my opinion, this Court thus has no jurisdiction to hear original prosecutions for the offense of criminal contempt.

(j) I have grave doubts, moreover, that the acts with which the defendants are charged are criminal contempts of court, inasmuch as the same acts are indictable "crimes" under 18 U.S.C.A. §§ 1503 and 1509. It is important that acts which *are* crimes not be confused with acts which also *amount* to crimes, e.g., impeding an officer of the court may also *amount* to an assault and battery, but it may be a crime under 18 U.S.C.A. § 1503.

I am not unaware of *Savin, Petitioner*, 1889, 131 U.S. 267, which held that the fact that the offense charged was a crime, punishable by indictment under the then § 725 (taken from § 2 of the Contempt Act of March 2, 1831) did not preclude punishment for criminal contempt. But *Nye v. United States*, 1941, 313 U.S. 33, written after this whole question had been clarified by statutes and decisions, casts great doubt on that holding:

> [P. 49] "Yet in view of the history of these provisions, meticulous regard for these separate categories of offenses must be had . . . [or] The result will be that offenses which Congress designated as *true crimes* under § 2[9] of the Act of March 2, 1831 will be absorbed as contempts wherever they take place." [Emphasis added.]

The later opinions of the Court tend to sustain the thesis

[9] 18 U.S.C.A. §§ 1503, 1509 are the progeny of § 2 of the Act of March 2, 1831. See footnote 4 supra, for the acts enjoined in this case — acts which would be a violation of the statutes.

that, when Congress makes certain acts specific criminal offenses, such acts are no longer punishable as criminal contempts of court but as crimes; and if defendants are to be punished, it "must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions." *Nye*, supra, at p. 52.

(k) The opposition's opinion claims that the right of this Court to punish the defendants for the criminal offense here charged results from the "elementary" fact that this Court has exclusive jurisdiction so to punish. It cites as authority for this view three cases of rather ancient vintage. *In re Debs*[10] was part of the spacious litigation brought by the United States against Debs and others, officers and members of the American Railway Union, the suit being brought under the Interstate Commerce Act. An injunction was issued commanding the defendants and a large number of others to refrain from interfering with or obstructing the operation of the trains of the twenty-two railroads listed in the original complaint. The main question argued was whether the United States could bring a suit involving the private property of the railroads on the ground that interference with their efficient operation, particularly with respect to the carriage of mail, was cognizable under the Interstate Commerce Act.

The court of first instance granted an injunction because of "interferences, actual or threatened, with property rights of pecuniary nature." Debs et al were cited for violating that injunction by "disobedience to an order of a civil court, made for the protection of property and the security of

[10] 1895, 158 U.S. 565, 595.

rights." The Supreme Court, in a habeas corpus proceeding, merely affirmed the action of the trial court in punishing the violation of the injunction. It is difficult to tell from the language of the opinion whether the punishment of the offense was considered civil or criminal in character. The fact is that the difference between civil and criminal contempts seems not to have been understood, certainly was not made explicit, until the two *Gompers* cases, supra. I find nothing in this case to sustain the opinion of the opposition that this Court of Appeals has jurisdiction to entertain a prosecution for criminal contempt.

The other Supreme Court case, *Ex parte Bradley*, 1868, 74 U.S. 368, et seq., involved disbarment of an attorney by the Supreme Court of the District of Columbia. The disbarment was based upon "contemptuous language to ... the said judge in the progress of a trial therein ... for which the said justice disbarred him from the privileges of attorney and counsel of the Supreme Court." The holding that this contempt, actually committed in the presence of a judge of the Supreme (trial) Court, while holding a term of the Criminal Court, must be disposed of by that Criminal Court and not by the same judges of the Supreme Court of the District of Columbia, sitting as a civil court, does not support what the opposition contends for here.

The only other case mentioned is an ante-bellum case from Mississippi.[1] That case arose in the administration of an estate, and a fiduciary refused to comply with the order of the court. The language of the order is that "contemptuously refusing to comply with the order of the court

[1] Watson v. Williams, 1858, 36 Miss. 331.

in the presence of the court, he was, by the order of the court, committed to the jail of said county, *until he should comply with said order.*" [Emphasis added.] This order was simply the conventional enforcement of a court order by imprisoning the intransigent person until compliance was had. Of course, that action must be taken by the court which entered the order — a trial court in this instance. Interestingly enough, the main issue in the case was whether or not appeal should lie from such an order, and the appellate court held that there could be no appeal from such an order of contempt, a holding in line with the common law rule of that era which did not permit review of a finding of contempt.

These cases hold merely that a trial court may punish for criminal contempt.

It does not follow from those cases that, under the circumstances here present, the Court of Appeals is, by the attempted tacking on of the order of this Court to the September 13th order of the District Court, vested with exclusive jurisdiction, or with any jurisdiction at all, to punish for the alleged criminal contempt.

IV.

I join with the other members of the Court in submitting the question of trial by jury to the Supreme Court. Since jurisdiction affects the right of this Court to try this prosecution at all, I have felt constrained to set down, supra, my reasons for believing that this Court has no jurisdiction before beginning a brief discussion of the matter of trial by jury.

The defendants, of course, filed other pleadings presenting many legal questions in addition to challenging the jurisdiction of the Court and in addition to other grounds relied on as to the jurisdictional question. These include those listed in the opinion of the opposition. While a majority of the Court voted to reject those contentions, I thought in many cases they were meritorious. I understand that these questions will not be foreclosed by the action which the Supreme Court takes with respect to the questions presented to it.

V.

The right of defendants to be tried by a jury has been well justified by the able opinions of Judges Jones, Gewin and Bell, the reasoning of which I adopt and will try to avoid repeating.

There being no statute specifically vesting power in this Court to hear this prosecution for the criminal offense charged and no precedent establishing the legal mechanics for conducting such an action, those who seek to justify the present procedures are relegated, it seems to me, to the language of the last clause of 18 U.S.C.A. § 402, quoted in the opinion of the opposition:

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

What, then, are these prevailing usages at law to which this Court must conform if it sets itself the task of meting out punishment to these defendants? The question, it

seems to me, is answered by Mr. Justice Holmes in second *Gompers*, supra: "... 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 ..." we should proceed to fashion the rules by which we shall be guided."[18]

A few words may be added to what my Brothers say concerning the question whether the Government's entry into Mississippi's civil action, by the order of September 18th, constituted a "suit or action brought or prosecuted in the name of, or on behalf of, the United States."

The amorphous, hybrid role it assumed in its request for admission constitutes a slender reed upon which to rest its status. The essence of the role of friend to the court is the possession of the same objectivity and detachment which belong to the Court. Friend of the court and partisan litigant are mutually exclusive terms. As friend, the Government could not bring or prosecute an action.[19]

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[18] Mr. Justice Holmes makes it plain that before the foundation of this Government our English forebears had adopted the procedure of trying criminal contempts in the same manner in which other charges of crime were tried.

[19] The Department of Justice has never been objective in a segregation case. In both Brown cases, presenting as they did sociological political questions upon which the nation was divided, it took sides. In the former case it is stated in 347 U. S. at page 485: "By special leave of Court, Assistant Attorney General Rankin argued the case for the United States on the reargument, as amicus curiae, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were Attorney General Brownell, James B. McGranery, then Attorney General, and Philip Elman filed a brief for the United States on the original argument as amicus curiae urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10." And see 349 U. S. at page 297, the notation that Solicitor General Sobeloff participated in the oral argument for the United States and that with him on the brief were Attorney General Brownell and others representing the United States."

The Department of Justice has tried in a number of Con-

No statute has been referred to giving the United States the right to enter private civil litigation to assist either of the parties. In his dissenting opinion in the Green case[9] Mr. Justice Black lists a number of instances in which Congress has provided for the bringing and prosecution of actions in the name of and on behalf of the United States. Through Congress alone can the Government receive the right to litigate in the courts. It is perfectly plain, I think, that the phrase "actions brought or prosecuted in the name of the United States" refers only to those actions which may be brought under congressional authority.[10]

The usages of law existing at the time the Government supposedly brought its case are significant to show how they relate to trials of criminal contempts. Criminal contempts have been since the beginning of the Government universally brought in the district courts. *Shipp* [illegible] the only exception under the practice in the district courts. It is likewise universal that defendants in such proceedings are entitled to be tried by a jury if the act constitutes also a criminal offense under any statute of the United States or under the laws of any State in which the act is committed. That right has been given ever since 1914 when the Clayton Act was passed. That Act applied, of course, only to injunctions in labor disputes. Ever since then every statute passed by Congress and every court decision has tended to enlarge the scope of the right to trial by jury.

[9] Greens to obtain the right to bring segregation suits and it has taken a partisan part in a large number of cases as reference to the Reports will show. I know of no instance in which it has functioned objectively in such a case.
[9] Green v. United States, 1958, 356 U. S. 165, 208.
[10] In addition, as noted supra, the United States can bring a civil action only in the district courts. 28 U.S.C.A. § 1345.

When Congress passed the Civil Code of 1948, it provided, by 18 U.S.C.A. § 3691, that the rights previously belonging to those involved in labor disputes were universally given to all persons charged with criminal contempt. When the right to jury trial came up in the passage of the Civil Rights Act of 1957, 42 U.S.C.A. § 1995, the abridgement of the right to trial by jury was severely limited. Finally, Congress, in 1960, passed 18 U.S.C.A. § 1509.[10] Whatever may have been the purpose of Congress in passing this Act, the effect of it certainly was to combine with 18 U.S.C.A. § 1503 so as to make practically every interference with an injunctive order of a court a crime punishable under criminal laws. Whatever the court, therefore, usage gives a jury if the alleged contempt is a crime also.

This evolution in dealing with criminal contempts is, in my opinion, a logical one. The courts are fully protected by the statutes regulating direct contempts, and by the right to coerce obedience of injunctive orders by commitment for civil contempt, which is apparently limitless in the provision for imprisonment.

VI.

After a court's order has been enforced, by whatever means, it loses all interest in dealing with those who inter-

[10] "Obstruction of court orders
"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, impedes, or interferes with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
"No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime." [Emphasis added.]

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W WADSWORTH
CLERK

OFFICE OF THE CLERK

POST OFFICE BOX 30120
NEW ORLEANS 30, LA.

April 9, 1963

Re: No. 20240 - United States of America
-vs- Ross R. Barnett and Paul B. Johnson, Jr.

Dear Sirs:

Find enclosed copy of per curiam order of this Court entered this date on all pending motions, together with copy of certified question and opinions rendered in connection therewith, all of which is self-explanatory.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

cc and Enc:
Mrs. Constance Baker Motley
Messrs. Leon Jaworski and
W. H. Vaughan, Jr.
Mr. R. Jess Brown
Mr. Charles Clark
Mr. Dugas Shands
Hon. Joe T. Patterson
Mr. H. H. Roberts
Mr. Fred B. Smith
Mr. Francis T. Zachary
Mr. Walter Sutton
Mr. Orma R. Smith
Mr. Edward L. Cates
Mr. H. B. Montgomery
Mr. Garner W. Green, Sr.
Mr. Thomas H. Watkins
Mr. Burke Marshall
Mr. John Doar
Mr. J. D. Doty
Mr. Ben H. Walley
Mr. J. P. Coleman
Mr. W. H. Barbour
Mr. Chester E. Curtis
Mr. Will A. Eichman
Mr. Charles L. Sullivan
Mr. St. John Barrett
Messrs. Jack Greenberg and
Derrick A. Bell, Jr.

fered with its enforcement. This Court has no interest in the punishment of these defendants for past criminal offenses committed by them. Society alone has such an interest. Society has chosen throughout the life of this government to punish crime by prosecution in the criminal courts under protection of the Bill of Rights. It provides no other method for such punishment and, in my opinion, this Court has no duty to perform and no interest in what society does to these defendants.

