IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES

OF

AMERICA,
Plaintiff

VS.

GOVERNOR ROSS R. BARNETT

AND

LIEUTENANT GOVERNOR

PAUL B. JOHNSON, JR.,

Defendants

MEMORANDUM BRIEF OF DEFENDANTS

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CONSTITUTIONAL RIGHTS OF DEFENDANTS IN CRIMINAL CONTEMPT PROCEEDINGS

Preliminary Statement

It seems advisable at the outset to distinguish between the two broad classifications of contempt proceedings, civil and criminal. A civil contempt proceeding is defined as one in which the court, within the framework of the pending suit, seeks to coerce a party to perform or refrain from doing an act. It is wholly remedial and serves only the purposes of the opposite litigant as distinguished from a public purpose. In recent times the sanctions imposed in civil contempt proceedings have been broadened from conditional imprisonment to include compensatory, as distinguished from punitive, fines.

Criminal contempt is defined as an action seeking to vindicate the authority of the court. It serves a public purpose and, unlike civil contempt, is the subject of a separate proceedings not connected with the principal litigation. It can run against parties, officers of the court or strangers to punish for any act showing disrespect for the court or which constitutes a wilful interference with the conduct of the court's business. The punishments which may be imposed consist of punitive fines payable to the sovereign or imprisonment for a definite term or both. There is no statutory limit on the sentencing power of Federal Courts in criminal contempt. See: Gompers v. Bucks Stove & Range Co., 221 U.S. 418; Nye v.

I.

A BRIEF HISTORY OF TRIAL OF CONTEMPTS AT COMMON LAW IN ENGLAND

The Supreme Court of the United States assumes that the Constitution must be "interpreted" by reference to the English common law as known and practiced at the time of its ratification. Ex Parte Grossman, 267 U.S. 87. This assumption -- carried too far -- is the basis of the grave error present in these decisions.

It is basic hornbook law that a court does not look beyond a written document for interpretation unless the document is ambiguous. Bast v. First National Bank, 101 U.S. 93. If the words of the Constitution guaranteeing the right to jury trials in this country are ambiguous, then we must admit that we have, in the words of Judge Rives, "Entered the world of Alice in Wonderland where words don't mean what they say." Still and nevertheless, the High Court's references to "the common law" are both incomplete and inaccurate, as the following discussion will attempt to demonstrate.

One of the finest works on the English Common Law related to contempt proceedings is "The History of Contempt of Court", by Sir John Charles Fox, the Senior Master of the English Chancery Division. Briefly summed up, he has stated this history to be as follows:

I. Down to the early part of the 18th Century, cases of contempt even in and about the common law courts, when not

dealt with by the ordinary course of law, i.e., tried by a jury, except when the offender confessed or when the offense was committed within the actual view of the court.

2. After the advent of the infamous Star Chamber, it assumed authority over contempts against any court and, unlike the common law courts, it exercised its power by a summary procedure without a jury. The Star Chamber was abolished in 1641.

3. Gradually the summary processes of the Star Chamber slipped into the common law courts, which had been given some authority by the statutes to try certain special offenses without a jury.

4. The undelivered judgment of Lord Chief Justice Wilmot in the case of King v. Almon (1765) (a now completely discredited opinion), caused the English courts and the courts of this country to believe that "immemorial usage" in the common law courts of England gave power to punish summarily any contempts, including those committed out of the court's presence. (See also 37 Harv. L. Rev. 1042-1047).

The English Common Law system provided for no appellate review of contempt proceedings. Bessette v. W. B. Conkey Co., 194 U.S. 324.

The failure to obey an injunction in English common law was considered a contempt of the King's Writ but not a contempt of the Judge or Chancellor who ordered its issuance. The punishment imposed [redacted] was not a punitive criminal punishment but a coercive civil sanction. Neither fine nor imprisonment

for a specified term was imposed. Joseph H. Beale, Jr., 21 Harv. L. Rev., 161.

In his scholarly article "The Right to Trial by Jury" in the January Reader's Digest, Albert Q. Maisel points out that juries were originated by William the Conqueror, not as instruments of freedom but as a tool of oppression to assure the monarch that the "dooms" they pronounced on their neighbors in each manor would include all taxable land and property. Sources of Our Liberties, Richard L. Perry, Ed. American Bar Foundation, 1952, Page 8. Law and Tactics in Jury Trials, Students edition, F.Y. Busch, Bobbs-Merrill, 1950, pps. 7-10. Encyclopedia Britanica, references under heading "Doomsday Book." Talks on American Law, Harold J. Berman, ed., Vintage (paperback) Random House 1961. They were the source of the "Doomsday Book" of 1086. However, such juries quickly became the freeman's savior from tyrants who would claim the lands and chattels and were in such favor by 1215 that the Barons at Runnymeade forced King John to include the following promise in the Magna Carta:

> "No free man shall be imprisoned or outlawed or banished or in any way destroyed except by the legal judgment of his peers and by the law of the land."

One of the greatest victories for the jury system occurred in 1670 when the Quaker, William Penn, was acquitted of a charge of disturbing the peace by a jury, only to be themselves fined and imprisoned by the Judge, who did not want the Crown to be denied the conviction it demanded. On appeal to the Court of Common Pleas, the Judges of that Court unanimously voted to

free the jurors and in the same proceeding cleared Penn of the possibility of being placed in jeopardy a second time for the same charge. Concise History of the Common Law, 5th edition, Theodore F. T. Plucknett, Little Brown & Co. 1956, p.134. Almanac of Liberty, Justice W'm. O. Douglas, Dolphin paperback, 1954, pps. 86-88 and p. 149.

