

1 that at the time we issued the restraining order of September
2 18th the matter was still pending in the Supreme Court of
3 the United States on your petition for certiorari.

4 MR. CLARK: Yes, sir.

5 CHIEF JUDGE TUTTLE: Our injunction, which was a
6 preliminary injunction pending appeal -- the matter was
7 still on appeal when we issued our temporary restraining
8 order. Excuse me.

9 MR. CLARK: Yes, sir.

10 CHIEF JUDGE TUTTLE: Yes, the matter was still on
11 appeal on September 18th when we issued our restraining
12 order -- September 25th or whatever date it was. In other
13 words, --

14 MR. CLARK: The Supreme Court of the United States
15 didn't act until October 8th, as I recall.

16 CHIEF JUDGE TUTTLE: So the Meredith against
17 Fair case was still on appeal to the United States Supreme
18 Court at the time when this Court issued the temporary
19 restraining order which is involved in this case.

20 MR. CLARK: I cannot admit that, Your Honor.

21 CHIEF JUDGE TUTTLE: Is there any doubt of it?

22 MR. CLARK: I don't conceive a petition for
23 certiorari has that effect. The petition simply suggests to
24 the Court that it ought to review. There is no right -- no
25 right of appeal.

1 JUDGE BELL: Not whether or not the mandate had
2 issued. This case was in the District Court and the order
3 of this Court and the order of this Court had been made the
4 judgment of the District Court at the time the temporary
5 restraining order was issued, as I understand.

6 MR. CLARK: Yes, sir.

7 JUDGE BELL: Here is what I want to ask: In
8 this series of orders, some were presented to the District
9 Court, the District Court refused to grant them, and then
10 they were brought to the Court of Appeals. Some were not,
11 as I understand it. The Government can probably answer. I
12 would like to get an answer to it during the day if
13 somebody -- was this temporary restraining order of
14 September 25th sought first from the District Court?

15 MR. CLARK: No, sir. I can answer that.

16 JUDGE BELL: Or was it brought here skipping over
17 the District Court, brought straight to this Court?

18 MR. CLARK: This Court, the Fifth Circuit Court of
19 Appeals, appointed the Government as Amicus in this Court
20 and in the District Court for the Southern District.

21 JUDGE BELL: Right.

22 MR. CLARK: And there was only one proceeding
23 there brought and brought by the Government.

24 JUDGE BELL: No. That order was sought in the
25 District Court first. They went to the District Court,

1 asked the District Court to make them Amicus, the District
2 Court refused. It was brought to this Court. We entered
3 the order pursuant to preserving our jurisdiction. Now
4 that is the amicus order.

5 MR. CLARK: This is news to me, Your Honor. We
6 had no notice that they were asking to appear as amicus,
7 and we know of no ruling by the District Court preventing
8 them appearing as amicus.

9 JUDGE BELL: I know that, know about that, of my own
10 knowledge. What I want to know about now is the restraining
11 order of September 25th.

12 MR. CLARK: It was not ever sought from the
13 District Court insofar as I know, unless it was another
14 one of these proceedings they asked for and we had no knowl-
15 edge.

16 CHIEF JUDGE TUTTLE: I think the Court will
17 remember as we relate -- this happened on the day we were
18 here hearing the en banc motion for contempt against Fair
19 and others. Is that not correct? It was after the petition
20 for contempt hearing, Fair and others, that the Government
21 then came in and said, We want you to make us parties to
22 this, the Governor and later on the Lieutenant Governor,
23 and that was done practically in open court here on the 25th
24 of September.

25 JUDGE WISDOM: But on the 18th we appointed the

1 United States as amicus, and that was in Hattiesburg after
2 having first discussed the matter with the District Court.

3 MR. CLARK: Yes, sir, and they were appointed
4 amicus in the District Court and in this Court, and, as I
5 started to say to Judge Bell, the only proceedings that we
6 were ever advised that they ever started in the District
7 Court was a proceeding to cite the Registrar, the Dean, and
8 the Chancellor for contempt, and that was --

9 JUDGE WISDOM: That was started in the District
10 Court?

11 MR. CLARK: That was started in the District
12 Court, and so far as we were ever advised by notice, pleas-
13 ings, that was the only thing ever asked of the District
14 Court.

15 JUDGE WISDOM: Well, the amicus order was sought
16 there.

17 MR. CLARK: I just didn't know it.

18 JUDGE WISDOM: What I want to get straight from
19 the lawyers some time today is if the restraining order of
20 September 25th was first sought in the District Court.

21 JUDGE RIVES: I know I joined in that restraining
22 order and there wasn't anything at that time to show it had
23 been sought in the District Court. Apparently it was sought
24 here the first time. I don't think it was sought in the
25 District Court.

1 MR. CLARK: It was on the morning after the hearing
2 concluded at approximately 6:00 p.m. on the question of
3 the Trustees being -- whether or not the Trustees were in
4 contempt, because I was ordered to remain here and then
5 report to the Court the next day.

6 CHIEF JUDGE TUTTLE: It was presented to us that
7 evening and we signed it at 8:30 the next morning.

8 MR. CLARK: The next morning. And the next after-
9 noon --

10 CHIEF JUDGE TUTTLE: -- against Johnson.

11 MR. CLARK: The Appellant secured an order against
12 Governor Barnett -- I know of no temporary restraining order
13 issued by this Court specifically directed to Lieutenant
14 Governor Johnson -- and the application of the United States
15 seeks only to hold him as an agent, No. 1, of the State of
16 Mississippi, and, No. 2, as agent of Governor Barnett or
17 acting for Governor Barnett.

18 JUDGE BROWN: There is some additional history:
19 on either September 18th or thereabouts, while Judges Bell,
20 Wisdom, and Brown were in Hattiesburg, the Government pre-
21 sented an application for a temporary restraining order, and
22 in that presentation we were advised by the Government that
23 the District Judge had entered an order enjoining certain
24 prosecution -- wasn't it for 24 hours?

25 JUDGE BELL: Right.

1 JUDGE BROWN: But just for 24 hours, and said he
2 would set the matter down then for the following Monday for
3 a hearing, and we entered an order at that time returnable,
4 I think, along with these other papers at the same time we
5 were having a hearing on the following Monday at New Orleans.
6 That preserves that.

7 MR. CLARK: And every proceeding that you men-
8 tioned there insofar as the District Court was concerned,
9 if Your Honor please, was a proceeding by Appellant Meredith.
10 Meredith went to the District Court and asked for orders
11 restraining prosecution or injunctive actions or further
12 developments of criminal charges then pending, and the only
13 thing I knew that the Government had done insofar as the
14 District Court was concerned, until Judge Bell just correct-
15 ed me, was the application for citation of the Registrar,
16 the Chancellor, and the Dean, and then everything else was
17 done here, and that is the subject matter of our present
18 petition for certiorari.

19 Would Your Honors permit me just a second to
20 confer with Mr. Green?

21 CHIEF JUDGE TUTTLE: Yes.

22 (Discussion between Counsel off the
23 record.)

