

1           Now, then, when it has been converted into the  
2 actual jurisdiction of the court, we are confronted by the  
3 old maxim that no one can injure the willing, and consequent-  
4 ly before a person can receive affirmative relief at the  
5 hands of the court, he must by his prayer pray for the  
6 affirmative relief that he seeks, and the jurisdiction of  
7 the court is not limited by the potential jurisdiction  
8 given by the statute but is limited by the jurisdiction that  
9 is invoked by the terms of the pleading and is contained in  
10 the prayer itself.

11           Now, then, the only way, as I see it, that the  
12 Court could issue, although it has the power to issue, a  
13 temporary restraining order, yet its power to do that is  
14 limited to -- in its exercise to those instances where some  
15 plaintiff comes in and requests that that be done.

16           Now, then, so far as the Meredith temporary  
17 restraining order is concerned, that was done in response to  
18 a petition that was filed by Meredith, and very well and  
19 very good, but so far as the United States was concerned, it  
20 was not by any petition of the plaintiff in the lawsuit at  
21 all but was at the instance of the Court, and that the Court  
22 exceeded the jurisdictional power conferred upon it by the  
23 pleadings when they stepped over --

24           JUDGE BROWN: Why do you say that order was at  
25 the instance of the Court? My recollection is that the

1 Government sought leave to enter -- we granted them leave  
2 to be amicus curiae with all these powers --

3 MR. MONTGOMERY: Well, Your Honor --

4 JUDGE RIVES: -- and then the following week they  
5 filed on their own behalf an application.

6 MR. MONTGOMERY: Your Honor, the statement that  
7 I was trying to make -- and I am sorry if I got it confused  
8 -- the statement I was trying to make is that the petition  
9 of the United States was not filed at the instance of  
10 Meredith. Meredith had his own petition and Meredith was  
11 the only plaintiff who had the right to make the request  
12 of the Court and confer the jurisdiction upon the Court to  
13 issue that order, because, if he were satisfied and he  
14 were willing, nobody else was harmed.

15 JUDGE BELL: The short answer to all that is, Mr.  
16 Montgomery, that the Government didn't have a right to do  
17 anything whatsoever except to take such action as would  
18 preserve the processes of the Court in the administration of  
19 justice. They didn't have any right at all to do anything  
20 for the Plaintiff in Meredith vs. Fair. That is the way  
21 I understand the amicus order. Now if the Government is  
22 right in the motion -- I didn't understand they were taking  
23 the position -- all they have to do is get an amicus order  
24 in every case in any district court to completely obliterate  
25 the right to a jury trial, but we will hear from them about

1 that when they get up.

2 JUDGE MONTGOMERY: Of course, that would have to  
3 emanate from the plaintiff in the lawsuit and no one else  
4 would have the power to invoke the jurisdiction of the  
5 Court with reference to the subject matter of that suit  
6 and the remedy that would be provided on the claim asserted.

7 I thank you very much.

8 CHIEF JUDGE TUTTLE: Thank you, Mr. Montgomery.  
9 All right, Mr. Clark.

10 MR. MONTGOMERY: I thank Your Honor.

11 MR. CLARK: May it please the Court, I will address  
12 myself to the proposition that the Constitution of the  
13 United States guarantees to the Defendants in this lawsuit  
14 a grand jury presentment or indictment and a trial by a  
15 constitutional jury.

16 Judge Montgomery read to you the sections of the  
17 Constitution that you are certainly familiar with and I  
18 shall not repeat the sections of the Constitution.

19 JUDGE BROWN: Now you will help me greatly if you  
20 will let us know what it is that you are distinguishing,  
21 the Green case or simply engaging, as you have done in the  
22 briefs, and properly so, in speculation about what is going  
23 to happen with --

24 MR. CLARK: Judge, I am not speculating with  
25 anything. I think this Court has no right whatsoever to

1 disregard the clear mandates of the Constitution of the  
2 United States of America if there were fifty unanimous  
3 decisions of the Supreme Court of the United States directly  
4 in point.

5 JUDGE WISDOM: Mr. Clark, it seems to me that  
6 the Constitution is unintelligible unless you go beyond the  
7 words. For example, when the Constitution uses the term  
8 due process, you have to go beyond the four corners of the  
9 instrument, and the same thing is true when it uses the term  
10 jury, so that contemporaneously with the discussion of the  
11 Constitution, a jury was not contemplated in contempt cases,  
12 so when you talk about violating the Constitution, you have  
13 to tell us whether you are talking about the words themselves  
14 or the construction that is generally given to it or a  
15 rational construction.

16 MR. CLARK: Judge Wisdom, I need to know what  
17 one thing -- you said the word jury was what was worrying  
18 you. The only word I see for construction is the word crime.

19 JUDGE WISDOM: I think there is much more than  
20 that. As a matter of fact, it may even be favorable to you:  
21 and that is the use of the term criminal prosecution rather  
22 than the term trial, but it shows the Constitution is not so  
23 clear that you can say that this Court can disregard 150  
24 years of settled jurisprudence.

25 MR. CLARK: There has never been a time that I

1 know of or a case that I know of in criminal contempt when  
2 the Constitution was vague or obscure. The question that  
3 I thought had always been adjudicated was whether or not  
4 at the time that the Constitution was adopted there was a  
5 practice of trying contempts as crimes without juries, so  
6 that, therefore, when the courts were born, they were  
7 born like Athena, full grown and with the power to punish  
8 for contempt that somehow came around the clear words of  
9 the Constitution and flowed into those vessels, the courts  
10 which the Congress had created. But I am much in the same  
11 position as Judge Rives was in being critical of some words  
12 that I used before this Court. The Constitution says the  
13 trial of all crimes shall be by jury, and, if those words  
14 don't mean what they say, then we are in an Alice in  
15 Wonderland situation.

16 JUDGE WILDOM: You have to say what is a crime.  
17 You are begging the question. The question here is whether  
18 a contempt is a crime, and at the time a contempt was not  
19 a crime within the sense of the Sixth and Seventh Amendment.  
20 in Article 3 and also Article 3 -- as proved by the fact  
21 that there were no juries and also by the lack of any fixed  
22 fine or punishment.

23 MR. CLARK: This is where I would differ with  
24 Your Honor. As early as 87 U.S. in New Orleans vs. New  
25 York Mail Steamship Company, Judge Wayne of the Supreme

1 Court of the United States said:

2 "Contempt of court is a specific  
3 criminal offense. The imposition of  
4 the fine was a judgment in a criminal  
5 case."

6 Justice Holmes in the majority opinion in the  
7 Gompers Case said:

8 "If such acts are not criminal,  
9 we are in error as to the most funda-  
10 mental characteristics of a crime as  
11 that word be understood in English  
12 speech."

13 I don't think they had any trouble understanding. The  
14 trial of all crimes was to be by jury. I think they have  
15 taken the position and I believe the decisions bear out  
16 that they have taken the position, despite that clear  
17 constitutional guarantee that the crime of criminal contempt  
18 of court is one that travels around the prohibition of the  
19 Constitution and flows from the English common law around  
20 the Constitution and into the courts, and I tell Your  
21 Honors that that is fallacious and unconstitutional  
22 reasoning and won't stand the test of logic.

23 CHIEF JUDGE TUTTLE: Mr. Clark, as I understand  
24 your answer to Judge Brown, you say to us that no matter  
25 how many times the Supreme Court has adopted this theory,

1 we are not bound by what the Supreme Court has said? Is  
2 that what you are saying?