In the time of the Stuart kings, jury panels were allowed but were hand picked to bring in the verdict those in power desired. Development of Constitutional Guarantees of Liberty, Roscoe Pound, Yale U. Press., 1957, p.67. Almanac of Liberty, p. 195.

II.

THE EARLY BEGINNINGS OF JURY TRIAL RIGHTS IN THE AMERICAN COLONIES

Mr. Maisel points out that most of the American colonies were established during the reign of the Stuarts. Actually, as an encouragement to settle the new colonies, stipulations were made that among the liberties the colonists would enjoy was the right to trial by jury. Law and Tactics in Jury Trials, pps. 16-17. Sources of Our Liberties, pps. 53, 84, 93, 101, 109, 151, 177, 185, 206, 217. Later, King George, III, realizing the revenue potential of the colonies, commenced a program of vigorous taxation, including the odious stamp act of 1765. King George's ministers entertained the same fear that has bred such inaccuracies in the law of criminal contempts in this country -- that the jury system would not result in adequate enforcement of unpopular laws. Enforcement of the

tax laws was placed in the hands of the Admiralty Courts with no right to trial by jury. According to Mr. Maisel:

> "It was this flagrant denial of trial by jury, added to the indignity of taxation without representation, that forced even the hesitant among the colonists into the ever greater resistance that culminated in the war of the Revolution."

He further points out that within a month after the Declaration of Independence, Pennsylvania and the other states in rapid succession, adopted Constitutions guaranteeing jury trials in criminal and civil cases. Law and Tactics, p. 17. Sources of Our Liberties, p. 323 et. seq., esp. sections 9 and 10 on page 330. Also p. 332 et. seq., esp. sections 13 and 14 on page 339. He further points out that the dissatisfaction of the states with the single constitutional guarantee of the right of trial of all crimes by jury was quickly followed by the 6th and the 7th Amendments, making jury trials by impartial juries applicable not only to criminal matters but all civil suits where the alue in controversy exceeds $20.00. Sources of Our Liberties, p. 403 et. seq. Birth of the Bill of Rights, Rutland, U. of N. Carolina Press, 1955, pps. 126 et. seq., esp. 129. Also bottom of page 209. Mr. Maisel also points out that the right of trial by jury is the only civil right so much in the minds of those who adopted, ratified and amended the Constitution that its assurances positively appear thrice.

III.

THE GUARANTEES OF THE CONSTITUTION

ARTICLE III, §2, Par. 3.

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

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

AMENDMENT VI.

"In all criminal Prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation;"

AMENDMENT VII.

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

These sections of the Constitution prohibit summary non-jury criminal contempt punishments.

It is more than passing strange that this simple and inescapable conclusion is contrary to every known decision of courts of the United States and is contrary to the statutes relating to contempt enacted by the United States Congress. Cf. Hamilton, The Federalist, No. 83. The remainder of this memorandum will be directed to show the error of these decisions and statutes.

IV.

A BRIEF HISTORY OF THE STATUTES OF THE UNITED STATES RELATING TO CONTEMPT OF COURT

The history of the statutory law applicable to contempt of court in the United States began with the Act of September 24, 1789, §17, 1 Stat. at L. 73, 83. This was one section in the original judicial code that was passed en mass. It gave the Federal courts,

> "power to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."
> 1 Stat. at L. 83.

The next pertinent highlight, chronologically, followed in 1831, when impeachment proceedings were brought against Federal Judge James H. Peck. Judge Peck convicted a lawyer of his court of criminal contempt for writing an article critical of one of the judge's decisions in a case then on appeal. The matter was heard without a jury, the lawyer was sentenced to a day in jail and to temporary disbarment from the court for 18 months. Although Judge Peck was quite elderly and had a disabling eye impairment, the House of Representatives voted to bring impeachment proceedings; and, after lengthy arguments, the vote in the U. S. Senate was 21 for impeachment and 22 against impeachment. (A two-thirds vote was required to impeach). Congressional Debates, Vol. VII, 1830-1831, Cols. 9-45.

Immediately after these impeachment proceedings failed, the Congress passed the Act of March 2, 1831, §1 & §2; 4 Stat.

at L. 487, 488, entitled "An Act Declaratory of the Law Concerning Contempts of Court". The text of this Act, being Chap. XCIX of the Acts of the Twenty-First Congress, 2nd Session, follows:

> " 'Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.
>
> " 'SEC. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.' "

In codifying these same statutes into §§ 725 and 5399 of the Revised Statutes, the important word "summary" was omitted by the reviser in his rescript of §725. §725 of the Revised Statutes, entitled "The Judiciary", is in these words:

> "The courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

These Revised Statutes were not a congressional enactment but were only intended to constitute prima facie evidence of what the existing law already was. Cong. Record, 45th Cong., 2nd Sess., p. 1376, 7.

If the Act of 1831 was intended to only restrict the procedure to be used in punishing contempts, it would appear that the omission of the word "summary" would indicate that the reviser actually limited the extent of the substantive power of the judiciary to punish contempts. (The Supreme Court did not agree. See Ex Parte Savin, 131 U.S. 267.)

