

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 way an oath or affirmation that he will do or assert -- in
2 other words, you wanted a written statement as to what he
3 would do, as I understood it.

4 JUDGE TUTTLE: Well, I think we would want a great
5 deal more than that. I think we would want at least for you
6 to come in and tell us that he has now agreed to comply
7 unequivocally with the Court's order, and that could be
8 supplemented in writing. But you are not proposing to?

9 MR. CLARK: No, sir.

10 JUDGE TUTTLE: You don't have any reason to think
11 he would agree to that, and you are not asking --

12 MR. CLARK: I say that he could not.

13 JUDGE TUTTLE: All right.

14 MR. CLARK: And I have to be very positive to
15 answer to that question.

16 JUDGE TUTTLE: All right.

17 MR. CLARK: But I thought Judge Brown said he
18 should file a written statement of exactly what his position
19 is.

20 JUDGE TUTTLE: We have killed a lot of time in this
21 case, and I think the Court is of the disposition that a
22 further delay to let the Governor file a written statement
23 to the effect that he will use his own judgment as to whether
24 to comply with the order of the Court is something that would
25 not cause us to separate today.

1 MR. CLARK: I obviously believe that is what the
2 statement would contain, because it was my position I under-
3 stand I was authorized to present to the Court. I thought
4 Judge Brown wanted a personal reaffirmation of that.

5 JUDGE TUTTLE: You needn't expect any further
6 delay from the Court then waiting for his agreement to write
7 anything of that kind to the Court. Is that a fair state-
8 ment? So in the light of the fact that the Governor and the
9 Lieutenant Governor have made their qualified statement, I
10 am going to ask if you will let me -- I am going to ask the
11 Government now if they will state their position as to what
12 we should do and the Appellant's position as to what we
13 should do under the circumstances.

14 MR. PATTERSON: Will the Court permit me just to
15 clarify myself with the Court?

16 JUDGE TUTTLE: Yes, sir.

17 MR. PATTERSON: When we were down here the past
18 Tuesday a week ago, I believe, in response to the Court's
19 question, which I believe came from Judge Rives, I want the
20 Court to know that I was dealing with the Court in all
21 sincerity.

22 JUDGE TUTTLE: We don't doubt that at all, Mr.
23 Patterson. We do question this -- and I think it is fair to
24 say it: When you found out that what you said there could
25 not be carried out, we think -- let me say for myself -- I

1 think that you should have notified us that we misunderstood,
2 because it was perfectly plain that the decision to postpone
3 it was based on the assumption that that language meant
4 pretty much what it said. We think that Counsel should have
5 let us know before we met here today that the position of
6 the Governor is different from what you thought it was on
7 last Tuesday.

8 MR. PATTERSON: Well, frankly --

9 JUDGE TUTTLE: Aside from that, no one holds you
10 responsible for the fact that you cannot carry out what you
11 said the Governor would do.

12 MR. PATTERSON: Well, I thought frankly last
13 Tuesday, and I still think today, that the issues boil down
14 to relatively simple and clear-cut issues. The lawsuit was
15 to get Meredith in the University of Mississippi and to --

16 JUDGE WISDOM: -- and to keep him --

17 MR. PATTERSON: -- there, and to permit his con-
18 tinued attendance there. He is in the University of
19 Mississippi, he is in attendance today.

20 JUDGE TUTTLE: Just barely.

21 MR. PATTERSON: The injunction directed that the
22 Governor and the Lieutenant Governor, as I understood it, or
23 the restraining order was to prevent them from interfering.

24 JUDGE TUTTLE: Read it, read it, just read it, Mr.
25 Patterson, just read it.

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1 MR. PATTERSON: I am just stating, basically that
2 is what it was, to prevent their interfering --

3 JUDGE TUTTLE: It was more than that.

4 MR. PATTERSON: -- with his attendance, admission
5 and attendance. That is being done without any interference
6 on their part whatsoever. Therefore, I thought it was being
7 complied with. Furthermore, the Governor has called for law
8 and order in the State, and it was based upon those simple
9 factual matters that I made my statement to this Honorable
10 Court, and I think they are being complied with this very
11 minute.

12 JUDGE TUTTLE: We do understand correctly under
13 our agreement with Mr. Clark as to what the Governor's
14 response now is, what his present position now is. You agree
15 with what Mr. Clark said the Governor's present position is?

16 MR. PATTERSON: As I understand Mr. Clark --

17 JUDGE TUTTLE: I hope you understand him.

18 MR. PATTERSON: As I understood his statement to
19 the Court, I think it was correct, yes, but I also think that
20 the orders of this Court are being complied with.

