

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

Meredith v. Fair

Trial Files

Transcripts - U. S. v. Barnett -Johnson

1 lawyers and the New York lawyers all come down to New Orleans,
2 and you all have to come from wherever your business takes
3 you in the District, when you are not losing -- if there is
4 any fear that the Mississippi District Courts won't properly
5 perform their duty, you still have -- any time your mandate
6 is tampered with -- let's see (referring to document) --
7 here is what the Supreme Court said -- this is in the brief,
8 so I won't give you the citation -- it's on page 26 of the
9 brief, They are talking now about the Supreme Court's own
10 mandate. They said:

11 "It is for the district court to
12 which the mandate is directed to construe
13 and execute such mandate; and if that
14 court (1) misconstrues or (2) refuses to
15 enforce it or (3) attempts to 'vary it'
16 or (4) 'to intermeddle with it,'" (Arabic
17 numbers in parentheses added)

18 then the Supreme Court can step right back in and enforce
19 the mandate in any way they want it enforced. -

20 JUDGE BROWN: But isn't it ludicrous, assuming we
21 had the power to enter the order of July 28th and that there
22 is strong indication shown by the proof now again in the
23 record that it is not being obeyed, isn't it ludicrous that
24 we have to refer to the District Court to take appropriate
25 action to see that our orders are carried out?

1 MR. CLARK: No, sir, for this reason:

2 JUDGE BROWN: Do you think the Supreme Court of the
3 United States would ever turn to a district court to enforce
4 its orders?

5 MR. CLARK: I think that this is exactly what the
6 Supreme Court said in the Union Steamboat case. That is why
7 you have district courts. They have the machinery to deal
8 with just exactly this; they are permanently there in that
9 particular district, they are on the ground; that is their
10 function. This Court is an appellate court, and I say to
11 you that it was entirely improper for the Government to use
12 this Court as the vehicle in which it would seek to enforce
13 this right that it claims that it has as an amicus, which it
14 could have brought in a completely separate and independent
15 action.

16 JUDGE BROWN: You think this Court, assuming
17 validity of the July 28th order and the present showing is
18 adequate for preliminary injunction, has the power to issue
19 a preliminary injunction which by its terms remands that
20 injunction to the District Court for further enforcement?

21 MR. CLARK: I suggest so, sir, and I would say
22 this: If you have the apprehension that Judge Jones has --
23 I have a difficulty in my mind that apparently doesn't exist
24 in this Court's minds, because you say that this order of the
25 28th has not been complied with or that no proof has been

1 made that it has been complied with, and I say that everybody
2 that was directed to has shown to the Court to have complied
3 with it, and I will assure you as an officer of this Court
4 that they have absolutely and fully. In complete good
5 faith and with regard to Judge Wisdom's remark with regard
6 to good faith of those who testified, I would like to remind
7 Your Honors -- excuse me for saying this -- Judge Tuttle,
8 you told me one time when I got before this Court I could
9 argue as strong as I wanted to. I hope I still have that
10 permission.

11 JUDGE TUTTLE: Yes, sir.

12 MR. CLARK: -- that Mr. Ellis, the Registrar,
13 testified to that Court that if any qualified Negro applicant
14 applied for admission that he would be admitted, and as an
15 aside the next day Counsel for Appellant wanted to know if
16 he was still the Registrar, and you know he still is, and he
17 has never ever varied from that. The only time that he did
18 not do so is when he thought that he was powerless to do so,
19 and apparently this Court agreed with him.

20 JUDGE WISDOM: Now I don't want to continue this
21 argument, because it is tangential, but my remark was
22 directed to the fact that he testified that he was shocked
23 and surprised that anybody would think the University of
24 Mississippi would turn down a qualified Negro. I say that
25 casts a doubt on his sincerity, but let's pass that, because

1 it is tangential.

2 MR. CLARK: I don't recall that, and, of course,
3 they --

4 JUDGE WISDOM: I recall it distinctly.

5 MR. CLARK: -- said that they had never met and
6 considered --

7 JUDGE TUTTLE: Counsel stood here in this court-
8 room and repeatedly urged on us the proposition that there
9 was no showing that the University of Mississippi was a
10 segregated institution. Now somebody, either counsel or
11 witnesses, came up with that fanciful -- I say fanciful --
12 proposition, and I say fanciful especially in the light of
13 the evidence that has been proved in this case now.

14 MR. CLARK: Judge, you are talking about the
15 temper of individual citizens when you are talking about the
16 purposes or the things that led to the unfortunate events at
17 the University of Mississippi on that Sunday night.

18 JUDGE TUTTLE: No, Mr. Clark. I am talking about
19 the fact that this Court had to get into a case on the fact
20 issue. Counsel made this Court get into the fact issue as
21 to whether Ole Miss is segregated or not, and that fact
22 issue ought never to have come to this Court. In some way
23 or other, in some way or other, if everybody had answered
24 honestly and faithfully, it seems to me that that issue could
25 never have come to this Court as a fact issue. Now that is

1 all I had to say about what I --

2 MR. CLARK: I disagree with you, because --

3 JUDGE TUTTLE: You have the right to do so.

4 MR. CLARK: -- because the question with regard to
5 whether the University is segregated is one question that we
6 didn't attempt to interject into the case. The question
7 that we interjected in the case was whether there was a
8 state policy under which the University was being kept
9 segregated as opposed to the fact that there never had been
10 a qualified Negro applicant that had been refused, and, of
11 course, we took the fact position that this man was not.

12 JUDGE RIVES: If I may turn back to your main
13 argument, as I understand it, that the orders of the Court
14 have been complied with, it seems to me -- I can't get it
15 in my mind, but the order of the Court not only directs his
16 admission to the University but directs his continued
17 attendance thereafter at the University on the same basis as
18 other students who attend the University.

19 MR. CLARK: Absolutely.

20 JUDGE RIVES: Now do you think that has been
21 complied with?

22 MR. CLARK: Absolutely, to the very letter.

23 JUDGE RIVES: Do you think other students have to
24 walk around with a marshal to protect them and be jeered at
25 and halloed at as they go about the campus?

1 MR. CLARK: Judge, in your question whether or not
2 the people that you directed this injunction to and the
3 people that you could direct this injunction to have complied
4 with your orders, there is not a man --

5 JUDGE BROWN: What about the Dean? Why don't they
6 exercise some discipline over students that act this way?

7 MR. CLARK: As near as I know, sir, they are
8 exercising all the discipline they can.

9 JUDGE BROWN: I read the papers. It's now in the
10 hands of the Attorney General. I don't know on what basis,
11 but that is what I am told. The only reason I can refer to
12 these things is that your argument -- we had a condition in
13 our decree, and we did -- that that condition has been met.
14 The evidence offered by the Government shows that on such and
15 such a date these things were transpiring and that there
16 was a need for an injunction, as we could judge from the
17 fact that there are troops there. You have made no effort
18 to prove that conditions, that those conditions in that
19 decree, have been fully met. Now if you want to establish
20 that it is no longer operative by its own terms, it seems
21 to me that it was incumbent upon you to demonstrate that by
22 facts. I don't know where you have shown it.