The second section of the act of 1831 is in part reproduced in §5399, Rev. St., entitled "Crimes". That section is as follows:

> "Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a

fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

By the Act of March 3, 1911, §268 of the Judicial Code, 36 Stat. at L. 1163, Revised Stat., §725, set out above, was officially codified in the reviser's exact words. See House Report No. 613, 62nd Congress, 2nd Session. It was later amended so as to delete the reference to the administration of oaths and was rescripted into its present form:

"§401. Power of court.

"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."

The Act of October 15, 1914 (The Clayton Act), 38 Stat. at L. 730, 738, 739, created certain exceptions to the theretofore general statutory powers of Federal Courts to punish for contempts (See House Report No. 304, 80th Congress). The parts of this act relating to contempts are now codified as follows:

"§402. Contempts constituting crimes.

"Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of

any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

"Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. June 25, 1948, c. 645, 62 Stat. 701, amended May 24, 1949, c. 139, §8 (c), 63 Stat. 90."

Other statutory provisions relating to jury trial rights in contempt cases in Federal Courts are:

18 U.S.C.A. §3691, which reads as follows:

"§3691. Jury trial of criminal contempts

"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. June 25, 1948, c. 645, 62 Stat. 844."

18 U.S.C.A. §3692 (from the Norris-LaGuardia Act), which specifically requires jury trials for contempts based on violations of injunctions in cases involving labor disputes.

42 U.S.C.A. §1995, a part of the Civil Rights Act of 1957, relates to jury trial rights in cases of criminal contempt.

Rule 42 of the Federal Rules of Criminal Procedure, provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts

> constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

This rule relates only to District Courts. 18 U.S.C.A §3771.

V.

THE DEVELOPMENT OF THE "CONTEMPT POWER" IN THE COURTS OF THE UNITED STATES

The Federal Courts have taken what we respectfully submit is the incongruous position that the Constitution limits only lesser governmental functionaries. They reason that the Inferior Courts of the Federal Judiciary arose from the pens of the Congress full-grown; like Athena, the mythological Goddess who sprang full-armored from the forehead of Zeus; unencumbered by any of the "impediments" of constitutionally guaranteed individual liberties and freedoms that the forefathers of this country determined must restrict all forms of government to avoid even a tendency toward the tyranny they fought to be rid of.

The history of this judicial superiority over constitutional rights began rather obliquely in the case of United

States v. Hudson and Goodwin, 7 Cranch 32, 3 L.Ed. 259, in which the court held that the courts of the United States possessed no common law jurisdiction in criminal cases. After disposing of the only question before it on that ground, the court continued in dicta to state:

> "To fine for contempt, imprison for contumacy, enforce the observance of order, etc. are powers which cannot be dispensed with in a court because they are necessary to the exercise of all others;"

The dicta in the Hudson case was adopted by the court in its opinion in Anderson v. Dunn, 6 Wheat. 204, 5 L.Ed. 242.

Despite the court's clear holding in Cary v. Curtiss, 3 How. 236, 245, 11 L.Ed. 576, 581, that:

> "The courts of the United States are all limited in their nature and constitutions and have not powers whereat in courts existing by prescription or by the common law"

and the later case of U. S. v. Hall, 98 U.S. 343, 25 L.Ed. 180, which, based on the Hudson case, held not only that Federal Courts possessed no common law criminal jurisdiction but also pointed out that Congress could not invest such courts with any criminal jurisdiction except within the limitations of the Constitution, the contempt theory expounded in the Anderson case was developed still further in Ex Parte Robinson, 19 Wall. 505, 22 L.Ed. 205.

In this case the contempt power was referred to as an "essential" which the courts had possessed since the moment of

their creation, even though the court recognized that Congress could and, in fact, had limited this inherent power. No explanation has ever been given as to how "need", no matter how essential, can override the positive guarantees of the Constitution or how Congress can limit a power that the Constitution cannot modify, but we must concede that thus far no majority of Judges on any United States Court has ever been sufficiently troubled by this lack of logic to reverse the trend thus started. However, recent authority clearly demonstrates that the judicial trend to return to the Constitution is markedly clear and imminent.

The cases announcing that Federal Courts had (in a supra-constitutional manner) acquired the right to disregard constitutional guarantees when they felt they "needed" to are cited in the case of Interstate Commerce Commission v. Brimson, 154 U. S. 447, and in In Re Debs, 158 U.S. 564. In the Brimson case the court had become so persuaded by its earlier opinions that it concluded:

> "Surely, it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."

A consideration of the historical background against which the Debs case was placed should have shocked the nation into awareness of the grave error which this reasoning could produce. Railroad barons had acquired such inordinate economic power over their employees that they were, in effect, less than

slaves. Any man who dared to speak up against management practices, work hours or wages was dismissed and blacklisted. Unions were so scattered and jealous of the individual craft they represented that they were a totally ineffective bargaining agent from an over all standpoint.

Debs conceived that only a united union effort could bring about fair working conditions. His union staged one successful strike against one of the larger railroad companies and was fast gaining in popularity. The next task that he undertook was to go to the aid of the employees of the Pullman Company. The Pullman Palace Car Company in those times was still dominated by its founder, who at a point of particular economic stress chose to cut the wages of his employees without making any provisions for relief regarding house rents and food stuffs. His employees all lived in company owned housing and purchased their furnish from company owned stores. Debs advised his members to strike every railroad operating Pullman cars unless Pullman made some adjustment to relieve this economic squeeze. Pullman refused.