24 MR. CLARK: Of course, our position insofar as the
25 law of the case might be concerned in regard to the petition

1 is that this present petition for certiorari, review of the
2 Supreme Court of the United States, could bring everything
3 that they previously refused to take certiorari of before
4 them, should they so decide.

5 JUDGE CAMERON: On that point, Mr. Clark, you have
6 got me a little confused. I listened to this on paper only.
7 I understood that the original application for certiorari
8 was made in the early days or middle days of July and that
9 your record went up some time in August. I don't see how
10 all these things that transpired in September got into that
11 record, were passed upon by the Supreme Court, but, of
12 course, the record will speak for itself, but you confused
13 me when you said that the Supreme Court by its denial of
14 certiorari in that case has passed on some actions taken
15 by this Court en banc. I thought that record was long
16 since in Washington. Last time I heard of it, Mr. Justice
17 Black had hold of it.

18 MR. CLARK: If Your Honor please, there are two
19 petitions for certiorari. Your Honor is correct about the
20 earlier one being filed in August; on August 16, 1962, we
21 filed a petition for certiorari to review the matters that
22 had been had and done in the Meredith case to that particular
23 time in connection --

24 JUDGE CAMERON: I see.

25 MR. CLARK: -- with that petition, which was No.

1 3-7 of the '62 term. Mr. Justice Black did set aside stay
2 orders granted by Your Honor here as a member of this Court
3 under the provisions of 2101 of --

4 JUDGE BROWN: Now specifically that petition did
5 question the orders of this Court entered on July 27 or 28
6 and the preliminary injunction, did it not?

7 MR. CLARK: That is correct, sir.

8 JUDGE BROWN: Now isn't it likely that the present
9 petition for certiorari, which attacks the validity of the
10 injunction, the temporary restraining order of September
11 21st, and the civil contempt order as based thereon, could
12 also foreclose the Respondents, if certiorari is denied
13 between now and the time we hear this case? Doesn't it cut
14 you off?

15 MR. CLARK: No, sir. On the question of criminal
16 contempt?

17 JUDGE BROWN: On the validity of the restraining
18 order.

19 MR. CLARK: Yes, sir, but by the same token, Judge
20 Brown, if they sustain it, then it would create some con-
21 siderable legal dilemma, and they haven't acted yet. I still
22 have every hope that they will be persuaded by our petition
23 at least to take certiorari, and then, of course, from there
24 on the question would pend with them as to what they would
25 do with it. I would only point out that I don't think that

1 Mr. Jaworski made a valid distinction to the Court between
2 the fact that Lieutenant Governor Johnson is not even men-
3 tioned, top side or bottom, in Counts 1 and 4 of a four-
4 count application for citation for criminal contempt, and
5 yet he would be called before this Court to defend himself
6 as to the conspiracy charges and the agency charges in
7 Counts 2 and 3 at a time when the thing would be pending on
8 four counts before the Court, and that was why we were
9 hopeful that the Court would grant our motion for severance
10 and why we think we are entitled to it at least.

11 JUDGE BROWN: Ordinarily if you ask for severance,
12 you come and tell the Court there are reasons why it is
13 going to be unfair. Are you suggesting here the positions
14 of Governor Barnett and Lieutenant Governor Johnson are
15 in conflict? Is that the position you are going to take?
16 Is one going to try to palm off on the other?

17 MR. CLARK: Judge Brown, our motions are almost
18 speaking motions in the extent to which we go of showing the
19 differentiation between the two charges. Your Honor used
20 the words "palm off," and that is not anywhere in there,
21 and that is not involved in the reasons for the request for
22 severance. We pointed out to Your Honors that these men had
23 different responsibilities in their elective offices and
24 that Lieutenant Governor Johnson obviously was here only as
25 an agent of the state, and, if he is an agent of the state,

1 he is here as the Lieutenant Governor solely and alone, and
2 he is not charged with doing anything other than in his
3 official capacity, and he is not charged with either doing
4 or participating in anything that the Government complains
5 of in Counts 1 or 4, and if we are entitled to a severance
6 on 1 and 4, it would seem to me that the Court ought to
7 grant us the severance on the conspiracy charge, and I
8 don't contend to you that we have the same right to a
9 severance on conspiracy that we would on the other matters
10 charged to be criminal contempt. I think Your Honors would
11 have to rule on the basis of what you would do in a criminal
12 case if defendants in a criminal action presented this same
13 motion for severance to you. I think that ought to guide
14 or deny your granting of motion on the severance in this
15 case.

16 CHIEF JUDGE TUTTLE: On this very thing, you
17 don't take the position that bringing both of them out of
18 the State of Mississippi at one and the same time for
19 possibly an extended period of time would give their motion
20 for severance any special significance? In trying to get
21 at this, I suppose the statutes of Mississippi make pro-
22 vision for the circumstances where the Governor and the
23 Lieutenant Governor are both absent from the state.

24 MR. CLARK: The President Pro Tem of the Senate
25 becomes --

1 CHIEF JUDGE TUTTLE: So you do not here urge that
2 they should be entitled to any special consideration because
3 of damage to the state government by reason of their joint
4 absence from the state?

5 MR. CLARK: If Your Honor please, no, sir, we did
6 not make that contention in the motion. That would be the
7 short answer to your question.

8 CHIEF JUDGE TUTTLE: All right. Thank you.

9 MR. CLARK: Judge, I would simply say the
10 Lieutenant Governor is the only presiding officer in the
11 Senate -- the Governor is the only officer entitled to
12 call the Senate into session in matters relating to consti-
13 tutional amendments because of the recent reapportionment
14 laws that are upcoming, and I would not want to waive the
15 rights of either of my clients to contend --

16 CHIEF JUDGE TUTTLE: As to continuance at the
17 time. In other words, you can always renew a motion for a
18 continuance as to either of joint defendants I would
19 assume, and if this situation arises, it can be faced at
20 the time.

21 MR. CLARK: I just did not recall that our motion
22 made that point to Your Honors. That is all I meant to say.

23 CHIEF JUDGE TUTTLE: All right. Gentlemen, as I
24 understand it now, the only argument left is with respect to
25 whether the Respondents, if a trial is had, are entitled to

1 be tried only by presentation to the grand jury and by a
2 jury trial, and, that being the case, I think we might most
3 appropriately take the next hour off for lunch and come back
4 after lunch. Unless someone has a different view of the
5 matter, the Court then will recess until quarter of two.

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7
8 Thereupon, at 12:45 o'clock p.m.,
9 a recess was taken until 1:45 o'clock
10 p.m.
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1 Pursuant to the recess, the proceedings
2 herein were resumed at 1:45 o'clock p.m., appearances being
3 the same as heretofore noted in the record. . . .

4 CHIEF JUDGE TUTTLE: You may proceed on behalf
5 of the Respondents in connection with the remaining motions.

6 MR. MONTGOMERY: If the Court please, --

7 CHIEF JUDGE TUTTLE: Mr. Montgomery.

8 MR. MONTGOMERY: If the Court please, I am going
9 to discuss the question of the right to trial by jury in
10 this matter, and it is quite apparent that the history that
11 is behind our jury system might in certain respects in a
12 brief way be of importance here.