REJOINDER

The four Judges opposing trial by jury of these defendants properly undertook the role of proponents and filed their opinion first. Since a good part of the supplementary comments of the opposition deal with the opinion prepared by me, I feel that it is proper that I undertake to respond to the new matter brought in by the supplement they have filed.

The opposition takes the position that the stays granted by me, particularly the first one of July 18th, had the effect of frustrating the will of the panel which had ordered the District Court to enter the injunction Meredith had prayed for. The position is further taken that this Court was left helpless unless it adopted the novel and unprecedented procedures embraced in the panel's orders of June 27-28. I do not believe that this position, taken first by the original panel of Judges Brown, Wisdom and DeVane and now adopted by the opposition, is justified.

The fact is that the record does not disclose that the District Court ever refused to carry out the original mandate,

or ever took any step indicating that it would not faithfully obey any legal mandate the panel might issue. On July 20, two days after the original mandate had been received by the District Court and had been stayed by my order of July 18, the panel caused telegrams to be sent to the litigants requesting five-day briefs on whether the mandate should be recalled and other steps taken in this Court, thus holding in abeyance any action on the mandate by the District Court. Nine days after the District Court received the mandate the panel issued its order of July 27th the exact effect of which, as I see it, no one has even explained. It seemed to place this Court in the driver's seat astride the District Court, leaving the District Court with no specific instructions and in effect with no discretion to act except specifically as the panel should direct. The District Court was then faced with successive stays issued immediately after new orders were issued by the panel. The final order of August 4th made it clear that the whole matter was to be subjected to some appellate procedure. It would have been a very unusual and presumptuous act if the District Court had essayed to enter any order under the existing circumstances.

It is probably worthwhile to digress from the main theme to consider the exact nature of the impediment which the opposition regards as preventing other proceedings by the District Court. It was undoubtedly confronted with stays which on their face were issued under authority of the statute,[1] and nobody has cited any decision casting any doubt upon the validity of the stays. On the other hand, the lower court was faced with the recent decision of the Supreme

[1] 28 U.S.C.A. § 2101(f)

Court in *Rosenberg et al v. United States*, 1953, 346 U.S. 273, which I think justified the stays.

After a bizarre array of motions, applications for stay, for relief under § 2255, and other like efforts had been presented by the petitioners there, the Supreme Court finally held a special session after its recess on June 15th and put an end to all proceedings pending in connection with the effort to save the petitioners from execution. After that Court had adjourned for its summer recess, Mr. Justice Douglas was importuned to grant a stay based upon questions which it was claimed had not theretofore been raised, and he finally granted the stay of execution. Upon the Government's request, the Supreme Court convened in special session, heard on the merits the new questions raised and vacated the stay granted by Mr. Justice Douglas [illegible] its decision of those questions. But every Justice agreed that Mr. Justice Douglas had properly issued the stay until the Court held that it could be vacated only by its decision of the question preserved by the stay. The District Court here was justified in acting on the assumption that the stays in the Meredith case, pending in the Supreme Court upon petition for certiorari, could be vacated only by similar action. And cf. *Application of Chessman*, 1954, 75 Cal. S.Ct. 85, 274 P. 2d 645, certiorari denied 348 U.S. 864.

I revert now to the opposition's claim that the panel had no alternative except taking the extreme action represented by the unprecedented proceedings of July 27-28. Its opinion here says in Note 7:

"With the successive stays of Judge Cameron (vacated by our several orders), the District Court

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."

The decision of June 25th, 305 F. 2d 343 at 361, required only that "the District Court issue the injunction as prayed for in the complaint, the District Court to retain jurisdiction." If the stays were without legal basis, and the District Court had refused to follow the panel's mandate, the panel had the simple and traditional power to enforce its decision by mandamus:

"When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this Court, either upon a new appeal or by writ of mandamus." *Baltimore & Ohio Railroad Co. et al v. United States et al*, 1929, 279 U.S. 781, citing *In re Potts*, 166 U.S. 263, 265, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, and cases cited.[*]

[*]The general rule is thus stated in 55 C.J.S. 171, Mandamus, § 100 d:

"Where a judgment, decree or order of a superior court made in review of the decision of an inferior court comes down to the lower court it is the duty of the lower court to enter and enforce it, and, if it fails or refuses to do so, mandamus ordinarily will lie to compel compliance therewith . . ."

American Jurisprudence states the rule similarly. 3 Am. Jur., 728, Appeal and Error, § 1232:

"When the trial court fails or refuses to obey or give effect to the mandate . . . of the reviewing court . . . it becomes the province and duty of the appellate court to enforce com-

The opposition, in its addendum, makes an interesting, but to me unconvincing, argument that this Court is empowered to fashion its own rules of procedure unsupported by any authority at all as far as I can discover. This I think, may not be done. The effort is made to blaze an entirely new trail in the carefully guarded realm of criminal contempts. A surveyor attempting to establish a line in an unknown region must first find a monument, an established point of beginning. He must then find his bearings by two readings from the North Star. These requirements are a *sine qua non* of his ability to blaze a new trail. No court can, I think, invest itself with the right to take the liberties or the property of a citizen without a monument and bearings. There are none, as far as I can find, in the opposition's opinion.

We cannot lose sight of the fact that, under the heading "18 U.S.C.A. § 401. Power of Court," these words are found: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —." With these words of limitation begins the cautious marking of the area into which courts may enter in punishing alleged contempts. No statute and no decision invests them with the power sought to be used here, I respectfully suggest.

It seems to be accepted by all that the questions certified to the Supreme Court require answers granting these de-

pliance therewith. The remedy generally recognized as the proper one is a writ or order of mandamus." To like effect are United States v. District Court, S.D. New York, 1948, 334 U. S. 258, 283, and Sibbald v. United States, 12 Peters 487, 491. The former of these cases is cited by the opposition as supporting its position. I think that this is a mistake and that it supports the views above expressed.

fendants the right of trial by jury, unless the order alleged to have been disobeyed was "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States . . ." The crucial importance of these words entitle them to a brief discussion in response to the opposition's supplementary comments.

The test to be applied is not who "brought" these contempt proceedings, nor who requested the restraining order of September 25th; the test is who "brought" the suit or action upon which the restraining order of September 25th is predicated. The civil action was brought and prosecuted by, and in the name of, and on behalf of James H. Meredith. This Court has characterized the Government's role in "entering" that action on September 18th thus: "These proceedings, therefore, are purely ancillary to the original lawsuit . . ." (Order of October 19th). The proceedings which produced the restraining order of September 25th were those constituting the civil action of James H. Meredith.

The cases which the opposition cites as the Government's authority to "enter" the action clearly refute the thesis that the Government's obtaining an order on September 25th (along with an almost identical order obtained by Meredith) destroyed defendants' right to a jury trial. In the *Bush* case, for example, the Government "entered" at the district court level and its status was explained and defined in these words: "The interest of the government here is the same as that which justifies its prosecution for obstruction of court orders in violation of 18 U.S.C. § 1509, or for contempt of those orders under 18 U.S.C. § 401." *Bush v. Orleans Parish School Board*, D.C. La., 1961, 191 F. Supp.

871, 877-878, affirmed 367 U.S. 908. This premature entry of the government into a pending civil action certainly adds nothing to its claim that defendants are not entitled to a jury trial. The status of the United States in this case is in no way different from its status as prosecutor in any criminal contempt case. That, on September 25, an order was entered at its request, as well as Meredith's, is, in my opinion, entirely immaterial.

If the position of the opposition be correct, then the executive branch of the government may be permitted to enter *any* civil case in which the government professes an interest, political or otherwise, and may be permitted to align itself with a litigant and obtain with him an order such as relied upon here. If such a proceeding would make a violation of that order the violation of an order "entered in a civil suit or action brought or prosecuted in the name of, or on behalf of, the United States," the statutory right to a jury trial would not depend upon the character of the relief sought in the action, the acts done, the statutes, or the real parties, but upon the whim of the Attorney General. I do not believe this to be the law. The government has an "interest" in seeing that all court orders are obeyed; this does not, however, give the government the right to make the decision whether a jury trial will be granted in a prosecution for an alleged violation of every order entered by every court in every civil case.

If the government's status in this case is such as to deny the defendants the statutory right to a trial by jury, it is my opinion that the provisions of 18 U.S.C.A. §§ 402 and 3691 are meaningless. To follow the government's and the opposition's argument is to hold that every civil case is one

brought or prosecuted in the name of, or on behalf of, the United States if some government official wants it to be and the court acquiesces in his desire. The right to jury trial does not, in my opinion, rest upon so frail a foundation.

The opposition misconstrues my remarks concerning the panel of Judges Brown, Wisdom and DeVane. I did not assert that it was not a duly constituted court, but that it was not an assembled court. My original opinion will show that it was my view that action to recall a mandate under the specific wording of the rule involved had to be done by a "court." What was attempted to be done on July 27-28 called for judicial action by the panel of three Judges. My original opinion asserted that those actions were not the product of an assembled court. The opposition's supplement does not challenge this statement.

My remarks about summer panels had to do with the attempted hearing and determination of important aspects of the Meredith case by panels of three Judges after the hearing of that case had been ordered by a majority of the Judges "before the Court in banc," and at the very moment when the Court in banc was engaged in consideration of the Meredith case and the entry of orders on other aspects of it. Jurisdiction of the Court is fixed by the express language of 28 U.S.C.A. § 46(c) and, in my opinion, no informal understandings between members of the Court can invest any Judges with power to act except in conformity with law.

I took the position further that, if any action could be taken by any Judges except by the Court in banc, it would

have to be taken by the panel of Judges designated to act at that particular time. The records of this Court show that, on June 6, 1962, formal assignment of Judges for the summer panels was entered on the records, and that, e.g., the panel designated for the week of July 16, 1962, consisted of Judges Cameron, Brown and Wisdom. The records further show that this panel assembled in New Orleans on Thursday, July 19th, and heard extended oral argument in case No. 19730, *Guillory et al v. The Administrators of the Tulane University of Louisiana et al*; and that, upon consideration of the oral arguments and the briefs, it affirmed and remanded the case to the district court, upholding that court's denial of summary judgment and dissolution of a temporary injunction theretofore granted. 306 F. 2d 489 (July 21, 1962).

These defendants, subjected to criminal prosecution under serious charges are in my opinion entitled to have the proceedings upon which the charges are based conducted in strict obedience to the Constitution and the Laws.

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,
Movant,

versus

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

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

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

JONES, Circuit Judge: It had been assumed by me that the purposes of a judicial opinion, unless it be in dissent, are to inform the losing litigant as to the reason why he has lost his case, and to set forth and publish the govern-

ing legal principles so that they might become precedents for future decisions. The use of judicial precedents and the application of the doctrine of stare decisis is a characteristic of Anglo-American law which distinguishes it from Roman law.[1] The use of precedents is older than the Year Books.[2] I cannot see how the judges of this Court are contributing to the law's development by writing opinions at this juncture of this cause where their equal division has called forth a certification of questions to the Supreme Court of the United States. We have not here made a decision. We have not here established a precedent. It was, and is, my view that we could, and should, submit certain inquiry to the Supreme Court without indulging ourselves in an inconclusive debate of our divergent views upon the steps of the Supreme Court Building. Others of the Court are otherwise minded. Since opinions are being written, I will join the cavalcade lest there be a lurking suspicion that I am neglectful of a duty.