The strike was called and in several areas where the actions of the Pullman Company were the subject of widespread public resentment, great hoards of people joined the strikers. Through Pullman's influence on state and national leaders, national guardsmen and U. S. Troops were used for strike-breaking purposes. When this course was not fully effective a U. S. District Court was asked by the Federal Government to grant an injunction against the maintenance of the strike. The

injunction issued. Debs refused to abandon his position. The Court summarily cited, tried, convicted and imprisoned Debs and his principal lieutenants. The strikers were demoralized and Pullman's domination was reinstated.

The Court refused the Defendants a trial by jury on the theory that "efficiency" justified the denial of this absolute constitutional right. They also reasoned that criminal contempt was not a criminal proceeding, and that the 5th Amendment's prohibition against double jeopardy could be ignored.

However, in the later case of Gompers v. United States, 233 U.S. 604, Mr. Justice Holmes reasoned:

> "If such acts (of criminal contempt) are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

In New Orleans v. New York Mail Steamship Co., 87 U.S. 387, 392, Mr. Justice Swayne emphatically stated:

> "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

The most recent collection of cases announcing this peculiar doctrine of unconstitutional "need" is contained in the last part of Footnote 14 to the majority opinion in Green v. United States, 356 U.S. 165, 183.

In the Green case and in Brown v. United States, 359 U. S. 41, the court pointed out that there is no limit on the

punishment that a court can inflict for criminal contempt. The question even arises -- If the Federal Courts are free to disregard the guarantees of the Constitution requiring trials by jury in criminal contempt proceedings, are they similarly free from the prohibitions of the 8th Amendment against cruel and unusual punishment? Can they revert to other procedures used by the Star Chamber, such as the rack, and the pillory?

The revulsion that such ideas of completely unregulated procedure produces has doubtless caused the court to try to draw some sort of an imaginary line limiting the exercise of the "need" power. In Ex Parte Savin, and in Ex Parte Robinson, supra, the court recognized that Congress possessed a power greater than the Constitution so as to enable them to regulate the exercise of contempt proceedings in the inferior Federal Courts Congress had created. To the same effect are Michaelson v. United States, 266 U.S. 42 and In Re McConnell, 370 U.S. 230, 82 S.Ct. 1288.

Other accepted limitations which the courts have arbitrarily adopted include the following constitutionally guaranteed criminal procedural devices:

(1) The accused is presumed innocent, proof of guilt beyond a reasonable doubt is required, and the accused cannot be compelled to testify against himself. Gompers v. Bucks Stove & Range Co., 221 U.S. 418.

(2) The accused is entitled to advice as to the charges against him, a reasonable opportunity to prepare a defense, the benefit of compulsory process, and the assistance of counsel. Cooke v. U. S., 267 U.S. 517.

(3) The accused is entitled to an impartial arbiter of fact. In Re Murchison, 349 U.S. 133.

(4) The accused is entitled to the benefit of a statute of limitations governing crimes. Gompers v. U. S., 233 U.S. 604. (Congress has subsequently adopted a statute of limitations directly relating only to criminal contempt -- 18 U.S.C.A. §3285.

(5) A person convicted of criminal contempt may be pardoned by the President under the President's constitutional authority to pardon criminal offenses. Ex Parte Grossman, 267 U.S. 87.

(6) A criminal contempt proceeding cannot be conducted by a state court where the result is to abridge the constitutional guaranty of free speech. Wood v. Georgia, 368 U.S. 894, 82 S.Ct. 178.

(7) Contempts of Congress are processed and punished as other crimes. Deutch v. U.S.

the courts have attempted to delineate is found in the technical differentiation between the words "offenses" and "crimes" as used in the Constitution. In the case of Schick v. United States, 195 U.S. 65, the court points out that the word "offense" in the Constitution is more comprehensive than the word "crime". This reasoning is applied in permitting the presidential pardon power to cover contempts, for Article II, §2, Cl. 1 extends the pardon power to "offenses" against the United States. Ex Parte Grossman, supra.

Mr. Justice Harlan, in the majority opinion in Green v. United States, supra, has emphatically stated that criminal contempt is not a"crime" within the meaning of the Constitution. It would thus seem that the court is firmly committed to the proposition that while a criminal contempt may be an "offense", it is not a "crime" within the meaning of those words used in the Constitution. Yet, the 5th Amendment states:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

But by statute (18 U.S.C.A. §3285), and by decision (In Re Debs, supra), it is clear that the same "offense" may be punished as a criminal contempt and as a separate crime.

Another obvious and material inconsistency in the court's present holdings is concerned with the right of appellate review of a criminal contempt conviction. The majority of the court in the Green case based the principal justification for their

decision on the protection afforded by the review right. The majority pointed out that the people need have no fear because of the deprivation of the Constitutional right of trial by jury because appellate courts can review contempt proceedings and thus prevent any injustices. (In his dissent, Judge Black calls this promise "a trifling amelioration".) Yet, in the case of Bessett v. Conkey Company, 194 U.S. 324, the court stated positively that at the English common law,

> "the sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court."

They pointed out that decisions of fact by the trial tribunal were conclusive and could not be reviewed. They did, however, sanction a departure from the English common law for the Federal courts to the extent that they would permit a review on matters of law only. Since fact matters cannot be reviewed, it would seem that the denial of a jury trial in the Court of Original Jurisdiction is not ameliorated at all.

