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Constitutional Right to Jury Trial in Criminal Contempt Cases?-*United States v. Barnett*

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RECENT DEVELOPMENTS

Constitutional Right to Jury Trial in Criminal Contempt Cases?—*United States v. Barnett**

Federal courts historically have had the power to try criminal contempt cases[1] without a jury. There is a virtually uninterrupted 150-year line of cases[2] which holds that contempt is not a "Crime" or "criminal prosecution" within the meaning of article III and the sixth amendment to the Constitution.[3] Superficially, the decision in *United States v. Barnett* is in accord with these precedents. However, in an important "dictum," footnote number 12, the majority cautioned that "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses."[4] Although the Court itself styles this comment a dictum, its potential effect is to overrule this long history of decisions.

In the *Barnett* case, Mississippi Governor Barnett and Lieutenant Governor Johnson were charged with violation of three federal court orders.[5] The Court of Appeals for the Fifth Circuit divided

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* 376 U.S. 681 (1964).

1. Criminal contempt cases are distinguishable from civil contempt cases. Although both consist of acts disrespectful to the court, sanctions imposed for civil contempt are "remedial," Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442-52 (1911); Doyle v. London Guar. & Acc. Co., 204 U.S. 599 (1907), either for the purpose of awarding compensatory damages, Mitchell v. All-States Business Prods. Corp., 232 F. Supp. 624 (E.D.N.Y. 1964), or for inducing some required performance by the defendant, United States v. Testa, 334 F.2d 746 (3d Cir.), *cert. denied*, 85 Sup. Ct. 83 (1964). Criminal contempt sanctions are "punitive." Within the criminal contempt category the courts recognize a further distinction. Contumacious acts in the presence of the court are characterized as "direct," *e.g.*, Piemonte v. United States, 367 U.S. 556 (1961) (refusal to answer grand jury questions after being directed to do so by the court). Violations of court orders are labeled "indirect." The principal case is of this latter type.

2. Fifty-four cases are collected in the principal case at 694-95, n.12. The most recent case is Green v. United States, 356 U.S. 165 (1958), which received extensive comment, *e.g.*, 72 HARV. L. REV. 153 (1958); 57 MICH. L. REV. 258 (1958). See note 15 *infra* and accompanying text.

3. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ." U.S. CONST. art. III § 2. "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 . . . ." U.S. CONST. amend. VI.

4. "In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Principal case at 695, n.12. The problems surrounding the definition of what constitutes punishment for petty offenses are set out in note 23 *infra*.

5. Two orders were issued by the court of appeals and one by the District Court for the Southern District of Mississippi. The charges were filed with the court of appeals in accordance with FED. R. CRIM. P. 42(b) and 18 U.S.C. § 401(3) (1958), which provide the substantive basis for federal indirect criminal contempt cases and the procedure to be followed therein.

evenly on the defendants' demand for a jury trial and certified the following question to the Supreme Court: Are two individuals charged with criminal contempt consisting of illegal disobedience of a court of appeals restraining order entitled, upon demand, to trial by jury?[6] The United States Supreme Court answered in the negative, four Justices dissenting.[7]

Defendants based their demand for a jury trial upon two grounds, one statutory and the other constitutional. All United States courts have statutory power to punish contempt consisting of disobedience to their lawful orders.[8] Rule 42(b) of the Federal Rules of Criminal Procedure allows such punishment to be imposed without a jury trial. However, an exception requiring jury trial is made in cases where the disobedience is to an order of a federal district court, issued in a case not brought by the United States, if such disobedience also constitutes a separate criminal offense.[9] The defendants in *Barnett*, asserting the existence of these three elements, claimed a statutory right to jury trial. The majority rejected this contention upon a finding that the allegedly violated orders were issued by the court of appeals, and not the district court.[10] Although this phase of the case was fully argued,[11] and legislation does exert a significant overall influence on the law of criminal contempt,[12] the possible importance of this approach is somewhat abated, in the federal courts at least, by the pre-emptive

6. This is a paraphrased version. For the complete text of the question, see principal case at 682, n.2.

7. The Chief Justice, Justices Black, Douglas, and Goldberg.

8. 18 U.S.C. § 401(3) (1958). *But see* Mr. Justice Black's dissent in the principal case at 724, in which he expresses doubt as to the statutory power of courts of appeal to *try* contempts.

