to dissolve the restraining order and the motion to dismiss the contempt proceedings by the State of Mississippi are, therefore, DENIED.
>
> The ruling just stated equally disposes of the contention made by the respondents that this Court is now powerless to issue the temporary injunction. We, therefore, hold that the Court has the power to issue the injunction against the persons not previously named as defendants in the main suit to prevent their active interference with this Court's injunction.
>
> The evidence adduced before this Court, neither attacked by respondents nor contended by them to be legally insufficient to warrant the granting of the relief sought, establishes the following facts:
>
> The State of Mississippi, Ross R. Barnett, Governor of Mississippi, Joe T. Patterson, Attorney General of Mississippi, T. B. Birdsong, Commissioner of Public Safety of Mississippi, Paul G. Alexander, District Attorney of Hinds County, William R. Lamb, District Attorney of Lafayette County, J. Robert Gilfoy, Sheriff of Hinds County, J. W. Ford, Sheriff of Lafayette County, William D. Rayfield, Chief of Police of the City of Jackson, James D. Jones, Chief of Police of the City of Oxford, Walton Smith, Constable of the City of Oxford, threaten to implement and enforce, unless restrained by order of this Court, the provisions of a Resolution of Interposition adopted by the Mississippi Legislature, the provisions of Section 4065.3 of the Mississippi Code, and a Procla-

mation of Ross R. Barnett invoking the doctrine of interposition with respect to the enforcement of the orders of this Court in this case; that Paul G. Alexander has instituted two criminal prosecutions against James Howard Meredith on account of the efforts of James Howard Meredith to enter the University of Mississippi pursuant to the orders of this Court; that on September 20, 1962, James Howard Meredith, while seeking to enroll at the University of Mississippi in Oxford, Mississippi, pursuant to the orders of this Court, was served with a writ of injunction issued by the Chancery Court of Lafayette County, Mississippi, at the instance of Ross R. Barnett, enjoining James Howard Meredith from applying to or attending the University of Mississippi; that on September 20, 1962 the State of Mississippi enacted Senate Bill 1501, the effect of which is to punish James Howard Meredith should he seek enrollment in the University of Mississippi; that the effect of the conduct of the defendants herein named to implementing the policy of the State of Mississippi, as proclaimed by Ross R. Barnett will necessarily be to prevent the carrying out of the orders of this Court and of the District Court for the Southern District of Mississippi; and that the acts and conduct of the defendants named in the petition will cause immediate and irreparable injury to the appellant Meredith and to the United States consisting of the impairment of the integrity of its judicial processes, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the

United States unless prevented by an order of the Court.

18. Thereafter this Court (Judges Hutcheson and Cameron not sitting) entered its order of November 15, 1962, which ordered that "The Attorney General of the United States, and such Attorneys in the Department of Justice as he may designate, be and they hereby are appointed by the Court to institute and to prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr., pursuant to Rule 42b of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962." The order recited that it appeared "from the pleadings filed and the oral testimony and documentary evidence already adduced in the proceedings on the petitions for temporary restraining order and for preliminary injunction and the civil contempt proceedings heretofore instituted against Ross R. Barnett and Paul B. Johnson, Jr. that proceedings should be instituted against the said Ross R. Barnett and Paul B. Johnson, Jr., to determine whether they are, or either of them is, guilty of criminal contempt of the orders of this court;"

19. Thereafter the United States through the Attorney General filed on December 21, 1962, its application for an order requiring Ross R. Barnett and Paul B. Johnson, Jr. to show cause why they should not be held in criminal contempt. This application alleged, in four numbered counts, certain conduct of Barnett and Johnson which were thereafter made the basis of this Court's order to show cause hereafter set out in Paragraph 21.

20. On January 3, 1963, the Court entered an order con-

stituting the Court en banc for the consideration of all matters relating to criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. (Judge Hutcheson "is excused from participating in the hearings and decisions of this Court by reason of conditions of his health").

21. Thereafter this Court en banc (Judges Cameron and Gewin dissenting) entered its order to show cause on January 4, 1963. The show cause order contained the following charges and order:

> Probable cause has been made to appear from the application of the Attorney General filed December 21, 1962, in the name of and on behalf of the United States that on September 25, 1962, Ross R. Barnett, having been served with and having actual notice of this Court's temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the offices of the Board of Trustees of the University of Mississippi in Jackson, Mississippi, and thereby deliberately prevented James H. Meredith from enrolling as a student in the University pursuant to this Court's order of July 28, 1962; that on September 26, 1962, Paul B. Johnson, Jr., acting under the authorization and direction of Ross R. Barnett, and as his agent and as an agent and officer of the State of Mississippi, and while having actual notice of the temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the campus of the University of Mississippi in Oxford, Mississippi, and thereby deliberately prevented James H. Meredith

> from enrolling as a student in the University, pursuant to the orders of this Court; that on September 27, 1962, Ross R. Barnett and Paul B. Johnson, Jr. wilfully failed to take such measures as were necessary to maintain law and order upon the campus of the University of Mississippi and did, instead, direct and encourage certain members of the Mississippi Highway Safety Patrol, Sheriffs and deputy Sheriffs and other officials of the State of Mississippi to obstruct and prevent the entry of James H. Meredith upon the campus of the University that day; that on September 30, 1962, Ross R. Barnett, knowing of the planned entry of James H. Meredith upon the campus of the University of Mississippi, knowing that disorders and disturbances had attended and would attend such entry, and knowing that any failure of the Mississippi Highway Patrol to take all possible measures for the maintenance of peace and order upon the campus could and would result in interferences with and obstructions to the carrying out of the Court's order of July 28, 1962, wilfully failed to exercise his responsibility, authority, and influence as Governor to maintain law and order upon the campus of the University of Mississippi; and that all of said acts, omissions and conduct of Ross R. Barnett and Paul B. Johnson, Jr., were 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 were in wilful disobedience and

defiance of the temporary restraining order of this Court entered on September 25, 1962.

IT IS ORDERED that Ross R. Barnett and Paul B. Johnson, Jr., appear before this Court in the courtroom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, on February 8, 1963, at 9:30 o'clock a.m., to show cause, if any they have, and why they should not be held in criminal contempt, and should either of them at said time and place show such cause, either by pleading not guilty to the charges contained in the application of the United States, or by other means, he shall thereafter appear before this Court for hearing upon said charges at a time and place to be fixed by the Court.

The Chief Judge of this Court then directed the Clerk, for convenience in handling all matters relating to the criminal contempt proceedings to assign a new number, No. 20,240, and a new caption, "United States v. Ross R. Barnett and Paul B. Johnson, Jr.", to the case.

Pursuant to notice from the Court, respondents filed nine motions and the State of Mississippi filed one motion to be considered at the hearing. These motions may be briefly described as follows:

1. Motion and plea of the State of Mississippi to dismiss the proceedings 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.

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, as indicated on the order of the Court filed this date, sustained the motion of the United States to strike the motion and plea numbered 1, overruled or denied motions numbered 2, 3, 4, 5 and 7, decided to certify the question raised by the motion numbered 6, and the motions numbered 8, 9 and 10 are not now passed on.

Consideration has been given to attaching as Exhibits certified photostatic copies of each and all of the pleadings, motions and orders referred to in the foregoing statement. The Court is of the view that this would be unnecessarily cumbersome since the summary or paraphrased statement of any such pleadings, motions and orders is not intended to modify them in any way, and the Supreme Court will, wherever appropriate, consider the exact terms of the pleadings, motions and orders which are incorporated by reference and which have been referred to in the opinions filed herein by the several Judges.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.
Defendants.

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

Before TUTTLE, Chief Judge, and RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, Circuit Judges.

TUTTLE, Chief Judge, and RIVES, BROWN and WISDOM, Circuit Judges: The United States entered the case of *James H. Meredith, et al. v. Charles Dickson Fair, et al., No. 19475*, pursuant to this Court's order of September 18, 1962, "that the United States be designated and authorized to appear and participate as amicus curiae in all pro-

ceedings 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 Mississippi, to accord each Court the benefits 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." (Emphasis supplied.)

In its order of November 15, 1962, this Court ordered "that the Attorney General of the United States, and such attorneys in the Department of Justice as he may designate, be and they are hereby appointed by the Court to institute and to prosecute criminal contempt proceedings against the said Ross R. Barnett and Paul B. Johnson, Jr., pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962."

On December 21, 1962, the United States applied to this Court "for an order requiring Ross R. Barnett and Paul B. Johnson, Jr., to show cause, if any they have, why they should not be held in criminal contempt of this Court for wilfully disobeying the temporary restraining order entered on September 25, 1962, in *United States v. State of Mississippi, et al.*, No. 19,475."