If the common law overrides the Constitution to deny a right to trial by jury, how can it be that it does not override this "trifling amelioration" consisting in a right to have an appellate court review contempt proceedings? It is also to be noted that in the case of United States v. Shipp, 203 U.S. 563, the Supreme Court of the United States tried a Tennessee sheriff for criminal contempt in an original proceeding in that court, found him guilty principally on the basis of a newspaper

article and sentenced him to prison. Where did the sheriff's right of review in that case lie? When a Court of Appeals commences a criminal contempt proceeding as an original action, wherein does the right of review lie? (cf. Craig v. Hecht, 263 U.S. 255, 278, Concurring opinion of Chief Justice Taft.)

Our research discloses no case in which a Court of Appeals has ever conducted an original criminal contempt proceeding. The only two reported cases where an appellate court conducted contempt proceedings were both civil proceedings conducted in the same litigation wherein an appeal was pending. Toledo Scale Co. v. Computing Scale Co., 281 F. 483, 261 U.S. 399, and Sawyer v. Dollar, 190 F.2d 623; opinion vacated on the grounds of mootness, 344 U.S. 806.

The case of Green v. United States, supra, decided in 1957, is one of the latest decisions in this field, and the one most closely in point here. Gilbert Green and Henry Winston were convicted of conspiring to teach and advocate the violent overthrow of the government in violation of the Smith Act. Their convictions were affirmed in Dennis v. United States, 341 U.S. 494; and the lower court made an order for them to surrender to the United States Marshal for the execution of their sentences. They failed to appear. The United States instituted criminal contempt proceedings for wilful disobedience of the surrender order under 18 U.S.C.A. 401. The prosecution was pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. They were tried without a jury and found guilty

of the contempts charged and sentenced to prison terms of three years to commence after their five-year sentences imposed in the conspiracy cases. Mr. Justice Harlan wrote the majority opinion affirming this case. The concurring justices were Frankfurter, Burton, Clark and Whitaker. There was a dissenting opinion by Mr. Justice Black, concurred in by Chief Justice Warren and Mr. Justice Douglas. Mr. Justice Brennan, joined by the Chief Justice and Douglas, dissented on the ground that the evidence was not sufficient to establish the petitioner's guilt of criminal contempt beyond a reasonable doubt because of lack of proof that the petitioners knew of the surrender orders.

It is hard to pick out any one part of Judge Black's dissent for quotation or emphasis. It is an excellent documentation for the precise position of defendants in these proceedings. His summary is expressed in these words:

> "In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state. It is significant that neither the Court nor the Government makes any serious effort to justify such differentiation except that it has been sanctioned by prior decisions. Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is concerned. There is no valid reason why they should be

> singled out for an extraordinary and essentially arbitrary mode of enforcement. Unfortunately judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth. In my judgment trial by the same procedures, constitutional and otherwise, which are extended to criminal defendants in all other instances is also wholly sufficient for the crime of contempt."

Compare also the dissent of Chief Justice Warren in Brown v. United States, supra, which concluded in these interesting words:

> "Unfortunately, the failure to adhere to procedural regularity may be glossed over in the investigation of matters of burning public interest, but it should be remembered that the deprivation of the rights of a witness in such an investigation must apply as a precedent to people in all walks of life, both good and bad. I suggest that the full import of the decision in this case will not be recognized until it is applied at some future time in other types of investigations and to other people."

We respectfully submit that the reasoning and authorities supplied by these dissents in the Green and Brown cases lead to the inescapable conclusion that the courts of this country have assumed an arbitrary and unconstitutional power in the field of criminal contempt wholly unwarranted and unjustified and absolutely without constitutional or historical support. The error has perpetrated itself too long and the "time is ripe" for it to be corrected.

There are several well-documented law journal articles on this subject. The most recent is entitled "The Constitution

and Contempt of Court" by Ronald Goldfarb, 61 Mich.L.Rev. 283. See also 57 Yale L. Journal 83, 97, 98; 46 Yale L. Journal 326, "Civil and Criminal Contempt in the Federal Courts"; Moskovitz, "Contempt of Injunctions", 43 Col. L. Rev. 780; Goldfarb, "The Varieties of Contempt Power", 13 Syracuse L. Rev. 44; Beale, "Contempt of Court, Civil and Criminal", 21 Harv. L. Rev. 161; Frankfurter and Landis, "The Power to Regulate Contempts", 37 Harv. L. Rev. 1010; and Nelles, "The Summary Power to Punish for Contempt", 31 Col. L. Rev. 956. cf. Nells and King, "Contempt by Publication", 28 Col. L. Rev. 401.

Certainly no one would assert that courts could function properly if persons were allowed to misbehave during the conduct of court proceedings to such an extent that they interferred with the orderly conduct of such proceedings or with the administration of the courts, but such objectionable action is readily remedied by civil contempt procedures. The offender may be summarily removed from the presence of the court and, if persistent, may be summarily incarcerated until the court can conduct its proceedings in an orderly manner. Such a process is completely remedial and serves the parties whose interests are being litigated. However, criminal punishment for the purpose of vindicating the court's authority and deterring the obstruction of justice should only be conducted in a proceeding where the accused is accorded the guarantees of the Constitution.