9. 18 U.S.C. §§ 402, 3691 (1958).

10. Finding that this element was not established, the majority did not reach the other two. It appears to have been accepted that the defendants' behavior constituted a separate criminal offense, but the majority expressly took no position on whether the case was brought by the United States. Principal case at 692, n.8. *But see* Mr. Justice Goldberg's dissent in the principal case at 728; by finding that the contempt proceeding was based on the district court order, that it was not brought by the United States, and that the violation constituted a separate criminal offense, under 18 U.S.C. § 1509 (Supp. V, 1964), he concluded that §§ 402 and 3691 *were* applicable and that there did in fact exist a statutory right to jury trial.

11. Brief for United States, pp. 20-44, principal case.

12. Two other federal statutes provide for jury trial in certain criminal contempt cases: 18 U.S.C. § 3692 (1958) (labor disputes); Civil Rights Act of 1964, tit. XI, § 1101, 78 Stat. 268. In addition, four states by statute guarantee a jury in all indirect criminal contempt trials: ARIZ. REV. STAT. ANN. § 12-863 (1956); GA. CODE ANN. § 24-105 (1959); OKLA. STAT. ANN. tit. 21, § 567 (Supp. 1965); PA. STAT. ANN. tit. 17, § 2047 (1962). Other states have variously limited this summary power: *e.g.*, KY. REV. STAT. §§ 432.260(1), 432.290 (1962) (jury trial if punishment is to exceed $30 and 30 hours imprisonment); N.Y. LAB. LAW § 808(1) and WIS. STAT. §§ 103.60(3), 133.07(4) (1957) (jury trial for contempt cases arising out of labor disputes); TENN. CODE ANN. § 23-903 (1955) and WASH. REV. CODE § 7.20.020 (1956) (providing maximum limits for contempt punishments).

effect of footnote 12 and the probability that a clear constitutional basis for the right to jury trial in indirect criminal contempt cases will soon be established.

Defendants' second ground was based upon article III and the sixth amendment to the Constitution.[13] In recent years the prevailing view, denying a constitutional right to jury trial in all criminal contempt cases, has met increasing opposition within the Supreme Court.[14] In a 1958 decision, *Green v. United States*,[15] a case factually similar to *Barnett* in that an indirect criminal contempt charge for failure to obey a district court order was involved, four Justices also dissented. In both *Green* and *Barnett* the dissenting views were comprehensively expressed.

The majority maintains that contempt has historically been considered "sui generis" and is not therefore a "Crime" requiring a jury trial within the meaning impliedly given article III by the founders; that a 150-year line of decisions should not be overturned judicially; that the courts could not maintain discipline and respect without this summary power; and that jury trials in contempt cases would require an unwarranted expenditure of time and money. The minority responds to each of these arguments. They contend that the jury is fully capable of maintaining proper respect for court authority and that expense is irrelevant when personal liberties are involved. Moreover, they argue that inconclusive debate as to the nature of the eighteenth-century contempt power is of no more than scholastic value because of the changed usage of the criminal contempt power and that the Court should not hesitate to overrule precedent in today's significantly altered factual context.

The essence of the minority position—its basic premise—is that the nature of the criminal contempt proceeding has undergone substantial change. Two facets of this change are stressed. First, courts are using their discretionary contempt power in an expanding number of situations.[16] Second, and of greater concern to the

13. See note 3 *supra*.

14. See Piemonte v. United States, 367 U.S. 556 (1961); Levine v. United States, 362 U.S. 610 (1960); Brown v. United States, 359 U.S. 41 (1959); Green v. United States, 356 U.S. 165 (1958); Yates v. United States, 355 U.S. 66 (1957); Nilva v. United States, 352 U.S. 385 (1957). In all the above cases at least three Justices dissented.