13 We know that back in 1215 that the sturdy English
14 people during the reign of King John became mindful of the
15 right of trial by jury and that they wrested the Magna Carta
16 from the King at that time.

17 For some four hundred years after that, there was
18 a constant and unremitting struggle between the people of
19 England the the successors of King John to maintain their
20 right to a trial by jury, and you will recall that in 1617,
21 I believe it was, that William Penn, who later became the
22 founder of the State of Pennsylvania and who was a Quaker
23 minister, was arrested on the streets of London for preaching
24 to the people after Charles II had closed the home of the
25 Friends and it was no longer available for their services.

1 He was charged with the disturbing of the peace and was
2 tried, and the jury found him not guilty. The Judge who was
3 presiding in the court told the jury that they must go back
4 and change their verdict and bring in a verdict of guilty.
5 The jury stayed locked up for three days, history tells us,
6 without water and without food and without fire, and that
7 then they were imprisoned and an appeal was taken by the Bar
8 of England. The lawyers were so incensed over the act of the
9 Judge that the appeal was taken to the Court of Common
10 Pleas by the common agreement of the Bar, and there the Court
11 of Common Pleas did two things: In the first place, they
12 upheld the right of trial by jury, and, secondly, established
13 for the first time the doctrine that no one could be placed
14 twice in jeopardy for the same offense.

15 After that the struggle continued and when the
16 founders of America came to our shores, impressed as they
17 were with the importance of trial by jury, they preserved
18 that system in the colonies, and even while the War of the
19 Revolution was still continuing they were constantly strug-
20 gling for the perpetuation of our jury system, and when the
21 fighting ended, within one month the State of Pennsylvania
22 adopted its constitution, and in its constitution it pre-
23 served the same language of the Magna Carta, which was:

24 "No free man shall be imprisoned or
25 outlawed or banished or in any way destroyed

1 except by the legal judgment of his
2 peers and by the law of the land."

3 So then when the framers of our Constitution began
4 to undertake the work of establishing the principles of
5 government that are announced in that instrument, they were
6 so obsessed with the various questions of the relationship
7 between the states and the federal government, and nearly
8 all of that hot summer was expended in struggling and
9 compromising over those differences, and history tells us
10 that it was only in the last two days of that convention
11 that the question of the right of trial by jury came up,
12 and in a hurried compromise the original constitution
13 provided only that the trial of all crimes shall be by jury.
14 That constitutional convention could not possibly have any
15 less regarded the temper of the people of the United States.

16 JUDGE WISDOM: Mr. Montgomery, at that time
17 contempt proceedings were still not tried by jury, were they?

18 MR. MONTGOMERY: I am going to get to that, if
19 Your Honor please. I am going to show how that arose.

20 So then when the framers of the Constitution
21 submitted it for adoption, why, there was such a cry of
22 criticism and such a refusal to approve the constitution
23 that the colonies, or states as they then were, would not
24 approve it until it had been expressly promised that the
25 Bill of Rights would be included and that the right of trial

1 by jury would be preserved. So when the Bill of Rights
2 came in with the first ten amendments, we find that Article
3 3 of Section 2 of Clause 3 says that the trial of all
4 crimes, except in cases of impeachment, shall be by jury
5 and such trials shall be held in the state where the certain
6 crimes shall have been committed.

7 Then the Sixth Amendment comes in and says that in
8 all criminal prosecutions, the accused shall enjoy the right
9 to a speedy and a public trial by an impartial jury of the
10 state and district wherein the crime shall have been
11 committed, which district shall have been previously
12 ascertained by law, and to be informed of the nature and
13 cause of the accusation.

14 Then in the Seventh Amendment it was provided that
15 juries should be available in all civil cases where the
16 amount that was in controversy exceeded \$20.00.

17 So you can see that in the preparation of the
18 amendments of the Constitution the provision with reference
19 to juries was triply guarded. It is guarded by three
20 separate sections of the Constitution of the United States.

21 Now, then, Congress saw that with reference to
22 the trial for criminal contempt that there had arisen a
23 series of proceedings in courts whereby the courts had held
24 that in cases of criminal contempt that those proceedings
25 would be summary and would not be by trial by jury. As a

1 matter of fact, Mr. Frankfurter's work says that all this
2 started out under the misapprehension that arose from an
3 opinion handed down by the Court in England, or rather by
4 one of the judges that was never delivered from the bench but
5 was placed in the drawer and found its way subsequently into
6 the decisions of this country. So it was that the custom
7 arose to try criminal contempt without a jury but as a
8 summary proceeding.

9 Now confronted with that, they found this: --

10 JUDGE BELL: Wait. Let me ask you a question,
11 Judge. Before that decision that they claim was error, --

12 MR. MONTGOMERY: Yes, sir.

13 JUDGE BELL: -- for two or three hundred years they
14 had been trying criminal contempt, as I understand, by
15 juries --

16 MR. MONTGOMERY: Well, now --

17 JUDGE BELL: -- up until about the time of the
18 Court of the Star Chamber, which was about this same time you
19 were speaking of?

20 MR. MONTGOMERY: Now Frankfurter's work on that and
21 Mr. Goldfarb's both seem to say that arose from that opinion.

22 JUDGE WISDOM: But it was not until around the end
23 of the Eighteenth Century, because long prior to the end of
24 the Eighteenth Century contempt had been tried without a
25 jury, and, of course, the star chamber does go back a couple

1 of hundred years.

2 MR. MONTGOMERY: Yes, sir. Now in view of those
3 situations and in view of the existing set-up of the judicial
4 procedure, Congress then had before it this sort of a proposi-
5 tion: It had before it the actual statutes of Congress
6 under Title 18, Section 1, wherein it is said that any crime
7 that is punishable by death or by imprisonment for more than
8 one year is a felony. Under the rule that had been followed
9 by the courts in furthering these criminal contempts, they
10 had the unlimited power to place any restraint upon a man
11 by punishment, by fine or imprisonment, that might occur
12 to them to be proper under the circumstances. The only
13 limit that the Courts had upon their ability to fine and
14 imprison was the possible limitation, if it might be so
15 called, of the Eighth Amendment wherein it was provided that
16 cruel and unusual punishment should not be inflicted, and,
17 of course, there was also the rule that the courts them-
18 selves had adopted which was the rule of reasonableness.

19 Now, then, that being the case, when a person was
20 charged with a crime or charged with criminal contempt, he
21 found himself in this position: that the punishment could be
22 up to fifty years or any other amount that might meet the
23 test of reasonableness.

24 CHIEF JUDGE TUTTLE: Has your research indicated
25 what maximum punishment for criminal contempt has ever been?

1 MR. MONTGOMERY: No, sir, there has never been
2 any maximum set that I have been able to find except
3 maximums and minimums.

4 CHIEF JUDGE TUTTLE: I didn't mean that. Has
5 your research indicated what maximum punishment has ever
6 been adjudged for criminal contempt?