It seems to me that it is much less important, in the judicial scheme of things, that Governor Barnett[3] should escape being fined or jailed for his publicly demonstrated contempt of a valid order of this Court, of which he had notice, than that he should be denied the jury trial which he has demanded.[4] Blackstone, from whom a number of the founding fathers received their legal fundamentals,

[1]Llewellyn, The Common Law Tradition, Deciding Appeals pp. 36 et seq; Radin, Anglo-American History, pp. 343 et seq. Salmond, Jurisprudence, 8th Ed., pp. 158 et seq.
[2]Holdsworth, The Year Books, 2 Select Essays in Anglo-American Legal History, pp. 110 et seq.
[3]And Lieutenant Governor Johnson.
[4]I do not adhere to the view that a grand jury indictment is required in order to impose punishment for criminal contempt. It is not the function of this Court to reconsider Green v. United States, 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672.

referred to trial by jury as "the grand bulwark" of the liberties of every Englishman, secured to him by the great charter.[5] Although it has been said, with little to support the saying, that the trial by jury was begun by Alfred the Great,[6] it was definitely incorporated into the law of England during the time for Henry II.[7] The opinion has been well expressed that "the most practical and effective safeguard of liberty and justice is the right of trial by jury," and it is "necessary for the defenders of that right to bear in mind that 'Eternal vigilance is the price of liberty.' "[8] It has been said by Professor Dillon, "In criminal cases there is no substitute for the jury that would be acceptable to the profession or endured by the people. In the solemn act of passing upon the guilt of those charged with offenses against the public, the jury represents the majesty of the people as a whole . . . . . "[9] It might not be amiss to look at the great instrument which was said to be "such a fellow that he will have no sovereign."[10] Thus it still reads after nearly three quarters of a millennium:

> "No freeman shall be taken, or imprisoned, or be dissesed of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we go upon him, nor send against him, save by lawful judgment of his peers, or by the law of the land." Magna Charta, Cap. XXIX.

[5]Chase's Blackstone, 4th Ed., p. 1023.
[6]O'Donnell, Cavalcade of Justice, p. 63.
[7]Pollock & Maitland, History of English Law, Vol. I, pp. 73, 117 et seq.
[8]Dissenting opinion of Judge Rives in Mercer v. Theriot, 5th Cir. 1963, F. 2d .
[9]Dillon, Laws and Jurisprudence of England and America, p. 122.
[10]Edward Coke, speech in the House of Commons, May 27, 1628.

At the dedication of the Magna Charta Memorial at Runnymede in 1957, a former President of the American Bar Association, E. Smythe Bambrell, declared that the American Bill of Rights "still wears the crest of Runnymede."[11] Statutory constructions which deny to the citizen the fundamental and hallowed right of trial by jury should, wherever possible be avoided.

Criminal contempt is the willful violation of a duty created or declared by an order of court of such kind or degree that public interest permits it to be punished as a public wrong in a proceeding brought by the Government. Wharton's Criminal Law and Procedure § 1332. A crime is a wrong arising from a breach of a legal obligation which the Government deems injurious to the public at large and punishes through a proceeding in its own name. Bishop, Criminal Law § 32. Notwithstanding the substantial resemblance of criminal contempt and crimes, there are differences. There is a difference in the origin of the duties which, when breached, result in the commission of the offense. There is a difference in that there is a maximum penalty which may be imposed for the commission of a crime. Unless there is a statutory limit, the discretion of the court provides the only restraint upon the severity of the penalty for criminal contempt. There is a difference in that no person, except by his consent, shall be tried for a crime other than before a jury. In criminal contempt in the Federal System, there is no right to a jury trial except as provided by statute. It has been said that criminal contempt is not a crime and it has been held that there is no right to a jury trial for criminal contempt under

[11] American Bar Association Meeting in London, p. 27.

the Federal Constitution as presently interpreted by *Green v. United States*. Note 4 supra. The Green case is discussed by Ronald Goldfarb in his article on The Constitution and Contempt of Court 61 Mich. L. Rev. 283, Dec. 1962. But inherently, criminal contempt has most of the characteristics of a crime.[12] It is significant that statutory provisions which relate to contempt[13] are in the Criminal Code. Congress includes criminal contempt with "other criminal cases." 18 U.S.C.A. § 3691. The provisions of the rules[14] which relate to contempt are found in the Federal Rules of Criminal Procedure. Text discussions of criminal contempt are found in the treatises on criminal law.[15]

Contempt has been a subject of congressional consideration from the beginning. The earliest enactment was in 1789.[16] The next statute was passed in 1821 and it, with minor amendments, is on the books today.[17] The contempt provisions of the Norris-La Guardia Act[18] and of the Civil Rights Act of 1957[19] are pertinent here only as showing a congressional policy of favoring jury trials in contempt

[12] Cf. Gompers v. United States, 233 U.S. 604, 34 S. Ct. 693, 58 L. Ed. 1115; New Orleans v. New York Mail Steamship Co., 87 U.S. 387, 22 L. Ed. 354.
[13] 18 U.S.C.A. § 401, 402, 3285, 3691 — 3693, 3771, 3772.
[14] Rules 17(g) and 42, Fed. Rules Crim. Proc., 18 U.S.C.A.
[15] See Wharton, Criminal Law and Procedure, § 1329 et seq.
[16] 1 Stat. 92.
[17] A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. 18 U.S.C.A. § 401.
[18] 18 U.S.C.A. § 3692.
[19] 42 U.S.C.A. § 1971.

cases. Some procedural provisions are set forth in the Rules,[20] the application of which is hereafter discussed.

The Clayton Act, passed in 1914, contained provisions relating to punishment of contempts under some circumstances and providing for jury trials under some conditions. These statutes, as now incorporated in the Code, are 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.

[20] Rule 42, Fed. Rules Crim. Proc. 18 U.S.C.A.

"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.

The contempt of Governor Barnett[21] was the violation of an order entered in the suit of *Meredith v. Fair*. This was an action brought and prosecuted by Meredith, in the name of Meredith, and on behalf of Meredith. It was not brought or prosecuted by, or in the name of or on behalf of the United States. It seems to me that the strained and forced construction which reaches a different conclusion is wholly untenable. It is contempt to resist an order of court. 18 U.S.C.A. § 401. It is a crime to resist an officer in executing an order of court. 18 U.S.C.A. § 150. See also 18 U.S.C.A. § 242. It seems clear that the acts and things done by Governor Barnett constituted not only a contempt but also a criminal offense. This being so, I would have no doubt but that, under Section 3691, there is a right to a jury trial unless the language of the statute precludes its application to the trial of criminal contempts of courts of appeals. This provision of the Clayton Act was not directly involved in the Green case although it is discussed in the dissenting opinion of Mr. Justice Black. The Shipp case[22] has been cited for the proposition that jury trials are not available to defendants in contempt cases. It seems to me that the obvious answer to this contention is that the Shipp case was decided before the Clayton Act was passed.

The District Court for the Southern District of Mississippi declined to enter an injunction requiring the admission of James H. Meredith as a student at the University of Mississippi. On June 25, 1962, this Court reversed,

[21]There has been an adjudication of civil contempt upon the same facts as form the basis for the criminal contempt charge.

[22]United States v. Shipp, 203 U. S. 563, 27 S. Ct. 165, 51 L. Ed. 319; 214 U. S. 386, 29 S. Ct. 637, 53 L. Ed. 1041, 215 U. S. 580, 30 S. Ct. 397, 54 L. Ed. 337, 30 S. Ct. 403, 54 L. Ed. 1213.

directing that the injunction issue and that the district court retain jurisdiction.[23] For reasons which need not be here recounted, there was a delay in the compliance by the district court in the issuance of its injunction as directed by the order of this Court. This Court, concluding that time was of the "quintessence", withdrew its mandate and, on July 27, 1962, issued its injunctive order or judgment directing that Meredith be admitted to the University forthwith and prohibiting the University officials "and all persons having knowledge of the decree" from excluding Meredith from attending the University.[24] From this order there stemmed the restraining order which Barnett violated. Such violation is the genesis of the charge of contempt. Thus it is, that but for the fortuity of the delay of the district court in the entry of its injunctive order, the contempt proceeding now before this Court would be pending before or have been decided by the district court, in which I conclude it could not be plausibly asserted that a jury trial could be refused. The literal reading and strict construction of Section 3691 would permit a court of appeals, anticipating resistance to or noncompliance with a district court injunction, to issue its own injunctive order instead of issuing or requiring compliance with its mandate to a district court, and thus be in a position to conduct a criminal contempt trial without a jury. Although this was neither contemplated nor intended in the matter before us, the result is the same. I cannot attribute to Congress an intention that such a fundamental right as that of trial by jury shall be dependent upon either design or chance and happenstance.

[23]Meredith v. Fair, 305 F. 2d 343.

[24]Meredith v. Fair, 306 F. 2d 374.

We are told that this Court has neither statutory authority nor the facilities for empaneling a jury. The right may be implicit in the statute as well as express, and if a jury is allowed it is no answer to a demand for a jury to say that we have no jury wheel from which to draw, or that we do not now have a list from which to summon our veniremen. The right to a trial by jury if authorized should not be denied because Congress has not blueprinted the specifications for getting the jury into the box. Apparently the Supreme Court of the United States has had no difficulty in the procurement of juries. In 1789 the Congress provided that the trial of issues of fact in cases before the Supreme Court in actions at law against citizens of the United States shall be by jury. 1 Stat. 80. The statute, with some changes in form, remains in effect. 28 USCA § 1872. The first matter of consequence to come before the Supreme Court was *Georgia v. Brailsford*, 2 Dallas 402, 1 L. Ed. 433.[25] The case came before the Court again and was submitted to a jury after four days of argument. *Georgia v. Brailsford*, 3 Dallas 1, 1 L. Ed. 483. At least two other cases have been tried in the Supreme Court before juries. Carson, History of the Supreme Court, Vol. II, pp. 168-169. Warren, The Supreme Court in United States History, Vol. I, p. 104. The rules of the Supreme Court, adopted at the February Term, 1790,[26] make no reference to the manner of selecting a jury. The statute[27] says that the criminal contempt trial "shall conform as near as may be to the practice in other criminal cases." If this Court is unable to fashion the procedures for empaneling a jury, then its judges will

[25] Earlier procedural orders had been entered
[26] 2 Dallas 399, 1 L. Ed. 432
[27] 18 U.S.C.A. § 3691

have lost that resourcefulness of which the record in this case so eloquently testifies.

We hear it urged that if Congress had intended for the provisions of Section 3691 to be applicable in courts of appeals it would have said so. The section refers only to district courts. I am not willing to assume that the Congress should have been expected to contemplate that an appellate court would be required to superimpose its jurisdiction upon that of a district court by invoking the All Writs Statute[28] to enter an exceptional and extraordinary injunction and buttress it with another injunctive order under the All Writs Statute.[29] I would construe Section 3691 as requiring a trial by jury in a court of appeals as well as in a district court, upon the demand of a defendant, where the act charged as criminal contempt also constitutes a criminal offense. I would give Barnett a jury trial.