23 MR. CLARK: I say this, sir: The problem is not
24 a factual one in my mind, it is a legal one, because the
25 Court already has the possession of the factual knowledge

1 that the state officials -- you can't enjoin any individual
2 citizen to like or not like somebody, you can't enjoin him
3 to like red-headed girls.

4 JUDGE BELL: At least we haven't tried that so far.

5 JUDGE TUTTLE: The Trustees have the power to
6 expel students who do not comport with the legal requirements
7 of citizens of the State of Mississippi.

8 MR. CLARK: They certainly do.

9 JUDGE TUTTLE: Have they done any of that?

10 MR. CLARK: They certainly have.

11 JUDGE TUTTLE: Have you produced any evidence to
12 that effect?

13 MR. CLARK: No, sir.

14 JUDGE TUTTLE: Or that they are trying in any way
15 to control the riotous conduct of students on the campus of
16 Ole Miss? Have you any evidence to that effect to show us
17 now?

18 MR. CLARK: No, sir.

19 JUDGE TUTTLE: This is what Judge Brown is asking.

20 JUDGE JONES: Are we to assume that the order has
21 been complied with because with force and arms Meredith was
22 taken to the campus and there protected while he was
23 registering, and has since been protected while he has been
24 attending classes? Are we to assume then that that has been
25 a full compliance with this Court's injunctive order?

1 MR. CLARK: I say, sir, that that is absolutely a
2 compliance with this Court's injunctive order against these
3 parties. They were required to admit Meredith on the same
4 terms and conditions applicable to other students, and they
5 have done that. You didn't tell --

6 JUDGE GEWIN: Mr. Clark, you are saying that the
7 things that happened are things that nobody in Mississippi
8 can stop, I assume; that he has been admitted and enrolled
9 and the terms of the decree of July 28th have been complied
10 with. Now whether the students continue to jeer or dislike
11 or fuss is something really that the parties-respondent in
12 this case cannot control.

13 MR. CLARK: Except unless, as Judge Tuttle said,
14 if the University officials are making some exception that
15 they are letting students misbehave on the campus with
16 regard to Meredith but not letting them misbehave with regard
17 to other students on the campus, then they would be treating
18 him differently, but that is not so.

19 JUDGE TUTTLE: There is no proof of that.

20 MR. CLARK: I say, sir, as far as proof is concerned,
21 that is not my burden.

22 JUDGE WISDOM: Do I understand you to say they are
23 treating him on the same basis because there is no evidence
24 they have not treated other students the same way? Is that
25 what you are saying?

1 MR. CLARK: No, sir. I say to you under the
2 injunctive order of this Court, that is all they were required
3 to do. And I say that the pendency clause of your injunc-
4 tive order has determined by its own terms.

5 JUDGE JONES: Would you say if the Federal troops
6 and the United States Marshals were to forthwith depart from
7 Oxford and its vicinity that the State of Mississippi would
8 undertake to give Meredith the protection that he apparently
9 now requires?

10 MR. CLARK: I am not in any position whatsoever to
11 say that for any --

12 JUDGE JONES: Of course not.

13 MR. CLARK: -- party on this motion or any motion
14 in the lawsuit.

15 JUDGE TUTTLE: And what is the duty of the Court in
16 the light of that fact? What is the duty of this Court? The
17 duty of this Court is to carry out its order, to see that he
18 is maintained on that campus without being killed or damaged
19 to his personal injury, and since no one can guarantee to
20 this Court that this will be done in the absence of an in-
21 junction, what is the duty of this Court under those
22 circumstances?

23 MR. CLARK: Judge Tuttle, I'd say this -- and you
24 have asked me a very frank question, almost put me on the
25 other side of the lectern -- it would be, in my opinion,

1 if it is worried about an interval of a day or five days of
2 suspension of an injunctive order against others, I would
3 say use your power of mandate to refer this matter back to
4 the District Court with an injunction in that regard, but I
5 do say to you -- and you ask me what your duty is -- I am
6 talking about your power -- your duty is to your oath; your
7 power is under the jurisdiction that has been vested in you
8 by Congress, and, of course, I wouldn't attempt to tell you
9 how to do the other.

10 JUDGE TUTTLE: Of course, I mean the duty under
11 our power and oath of office. I don't mean to say what can
12 we do as people acting like judges. I say: What is our
13 duty under the law and the facts of this case?

14 MR. CLARK: It would be, if you have the idea or
15 if you are convinced legally that your order of the 28th
16 does continue, I would suggest that the proper function of
17 this Court would be to get rid of this lawsuit, as I believe
18 you should have gotten rid of it two or three weeks ago, by
19 keeping your injunction in effect and keeping any other
20 ancillary or amended injunction that you deem proper in
21 effect until such time as you can get a mandate or direction
22 back to the District Court.

23 JUDGE JONES: I thought you said they were all gone
24 already.

25 MR. CLARK: I thought that was what was worrying

1 you, sir. I made that point with you because I think it is
2 correct.

3 JUDGE JONES: If it has disappeared, then how do we
4 keep it operative until we can mandate the District Court
5 into doing what you say we are no longer able to do?

6 MR. CLARK: No, I don't say you are no longer able
7 to control the District Court if you find today -- excuse me
8 -- I got so interested I went ahead and talked.

9 JUDGE JONES: We can't do it -- we can't do it nunc
10 pro tunc as of the date you tell us our injunctive order
11 expired?

12 MR. CLARK: No, sir, but you can do it instantane-
13 ously with the time that you agree with me by virtue of your
14 control of the District Court. In other words, the instant
15 that you accept my legal arguments and enter an order to that
16 effect, your injunction is outstanding, and, if anybody is
17 going to test it, they have got to presume that you have no
18 jurisdiction to enter it, and nobody is testing it, but, if
19 you are going to hold that your appellate jurisdiction over
20 this case has ended, then I think instantaneously with that
21 order you could mandamus the District Court to do that which
22 you thought was necessary to effectuate the mandate that you
23 sent down to him already, which would be to immediately
24 instruct him to forthwith issue his temporary restraining
25 order or preliminary injunction. It would have to be a

1 temporary restraining order to the District Court, because
2 there wouldn't be any notice of it until such time as he
3 could notify and have a hearing under the rule, but to
4 immediately enter a temporary restraining order and say (a),
5 (b), (c) what this Court thinks has to be done to preserve
6 the effect of its judgment, because really this is not an
7 appellate matter any more. That is exactly the argument we
8 are making.