On January 3, 1963, this Court ordered that Ross R. Barnett and Paul B. Johnson, Jr. appear on February 8,

1963 and "show cause, if any they have, why they should not be held in criminal contempt either by pleading not guilty to the charges contained in the application of the United States, or by other means, and that they thereafter appear before this Court for hearing upon said charges at a time and place to be fixed by this Court."

On February 1, 1963, a number of motions and demands were filed in this case, captioned substantially as follows:

A. Motion and Plea of the State of Mississippi.

1. Motions of Barnett and Johnson to Dismiss All Proceedings in Original Action No. 20,240 for Lack of Process.

2. 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.

3. Second Alternative Motions of Barnett and Johnson to Dismiss Original Proceedings in cause No. 20,240 for Lack of Venue or Jurisdiction.

4. Third Alternative Motions of Barnett and Johnson to Dismiss all Pending Proceedings in Criminal Contempt for Lack of Grand Jury Presentment or Indictment.

5. 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.

6. Demands of Barnett and Johnson for Trial by Jury.

R1. Motions of Barnett and Johnson for Severance.

R2. Motion of Johnson to Strike the Third Charge contained in the Order to Show Cause of date January 4, 1963.

R3. Motion of Barnett to Strike the Third and Fourth Charges contained in the Order to Show Cause of date January 4, 1963.

Briefs in support of and in opposition to the said motions and demands were filed, and on February 8, 1963 this Court en banc heard daylong oral arguments. At that time this Court granted the motion of the United States to strike motion A, that is the "Motion and Plea of the State of Mississippi," but considered Mississippi's brief filed in support of that motion as a brief filed by an amicus curiae, and invited counsel for the State as amicus curiae to make oral argument before the Court. Thereafter, this Court denied the motions heretofore listed as numbers 1, 2, 3, 4 and 5, and reserved its rulings on the motions listed as numbers R1, R2 and R3.

We four Judges are in favor of denying the demands

listed as number 6; that is, the demands of the defendants for trial by jury. [Since this Court was unable to dispose of those demands by majority vote, we join in certifying to the Supreme Court of the United States the question thus presented. We state briefly the reasons for our view that the demands of the defendants for trial by jury should be denied.]

Logically and legally connected with the said demands, on the disposition of which our brothers do not agree with us, are the motions, listed as number 4, to dismiss the proceedings in criminal contempt for lack of grand jury presentment or indictment which all of our brothers with the exception of Judge Cameron have joined us in denying. In all of the books and records, so far as counsel have been able to advise us or as we have discovered, there is not a single precedent of any criminal contempt of court proceeding *ever* having been prosecuted by grand jury presentment or indictment. In *Green v. United States*, 1958, 356 U.S. 165, 187, the Supreme Court held that " . . . it is clear that criminal contempts, although subject, as we have held, to sentences of imprisonment exceeding one year, need not be prosecuted by indictment under the Fifth Amendment."[1]

It is elementary that the court against which a contempt is committed has exclusive jurisdiction to punish for such

[1] See also, Goldfine v. United States, 1 Cir. 1958, 268 F. 2d 941, cert. denied, 363 U. S. 842, 80 S. Ct. 1608, 4 L. Ed. 2d 1727; United States v. DeSimone, 2 Cir. 1959, 267 F. 2d 741, cert. denied, 361 U. S. 827, 41 L. Ed. 2d 70, 80 S. Ct. 74, cert. granted to vacate as moot, 361 U. S. 125, 4 L. Ed. 2d 167, 80 S. Ct. 253.

contempt. *In re Debs*, 1895, 158 U.S. 565, 595;[2] *Ex parte Bradley*, 1868, 74 U.S. 364, 377. To the principle that every court possesses the power to punish for criminal contempt committed against it, this Court of Appeals is no exception. Such power is "inherent." See *In re Debs*, *supra*, 158, U.S. at 596. Further, such power is expressly conferred by Title 18, United States Code, Section 401, which provides in part pertinent to the present case:

> "A court of the United States[3] shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
>
> . . . . . .
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

The defendants assert that this Court "is without statutory power or authority to summons a constitutional jury." While lack of a statutory procedure to obtain a jury would not satisfy a demand for a jury if one existed as a matter

[2] It is interesting to note that the Supreme Court quotes with approval from an opinion of the Supreme Court of Mississippi as follows:

"In *Watson v. Williams*, 36 Mississippi, 331, 341, it was said: 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.'"

[3] There can be no doubt that "court of the United States" includes this Court of Appeals. See 28 U.S.C.A. § 451; 10 Words and Phrases, Perm. ed., pp. 272-275, and pocket supplement.

of constitutional right, the complete absence of any such mechanism is strong evidence that Congress has not impliedly recognized any such right as a statutory one.

The defendants insist, however, that they do have a constitutional right of trial by jury under one or more of the following provisions of the Constitution:

ARTICLE III, §2, Par. 3.

> "The trial of all crimes . . . shall be by Jury; and such trial shall be held in the State where the said crimes shall have been committed . . . ."

AMENDMENT V.

> "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 subject for the same offense to be twice put in jeopardy of life or limb . . . ."

AMENDMENT VI.

> "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, . . . and to be informed of the nature and cause of the accusation . . . ."

AMENDMENT VII.

"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."

In support of their insistence on a constitutional right of trial by jury, the defendants have advanced not a single argument which has not already been considered and ruled adversely to their views by the Supreme Court of the United States. As lately as 1958, in *Green v. United States*, *supra*, the Supreme Court held that criminal contempts are not subject to jury trial as a matter of constitutional right. We four judges consider that decision as binding upon us. Further, with deference to the dissenting Justices, it is our opinion that the views of the majority of the Supreme Court as there expressed are soundly based not only on precedent, as must be conceded, but also on reason and logic. It would be threshing old straw for us to say more on the question of constitutional right.

There being no constitutional right to trial by jury, we look next to the statutes. As has already been commented, the defendants contend, and we agree, that this Court "is without statutory power or authority to summons a constitutional jury." Further, as has been mentioned, this Court possesses the power to punish for criminal contempt confirmed by Title 18, United States Code, Section 401. It would then be strange indeed to find that some other statute

grants to the defendants a right of trial by jury, and we find no such statute.

It would appear that, prior to the occasions here involved, there had never been such willful disobedience or resistance to an order, judgment or decree of a Court of Appeals of the United States as to make necessary the institution of original proceedings in criminal contempt. We do find such a proceeding for contempt of the Supreme Court of the United States, viz: *United States v. Shipp*, 1906, 203 U.S. 563; 1909, 214 U.S. 386; 1909, 215 U.S. 580. That proceeding was disposed of by the Supreme Court without the intervention of a jury. We find in the opinions of the Court no discussion of any right of trial by jury, but it clearly appears from the following part of the "Argument for the United States," as reported in 203 U.S. 564, that the subject was not overlooked:

"There is no right to a trial by jury in contempt cases. *Eilenbecker v. Plymouth County*, 134 U.S. 31; *Ex parte Terry*, 128 U.S. 289; *Ex parte Sarin*, 131 U.S. 267; *Ex parte Cuddy*, 131 U.S. 280; *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 489; *In re Debs*, 158 U.S. 564."

In directing the Attorney General of the United States to institute and prosecute criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. "pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure," there was no intimation that the proceedings be instituted or prosecuted in a district court. Those rules apply to all criminal proceedings in the United States Courts of Appeals. Rule 54(a)(1), Federal Rules of Crimi-

nal Procedure. Further, "Rule 42 of the Federal Rules of Criminal Procedure is no innovation. It simply makes 'more explicit' the long-settled usages of law governing the procedure to be followed in contempt proceedings." *Brown v. United States*, 1959, 359 U.S. 41, 51. See also, *Offutt v. United States*, 1954, 348 U.S. 11, 13, 14. *Sacher v. United States*, 1952, 343 U.S. 1, 7.

Rule 42 b) provides that, "The defendant is entitled to a trial by jury in any case in which an act of Congress so provides." That provision, and the acts of Congress to which it refers, constitute clear recognitions of the absence of any constitutional right of the defendants to trial by jury.

The only statutes upon which the defendants rely are Sections 402 and 3691 of Title 18, United States Code, which read as follows:

> "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.A. § 402.
>
> "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." 18 U.S.C.A. §3691.