7 MR. MONTGOMERY: Well, the only one that I recall,
8 I think, is in the Gompers case.

9 CHIEF JUDGE TUTTLE: A year and a half?

10 MR. MONTGOMERY: Yes, sir.

11 JUDGE BELL: Three years in the Green case.

12 MR. MONTGOMERY: That is right, three years. Now,
13 then, the fine in that case, however, was tremendous. Now
14 here we found ourselves that the person who had been
15 charged with criminal contempt, knowing that the statutes of
16 the United States make it a felony, a crime for -- the
17 offense is punished by imprisonment of more than one year
18 and when it is more than one year, and so he is charged with
19 contempt. He doesn't know whether his fine is going to be
20 \$10,000.00 or more than \$1,000.00. He doesn't know whether
21 his imprisonment is going to be one year or five years or
22 ten years, so the charge carries with it the substance of --
23 being one that is in excess of one year, that makes the crime
24 a felony. So here you have under that proceeding that was
25 followed in the courts of punishing contempt without the

1 trial by jury of a person who was guilty, was subsequently
2 found guilty by a jury, found guilty by the court, when if
3 he had known in advance what his punishment would be, he
4 would have been charged with a felony, his charge would
5 have amounted to a felony, and he would have been entitled
6 under the Constitution to a trial by jury.

7 JUDGE WISDOM: Would not the absence of a fine or
8 punishment or fixed fine or fixed punishment within limits
9 indicate that it is not essentially a crime?

10 MR. MONTGOMERY: Well, that is not my thinking,
11 Your Honor. My thinking is that when the statute says that
12 anything that is punishable by imprisonment of more than a
13 year is a felony --

14 JUDGE BROWN: The Constitution says that?

15 MR. MONTGOMERY: -- then that statute says that
16 whenever a criminal contempt is punishable by imprisonment
17 of more than a year, that that man -- the crime that that
18 man committed was a felony. Then with that meaning of the
19 statutes --

20 JUDGE BROWN: I think you are right on this. If an
21 infamous crime can be prosecuted only by indictment --

22 MR. MONTGOMERY: What I am working up to, Your
23 Honor, what Congress had in mind --

24 JUDGE BROWN: Congress can't have anything in mind
25 about a constitutional problem.

1 MR. MONTGOMERY: No, but in reference to the rule
2 that had been constitutionally passed. That is what I am
3 trying to work up to.

4 JUDGE BROWN: What you are trying to get down to
5 is that the Green case had grand jury presentment?

6 MR. MONTGOMERY: Yes.

7 JUDGE BROWN: Why do you argue that to us? Aren't
8 we foreclosed by the Green case?

9 MR. MONTGOMERY: No.

10 JUDGE BROWN: Well, why not?

11 MR. MONTGOMERY: You are not foreclosed for two
12 reasons, because I am going to show Your Honors why Congress
13 has passed a statute which expressly provides that in this
14 case trial shall be by jury.

15 JUDGE TUTTLE: But not by grand jury indictment?

16 MR. MONTGOMERY: But not by grand jury indictment,
17 but shall be by jury.

18 CHIEF JUDGE TUTTLE: If one is required, the
19 other is required under constitutional requirements, isn't
20 it?

21 MR. MONTGOMERY: I am speaking now from the stand-
22 point of the rule. So that is the situation that existed
23 when Congress began to pass these rules that we are --

24 JUDGE BELL: Judge Montgomery, let me interrupt
25 you a minute and get this straight in my mind. The right

1 to jury trial now you are arguing is the one that Congress
2 has provided under Section 3691?

3 MR. MONTGOMERY: Yes, sir.

4 JUDGE BROWN: That is a limited interference or
5 displacement of the authority of the court which has been
6 approved by the Supreme Court. That doesn't say anything
7 about grand jury indictment, and I understood you were
8 going to argue that. When you do, I would like for you to
9 separate the two so that you argue separately why you
10 contend you have the right to be indicted by grand jury.

11 MR. MONTGOMERY: The feature with reference to
12 the indictment will be argued by Mr. Clark. I am going to
13 argue solely the question of the right of trial by jury
14 under our separation.

15 JUDGE BROWN: I don't want to tell you how to
16 argue. But you do it then on the basis of the statute and
17 not the Constitution?

18 MR. MONTGOMERY: I am doing it on the basis that
19 the Constitution, the reasoning behind the provisions of
20 the Constitution, and the then existence of the conditions
21 brought to life the statutes that create our present set-up.

22 Now, then, the Court in appointing the United
23 States as Amicus to present this charge of criminal contempt
24 ordered that the United States proceed to prefer these
25 charges under Rule 42-b. Now, then, 42-b, leaving out --

1 and if Your Honors would like to, while I am discussing
2 these rules, it might be well to have a copy of the rules
3 before you, and, if you will, I have some copies here that
4 have been made that I would like to let Your Honors have so
5 as to follow me as I discuss them.

6 (Whereupon, the documents referred to
7 by Counsel were distributed among
8 the Court.)

9 MR. MONTGOMERY: Now you will notice on the top
10 sheet of that sheaf that has been handed to you that it
11 contains a copy of Rule 42-1. The next sheet contains a
12 copy of Section 402, Title 18, 402, and the third sheet
13 contains a copy of Section 3691 of Title 18.

14 Now, then, omitting the points or parts of Rule
15 42-b that are not pertinent to the present consideration, we
16 find that Title 42-b on the first sheet of the sheaf does
17 say:

18 "The defendant is entitled to a
19 trial by jury in any case in which an
20 act of Congress so provides. He is
21 entitled to admission to bail, as
22 provided in these rules."

23 Now, then, of course, that is followed by Rule 46
24 that provides for the bail.

25 Now bearing in mind that Rule 42-b provides that

1 the defendant is entitled to a trial by jury in all of those
2 instances where the facts constituting the contempt also
3 constitute a criminal act in violation of an act of
4 Congress, that he is entitled to jury and he is entitled to
5 bail.

6 So now then we go from there to Section 402, and
7 in Section 402 it is provided by Congress that:

8 "When any person, corporation or
9 association wilfully disobeys any lawful
10 writ --

11 of course, it has no application except where the writ that
12 has been disobeyed is a lawful writ --

13 " -- process or order, rule, decree or
14 command of any district court of the
15 United States or of any court of the
16 District of Columbia --

17 Now, then, evidently in mentioning the District of
18 Columbia, it was not referring to the District Court of the
19 District of Columbia for the simple reason that the District
20 Court of the District of Columbia was covered in the use
21 of the words "district court of the United States."

22 CHIEF JUDGE TUTTLE: But there are subordinate
23 courts of the District of Columbia that have district
24 trials.

25 MR. MONTGOMERY: Yes, yes, but this says "any

1 court of the United States." Now, then, in saying "any
2 court of the United States," that is, "any court of the Dis-
3 trict of Columbia," that would mean any court that is a court
4 of the District of Columbia.

5 CHIEF JUDGE TUTTLE: You think that applies to
6 the Court of Appeals of the District of Columbia Circuit?

7 MR. MONTGOMERY: That is the point I am making,
8 that when it says "any court of the District of Columbia,"
9 there naturally falls within the meaning of those words the
10 District of Columbia Court of Appeals.