No question has yet been raised by Governor Barnett as to whether the judges of this Court, or any of them, are disqualified, as a matter of law, to participate as triers of fact in a trial without a jury of this criminal contempt proceeding. Perhaps the conclusion has been reached that such a question is not now timely since it has not been decided that the cause shall be tried by the Court without a jury. Possibly it has been regarded that it would be inexpedient to raise the question. It may be that the

[28] 28 U.S.C.A. § 1651
[29] There may be a valid doubt as to whether the order of this Court that Meredith be admitted to the University of Mississippi is valid. I assume its validity although believing it was an extraordinary exercise of a power which we are admonished to use only in exceptional cases. Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106.

question is immaterial to the matters presently posed for decision. Yet if the judges, or some one or more of them, are disqualified as triers of fact, or if there is reason to doubt their qualifications, might not such considerations cast some weight into the scales on the side of trial by jury?

On July 27, 1962, this Court ordered the enrollment of Meredith as a student at the University of Mississippi and directed its order to the University officials and all persons with knowledge. On September 12, 1962, the Governor issued his order to the University officials directing them to refuse the admission of Meredith. In a public proclamation on September 24, 1962, Governor Barnett recited "the direct usurpation of this [undelegated] power by the Federal Government through the illegal use of judicial decree" and directed the arrest of representatives of the Federal Government who sought to arrest any state official. On September 25th this Court entered its restraining order directed to Governor Barnett by name. On the same day Governor Barnett directed a proclamation to Meredith "finally" denying him admission to the University. These were before us at the hearing on civil contempt.

This Court, sitting en banc, conducted a trial of Ross R. Barnett for civil contempt on September 28, 1962. The acts and things with which he was then charged are the same as those with which he is now charged as constituting criminal contempt. After the trial, and on the day of the trial, findings of fact and conclusions of law were made and a judgment of civil contempt was entered. The Court found that "Ross R. Barnett deliberately prevented him

[James H. Meredith] from entering [the office of the Registrar of the University of Mississippi] and told him that his application for enrollment was denied by Ross R. Barnett." The Court found that: "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." As a conclusion of law this Court held that "Ross R. Barnett is in contempt of the temporary restraining order entered by this Court on September 25, 1962." Thereafter the Attorney General was requested by the Court to bring a criminal contempt charge.

There is a present unwillingness on my part to express the opinion that the defiant statements made by Governor Barnett, or any other of the matters involved in the civil contempt proceedings, are such as would disqualify the judges of this Court under Rule 42 b).[30] Such contention might be urged with plausibility. Cf. *Offutt v. United States*, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11.

Of greater moment, it would appear, is the question as to whether a trial for criminal contempt by the judges who conducted the trial, made the findings, and entered the judgment in the civil contempt proceeding and then initiated criminal contempt proceedings, could be, and appear to be, such a fair and impartial trial, as a matter of law, as would meet due process requirements. Not squarely in point on its facts, but pertinent and, I think,

[30] If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Rule 42(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

controlling, as to the principles announced, is In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942. From the opinion in Murchison it appears that the Michigan law permits every judge of a court of record to act as a one-man grand jury. A judge so acting charged two witnesses with contempt, one of them, White, for refusing to answer questions, and the other, Murchison, for perjury. After notice the judge tried White and Murchison in open court, found them guilty and imposed penalties. The Supreme Court held that due process had been denied. In the opinion of Mr. Justice Black, speaking for a six-justice majority, it is said:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an original lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See Cooke v. United States, 267 U. S. 517, 539. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. For we held in the Oliver case that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.

"As a practical matter it is difficult if not impossible for a judge to free himself from the in-

fluence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." 349 U. S. 136–138.

A grand jury, whether one man or many men, finds probable cause to believe that a crime may have been committed. The Court has not only performed the grand jury function of causing the charge of criminal contempt to be preferred; it has done more, it has found in the civil contempt cause that Barnett is guilty of the acts with which he is charged in the criminal contempt proceeding.

If the evidence on the criminal contempt trial is the same, or substantially so, as that which was before the Court in the civil contempt case, can the judges be expected to erase the inferences and conclusions which that evidence produced when it was previously considered? Will the judges be able to make any nice distinction between preponderance of the evidence, which I suppose was the standard in civil contempt, and proof beyond a reasonable doubt, which, presumably, would be required to convict of criminal contempt? If the evidence on the criminal contempt charge is substantially different than that which was before submitted, will the judges be able to expunge from mind and memory that which they heard and saw at the former trial? And how would they know? And would it appear so? I need none to bear me witness that the judges of this Court have no actual bias in this cause. I need none to assure me that the judges of this Court would "do their very best to weigh the scales of justice equally between contending parties." I do not suggest prejudice

or disqualification as a matter of fact. I make inquiry as to whether there is disqualification as a matter of law.

The defendants have not suggested disqualification. But should the Court wait for the defendants to raise the question? If there is a doubt as to the qualification of the judges, should it be ignored if the defendants do not raise it? If the judges, or any of them, are disqualified as triers of the fact, ought not the Court say so?

This digression on disqualification has been overlong. My views are that Governor Barnett is entitled to a trial by jury, but if judges are to be triers of the facts, any question as to the qualifications of the judges of the Court should be considered and determined.

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.

GEWIN, Circuit Judge: In the beginning the plaintiff Meredith brought a civil action against the defendant Fair, as President of the Board of Trustees of State Institutions of Higher Learning, and others, to enforce constitutional rights allegedly denied to the plaintiff Meredith. Before this court was convened for an en banc hearing, a panel of the court by a 2 to 1 decision granted to Meredith all

the relief he sought.[1] Neither Meredith nor his counsel now appear in court. The case has changed its identity. Its style is now United States of America v. Ross R. Barnett and Paul B. Johnson, Jr., who are Governor and Lieutenant Governor respectively of the State of Mississippi. At this stage of the proceeding, Meredith, the individual who commenced the proceedings, has no part in the procedure under consideration. The defendants who are now before us, charged with criminal contempt, were not parties in the lower court. They were joined after the case had reached us, a decision rendered and our mandate issued, amended and returned to the District Court where the case originated. Accordingly, since the original suit was filed the original plaintiff has fallen out of the picture. The original defendants are [illegible]

United States claiming to be something more than an amicus is the plaintiff-prosecutor. This not merely transformation took place in this court on the appellate level. Now the action of the District Court in Mississippi is before us for review.

The device used to accomplish this transformation is an order of a panel of this court dated September 18, 1962, designating the United States as *amicus curiae* — "friend of the court." The mentioned *amicus* order and the actions of the United States pursuant to it, are the sources of my initial difficulty with the entire proceeding.

In a criminal case neither the prosecutor nor the defendant should be a friend of the court in which the case is to be tried. All litigation, especially criminal prosecu-

[1] 296 F. 2d 696; 305 F. 2d 341; 305 F. 2d 343; 306 F. 2d 374.

tions, should be conducted in an atmosphere of independent, fearless impartiality. The court should have no friends and no enemies amongst the litigants.

The sine qua non of all litigation is the adversary system in which adverse parties represent and assert adverse interests in a completely neutral atmosphere, where only the law and strict rules of justice can gain the attention of the court.[2] Any less standard does not serve the purpose of preserving and maintaining the due administration of justice and the integrity of the judicial processes of the courts. Intimacy and cooperation between the court and one of the parties before it, or counsel for one of the parties, will destroy the due administration of justice, the integrity of the judicial processes and will reduce the court to a mere gewgaw.[3]

In my view a true *amicus* is a non-partisan adviser of the court who gives information to the court on some matter of the law with respect to which the court may be doubtful; or who may assist the court in the enforcement of judgments and decrees already made; but an *amicus* is not and should not be a party to the suit, should not have control over it, but should accept the case before the court with

[2] "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr Chief Justice Marshall as early as the leading case of Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure." Muskrat v. United States, 55 L. Ed. 246.

[3] Nothing herein said should be construed as an unfavorable reflection on the Attorney General of the Justice Department or counsel appearing on behalf of the United States. After all, a panel of this court appointed them and requested them to act. They are advocates and they are only acting as advocates in this proceeding.

the issues made by the parties involved. An *amicus* who has demonstrated an active interest in civil litigation and has actually participated in such litigation on the side of one of the parties should never be appointed to prosecute a criminal case arising out of the same litigation; and while serving as *amicus*, undertake to help the court reach a conclusion as to the guilt of the defendant.

In this case, the United States acting as a friend of the court is framing issues and making charges of criminal conduct and proposes to pursue the prosecution of the defendants to the ultimate conclusion of the case. The cases of *Bush* and *Faubus*[4] are not authority for the action of the *amicus* in the instant case. In each of the cited cases the *amicus* was appointed in the District Court where the case originated and was pending, no contempt proceeding was involved; and no one was charged with the commission of a crime. There are other distinctions, but those mentioned will suffice. The United States has heretofore assisted the private litigant Meredith. This court judicially knows that counsel for the United States actively participated in certain aspects of the civil proceeding and the evidence adduced before us on the civil contempt hearing clearly showed the activity of counsel for the United States on behalf of the plaintiff Meredith in the civil suit. Indeed, in the application seeking designation as *amicus* the following allegation is made:

[4]Bush, et al. v. Orleans Parish School Board, et al., 190 F. Supp. 861 (E.D. La. 1960), aff'd sub nom. Bush, et al. v. Orleans Parish School Board, et al., 191 F. Supp. 871 (E.D. La. 1961), aff'd. 368 U. S. 11, 7 L. Ed. 2d 75. Faubus, et al. v. U. S. of America, et al., 254 F. 2d 797 (8 Cir. 1958) cert. den. 358 U. S. 829, 3 L. Ed. 2d 68.

> "The United States has an interest in the orderly administration of its judicial processes and in the due observance and implementation of the orders and mandates of this Court. *This interest cannot be adequately represented by the plaintiff in this proceeding.*" (Emphasis added)

After the United States was designated *amicus*, their participation in the civil proceeding was extensive. Counsel for the United States and for the plaintiff Meredith sat at the same counsel table and conferred; both participated in the filing of pleadings and although pleadings were separate, they were substantially identical. Both participated on the same side at the civil contempt hearing and substantially the same evidence was offered by each in the hearing with reference to civil contempt. Those actions may have been appropriate in a civil proceeding, but now we are concerned with a criminal case. In the order of this court directing ". . . 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 the said Ross R. Barnett and Paul B. Johnson, Jr. . . . ", the following appears in the preamble to the order:

> "It appearing that the United States as amicus curiae filed in this Court 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 Ross R. Barnett has purged himself of his civil contempt of this court."[8]

The standing and duties of an *amicus* have been well defined in the law. Mr. Justice Frankfurter stated in *Universal Oil Products Co. v. Root Refining Co.*, (1946), 328 U.S. 575, 90 L. Ed. 1447.

[8]My opposition to the order directing the institution of criminal proceedings was evidenced by my dissent when the order was issued on November 13, 1962.

The full text of the order authorizing the criminal prosecution is as follows:

"It appearing that this Court on September 18, 1962, ordered that the United States [illegible] submit pleadings, evidence, arguments and briefs and to participate in 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 process [illegible]

It appearing that the United States as *amicus curiae* filed in this Court 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 Ross R. Barnett has purged himself of his civil contempt of this Court, and (emphasis added)

It appearing 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, and

It appearing undesirable to conduct successive proceedings involving similar factual issues and that litigation of such issues in a criminal contempt proceeding would afford to the said Ross R. Barnett and Paul B. Johnson, Jr., maximum procedural protection;

IT IS 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.