By explicit language, Section 3691 is limited to contempts which "consist in willful disobedience of any lawful writ, process, order, rule, decree or command of *any district court* of the United States."[4] (Emphasis supplied.) It has no application to a proceeding for contempt against a Court of Appeals. Section 402 refers to "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* . . . ." (Emphasis supplied.

The defendants argue that "any court of the District of Columbia" as used in Section 402 includes the United States Court of Appeals for the judicial circuit composed of the District of Columbia. See Sections 41 and 43 of Title 28, United States Code. As appears from the "Historical and Revision Notes" appended to 18 U.S.C.A. §402, that section was derived from the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, which had conferred extensive jurisdiction under the antitrust laws on the district courts

[4]The term "district court of the United States" means one of the courts constituted by Chapter 5 of Title 28, United States Code. — See 28 U.S.C.A. § 451; 13 Words & Phrases, Perm. ed. p. 41.

of the United States and the courts of the District of Columbia. It seems clear to us that "any court of the District of Columbia" as used in Section 402 does not include the United States Court of Appeals for the District of Columbia Circuit.

Let us, however, *arguendo* assume that point to be in accord with the contention of the defendants. By some sort of "tail wags dog" argument the defendants would then extend "any court of the District of Columbia" to include all of the other ten United States Courts of Appeals. That remarkable feat is accomplished simply by waving the wand of Article IV, Section 2, Clause 1 of the Constitution of the United States, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The short answer to that argument is that, "Section 2 of Article IV is inapplicable to the District of Columbia. It is a limitation upon the powers of the states and in no way affects the powers of Congress over the territories and the District of Columbia." *Duehay v. Acacia Mut. Life Ins. Co.*, D.C. Cir., 1939, 105 F. 2d 768, 775. See also, *Martinsen v. Mullaney*, D.C. Alaska, 1949, 85 F. Supp. 76, 79.

It seems to us beyond controversy that there is no act of Congress granting to a defendant charged with criminal contempt for disobedience or resistance to a "lawful writ, process, order, rule, decree, or command" (18 U.S.C.A. §401 (3)) of a United States Court of Appeals a right of trial by jury. So clearly does that appear that we make extremely brief our discussion of another sound reason why Sections 402 and 3691 do not apply to the contempts charged against the defendants; viz: that such contempts are charged

to have been committed in disobedience of a lawful writ, etc. "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." Sections 402 and 3691 of Title 18, United States Code.

This Court's order of September 18, 1962, from which we have quoted at the beginning of this opinion, constituted the United States as something more than a mere amicus curiae. Pursuant to that order, the United States was " . . . 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." *Faubus v. United States*, 8 Cir., 1958, 254 U.S. 797, 805, cert. denied, 358 U.S. 829.[8]

Upon a verified petition filed by the United States, this Court on September 25, 1962, issued its order temporarily restraining, among others, Ross R. Barnett "and all persons in active concert or participation" with him from

"1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his

[8] See also, Bush v. Orleans Parish School Bd., E.D. La. 1960, 188 F. Supp. 916, aff'd, 365 U.S. 569, 5 L. Ed. 2d 806, 81 S. Ct. 754 (1961); Bush v. Orleans Parish School Bd., E.D. La. 1960, 190 F. Supp. 861, aff'd sub nom. New Orleans v. Bush, 1961, 366 U.S. 212, 6 L. Ed. 2d 239, 81 S. Ct. 1021; Bush v. Orleans Parish School Board, E.D. La. 1961, 191 F. Supp. 871, aff'd, 368 U.S. 11 (1961), 7 L. Ed. 2d 75, 82 S. Ct. 119; Hall v. St. Helena Parish School Board, E.D. La. 1961, 197 F. Supp. 649, aff'd 368 U.S. 515, 7 L. Ed. 2d 521, 82 S. Ct. 529; Allen v. State Bd. of Educ., No. 2108 (E.D. La.), m.s.; Angel v. State Bd. of Educ., No. 1638 (E.D. La.), m/s; Davis v. East Baton Rouge Parish School Bd., No. 1662 (E.D. La.), m.s.

attending, or seeking to attend, the University of Mississippi;

"2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Meredith's enrolling or seeking to enroll, or attending the University of Mississippi;

"3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty."

Ross R. Barnett and Paul B. Johnson, Jr. now stand under this Court's order "to show cause, if any they have, why they should not be held in criminal contempt," and are required to plead "to the charges contained in the application of the United States." Each count of those charges is based upon "criminal contempt of this Court for wilfully disobeying the temporary restraining order entered on September 25, 1962, in *United States v. State of Mississippi, et al.*, No. 19475."

The contempts are charged to have been committed in disobedience of a temporary restraining order entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United States. Each of the two Sections 402 and 3691 of Title 18, United States Code provides that it shall not relate or be applicable to such contempts.

To summarize: 1) the Supreme Court has definitely held that criminal contempts are not subject to jury trial as a matter of constitutional right; 2) there is no Act of Congress entitling the defendants to a trial by jury for contempt against a Court of Appeals; 3) the defendants are not entitled to a trial by jury because they are charged with willful disobedience of a restraining order entered in a suit or action brought or prosecuted in the name of, or on behalf of the United States.

In our opinion this Court has no duty or power to accord the defendants a trial by jury, but is under the clear duty itself to proceed without unnecessary delay to try the defendants for the criminal contempts charged.

COMMENTS AS TO FOUR SEPARATE OPINIONS

In order to facilitate preparation of the various opinions, the foregoing part of this opinion was first circulated. Thereafter each of the other four Judges circulated his opinion. After consideration of their four separate opinions, we think the following comments appropriate.

Two main contentions seem to run throughout the several opinions though stated in various ways. The first is, as Judge Bell succinctly phrases it, "in short, we must abide the statutes applicable to the district court when we act as a district court."

This is apparently based on the fact that in the orders of July 27-28 and again in the restraining order of September 25, this Court issued its own injunction. From this it is presumably argued that since district courts ordinarily issue injunctions, our essential nature changes from an appellate to a trial court when we issue an order with traditional *nisi prius* characteristics. In other words, the character of a court is fixed, not by the organic statute establishing it, but by the nature of the order issued at any given time.

This ignores at least two things. First, and paramount, is the fact that Congress has specifically clothed this Court in the disposition of cases before it with the express power to issue whatever orders are appropriate. 28 U.S.C.A. §2106.* Second, this court, as have most others, has not

*§ 2106 Determination The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or

felt itself bound as a matter of power to the mechanism of a direction to the district court. Ordinarily this will be done. But frequently in run-of-the-mill cases, we have reversed and *rendered* decisions for one of the parties. If it may be done for a money judgment, it may likewise be done as to equitable relief. The statute and the practice reflect the flexible standard of that which is *appropriate*. What is *needed* is assuredly encompassed in what is appropriate. And it is now way too late to urge that injunctive orders of this Court were not needed to effectuate the holding in this Court's opinion of June 25 in the *Meredith* case.[7] 305 F. 2d 343.

The second main theme is closely akin to the first. The argument is made that the Government chose this Court rather than the District Court as the forum in which to assert its interest. From that it is argued that while §§402 and 3691 each speak in terms of "any district court of the United States," we must read this as though Congress expressly specified a Court of Appeals as well. This is so because otherwise the Government, by artful, purposeful

order, or require such further proceedings to be had as may be just under the circumstances."

To this must be added the all writs statute, 28 U S C A § 1651.

[7] With the successive stays of Judge Cameron (vacated by our several orders), the District Court either was, or thought itself, unable to take action. Unless this Court's decision of June 25 was to be frustrated, affirmative action was needed then and there. It had to come from and *through* this Court and this Court alone. Hence the injunctive orders of July 27-28 were imperatively required.

Similarly this Court en banc unanimously on October 19, 1962, entered its preliminary injunction (Judges Bell and Gewin dissenting on one limited phase). In most unmistakable terms, it reaffirmed that the temporary injunctive orders of September 25 and 26 against the Governor and Lieutenant Governor, respectively, were each appropriate and essential.

choice, could defeat a statutory right accorded contempt defendants had it gone into the District Court instead. Of course at the bottom of this argument is the assertion made at many times and in many ways that there was no need for this Court to have issued its injunctive orders of July 27-28 in the continuing terms employed, and that there was no need for it to enter its temporary restraining orders of September 25-26. A branch of that contention apparently is that once the District Court entered its injunction on September 13, our interest came to an end.