3 MR. CLARK: Yes, sir, on constitutional questions,  
4 if Your Honor please.

5 CHIEF JUDGE TUTTLE: I understand what you are  
6 saying -- the point is if the Supreme Court has construed or  
7 applied the Constitution in a manner which we can clearly  
8 understand and apply to a case before us, we are bound by  
9 what the Supreme Court has said or done in that regard,  
10 unless, as Judge brown put it, we are asked to speculate  
11 that the Supreme Court will take a different position next  
12 time it comes up there. Do you disagree with that?

13 MR. CLARK: Yes, sir, I do, Judge Tuttle.

14 CHIEF JUDGE TUTTLE: All right.

15 MR. CLARK: -- on questions of constitutional  
16 construction, because there is no stare decisis. The Supreme  
17 Court themselves have said the principle of stare decisis  
18 has no place --

19 CHIEF JUDGE TUTTLE: The principle of stare  
20 decisis doesn't exist as to a subordinate court. Its  
21 obligation is to follow a precedent by the superior court,  
22 the Supreme Court of the United States. We are not dealing  
23 with stare decisis; we are dealing with the requirement that  
24 we conform to the binding precedents of the Supreme Court  
25 of the United States.

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inadvertently omitted. Copy  
follows from page 154, line 25, to  
line 1, page 156.



1 MR. CLARK: But a precedent is binding because of  
2 the doctrine of stare decisis, and if that doctrine does  
3 not exist, then there is no precedent.

4 CHIEF JUDGE TUTTLE: We can't change the law, we  
5 can't change the law as announced by the Supreme Court.

6 JUDGE BROWN: I want to press one further point.  
7 Do you try to distinguish the Green Case at all? I think  
8 you face up to it?

9 MR. CLARK: Judge, the Green Case can be dis-  
10 tinguished not on the constitutional arguments but on the  
11 argument that there was no statute making bail-jumping an  
12 offense at the time of the commission of that particular  
13 act relating to criminal contempt.

14 JUDGE BROWN: But then you go back to a statute  
15 and not the Constitution there when you do that?

16 MR. CLARK: Right.

17 JUDGE BELL: What the Green Case stands for today  
18 is Footnote 14 that sets out all the authorities, that says  
19 you don't have a constitutional right to jury trial in  
20 criminal contempt, and that is really the import of it as  
21 I see it here. It just sets out a long list of cases that  
22 you are trying to tell us we can ignore.

23 MR. CLARK: Must ignore, Your Honor.

24 JUDGE BELL: I don't know how we could ignore all  
25 those binding precedents of the Supreme Court.

1 MR. CLARK: You are bound to ignore them, Your  
2 Honor, under your oath.

3 JUDGE BELL: I don't understand. There would be  
4 utter chaos in the court system if we decided we were going  
5 to reexamine every question the Supreme Court has already  
6 ruled on.

7 MR. CLARK: As far as the clear meaning of the  
8 Constitution is concerned -- and, of course, each one of  
9 the eight of you has got to be your own arbiter of what your  
10 mind tells you about how clear it is, but if you read the  
11 Constitution and it says to you that the trial of all crimes  
12 shall be by jury, and if in your mind criminal contempt is,  
13 in the meaning and language used by previous decisions, a  
14 crime, then I submit to Your Honors that your oath of office  
15 would require you to give the Defendants in this case a  
16 trial by jury and give them the rights under the Fifth  
17 Amendment to a grand jury presentment or indictment, and I  
18 adhere to my statement to Judge Brown that that requirement  
19 would exist despite any amount of clear precedent to the  
20 contrary.

21 JUDGE BROWN: If you adhere to that, even if this  
22 Court would certify this question precisely to the Supreme  
23 Court and get an answer back by the Supreme Court that in  
24 a proceeding of this kind the respondent is not entitled  
25 either to presentment by a grand jury or indictment by grand

1 jury, you would have to be back making the same argument you  
2 are making today.

3 MR. CLARK: Judge, I wouldn't dare come before you  
4 and make it. I would want to and think I had the right to,  
5 but if you took that step, of course, I wouldn't do it. I  
6 don't want to rail against the law, but I think the defense  
7 of my clients demands that I present to you as candidly and  
8 as frankly as I can the issues that I have from the  
9 Constitution.

10 JUDGE WISDOM: Justice Frankfurter, who was not  
11 in the position of judge on a subordinate court, felt that  
12 150 years of settled jurisprudence made it clear that if it  
13 is a crime, it is not a crime within the meaning of the  
14 Constitution. It may have criminal aspects.

15 MR. CLARK: I can't distinguish the Green Case or  
16 the Brown Case or the cases that -- there were probably 15  
17 in all -- that were cited, and there are actually others  
18 that do exist besides those that were cited in Footnote 14.

19 JUDGE WISDOM: I think you would find most of the  
20 members of the court sympathetic to your argument if it were  
21 coming before us as a case of first impression.

22 MR. CLARK: I am glad to hear you say that, Judge,  
23 because the second point I want to make is just this: --

24 JUDGE RIVES: Since you are interrupted, on the  
25 other phase or presentment by grand jury, I have never run

1 across any contempt proceeding initiated that way. Is  
2 there any precedent for contempt being initiated by present-  
3 ment from grand jury?

4 MR. CLARK: Judge Rives, I have never found the  
5 precedent, and as far as my research -- it is not even  
6 partially complete, but as far as it is concerned -- and it  
7 has been somewhat detailed -- I have never found a case  
8 where the contention of a right to grand jury presentment  
9 under the Fifth Amendment was made except in the Green  
10 Case, and the Defendants there did make as their principal  
11 -- their principal contention dealt more with grand jury  
12 presentment or indictment rights than it did the right of  
13 trial by jury, but I know of no other case where the ques-  
14 tion was raised.

15 JUDGE BELL: That is a pure constitutional ques-  
16 tion and we are foreclosed -- if we are right in our view,  
17 we can't turn around all the opinions of the Supreme Court.

18 MR. CLARK: I wouldn't say that you would turn  
19 them around, but let me just pursue Judge Wisdom's point a  
20 little bit further, because the second part of the argument  
21 I would make to you is that we have an argument that we are  
22 making to this Court today on the right -- in other words,  
23 we demand a trial by jury, we have got a right to a trial  
24 by jury, but the second part of this is that the statute is  
25 completely discretionary. There is nothing in the statute

1 which says the trial of contempts shall not be by jury. You  
2 are not even required to proceed in accordance with what  
3 you think usages at law have been. It is permissive  
4 entirely under 402. 401 is a jurisdictional statute; 402  
5 is a procedural statute.

6 JUDGE WISDOM: Would it be sound judicial dis-  
7 cretion to ignore the usages of 150 years?

8 MR. CLARK: Judge, the only reason that 150 years of  
9 the practice of punishing contempts without juries on a  
10 summary matter has existed in certain courts has been  
11 because the issue of a right to a trial by jury has not  
12 been asserted in almost all of those 150 years, and I  
13 think it is entirely discretionary, and I don't believe the  
14 Government can take a different position from this.