This 15th day of November, 1962."

"Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome."

While it is true that Federal Courts are always at liberty to call on officers of the United States to serve as amici, such officers are disqualified, in my judgment, when they have taken an active role in the litigation "in the service of those having private interests in the outcome."[9]

[9]Such has been the uniform holding of other authorities as to the duties and rights of an amicus:

"A person [illegible] a counselor who interposes and volunteers information on some matter of law in regard to which the court is doubtful or mistaken." Black's Law Dictionary, 4th Ed. 1951, p. 197.

"In view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question [illegible] brief filed by an amicus curiae, by leave of court, will not be considered." 3 CJS § 3, p. 1059.

"An amicus curiae is heard only for the purpose of assisting the court in a case already before it, and the function of an amicus curiae is to call the court's attention to law or facts or [illegible] matter than before it that may otherwise escape its consideration."

"An amicus curiae is not a party and cannot assume the functions of a party; an attorney for a party or even a partisan. He has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties." Am. Jur. 2d, Vol. 4, pp. 110-11.

"Furthermore, in a quasi criminal prosecution for a violation of a municipal ordinance, it has been held that amicus curiae briefs [illegible] received and considered over the objection of both the prosecution and the defendant, where such briefs tend to improve upon the court the guilt of the defendant." Ibid., § 4, p. 113.

"It has been held that an amicus curiae is one who gives information to the court on some matter of law in respect to which the court is doubtful, or upon a matter of which the court may take judicial cognizance; that he is not a party to the suit, has no control over it, and must accept the case before the court with the issues made by the parties." United States v. F. M. Jabara & Bros., 19 U. S. Ct. of Customs & Pat. Apps. 76.

"An amicus curiae is not a party to the action, but is merely a friend of the court whose sole function is to advise or make suggestions to the court." Clark v. Sandusky, 7 Cir., 1953, 205 F. 2d 915, 917.

See also Northern Securities Co. v. United States, 48 L. Ed. 299.

The next difficulty I encounter with the case is a procedural one. My four brothers who have the view that this court should proceed with the trial of the defendants seem to feel no such pause or restraint, and they resolve all doubts with respect to the *amicus* order of September 18, 1962, with the simple statement that the order "... constituted the United States as something more than a mere amicus curiae." In my view, the position of the United States in this proceeding is cloaked with obscurity and uncertainty, but it is acting like a party. There has been no effort to intervene in the lower court. There is a definite distinction between a party and an *amicus*.[1] No effort has been made to comply with the decisions and rules relating to intervention. See F.R. Civ. P. 24 (c) and 6 (d); *Atlantic Refining Co. v. Port Lobos Petroleum Co.*, D. Del. 1922, 280 Fed. 934, Moore, Fed. Prac., 2d ed., Vol. 4, p. 95.

If the United States is to act as a party in the case, it should seek intervention in accordance with the accepted procedural rules which are fundamental to the law. Following the majority rule, this Circuit has been slow to permit intervention on the appellate level even when formal application was made. "Intervention in an appellate court is certainly unusual.", 5 Cir., 1939, *Morin v. City of Stuart*,

[1] Faubus v. United States, 254 F. 2d 797, 805 quoting from the Universal Oil Products case, 2 Modern Fed. Practice Digest, Amicus Curiae p. 660, 3 Words & Phrases, perm. ed., Amicus Curiae p. 478.

[2] "Where a statute gives an absolute right to be heard which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal. Subject to this proposition, an intervenor must be sharply distinguished from a mere amicus curiae or a person who has been heard but has never intervened." Moore's Fed. Pract., Vol. 4, 2d Ed. p. 104.

112 F. 2d 585. "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." (citing the Morin case). *McKemie v. Pan American Petroleum Corp.*, 5 Cir., 1962, 303 F. 2d 778, see also *Holland v. Board of Public Instruction of Palm Beach*, 5 Cir., 1958, 258 F. 2d 730, 733. If intervention was desired, application should have been made in accordance with the rules in the Federal District Court where the action was pending. 4 Moore Fed. Prac., 2d Ed. p. 96, 59 Am. Jur. §73 p. 945. *Stallings v. Conn.*, 5 Cir., 1964, 334 F. 2d 189.

Through the device of designating the United States as *amicus*, the effort here is to make the United States the prosecuting party-plaintiff, and the defendants Barnett and Johnson, the accused parties-defendant, but no effort has been made to comply with any procedural rules. As a matter of fact, the District Court has been ignored. No action of the District Court in this connection has reached us for review. Since the mandate issued by a panel of this court on July 28, 1962, amending the mandate of the same panel issued on July 27, 1962, which directed the District Court in Mississippi to do certain things, but also attempting to reserve jurisdiction in this court, we have not considered the trial court where the lawsuit originated. We have acted as a trial court.

Under the direction and supervision of this court in the criminal contempt case now pending, the Government as *amicus* (or "something more") has filed pleadings, briefs, presented arguments, participated in hearings as to procedure, filed charges against the defendants in the form of a show cause order, and generally conducted itself as

an original party. In some respects a record has been maintained of the actions of the trial court and our review thereof, but not in every instance. As a matter of fact, the *amicus* order of September 18, 1962, signed by a panel of this court, was presented to the Judge of the United States District Court in Mississippi. When the District Judge orally made some suggestion as to a change in the order, the United States abandoned that court and presented its request to this one. Only a telephone communication between one or two Judges of this court and the District Court constitutes the record in this regard. All of the foregoing has resulted in the creation of an original criminal case on the appellate level styled the United States of America v. Ross R. Barnett and Paul B. Johnson, Jr. The prosecuting plaintiff has never been before the trial court, the defendants have never been brought to the trial court, no pleadings were filed there, there is no evidence or record to examine, and no decision of the trial to review.

If the foregoing considerations are deemed to be picayune, they may be brushed aside and speedy results can be accomplished, but such a course of procedure does not comport with our traditional concepts of justice and the seriousness of placing individuals in jeopardy of their liberty by short cut and speedy methods. If the procedure outlined is approved, a new field of jurisprudence will have been created in my humble opinion. Throughout the case there appears to have been a deadline against which all substantive rights, procedure, and other considerations must willingly yield.

In the opinion of this court dated July 27, 1962, vacating stay, recalling mandate, and issuing new mandate forth-

with, it is stated, "*In this case time is now of the quintessence.*" (emphasis added) It is easy to yield to the criticism sometimes heard that judicial processes in a democracy are too slow. The truth is that all processes in a democracy are slow compared with the speed with which results are accomplished under some other types of government — the judicial process alone is not involved. Rules of law may serve to protect the rights of individuals in the courtroom as well as in the policeman's office. If expediency is to be the guiding rule in this case, some kind of a decision resulting in a judgment of guilty or not guilty can be rendered at an early date, but I cannot follow such rules of expediency unless such course of conduct is declared to be the law of the land. In my view, there is no end which justifies such means. With all our rush, turbulence, deadlines, speed and [illegible] we should remember substantive and [illegible] fundamentals. In this case, as in many others, [illegible] protects substantive rights. This case involves the [illegible] prosecution of the Governor and the Lieutenant Governor of a State of this Nation. Regardless of the [illegible] statutory, constitutional and statutory guarantees as to [illegible] liberty are seriously involved. Conviction of [illegible] charges may subject two human beings to serious criminal penalties and interfere with the governmental functions of a State of this Union.

Although not presently and eminently involved, it should be noted that the acts now charged as criminal acts are substantially the same ones as were involved in the civil contempt, although the civil contempt charges were not as formal. The defendant Barnett was adjudged guilty of civil contempt by this court. After proper notice, opportunity to be present and after a hearing at which evidence

was received, pertinent facts were developed with reference to the civil contempt charge, the right to cross-examine and the right to exercise all of the traditional rights which accompany such court procedure. This court unanimously concluded that the defendant Barnett was guilty of civil contempt.* He was instructed to remove himself from the pathway which blocked the plaintiff's entry to the University of Mississippi and he was told what would happen to him if he did not. Neither the defendant Barnett nor the defendant Johnson have further interfered. On October 2, they appeared before a panel of this court through counsel and assured the court that full compliance with the court's orders would be achieved so far as they were concerned. Because the court had acted en banc with reference to the civil contempt charge, it was considered appropriate for the court to decide en banc whether the defendants had purged themselves of civil contempt, all as agreed in open court by defendants through their counsel and a panel of this court which heard the report on October 2. The hearing before the court en banc was set down for October 12, 1962. At that time, the same counsel appeared for the same defendants; one of which counsel reaffirmed the position taken on October 2, but the other undertook to reserve for Governor Barnett an area of discretion as to future compliance. Thereafter, this court issued a full and complete preliminary injunction, far more explicit and detailed than the original restraining order which the defendants had been charged with violating. Most of the acts now charged in the criminal proceeding relate to conduct alleged to have

*Lieutenant Governor Johnson was also found guilty of civil contempt by a panel of this court.

taken place before our adjudication of guilt in the civil contempt. To date the court has imposed no sanctions pursuant to its order of civil contempt.* There has been a

*The attitude of the amicus and the participation of the amicus in the civil contempt proceeding are evidenced by the following from the transcript of proceedings in the civil contempt case:

"JUDGE TUTTLE: Mr. Marshall, in the light of this present situation, what do you recommend?

"MR. MARSHALL: May it please the Court, this is clearly a very serious situation for the United States. I would like to start out by saying that I find it very difficult to believe that a state which is defending the rights of the state is at the same time apparently denying a responsibility to exercise the basic right of the states to maintain law and order within their borders, if that is the position of the attorneys representing the State.

"Now it is a fact, I think, that Governor Barnett has taken steps to purge himself of the contempt in which this Court found him. The Governor did during the few days preceding the finding of contempt interfere directly and physically with the carrying out of the Court's order by preventing Mr. Meredith from entering on the campus and becoming registered. He has taken steps, I think, to purge himself of that contempt of Court. Whatever his lawyers say in this court today, he did in fact instruct the law enforcement officers of the State to cooperate with the Federal law enforcement officers in bringing Mr. Meredith on the campus a week ago Sunday and physically permitting him to enter the campus and to register there as a student. To that degree, Governor Barnett has certainly brought himself in compliance with the Court.

"The order of the Court which he was required to meet also required him to notify all law enforcement officers of the State of Mississippi that they should cooperate with the officers and agents of the Court and of the United States to the end that James 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. I think that the showing of purging on that aspect of the Court's order is not sufficient. The Governor has now (sic) shown what instructions, if any, he gave to the law enforcement officers of the State, and as far as the record is concerned, and as far as the Government's personal knowledge is concerned, I do not know what instructions he gave to the law enforcement officers of the State.

"This is still a civil contempt proceeding, it is still a remedial proceeding. Any questions of punishment for past actions are properly the subject of criminal contempt action. The fact is that at the moment law and order is maintained in the City of Oxford and on the campus of the University of Mississippi by Federal officials. Federal officers. I do not know of any specific action that this Court can ask the Governor to

suggestion in one of the briefs filed by the Government that perhaps further facts should be developed in the civil contempt proceeding. Without any further attention to civil contempt, the case has now been converted to criminal contempt.

The foregoing considerations bring us to another serious aspect of the case — the question of the right to trial by jury. The defendants have filed appropriate pleadings and motions which bring to the attention of the court the various problems presented, including the right to a jury trial. It seems unnecessary to rule on specific motions attacking various segments of the prosecution inasmuch as the [illegible] questions which trouble the court have been settled. The division in our court makes it imperative that the questions presented be certified to the Supreme Court of the United States.