9 JUDGE JONES: You say the mechanics are in the
10 District Courts of Mississippi --

11 MR. CLARK: Yes, sir.

12 JUDGE JONES: -- which has discretionary power to
13 grant or refuse and may not feel the same way this Court has
14 indicated it felt in the way of discretion, and then it's
15 back with us again?

16 MR. CLARK: If that is so, Judge Jones, the two
17 remedies that you have are both mandamus, and, if you accept
18 Land vs. Dollar as a valid case -- and we question its
19 validity -- the Government has accepted it as a valid
20 authority -- based on the Toledo Scale case you could pop
21 another injunction from this Court or rather a citation for
22 contempt, because the order of the District Court was not
23 complied with. You are not going to give up this case by
24 giving up appellate jurisdiction at that point. That is the
25 point I want to convince you of, if you are concerned about

1 somebody's personal safety.

2 JUDGE BELL: We couldn't give it up, because, if
3 we did, we wouldn't have any jurisdiction now. If we have
4 got jurisdiction now, we are going to have it next week,
5 next month, next year, so long as this case is pending.

6 MR. CLARK: This Court?

7 JUDGE BELL: Right.

8 MR. CLARK: Yes, sir.

9 JUDGE BELL: So there is no question about that.
10 What you are arguing is that we ought to make up whatever
11 kind of order we want to make up, either the one we have or
12 another one, send it back to the District Court and tell the
13 District Court to enter this, that this is our mandate, do
14 this?

15 MR. CLARK: And until such time as he enters it
16 that it is the order of this Court.

17 JUDGE BELL: That is what you are arguing?

18 MR. CLARK: Yes, sir.

19 JUDGE BROWN: If we can do that much, could we go
20 the next step and write out the decree in the same terms as
21 we would ourselves and direct him to enter it as an injunc-
22 tion against these other parties?

23 MR. CLARK: That is what the Court, I believe,
24 referred to in Land vs. Dollar, that they had done. It was
25 entered in their own words, and thereafter a violation of

1 that injunction constituted a violation of the Court ('s
2 order), and I am trying to disabuse your minds of procedural
3 problems that are bothering you, but I do want it to be
4 clearly understood that my legal presentation to the Court
5 is that your appellate jurisdiction has already expired.

6 JUDGE TUTTLE: That being so, I wonder -- we have
7 done most of the talking -- this is obvious -- you have
8 answered questions -- I wonder if you don't feel we now have
9 fully in mind your legal proposition.

10 MR. CLARK: Yes, sir.

11 JUDGE TUTTLE: I don't want to cut you off a
12 minute, but if, in fact, you believe that we understand what
13 your points are --

14 MR. CLARK: May I make just some very brief -- I
15 think you are right, sir.

16 JUDGE TUTTLE: I think some of us don't agree with
17 you at the present time, but I do believe we understand.

18 MR. CLARK: And I am showing, in the event you
19 don't agree with me, what alternative you should pursue.

20 JUDGE BROWN: I wanted your views. In your brief
21 you do a wonderful job, I think, on this proposition that
22 that part of the July 28th order which sought to cover
23 anybody who had any knowledge of it is a legal nullity in
24 effect.

25 MR. CLARK: Right.

1 JUDGE BROWN: Now, accepting that, doesn't that
2 make it essential then that to make our decree in the main
3 case effective, there needs to be some kind of ancillary
4 order to require people, whether or not parties to that
5 original act, to not interfere with its enforcement? That
6 would be the Governor or --

7 MR. CLARK: Judge, you bring up a point that was
8 worrying me the whole time that the Government was arguing,
9 and this is an entirely different facet that I had not
10 intended to get into with the Court, but you have decided a
11 lawsuit -- you haven't passed a law, and this Honorable
12 Court can't do it -- and I emphasize my argument with this
13 statement, that the Supreme Court of the United States
14 approved, that it had been decided by this Court, so that
15 the question could no longer be considered an open one there,
16 it was not an infraction of the Fourteenth Amendment for a
17 state to require separate but equal accommodations for the
18 two races. Now that came from McCabe vs. Atchison & Topeka
19 & Santa Fe Railway, 235 U. S. 151.

20 There is no such thing as a final decree of this
21 Court, and I don't know what the Government is going to say
22 in closing, but they didn't make any presentation to Your
23 Honors in the opening of what they wanted in the injunction.
24 We didn't have a chance, of course, to be heard on the
25 injunction itself before, but there are many things in here

1 which intrude upon the sovereignty of the State of
2 Mississippi far beyond any necessity of this case of
3 Meredith vs. Fair. I think that this Court must always
4 be aware that it can't be the vehicle through which the
5 judiciary becomes more important than the executive, and
6 it shouldn't be the vehicle by which the rights of a
7 sovereign state are deridden.

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15 REPORTER'S NOTE:

16 No hiatus here; copy follows
17 from line 7 above to page 108,
18 line 1.
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1 JUDGE JONES: You mean -- is that again suggesting
2 the doctrine of interposition?

3 MR. CLARK: No, sir, no, sir, I am not before you
4 now arguing interposition. I don't propose to get within
5 miles of that direction. I understand your position is final
6 and unyielding on the doctrine of interposition. I don't
7 argue it.

8 JUDGE JONES: I didn't otherwise understand your
9 reference with respect to the action of the judicial upon
10 the executive.

11 MR. CLARK: To this extent, sir: I believe that
12 your authority as a court is to tell the executive department,
13 whether it be of a state or of your own federal branch of
14 the government, only that it cannot intrude upon judicial
15 prerogatives, but this Court in this case has ordered the
16 arrest of Governor Barnett.

17 JUDGE BELL: Well, we pretty near had a war. That
18 is all we did, we issued an order, a formal court order,
19 which you'd think anybody would obey, at least until they
20 could get an appeal heard, and what happened? A war started
21 pretty near. We had people defying the court order.

22 JUDGE JONES: Two people are dead.

23 JUDGE BELL: And two people are dead. I don't
24 understand that argument. We haven't done anything more
25 than a court is supposed to do. We issued our order; that

1 is what we are supposed to do, as I understand it, under
2 our duties. We issued the order, and then defiance starts
3 of the order, even before the appeal is determined.