15 CHIEF JUDGE TUTTLE: How would we empanel a jury for  
16 the Fifth Circuit?

17 MR. CLARK: In accordance with the --

18 CHIEF JUDGE TUTTLE: Wait. Conforming as nearly  
19 as possible to other -- would that be five from Georgia,  
20 five from Florida, five from Alabama, five from Alabama,  
21 five from Florida (sic), five from Louisiana? How would  
22 we empanel a Fifth Circuit jury? We couldn't do it, as you  
23 point out in the brief elsewhere. We couldn't empanel a  
24 Fifth Circuit jury, could we? There is no provision for  
25 doing that anywhere.

1 JUDGE RIVES: I think his argument is it would  
2 have to be sent back to the District Court.

3 MR. CLARK: No, sir, no, sir. As I understand the  
4 Court now, you want me to turn from this argument on the  
5 Constitution. I believe you say that you might want to go  
6 along with me if it was a case of original or first instance.

7 CHIEF JUDGE TUTTLE: He can speak for himself in  
8 that regard.

9 MR. CLARK: I felt so rejected I thought I'd go  
10 on to my next point. I was pursuing that, the usages at  
11 law. It would be permissible under usages at law and your  
12 permissive procedure here.

13 CHIEF JUDGE TUTTLE: For this Court --

14 MR. CLARK: -- to summon a jury which would  
15 conform as near as may be to the practice in other criminal  
16 cases. Now in other criminal cases a jury has got to be  
17 called under the Constitution of the United States from the  
18 district in which the offense was committed, and that is  
19 where I think you could get your jury.

20 JUDGE WISDOM: This is an offense against the  
21 Court of the Fifth Circuit, which includes, we'll say,  
22 six states, not just against -- not just the fact that it  
23 was done in Mississippi, it seems to me.

24 MR. CLARK: Well, this is a little bit off of  
25 this question, but the thought occurred to me in the other

1 argument that I didn't want to prolong that there never has  
2 been a court of original jurisdiction created by Congress  
3 that transcends the boundaries of a state to have original  
4 jurisdiction, and I think that that could properly form a  
5 part of your thinking here as to what type of jury you would  
6 call. I think the Constitution means the district where  
7 the crime is committed, which is repeated several times in  
8 the statutes -- reading now from 402, it relates you to the  
9 laws of any state in which the act was committed. In  
10 other words, we would be entitled, presuming this was a  
11 question of an order secured by -- presuming the question  
12 of an order secured by the United States was out of the  
13 picture, we would be under the clear meaning of 402  
14 entitled to ask for a jury, if you are going to consider  
15 that the statutes are binding on you, and that that jury be  
16 summoned if we could find a law of the State of Mississippi  
17 that made the act of contempt also a crime.

18 JUDGE BELL: Well, if we were bound by the  
19 statute, we could certify the case, we'll say, to the  
20 Southern District of Mississippi, but as soon as it got  
21 over there, then you get to claiming you had a right to  
22 grand jury presentment. You haven't got any authority  
23 whatsoever for that. You have been arguing it around here  
24 all day.

25 MR. CLARK: I am naked except for the Constitution.

1 That is right.

2 JUDGE BELL: That is right. And it is not very  
3 helpful to the Court to put everything in Limbo. I mean  
4 there's got to be some way, a practical way. There must be  
5 an answer. You can't just offer problems without finding  
6 some answer. These people are charged with criminal  
7 contempt of this Court, and as near as I can tell from your  
8 argument, since we can't empanel a jury, that is the end of  
9 it. Judge Montgomery though does argue it would be  
10 certified to the Southern or Northern District of  
11 Mississippi.

12 MR. CLARK: Judge, --

13 JUDGE BELL: I am getting sort of confused. One  
14 argues one thing and then another comes along and argues  
15 something else.

16 MR. CLARK: I don't mean to be at all confusing  
17 and I certainly hope that I have not given you the  
18 impression that I would contend that a contempt, a criminal  
19 contempt, of the order of the Fifth Circuit could be made  
20 with impunity. Absolutely not. The point that I make with  
21 you is that this is not the forum in which the crime should  
22 be tried or the question of crime should be tried. There  
23 are procedures, if criminal contempt is a crime -- which I  
24 think it is, just like the Supreme Court has already said  
25 not once but twice. Then I think that there is a regular



1 procedure set up to punish that crime, and I think this  
2 probably is an appropriate point to call to Your Honors'  
3 attention the fact that when we started out in this particu-  
4 lar proceeding that we are in now on the 15th day of  
5 November, this Court said that what it wanted -- the reason  
6 that it wanted criminal contempt to be started was so that  
7 Johnson and Barnett would have the maximum procedural  
8 protection.

9           JUDGE WISDOM: Let me suggest this to you, that  
10 there may be offenses which are not necessarily crimes and  
11 punishment which is not necessarily criminal. For example,  
12 when a man is deported in a proceeding, that is essentially  
13 civil -- or at least the Supreme Court called it civil.

14 The ex post facto provision in the Constitution was  
15 inapplicable because it was not criminal. Now there was  
16 an offense and there was a punishment, the worst kind of  
17 punishment a man may have, to have to leave after spending  
18 years and years in this country. I would say this: that  
19 I think one of the most incongruous aspects of the present  
20 procedural law with regard to the punishment of contempt  
21 is that the Supreme Court readily recognizes and confirms  
22 in the Grossman (?) Case that the presidential pardon power  
23 extends to a person convicted of criminal contempt, and it  
24 was strongly urged there that the courts are so sanctified  
25 that not even the President can reach in and take a man out

1 of prison that the courts have seen fit to put there on a  
2 contempt charge, but the Supreme Court of the United States  
3 in Grossman (?) said no, because we will consider it as an  
4 offense and the presidential pardon power granted in the  
5 Constitution extends to no (?) offenses, and yet by a  
6 statute of the United States and by a decision of the  
7 Supreme Court there is no such thing as entitling a man  
8 convicted of criminal contempt to the protection of the  
9 double jeopardy provisions of the Fifth Amendment and it  
10 is couched in the word "offense." It doesn't say "crime,"  
11 it says "offense."

12 MR. CLARK: My point with the Court is that these  
13 decisions calling criminal contempt something else besides a  
14 crime and excusing it from the protection of the Constitution  
15 -- they don't mesh. A good decision and sound law fits in  
16 with other decisions, and it's right, it's like a jewel,  
17 it is perfect no matter how you look at it, but these  
18 decisions are not, they don't fit on the question of the  
19 Eighth Amendment. If you are not bound by constitutional  
20 guarantees, then there is no limit on cruel or unusual  
21 punishments.

22 JUDGE BROWN: You still have the Fifth Amendment,  
23 due process.

24 MR. CLARK: In criminal contempt?

25 JUDGE BROWN: Yes. I think it overrides every

1 act, state and federal.

2 MR. CLARK: I hope it will.

3 JUDGE BROWN: It surely does.

4 MR. CLARK: But if the Sixth Amendment and the  
5 parts of the Fifth that relate to grand jury presentment  
6 don't apply, how can you reach in and just pick due process  
7 and say, We will take this? That is what I mean by in-  
8 consistencies. And the right of review -- this is another  
9 facet of criminal contempt power that is strange. In  
10 Craig vs. Heck (?) they were talking about a Judge of the  
11 Circuit Court of Appeals granting a writ of habeas corpus,  
12 and I particularly relate to Judge Taft's concurring  
13 opinion in which he pointed out that it ought not be  
14 allowed because of the limited right of review, in fact,  
15 the absence of a right of review. If this Court should try  
16 and convict these people for criminal contempt, there is  
17 no right of review.