11 CHIEF JUDGE TUTTLE: I think that is the Court of
12 Appeals of the District of Columbia Circuit. I don't know
13 that this makes any difference, but technically --

14 MR. MONTGOMERY: As I understand it from my
15 reading of the Code, it says "the Circuit Court of the
16 District of Columbia." Then it starts off with the Circuit
17 Court of the First District, the Second District, and so
18 forth.

19 CHIEF JUDGE TUTTLE: Circuit?

20 MR. MONTGOMERY: And so on through the Tenth
21 District.

22 CHIEF JUDGE TUTTLE: Circuit?

23 MR. MONTGOMERY: Yes, Circuit.

24 JUDGE RIVES: Mr. Montgomery, is there any legis-
25 lative history that is illuminating on this?

1 MR. MONTGOMERY: I am fixing to give it to Your
2 Honors to the best of my ability, within limitations.

3 Now it applies whenever the order of any district
4 court or any court of the District of Columbia is violated,
5 wilfully disobeyed. Then it says:

6 "If the act or thing so done shall be
7 of such character as to constitute
8 also a criminal offense under any
9 statute of the United States or under
10 the laws of any state in which the act
11 was committed, (he) shall be prosecuted
12 for such contempt as provided in
13 Section 3691."

14 Now, then, that means -- to my thinking it means
15 that when there is an order of the District of Columbia or
16 writ of the Court of Appeals of the District of Columbia
17 that has been disobeyed, that then, if the act constituting
18 that contempt is at the same time a violation of any
19 criminal statute of Congress, then the person shall be tried
20 under the provisions of Section 3691.

21 Now, then, it would naturally follow that if a
22 person from Mississippi violated an act or an order or writ
23 of the Court of Appeals of the District of Columbia, then
24 automatically under that writ, under that statute, he would
25 be entitled to a trial by a jury for the contempt that he

1 had committed.

2 JUDGE WISDOM: Mr. Montgomery, aren't you overlook-
3 ing the last paragraph of Section 407 --

4 MR. MONTGOMERY: No. I am --

5 JUDGE WISDOM: -- which provides that in cases of
6 contempt not specifically embraced in this section, such
7 cases may be punished in conformity to the prevailing
8 usage? That, of course, is the position the Government
9 takes.

10 MR. MONTGOMERY: We are going to show here these
11 are specifically embraced in these rules, if I may. That
12 is my purpose in this argument, to make that point and to
13 establish it, if I can, under these very rules.

14 Now, then, it says further that it shall be tried
15 according to the provisions of Section 3691.

16 Now, then, when we get over to Section 3691, then
17 we find that there it says:

18 "When a contempt charge shall consist
19 in wilful disobedience of any lawful
20 writ, process, order, rule, decree or
21 command of any district court of the
22 United States by doing or omitting
23 any act or thing in violation thereof."

24 Now, then, it is true that there they refer to the
25 district court, but Section 402 of Title 18 does not rely

1 upon that part of Section 3691 but merely says that it shall
2 be tried according to Section 3691, which, of course,
3 embraces only those provisions that are applicable to the
4 trial of a contempt charge.

5 So that 3691 then says:

6 " -- and the act or thing done or omitted
7 also constitutes a criminal offense under
8 any act of Congress or under the laws
9 of any state in which it was done or
10 omitted, the accused, upon demand therefor,
11 shall be entitled to a trial by jury,
12 which shall conform as near as may be to
13 the practice in other criminal cases."

14 Now, then, that brings us to the position that
15 where Section 402 says that when the violation is of a writ
16 of the Court of Appeals of the District of Columbia that it
17 shall be tried under Section 3691, now in saying that, of
18 course, it says it is mindful of the provisions of Article
19 3 of the Constitution of the United States wherein it is
20 provided that the citizens -- that is Article 4, Section
21 2, Clause 1 of the Constitution, wherein it is provided
22 that "the citizens of each state shall be entitled to all
23 of the privileges and immunities of citizens of the
24 several states."

25 JUDGE BELL: Judge Montgomery, when was that

1 language about the District of Columbia put in the statute?
2 Was it in from the beginning, and, if so, when was the
3 statute enacted?

4 MR. MONTGOMERY: It was put in there at the time
5 of first amendment, as I recall.

6 JUDGE BELL: What year was that?

7 MR. MONTGOMERY: I think it was 1848.

8 JUDGE BELL: There was a Court of Appeals of the
9 District of Columbia at that time?

10 MR. MONTGOMERY: There was a Court of Appeals of
11 the District of Columbia at that time, yes.

12 JUDGE RIVES: Some time in the course of your
13 argument, -- as I get it, your inference is because it
14 includes the Court of Appeals of the District of Columbia,
15 then by reference to Article 4, Section 2, Clause 1 of the
16 Constitution, it must also include other courts of appeal?

17 MR. MONTGOMERY: Yes, sir, and not only that,
18 Your Honor --

19 JUDGE RIVES: But here is the point I would like
20 to get you to answer some time in your argument: In an
21 insanity case -- I think Bobby Jack Howard -- we refused to
22 follow the District of Columbia insanity rule in its very
23 famous case -- I have forgotten the name of it -- the
24 Darrah case (?) -- because we said that we were bound by
25 the decisions of the Supreme Court of the United States

1 where the Court of Appeals of the District of Columbia stood
2 in a somewhat different position from other courts of appeal,
3 because it had more autonomy, it was like a state court, it
4 was more autonomous and could govern itself, and it was not
5 upon the same basis at all as the other courts of appeal.

6 MR. MONTGOMERY: Yes.

7 JUDGE RIVES: We took that position. I wrote the
8 opinion, I remember, in an en banc case, and it seems to me
9 that same distinction might apply here.

10 MR. MONTGOMERY: Well, now, the underlying
11 principle, to my way of thinking, which would control is
12 whether or not a citizen residing in the District of
13 Columbia, say prior to the time when the District of
14 Columbia was given the franchise, the people were given
15 the franchise --

16 CHIEF JUDGE TUTTLE: They don't have it now.

17 JUDGE RIVES: I thought that -- the other day they
18 had it up and I was under the impression that it had passed.
19 I hadn't followed that.

20 CHIEF JUDGE TUTTLE: They elect some one person
21 for something; they don't elect their mayor or --

22 MR. MONTGOMERY: Yes, sir. Well, anyway, prior to
23 that they had a right to elect anyone. There was in the
24 District of Columbia residents of different states from
25 whence they came. Now, then, if one of those persons, say

1 a citizen of the State of Nebraska, was charged with
2 criminal contempt in that Court of Appeals, then, of course,
3 it would naturally follow that if that same citizen were down
4 in Mississippi in the Fifth Circuit that he would have the
5 same right that he would have before the Court of Appeals
6 up there. Now it just naturally follows from the standpoint
7 of fair play. The people of the United States have been
8 very careful to conserve the liberties and the freedoms of
9 their people, they have been very attentive to the admeasure-
10 ment of the rights of the citizens to give no right to one
11 citizen that would not be an equal right to another citizen
12 and also to take no regard as to the various geographical
13 divisions in the United States, and whatever is the law in
14 one area is also the law in another area, so just by the
15 measure of fair play, it would certainly -- it could
16 certainly not be construed as giving to one citizen
17 charged with contempt under the laws of the United States,
18 with contempt of court, a right to a trial by jury and not
19 give it to another citizen of the United States in a
20 different geographical location, not giving him also the
21 right of a trial by jury.