21 JUDGE RIVES: May I ask you just one question.

22 MR. PATTERSON: Yes, sir.

23 JUDGE RIVES: You heard us once or twice read the
24 question I addressed to you last week and your answer to it?

25 MR. PATTERSON: Yes, sir.

1 JUDGE RIVES: Do you think the Governor's position
2 is the same this week that it was last week?

3 MR. PATTERSON: I think so in that he is not
4 interfering with the carrying out of the order of this
5 Court.

6 JUDGE RIVES: And you this week would give me the
7 same answer, yes, that you gave me last week to that question
8 I asked you?

9 MR. PATTERSON: Yes, sir.

10 JUDGE RIVES: You would?

11 MR. PATTERSON: In the vein that I meant to reply
12 to Your Honor last week, that is, we are not interfering with
13 the order of this Court, which was to admit Meredith, and --

14 JUDGE RIVES: We have indeed entered the field of
15 Alice in Wonderland where language doesn't mean what it says
16 when you tell me last week that the Governor and Lieutenant
17 Governor will comply with the orders of this Court to the
18 best of their ability --

19 MR. PATTERSON: Yes, sir.

20 JUDGE RIVES: -- and this week you tell me they
21 will comply if in their judgment they should comply.

22 MR. PATTERSON: No, sir, I am not saying that to
23 Your Honor. I was saying last week and I still say this
24 week, Your Honor, they are doing nothing to interfere with
25 the carrying out of the main order and judgment of this Court,

1 and that was to permit the admission of Meredith into the
2 University of Mississippi and his continued attendance there-
3 in. They are doing nothing to interfere with that.

4 JUDGE GEWIN: You have read the transcript wherein
5 you and Mr. Clark and Mr. Satterfield appeared before a
6 panel of this Court. Do you amend, modify, or change in any
7 respect any of the representations you made to the Court at
8 that time?

9 MR. PATTERSON: No, sir.

10 JUDGE GEWIN: Do you still reassert and reaffirm
11 on behalf of the Governor and Lieutenant Governor and as
12 Attorney General of Mississippi the statements that were
13 made to the Court and the same representations that were
14 made to the Court on that occasion?

15 MR. PATTERSON: Yes, sir, as I understand it, Your
16 Honor.

17 JUDGE GEWIN: I mean in the words that you used
18 then.

19 MR. PATTERSON: Yes, sir, but what I am trying to
20 say, Your Honor, is that in my opinion -- maybe I have got
21 it wrong, but in my opinion they are complying now. They
22 are not interfering with the order of this Court.

23 JUDGE GEWIN: Do you represent to the Court now
24 that they intend to comply in the future?

25 MR. PATTERSON: Well, I don't know what Your Honor

1 means by compliance. I would say this --

2 JUDGE GEWIN: In the same fashion that they have
3 since you were here?

4 MR. PATTERSON: In my opinion, they will not be
5 found seeking interference with the order of this Court.

6 JUDGE WISDOM: Have they notified any law enforce-
7 ment officers to cease resistance and to cooperate with the
8 officers and agents of this Court? Have they done that?
9 You know that that is in the order.

10 MR. PATTERSON: That I don't know.

11 JUDGE WISDOM: Well, one of the terms of the order
12 is that he show to this Court that he is fully complying with
13 the terms of the restraining order and that he has notified
14 all law enforcement officers and all other officers under his
15 jurisdiction or command to cooperate. Has he done that?

16 MR. PATTERSON: That I don't know, but do I under-
17 stand Your Honor to say that this Court would attempt to
18 relieve the Army and the United States Marshals of their
19 responsibilities and impose those responsibilities upon the
20 Governor?

21 JUDGE TUTTLE: That is ridiculous! That is
22 ridiculous, Mr. Patterson! The fact that the Army is pro-
23 tecting a man because he can't be protected by the State
24 forces doesn't relieve the State forces of their obligation
25 under the order of the Court to protect him. Really, that

1 is ridiculous!

2 MR. PATTERSON: No, sir, Your Honor, I didn't mean
3 it ridiculous.

4 JUDGE TUTTLE: I can't help it.

5 MR. PATTERSON: I meant to pose the question,
6 would this Court seek to impose that responsibility upon the
7 Governor and relieve those authorities that are there carry-
8 ing out the orders of this Court.

9 JUDGE TUTTLE: The question you asked was whether
10 we seek to relieve the Army of the United States and put on
11 the Governor of the State of Mississippi the duty to protect
12 the man. Isn't that the question you were asking?