But our order was a continuing one until, in effect, Meredith should be admitted to and continued as a student on the same basis as any other student. The facts of record in this Court show without contradiction that until Sunday, September 30, 1962, Meredith was not admitted to the University and, indeed, he was prevented from admission by direct personal interposition of the Governor and Lieutenant Governor. During all of the events which occurred between September 13 and September 30, it was this Court's orders which were being wilfully disobeyed. While these actions amounted to disobedience of the District Court's injunction as well, this Court was hardly so powerless that to secure obedience to its own orders it would have to refer the matter to the District Court. At the time of the issuance of the temporary restraining orders of September 25-26, Meredith was not yet in the University. By the terms of this Court's order, the injunction issued by it continued at least until Meredith was admitted. It was this Court, then, whose orders were being frustrated.

While the Government took the initiative in seeking leave to enter the case as so-called amicus curiae with the

specified powers, this Court must assume the full responsibility for the Government's presence thereafter. For only by the entry of the order of September 18 could the United States have participated. This was in effect a recognition that the sovereign's presence was needed by this Court to effectuate its decrees and to maintain and uphold the rule of law. All of this became doubly clear when in the course of hearings on the various civil contempt matters, it became evident that injunctive orders ancillary to the main case had to be entered against the Governor and Lieutenant Governor. And what was then understood to be a necessity calling for temporary relief was reaffirmed when the Court en banc on October 19, 1962, reaffirmed that action by the issuance of its preliminary injunction which is still in force and effect.

It was this Court which made its ruling of June 25. It was this Court which made its orders of July 27-28. It was this Court whose orders were being disobeyed. It was this Court which needed the assistance of the sovereign and called upon it to take appropriate steps for the execution of the decrees of this Court. The rights of these Defendants are not then to be measured by what might have been claimed had these asserted acts of defiance taken place as to the District Court alone.

Moreover, this Court had ancillary jurisdiction to effectuate its own decrees. To that end it was certainly appropriate that the Court in effect call on the sovereign's law officer to initiate and prosecute the necessary proceedings. The Court's power to conduct the proceedings ancillary to the main cause to protect and effectuate its decrees is well settled. *Toledo Scale Co. v. Computing Scale Co.*, 7

Cir. 1922, 281 Fed. 488, aff'd 261 U.S. 399 (1923); *Sawyer v. Dollar*, D.C. Cir. 1951, 190 F. 2d 623, vacated as moot, 344 U.S. 806 (1952); *Merrimack River Savings Bank v. Clay Center*, 1911, 219 U.S. 527. And, of course, this Court continued to have jurisdiction even after its mandate of July 28. By the terms of its affirmative injunction, it reserved jurisdiction, and even without 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*, 1948, 334 U.S. 258; *National Brake Co. v. Christensen*, 1921, 254 U.S. 425; *Root Refining Co. v. Universal Oil Products Co.*, 3 Cir. 1948, 169 F. 2d 514, cert. denied, 332 U.S. 813; *Sawyer v. Dollar*, *supra*.

Since the Court had this power the argument expressed or implied, particularly in the opinions of Judges Cameron and Gewin, as to the amicus status of the Government does not detract from the validity of the Court's orders. The argument seems to be that the Government cannot be an amicus because it has taken, and continues to take, a partisan position. But a Court empowered to take ancillary action to effectuate its decree is hardly to be left to the assistance of one having the neutral position of a traditional amicus. Within its sound discretion it is for the Court to determine whether the presence of the United States having the status of a quasi-party is needed. Here, the Court on September 18 recognized that the United States was needed not only to "accord each Court the benefit of its views" but more important "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." This was not, as some of the opinions suggested (see, e.g., Judge Bell's opinion, Part V), the Government obtaining through a permissive court order that which it is asserted Congress has declined to allow. This was not the Government instituting a suit or intervening on behalf of private litigants to vindicate the civil rights of private suitors. It was the sovereign intervening in the sovereign's court to uphold and maintain the sovereign's rule of law. Congress never meant to withhold that power. If the effect of that is to make the United States a party then at least one problem arises, and one consequence flows from it.

The problem is whether the Government could become a party in this manner. The Federal Rules of Civil Procedure are not generally applicable to the Court of Appeals. F.R. Civ. P. 1. Hence, failure to follow F.R. Civ. P. 24 and 6(d) does not imperil either the order of September 18 or the temporary restraining orders of September 25. It is then only a question of assuring the parties thereby affected — here, Governor Barnett and Lieutenant Governor Johnson — of procedural due process by according them a fair opportunity to challenge the right of the Government to come into the case and the power or propriety of the Court's allowing the Government to do so. These defendants have repeatedly challenged these actions, and the Court — as it did en banc as recently as October 19 — has rejected their contentions.*

Once it is established or assumed that the Government

*Allowance of the intervention of the Government was, so we are informed, one of the errors urged in the petition for certiorari in State of Mississippi v. James Howard Meredith, USA No. 681, Oct. Term 1962, cert. denied U. S.

is a "party" and procedural fairness has been accorded, as was the case here, the consequence is to add further weight to the proposition that a jury trial is not available since the alleged contempt is for violation of an order "entered in an action brought or prosecuted in the name of, or on behalf of, the United States."

Perhaps some brief comment should also be made as to the suggestion made in Judge Cameron's opinion that the panel of Judges Brown, Wisdom and DeVane (District Judge sitting by designation) was not a duly constituted court. By the practice traditionally followed in the Fifth Circuit, the panel which has heard the case and written the opinion has the responsibility for handling all matters growing out of such disposition. The so-called summer panels* are designated as a matter of administrative convenience to handle motions, emergency matters, and the like in proceedings not theretofore submitted to a panel. Hence, all of the actions taken by the panel of Judges Brown, Wisdom and DeVane in July and August were properly for that panel and none other. Indeed, it was for this reason among others that such panel vacated the several stays entered by Judge Cameron.

Judge Cameron's similar suggestions made as to the temporary restraining orders of September 25 (Chief Judge Tuttle, Judges Rives and Wisdom), the show cause order

*This Circuit has had summer panels for the last two summers only. They are empanelled in accordance with the direction of the Judicial Council of the Circuit as evidenced by the minutes of the meeting of the Council held in Atlanta, Georgia, on October 17, 1960, as follows:

"IV. The Chief Judge submitted to the Council his suggestion that, during the summer recess of this Court, stand-by panels be designated for each month of the summer — July, August and September. After a discussion, that suggestion was adopted."

directed to Governor Barnett at 8:20 P.M., September 25 (Judges Rives, Wisdom and Gewin), the show cause order of September 26 directed to Lieutenant Governor Johnson (Judges Rives, Brown and Wisdom), and the other orders of the same dates are likewise answered. Further, while the Court was still assembled en banc on the evening of September 24, it was informed that the United States had an application for temporary restraining orders which it desired to present. As it was then late in the evening and several of the Judges were engaged in drafting orders to effectuate rulings made that day, the full Court (Judge Cameron not then sitting) agreed that issuance and entry of these ancillary orders could be done by panels of three judges. In addition, the Court en banc thereafter unanimously reaffirmed each of these orders as its own, thus, for example the order of September 28 adjudging Governor Barnett in civil contempt recited that, "This Court • • • on September 25 issued orders requiring Ross R. Barnett to appear • • • to show cause," and in paragraph two expressly found as a fact that "on September 25, 1962 this Court entered its temporary restraining orders." As to Lieutenant Governor Johnson the Court, that same day, September 28, agreed that the contempt hearing fixed for September 29 should be held and appropriate orders entered by a panel (Judges Rives, Brown and Wisdom). And by the order of October 19 granting a preliminary injunction following the en banc hearing thereon held October 12, the Court again reaffirmed all of these orders.

We remain of the opinion that this Court has jurisdiction and that the defendants are not entitled to a trial by jury.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

GOVERNOR ROSS R. BARNETT and
LIEUTENANT GOVERNOR PAUL B. JOHNSON, JR.
Defendants.

Before TUTTLE, Chief Judge, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

CAMERON, Circuit Judge: Before us stand the highest two executive officers of a Sovereign State of this Union, charged, by direction of this Court, with the criminal offense of contumacious violation of its injunctive order. Never before has such a charge been brought by or in a Court of Appeals since its establishment by Congress in 1891, against either a state officer or a private citizen. It behooves us, I am confident we all agree, to be very sure

that we have jurisdiction to issue and enforce such a drastic and unprecedented order involving the most delicate relationships between the State and Federal Governments, and that our procedures are in strict conformity with the Constitution and laws which govern our actions.

In the circumstances here present, I think that a heavy burden rests upon those who oppose defendants' demand for a jury trial to demonstrate, by the clearest possible showing, that their position is sound in all requisite respects.