18 JUDGE BELL: You have got that in U.S. vs. Lind  
19 (?), same point, no right of review there.

20 MR. CLARK: I think it exists here, and I think  
21 this is -- although Judge Black called it a trifling  
22 amelioration, this right of review to determine under the  
23 test of reasonableness if the court below acted reasonably  
24 -- this doesn't exist to us, because all we have is a  
25 contingent right to ask the Court, the Supreme Court, to

1 review these proceedings on certiorari. There is no right  
2 of appeal.

3 JUDGE WISDOM: For many years there was no consti-  
4 tutional right of appeal. In fact, there is none now.

5 MR. CLARK: As far as right of appeal, except by  
6 statute, but I don't think you can justify the foreclosing  
7 of constitutional rights on the basis that a right of review  
8 exists. If this Court is going to undertake criminal  
9 contempt, I think the majority opinion in Green would have  
10 to be based upon some other premise than the premise that  
11 it is based on, if this Court is permitted to initiate and  
12 try criminal contempt.

13 JUDGE WISDOM: Is there any feeling that the  
14 question of contempt is primarily a question of law and  
15 one for the Court? Is that any part of the practice for  
16 the past 150 years?

17 MR. CLARK: Judge, the entire basis of the  
18 exercise of contempt power by courts without the right of  
19 jury or in a summary manner has been based upon need,  
20 necessity, expediency, efficiency, words that are as foreign  
21 to the guarantees of the Constitution of the United States  
22 as anything that you can find in the heart of Russia.

23 JUDGE WISDOM: Livingston has a good passage on  
24 that.

25 MR. CLARK: . . . and his proposed Louisiana

1 Civil Code --

2 JUDGE WISDOM: Penal Code.

3 MR. CLARK: -- would have eliminated every court's  
4 criminal contempt powers. This would have been a criminal  
5 matter. And it fits in with your decision in Matusso (?),  
6 this Circuit's decision in Matusso, where all of your  
7 contempt functions are designed to be the least possible  
8 power to secure the ends that you desire, and the ends that  
9 you desired in this case were to afford maximum procedural  
10 protection to these Defendants.

11 Now I don't think that the efficiency of the  
12 Court --

13 JUDGE BELL: No. The end desire is to punish for  
14 criminal contempt, if there has in fact been contempt. That  
15 is the end desired. Now there might be an incidental end  
16 of offering safeguards, but I thought the end result we are  
17 trying to achieve is to, I guess, get people to have respect  
18 for the order of the Court.

19 MR. CLARK: Of course, it is not a legal treatise,  
20 but I would recommend your attention to an article written  
21 by Mr. Macel (?) in the Reader's Digest as far as what  
22 develops respect for courts, as well as Judge Black's  
23 opinion.

24 JUDGE BELL: I saw that in your brief, and I am  
25 familiar with In re: Michael(?) where the language comes

1 from.

2 MR. CLARK: As to the least possible power, which  
3 you adopted in this Circuit.

4 JUDGE BELL: With the end desire?

5 MR. CLARK: As I say, I think the end desired is  
6 to deter any disobedience of court orders.

7 JUDGE BELL: Right.

8 MR. CLARK: And you are going to pursue that,  
9 even according to your original intention, by assuring  
10 maximum procedural safeguards to these men. You don't want  
11 to find them guilty of contempt unless they should be found  
12 guilty of contempt.

13 JUDGE BELL: That is right.

14 MR. CLARK: And the system for determining whether  
15 a man has been guilty of a crime in these United States has  
16 always been on a trial by his peers.

17 CHIEF JUDGE TUTTLE: Except in contempt matters?  
18 I say --

19 MR. CLARK: Except in contempt matters, insofar  
20 as the rules --

21 CHIEF JUDGE TUTTLE: You say they have always  
22 been -- in the traditional manner always been before a  
23 jury, and I say except in criminal contempt matters.

24 JUDGE WISDOM: And in petty offenses which are  
25 also crimes. How do you justify the exception for petty

1 offenses which are crimes?

2 MR. CLARK: There is no constitutional --

3 JUDGE WISDOM: De minimus (?), I guess.

4 MR. CLARK: There is no constitutional justifica-  
5 tion for it. Would Your Honors indulge me a moment?

6 JUDGE BELL: You'd be out of jail though before you  
7 could get your case to the Supreme Court. That would be one  
8 way you'd do it.

9 MR. CLARK: May I make in conclusion two points  
10 to Your Honors:

11 No. 1. There is no statute requiring you to pro-  
12 ceed without a jury, and, of course, I make the basic con-  
13 stitutional argument that the Constitution requires both  
14 grand jury presentment or indictment and a trial by a  
15 constitutional jury, but I think that it is very clear that  
16 the statutes don't require you to proceed without one, and  
17 I don't agree with the proposition advanced for argument by  
18 Judge Tuttle that there is no way in which the Fifth  
19 Circuit could call a statutorily required jury in accordance  
20 with the procedures used in other criminal cases.

21 CHIEF JUDGE TUTTLE: Mr. Clark, I think I will  
22 say this on behalf of the Court -- I know I speak the  
23 sentiments of the Court: It seems to me that we always  
24 subject you to a lot of grilling and a lot of reaction. I  
25 think it is a compliment to you that you propound well

1 thought out and well expressed views, and while they may be  
2 novel to the Court, they do call for a rather Socratic  
3 method of presentation. What we have done in doing this to  
4 you I hope you will take as a compliment rather than any  
5 effort on our part to prejudge your case.

6 MR. CLARK: Thank you, Your Honor.

7 MR. GREEN: May it please the Court, may I  
8 address the Court for a moment? In Stone vs. Pipeline (?),  
9 103 Federal Second, while this Honorable Court had before it  
10 the question of taxation of a corporation engaged inclusive-  
11 ly in interstate commerce, and the Supreme Court had dealt  
12 so many blows on this side and so many on that side that  
13 the Presiding Judge of this Court said he really couldn't  
14 tell, to balance one against the other, and that he was  
15 going to take over all the process and go back to the  
16 fountain source, the law, and announce what the law was,  
17 we were taxed and the Supreme Court affirmed it. In other  
18 words, our idea is, with deference, that the Supreme Court  
19 has gotten questions about the constitutionality of this  
20 thing in exactly the same shape as it was when this case of  
21 ours -- oh, thirty years ago -- was presented to this court  
22 and that court then examined it de novo, as it were, and  
23 rendered an opinion which was promptly affirmed, 103 Federal  
24 Second, against the Pipeline Company.

25 CHIEF JUDGE TUTTLE: Thank you.



1 MR. JAWORSKI: May it please the Court, I think  
2 it would not be amiss if perhaps we may address one matter  
3 that has been talked about some little bit. Although no  
4 authorities were cited in support of the contention, sug-  
5 gestions are constantly being advanced that perhaps this is  
6 not the court that has jurisdiction of this matter and that  
7 perhaps it should be sent to some other court. No cases  
8 have been cited to support that proposition of law.

9 JUDGE CAMERON: Well, you haven't got any case to  
10 cite to support your position for the novel thought that  
11 this Court can make itself a nisi prius court and go to  
12 trying people charged with crimes?