22 JUDGE BROWN: Maybe they didn't give it though to
23 persons in the District of Columbia. How are you going to
24 get the jury?

25 MR. MONTGOMERY: I am getting to that, if Your

1 Honor please.

2 JUDGE BROWN: That is just it. We get to all
3 these things later on. Isn't one of the most likely things
4 in the congressional mind that caused them to distinguish
5 between a district court and a court of appeals that the
6 district court does have a system set up under the statute
7 to get a jury and that is entirely absent as to a court of
8 appeals?

9 MR. MONTGOMERY: If Your Honor though will give
10 me the opportunity to present this --

11 JUDGE BROWN: All right.

12 MR. MONTGOMERY: -- in the orderly, logical manner
13 that I have chosen, I assure you I will cover that very point
14 before I sit down.

15 Now here we have, of course, a citizen, two
16 citizens of Mississippi, who are charged with contempt of
17 court in the Fifth Circuit. If this were the Court of
18 Appeals in Washington or the District of Columbia, they
19 would be entitled to a trial by jury, and we contend that
20 the same law that would give a right to a trial by jury
21 there must of necessity give a right to a trial by jury
22 here.

23 Now, then, of course, Your Honor has raised the
24 question about the jury and how are you going to get the
25 jury and where are you going to get the jury. Now there are

1 no rules that I can find anywhere that authorize this Court
2 to draw a jury. There is no --

3 JUDGE CAMERON: What about the provision in 3691
4 which says ". . . shall be entitled to trial by jury,
5 which shall conform as nearly as may be to the practice in
6 other criminal cases. . . ."?

7 MR. MONTGOMERY: Yes, sir, that is right. Now,
8 then, I don't use that by way of saying that there is no
9 contempt of court because you can't get a jury, but I say
10 that a person is entitled to a jury and for that reason
11 this Court does not have the power of the original jurisdic-
12 tion to try that matter in this court.

13 JUDGE BROWN: I want to be clear on that, on what
14 you are saying there. Do you mean to say now, because
15 there is no facility for a jury, there really can be no
16 contempt of a court of appeals?

17 MR. MONTGOMERY: No, sir, no, sir, no, sir. I am
18 not saying that. I am saying that the Court of Appeals does
19 not have a jury commissioner, has no jury, has no means of
20 employing a jury to get any issue in the Court of Appeals.

21 JUDGE BROWN: No, sir. We agree with you, and if
22 you say we are going to try Mr. Barnett with a jury, how are
23 we going to go about getting it?

24 MR. MONTGOMERY: I am going to tell you that. I
25 have a case on that very proposition. Now, then, we say that

1 since the Court has not any power, but, of course, that the
2 contempt, if any, is against this Court, that then the
3 contempt, being an original action, must be tried in a
4 court of original jurisdiction. Now the underlying back-
5 ground of that is discussed by Judge Black in his dissenting
6 opinion in the Green case as this: that originally in these
7 cases the Judge whose order had been disobeyed would then
8 go ahead and would issue the order to show cause charging
9 the contempt, and then he would prefer the nature of that
10 charge, and then when it came to the question of trial,
11 why, he would hear the case, and then when it came to the
12 question of the punishment, he would inflict the punish-
13 ment. So you had a combination there of prosecutor, judge,
14 and jury all intertwined so as to give the Judge the
15 opportunity to impose such penalties as he might see fit
16 and prefer such charges as he might see fit, and that in
17 absolute disregard of whether he had any personal feeling
18 in the matter, and that is the thing that brought the
19 provision into the statute that the judge who in cases of
20 contempt in the presence of the court prefers the charge
21 cannot sit as the judge in the trial of the case. So they
22 then in trying to work out a condition with reference to
23 that, why, then the law, while not too broadly developed,
24 has been developed in the Texas courts, and there Judge
25 Atwell, the District Judge of the Southern District of

1 Texas --

2 JUDGE RIVES: You have cited that in your brief,
3 haven't you?

4 MR. MONTGOMERY: This is the case of Houston and
5 North Texas Motor Freight Lines vs. Local No. 745, Inter-
6 national Brotherhood of Teamsters Union, 27 Fed. Supp. 154.

7 Now, then, in that case the Teamsters Brotherhood
8 had been on a strike and they were using violence against
9 the employees of the Houston and North Texas Motor Freight
10 Lines, and they had been destroying property that belonged
11 to the company, and so there was a motion for a temporary
12 restraining order to restrain the Brotherhood and the
13 employees of the Brotherhood from using violence in the
14 enforcement of the strike. So there was a hearing that
15 was held before Judge Atwell pursuant to notice, and there
16 was testimony taken and witnesses appeared on the witness
17 stand. The temporary restraining order was issued, and one
18 of the witnesses who had testified in that hearing then
19 went to his home in the Northern District of Texas,
20 instead of the Southern District where this matter had been
21 -- the writ had been issued. When he got home, some
22 hoodlums and thugs from the Teamsters Brotherhood showed up
23 and beat him rather severely. He came back to the Court in
24 the Southern District and reported what had happened. They
25 then cited these particular members for contempt of court

1 in violating the order to refrain from violence. So that,
2 of course, the temporary restraining order was issued under
3 Title 29, "Employer and Employee," but there was a statute
4 there which said, Section 111 of Title 29, U.S.C.A., that
5 said:

6 "In all cases arising under this
7 chapter in which a person shall be
8 charged with contempt in a court of the
9 United States, the accused shall enjoy
10 the right to a speedy and public trial
11 by an impartial jury of the state and
12 district wherein the contempt shall have
13 been committed, provided that this
14 right shall not apply to contempts
15 committed in the presence of the court
16 or so near thereto as to interfere
17 directly with the administration of
18 justice or to apply to the misbehavior,
19 conduct, or disobedience of any officer
20 of the court in respect to the writs or
21 orders or processes of the court."

22 So there the Judge of the Southern District was confronted
23 with that statute, which said that the contempt should be
24 charged -- should be tried in the district in which it was
25 committed. The Judge of the Southern District had no right

1 to try the case in the Northern District, except, of course,
2 by interchange, and then the matter would have to be
3 certified to the other court for trial. So the Judge there
4 then certified all of the pleadings and everything in that
5 contempt to that court which had jurisdiction to try it,
6 certified it to the District of the Northern Division to be
7 tried as an original action in the court of the Northern
8 District.