I do not think it is sound. The opinions of Judges Jones, Gewin and Bell are to me unanswerable. I desire to set down a few reasons for my conviction that the position of the opposition is unsound; hoping to avoid too much repetition, and that what I write may supplement what my Brothers have so well said.

I.

I think it is important to place our court order which the defendants are charged with having violated in its correct context and to be sure that it is considered in proper perspective. Specifically, the defendants are charged by this Court with having wilfully violated a restraining order issued September 25, 1962, at 8:30 A.M., over the signatures of Judges Tuttle, Rives and Wisdom, which refers to, and is based in large part on, an order ostensibly of another panel, dated July 28, 1962. It is my opinion that neither of these orders was legally entered and that neither is an order the violation of which can be punished in the present proceeding.

I will discuss first the order of July 28th, which I think is void *inter alia* because it was not entered by an assembled court and because the mandate had been sent to the United States District Court for the Southern District of Mississippi, which court had exclusive jurisdiction of the action brought by James H. Meredith against Charles Dickson Fair, et al (No. 19475).

This Court filed its opinion on June 25, 1963, *Meredith et al v. Fair et al*, 305 F. 2d 343, reversing the decision of United States District Judge S. C. Mize, which denied the relief sought, and remanded the case to the District Court with directions that it issue an injunction as prayed for and that it retain jurisdiction. The mandate was in these words (By our order dated Feb. 15, 1958 "the mandate provided for in Rule 32 shall consist of a certified copy of the Judgment entered . . ."):

> "This cause coming on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi and was argued by counsel;
>
> "On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions that an injunction issue as prayed for in the complaint, the District Court to retain jurisdiction; . . .

DeVane, District Judge, Dissents.
June 25, 1962
Issued July 17, 1962."

The mandate so mailed July 17th was received by the clerk of the District Court in Jackson, Mississippi on the morning of July 18th, and was forthwith delivered to Honorable Harold Cox, Chief Judge of that court.

Thereafter, the appellees applied to the Judge of this Court resident in the State of Mississippi and senior member of the summer panel designated for that week (who was not a member of the panel rendering the opinion which formed the basis of the mandate) for the stay of the execution and enforcement of such judgment to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. Said Judge granted the stay in obedience to the provisions of 28 U.S.C.A. § 2101(f),[1] and the stay was served upon the court to which the mandate was directed and by which it would be executed and enforced and upon all other interested parties.

On July 20th, the clerk of this Court, by direction of one or more of the Judges of the panel which had decided

[1] "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . ."

The stays thus issued by the single Judge of this Court were, in my opinion, valid, and could not be set aside by any panel or any other Judges of the Court; and the attempts to vacate the stay, or any of them, were, with deference, void and without effect.

the case, called upon the parties to file legal memoranda on the question *inter alia* whether the mandate should be recalled.

July 27th, an order was entered by said Judges headed "Order Vacating Stay, Recalling Mandate, and Issuing New Mandate Forthwith." The order was nine pages long and dealt chiefly with the right of the Court of Appeals to recall its mandate; it vacated and set aside the stay order of July 18th, recalled the mandate and issued a preliminary injunction couched in broad terms against the defendants-appellees.[2] On the following day, July 28, 1962, a further order was so entered reciting that, on July 26th [sic], an opinion and judgment had been entered vacating the stay and amending and reissuing the mandate, which order enjoined the appellees and a wide group of others to admit plaintiff James H. Meredith to the University of Mississippi, prohibited any act of discrimination against him, and ordering the District Court to enter an injunction in line with the amended instructions.[3]

[2] ". . . this Court herewith issues its own preliminary injunction . . ."

[3] The Order of July 28th contained this language

"Now, therefore, the following injunctive order is issued:

ORDER

"Pending 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 by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:

1.

"Ordered to admit the plaintiff James H. Meredith, to the University of Mississippi, on the same basis as other students at the University, under his applications heretofore filed, which are declared to be continuing applications, such admis-

These "orders" of July 27th and July 28th were issued, presumably, under authority of this language from Rule 32 of this Court:

> "The mandate once issued will not be recalled except by the court and to prevent injustice."

This language, in my opinion, refers to an *assembled* court duly empaneled and authorized by law to hear and decide cases. Cf. *Cowden v. Addis*, 5 Cir., 1932, 55 F. 2d 230. These orders were not considered or entered by an assembled court. For this reason they are, in my opinion, void. Other considerations which might bear on this question are that the entire Court had been in recess for many weeks, an order had been entered on the minutes of the books of the Court on July 19th recessing the Court for thirty days; regular vacation panels were appointed by the Chief Judge at the beginning of the summer recess and the order had been duly inscribed on the records of the Court, and the panel for the week beginning July 23, 1962 were Judges Cameron, Brown and Wisdom.

After the entry of the foregoing "orders" further stays of execution and enforcement of the several orders and mandates were granted by the same Judge; and, with the same informalities, an order was filed with the clerk by the original panel of Judges Brown, Wisdom and DeVane bearing date of August 4th (at which time the regularly constituted vacation panel consisted of Judges Cameron,

sion to be immediate or, because of the second summer session having started, such admission to be in September, at Meredith's option, and without further registration . . ."

Jones and Bell), referring to the entry of the several previous orders and stays and concluding thus:

> "While it might appear to be unnecessary to enter any further orders, the Court now enters this order to make certain that the record is kept straight.
>
> "For the reasons pointed out in our opinion orders of July 27, 1962, the stay or stays granted by Judge Cameron on July 28 and July 31, 1962, were unauthorized, erroneous and improvident and each of them is hereby vacated and set aside forthwith. All of our orders of *July 17, July 27 and this date*, therefore, continue in full force and effect and require full and immediate obedience and compliance." [Emphasis added.]

From this it seems that the Judges constituting the original panel which heard the Meredith case were "straightening up" the record for the appeal so that it might include everything which was intended to be included; and that the order of July 28th, which now lies at the base of the criminal contempt charges, was eliminated from those orders which "continue in full force and effect."

Finally, it seems clear to me that when Mr. Justice Black — exercising such jurisdiction as was vested in him — vacated and set aside all of the stays which had been granted, the situation reverted back to its status at the time the first stay was granted. At that time, the mandate first above copied, being a certified copy of the judgment of this Court entered June 25th, was officially in the hands

of the District Court. In his opinion dated September 10, 1962, Mr. Justice Black discussed the various orders and stays coming after the service of the original mandate and stated:

> "I am therefore of the opinion that all of the stays issued by Judge Cameron should be and they are hereby vacated, and that the *judgment and mandate* of the Court of Appeals should be obeyed, and that pending final action by this Court on the petition for certiorari the respondents should be and they are hereby enjoined from taking steps to prevent enforcement of the Court of Appeals *judgment and mandate*." [Emphasis added.]

The order entered by Mr. Justice Black on the same date refers likewise to the stays which had been entered on July 18th, July 28th, July 31st, and August 6th, and vacates those stays, and the paragraph so doing concludes "... and that the *judgment and mandate* of said court shall be effective immediately." The final paragraph of the order reads:

> "It is further ordered that the respondents be and they are hereby enjoined from taking any steps to prevent enforcement of the United States Court of Appeals' *judgment and mandate* pending final action by this Court on the petition for writ of certiorari now on the docket." [Emphasis added.]

Copies of the opinion and orders of Mr. Justice Black was served by mail upon the clerk of the District Court

and were marked filed September 12, 1962. On the following day, September 13th, Judge Mize entered a judgment carrying out fully the mandate of this Court and the order of Mr. Justice Black. As far as I know, the content of the District Judge's judgment has never been challenged by anyone.

It is my opinion, therefore, based upon the foregoing facts, that the judgment of September 13th of the District Court is in all respects valid and binding upon the parties and that it is the only injunctive order which is, or ever has been, legal and binding, and that sole power is, and always has been since July 17, 1962, vested in said District Court.

II.

It is further my opinion that the order entered by this Court en banc dated January 4, 1963 is unenforceable for the independent reason that the temporary restraining order issued September 25, 1962, by a panel composed of Chief Judge Tuttle and Judges Rives and Wisdom, is void and unenforceable for the reasons set forth *infra;* and that the order now before us, based as it is upon said void restraining order of September 25th, can have and has no validity or legal status.

These are the facts. On September 24, 1962, this Court entered an order for an in banc hearing of the case of *James Howard Meredith, et al v. Charles Dickson Fair, et al* in these words:

ORDER

Pursuant to Rule 25(a) of this Court and Section 46(c) of Title 28 U.S.C., it is ordered by a majority of the Circuit Judges in active service that the above entitled and numbered cause on this Court's orders to show cause be considered by the Court en banc on Monday, September 24, 1962 at 11:00 A.M."