The courts have emphasized that summary contempt sanctions should never exceed the bare minimum sufficient to remove

the obstruction. In Re Michael, 326 U.S. 224, 66 S.Ct. 78. See also Judge Cameron's opinion in Matusow v. United States, 229 F.2d 335. See also the well-reasoned article by Mr. Beale, supra, in which he observes that contempt of court consisting in the disobedience of the court's order is entirely different, both in nature and historical origin, from contempts taking place in the courtroom during trial proceedings.(P. 170.)

Mr. Beale concludes, in our opinion correctly, that the imposition of criminal punishment based either upon history or the Constitution requires regular criminal proceedings and a trial by jury. (21 Harv. L. Rev. 174). We respectfully urge this court to expressly reject, both on the basis of logic and constitutional right, the approach of those who would allow a criminal contempt trial to proceed without a jury because of what they say is the "need" of the court system to do its job most expeditiously. The Constitution was written so that this government would be founded not on expediency but on liberty.

The only constitutional approach to determining the question of the right of a trial by jury is to look to the plain and unambiguous words of the Constitution to determine what rights are vested and vouch-safed by that instrument to a person who might be accused of a criminal contempt of court, then to require that the adjudication of his guilt or innocence proceed positively and absolutely in accordance with those rights. When the problem is approached in this way, there is not but one result possible and that result is a

demand that the rights of the accused in a criminal contempt proceeding be determined after grand jury indictment by a jury in the state and the district in which the alleged criminal act was committed.

We further submit that logic and law require that such a trial take place in the court of original jurisdiction provided for by the Congress under the mandate of the Constitution.

It has been unquestioned since the inception of inferior Federal Courts by the Congress that such courts are limited in their nature and constitutions and do not have any powers existing by prescription or by the common law. Cary v. Curtis, supra. It is also elementary that such courts possess no common law criminal jurisdiction nor can they be invested with such jurisdiction by Congress except within the limitations of the Constitution, U. S. v. Hall, supra.

Congress has enacted specific statutes fixing the jurisdiction of Courts of Appeal (28 U.S.C.A. 1291, 2 & 4). This statutory grant does not include any grant of original jurisdiction, although by other statutes certain administrative functions not pertinent here may receive their initial judicial review in such courts. (e.g. NLRB proceedings)

On the other hand, Congress has vested the District Courts with extensive original jurisdiction. They have jurisdiction of all civil actions, suits or proceedings commenced by the United States (28 U.S.C.A. 1345). If the United States

claims to have "brought" or "prosecuted" any part of the Meredith case, this statute fixed the jurisdiction of such action, subject only to the constitutional grant of original jurisdiction of actions in which a state is a party to the Supreme Court. Art. III, Section 2, Clause 2.

Original jurisdiction to hear and determine all criminal offenses against the United States is vested in such District Courts (18 U.S.C.A. 3231) and venue of such prosecutions is laid in the district in which such offense was committed (Rule 18, Federal Rules of Criminal Procedure). Venue of civil actions is clearly laid in the district and division where all defendants reside (28 U.S.C.A 1391 (b)).

To avert to the cliche that criminal contempt actions are neither civil nor criminal actions but "sui generis" is to reason contrary to the clear holdings of the courts that the inferior Federal Courts are, under the Constitution, exclusively creatures of congressional creation and to ignore the plain pattern of congressional intent expressed in the above statutes fixing original jurisdiction in the District Courts exclusively. cf. Also New Orleans v. New York Mail Steamship Co., supra - "Contempt of Court is a specific criminal offense."

All present proceedings should be dismissed in this court for lack of jurisdiction, lack of the prerequisite grand

jury indictment and lack of procedural power to summons and proceed with a constitutional jury.

Respectfully submitted,

JOE T. PATTERSON, Attorney General of the State of Mississippi

DUCAS SHANDS, Assistant Attorney General of the State of Mississippi

MALCOLM B. MONTGOMERY
GARNER W. GREEN
M. M. ROBERTS
FRED B. SMITH

Charles Clark

CHARLES CLARK

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, CHARLES CLARK, of counsel for Defendants, certify that I have mailed true copies of the foregoing Brief of Defendants to Burke Marshall, Esq. and Leon Jaworski, Esq., this ___ day of February, 1963.

Charles Clark

CHARLES CLARK

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : John Doar
First Assistant
Civil Rights Division

DATE: 11/16/62

JHF:seh

FROM : J. Harold Flannery
Attorney
Civil Rights Division

144-100-40-1
#9782

SUBJECT: Criminal Contempt Proceedings Against Ross R. Barnett.

The key elements of criminal contempt are the contemnor's wilfulness or mens rea in acting as he did and his disregard for the court whose order he violated.[1/]

The nature and level of wilfulness required have been variously described by the commentators,[2/] but it is reasonably clear that a Screws v. United States[3/] specific intent need not be shown. That is, the fact finder may infer objectively a generalized evil intent from the actor's conduct. However, it is equally true that evidence, otherwise inadmissible, may come in as bearing on the defendant's state of mind when he acted.

Similarly, although the contemnor's disregard for the court relates to the purpose of the proceeding rather than to the nature of his act, evidence tending to show a studied, longstanding loathing for federal court orders should be admissible to show the need for criminal proceedings to vindicate the court, although it might be irrelevant in a civil proceeding.

The foregoing is a preface to my conclusion that if and when Governor Barnett is tried for criminal contempt, we should attempt to introduce a catalogue of his words and deeds with respect to school desegregation going back at least to 1959.