13 MR. JAWORSKI: Well, Your Honor --

14 JUDGE CAMERON: It looks to me like you have got  
15 your foot in as deep as they have.

16 MR. JAWORSKI: I don't quite think I have, if I  
17 may respectfully suggest, because I have a statute that reads  
18 very clearly on which I can stand, even if I don't have a  
19 case construing it.

20 JUDGE CAMERON: Well, under your construction of  
21 that statute, if any court any time wanted to ask the United  
22 States Attorney or the Attorney General to help them out to  
23 get justice done, as they thought it, they could change the  
24 number of the case and issue what looks like a new, original  
25 order asking you to come in, or Mr. Kennedy or anybody, and

1 bring the suit for them. Then you deny the man ipso facto  
2 the right of trial by jury, don't you?

3 MR. JAWORSKI: No, Your Honor, that is not the  
4 position.

5 JUDGE CAMERON: Now tell me what your position is  
6 on that.

7 MR. JAWORSKI: The position on the matter of trial  
8 by jury that the Government has taken is twofold: 1. That  
9 there is, of course, no constitutional right to trial by  
10 jury under the Supreme Court decisions, and we are assuming  
11 that this Court will follow those decisions. Now, with  
12 respect, if there is no constitutional right, then the right  
13 must be found in the statutes, and we say that there is no  
14 statute, no statute of any kind, that can possibly be  
15 construed to give a trial by jury in a proceeding in this  
16 court.

17 JUDGE CAMERON: That is the strangest thing I  
18 have ever heard. I think the statute that the gentleman  
19 gave us a copy of here says just that thing, if the offense  
20 constitutes also a crime. Now you could take this informa-  
21 tion that you filed in the name of the United States and  
22 take it up to Oxford, Mississippi, and file it in the court  
23 there and charge a crime against these two men. Now you  
24 would admit that, wouldn't you?

25 MR. JAWORSKI: Not insofar as the contempt against

1 this Court is concerned, no, sir, I would not admit it.  
2 That court in Mississippi has no more jurisdiction of the  
3 contempt charged to have been committed against this Court  
4 than a court in another state would.

5 JUDGE CAMERON: Well, I am talking about the --

6 MR. JAWORSKI: That is the very --

7 JUDGE CAMERON: It's made a crime now, it's made  
8 a crime now to violate an order of court, and district  
9 courts are vested with jurisdiction of all trial work in  
10 criminal cases.

11 MR. JAWORSKI: Your Honor, I was -- just as I  
12 started to speak, I was just going to read the United States  
13 Supreme Court case that says just to the contrary, and that  
14 is that it is this court that has jurisdiction.

15 JUDGE BROWN: I don't think you understand Judge  
16 Cameron's question. It was this: that the acts charged in  
17 this bill of indictment filed by the Government here would  
18 constitute crimes against either the United States or the  
19 State of Mississippi.

20 JUDGE JONES: Or both.

21 JUDGE BROWN: Both. That is correct.

22 MR. JAWORSKI: We have said in our brief, may it  
23 please the Court, that we are certainly not denying and not  
24 saying for a moment that there couldn't be also charges  
25 brought on a contempt against the District Court of

1 Mississippi. We point that out, may it please the Court.

2 JUDGE GEWIN: I think maybe what he has in mind is  
3 when the acts constituting the contempt also constitute  
4 violations, if proven, of criminal statutes of the United  
5 States in those circumstances then the jury question  
6 becomes troublesome.

7 MR. JAWORSKI: I don't think so, Your Honor. I  
8 don't think it does in any circuit court case, and I don't  
9 think it does. A matter that I am going to discuss in a  
10 few minutes for Judge Bell.

11 JUDGE CAMERON: You mean that a violation of an  
12 order of a circuit court is not a crime under 1509? I  
13 believe it is.

14 MR. JAWORSKI: Well, --

15 JUDGE CAMERON: The new criminal statute or under  
16 241 or --

17 MR. JAWORSKI: I don't recognize those statutes,  
18 Your Honor, but the contempt that I think Your Honor has  
19 reference to, the statutes are 401, 402. Are those the ones?

20 JUDGE CAMERON: No. I am talking about the viola-  
21 tion of any order of any federal court is made a crime now  
22 punishable just as all crimes are and to be brought into  
23 court and into a nisi prius court, district court, by  
24 indictment or presentment or information, and punished just  
25 as any other crime, just as contempt of Congress is

1 punished. You haven't got any right -- if you are in  
2 contempt of Congress, you have got to carry your case to  
3 the criminal court, and it looks to me like it boils down to  
4 the point where you are saying that just because long after  
5 the Meredith Case had been going this Court entered an  
6 order in which it styled the case with a United States  
7 handle on it and entered an order that you bring the present-  
8 ment, bring the information, that that takes away the right  
9 of trial by jury.

10 MR. JAWORSKI: No. That is one facet of the  
11 argument, Your Honor, but the principal ground that I have  
12 been urging here in answer to Your Honor's questions has  
13 been that there is no right of trial by jury in any case as  
14 a matter of constitutional right that involves a criminal  
15 contempt. That is the basic matter.

16 Then we must turn to the statutes to see if the  
17 statutes give any such right, and there is no statute that  
18 can possibly be construed, in my opinion, to give such a  
19 right in a United States Circuit Court case. It is also  
20 true that -- in my opinion, I don't believe that it can  
21 apply in any case where the United States has been a party  
22 with the right and the power and the responsibilities --

23 JUDGE BELL: That is what I wanted to hear. You  
24 take the position that because you were appointed amicus you  
25 can deprive somebody of a right to a jury trial?

1 MR. JAWORSKI: I would be pleased to discuss that,  
2 Your Honor.

3 JUDGE BELL: You are going to argue that? You  
4 will argue that?

5 MR. JAWORSKI: Yes, I will argue that, Judge Bell.  
6 The case that I wanted to call to Your Honors'  
7 attention on the question of jurisdiction is In re Iola.

8 JUDGE BELL: Is that in your brief?

9 MR. JAWORSKI: Yes, sir, it is in the brief.

10 JUDGE CAMERON: Before you get to that, let me  
11 read you the last sentence in New York vs. United States,  
12 which is the most complete of these decisions, and this is  
13 brought incidentally in the name of the United States, so it  
14 started out as a private litigation and the United States  
15 got in pretty much like they did here. The Supreme Court  
16 says:

17 "If the petitioners can be punished  
18 for their misconduct, it must be under  
19 the Criminal Code where they will be  
20 afforded the normal safeguards surround-  
21 ing criminal prosecution. Accordingly,  
22 the judgment below is reversed."

23 Now until you took the floor, I thought that was  
24 considered to be the law here and the narrow question was  
25 whether the entering of this order in the latter stages of

1 Meredith in the name of -- a new case docketed United  
2 States of America vs. Ross Barnett and Paul Johnson -- by  
3 that mere expedient you could set aside all of the Bill of  
4 Rights protections, which we settled in Matusso, and I  
5 didn't think there was any question about it in anybody's  
6 mind.

7 MR. JAWORSKI: I am familiar with Your Honor's --  
8 Your Honor wrote the opinion in the Matusso Case and certain-  
9 ly set out what Your Honor considered to be the minimal re-  
10 quirements that should be met, what the Court considered  
11 (them) to be, but we must go back first to the question of  
12 whether there is a constitutional right to a trial by jury.

13 JUDGE CAMERON: No, no. There may be a statutory  
14 right to a trial by jury.

15 MR. JAWORSKI: If there is no constitutional right,  
16 the next thing we examine is whether there is a statutory  
17 right.