15. 356 U.S. 165 (1958).

16. "[The contempt power] has undergone an incredible transformation and growth, slowly at first and then with increasing acceleration, until it has become a powerful and pervasive device for enforcement of the criminal law. . . . In brief it has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs. But still worse, its subversive potential to that end appears to be virtually unlimited." *Id.* at 208 (dissenting opinion of Black, J.). The wide range of federal statutory authorizations for the punishment of criminal contempt is listed in an annotation to FED. R. CRIM. P. 42, in 18 U.S.C.A. 292 n.5 (1961).

defendant, criminal contumaciousness is receiving increasingly severe punishment. Rather than the traditional imposition of a small fine and two or three days imprisonment,[17] sentences now impose imprisonment for three or four years,[18] and, in some instances, the contempt punishment may exceed the penalty imposed in the substantive proceeding from which the contempt arose. The dissenters feel that the "Crimes" to which Article III refers[19] should be identifiable, at least in part, by the punishment they command,[20] and criminal contempt can, and frequently does, command extreme punishment. Finally, the changed usage is further demonstrated by the many procedural safeguards which have been made applicable to indirect criminal contempt proceedings over the years,[21] reflecting gradual judicial and legislative recognition that criminal contempt is, in fact, "criminal" in nature.

Despite purported adherence to the traditional view, the majority opinion in the *Barnett* case nevertheless reveals an uncertainty as to the future disposition of jury trial demands in criminal contempt cases. The crucial "dictum" of footnote 12, although only a terse, one-sentence statement that is unamplified and undiscussed in the body of the opinion, impliedly overrules the precedent line of cases; this dictum, however, does not fill the resultant void.

Procedurally,[22] footnote 12 appears to mean that the court must impanel a jury in those cases where it anticipates that more punishment than that "provided for petty offenses" is warranted.[23] If this is

17. See principal case at 740-49 (dissenting opinion of Goldberg, J.).

18. See, *e.g.*, Piemonte v. United States, 367 U.S. 556 (1961) (18 months); Reina v. United States, 364 U.S. 507 (1960) (2 years); Green v. United States, 356 U.S. 165 (1958) (3 years); Collins v. United States, 269 F.2d 745 (9th Cir. 1959) (3 years); United States v. Thompson, 214 F.2d 545 (2d Cir. 1954) (4 years).

19. See Mr. Justice Goldberg's dissent in the principal case at 757.

20. "[T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus entitle the accused to the benefit of a jury trial prescribed by the Constitution." District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

21. See FED. R. CRIM. P. 42(b) (providing for notice, a reasonable time for preparation of a defense, information as to the facts of the charge, bail, and disqualification of interested judges); Offutt v. United States, 348 U.S. 11 (1954); Cooke v. United States, 267 U.S. 517 (1925). See also Levine v. United States, 362 U.S. 610 (1960) (right to public trial); *In re* Murchison, 349 U.S. 133 (1955) (disqualifying a "one-man grand jury" judge from also trying an alleged contempt that occurred before him while he was acting a grand jury and providing the right to examine witnesses and to be represented by counsel).

22. *Cf.* 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1958) (procedure for contempt trials under the 1957 Civil Rights Act); Armstrong v. Bryan, 273 S.W.2d 835 (Ky. 1954).

23. "That penalty provided for petty offenses" would appear to mean a maximum of $500 fine and six months imprisonment. 18 U.S.C. § 1(3) (1958); District of Columbia v. Clawans, 300 U.S. 617 (1937). It has been suggested that if local code provisions define the allowable penalty for petty offenses even more restrictively