4 MR. CLARK: Now may I comment on what I was going
5 to say?

6 JUDGE BELL: Yes.

7 MR. CLARK: Here is what happened: This Court
8 entered an order in a lawsuit that said that James Meredith
9 was entitled to go to the University of Mississippi. The
10 Governor of the State of Mississippi said, I have got an
11 executive power here, a discharge of a duty that I think re-
12 quires me to interpose or to step in the way, or whatever
13 you want to call it -- Moyer vs. Peabody, 212 U.S. 78 --
14 and I paraphrase it slightly at the beginning so I won't
15 have to read so long:

16 There are times when the ordinary
17 rights of individuals must yield to what
18 he, the head of the state, deems the
19 necessity of the moment. Public danger
20 warrants a substitution of executive
21 processes for judicial processes.

22 Mr. Justice Frankfurter in Feiner vs. New York,
23 340 U.S. 268, said:

24 " * * * It is not a constitutional
25 principle that in acting to preserve

1 order the police must proceed against
2 the crowd, whatever its size and
3 temper, and not against the speaker.

4 * * *

5 And I think that that same rule would apply to the Governor.
6 Let's say at this time that you had an order to put him in;
7 Governor Barnett said, I use the executive prerogative that
8 is in me to say he can't go in.

9 JUDGE JONES: What he could have done is say, I
10 will use my executive power to put him in.

11 MR. CLARK: But he did not.

12 JUDGE JONES: He did not.

13 MR. CLARK: He said exactly the opposite. He took
14 a contrary position to the order of this Court.

15 JUDGE TUTTLE: And then after service on him re-
16 strained him from doing the very thing he was doing, he
17 ignored that order.

18 MR. CLARK: Yes, sir.

19 JUDGE TUTTLE: And what should we then do under
20 those circumstances under our system of government? It is
21 only the interposition statute or under the interposition
22 theory that would prevent us from going the next step, is
23 it not, and finding him in contempt of court?

24 MR. CLARK: No, sir. I don't think that the
25 Governor of the State of Mississippi -- we are on the last

1 part of the argument -- I don't think that the Governor can
2 be in contempt of the Court. I think any time he interferes
3 with what you have said is a valid right that an individual
4 possesses -- James Meredith was declared by this Court to
5 have the right to attend the University of Mississippi.
6 The Governor says that he does not have that right. Then
7 this Court said, Arrest the Governor unless he shows that
8 he has changed his mind about what he said.

9 JUDGE BELL: No, we didn't say that.

10 JUDGE WISDOM: Let's assume you are right the
11 first time as to the original order ordering Meredith ad-
12 mitted to the University. Is he right to ignore the second
13 order, which restrains him specifically from interfering
14 with the order of the Court?

15 MR. CLARK: Yes, sir, because --

16 JUDGE WISDOM: Isn't that a different case?

17 MR. CLARK: That is my point, Judge, it is a dif-
18 ferent case, and he had no chance to litigate it. I say
19 that when he got in the way of that court order, there were
20 two things that could have been done.

21 JUDGE WISDOM: He had the same chance as any
22 private individual has when there is a restraining order.

23 MR. CLARK: No, sir.

24 JUDGE JONES: Did he attempt to litigate that
25 issue in this Court?

1 MR. CLARK: No, sir.

2 JUDGE JONES: He dropped the summons on the ground
3 and said that he was not subject to the jurisdiction of this
4 Court. Isn't that what he said?

5 MR. CLARK: No, sir. There was not an opportunity
6 for him to litigate the question against him in this Court,
7 but only to respond to a citation for contempt.

8 JUDGE JONES: Did anybody ever make any effort to
9 bring him before the Court?

10 MR. CLARK: No, but you didn't say to try your
11 lawsuit here or try your issues here or why are you doing
12 this, is it for the peace and order of the State.

13 JUDGE BELL: We said, Show cause why you should
14 not be adjudged in contempt. He can show anything under the
15 sun if he'd just come here before this Court and give his
16 reasons. He could say, I am a Governor, you have no right
17 to proceed against me. He could raise any type of defense
18 he wanted to raise, but he didn't come. In spite of that,
19 we gave him five more days to decide what he wanted to do,
20 and he decided to obey the court order. At least I under-
21 stand he did from the argument you made down here last week.
22 I was not here.

23 MR. CLARK: I said this, sir --

24 JUDGE BELL: But he had about five days before he
25 was to appear and show cause.

1 MR. CLARK: The point that we made with the Court
2 the other day was that the Governor had not violated the
3 injunction of this Court.

4 JUDGE BELL: I didn't hear the argument.

5 MR. CLARK: And he was not guilty of contempt of
6 this Court at that time because of anything that he had done
7 or left undone.

8 JUDGE WISDOM: I think you also said that he would
9 comply with the order of the Court.

10 MR. CLARK: I said subject to his oath of office,
11 yes, sir, and he will.

12 JUDGE BELL: Well, --

13 JUDGE TUTTLE: Which office -- the Constitution of
14 the United States or the Constitution of the State of
15 Mississippi?

16 MR. CLARK: Both, as he sees it, and this is the
17 executive prerogative.

18 JUDGE JONES: Including the Interposition
19 Resolution?

20 MR. CLARK: Judge, I don't think that -- well, of
21 course, I am out of the argument that I had intended to make
22 to the Court.

23 JUDGE TUTTLE: Yes. We are asking so many dif-
24 ferent questions on so many different facets of it. I
25 still think, as I suggested maybe ten minutes ago, that we

1 do understand your legal position on the thing.

2 MR. CLARK: The only thing I would say is that I
3 have not yet gotten a chance to discuss the case of Scott vs.
4 Donald (165 U.S. 107) from the United States Supreme Court,
5 which I think very clearly holds that you can't enjoin a
6 class of constables or a class of peace officers of the
7 State.

8 JUDGE TUTTLE: I am inclined to think you may be
9 right as to our ability to enjoin to the extent that they
10 can be cited for contempt of court for not complying with the
11 order if they are not actually served with a copy. Isn't
12 that what you mean?

13 MR. CLARK: No, sir. I mean the injunction should
14 not issue against them under Scott vs. Donald.

15 JUDGE TUTTLE: This injunction -- we have not
16 issued any restraining order against all to whom notice of
17 this may come. We haven't issued that broad a restraining
18 order, and there is no motion to issue an injunction in
19 that language here, is there?

20 MR. CLARK: They are defendants in this cause,
21 they are defendants to the preliminary restraining order,
22 and I am saying to you now -- I don't really know what the
23 Government is going to ask you to do -- pointing out that
24 part of what they have asked you to do is keep any of these
25 named officials from instituting any proceedings in civil

1 action with regard to James Meredith and his attending the
2 University of Mississippi, and in that connection one of the
3 officials of his own organization said in Detroit, Michigan,
4 that he was one of seventeen that had been picked to inte-
5 grate the University of Mississippi, which is directly
6 contrary to the fact that Judge Wisdom and the Court found
7 here that he was seeking an education.