9 JUDGE BELL: Did they get a grand jury presentment?

10 MR. MONTGOMERY: The case doesn't so state.

11 JUDGE BELL: All right.

12 MR. MONTGOMERY: The Congress was rather explicit
13 there. Talking about the statute, "We don't have any
14 trials in America other than public trials, nor any juries
15 except impartial juries." He was assuming something there,
16 and yet the statute provides for public trial. I believe
17 it was Shakespeare who said, "Doubt not that amongst the
18 twelve there is a thief or two more guilty than he whom
19 they try."

20 But anyhow the Court here assumes that we don't
21 have anything but fair and impartial juries. The Constitu-
22 tion provides for -- and this Court has no other authority --
23 speedy, public and impartial trial, and I think the proviso
24 clearly demonstrates that if and when an alleged contempt
25 is committed outside of the district and away from the

1 Court, so as not to interfere with the orderly administration
2 of the Court, that then and in that event the person so
3 charged should be tried where he is alleged to have committed
4 the violation.

5 "I think the motion should be granted," that is,
6 the motion to transfer,"and the Clerk will certify to the
7 United States Court for the Southern District at Houston,
8 Texas, the original bill, the answer to that bill, the
9 order made on the bill by this Court, and the motion for
10 contempt which has been filed here for trial there."

11 (Reporter's Note: The documents from
12 which Mr. Montgomery quoted during
13 his argument were not handed to the
14 reporter and the quotations are
15 transcribed from the notes. As
16 to the passage above, beginning at
17 p. 135, line 12, through line 11 above,
18 the reporter is unable to identify
19 with certainty the quoted passages.)

20 MR. MONTGOMERY: Now, then, here we --

21 JUDGE RIVES: Of course, that statute was much
22 more definite that it was to be by a jury in the place where
23 the contempt was committed.

24 MR. MONTGOMERY: Yes, but I am now going to develop
25 that to show you that it is not any more explicit than what

1 we have right here.

2 Now Section 3691 says that he shall be entitled to
3 a jury which -- to trial by jury which shall conform as near
4 as may be to the practice in other criminal cases.

5 Now, then, here you have a statute, Section 402,
6 which says that the man shall be charged, shall be tried
7 under Section 3691, and we have Section 3691 which says
8 that if the acts committed also constitute a violation of a
9 criminal statute of the United States, he shall have the
10 right of a trial by jury if demanded, and also that he is
11 entitled to a trial which shall conform as near as may be to
12 the practice in other criminal cases.

13 Now what is the practice in other criminal cases,
14 which is required by Section 3691?

15 We go then to section -- to Rule 18 of the Rules
16 of Criminal Procedure, which specifically provides that in
17 all criminal cases that the venue is fixed in the district
18 in which the crime itself was committed. So now, then, if
19 Section 3691 is to be given effect, that the criminal
20 contempt shall be tried according to, as near as may be, the
21 practice in criminal cases, then you follow that criminal
22 practice and you will find that there it requires that it
23 be tried where the conduct was committed, which, of course,
24 is either, in the one instance, in Oxford, or, in the other
25 instance, in Jackson, Mississippi, and, of course, it would

1 be tried before a court of original jurisdiction having
2 jurisdiction of the subject matter, and it would be tried
3 upon a certificate by this Court to that Court to try it as
4 an ordinary matter.

5 Now, then, when you do that, you escape all of the
6 criticisms that have been heaped by some of the text writers
7 upon some of the courts who have on occasions exercised
8 something more than just a slight desire to enforce a
9 criminal contempt to preserve the integrity of the court's
10 orders, and you remove from the Court its being placed in
11 the position of being the triers of something that they
12 themselves to a certain extent do have an interest in. So
13 the statute that we have here, Section 3691, is just as
14 commanding in its effect that the jury trial be had
15 according to the criminal law and at the place where the
16 offense was committed as is Section 111 of Title 29 that
17 was involved in the Texas case.

18 Now, then, there is only one other thing to
19 clarify, that is, to clarify and make sure that 42-b and
20 Section 402 do apply in this case.

21 Now, then, in the latter part of Section 402 it
22 does say this -- makes an exception and says:

23 "This section shall not be construed
24 to relate to contempts committed in the
25 presence of the Court or so near thereto

1 as to obstruct the administration of
2 justice, --

3 Now, then, of course, that is out.

4 " -- nor to contempts committed in dis-
5 obedience of any lawful writ, process,
6 order, rule, decree or command entered
7 in any suit or action brought or prose-
8 cuted in the name of or on behalf of the
9 United States."

10 Now, then, that brings up the question that if
11 the writ in this case -- now let's pay particular attention
12 to the wording of that statute wherein it says "to obstruct
13 the administration of justice nor to contempts committed
14 in disobedience of any lawful writ entered in any suit or
15 action brought or prosecuted in the name of or on behalf of
16 the United States. So that is referring to a writ that is
17 charged with being violated and which writ was entered in a
18 suit that was originally brought or prosecuted by the United
19 States.

20 Now, then, let's look to the writ here and see
21 if the writ that is charged to have been disobeyed does in
22 any manner reflect that it was entered in an action or suit
23 that was brought by or prosecuted by the United States, in
24 the name of the United States, or on behalf of the United
25 States.

1 Now, then, when we go to the actual facts in the
2 record, we find that this suit was filed originally as a
3 suit of Meredith against the Trustees of the University of
4 Mississippi and that when the temporary restraining order
5 -- before the temporary restraining order was issued that
6 it was provided by this Court in its order that the United
7 States is appointed as Amicus Curiae in this cause, that is,
8 that they were empowered -- let me get that writ, that order,
9 and read it to Your Honors so that there won't be any
10 mistake about it.

11 JUDGE BROWN: That is the order of September 18th?

12 MR. MONTGOMERY: No, sir, this is the order to
13 show cause.

14 JUDGE BROWN: Well, the order you are talking
15 about now is the order appointing the United States as
16 Amicus Curiae, isn't it?

17 MR. MONTGOMERY: Yes, sir, but I am showing now
18 the context and the construction that has been placed upon
19 that order by this Court and what this Court has determined
20 that order to mean.

21 Now, then, when the Court went to issue --

22 JUDGE BROWN: Isn't that order itself -- doesn't
23 it specifically provide that the United States should have
24 the right to file pleadings, take evidence, make motions
25 for contempt?

1 MR. MONTGOMERY: Yes, sir, but now --

2 JUDGE BROWN: -- take any other action that was
3 necessary to preserve the integrity of the Court?

4 MR. MONTGOMERY: Yes, sir, but now let's see now
5 what the Court here says the meaning of that order is,
6 you all's interpretation and your judicial construction of
7 that order. You say:

8 "This Court having entered an order
9 on September 18, 1962, in the case of
10 James H. Meredith, et al. vs. Charles
11 Dickson Fair, et al., No. 19,475, desig-
12 nating and authorizing the United States
13 to appear and participate in that case,
14 that is, in Meredith against Fair, as
15 Amicus Curiae, with the right to submit
16 pleadings, evidence, arguments and
17 briefs, and to initiate such further
18 proceedings, including proceedings
19 for injunctive relief, as might be
20 appropriate in order to maintain and
21 preserve the due administration of
22 justice and the integrity of the
23 judicial processes of the United
24 States."