18 CHIEF JUDGE TUTTLE: I suggest you read the  
19 language of the statute which restricts that right to  
20 district court cases. Maybe that is the matter you want  
21 to bring out, Judge Cameron, on Section 402.

22 MR. JAWORSKI: Yes, sir, and I started to read  
23 that.

24 CHIEF JUDGE TUTTLE: I think you never got to that  
25 precise point. Are you relying on the fact that Section 402

1 affirmatively gives the right to a jury where a charge of  
2 criminal contempt arises because of disobedience to a lawful  
3 order of a district court and does not include a court of  
4 appeals or the Supreme Court?

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

6 CHIEF JUDGE TUTTLE: Now you say that where this  
7 occurs with respect to the order of a district court, it  
8 means district court and would not include a court of  
9 appeals? Is that the basis?

10 MR. JAWORSKI: That is correct, Your Honor. That  
11 is the point.

12 JUDGE RIVES: Your opponents tried to bring in  
13 the Court of Appeals by saying it includes the District of  
14 Columbia. What is your answer to that?

15 MR. JAWORSKI: Well, the answer to that, Judge  
16 Rives, is this: that certainly if they had intended to  
17 include any court of appeals, the statute would have said so.

18 JUDGE BROWN: Well, it does include the Court of  
19 Appeals of the District of Columbia. Does the Constitution  
20 necessarily bring in all the other Courts of Appeal?

21 MR. JAWORSKI: No, but I don't see that it is  
22 subject to that construction very frankly, and I don't  
23 think it was meant to so read. I don't think that it reads  
24 that way.

25 JUDGE RIVES: It reads, "The Court of Appeals of



1 the District of Columbia."

2 MR. JAWORSKI: No, sir. I don't think it will be  
3 so construed.

4 JUDGE RIVES: It does say "any court of the  
5 District of Columbia."

6 MR. JAWORSKI: It does say that, but it speaks  
7 of courts -- it actually, if I may read the exact language:

8 "Any person, corporation or associa-  
9 tion wilfully disobeying any lawful  
10 writ, process, order, rule, decree, or  
11 command of any district court of the  
12 United States or any court of the  
13 District of Columbia . . ."

14 JUDGE WISDOM: Isn't it pretty general throughout  
15 the Code, for example, that the word court means District  
16 Court and the Court of Appeals is not used alone without  
17 the word "Appeals" -- or is that just an impression on my  
18 part?

19 MR. JAWORSKI: No, I think that is correct, Judge  
20 Wisdom, but the point I am making here is that there is a  
21 very cardinal and elementary rule with respect to the con-  
22 struction of statutes, and that is that certainly there is  
23 not going to be placed a construction here that would be an  
24 unusual, an unreasonable one when an entirely reasonable  
25 construction can be given the statute.

1 JUDGE RIVES: Now we take exactly the opposite  
2 tack from what you and Judge Wisdom are talking about when  
3 we get to Section 401. "Any court of the United States  
4 shall have power to punish for contempt" includes this  
5 Court of Appeals and the Supreme Court having power to  
6 punish for contempt.

7 MR. JAWORSKI: I think that reads differently, if  
8 I may suggest, Judge Rives. I think the language is quite  
9 different, and I think you will find too --

10 JUDGE JONES: If we are going to use rules of  
11 reason in construing statutes, as you suggest, what is the  
12 rational basis for saying that (they) be denied a trial by  
13 jury if the contempt is of an order of the Court of Appeals  
14 when if the same order had been issued by a district court  
15 and the same action in opposition to that order had occurred,  
16 there would have been a right to a trial by jury? Why in  
17 the one and not the other?

18 MR. JAWORSKI: For the simple reason that the  
19 matter has been left to Congress as one of legislation. If  
20 there is no constitutional right -- and we must never  
21 confuse the two matters -- if there is no difficulty, then  
22 we must look to see wherein Congress in its wisdom has  
23 thought a trial by jury permitted. In this case --

24 JUDGE JONES: The absence in one and not the other?  
25 Would we not look for a basis of construction that would

1 harmonize and rationalize the basis for a jury trial in one  
2 as well as the other?

3 MR. JAWORSKI: May I suggest that I think there  
4 is good reason for not providing one in the Circuit Court,  
5 and that is that there are no jury trials of any kind that  
6 are provided for in the Circuit Court.

7 JUDGE JONES: Well, the reason is for the  
8 convenience of the court rather than the benefit and protec-  
9 tion of the accused?

10 MR. JAWORSKI: Not necessarily. It is a question  
11 of how far Congress wanted to go. Congress has provided  
12 jury trials in other instances; may it please the Court, in  
13 contempt cases there are certain instances of labor contempt  
14 where there has been an express provision made for jury  
15 trials. As it is a matter that has been left to Congress,  
16 the Congress can determine it should be in some cases and  
17 not in other cases as it wishes. So what we are really --  
18 if we are going to accept the Green Case -- and I have to  
19 accept it as the beginning point, because it is the rule, it  
20 is the rule of law as it now stands -- it has not only been  
21 so stated in one case, but there have been several cases  
22 since that time that have been decided by the Circuit Court  
23 in which trial by jury has been denied since the Green Case.--  
24 the Goldfine Case, the DeSimone Case, the James Case, the  
25 Robles Case. In every single one of those instances the

1 United States Supreme Court has refused a writ of certiorari,  
2 so I must conclude that there is no constitutional right,  
3 so we get back to what we were talking about, and that is  
4 the question of whether there could be any possible statu-  
5 tory right.

6 JUDGE BELL: Let me say this to you, Mr.  
7 Jaworski, because I think it is fair to let you know how my  
8 mind is running, --

9 MR. JAWORSKI: Yes, sir.

10 JUDGE BELL: -- just what I have been thinking  
11 about. This same order was in force in the Court of  
12 Appeals -- going back now to the order of July 28th -- and  
13 then was made the judgment of the District Court, the same  
14 order. When the Government came in as amicus, either they  
15 had to go and ask the District Court first for some help  
16 and not get it and come to our Court, or -- they had a  
17 choice -- they could go in either court and get this re-  
18 straining order of September 25th, and this is where the  
19 rub comes in -- this is what I consider to be the crux of  
20 the case -- if they went into the District Court and these  
21 Respondents violated the restraining order, they would get  
22 a jury trial, but if the Amicus came in our Court and got  
23 the order, they wouldn't get a jury trial. Now it seems to  
24 me that may violate some national policy of some sort. It  
25 doesn't seem right -- what I am trying to say to you --

1 that the Amicus could take a choice, and under one choice  
2 a man would lose his right to trial by jury, and under the  
3 other he would have a right to trial by jury. That is what  
4 bothers me more than anything about the case.

5 MR. JAWORSKI: Yes, Your Honor, and I judged that  
6 from questions that were asked, but let's bear in mind --  
7 now that gets to the second ground on which we say they are  
8 not entitled to a trial by jury -- let's not forget there  
9 still stands a ground -- unless the Constitution gives it  
10 to you, you have to find a statutory ground for it, and we  
11 say there is nothing in the statute that authorizes a trial  
12 by jury in a United States Circuit Court case.