true, severity of the *sentence* in each particular case is the criteria used to determine whether a right to jury trial exists. Mr. Justice Goldberg, dissenting in *Barnett*, argues instead that the seriousness of the *charged offense*, measured in part by its maximum permissible sentence, should be the determinant.[24] In other words, the authors of footnote 12 apparently feel that even serious indirect criminal contempts are not "Crimes," for which the Constitution provides jury trial, until they are actually punished as "Crimes"; Mr. Justice Goldberg, on the other hand, feels that if an indirect criminal contempt is itself serious, regardless of how it is actually punished, it is a "Crime" and must, upon demand, be tried by a jury.[25] In practical effect these two approaches differ in two respects. First, under footnote 12 a court may, even in a serious offense case, impose upon the defendant, without a jury trial, that penalty provided for petty offenses. This option would not be available under Mr. Justice Goldberg's approach.[26] Second, footnote 12 does not necessarily extend the jury trial guarantee to include *direct* contempt cases.[27] Mr. Justice Goldberg does not specifically deal with direct contempt, but some of the phraseology he uses is broad

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than the federal code, the local code may be the relevant standard for determining when criminal contempt cases must be tried by a jury. "We do not think the definition of petty offense contained in 18 U.S.C. § 1 . . . applies here. . . . [W]e think we may take our guide from the D.C. Code provision governing trial by jury. . . . Accordingly, we think it proper to instruct the District Court that if on remand it proceeds without a jury, it can impose no greater imprisonment than ninety days." Rollerson v. United States, No. 17675, D.C. Cir., Oct. 1, 1964.

24. Mr. Justice Goldberg suggests that the seriousness of the offense would be determined by comparison with like cases and by consideration of the "severity of the punishment which could legally have been imposed." "If Green's contempt—jumping bail—was punishable by imprisonment for three years, and if Piemonte's contempt—refusal to answer a question before a grand jury—was punishable for imprisonment for a year and a half, it would be wholly unrealistic for us to assume that . . . the present contempt may be characterized as a petty offense . . . ." Principal case at 758-59.

25. The essence of this difference in approach between footnote 12 and Mr. Justice Goldberg's dissent, if more than illusion, is contained in this thought: "The right to trial by jury depends not on the severity of the punishment actually imposed, but rather on the severity of the punishment which could legally have been imposed." Principal case at 759 n.48. (citing District of Columbia v. Clawans, 300 U.S. 617, 623 (1937)). Both approaches recognize the validity of correlating severity of punishment with the constitutional meaning of the word "crime." See note 20 *supra* and accompanying text. The dispute revolves around the nature of the correlation.

26. This analysis, of course, assumes that the courts will generally contemplate "serious penalties" only in "serious offense" cases.

27. See United States v. Harris, 334 F.2d 460, 463 (2d Cir.), *cert. granted*, 85 Sup. Ct. 438 (1964) (interpreting the "dictum" of footnote 12 to be inapplicable to contempts committed in the presence of the court). *But see* Rollerson v. United States, No. 17675, D.C. Cir., Oct. 1, 1964 (applying the footnote 12 requirement of jury trial where a robbery defendant, asserting an insanity defense, threw a water pitcher at the prosecutor in the presence of the court).

enough to include these cases.[28] Mr. Justice Black, also dissenting in *Barnett*, goes even farther in reiterating a position he has urged for several years.[29] Although welcoming the "halting but hopeful step"[30] of footnote 12, he asserts that the right to trial by jury in criminal contempt cases, direct or indirect, is guaranteed without qualification by both article III and the Bill of Rights.[31]

Although the majority rejects both of these dissenting views, the *Barnett* decision in its entirety does indicate that the Court believes trial by jury in *some* federal criminal contempt situations is constitutionally guaranteed. Therefore, to conclude that this dictum presently will be upheld and will be relied upon by the lower courts, to say that it is more than dictum, is not conjecture. Several recent Supreme Court decisions, both in contempt cases and in analogous areas, evidence a protective concern for the role of the jury and the right of the defendant to trial by jury. There is indication of increasing apprehension toward the sentencing "discretion" in contempt cases. In the *Green* case, the majority referred to the "special responsibility" of appellate courts to see that the power is not abused.[32] Analogously, in two recent federal civil suits, the Court has held that a claimant's right to jury trial on legal issues may not be diluted by prior determination of equitable issues.[33] The Court has also held that there is a right to jury trial on the legal issues in federal declaratory judgment suits.[34] In addition, Mr. Justice Frankfurter, who voted with the five-Justice majority in *Green*, has been replaced by Mr. Justice Goldberg, who dissented in *Barnett*. However, Mr. Justice Brennan, a dissenter in *Green*, joined the majority in *Barnett* and, in a sense, represented the mar-