8 JUDGE WISDOM: And he later retracted that state-
9 ment.

10 MR. CLARK: What I mean is there are many facets,
11 that the Court can't make or shouldn't make a final injunc-
12 tion that we'll say we'll never look at again, we are just
13 going to put this one on the shelf and we are through with
14 it forever. That is not a correct order, and I am a little
15 at a loss to argue to you, because I don't know what kind
16 of order the Government is going say it is entitled to or
17 you should enter, if you enter any kind of injunctive order.
18 I know what the temporary restraining order said both as to
19 Meredith's action and the Government's action, and many of
20 the things enjoined there I don't think the Court should
21 enjoin in the event it does decide that it has to issue some
22 injunction, that it does have that authority to do it. I
23 have made a very poor argument on the question --

24 JUDGE TUTTLE: It is not your fault, I hasten to
25 say.

1 MR. CLARK: -- on separation of powers, and I feel
2 very deeply about that, because I think it is essential to
3 the maintenance of a republican form of government not only
4 in the State of Mississippi but throughout the United States
5 that you do no more than move the executive authority out of
6 the judicial field. Certainly you have got a right to keep
7 a person from interfering with a judicial process, but I
8 don't think that is part of this same lawsuit, and that is
9 where we have our differences.

10 JUDGE BELL: I doubt if you can find anybody in
11 the United States that believes more in separation of powers
12 than I do, but I'd like you to answer this question: What
13 is the Government to do -- break down? -- when a court
14 places an order --

15 MR. CLARK: No, sir.

16 JUDGE BELL: Just break down?

17 MR. CLARK: No, sir. Judge, I know the Court
18 doesn't have to accept Mississippi authority in this case,
19 because it is a Federal question involved, but we had a
20 judge on the Supreme Court of the State of Mississippi named
21 Judge Griffith. I don't know if you knew him or not.

22 JUDGE BELL: What is his name?

23 MR. CLARK: V. A. Griffith, a very great jurist.
24 In State vs. McPhail, 180 So. 387, he accepted the proposition
25 that:

1 " * * * it is true that no writ of
2 injunction or mandamus or other judi-
3 cial remedial writ will run against the
4 Governor or any member of the Legislature,
5 in his official capacity; but whenever
6 they, or any of them, or any other
7 officer acting or assuming to act for
8 the government, puts into action any
9 agency which comes into collision with the
10 private personal or private property
11 rights of any person within the juris-
12 diction of the state, such personal and
13 property rights of the citizen and their
14 infringements are always subject to
15 inquiry and redress by the courts, as
16 against any unauthorized act by any
17 officer of the state, whatever his
18 character and rank may be, and all
19 appropriate judicial process will be
20 directed to and against his agents or
21 agencies -- and against the officer
22 himself, other than those expressly
23 above mentioned; * * *"

24 JUDGE TUTTLE: That may be the constitutional law
25 of Mississippi, but I doubt whether it is the constitutional

1 law of the United States, I think Sterling vs. Constantin
2 resolved that.

3 MR. CLARK: As to the prerogative of the
4 judiciary to remove that encroachment upon its authority,
5 but not to the extent of saying, Now you have to do your
6 job in the future in any particular way, you have got to
7 act or refrain from acting. In other words, once he
8 encroaches into the judicial prerogative, you can move him
9 back out of your field, but if you pursue him into the
10 field of the executive, then I think that you have violated
11 the Constitution of the United States.

12 JUDGE JONES: Mr. Clark, what should the Court have
13 done, if anything, when the Governor of the State reads to
14 Meredith the proclamation that he read to him as Meredith
15 was on his way toward the doing of what this Court had said
16 he was lawfully entitled to do?

17 MR. CLARK: I think that the proper action at that
18 time would have been for the Government, instead of coming
19 to this Court for a temporary restraining order or any other
20 purpose, to have proceeded under authority previously
21 granted in Debs to take the Governor into court to litigate
22 that particular --

23 JUDGE TUTTLE: What court?

24 MR. CLARK: It would have been the District Court
25 or the Supreme Court of the United States if they claimed he

1 was acting for the State of Mississippi, and that is my
2 position.

3 JUDGE TUTTLE: We have next the matter of the
4 determination of whether the Governor and the Lieutenant
5 Governor have purged themselves of contempt. You have
6 nothing further to say on the motion for the temporary
7 injunction, I guess, in response, rebuttal? I don't invite
8 you to.

9 MR. BARRETT: I just had one or two comments,
10 which perhaps aren't necessary.

11 JUDGE TUTTLE: All right. Mrs. Motley?

12 MRS. MOTLEY: The Appellant has nothing further.

13 JUDGE TUTTLE: You say you do have?

14 MR. BARRETT: I had one or two comments. I don't
15 wish to take up the Court's time unnecessarily.

16 JUDGE TUTTLE: Well, all right. Let's get to the
17 next issue then. What is your position with respect to
18 whether the Governor has purged himself?

19 MR. MARSHALL: Judge Tuttle, I was not here in
20 court the other day. I understood that the Court deferred
21 that matter until today.

22 JUDGE TUTTLE: That is right.

23 MR. MARSHALL: So that the Governor could make a
24 further showing to the Court on what he had done to purge
25 himself, and I don't have any position until I hear what

1 further showing they make.

2 JUDGE TUTTLE: I understood -- I inquired of
3 Counsel for the Governor this morning -- that the answer
4 was -- well, what is your position as to any showing on
5 behalf of Governor Barnett to the effect that he has purged
6 himself from the contempt under the finding of this Court
7 that he was in contempt of court?

8 MR. CLARK: Judge, we had no such obligation. I
9 didn't realize when we continued the cause the other day it
10 was continued for some further showing. We came before the
11 Court at that time and made a statement to the Court con-
12 cerning what the situation was and what the Governor's
13 position was, appearing for him with regard to the civil
14 contempt action that had been brought against him, and I
15 did not understand that we were in the interim to come in
16 with any further showing or any further action. I thought
17 we were just to come back to this Court today.

18 JUDGE TUTTLE: So that whatever showing you made
19 on behalf of the Governor and the Lieutenant Governor last
20 week is the only showing you are now prepared to make?

21 MR. CLARK: That is correct, sir.

22 JUDGE TUTTLE: We did invite you or give you the
23 opportunity to make such other showing, I am sure, as you saw
24 fit to make.

25 MR. CLARK: I am sure that the Court didn't

1 indicate it wouldn't hear us on it, no, sir, but I just did
2 not realize that we were required to come forward with any-
3 thing additional at this time.