This order was signed by all of the Circuit Judges in active service on this Court except one who was excused for physical reasons. As stated in the order, it was entered pursuant to 28 U.S.C.A. § 46 which reads in part as follows:

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs. . . .

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service . . ."

Pursuant to the foregoing order by which a hearing before the Court in banc was ordered, the Court assembled in New Orleans and conducted in banc the following proceedings inter alia:

(1) On September 24, 1962, it heard extended evidence,

including an announcement by the Registrar of the University of Mississippi that he would be available in Jackson, Mississippi September 25, 1962 for the purpose of registering and admitting as a student of the University of Mississippi James H. Meredith in accordance with the order of this Court. It ordered that the members of the Board of Trustees comply fully with all of the terms of the Court's order of July 28, 1962 that it revoke and rescind the action taken September 20, 1962 appointing Ross R. Barnett, Governor, as its agent to act on all matters pertaining to such registration; and it required that the Board notify all University employees that all of the orders of this Court with respect to Meredith were to be complied with. It further ordered the Chancellor and other administrative officers of the University to admit Meredith to admission and continued attendance at the University as provided in the order of July 28th; that Registrar Ellis be present from one to four o'clock P.M. September 25, 1962 at the office of the Board of Trustees in Jackson, Mississippi to register Meredith; and it ordered that respondents report their actions to the Court in New Orleans not later than four o'clock P.M. of September 25th.

(2) September 25, 1962, at 3:40 P.M., the Court entered an order, in which Judge Gewin declined to join, amending the order of September 24th so as to permit the report of the respondents to be made before 6:00 P.M. of September 25, 1962.

(3) On September 28, 1962, it entered its findings of fact and conclusions of law and judgment of civil contempt against Ross R. Barnett (Judges Jones, Gewin and Bell dissenting in part) holding Barnett in civil contempt

of the temporary restraining orders of the Court entered September 25, 1962 declaring the contempt to be continuing, committing said Barnett to the custody of the Attorney General and to the payment of a fine of $10,000.00 per day unless on or before Tuesday, October 2, 1962 at 11:00 A.M. he shows the Court that he is fully complying with the terms of the restraining orders and that he has notified all law enforcement officers and all other officers to cease resistance to the orders of the Court and of the District Court for the Southern District of Mississippi, to maintain law and order at the University, and reserving the right to assert criminal contempt charges against respondents and to enter other orders as may be appropriate.

The findings of fact were based upon the verified application of the United States and of appellant Meredith and evidence heard in the absence of respondent Barnett. The basis for the findings was asserted to be the orders entered on September 25, 1962.

"(4) On October 2, 1962, it entered an order vacating and dismissing the citation for civil contempt as to the President and each of the members of the Board of Trustees of Institutions of Higher Learning, and finding that the Chancellor and the other executive officers of the University had not been in civil contempt of the Court. The order also continued until October 12th the matter of the entry of further orders as to the civil contempt of Governor Ross R. Barnett or Lieutenant Governor Paul B. Johnson, Jr., as well as the motion for preliminary injunction and all other motions pending in the cause.

"(5) On October 12, 1962, the Court heard evidence upon

which it entered an order dated October 19) on its order to show cause why a preliminary injunction should not be granted, on the motion filed by the State of Mississippi to dissolve the temporary restraining order entered September 25, 1962, and to dismiss the proceedings which had resulted in a judgment of civil contempt against Ross R. Barnett. The Court found that the proceedings it was engaged in hearing "are purely ancillary to the original lawsuit, and this Court has ample power to proceed against any party, including the State of Mississippi, which is shown to be engaged in a willful, intentional effort to frustrate this Court's injunction." The Court denied the motion to dissolve the restraining order and to dismiss the contempt proceedings and issued an injunction against the Attorney General of Mississippi and eight other persons, struck down several proceedings which had been commenced in the courts of Mississippi, and enjoined in very sweeping terms all persons who received actual notice of the injunction from interfering with, injuring, harassing or intimidating James Howard Meredith in connection with his attendance as a student in the University of Mississippi.[4]

[4]The following language used in this injunction of October 19, 1962 is taken largely from criminal statutes carried as 18 USCA §§ 1509 and 1503 and is copied here for reference at a later place in this opinion.

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing by force, threat, arrest or otherwise any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of or obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; . . ."

(6) On November 15, 1962, it entered an order, Judge Gewin dissenting, reciting that the United States as amicus curiae had filed on November 6, 1962, a memorandum suggesting that the taking of further evidence concerning the actions of Ross R. Barnett would be appropriate with respect to the issue of whether he had purged himself of civil contempt; that "it appeared to the Court from the pleadings filed and the oral testimony and documentary evidence already adduced in the proceedings on the petitions for temporary restraining order and for preliminary injunction and the civil contempt proceedings heretofore instituted against Ross R. Barnett and Paul B. Johnson, Jr., that proceedings should be instituted against the said Ross R. Barnett and Paul B. Johnson, Jr. to determine whether they are, or either of them is, guilty of criminal contempt of the orders of this Court . . ." The Court concluded the order by appointing the Attorney General of the United States "and such attorneys in the Department of Justice as he may designate" to institute and prosecute criminal contempt proceedings against said Barnett and Johnson "pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure and the order of this Court of September 18, 1962."

(7) On December 21, 1962, the representatives of the United States responded to that order and filed an application for an order requiring Ross R. Barnett and Paul B. Johnson, Jr. to show cause why they should not be held in criminal contempt. The caption bears the number of the Meredith case and the caption both of *James H. Meredith, Appellant v. Charles Dickson Fair, et al, Appellees*, and *United States of America, Amicus Curiae and Petitioner, v. State of Mississippi, et al, Defendants*. The application is

nine pages long, and charges the two defendants with various violations of this Court's restraining order of September 25, 1962 in disobedience of this Court's order of July 28, 1962 and the District Court's order of September 13, 1962. Much of the language used in the charge is taken verbatim from the sections of the Criminal Code referred to in footnote 4, supra.

Acting on said application, this Court entered its order dated January 4, 1963 and marked filed January 5, 1963, reciting that a majority of the Circuit Judges in active service had voted to consider the matter by the Court in banc, that a court in banc is designated for the consideration of all matters relating to criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr. The order bears a new number, 20240, and is styled *United States of America v. Ross R. Barnett and Paul B. Johnson, Jr.*, and was signed by the Chief Judge of this Court.

An "Order to Show Cause Why Ross R. Barnett and Paul B. Johnson, Jr. Should Not Be Held in Criminal Contempt," also filed January 5, 1963, and signed by a majority of the members of this Court, recites that the two defendants had violated the temporary restraining order of September 25, 1962 in disobedience of this Court's order of July 28, 1962 and the District Court's order of September 13, 1962; and orders said defendants to appear before the Court on February 8, 1963 to show cause why they should not be held in criminal contempt. Much of the language of this order is couched in the same words as the sections of the Criminal Code referred to in footnote 4, supra.

From this recital it is clear that, on September 24, 1962 and pursuant to the order of that date, this Court in banc took exclusive jurisdiction and charge of the civil contempt

proceedings of *Meredith v. Fair, et al* and of the proceedings filed and taken therein by the United States as *amicus curiae*, and said cause is still pending before the Court in banc.

It is further clear that, by virtue of its two orders filed January 5, 1963, it took exclusive jurisdiction of the criminal contempt proceedings against the defendants Barnett and Johnson, and conducted a full hearing on February 8, 1963, in connection with which these proceedings are progressing.

As of September 24, 1962, therefore, and to this moment, all aspects of the litigation growing out of or connected with the action brought by James H. Meredith and carried on and participated in by the United States of America have been exclusively within the in banc jurisdiction of this Court.

Notwithstanding these facts, Chief Judge Tuttle and Judges Rives and Wisdom, assuming to function as a panel of this Court, essayed to enter three orders on September 25, 1962 between the time of the in banc order of September 24th and the in banc order of September 25th, items (1) and (2), supra. An order was entered by them on September 25th reciting:

> "Upon the application of appellant which is appended hereto:
>
> "It is hereby ordered and decreed that Ross R. Barnett, Governor of the State of Mississippi, is added as party defendant in this cause in this Court."