1/ Gompers v. Bucks Stove & Range Co., 221 U.S. 418,441-443 (1911).

2/ Compare Moskovitz, Contempt of Injunctions, 43 Col. L. Rev. 780,793 (1943) with Note, Criminal Contempt: Violations of Injunctions in the Federal Courts, 32 Indiana L. J. 514,520 (1957).

3/ 325 U.S. 91,104 (1945).

This may seem superfluous legally and from the standpoint of market ability, because it's no news to anyone that he is a staunch segregationist. However, we should dramatize his unique intransigence to justify limiting the criminal proceedings to him - i.e., to show that he is not a martyr-scape-goat, singled out arbitrarily - and to illustrate that our society can not permit contempt for order to be the basis for one's public career.

Finally, it will be tactically important to illuminate the background of Barnett's acts because we have already conceded that after 28 September he did not affirmatively obstruct Meredith's admission. That is, some of his conduct that we shall wish to show as a part of the contempt were acts of omission which are not too persuasive absent a showing of Barnett's state of mind when he failed to do them.

The Trial

Typically, the trial would be like that for civil contempt, i.e., showing the service of the order of September 25, the grave subsequent events, and his vacillation during the crisis. However, I think that the real nature and meaning of his conduct would be shown if we were to, in effect, set the stage by thoroughly delineating Barnett's character as a preface to the events of Meredith's admission.

We should, therefore, start now to prepare a brochure of his pertinent words and deeds in this matter, and to that end texts of his speeches and similar "hard" evidence, including documents, should be gathered. The attached request to the Bureau was drafted in this vein.

The Contempt

Of what order or orders is Barnett in contempt, and precisely what acts or omissions constitute the contempt?

Governor Barnett can not be held in criminal contempt of the Court of Appeals and District Court injunctions of July 28

and September 13, respectively, because he was not bound by them unless he was "in active concert or participation" with those enjoined and had actual notice of the decrees.

Because Barnett violated the Court of Appeals TRO of September 25 so clearly, I think we should avoid the difficult question whether he was sufficiently in privity with the Board of Trustees to be bound by the earlier orders directed to them.4/

4/ This issue, on which the cases and commentaries are confusing and at variance, I am now researching thoroughly because it will come up frequently. Representative discussions are at 7 Moore, Federal Practice 1670, §65.13; 3 Barron & Holtzoff, Federal Practice and Procedure 501, §1437; Mostovitz, op. cit. supra at page 813; Note, supra, 32 Indiana L. J. 514,524; Note, 57 Yale L. J. 83 (1947).

The statements in the cases range from that in Ex Parte Lennon (dicta) 166 U.S. 548,554 (1897):

> The facts that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice (emphasis added).

to that in Kean v. Hurley, 179 F.2d 888,890 (C.A. 8, 1950):

> ... persons who are not parties to the injunction or in privity with them, and whose rights have not been adjudicated therein, are not bound by the decree and can not be held liable for acts done contrary thereto even though the decree assumes to bind them.

4/ Cont'd:

Recent cases say uniformly that, to be held in contempt, one must be in active concert with the enjoined party who commits the violation. Not clear, however, is whether the participation must precede the order or whether post-decree participation (in the violation by one with notice) will suffice.

The better view, for two reasons, is that a non-party must be a participant prior to the issuance of the decree in order to be amenable to contempt proceedings. First, one can not be in contempt of an injunction unless he is bound and Rule 65(d) identifies (presumably limited to presently ascertainable) participants as those enjoined. That is, it would appear that the class of participants who may be held in contempt closes when the decree issues and binds only prior and present participants. Secondly, only pre-decree participants have had their day in court when the order issues, and even they get their day only technically on the theory that the party defendants represent the class of actors. See Scott v. Donald, 165 U.S. 107,117 (1897).

Resp. to Brief

Harold H. Greene
Chief, Appeals and
Research Section

November 23, 1962

KMW:mcs

Kathryn M. Werdegar
Appeals and Research Section

Appointment of Master in Criminal Contempt Proceeding

In Barron and Holtzhoff, Federal Practice and Procedure (1950), §2428 at p. 388 the authors state that in cases of criminal contempt "particular issues, in the discretion of the court, may be referred to a referee, master or commissioner, but the court is not bound by the findings of such person." 1/

While courts have on occasion appointed a referee, master or commissioner to take testimony in criminal contempt cases, see United States v. Shipp, 214 U.S. 386, 471 (1908); United States v. Goldman, 277 U.S. 229, 234 (1927); National Labor Relations Board v. International Mod Carriers, 228 F. 2d 589 (C.A. 2, 1955); National Labor Relations Board v. Giannasca, 119 F. 2d 756 (C.A. 2, 1941); Merchants' Stock and Grain Co. v. Board of Trade of Chicago, 201 Fed. 20 (C.A. 8, 1912), not since 1912 has the power of the court to do so been challenged and upheld.

In Merchants' Stock and Grain Co. v. Board of Trade of City of Chicago, supra, the defendants alleged that appointment of a special examiner to hear the testimony in the proceeding against them for criminal contempt deprived them of their privilege under the Sixth Amendment to confront

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1/ The authors cite no case in support of this proposition.

the witnesses against them. Without deciding whether the defendants were in fact deprived of the opportunity to confront witnesses, the court held that that portion of the Sixth Amendment was inapplicable to criminal contempt proceedings. In support of this conclusion, the court in part relied on the following language in the case of United States v. Anonymous, 21 Fed. 761, 767 (W.D. Tenn., 1884):

> If the accused [in a criminal contempt action] appears he is heard in any way that suits the convenience of the court, by an examination ore tenus, upon affidavits, or by propounding interrogatories. If he deny the contempt, the court, either for itself or by reference to a master, ascertains the facts upon the proof, either party examining witnesses by affidavit or otherwise.