4 JUDGE TUTTLE: So that if what you stated to the
5 Court last week is to be considered now by the Court, that
6 is your complete showing on that subject?

7 MR. CLARK: I would say this, Your Honor --

8 JUDGE TUTTLE: I am not trying to trap you in any
9 way. I just want to be sure.

10 MR. CLARK: No. I am very easily trapped, but I
11 don't have any place to go except to tell you very frankly
12 that the Governor's position is that the orders of the Court
13 required Meredith to be admitted to the University. He was
14 admitted. They required that he be permitted to continue
15 there without interference from the Governor, and he has not
16 been interfered with by the Governor, and that is as far as
17 the Governor's powers and prerogatives are concerned.

18 I think perhaps this would be the time to tell
19 Your Honors of the legal situation and of the statutes of
20 the State of Mississippi that I think that you should take
21 judicial notice of. I presume that the Court now wants us
22 to go into the question of contempt?

23 JUDGE TUTTLE: Yes.

24 MR. CLARK: Yes, sir.

25 JUDGE RIVES: Have the proceedings that were had

1 the other day on that question been transcribed?

2 MR. CLARK: Yes, Your Honor. Would you like to see
3 a copy of the transcript?

4 JUDGE RIVES: Yes, sir.

5 MR. CLARK: If there are enough of them. I have
6 one. Mine has some marks in it here, there, and yon.

7 (Transcripts produced and handed to the Court.)

8 JUDGE WISDOM: Mr. Clark, my recollection is -- I
9 wish you would correct me -- that on behalf of the Governor
10 you said that he would comply with the orders of the Court,
11 and unequivocally, without any qualification with regard to
12 his oath as Governor of Mississippi. I don't remember that
13 being injected in it, but I could be wrong about it.

14 MR. CLARK: Let me say this, Your Honor: To be
15 perfectly candid with the Court, I was of the impression
16 that the statements were made insofar as he was able he will
17 comply with the laws, and I thought that my statement to the
18 Court was to the effect that he had a paramount right or a
19 paramount duty in his consideration to preserve peace and
20 order in the State of Mississippi, and that he acted and
21 would act with that paramount duty in mind; that he had not
22 contemptuously flouted the orders of this Court because he
23 didn't like you, but that he had done what he considered he
24 had to do under the circumstances and his powers as Governor,
25 and that he would continue to do that, and if the remarks

1 that were made left any other connotation with the Court,
2 then I was in error in making them on behalf of the Governor.

3 JUDGE BELL: Could you take about a minute or two
4 just to say what the Governor's position is. I was not here.
5 I didn't hear that, and I haven't got a copy of the
6 transcript before me. Do you mind just saying it again?
7 What is his position?

8 MR. CLARK: The Governor takes the position --

9 JUDGE BELL: I am talking about with regard to
10 obeying this -- not only the 28th of July order but the
11 temporary restraining order.

12 MR. CLARK: Yes, sir. The Governor's position is
13 that he will do everything that he can do legally to
14 preserve peace and order in the State of Mississippi.

15 JUDGE JONES: Has he been advised by Counsel that
16 any portion of either of the orders is legal?

17 MR. CLARK: I am trying to think whether I can
18 answer your question. My answer to you would have to be to
19 my knowledge. I am not the Governor's sole counsel and
20 there are many occasions when counsel that represent him
21 have been with him at which I have not been present.

22 JUDGE RIVES: Mr. Clark, it still holds true that
23 I asked the Attorney General last week, quoting from the
24 transcript:

25 "I understand, Mr. Attorney General,

1 you assure us as Attorney General of the
2 State and as attorney for the Lieutenant
3 Governor and for the Governor, that to
4 the best of their ability, they will
5 maintain law and order and will comply
6 with the orders of this Court?

7 MR. PATTERSON: Yes, sir."

8 That remains true?

9 MR. CLARK: That is certainly what was said, Your
10 Honor, no doubt about it.

11 JUDGE RIVES: Not only was said. Is it true?

12 MR. CLARK: That is what I want to get to, sir,
13 the point that I make with you, sir. If you put any other
14 connotation on that statement on behalf of the Governor
15 other than that he will discharge the duties of his office
16 and keep peace and order and that he has no contempt for
17 this Court's order and when he does not consider in his
18 executive prerogative that the orders of this Court would
19 result in disorder or a breach of the peace, that he would
20 comply with it.

21 JUDGE RIVES: What you are saying is that these
22 words, "to the best of their ability," include the Governor's
23 construction as to what is legal and what is not legal rather
24 than what the Court told them to do. Is that right?

25 MR. CLARK: Yes, sir, that should be corrected to

1 that extent if there was any other connotation placed on
2 them.

3 JUDGE BELL: That is the position he has been
4 taking all the time, Mr. Clark. About a week there he took
5 the position he was going to have disorder in Mississippi
6 if Meredith got in the University and that he was trying to
7 preserve law and order and save human life and that sort
8 of thing, and that was the basis of his action, and
9 apparently that is still it.

10 JUDGE JONES: And if another mob forms, in order
11 to avoid violence he will see that Meredith is taken out of
12 the University of Mississippi.

13 JUDGE BELL: I came down here to this hearing --

14 JUDGE RIVES: You may need this (transcript). I
15 didn't mean to deprive you of it.

16 MR. CLARK: Don't misunderstand. I don't question
17 the accuracy of the transcript of what was said --

18 JUDGE RIVES: Yes.

19 MR. CLARK: -- but I do think that the position
20 ought to be emphatically and clearly presented.

21 JUDGE RIVES: That is not my understanding of the
22 meaning. My understanding of the meaning is that the
23 Governor and the Lieutenant Governor to the best of their
24 ability would comply with the orders of the Court, and that
25 you tell us is not true now?

1 MR. CLARK: I tell you, sir, that the Governor and
2 the Lieutenant Governor will, to the best of their ability,
3 preserve peace and order, discharge the duties of their
4 office as they think the oath requires, and comply with the
5 orders of this Court that they don't find in their dis-
6 cretion come into conflict with that. In other words, with-
7 out disputing or getting into a dispute about what was said,
8 that is what the position of the Governor and the Lieutenant
9 Governor is before this Court at this moment.

10 JUDGE BROWN: Isn't your statement an impossible
11 one to accept, in this sense, that on its own terms, on its
12 own terms, the Governor by virtue of his office as Governor
13 and the duties imposed on him by Mississippi law must
14 determine when it is that obedience to the court decree will
15 cause a breach of the peace? Now have I stated it correctly?