> A temporary restraining order was issued by them on September 25, 1962 at 8:30 A.M. upon the application of appellant Meredith enjoining Ross R. Barnett, Governor, and others from proceeding with criminal and civil actions pending in the state courts of Mississippi and from applying for any other injunctions therein and from ordering any state official to arrest, obstruct or otherwise interfere with the freedom of movement of the appellant. The order also required that Governor Barnett appear before the Court in the City of New Orleans on October 5, 1962 at 10:00 A.M. and show cause why he should not be made a party in this case and why a preliminary injunction should not issue.
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> At 8:30 A.M. on the same day, they issued a temporary restraining order — *which is the restraining order the defendants are here charged with disobeying* — upon the verified petition of the United States as *amicus curiae* against the Governor, the Attorney General, the Commissioner of Public Safety, the District Attorney of Hinds County, the District Attorney of Lafayette County and a number of other officials, including all district attorneys in Mississippi, the sheriffs of all the counties of Mississippi, and all chiefs of police, constables and town marshals enjoining them from arresting James Howard Meredith or prosecuting him further, or from injuring, harassing, threatening or intimidating him, or obstructing him by any means from enjoying his rights "under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962 in this action."
>
> The restraining order was couched in large part in the

language of sections of the Criminal Code, which language was copied into the injunction of October 19. See footnote 4, supra.

In addition, Judges Tuttle, Brown and Wisdom signed an order on September 26, 1962, upon Meredith's motion, directing Governor Barnett to appear before the Court on September 28th to show cause why he should not be adjudged in civil contempt of the orders of the Court. On the same date — I do not find in the record that Lieutenant Governor Johnson was ever made a party to the action — Judges Rives, Brown and Wisdom signed an order upon the application of the United States as *amicus curiae*, ordering Johnson to appear and show cause on September 29, 1962 why he should not be held in civil contempt of the restraining order of September 25, 1962 (which, in turn, enforced the order of July 28, 1962 of this Court and the order of September 13, 1962 of the District Court).

In my opinion, this Court in banc had sole jurisdiction to proceed in this action and all phases of it from the time of the entry of the in banc order of September 24th. It follows that the three Judges who signed the five orders last above listed had no power or jurisdiction to sign or enter them, and that said orders and each of them are wholly null and void.[8]

These orders constitute the very bases of the proceedings

[8]This Court was in recess, except as a court in banc for the hearing of the Meredith case, the entire month of September 1962. The recess panel duly created by court action at the beginning of the summer recess with jurisdiction on September 25th was composed of Chief Judge Tuttle and Judges Cameron and Bell.

now before us; and said orders being entirely void, the Court is, in my opinion, not empowered to proceed or to take any action in connection with the attempted prosecution of Governor Barnett and Lieutenant Governor Johnson for criminal contempt of court.

III.

(a) The language of the basic statutes governing the proceedings before us, together with the decisions of the Supreme Court in the two Gompers cases[9] — which have been accepted as fundamental by the courts ever since their publication — in my opinion, reject the power of this Court to proceed with the enforcement of its criminal contempt order of January 4, 1963. No better dissertation upon civil contempts and criminal contempts and the difference between them could be compiled than is afforded by quotations from the two *Gompers* cases. In fact, these two cases represent the first real effort of the courts to differentiate the two.

First *Gompers* involved an equity suit for an injunction between Bucks Stove and Range Company and Gompers and other individuals who were officers of the American Federation of Labor in proceedings before the trial (the Supreme) court in the District of Columbia for contempt of court for violation of orders entered by the trial court. The details are not important, but the case resulted in a finding of the trial court and an affirmance by the Court of Appeals that Gompers et al had been guilty of criminal contempt for violating the order of the Supreme Court of

[9]Gompers v. Bucks Stove & Range Co., 1911, 221 U. S. 418, and Gompers v. United States, 1914, 233 U. S. 604.

the District. The Supreme Court of the United States wrote extensively of the difference between civil and criminal contempt and set up standards which are involved in the proceedings before us. I quote excerpts from that decision:

[P. 443] "In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, (p. 444, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience . . .

"But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months, no relief whatever was granted to the complainant, and the Bucks . . . Company took nothing by that decree.

"If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed *only in a proceeding instituted and tried as for criminal contempt.* . . . Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the *defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.* . . .

"There is another important difference. Pro-

ceedings for [p. 445] civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for *criminal contempt are between the public and the defendant, and are not a part of the original cause.* . . .

"The Bucks . . . Company was not only the nominal, but the actual party on the one side, with the defendants on the other. The Bucks . . . Company acted through or as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and *not as a representative of the United States, prosecuting a case of criminal contempt* . . .

[446] "In the first place the petition *was not* entitled 'United States v. Samuel Gompers, et al.' or 'In re Samuel Gompers, et al.,' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings *ought to be able to see whether it was instituted for private litigation or for public prosecution,* . . . He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. . . .

[447] "It is argued the defendants' answers concluded with a statement that as questions of criminal and quasi-criminal intent were involved, a jury was better qualified to pass on the issues than a judge, and in the event he should be of opinion that the charges had not been sworn away, they moved *that issues of fact should be framed and submitted to a jury*. Such a motion was not inconsistent with the theory that this was a proceeding for civil contempt in equity, but *was in strict accord with the practice under which questions of fact may be referred by the chancellor to a jury for determination*. . . . [And cf. Rule 39(c), F.R.C.P., providing that a court may, of its own initiative, try any issue with an advisory jury.]

[P. 448] ". . . the provision of the Constitution that 'no person shall be compelled in any criminal case to be a witness against himself' *is applicable, not only to crimes, but also to quasi-criminal and* penal proceedings. . . .

[P. 450] "Congress in recognition of the necessity of the case has [p. 451] also declared (Rev. Stat., § 725) that the courts of the United States 'shall have power to punish by fine or imprisonment contempts of their authority . . .' including 'disobedience by any party to any lawful order . . . of the said courts.' But the *very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper* . . . .

"If this had been a *separate and independent proceeding* involved at law *for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other,* it could not . . . have been affected by any settlement which the parties to the equity cause made in their private litigation . . .

[P. 452] "The judgment of the Court of Appeals is reversed, and the case remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the case to that court with direction that the contempt proceedings instituted by the Bucks . . . Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it." [Emphasis supplied.]

(b) When the case got back to the trial court, it appointed a committee — here, the Department of Justice — "to inquire whether there was reasonable cause to believe the plaintiffs in error guilty, in willfully violating an injunction issued by that court . . if yea, to present and prosecute charges to that effect. The inquiry was directed solely with a view to *punishment for past acts, not to secure obedience for the future*; . . .

[233 U. S. p. 606] "The committee . . . reported and charged that the parties severally were guilty of specified acts in violation of the injunction, being the same acts of which they had been found

guilty by the Supreme Court in the former case . . . The defendants pleaded the Statute of Limitations, Rev. Stat. § 1044, as to most of the charges. . . . There was a trial, the Statute of Limitations was held inapplicable and the defendants were found guilty and sentenced to imprisonment . . ."

The Supreme Court denied the petition filed by the Judges of the trial court, assumed that the evidence required a finding that the defendants were guilty, but reversed the decision solely upon the application of the Statute of Limitation, which provides that "*no person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed.*" In holding the quoted Statute of Limitations applicable, the Supreme Court used this language:

[P. 610] "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc. to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. . . . *It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses,* because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. *These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.* So truly are [p. 611] they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure [citing several English cases and cases from the Supreme Court] . . .

"We come then to the construction of the Statute. . . . and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. . . . The substantive portion of *the section is that no person shall be tried for any offence not capital except within a certain time.* Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 3 years; *indictment and information being the usual modes by which they are begun and very likely no other* having occurred to those who drew the law. But it seems to us plain that the dominant words of the act are 'no *person shall be prosecuted, tried, or punished for any* offense not capital' unless. —

"No reason has been suggested to us for not giving to the [612] statute its natural scope. The Eng-

lish courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. . . . Indeed the punishment of these offences peculiarly needs to be speedy if it is to occur. The argument loses little of its force *if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.*

"*Even if the statute does not cover the case by its express words, as we think it does,* still, in dealing with the punishment of crime a rule should be laid down, *if not by Congress by this court.* The power to punish for contempt must have some limit in time, and in defining that limit *we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years.* . . ." [Emphasis added.]

(c) These words of Justices Lamar and Holmes have served as guidelines since their utterance a half century ago. The language of these two cases, it seems to me, spells out categorically that the prosecution of the offense of criminal contempt before us must be conducted in conformity with the laws of the United States governing prosecution for crimes, whether those laws are derived from statutes or from "what has been the policy of the law from the foundation of the Government." It is further clear that, if a statute does not specifically cover such a

policy, the court should conform its practices by analogy with that policy so as to insure these defendants the same protections and immunities which would surround them if they were prosecuted for crime in a conventional proceeding.