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take within the next few days some part [illegible] the Federal Government [illegible] officials so that the responsibility [illegible] think that the Court [illegible] cannot on the present record [illegible] set and that the Government [illegible]

"I think that the Court should look again to the future because I think that [illegible] the sanctions set by the Court do not necessarily have to be imposed now. I think that the future to which the Court should look is the time when the Federal Government feels that it is safe and that they have met their responsibilities and that conditions are stable enough so that the basis for [illegible] protecting Mr. Meredith and maintaining law and order can be withdrawn. I think at that time it will be the position of the Governor which is significant. I think at this time the assurances given to the Court by the Governor are adequate and satisfactory and that the Court may wish to take steps to make sure that they become satisfactory.

"I think that is the best that I can suggest, Judge Tuttle, considering that this is a change of position by the State which I did not expect."

Directly involved are certain statutes relating to the power of courts in criminal contempt cases and the right to trial by jury. Title 18 §§ 401, 402 and 3691. The matter of the right of trial by jury in a criminal contempt proceeding has been the subject of much discussion in the courts and among legal scholars. The most recent expression by the United States Supreme Court is the case of *Green v. United States*, 358 S. Ct. 632, 356 U.S. 165, 2 L. Ed. 2d 672. In the majority and dissenting opinions one will find a thorough review of the subject. To say the least, the common law as it existed before the adoption of our Constitution " . . . is shrouded in much obscurity." Much of the argument begins at this point. For our purposes it seems sufficient to say that the Green case is easily distinguishable from the case at hand for two reasons: (1) In the Green case the United States commenced the proceeding in the District Court and was a party from the beginning. (2) The act which constituted the contempt in the Green case (bail jumping) was not a federal criminal offense at that time. In the Green case the position of the United States was clear from beginning to end — it was a party to the litigation. As heretofore stated the United States did not enter the instant case until the litigation had been decided in the appellate court and returned to the District Court by proper mandate, although the last mandate also sought to retain jurisdiction in this court.

It is obvious that the acts with which the defendants Barnett and Johnson are now charged, constitute crimes under Title 18 USCA § 242 and § 1509. Under Title 18 §§401, 402 and 3691, it is clear that the defendants would be entitled to a jury trial if they were being prosecuted in the United States District Court, unless the alleged dis-

obedience of the writs, processes and orders of the court were involved in a "suit or action brought or prosecuted in the name of, or on behalf of, the United States." In my opinion, the United States is not a party and therefore the exemption of the statutes would not apply for that reason. It should be remembered also that the United States District Court, pursuant to the final mandate of this court, issued its permanent injunction placing substantially the same restraints on the defendants as the temporary restraining order of this court. Whatever acts violate the orders of this court may reasonably be said to constitute a violation of the orders of the United States District Court.[10] Accordingly, if the United States is not a party

[10]The order of the District Court for the Southern District of Mississippi granting the permanent injunction dated September 13, 1962, was broad and general and complied with every Mandate issued by this Court, and the Mandate of Mr. Justice Black of September 10, 1962. While the defendants Barnett and Johnson, are not specifically mentioned therein, numerous persons are mentioned and the order applies to ... all persons in active concert and participation with them be and they hereby are permanently restrained and enjoined from ....

The temporary restraining order issued by a panel of this Court dated September 25, 1962, refers to the order of this Court dated July 28, 1962, and the fact that the District Court for the Southern District of Mississippi ... having entered a similar order on September 13, 1962, pursuant to the Mandate of this Court ... and said order of this Court temporarily restrained the defendants, said other persons from

"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."

and if the acts charged in the show cause order also constitute a violation of the orders of the United States District Court and constitute federal criminal offenses, the defendants are entitled to a trial by jury if tried in the District Court. To me it is perfectly logical therefore to hold that if the defendants Barnett and Johnson are given greater substantive and procedural rights in the District Court than in our court (assuming such rights to be greater in the District Court than here) they are entitled to demand and receive a trial in that court which will guarantee the full rights assured to them by statute. The device of designating an *amicus* and giving the *amicus* the right in effect to choose the court to hear the case is improper. The choice of forum to the extent indicated should not be tolerated in criminal cases.

To say the least, there is serious disagreement and debate amongst the scholars and those in ultimate authority as to the right of trial by jury in criminal contempt cases. Regardless of the final conclusion reached in that controversy, it is enough to say that *under the facts and in the circumstances of the instant case* outlined herein, the question of guilt or innocence should be decided by a jury. In my judgment, the proper place to try the defendants is in the United States District Court where the case originated; but if not, a jury should be provided in our court. Trial by jury in appellate courts is not completely unknown to the law. Title 28 USCA § 1872 provides:

"§ 1872. Issues of fact in Supreme Court. In all orig-

inal actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury. June 25, 1948, c. 646, 62 Stat. 953."[1]

For the reasons stated, it is my opinion that this case should not be tried in the appellate court with the United States designated as *amicus*, serving as party and prosecutor, but the case should be certified to the United States District Court where the case originated, for trial there. In any event, whether the trial is in the United States District Court or in our court, the defendants should be accorded a trial by jury.

[1]See also the State of Georgia v. Brailsford, (1794), 3 Dall. 1, 1 L. Ed. 483.
The following statement from Hart and Wechsler, "The Federal Courts and The Federal System", is of interest:
"Since the earliest days, original cases have usually been equitable in character, and invariably the Court has been able to deal with problems of taking testimony and preparing findings of fact by the procedure of reference to a special master. The Seventh Amendment, however, applies to trials at common law in the Court, as 28 U.S.C. § 1872 recognizes, although no trial by jury seems to have been held since the eighteenth century. See Georgia v. Brailsford, 3 Dall. 1 (U.S. 1794).
"See also 1 Carson, History of the Supreme Court of the United States 169, N. 1 (1902), describing two other unreported instances of trial by jury, in 1795 and 1797. Cf. United States v. Louisiana, 339 U.S. 699, 706 (1950), denying Louisiana's motion for a jury trial."
Footnote 1 referred to above in Carson's History of the Supreme Court, page 169, contains the following comment:
"3 Dallas 1, (1794). It has been asserted that this case is the only instance of trial by jury in the Supreme Court. This is an error. The minutes of the court disclose that in the case of Oswald v. The State of New York, a jury was sworn and witnesses called, and a verdict found for the plaintiff of $5,315.06. This was in February, 1795. Two years and a half later a writ of inquiry of damages in the case of Catlin v. The State of South Carolina, was executed at the bar of the Supreme Court, and a verdict was given for the plaintiff for $55,002.84 . . ."

I fully approve and concur in the additional statement of Judge Bell set forth under Section VII of his opinion; and wholeheartedly join in his expressions as to the dissent therein mentioned, and certification of the additional question therein set forth. I do this rather than to add to my own opinion.

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

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,
Movant,

versus

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

ORIGINAL PROCEEDINGS IN CRIMINAL CONTEMPT

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

BELL, Circuit Judge:

I

Prior to becoming President, Abraham Lincoln, when told with reference to slavery that the law was wrong in

taking a man's liberty without trial by jury, responded that slavery was ungodly.

> "But it is the law of the land, and we must obey it as we find it."[1]

New legal precedents of recent years, with resultant changes in the existing order, have brought this maxim of another day, expressing an American tradition, into sharp focus. The necessary accommodation has differed in degree and manner, running the scale from prompt compliance, on through a middle ground of painful but responsible and dignified adjustment, down to extreme recalcitrance or outright refusal even to obey court orders entered, as they must be, pursuant to these precedents.

This case is concerned with what started as outright refusal on the part of Respondents herein, the Governor and Lieutenant Governor of Mississippi, to obey or let others obey court orders. Having been cited to show cause why they should not be held in criminal contempt for wilfully disobeying the temporary restraining order entered by this court on September 25, 1962 in the matter of *United States v. State of Mississippi, et al.*, No. 19475, a proceeding ancillary to that of *Meredith v. Fair*, No. 19475, their several motions to dismiss including that based on lack of grand jury presentment and indictment are denied under separate orders. Their demand for trial by jury in the district where the alleged contemptuous acts or omissions were committed or omitted is the subject matter of this further discussion.

[1]Sandburg, Abraham Lincoln, The Prairie Years, Volume II, p 236.

The background of the show cause order is the case of *Meredith v. Fair*, supra, and the incidental and ancillary proceedings arising therefrom. That suit involved the constitutional right of the plaintiff, James H. Meredith to attend the University of Mississippi free of discrimination because of race. The right to jury trial claimed here springs somewhat vicariously from the grant of that right. And having accorded plaintiff there his right, we must be alert not to now deprive Respondents of their right.

This court reversed the judgment of the District Court for the Southern District of Mississippi with the result that Meredith was to be admitted as a student to the University of Mississippi. The final order, dated July 28, 1962, of this court was unprecedented, in that jurisdiction was reserved full force to this court while at the same time the case was returned to the jurisdiction of the District Court from whence it came. Pursuant to mandate, the terms of the order were made the judgment of the District Court on September 13, 1962. The order of this court in pertinent part is as follows:

> "This Court on July 26, 1962 entered its opinion and judgment forthwith (1) vacating a stay issued herein by Judge Ben F. Cameron, July 18, 1962, (2) recalling its mandate issued herein July 17, 1962, (3) amending and reissuing its mandate, for the purpose of preventing an injustice, by ordering the District Court to issue forthwith an injunction against the defendants-appellees ordering the immediate admission of the plaintiff-appellant, James H. Meredith, to the University of Mississippi, (4) which opinion and judgment includes an order of

injunction by this Court against the defendants-appellees herein.

"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 admission 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.

"(2) Prohibited from any act of discrimination

relating to Meredith's admission and continued attendance, and is

"(3) Ordered promptly to evaluate and approve Meredith's credits without discrimination and on a reasonable basis in keeping with the standards applicable to transfers to the University of Mississippi."

Thus the same order was of force in each court, not only during admission but during continued attendance. This situation, whether fortuitous or otherwise, has been construed as giving those who sought to enforce the orders, plaintiff Meredith with the help of the Department of Justice, a choice of courts from which to seek ancillary relief. Traditional procedures including any distinction between original jurisdiction in the District Court and appellate jurisdiction in this court have been largely disregarded. Some orders were in fact sought from and granted by each court. Of these, at least two were granted by this court after refusal by the District Court. One of these was the order of this court of September 18, 1962 designating the United States as *amicus curiae*.

The orders material to this proceeding, other than the original order of July 28, 1962 reserving jurisdiction in this court during "continued attendance", are the order designating the United States to appear and participate as *amicus curiae* in all proceedings in the case of *Meredith v. Fair*, in this court and in the District Court, and the temporary restraining order of September 25, 1962 which Respondents are charged with violating. The *amicus* order authorized the United States to submit pleadings, evidence,

arguments, and briefs and to initiate such further proceedings, including proceedings for injunctive relief and for contempt of court as might be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States.

Thereafter this court entered the temporary restraining order of September 25, 1962 at the request of *amicus curiae* and plaintiff in *Meredith v. Fair*, restraining the State of Mississippi and its Governor, Ross R. Barnett, their agents, employees, officers and successors, together with all persons in active concert or participation with them, from interfering with or obstructing by any means or in any manner the enjoyment of rights or the performance of obligations under the order of July 28, 1962 of this court and the order of September 13, 1962 of the District Court, both of which orders required the enrollment of James H. Meredith in the University of Mississippi. No application for a restraining order was made to the District Court. The application in this court was original.