13 MR. PATTERSON: Yes, and the Marshals --

14 JUDGE TUTTLE: Excuse me for being so positive,
15 but to me that sounds ridiculous.

16 MR. PATTERSON: Well, I certainly didn't mean to
17 be ridiculous.

18 JUDGE TUTTLE: Because the order of the Court is
19 that the Governor of the State should direct his officials
20 to carry on this protection of the individual. Well, I think
21 we have your position anyway, Mr. Patterson. Thank you.

22 JUDGE TUTTLE: Mr. Marshall, in the light of this
23 present situation, what do you recommend?

24 MR. MARSHALL: May it please the Court, this is
25 clearly a very serious situation for the United States. I

1 would like to start out by saying that I find it very
2 difficult to believe that a state which is defending the
3 rights of the state is at the same time apparently denying
4 a responsibility to exercise the basic right of the states
5 to maintain law and order within their borders, if that is
6 the position of the attorneys representing the State.

7 Now it is a fact, I think, that Governor Barnett
8 has taken steps to purge himself of the contempt in which
9 this Court found him. The Governor did during the few days
10 preceding the finding of contempt interfere directly and
11 physically with the carrying out of the Court's order by
12 preventing Mr. Meredith from entering on the campus and
13 becoming registered. He has taken steps, I think, to purge
14 himself of that contempt of Court. Whatever his lawyers say
15 in this court today, he did in fact instruct the law enforce-
16 ment officers of the State to cooperate with the Federal law
17 enforcement officers in bringing Mr. Meredith on the campus
18 a week ago Sunday and physically permitting him to enter
19 the campus and to register there as a student. To that
20 degree, Governor Barnett has certainly brought himself in
21 compliance with the Court.

22 The order of the Court which he was required to
23 meet also required him to notify all law enforcement
24 officers of the State of Mississippi that they should co-
25 operate with the officers and agents of the Court and of the

1 United States to the end that James Meredith be permitted
2 to register and remain as a student at the University of
3 Mississippi under the same conditions as apply to all other
4 students. I think that the showing of purging on that
5 aspect of the Court's order is not sufficient. The Governor
6 has now shown what instructions, if any, he gave to the law
7 enforcement officers of the State, and as far as the record
8 is concerned, and as far as the Government's personal know-
9 ledge is concerned, I do not know what instructions he gave
10 to the law enforcement officers of the State.

11 This is still a civil contempt proceeding, it is
12 still a remedial proceeding. Any questions of punishment
13 for past actions are properly the subject of criminal
14 contempt action. The fact is that at the moment law and
15 order is maintained in the City of Oxford and on the campus
16 of the University of Mississippi by Federal officials,
17 Federal officers. I do not know of any specific action
18 that this Court can ask the Governor to take within the
19 next few days or at any particular time, because I do not
20 know when it will appear to be possible for the Federal
21 Government to withdraw force in sufficient numbers so that
22 the responsibility resumes in the State to maintain law and
23 order on that campus and in that city, but I think that the
24 Court should look -- I think that the Court cannot on the
25 present record and on the statement of Counsel find that the

1 Governor has purged himself of contempt.

2 I think that the Court should look again to the
3 future, because I think that he has purged himself enough to
4 show that the sanctions set by the Court do not necessarily
5 have to be imposed now. I think that the future to which
6 the Court should look is the time when the Federal Government
7 feels that it is safe and that they have met their responsi-
8 bilities and that conditions are stable enough so that the
9 basic Federal force protecting Mr. Meredith and maintaining
10 law and order can be withdrawn. I think at that time it
11 will be the performance of the Governor which is significant.
12 I think at this time the assurances given to the Court by
13 the Governor are unsatisfactory and that the Court may wish
14 to take steps to make sure that they become satisfactory.

15 I think that is the best that I can suggest, Judge
16 Tuttle, considering that this is a change of position by
17 the State, which I did not expect.

18 JUDGE BROWN: May I ask a question. Keeping
19 clearly in mind that it is a civil contempt, the terms of
20 this order, of our order, were that unless he showed by
21 11:00 o'clock on Tuesday that he had purged himself by
22 taking these steps, that he shall be fined \$10,000 a day.
23 Now a representation was made on that day which now turns
24 out to have been unauthorized. As a civil contempt matter,
25 has the Governor been in violation of that part of the order

1 since Tuesday last, so that he has incurred \$10,000 a day in
2 fines during that interim?