The two *Gompers* cases and others listed in the margin[7] hold specifically that one accused of the offense of criminal contempt of court is entitled to the following protections and immunities *inter alia*: the presumption of innocence; proof beyond a reasonable doubt; not compelled to testify against himself; advice as to the charges against him, a reasonable opportunity to prepare a defense; the benefit of compulsory process; assistance of counsel; an impartial arbiter of the facts; benefit of the statute of limitations governing crimes; the right to a pardon under the President's constitutional authority to pardon criminal offenses. Additionally, of course, contempts of Congress are punishable by normal criminal procedures.

Against this background should be considered certain of the more important actions taken by the prosecution and some of the more crucial statutes involved.

(d) It has been shown that the vital entry of the United States into the civil case by the order of September 18th was accomplished without observance of Rule 24(c), F.R.C.P. It is further manifest that the entry of the Government lies without any statutory authority and was in

[7] Cook v. United States, 1925, 267 U. S. 517; Ex parte Grossman, 1925, 267 U. S. 87; and In re Murchison, 1955, 349 U. S. 133; and see authorities cited in dissenting opinion, Ballantyne v. U. S., 5 Cir. 1956, 237 F. 2d 657, 666 et seq.

fact accomplished in derogation of the general statute granting to the United States the right to commence a civil action in a court of the United States. 28 U.S.C.A. § 1345.

> "Except as otherwise provided by Act of Congress, the *district court* shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." [Emphasis added.]

The entry which the United States attempted to make in the Court of Appeals is not, as far as I can find, authorized by any Act of Congress and none is claimed by the opposition. As my Brothers have amply shown, Congress has not authorized the Government to enter any segregation case as a litigant and, as I understand it, the opposition does not contend otherwise. The claimed entry by the United States under the order of September 18th is not to be confused with its commencement of this criminal proceeding by filing of its information of December 21, 1962. On September 18th, nothing but a civil proceeding brought by Meredith was pending, and the opposition has pointed to no authority as far as I can find for that intervention.*

*The expansive language of the Gompers cases and the others listed, in my opinion, cloak these defendants with all Bill of Rights protections (we omit trial by jury from the present discussion). Inasmuch as power to prosecute for criminal contempt is based on the validity of the civil proceedings, I question, for example, the validity of the restraining order of September 25th, which was entered without the presence of the defendants, outside of the State of Mississippi, and the initiation of this proceeding upon a show cause order entered outside said State in derogation of Article III, Section 2, Clause 3 and the Sixth Amendment of the Constitution of the United States; and cf Rule 18 F.R.Cr.P., infra. This opinion is drawing out to such lengths, however, that I will not pause to consider these possible infirmities here.

(e) The Government admits that no prosecution for criminal contempt has ever been conducted in a Court of Appeals and the only case in which any appellate court has ever conducted a criminal contempt hearing is *United States v. Shipp*, 1906, 203 U. S. 563; 1909, 214 U. S. 386; 1909, 215 U. S. 580. I will digress at this point to say that, in addition to the infirmities my Brothers have pointed out, it should be noted that the prosecution there was solely of violation of an order entered by an appellate court dealing with an exclusively appellate matter. Before the Supreme Court had taken up the merits of the case, in order to protect its jurisdiction upon appeal and prevent it from being entirely sterile, it stayed the execution of the condemned man until it could pass on the questions presented to it upon appeal. The only order violated was the order of the Supreme Court, and no other court had any possible jurisdiction to punish the violation of that order. We have, of course, no such situation before us.

I think it proper to digress further to say that I do not think that the opinion of the opposition has the question of jury trial in proper focus. An examination of the *Shipp* record, as reported with the opinions, will reveal that those charged with violating the Supreme Court's stay order did not ask for trial by jury, that question not being mentioned either in the motions or the brief of the accused or in the court's opinion.

Getting back to the mainstream of the debate on the

question before us, it is clear to me that this Court is, and has been from the time it sought to recall its mandate, acting wholly beyond the jurisdiction vested in it by Congress. Professor Moore, in his Commentary on the United States Judicial Code, gives a detailed account of the history and jurisdiction of the Court of Appeals, § 0-03 (51), pp. 455, et seq. Having stated that the Evarts Act of 1891 created a Circuit Court of Appeals for each of the nine circuits into which the United States was divided, and pointed out that this number had increased to eleven, he states (p. 456) the following:

"Courts of Appeals have only appellate jurisdiction.

"Since the courts of appeals are created by Congress and not by the Constitution, Congress could confer original jurisdiction upon them, but it has not done so. They have an exclusively appellate jurisdiction. [The text then quotes the following from Supreme Court decisions]

"Whitney v. Dick (1906) 202 U. S. 132, 137 . . . 'It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, Kentucky v. Powers, 201 US 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal.'; A F of L v. NLRB (1940) 308 US 401, 404 . . . 'The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts . . . Such jurisdiction as it had, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review.' Certification by NLRB of a particular labor union as the collective bargaining representative held non-reviewable in Court of Appeals.)."

Professor Moore then discusses in the succeeding pages certain jurisdiction to review and otherwise handle matters relating to administrative agencies and special boards, including Tax Court decisions, decisions of courts of bankruptcy, orders of the Interstate Commerce Commission, Federal Communication Commission, Civil Aeronautics Board, final orders of the National Labor Relations Board, orders of the Administrator of the Wage and Hour Division of the Department of Labor, and many others. He also discusses, pp. 467, et seq., the jurisdiction of a court of appeals in connection with § 1651, the All Writs Statute, and its power in such proceedings as mandamus, prohibition, habeas corpus, etc.

(g) Jurisdiction of courts of appeal is now dealt with in 28 U.S.C.A. §§ 43 and 1291, et seq. This Court, in my opinion, exhausted its jurisdiction when it reversed the decision of the District Court and remanded the case of James H. Meredith to that court with instructions to enter an injunction as prayed for. Meredith had filed his civil action asking for injunctive relief, and the District Court had denied the relief prayed for; Meredith appealed to this Court; this Court reversed and remanded the case with instructions as to the order which should be entered. There its jurisdiction ceased.

It could not, in my opinion, as an appellate court take hold of the case and essay to exercise the jurisdiction vested only in district courts. When it attempted to do so, the weaving of the tangled web began, and the Court has, in my opinion, been in a state of confusion ever since. Of course, the web had been woven when the Court in banc took hold. In my judgment the moves made and the actions taken leading up to and including the issuance of the citation against the defendants charging the offense of criminal contempt have been beyond the power and jurisdiction of the Court.

(h) Assuming that all I have written is in error and that what the Court has been doing has been in an effort to enforce its legal order in fulfillment of its appellate jurisdiction, its power extended, in my opinion, no further in any event, than the issuance and enforcement of civil contempt proceedings. Much of what the courts have said and the text-writers have repeated has been in justification of the right of a court to protect itself, and certainly I do not have a word to say against that right. But the right is limited to direct contempts and to enforcement of its orders rendered in the execution of its appellate jurisdiction. Moreover, even if it had the right to enforce by civil sanctions its orders in this case, certainly it has done so in a very adequate way. It did not enforce its imposition of the large fines and the sentencing of the defendants to imprisonment, apparently because the things the Court was trying to accomplish had already been satisfactorily performed. But the punishment for criminal contempt is entirely another matter and one not, in my opinion, of which this Court has jurisdiction.

(i) General jurisdiction of prosecutions for offenses against the United States is lodged by statute solely in the district courts, 18 U.S.C.A. § 3231:

> "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

It is provided in Rule 18 F.R.Cr.P.:

> "Except as otherwise permitted by statute or by these Rules, the prosecution shall be had in a district in which the offense was commited, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

These decisions and the statutes and rules of procedure referred to make it plain that the only place this offense can be prosecuted is in the district court where it originated, was tried, and to which it was remanded, and where an injunctive order was entered in obedience to the mandate of this Court as soon as Mr. Justice Black vacated the stays which were holding up its entry. Strangely enough, every important order entered in this proceeding in this Court has referred to the District Court's injunction of September 13th, *and has required the enforcement of the District Court's injunction*, along with the orders entered by this Court which the opposition strains so hard to justify.

If criminal contempt of court is an "offense" within the meaning of the statute of limitations, *Gompers*, supra it certainly is no less an "offense" the punishment of which is vested in the district courts, 18 U.S.C.A. § 3231; and, in