16 MR. CLARK: I would say this: There is a funda-
17 mental difference or dichotomy in the Mississippi Law. The
18 Governor is not a peace officer in the State of Mississippi
19 as such. He has an executive responsibility as the chief
20 executive that would possibly give him a prerogative to act
21 to preserve peace in the State in the way that he thinks is
22 best, but in a local situation, with regard to the call-out
23 of the militia, which is the only activity or the only
24 police force that he has, I have the statutes here on the
25 complete control -- if somebody creates some disturbance on

1 a highway or road leading into a campus, then the highway
2 patrolmen of the State of Mississippi --

3 JUDGE BROWN: It isn't clear -- and to me it's a
4 very fundamental question -- I am not lecturing you, what-
5 ever your answer might be -- do I understand now your
6 position is, the Governor's position is, that he will to the
7 best of his ability enforce the orders of this Court and not
8 resist them unless, in his judgment as Chief Executive of the
9 State of Mississippi, he determines that compliance with them
10 or enforcement would cause a breach of the peace?

11 MR. CLARK: Yes, sir.

12 JUDGE BROWN: Well, now, that is impossible, isn't
13 it? That is to say that a governor or the President of the
14 United States or a senator can determine when it is that a
15 court's order is to be obeyed. I am putting it that way,
16 because I don't see now much escape from a finding that he
17 has not even begun to purge himself.

18 MR. CLARK: If Your Honor please, I would say this:
19 You included more people than I had encompassed in my own
20 view of what I was saying when you went into the legislative
21 branch, but I see no real reason at the moment why your
22 statement would be inaccurate as to them, but as to the
23 executive of a state, I think that he has a responsibility
24 or an obligation as the executive, and if he chooses to
25 discharge it in a way that interferes with this Court's

1 adjudication of a right to any person or any right at all,
2 then I think that appropriate action can be taken to get that
3 obstruction as to what you have declared to be justice in
4 this case out of the way.

5 JUDGE TUTTLE: Without affecting the Governor,
6 without removing him from office, without in effect impeach-
7 ing him?

8 JUDGE WISDOM: Mr. Clark, let me call your
9 attention to the specifics of the order. Now I was here the
10 other day, and my recollection is the same as Judge Rives',
11 and incidentally Judge Rives read the language of the order
12 to you and asked you -- a, b, and c -- and asked, now what
13 about this, for example, "to cease forthwith all resistance
14 and interference with the orders of this Court and of the
15 District Court for the Southern District of Mississippi."
16 Judge Rives read that to you and said, "Is it the Governor's
17 intention to comply with that?" "Yes," you answered. "(b)
18 to maintain law and order at and around the University and
19 to cooperate with the officers and agents of this Court and
20 of the United States in the execution of the orders of this
21 Court and of the District Court of the Southern District of
22 Mississippi to the end that James H. Meredith is permitted
23 to register and remain as a student at the University of
24 Mississippi under the same conditions as apply to all other
25 students." Now you said yes to that. Now you say no, not

1 if the Governor thinks that there may be some disorder?

2 MR. CLARK: That is correct, sir. The answer was,
3 "Insofar as he is physically able to do so, Your Honor."
4 That was the answer given to that specific question.

5 JUDGE WISDOM: That was the answer given, but
6 "physically able to do so" doesn't carry any connotation
7 to me that if it is his opinion there is going to be dis-
8 order, he is not going to obey that order.

9 JUDGE RIVES: I didn't get it that the Governor
10 was to substitute his judgment for the judgment of the
11 Court --

12 MR. CLARK: I understand that.

13 JUDGE RIVES: -- as to whether to obey the order.
14 And now you tell us he is?

15 MR. CLARK: I understand both your connotation and
16 your present disposition about the matter, and I would say
17 that the construction that was placed on it by you was a
18 construction that the attorneys before you had no authority
19 to convey, and the one that I convey to you now is correct.

20 JUDGE BELL: Do you have authority to convey that?

21 JUDGE RIVES: Is that true as to --

22 MR. CLARK: Yes, sir.

23 JUDGE RIVES: -- Lieutenant Governor Johnson also?

24 MR. CLARK: Yes, Your Honor.

25 JUDGE WISDOM: Mr. Clark, the Lieutenant Governor

1 was widely quoted in the paper as saying that he would not
2 order any cooperation should the troops and marshals be
3 withdrawn, so I take it that really represents the position
4 now of the Lieutenant Governor and the Governor?

5 MR. CLARK: Well, that would be -- the Lieutenant
6 Governor's there would be about like my own would be if I
7 had said that, because he doesn't -- when the Governor is
8 in the state and acting, he is the President of the Senate,
9 and that is his only function.

10 JUDGE WISDOM: I understand that.

11 MR. CLARK: But his position as far as announcing
12 to this Court or making an announcement to this Court, his
13 position is identical with the Governor's -- or -- I have
14 too many words -- his position is the identical position
15 that the Governor takes, if he should be vested with the
16 authority to make a gubernatorial decision or the executive
17 decision.

18 JUDGE JONES: The Court did not correctly under-
19 stand what you represented on the prior hearing.

20 MR. CLARK: I would say, sir, that either that or
21 I misrepresented --

22 JUDGE JONES: I think you said you didn't have the
23 authority to make that statement.

24 MR. CLARK: I would say -- I don't know whether
25 you'd want to call it a mistake -- it wasn't a misrepre-

1 sentation, I didn't misrepresent to the Court.

2 JUDGE BELL: No.

3 MR. CLARK: But I say to you whatever connotation
4 you put on the comments outside of what I have just
5 delineated is an improper connotation that was not intended
6 to be announced to the Court.

7 JUDGE TUTTLE: The Attorney General's represen-
8 tations were just as positive as yours or more so. It is a
9 very serious matter. This Court convened today and delay
10 was had from last Monday or Tuesday a week ago based on that
11 representation, Mr. Clark.

12 MR. CLARK: Yes, sir.

13 JUDGE TUTTLE: And I am not critical of any of the
14 lawyers in the case at all, I am seriously not critical of
15 you, but for the Court to delay action based on a very
16 positive and final statement and set it down again for the
17 Court en banc, as it has, and for us to come to the end of
18 this long hearing and now find that the position of the
19 Governor is different from what was represented to the Court
20 when the delay was granted creates a very serious problem, --

21 MR. CLARK: I understand, sir.

22 JUDGE TUTTLE: -- as you well understand, but I do
23 understand that you now tell us the Governor and Lieutenant
24 Governor are not now in a position or are not now willing to
25 say that they will, so far as physically possible to them,

1 comply with the precise terms of our order in which we gave
2 them the right to purge themselves from contempt?

3 MR. CLARK: Your Honor now is speaking of future
4 compliance?

5 JUDGE TUTTLE: Yes, sir.

6 MR. CLARK: I cannot make that assurance. I
7 cannot tell you that the terms of this order will be the
8 executive decision of the Governor or the Lieutenant
9 Governor, if he should have the executive decision to make.