3 MR. MARSHALL: Well, Judge Brown, I think the
4 situation is this: I think that he has not purged himself
5 in accordance with the order of the Court. I think that he
6 has purged himself in part of the basic action required by
7 the Court's order, the cessation of interference with Mr.
8 Meredith's entrance into the University. To that extent, he
9 has purged himself. Accordingly, I think that the Court has
10 an area of discretion. I think that the fine can be said to
11 have run in whole or in part since the day he was supposed
12 to have purged himself, but I don't think that it is neces-
13 sary to vindicate the processes of the Court that the full
14 amount be gathered. I think that is within the discretion
15 of the Court, in other words.

16 JUDGE TUTTLE: I gather you do not ask the Court
17 then to take the further step to remand Governor Barnett to
18 custody until he does purge himself?

19 MR. MARSHALL: Judge Tuttle, I do not at this time.
20 The reason for that is that, as I said, under the conditions
21 that are existing now at Ocford, I do not know what specific
22 action of the Governor you would be attempting to compel by
23 that.

24 JUDGE TUTTLE: You say then that as to how much,
25 if any, of the daily fine he should be required to pay is a

1 matter that could be decided at a later date when it is
2 determined more clearly just what remains to be done by the
3 Governor to effectuate the order of the Court?

4 MR. MARSHALL: I think that would be a perfectly
5 proper further course of action by the Court, Judge Tuttle.

6 JUDGE BROWN: Do you think it is proper or advis-
7 able at this time to spell out in more detail some of the
8 minimum steps which are to be taken, looking toward the day
9 when troops can be withdrawn, such as a decision or
10 resolution, proclamation, issuance of affirmative instruc-
11 tions?

12 MR. MARSHALL: I think that it should be clear
13 that whatever instructions the Governor gives and is
14 required to give supersede all of the steps that were taken
15 by the Governor and at the Governor's command to interfere
16 with the Court's order previously. I think that it would
17 be a mistake for the Court to get into too much detail on
18 the way in which the Governor controls the law enforcement
19 mechanism of the State.

20 JUDGE BELL: Are you saying -- I am trying to catch
21 what you are saying -- are you saying that it would be better
22 to leave the matter in abeyance for a few more days until you
23 see what the situation develops into in Oxford?

24 MR. MARSHALL: Well, Judge Bell, no, that is not
25 precisely what I am saying. I am not suggesting the Court

1 can leave the matter in abeyance, because I think the Court
2 should decide whether he has or has not purged himself.

3 JUDGE BELL: Now --

4 MR. MARSHALL: And my view on that would be that he
5 has not purged himself, --

6 JUDGE BELL: Yes.

7 MR. MARSHALL: -- that he has not made a sufficient
8 showing either in terms of what he says he will do in the
9 future or in terms of what he has shown he has done in the
10 past to have purged himself of the contempt the Court found
11 him to be in.

12 JUDGE JONES: What have you understood he says he
13 will do in the future?

14 MR. MARSHALL: Judge Jones, I cannot understand it,
15 I do not understand it. A great deal again, I think, depends
16 on what he in fact does at the time that it becomes necessary
17 for him to take action and I would put much weight on that,
18 but I think that the Court should -- I think that it would
19 be good for the Court to seek further clarification of what
20 his position is, because, as I heard it in Court this after-
21 noon, I thought that Mr. Clark and Attorney General Patterson
22 took different positions and that both of them were in vary-
23 ing degrees different from the position, as I read the
24 transcript, of the hearing on Tuesday.

25 JUDGE BELL: Can you make any suggestion about how

1 We could find out what Governor Barnett's position is?

2 MR. MARSHALL: Judge Bell, I would like on that
3 and on these other matters -- I think the best thing to do,
4 since I haven't had time to consider what kind of --

5 JUDGE BELL: I understand that this came as a
6 rather --

7 MR. MARSHALL: --would be to suggest an order to
8 the Court that would be specific on that.

9 JUDGE BROWN: Well, this is my difficulty: You
10 suggest here, as I understand it, that probably no commit-
11 ment should be used now and that the fine, if any, should
12 be in our discretion moderated some, --

13 MR. MARSHALL: But, Judge --

14 JUDGE BROWN: -- depending on what he does in the
15 future. Now it seems to me on what has been shown to us so
16 far you are talking like they are now, in Never-Never Land,
17 because there is one thing we know: that, unless there is
18 some positive leadership for law and order, Meredith's life
19 is imperiled the moment those troops leave. It seems to me
20 that is so. Now we cannot await the day to put that kind of
21 a test up to see what is going to happen with Mr. Barnett
22 when the consequences to Meredith are so severe.