In addition, the court noted that in United States v. Shipp, supra, where the parties had consented to the appointment of a master, there had been no suggestion that the evidence should have been taken in open court. The court stated, 201 Fed. at 29:

> It has been the practice to thus take evidence by commissioner in contempt cases in England for 200 years. 9 Cyc. 47. And the same practice has prevailed generally in this country. Rapalje on Contempt, 124.

Apart from the Merchants' Stock and Grain Co. case, there is little support for this position. In United States v. Shipp, 214 U.S. 386 (1908), the parties seem to have assumed that the case should be referred to a master for the convenience of the Court (see 214 U.S. at 462, 464); the authority of the Court to adopt this procedure in a criminal contempt action is not discussed. In United States v. Goldman, 277 U.S. 229 (1927), a special master was appointed for the limited purpose of transcribing and reporting to the court such testimony

as the parties might offer in preparation for the trial, with the understanding that at the trial the parties might rely upon such portion of the testimony thus taken as might be desired and also introduce additional testimony, either oral or documentary. In neither the Goldman case, nor the two Court of Appeals cases cited at page 1, supra, is there any indication that the court had occasion, through the objection of a party or otherwise, to consider its authority to appoint a master in an action for criminal contempt.

The Merchants' Stock and Grain Co. case, therefore, remains the only clear holding on this issue. And in view of the greater procedural protection afforded a defendant in a criminal contempt proceeding today than in 1912, see, e.g., Nilva v. United States, 227 F. 2d 74 (C.A. 8, 1955), affirmed in part and sentence vacated, 352 U.S. 385, this case would seem to be questionable authority for the power of a court to appoint a master over the objection of the defendant.

UNITED STATES GOV. NMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Burke Marshall
Assistant Attorney General
Civil Rights Division

DATE: January 9, 1963

HJG:ash

FROM : Harrison J. Goldin
Attorney

SUBJECT: Contempt trial of Barnett and Johnson

Question

Does the Order to Show Cause in criminal contempt issued against Barnett and Johnson require their personal attendance upon the return date, or may they, consistent with the language of the Order, appear through counsel?

Answer

Barnett and Johnson may appear through counsel.

Discussion

The cast of the Order to Show Cause in Blackmer v. United States, 284 U.S. 421 (1931) parallels the Order issued by the Fifth Circuit against Barnett and Johnson on Jan. 4, 1963. In the Blackmer case, the respondent was "cited and admonished to appear before this Court [to] show cause." The Blackmer Court overruled objections to its jurisdiction by respondent's attorney and ordered Blackmer to file an answer. Through his attorney, Blackmer pleaded not guilty. After a subsequent hearing from which Blackmer was absent but at which he was represented by counsel, the Court entered a verdict of guilty.

John Doar -
This should be
on the matters for
discussion with L.I.
BK

Criminal Cases Generally

No problem of an analogous nature is ordinarily presented in the usual criminal prosecution. Since an arraignment, the criminal proceeding that is comparable to a hearing on the Order to Show Cause for criminal contempt, is ordinarily a feature of a defendant's detention, he is usually present to plead or to hear a plea entered in his behalf. In a small number of cases, however, the defendant has been absent when his attorney has entered a plea on his behalf at the arraignment. In these cases, no objection to the procedure has been raised on that score. Since a criminal contempt proceeding is something less than an ordinary prosecution, see e.g., Bullock v. U.S., 265 F.2d 683 (6th Cir., 1959), cert. den. 360 U.S. 909, 932, A fortiori, an appearance by an attorney alone at a hearing on an order to show cause satisfies the mandate of the order.

On the other hand, Rules 10 and 34 of the Federal Rules of Criminal Procedure seem to presuppose the defendant's presence at his arraignment. Moreover, by specifying that in crimes punishable by relatively light sentences defendants may waive arraignment, Rule 43 appears to require an arraignment in the presence of the defendant in all other instances. However, the case law asserts that since an arraignment is for the defendant's own protection, see e.g., Glouser v. U.S., 296 F.2d 853,855 (8th Cir., 1961), he can usually waive the proceeding. Garland v. Washington, 232 U.S. 642 (1914); Beatty v. U.S., 203 F.2d 652 (4th Cir., 1953)(arraignment and plea waived by going to trial), Kennedy v. U.S., 259 F.2d 883 (5th Cir., 1958).

If, despite the apparently mandatory language of Rule 43, arraignment can be waived entirely, arguably the "presence" requirement in the Rule is satisfied if the defendant is represented by counsel. Indeed, the Kennedy case, id at 884, seems to accept without question the propriety of a plea by counsel in the absence of a defendant. And though the issue of whether a plea may be issued by counsel in the defendant's absence is not considered in U.S. v. Johnson, 149 F.2d 53 (7th Cir., 1945), cert. den. 326 U.S. 722, that procedure was in fact followed there.

It would appear, therefore, that Barnett and Johnson need not appear at the hearing; it is sufficient if they are represented there by counsel.