10 JUDGE BROWN: Then as a minimum doesn't it require
11 -- I shouldn't put you in that position, but we will see
12 what you have to say to this as an advocate -- are we not
13 required then to go down, a, b, c, and spell out the precise
14 things the Governor must do to clear this record so that he
15 once again assumes the position of a leader for law and
16 order? That starts with the rescission of every one of
17 those resolutions, and positive instructions to the highway
18 patrol --

19 JUDGE WISDOM: Proclamations.

20 JUDGE BROWN: -- to the law enforcement authorities
21 that they will take the following steps, one of which is to
22 maintain law and order, not cooperate but maintain law and
23 order on the campus.

24 MR. CLARK: We have a difference of opinion with
25 regard to what the legal effect of the Court's order is.

1 JUDGE BELL: Well, one thing I would like to say
2 to you --

3 MR. CLARK: I think that the purge order cannot
4 extend the term of the injunction, and I would say only that
5 he cannot be disobedient to the Court's injunction without
6 being in violation of the Court's injunction, and then the
7 process that would be used to remove or test the validity
8 of the two positions --

9 JUDGE BROWN: You are not trying to say when a man
10 has been found guilty of contempt the Court cannot require
11 affirmative action which was not within the precise terms
12 of the prior order he disobeyed, if that is necessary to
13 eradicate the force and effect of his disobedience?

14 MR. CLARK: Yes, sir, I am.

15 JUDGE BROWN: Well, I'd like to see that law.

16 JUDGE JONES: And call it by whatever name you
17 want to, it seems to me it is still interposition.

18 JUDGE BROWN: What did they do in Dollar vs.
19 Sawyer? There were a lot of new people. They told the
20 Solicitor General of the United States, the Attorney General
21 of the United States, told the Bank President, told the
22 President of American Dollar Steamship Line, exactly what to
23 do to eradicate the resistance that had been given to that
24 court decree.

25 MR. CLARK: Yes, sir, and I don't say that the

1 Court does not have the absolute power to make purge terms
2 or purge conditions. I only say that you don't have the
3 right, if I understood you, to go outside of the terms of
4 the injunction on which the contempt was based, the order on
5 which the contempt was based, and, of course, this is my
6 position with regard to --

7 JUDGE TUTTLE: You will have to argue that point.

8 MR. CLARK: Terminal Railway, sir, is what I had in
9 mind.

10 JUDGE BELL: I don't know why we had to hear all
11 this argument. We came over here. I thought we were going
12 to get this straightened out today. I came all the way from
13 Jacksonville. We are just tilting with windmills. I have
14 great sympathy for you, Mr. Clark, but you may agree to
15 something here today and when you get back to Jackson you
16 may write a letter that you didn't have the authority to go
17 that far. I don't see that we are getting anywhere. I can't
18 cut you off -- certainly one judge can't do that -- but where
19 are we getting? Every time we have a hearing the terms
20 change.

21 JUDGE BROWN: How do we get Governor Barnett to
22 come here and tell us in his own words what he intends to do,
23 or in writing?

24 MR. CLARK: Would it be appropriate to ask the
25 Court at this moment, in response to Judge Brown's question,

1 to give me a five-minute recess and I will confer with my
2 fellow counsel, or a ten-minute recess, and then I will
3 make a response to that question?

4 JUDGE TUTTLE: Yes. The Court will take a ten-
5 minute recess,

6 JUDGE GEWIN: Could I ask him one question before
7 then?

8 JUDGE TUTTLE: Yes, sir.

9 JUDGE GEWIN: You were present in court, I believe,
10 and had made some statements, and Judge Rives, addressing
11 Attorney General Mr. Patterson, said this:

12 "JUDGE RIVES: I understand, Mr.
13 Attorney General, you assure us as
14 Attorney General of the State and as
15 attorney for the Lieutenant Governor
16 and for the Governor, that to the best
17 of their ability, they will maintain
18 law and order and will comply with the
19 orders of this Court?

20 "MR. PATTERSON: Yes, sir."

21 You remember that?

22 MR. CLARK: Yes, sir, that is correct.

23 JUDGE GEWIN: And were you there present, and you
24 and the Attorney General were associated together in --

25 MR. CLARK: Correct.

1 JUDGE GEWIN: -- in making that statement, whatever
2 it means, to this Court?

3 MR. CLARK: Yes, sir.

4 JUDGE GEWIN: And you approved it at that time?

5 MR. CLARK: Yes, Your Honor.

6 JUDGE GEWIN: And stated to the Court, you and
7 Mr. Patterson and Mr. Satterfield, that as officers of the
8 Court you made that recommendation to us?

9 MR. CLARK: Yes, sir.

10 JUDGE GEWIN: Speak out, sir.

11 MR. CLARK: Yes, sir.

12 JUDGE GEWIN: And that was made with the authority
13 of the Governor and the Lieutenant Governor?

14 MR. CLARK: Yes, sir.

15 JUDGE GEWIN: And that was your position at that
16 time, whatever the meaning of these words is?

17 MR. CLARK: Yes, sir.

18 JUDGE GEWIN: All right, sir.

19 JUDGE RIVES: But now you retract it?

20 MR. CLARK: To the extent --

21 JUDGE RIVES: Or qualify it?

22 MR. CLARK: If you put a different connotation on
23 it, qualify it to the extent of what I have said to the
24 Court here today.

25 JUDGE BELL: You have been very candid.

1 Thereupon, at 3:10 o'clock p.m.,
2 a ten-minute recess was taken, until
3 3:20 o'clock p.m.....
4

5 AFTER THE RECESS:

6 JUDGE TUTTLE: You may proceed.

7 MR. CLARK: Your Honor please, when we asked for
8 a ten-minute recess, we did so with the intention of making
9 a telephone call. That call has had some difficulty in
10 going through. I am not yet prepared to answer the question
11 at this instant. If the Court cares to question me further
12 about the proceedings or if it cares to hear with regard to
13 the contempt proceedings some observations on the quality of
14 the order that was entered, particularly with regard to fine
15 and imprisonment, or, -- in other words, is there anything
16 that I could do for a moment until I can get adequate
17 communication so we won't have to have any possible misunder-
18 standing about the filing of a written statement?

19 JUDGE TUTTLE: What is the nature of the inquiry
20 you are proposing to make of the Governor? I think the
21 Court is entitled to that much.

22 MR. CLARK: With regard to whether or not there
23 will be a written reply in response to what Judge Brown
24 asked, will he set down in a written statement to this Court
25 over his signature before the Secretary of State or in some