28. "If a violation of law is punishable by a nontrivial penalty, then the Constitution does require trial by jury whether the violation is labeled criminal contempt or anything else." Principal case at 757. However, the breadth of this statement should be appraised in the light of the following statement also made by Mr. Justice Goldberg in his dissenting opinion: "Nor am I here concerned with the imposition of the trivial punishments traditionally deemed sufficient for maintaining order in the courtroom. . . . I am concerned solely with the imposition, without trial by jury, of fixed nontrivial punishments *after* compliance with the court's *order* has been secured." Principal case at 754. (Emphasis added.)

29. *E.g.*, Levine v. United States, 362 U.S. 610, 620 (1960) (dissenting opinion); Green v. United States, 356 U.S. 165, 193 (1958) (dissenting opinion); Nilva v. United States, 352 U.S. 385, 396 (1957) (dissenting opinion).

30. Principal case at 727.

31. "It is high time . . . to wipe out root and branch the judge-invented and judge-maintained notion that judges can try criminal contempt cases without a jury." Principal case at 727.

32. 356 U.S. at 188. See Nilva v. United States, 352 U.S. 385 (1957) (remanded for resentencing); Yates v. United States, 355 U.S. 66 (1957) (remanded for resentencing); Offutt v. United States, 348 U.S. 11, 13 (1954).

33. Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

34. Simler v. Conner, 372 U.S. 221 (1963).

gin of decision. His dissent in the earlier case was on somewhat different grounds, and one may speculate about his future position.[35]

The meaning and effect of the *Barnett* decision await clarification. References to the case by lower federal and state courts do not reflect a consensus of interpretation. At least one state court has referred to footnote 12 as if it comprised the holding.[36] Another state court has mentioned only the certified question and negative answer, thus in effect ignoring footnote 12.[37] Decisions in the federal courts have been equally indecisive.[38] In two recent cases the Court of Appeals for the Second Circuit expressed doubt as to the weight and meaning of the so-called "dictum," but did, nevertheless, in each case attempt to deal with some uncertainties regarding the scope of the right established in footnote 12. In *United States v. Bialkin*,[39] without specific acknowledgment to footnote 12 but assuming a constitutional right to jury trial, the court held that the right had been waived by a guilty plea. *United States v. Harris*[40]

35. The right to trial by jury in criminal contempt cases has been in issue, directly or by implication, in seven cases since Mr. Justice Brennan joined the Court. Cases cited note 14 *supra* and Reina v. United States, 364 U.S. 507 (1960). He has dissented in four and concurred in three. However, in no case is his vote clearly based on the jury trial issue, and, of course, his position in *Barnett* regarding footnote 12 is not clear from the opinion.

36. Pearl v. Upper Lakes Shipping Ltd., 128 N.W.2d 73, 77 n.4 (Wis. 1964).

37. Holt v. Virginia, 136 S.E.2d 809, 816-17 (Va. 1964).

38. The Court of Appeals for the Third Circuit recently upheld a nonjury criminal contempt conviction imposing a $15,000 fine upon the defendant union and a $5,000 fine upon its business agent. *In re* Operating Eng'rs Local 825, 3d Cir., June 17, 1964, *cert. denied*, 85 Sup. Ct. 326 (1964). It appears that the contempt consisted of noncompliance with an NLRB order and was therefore of the indirect variety. However, the case has not yet been reported, and it is not clear to what extent the *Barnett* decision is in issue.

The Court of Appeals for the Tenth Circuit, in a direct contempt case involving a refusal to answer grand jury questions, cited *Barnett* for the proposition that "the trial court here clearly had the power to punish summarily for such criminal contempt. . . ." There is no mention of footnote 12. Nitti v. United States, 336 F.2d 576, 577 (10th Cir. 1964).