13 Now getting to the point which you have raised,  
14 which is the second ground, let us bear in mind that when  
15 the Amicus Curiae entered this case -- and, of course, I  
16 wasn't associated with it at that time, as the Court well  
17 knows, but I have certainly studied the record and I have  
18 studied the orders of this Court, but this Court was in a  
19 situation of finding that its orders and decrees needed to  
20 be enforced. It was this Court that needed help, it was  
21 the United States Government, this branch of the United  
22 States Government, that needed help at that time.

23 JUDGE BELL: But the Court doesn't want to deprive  
24 anybody of their rights.

25 MR. JAWORSKI: Of course not.

1 JUDGE BELL: We are in the business of granting  
2 rights, not taking them away.

3 MR. JAWORSKI: Of course not, but I think it is  
4 Congress that has provided, not this Court. Congress  
5 provided that in those instances where the United States is  
6 a party with the right to obtain a restraining order and  
7 has obtained that restraining order and that order has been  
8 violated, that then there is no right of trial by jury, so  
9 it goes back to whether we can find a statutory right that  
10 has been given by Congress, and we say it is absent here.

11 JUDGE BROWN: Are you saying, on Judge Bell's  
12 hypothesis, had the Government gone to the District Court  
13 and been granted the same order we granted on September 18th,  
14 there would then have been a suit prosecuted by or on behalf  
15 of the United States?

16 MR. JAWORSKI: And there would not have been a  
17 right of trial by jury.

18 JUDGE BELL: Of course there would have. The  
19 statute says it.

20 MR. JAWORSKI: Did you say "Circuit" or "District"?

21 JUDGE BROWN: "District."

22 MR. JAWORSKI: I am sorry. I misunderstood.

23 CHIEF JUDGE TUTTLE: If the United States had done  
24 in the District Court what they did here, you still say there  
25 would have been no trial by jury because a proceeding brought

1 by the United States --

2 MR. JAWORSKI: I am awfully sorry. I misunderstood  
3 the question. May I have it again?

4 JUDGE BELL: That is the third point. You haven't  
5 argued that. Anyway you can go ahead and answer it as far  
6 as I am concerned.

7 MR. JAWORSKI: Well, the point that I am trying to  
8 make though is that wholly apart from this being a United  
9 States Circuit Court case, which does not entitle them to a  
10 right of trial by jury inasmuch as there is no provision  
11 anywhere in the statutes, I am also saying there is a second  
12 ground and that is because this is a case in which the  
13 United States Government was a party coming in with a right  
14 to ask for a restraining order, and, having asked for it,  
15 that it falls within the exception that does not entitle  
16 them -- which exception does not entitle them to a right of  
17 trial by jury even in the District Court.

18 JUDGE BELL: Because the United States is amicus?

19 MR. JAWORSKI: Because the United States is a  
20 party, please the Court.

21 JUDGE BELL: Not a party.

22 MR. JAWORSKI: I was going to say a party with a  
23 right to ask for a restraining order, among other things,  
24 which it did ask for and which was violated.

25 Now I don't think that we can get to the question

1 of a magic being applied to call it an amicus or call it by  
2 some other name. In the Faubus Case that is the very thing  
3 that was true, also true in Bush vs. Orleans, and the Court  
4 there analyzed the power and the right that was given to the  
5 amicus and said, We may have even used a name that isn't a  
6 particularly good designation, but that is unimportant; the  
7 important thing is what right and what power is given to the  
8 party.

9 JUDGE BELL: You know, there is something wrong  
10 about this to me, that the Government would come in and ask  
11 to be made amicus to take the -- protect the order of the  
12 Court, and then today come and say, We are not really  
13 amicus, we are a party, this is under our name, all this is  
14 under our name. If you said, We present the order, you  
15 might not get the order signed. It might be different. But  
16 we have converted it around from the amicus. I signed the  
17 order. That is the reason I am interested. It was presented  
18 to me along with two other Judges, and now we have expanded  
19 the order and become a party.

20 JUDGE WISDOM: Well, I signed the order, and I  
21 knew at the time that amicus was not descriptive of the  
22 Government's status.

23 JUDGE RIVES: It had all the provisions then it  
24 has now. I don't see how Judge Bell can take that position,  
25 unless he didn't read the order he signed.



1 JUDGE BELL: I read it very well, but the name  
2 amicus is on there. I know what an amicus is; it is not a  
3 party.

4 MR. JAWORSKI: I am suggesting, Judge Bell, that  
5 the name itself, even though it may even have a misleading  
6 connotation, is not the important thing. The important  
7 thing is the power and the rights and the authority that was  
8 given to whoever was admitted.

9 JUDGE BELL: Yes.

10 MR. JAWORSKI: That is what I say is the controlling  
11 thing, if I may suggest, Judge Bell.

12 JUDGE WISDOM: There are so many of these orders  
13 it is hard to keep them straight. Isn't that the particular  
14 order which specifically authorized the so-called amicus to  
15 bring proceedings for contempt?

16 MR. JAWORSKI: Entirely so, may it please you,  
17 Judge Wisdom, and may I read it so we can have it before us:

18 "IT IS ORDERED that the United  
19 States be designated and authorized to  
20 appear and participate as amicus curiae  
21 in all proceedings in this action  
22 before this Court and by reason of  
23 the mandates and orders of this Court  
24 of July 27-28, 1962, and subsequently  
25 thereto also before the District Court

1 for the Southern District of  
2 Mississippi, to accord each court  
3 the benefit of its views and recom-  
4 mendations, with the right to submit  
5 pleadings, evidence, arguments and  
6 briefs and to initiate such further  
7 proceedings, including proceedings for  
8 injunctive relief and proceedings for  
9 contempt of court as may be appropriate  
10 in order to maintain and preserve the  
11 due administration of justice and the  
12 integrity of the judicial processes of  
13 the United States."

14 No party, may it please you, Judge Bell, no  
15 party, whether you call him a plaintiff or a defendant or  
16 whatever you term him, could be given any broader powers, it  
17 seems to me, than were given here as a litigant.

18 JUDGE CAMERON: That was in a civil case, and you  
19 can't bring in a new party without giving everybody notice  
20 and giving them an opportunity to object to the new party  
21 being brought in, and you didn't bring them in like a party.  
22 You went there with your petition and you got appointed the  
23 same day. You didn't give anybody any notice or give them  
24 a chance to object, and I guess you wrote the order up and  
25 gave it to them to sign -- I don't know -- but it certainly

1 has no earmarks of a normal civil court proceeding, I mean  
2 under the Federal Rules of Civil Procedure.

3 MR. JAWORSKI: Well, now, Your Honor, the precise  
4 circumstances under which it was done I cannot answer,  
5 because, as Your Honor knows, I wasn't in the matter at  
6 that time, but I know what the record shows, and I know that  
7 it shows that there were some situations prevailing and  
8 some circumstances prevailing at that time that called for  
9 immediate action. I also know that this precise procedure  
10 was approved in the Faubus Case in which the Supreme Court  
11 has denied a writ of certiorari. It was also approved in  
12 the Bush vs. Orleans case, in which the Supreme Court --

13 JUDGE CAMERON: All that happened in the Faubus  
14 Case is that a North Dakota District Judge came down there,  
15 and he needed some help, and he wrote a letter to the United  
16 States Attorney. That is the way the Faubus Case arose.

17 MR. JAWORSKI: It may have arisen that way, but  
18 that is not what the Court held, may it please Your Honor,  
19 if I may suggest, because that went to the Circuit Court,  
20 and the Court in the Faubus Case approved this procedure,  
21 and, as I say, the same thing was done in the Bush Case.