25 Now, then, that order there says two things: It

1 says first that they were appointed as the Amicus in the
2 Meredith Case, and it says also that they are to have the
3 right as Amicus to present pleadings and evidence and
4 arguments and briefs and to initiate such further proceed-
5 ings, including proceedings for injunctive relief, as
6 might be appropriate in order to maintain and preserve the
7 due administration of justice.

8 JUDGE WISDOM: Does it also say "including
9 proceedings for contempt of court"?

10 JUDGE RIVES: Yes.

11 MR. MONTGOMERY: Not in the original order.

12 JUDGE WISDOM: Well, in the order of September
13 18th?

14 MR. MONTGOMERY: I am reading, Your Honor, from
15 the order of January 4, 1953, the order to show cause and
16 the one that the Governor and the Lieutenant Governor are
17 now before the Court in response to.

18 JUDGE WISDOM: But the order that was filed on
19 September 18th designating the United States did authorize
20 it to file proceedings for contempt of Court.

21 MR. MONTGOMERY: But as I understand it, Your
22 Honor, we have here the order that is giving notice of the
23 charges to the Governor and to the Lieutenant Governor.

24 JUDGE BROWN: But your argument at this point, as
25 I understand it, is that this is not a suit brought by or

1 prosecuted by or on behalf of the United States?

2 MR. MONTGOMERY: Yes, sir.

3 JUDGE BROWN: Now that goes back to, first, how
4 they got into the case and then what they called themselves
5 when they got the restraining order on September 25th, and
6 that doesn't have anything to do with what we said in the
7 order of January 4th, does it?

8 MR. MONTGOMERY: Well, now, as I understand it,
9 this is a proceeding for a criminal contempt. This order
10 to show cause -- its purpose is to inform the Governor and
11 the Lieutenant Governor of the nature of the charges against
12 them, as I understand it.

13 CHIEF JUDGE TUTTLE: Sure, sure, but we have to
14 recite the authority by which we do these things.

15 MR. MONTGOMERY: That is right, that is right.

16 CHIEF JUDGE TUTTLE: Excuse me. Do you mean to
17 say that in order to give valid notice of the charges we
18 have to go back and recite accurately the basis on which we
19 are bringing the complaint?

20 MR. MONTGOMERY: I think that you have to give him
21 notice of the charges that he is confronted with and the --

22 JUDGE BROWN: In the charge, the violation of the
23 restraining order of September 25th?

24 MR. MONTGOMERY: Yes, sir.

25 JUDGE BROWN: And the argument you are now making

1 is it wasn't a United States Government order?

2 MR. MONTGOMERY: That is right.

3 JUDGE BELL: Just a minute. What is this
4 directed to? You are about to throw me off the track here.
5 You are arguing that Respondents are entitled to a jury
6 trial?

7 MR. MONTGOMERY: Yes, sir.

8 JUDGE BELL: Now are you directing this to the
9 point that this is not the Government, and, therefore, if
10 they were in the District Court they would have the right
11 to jury trial?

12 MR. MONTGOMERY: I am directing you to the last
13 part of Section -02, which says:

14 "This section shall not be construed
15 to relate to contempts committed in the
16 presence of the Court or so near thereto
17 as to obstruct the administration of
18 justice, nor to contempts committed
19 in disobedience of any lawful writ,
20 process, order, rule, decree, or
21 command entered in any suit or action
22 brought or prosecuted in the name of or
23 on behalf of the United States."

24 JUDGE BELL: Well, the Government is not taking
25 the position that your clients are not entitled to jury

1 trial because the United States was a party in this case.
2 They haven't take that position, have they?

3 MR. MONTGOMERY: I am trying to demonstrate --

4 CHIEF JUDGE TUTTLE: Excuse me. I think the
5 Government does take that position as one of the answers to
6 your contention. I understand the Government does say that
7 they fall within the exception of the last sentence of 402.
8 Is that correct?

9 MR. JAWORSKI: That is correct, Your Honor.

10 JUDGE BELL: That you are a party, not an amicus?

11 MR. MONTGOMERY: I thought you said our contention.
12 You meant the Government's contention?

13 JUDGE RIVES: And somewhere along in your argument
14 since you are interrupted on it -- my recollection is that
15 the language of our order directing the Government to appear
16 as Amicus Curiae is practically the same as we used in Bush
17 against Orleans, and I had sat as a member of the three-
18 judge court in that, and which we in turn had borrowed from
19 the Fautus Case, in which the Supreme Court had said that
20 the Government was something more than an amicus curiae,
21 that it had a right to appear almost as a party in the
22 proceeding under that kind of order.

23 MR. MONTGOMERY: I think it refers back to another
24 case, if I recall correctly, which said that, of course, the
25 Court at all times is at liberty to call on the Attorney

1 General as amicus curiae.

2 JUDGE RIVES: That is right, but said he was some-
3 thing more than an amicus, the Supreme Court said, didn't it?

4 MR. MONTGOMERY: I don't recall that provision,
5 any such provision in the opinion. Now--

6 JUDGE RIVES: I believe you are wrong.

7 MR. MONTGOMERY: -- what we are undertaking to
8 drive home here, if we may, is that that exception does
9 not relieve Section 402 from applying to this case, because
10 here this order was entered back in the Meredith Case and
11 was entered at the time there and in a manner --

12 JUDGE RIVES: So that you may answer it, it is
13 in the Government's brief in Fautus against U.S., 354 U.S.
14 797.

15 MR. MONTGOMERY: That is true.

16 JUDGE RIVES: It says:

17 "In our opinion, the status of the
18 Attorney General and United States
19 Attorney was something more than that
20 of mere amicus curiae in private liti-
21 gation. They were acting under the
22 authority and direction of the Court
23 to take such action as was necessary
24 to prevent its orders and judgment
25 from being frustrated and to represent

1 the public interest in the administra-
2 tion of justice."

3 MR. MONTGOMERY: Yes, sir. In that particular
4 case the order did -- that you all followed here -- did say
5 in substance what you said in this order.

6 JUDGE RIVES: Yes, sir.

7 MR. MONTGOMERY: But the point that I am making
8 is that that order was not entered in a case that was
9 brought by or prosecuted by or in the name of the United
10 States.

11 CHIEF JUDGE TUTTLE: And you are saying that the
12 initiation by the Government of the restraining order --

13 MR. MONTGOMERY: Yes, sir.

14 CHIEF JUDGE TUTTLE: -- did not make it one of the
15 exceptional cases mentioned in 402? That is your statement?

16 MR. MONTGOMERY: Yes. Now in my humble judgment,
17 Your Honor, I say that for two reasons. One reason is
18 that it is fundamental, as I have always considered, that a
19 court, every court, has two types of jurisdictions. One of
20 its jurisdictions is that potential jurisdiction which is
21 conferred upon it by statute, but which, of course, it has no
22 power to exercise and it lies dormant until such time as a
23 person whose rights have been invaded invokes the jurisdiction
24 with reference to that particular potential jurisdiction
25 and converts it into the actual jurisdiction of the court.