39. 331 F.2d 956 (2d Cir. 1964) (contempt for violation of an injunction prohibiting certain activities restricted by the Securities Exchange Act of 1934).

40. 334 F.2d 460 (2d Cir.), *cert. granted*, 85 Sup. Ct. 438 (1964) (contempt for refusal to answer certain grand jury questions upon court direction to do so.) *But see* Castaldi v. United States, 338 F.2d 883 (2d Cir. 1964), *petition for cert. filed*, 33 U.S.L. WEEK 3223 (U.S. Dec. 17, 1964) (No. 767); Rollerson v. United States, No. 17675, D.C. Cir., Oct. 1, 1964. The court held in *Rollerson* that the defendant, sentenced to one year imprisonment for criminal contempt consisting of throwing a water pitcher at the prosecutor in the presence of the court, had a right to jury trial under *Barnett*. This is a *direct* contempt case and therefore is in conflict with *Harris;* however, in the robbery proceeding out of which the contempt arose, the defendant was asserting an insanity defense, and it may be that for this reason the court of appeals felt the defendant was entitled to a jury trial on the question of his responsibility for his actions.

In direct contempt cases the judge is himself a witness to the factual events which constitute the charged disobedience or misbehavior. The jury's fact-finding function is thereby greatly diminished, and the argument against a constitutionally guaranteed jury trial is correspondingly strengthened. It has often been urged that unless misbehavior in open court is punished *immediately*, maintenance of

held that footnote 12 was not applicable when the disobedience occurred in the presence of the court and the contempt proceeding was begun before compliance with the order was achieved, presumably restricting the jury guarantee solely to cases of indirect criminal contempt.

This much is clear from the *Barnett* decision: if, in a federal indirect criminal contempt proceeding, trial by jury is demanded but not granted, punishment may not exceed that punishment provided for petty offenses. Paradoxically, the footnote 12 dictum is in basic accord with, and is necessarily grounded upon, the dissenting arguments. Although these arguments may be persuasive, the strength of Mr. Justice Frankfurter's reasoning in the *Green* case[41] should be recognized, as well as his conclusion that legislation should be enacted to accomplish what may be the correct result. However, because of the inclusion of footnote 12 in *Barnett*, the judiciary may resolve this problem, at least in the area of indirect criminal contempt proceedings, without assistance from the legislature. The trend is fairly clear, and the present litigation involving the meaning and effect of the *Barnett* decision suggests that resolution will be necessary in the near future.[42]

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courtroom decorum will become difficult. Consequently, the distinctions between direct and indirect contempt are meaningful; however, at least two counterarguments can be made for not distinguishing between the two and for requiring jury trial in each instance. First, the jury performs an insulating function between contemnor and judge, which is seemingly more important in direct than in indirect contempt situations. Second, punishment for direct contempt may be equally as serious, and equally as "penal" in nature, as that imposed for indirect contempt.

41. 356 U.S. 189-93. Mr. Justice Frankfurter lists fifty-three United States Supreme Court Justices, including Marshall, Holmes, Brandeis, and Cardozo, who have sustained the punishment of contempt without jury trial. *Id.* at 192. "It is not for this Court to fashion a wholly novel constitutional doctrine . . . in the teeth of an unbroken legislative and judicial history from the foundation of the Nation." *Id.* at 193. Mr. Justice Frankfurter took this position although he had co-authored an article, Frankfurter & Landis, *Power To Regulate Contempts*, 37 HARV. L. REV. 1010 (1924), which cast doubt on much of the historical reasoning employed in this long history of decisions. In fact, Mr. Justice Black cites that article in his dissent in *Green*. *Id.* at 196 n.5.

42. For a recent discussion of *Barnett* generally, see Goldfarb and Kurzman, *Civil Rights v. Civil Liberties: The Jury Trial Issue*, 12 U.C.L.A.L. REV. 486 (1965).