22 JUDGE BELL: I understand (they) approved it, but  
23 has the Court said that makes them into a party, makes the  
24 Government a party? That is all this argument is about. You  
25 have got to take the position -- if you are correct that

1 there is no statutory authority, you have got to take the  
2 position that the Government under this statute -- what  
3 does it say? -- brought this in the name of or by the  
4 United States Government, action brought or prosecuted in  
5 the name of or on behalf of the United States. Now you know  
6 it wasn't on behalf of the United States, the Meredith Case  
7 wasn't, and the restraining order wasn't on behalf of the  
8 United States.

9 MR. JAWORSKI: Well, the restraining order that  
10 has been charged with being violated here was an order that  
11 was issued by the Court on application of the United States  
12 as amicus curiae. That is the very reason that this --

13 JUDGE BELL: We always get back to the amicus  
14 anyhow. Go ahead with your argument.

15 MR. JAWORSKI: I want to suggest again that this  
16 very thing was done in the Faubus Case, and it was done by  
17 the amicus curiae, and it was also done by bringing in an  
18 additional party precisely as was done here with Governor  
19 Faubus being brought in as an additional party, and the  
20 Eighth Circuit Court affirmed and the United States Supreme  
21 Court denied a writ of certiorari. Now --

22 JUDGE GENIN: Was he brought in at the District  
23 Court level or the Circuit Court level?

24 JUDGE RIVES: District Court level, I am sure.

25 MR. JAWORSKI: I believe it was the District Court

1 level, Judge Gewin. I am not entirely certain. My recollec-  
2 tion is -- in fact, I am pretty certain --

3 JUDGE RIVES: Both the Faubus and Bush cases at  
4 the District Court level.

5 MR. JAWORSKI: If I may leave this subject a  
6 moment of whether the amicus curiae, because of the particular  
7 rights and powers that were given to it, is actually in the  
8 same position as the United States being a party to the  
9 proceeding today -- and I firmly believe that that is true,  
10 because there is no distinction between the powers and the  
11 rights that this Court gave to the United States as amicus  
12 curiae and any other party, the only distinction being  
13 that it was designated as an amicus curiae, but, as we read  
14 this order, we say that the authority given to it was  
15 precisely the same. Now the --

16 JUDGE BELL: Well, do you think if Congress has  
17 denied the Government the right to become a party in one  
18 of these type cases, it would have anything to do with our  
19 use of the term amicus curiae?

20 MR. JAWORSKI: Excuse me, Judge Bell. May I have  
21 that question again?

22 JUDGE BELL: The fact that Congress has denied  
23 the Government the right to intervene as a party in a case  
24 of this kind, do you think that would have any bearing on  
25 the claim that the Government was amicus?

1 MR. JAWORSKI: No, I don't.

2 Now, Your Honors, I believe it would be helpful  
3 if we had before us the particular motions and pleas that  
4 Respondents have raised here, because the arguments have not  
5 been, as I construed them to be, in line with what the  
6 motions are. The demand is entitled, "Demand of Governor  
7 Ross R. Barnett for Trial by Jury," and precisely the same  
8 motion was also filed on behalf of the other Respondent.

9 "Movant herewith demands that all  
10 issues made or which may be or could be  
11 made by any proceedings had, done or  
12 taken as to movant in original cause  
13 No. 20,240 and all related proceedings  
14 in appellate cause No. 19,475 be sub-  
15 mitted to, heard and determined by a  
16 constitutionally composed jury chosen  
17 from the district and division where  
18 the alleged criminally contemptuous  
19 acts or omissions were committed or  
20 omitted."

21 In other words, that is a motion that calls for  
22 this Court to choose a jury from the district and the  
23 division where the alleged criminally contemptuous acts were  
24 committed.

25 The next motion, the Fourth Alternative Motion,

1 asks that, and takes the position that, the Court is

2 ". . . without statutory power or  
3 authority to summons such a constitu-  
4 tional jury and said power is lodged  
5 only in a district court of the United  
6 States duly functioning in such district  
7 and division as previously determined and  
8 existing at the time of said alleged  
9 acts and omissions."

10 So that contrary to some suggestions that were made by one  
11 of the counsel that argued here, we have first a motion that  
12 asks for a jury trial, saying that that jury should be  
13 selected from the district and the division where this  
14 alleged contemptuous act occurred, and then the second  
15 motion saying that there cannot be any power on the part of  
16 this Court to do it. Now those are the two motions that are  
17 before the Court on that matter. We would like to respect-  
18 fully submit that if Congress had intended for there to be  
19 jury trials in criminal contempt proceedings in this Court,  
20 wholly apart from the question of whether the United States  
21 could be construed to be a party or not, that it would have  
22 said so in so many words. We do not have anything so  
23 stating and so providing, so as far as the statutory power  
24 is concerned -- and, as I see it, that is all that is before  
25 the Court, to determine whether there is such a statute,

1 because we know under the interpretation of the Constitution,  
2 if we are to accept the Green Case and all of the other  
3 cases that have been decided since then, we must say all we  
4 can do is look to the statutes to see if we can find any  
5 basis -- find anything that authorizes the Court to empanel  
6 a jury, and we would like to respectfully submit there is  
7 nothing in the statutes that gives any such authority to  
8 this Court. We would also like to, of course, reserve the  
9 the point, which I firmly believe, sincerely believe, is  
10 good, and that is that to all intents and purposes the  
11 United States was the party that obtained this restraining  
12 order, that that restraining order was violated, and that  
13 accordingly even in the District Court and in exactly the  
14 same situation, they would not be entitled to a trial by  
15 jury.

16 I do not think it is necessary to take the time of  
17 the Court to discuss the matter of grand jury presentment  
18 and indictment. I would like to --

19 JUDGE BROWN: That is curious. If it is an  
20 infamous crime, they are entitled to a grand jury present-  
21 ment, are they not?

22 MR. JAWORSKI: All I can say, Your Honor, is this:  
23 that that matter has been passed on by the United States  
24 Supreme Court, and no matter what I may personally think  
25 about it, I am accepting the interpretations of the United



1 States Supreme Court. Not only has it been passed on by  
2 that Court very squarely and pointedly, but in addition to  
3 that it has been raised in at least two cases since that  
4 time and the United States Supreme Court has refused  
5 certiorari in both of those cases, so I have to accept it  
6 as being the law, and then Rule 42-b comes along and  
7 provides exactly how the procedure should be, and it  
8 provides that there should be notice, and this Court has  
9 ordered that 42-b should be followed.

10 I might say incidentally that the United States  
11 Supreme Court has held in two cases, the Offutt case and  
12 the Brown case, that 42-b actually is consonant with the  
13 usages of law and does really nothing more than substantial-  
14 ly reiterate the uses at law.

15 JUDGE BROWN: You made one argument in your brief  
16 that I didn't understand. The Government says, first, this  
17 is not a district court, so by the terms of the statute it  
18 does apply. No. 2, even though it is not a district court,  
19 because it entered an order comparable to that as is some-  
20 times issued by a trial court, that it was nevertheless a  
21 suit brought by or on behalf of and prosecuted on behalf of  
22 the United States. But now you make another argument that  
23 according to certain usages, there would be no jury trial.  
24 Is that an independent argument or --

25 MR. JAWORSKI: Well, I think the other argument,