The order to show cause charges that after service, and on September 25, 1962, Governor Barnett wilfully prevented Meredith from entering the office of the Board of Trustees of the University in Jackson, Mississippi where he was to be registered as a student pursuant to the order of the court. On September 26, 1962 Lieutenant Governor Johnson, acting as officer and agent for Governor Barnett and for the State of Mississippi is alleged to have prevented Meredith from entering the campus of the University of Mississippi at Oxford, Mississippi and from enrolling as a student at a time when Lieutenant Governor Johnson had

notice of the temporary restraining order. The Governor and Lieutenant Governor are alleged to have assumed responsibility on September 27, 1962 for maintaining law and order on the campus of the University in connection with the expected enrollment of Meredith and instead, directed and encouraged certain law enforcement officers to obstruct and prevent the entry of Meredith upon the campus. Governor Barnett is also charged with violating the September 28, 1962 order of this court which adjudged him in civil contempt of the temporary restraining order of September 25, 1962. The violation is said to be of that portion of the order which directed that he purge himself by notifying all law enforcement officers and all other officers under his jurisdiction and command to maintain law and order at and around the University, and to cooperate in the execution of the orders of this court and the District Court to the end that Meredith be permitted to register and remain as a student at the University under the same conditions as apply to all other students. It is set out that Governor Barnett assumed this responsibility of maintaining law and order at the campus on September 30, 1962 and Meredith entered the campus without any interference or obstruction as a result of cooperation between the Mississippi State Highway Patrol and officials of the United States Department of Justice. However after entry, Governor Barnett is alleged to have wilfully failed to exercise his responsibility, authority and influence as Governor to maintain law and order with the result that disorder, disturbances and acts of violence designed to prevent and discourage the enrollment and attendance of Meredith as required by the court orders followed.

II.

Time has passed and the original order has been complied with to the end that Meredith is in school. And it is important to bear in mind as we consider the question here presented that the grant of jury trial to those charged with acts said to constitute criminal contempt and which at the same time constitute crimes would not leave a court bereft of power to enforce its orders. Here civil contempt was in order. See *Toledo Scale Co. v. Computing Scale Company*, 1923, 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719, affirming, 281 Fed. 488 (7 Cir., 1922); and *Sawyer v. Dollar*, D. C. Cir., 1951, 190 F. 2d 623, vacated as moot, 1952, 344 U. S. 806, 73 S. Ct. 7, 97 L. Ed. 622. The proceeding in civil contempt against Respondents is still pending in this court. It involves no question of jury trial. It was commenced for the purpose of obtaining compliance with the orders of the court, as distinguished from punishment for wrongful conduct under criminal contempt. We could have, upon violation of our orders, ordered Respondents taken into custody for confinement pending compliance with the court orders. *Gompers v. Buck's Stove & Range Co.*, 1911, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797. That Respondents happened to be Governor and Lieutenant Governor of their state would be no deterrent. *Sterling v. Constanton*, 1932, 287 U. S. 378, 53 S. Ct. 190, 77 L. Ed. 375. A majority of the court did not think this to be a wise course at the time but it was nevertheless an available course of action. At any rate, the orders of the court as to Meredith have now been carried out, albeit with force and arms, as well as by virtue of civil contempt, and we come now to the demands of each of Respondents for jury trial in this proceeding to punish.

III.

But for the happenstance that the temporary restraining order of September 25, 1962 allegedly violated was that of this court rather than the District Court for the Southern District of Mississippi, Respondents would clearly be entitled to jury trials. Rule 42 (b), Fed. R. Crim. P., provides that a defendant in a criminal contempt proceeding is entitled to trial by jury in any case in which an Act of Congress so provides. Title 18, USCA, §402 provides that any person wilfully disobeying a lawful order of a District Court shall be prosecuted as provided in Title 18, USCA, §3691. This latter section provides for jury trial, if demanded, upon the violation of an order of the District Court if the act done be of such character as to also constitute a criminal offense under any Act of Congress, or under the laws of any state in which the act was done or omitted. It is provided that the jury trial shall conform "as near as may be the practice in other criminal cases."[2]

Respondents are charged with what amounts to a crime under Title 18, USCA, §242 in that the acts alleged constitute deprivation of the constitutional rights of Meredith under color of law, and Title 18, USCA, §1509 in that their alleged conduct constituted interference with United States marshals in the performance of their duties under orders of United States courts.[3] No one disputes this.

Two reasons are asserted by the United States as to why

[2] The jury trial provision does not apply to contempts committed in the presence of the court, something not here involved.

[3] They may now be tried for these crimes of which they are accused, but the trials must be in the District Court and to a jury.

Respondents should be deprived of jury trials. First, it is said that the order allegedly violated was not that of a District Court; and second, even if this is such an analagous situation as to be controlled by the District Court statute, nevertheless no jury trial is permitted under the statute where the United States is a party.[4]

IV.

My views as to this latter question may be succinctly stated. It is true that the jury trial provision does not apply where the order violated is "entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States." § 3402, 3691, supra. And, so the argument goes, the order of September 25, 1962 was "entered in [a] suit or action brought or prosecuted in the name of or on behalf of the United States." This is on the theory that the order was obtained by the United States as *amicus* under an order vesting broad powers in the *amicus*.

I am unable to find any warrant in law for such a position. None has been cited to this court. My brothers have not enlightened me though some say it is so. I have read the *amicus* order and it did not make the United States a party.[5] Even this would hardly be sufficient for the order violated was entered in "a suit or action brought or prosecuted in the name of" James H. Meredith. There is not a

[4] This is not to disparage able counsel carrying out our direction to the United States to bring the criminal contempt proceeding against Respondents.

[5] The *amicus* order was granted *ex parte*. It can hardly be contended that the United States intervened for there was no motion served as is required by Rule 24(c), F. R. Civ. P., nor notice of any kind to defendants in *Meredith v. Fair*, cf. Rule 6(d), F. R. Civ. P.

word in *Faubus v. United States*, 8 Cir., 1958, 254 F. 2d 797, cert. den., 358 U. S. 829; or *Bush v. Orleans Parish School Board*, E. D. La., 1961, 191 F. Supp. 871, affirmed, 367 U. S. 908 that supports any such position. Authority to bring such a suit or action as that of *Meredith v. Fair* in the name of the United States has been refused by the Congress. And we are dealing with the right to jury trial — not with the right of the court to appoint the United States as *amicus* to help carry out orders in a pending cause. Therefore, this contention of the United States is rejected.

But in doing so, I do think it vital that the question be faced squarely and settled. To hold otherwise will mean that there will be no jury trial in criminal contempt cases even where the order is clearly that of a District Court whenever and wherever the United States is designated in the capacity of *amicus curiae* to assist a court in carrying out its orders and later procures a restraining order which is violated. Here the application for the restraining order was granted on the petition of the *amicus* and on the petition of the plaintiff and the position of the United States on this question is, of course, based on the *amicus* order.

V.

Thus it is that Respondents would be entitled to jury trial if the restraining order had been entered by the District Court, and we come to the main thrust of the demand. What we must decide is whether Respondents have that right where the order was entered by this court under the circumstances prevailing instead of the District Court. And it is no answer to say that there is no method prescribed by statute whereby this court an afford Respond-

ents a jury. The question is not what we can do, but what is the right of Respondents in the premises.

We turn in vain to the jury trial debates preceding the Civil Rights Act of 1957 for help in a situation such as this where a Court of Appeals has in effect acted as a District Court in entering the restraining order. This is to point up that the order was not sought in the District Court but was originally filed in this court when jurisdiction, or to say the least, co-jurisdiction had been returned by mandate to the District Court. There was no appeal pending or in view from the District Court. That court had the duty and the right under the law as we have heretofore known it to go forward.

Those debates were much concerned with retaining the right of jury trial under Title 18, USCA, §§402 and 3691, supra, as against an effort to permit suits in certain types of civil rights actions to be brought by the United States and thereby avoid the requirement of jury trial. The result of the debates was a compromise to allow suits by the United States in the area of voting rights only, and then to remove the provision for jury trial only where the fine does not exceed three hundred dollars and imprisonment is for no more than forty five days. Title 42, USCA, §§1971, 1995. The intent of Congress should be plain to all from this recent result that jury trial was to be preserved in all save voting rights cases.

Jury trials in criminal contempt proceedings in the District Court where the acts charged constituted crimes were at that time well established. *Michaelson v. United States, ex rel., Chicago, St. Paul, Minneapolis & Omaha Railway Company*; and companion case of *Sandefur v. Canoe Creek Coal Company*, 1924, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162. There the Supreme Court held what is now §3691, a part of the Clayton Act enacted in 1914, to be constitutional as against the charge that it interfered with the inherent power of courts to punish for criminal contempt. The first case, *Michaelson*, dealt with striking employees who were enjoined from picketing, and who were charged with contempt for violation of the injunction. The District Court their denied demand for jury trial and adjudged them guilty. The circuit court affirmed, 7 Cir., 1923, 291 Fed. 940. In the *Sandefur* case the same question was certified for the opinion of the Supreme Court by the United States Court of Appeals for the Sixth Circuit. The court said that the provision for trial by jury was mandatory under the facts presented, if demanded, and that trial of criminal contempt was an independent proceeding between the public and defendants, and no part of the original cause.

What we are largely concerned with here is policy, a policy established by Congress for the District Courts by statute, and constitutional policy that is a part of the warp and woof of this country where crimes are charged. Article III, §2, Cl. 3 of the Constitution, and the VI Amendment thereto. That criminal contempts are not subject to jury trial as a matter of constitutional right, *Green v. United States*, 1958, 356 U. S. 165, 78 S. Ct. 632, 2 L. Ed. 2d 672, does not obviate the fact that this constitutional policy was inherent in the District Court statute. And the avoidance of that policy by the simple medium of reserving jurisdiction to a Court of Appeals to enforce the same order that is by mandate made the order of the District Court, with the result that ancillary orders may be obtained

originally from the Court of Appeals is flagrant indeed. It is too simple. It thwarts the policy established by the Clayton Act, 18 USCA, §3691, and as reaffirmed in the debates leading to the enactment of the 1957 Civil Rights Act. That it was not done by design is unimportant. It is the result that counts.

That there was good reason for the reservation of jurisdiction and the injunctive order in this court is not now in dispute. I do not doubt the legality of the order of reservation under the authority of the All Writs Act, 28 USCA, §1651 up to the time that the order of this court was made the order of the District Court. However, from that point on legality for the present purposes of jury trial is at least limited. Any doubt could have been, but was not, resolved by a prior application to the District Court for the restraining order in question. The original application, I reiterate, was in this court, and my view is that original jurisdiction was at that time in the District Court at least to the extent of entitling Respondents to jury trial as they would be entitled to there.

To deny Respondents this right under the circumstances would be to establish a drastic and far reaching precedent,*

*If established as a precedent, it not only immediately involves Mississippi and Respondent Barnett, but their agents, employees, officers and successors and all persons in active concert or participation with them who may interfere with or obstruct by any means or in any manner the enjoyment of rights or the performance of obligations under the order of July 28, 1962 having to do with the admission and continued attendance of James H. Meredith at the University. This is the language of the restraining order of September 25, 1962 later entered as a temporary injunction and retained for enforcement in this court, two judges dissenting, rather than being remanded to the District Court. It is now pending in this court and every person in any way violating its broad terms may be subjected to trial for criminal contempt without benefit of jury trial.

and the fact that this is a hard case hardly indicates a different result. It goes without saying that we are dealing with a great and fundamental right, and one not lightly to be disregarded.

My views are buttressed by the strong, historically documented, dissenting opinion of Mr. Justice Black in which Chief Justice Warren and Mr. Justice Douglas concurred in *Green v. United States*, supra. They were of the view that, notwithstanding the established precedents, a defendant in criminal contempt who can be punished by severe prison sentences, as is the case here, is entitled to be tried by a jury after indictment by a grand jury in full accordance with all procedural safeguards required by the Constitution for "all criminal prosecutions". That case had to do with violation of court decrees outside the presence of the court, and the act charged, bail jumping, did not constitute a crime at that time so no statutory right to jury trial in criminal contempt was involved. The defendants were sentenced by the District Court to three years in prison.

The dissent did not dispute the established principle that there is no constitutional right in criminal contempt to a jury trial.† The dissenters would set aside these precedents as being repugnant to the Constitution. The problem of summary trial with punishment being meted out by the court whose order has been disobeyed is emphasized. See also Beale, Contempt of Court, Criminal and Civil, 1908, 21 Harv. L. Rev. 161; and Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in

†See the majority opinion and the supporting authorities set out in Footnote 14.

"Inferior" Federal Courts — A Study in Separation of Powers, 1924, 37 Harv. L. Rev. 1010.

That we should take a restrictive view of our power under these circumstances is made clear, as the Supreme Court has noted, by the history of the Act of 1831 from whence Title 18, USCA, §401, authorizing punishment for contempt, derives. *Nye v. United States*, 1941, 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172. It was the Congressional intent to safeguard constitutional procedures by limiting courts to the "least possible power adequate to the end proposed." *In Re Michael*, 1945, 326 U. S. 224, 66 S. Ct. 78, 90 L. Ed. 30. Here the end sought is trial for criminal contempt, with Respondents to be accorded each and every right and safeguard to which they are entitled under the Constitution and laws of the United States.

I think it sufficient to say in conclusion, conceding the power of this court to enter the restraining order of September 25, 1962, a date after which the order of this court had been made the judgment of the District Court, and where the restraining order was not first sought in the District Court so as to give this court some basis for acting in aid of its appellate jurisdiction; that deprivation of the right to jury trial under the circumstances improperly by-passes the statutory safeguard of jury trial intended by Congress. For these reasons I would accord Respondents trial by jury.

This can be done by certifying such charges as are contained in the show cause order outstanding against Respondents to the appropriate District Court for trial by jury. See *Houston & North Texas Motor Freight Lines, Inc. v.*

Local No. 745, International Brotherhood of Teamsters, N. D. Tex., 1939, 27 F. Supp. 154. This conclusion gives effect to my belief that there must be a constancy and sameness about procedure if the rights of all are to be secure, and it cannot be gainsaid that rights lost to some today, through make-shift procedures invoked for special situations of the moment, may be the rights of others tomorrow. The ideal of liberty and justice under, and equality before the law will not long survive under such a grievous practice. Nor may the practice be justified here with the result that the right to jury trial is lost, unless it is that those who deny the ideal are to be deprived of its benefits and, of course, that is not our system. In short, we must abide the statutes applicable to the District Court when we act as a District Court.

VI.

The court is evenly divided on this question and it is fortunate that a final decision may be sought elsewhere before further action is taken. Congress has provided by statute for certification at any time by a Court of Appeals of any question of law in any civil or criminal case as to which instructions from the Supreme Court are desired. Title 28, USCA, §1254. The Supreme Court has promulgated rules to be followed in certifying questions to it. Rules 28 and 29. For example, and as heretofore noted, the question of the constitutionality of what is now Title 18, USCA, §3691 making a jury trial mandatory in certain criminal contempt actions was certified and answered. *Sandefur v. Canoe Creek Coal Company*, supra.

Certification is all the more proper in a case such as

this where respondents inescapably are charged and must be tried in their positions as Governor and Lieutenant Governor, respectively of the State of Mississippi, as well as individually. It is plain that they were carrying out the policy of that state, and federal courts have long accorded special consideration to the delicate relationship that exists between the Federal and State governments under the Constitution. *South Carolina v. United States*, 1905, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 264.

Here the question raised with regard to jury trial should be finally resolved in advance of trial. We cannot finally resolve it. I am glad to join in certification even though I believe that Respondents are entitled to jury trial.

VII.

Two brief comments appear to be in order following the formulation of the certified question, and the additional comments of the four members of the court who would deny jury trial.

First, the limited dissent of Judges Gewin and Bell referred to in Footnote 7 of their opinion with respect to the preliminary injunction entered October 19, 1962 should by no means be deemed insignificant. That dissent went to the heart of what has been the problem in this case since it was taken over by this court through the July 28, 1962 order. We dissented, not from the entry of the injunction, but because the court would not thereafter return the case to the District Court where it should have been all along; there to be handled, subject, of course, to the traditional mandamus procedure.

Under our court system the District Court speaks to litigants, while a Court of Appeals speaks, or should speak, to the District Court. This historical mode lends itself to the maintenance of judicial dignity and decorum, engenders and preserves respect for the law, and avoids an unseemly type of judicial scurrying about that results when there are no rules to follow.

I regret that the court will not also certify the following additional question, deemed by me at least to be of the utmost importance in the event of jury trial, so as to eliminate more makeshift procedures:

> "If Respondents are entitled to trial by jury for the criminal contempt with which they are charged, may the order to show cause charging them be referred to the District Court where the alleged acts of contempt were committed for trial?"

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

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, constitute the original certificate of the said Court of Appeals to the Supreme Court of the United States including the certified question, the statement of the nature of the cause and of the facts on which the question arises, and the opinions of the judges in connection therewith, filed in the case entitled

UNITED STATES OF AMERICA

No. 20240 versus

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

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 9th day of April, A. D., 1963.

EDWARD W. WADSWORTH, CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

United States v. Barnett/ Johnson

Department of Justice Files
Selected Papers Taken from Departmental Files for Microfilming. Papers arranged in files in chronological order.

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10-2-62----------12-10-62

LAWRENCE W RABB
ATTORNEY AT LAW
[illegible]
MERIDIAN MISSISSIPPI
[illegible]

October 2, 1962
(Dictated October 1, 1962)

Honorable Robert Kennedy
Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Kennedy:

I am writing this to endorse the actions you and the President have taken to enforce the orders of the Federal Courts in the Meridith case.

From the vantage point of Meridian, Mississippi, at this stage I am impressed that there has been a serious breakdown in our state law, and I am further impressed that the only way to deal with our governor is with a firm, persistent and continued show and exercise of strength. At this particular hour the only oasis of lawful authority appears to be at the seat of the Federal troops in Oxford.

It is my considered judgment that Governor Barnett has engaged in a deliberate campaign to promote what amounts to an insurrection against the United States in our state. I think he must be held responsible and that he must be brought before the bar of justice of the Federal Courts in New Orleans and I further feel that his arrest is entirely justified.

Parenthetically, by way of identification, I wish to give you the following information.

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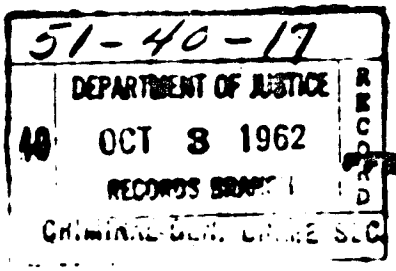
Ross Barnett PRR
Insurrection PRR
Civil Rights - Miss PRR

PRR



NEW

I am Chairman of the City of Meridian Democratic Executive Committee. I served four years on the State Board of Bar Admissions and was active in President Kennedy's campaign in this state. I am listed in Martindale-Hubbell which may be consulted for further biographical information.

In watching this matter develope it followed a very coldly calculated pattern by Governor Barnett and his advisers, Commencing with the television address approximately two weeks ago in which he urged the people by "all means" to resist the carrying out of the Federal Court order in the Meridith case. He used the word "all" without qualification.

Saturday it was related in the Memphis Commercial Appeal that Governor Barnett no longer appeared to be taking advice of Attorney General Joseph Patterson, and a respected attorney in Jackson verified this to me. It was also stated in the Commercial Appeal that Governor Barnett is being counselled primarily by a man named William Simmons who holds no public office in Mississippi but is coordinating director of the Citizens Council in Jackson. There are other members of the inner circle of the Citizens Council involved. Last Thursday's edition of the Wall Street Journal discussed the wide spread power of the Citizens Council in a matter of fact manner. These people, because we have no effective dissenting press, have been able to manipulate public opinion in this state through Governor Barnett, to the fever pitch which it reached in the past few days. They also artificially organized what clearly appears from this point, a conspiracy with General Walker to promote the riots of Sunday Night. It was reported to me that General Walker was in the Governor's mansion on Sunday morning prior to his activity in Oxford on Sunday Night.

It is my opinion that there was a state wide coordination to get sheriffs and their deputies to appear in Oxford in plain clothes on Sunday afternoon and it is my belief that some of these sheriffs and their deputies participated in the riots. Some of the arrests may corroborate this. In watching Governor Barnett's actions over the past two years and in checking with people who have observed him more closely than I have, he appears to have lost contact with other state officials who have by virtue of his superior public opinion moulding powers been intimidated into following him.

In regard to Mr. Simmons, one of Barnett's closest advisers, reliable information which I have is that Mr. Simmons, prior to World War II, was an associate of Sir Oswald Mosley and was active with his Fascist party in England. When Mosley was interned in 1940 for his Nazi sympathy, Simmons was required to leave England. Subsequent information I have is somewhat vague but I am reliably informed that because of some difficulties he had with the Draft during World War II a full FBI file was developed on him. I am quite concerned at the behind the scene power he has developed and the Citizens Council's steady promotion of speakers in this state such as General Edwin Walker early this year. I know that General Walker became very friendly with Simmons and Barnett when he spoke over statewide television this year just prior to the Military muzzling hearings. This appearance of Walker at that time appeared to be a thinly veiled intimidation of Senator Stennis's sub-committee on the muzzling hearings.

I feel this information is vital to you in evaluating the nature of the current minds who are influencing the Mississippi Governor. It is my feeling that with the type of mind that Barnett now represents it will only entrench the ability of him and his advisers to mislead and confuse the rank and file of Mississippi

if a compromise is negotiated which appeases the public & let them win the day.

Six months ago in my opinion, Mississipians were unhappy about it but were ready to accept the fact of Meridith's admission. The shrewd manipulations of Barnett and the foregoing advisers on television and in the press, has inflamed our people. After the riots of Sunday night our people, I believe, are ready for a new tack and I believe the only way to bring this about will be to carry out the Circuit Court of Appeals order to arrest Barnett and hold him responsible for his actions.

I am interested in the future of the Democratic Party in Mississippi and although we may go through a period like we had in '48, I feel that the only basis of a new start is to properly reveal Barnett for what he has done in breaking down respect for law and order in this state.

I have urged Senator Stennis this day by telephone to condemn Barnett's actions. I had hoped he would be a rallying point for the moderates in our state.

I called your office long distance to convey these thoughts but you were not in and I then talked with Mr. Walter C. Pine in the White House who suggested that I write this letter confirming my comments on the telephone.

Sincerely,

Lawrence W. Rabb

Lawrence W. Rabb

LWR/nc

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Honorable Robert Kennedy
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AIR MAIL