23 MR. MARSHALL: Well, Judge Brown, I think that
24 necessarily you have to look to the future, because it is
25 a civil contempt proceeding, that the only thing that you

1 can do -- there are two things that the Court can decide
2 today: One is whether or not he has purged himself and what
3 to do about that. That relates to his actions since the time
4 the purge order became effective and today. I suggest to the
5 Court that he has not purged himself.

6 The question then arises, what sanctions the Court
7 should impose on him. I suggested to the Court that there
8 would be no remedial purpose served in this commitment, in
9 his commitment at this time. I further suggested to the
10 Court that as far as the fine was concerned, that has run.
11 Now I think the Court would be justified in imposing a fine.
12 I think the Court would also be justified in imposing part
13 of the fine now. I think the Court would also be justified
14 in imposing the fine but permitting it to be remitted at
15 some other date, the date for the purging action. Now that
16 is as far as what he has done to date.

17 As far as what he is to do in the future, Judge
18 Brown, the problem with making specific recommendations
19 today is that the -- at the moment the Federal Government
20 is enforcing law and order. At the moment I do not see
21 what day or what week that condition will end, so that I
22 can't suggest to the Court, as I could the last time we were
23 before you on this problem, that he must do something by a
24 certain date or else something will happen. Under the
25 conditions that are -- I think were inevitably created by the

1 entire course of action taken by the Governor and the State
2 under those conditions, which are troops within the City of
3 Oxford and within the State of Mississippi, I don't -- I just
4 think that I have to say as to that aspect of it, it has to
5 be held in abeyance, at least as far as dates are concerned.

6 JUDGE RIVES: Mr. Marshall, you tell us he has not
7 purged himself. Hasn't the Court already said that sanctions
8 will be imposed? I can't follow you that it is not remedial.
9 The Court's order was that Ross R. Barnett shall be committed
10 to and remain in the custody of the Attorney General of the
11 United States and shall pay a fine to the United States of
12 \$10,000 per day unless on or before Tuesday, October 2, 1962,
13 at 11:00 a.m. he shows to the Court that he is fully comply-
14 ing with the terms of the restraining order, and that he has
15 notified all law enforcement officers and all other officers
16 under his jurisdiction or command (a), and then (b) -- and
17 we are familiar with (a) and (b).

18 Now why would it not be remedial to order Governor
19 Barnett's arrest and commitment to the custody of the
20 Attorney General of the United States until he issues those
21 orders?

22 MR. MARSHALL: Well, Judge Rives, there are two
23 reasons. I say that, though I do not say it is beyond the
24 power of the Court. I think it is within the power of the
25 Court.

1 JUDGE RIVES: Aren't you in effect asking this
2 Court to recede from its former order, modify its former
3 order?

4 MR. MARSHALL: I think modify is the proper (word).
5 The reason I think that that is justified and within keeping
6 of the dignity of the Court and the protectiveness of the
7 Court is that the Court's order issued Friday, September
8 28th, was in fact very effective.

9 JUDGE TUTTLE: In other words, a large part of it
10 accomplished. Even though there is some part that is clearly
11 not accomplished, there is a large part of it accomplished?

12 MR. MARSHALL: Yes, Judge Tuttle. We must -- it
13 is very difficult to have to call on this Court all the time,
14 it is an imposition on the Court, but in terms of what has
15 been accomplished, I think that a lot was accomplished by
16 that order and a lot has been accomplished by the successive
17 orders of the Court. On September 13th the Governor called
18 upon the entire state, every official of the State of
19 Mississippi, to intervene in a physical sense, interpose
20 themselves between the University of Mississippi and the
21 orders of this Court, and when Mr. Meredith went to the
22 campus -- in fact, despite that statement of Governor
23 Barnett's and despite what he had done during the previous
24 week, Mr. Meredith was met by state law enforcement officials,
25 he was taken to the campus; the state law enforcement

1 officials did not, despite the number of previous indications
2 to the contrary, interfere in any way with the United States
3 Marshals when they took Mr. Meredith on there. Now that is
4 not satisfactory, that doesn't end the matter, but it was a
5 major step by the Governor toward meeting the orders of the
6 Court, and that is why --

7 JUDGE TUTTLE: Which you say might in some degree
8 justify our modifying, at the moment at least, the initial
9 order? Is that your position?

10 MR. MARSHALL: That is right, Judge Tuttle.

11 JUDGE TUTTLE: Mrs. Motley, have you something to
12 say about the remedial -- bear in mind, remedial -- order
13 that we are seeking to issue?

14 MRS. MOTLEY: Yes, Your Honor. I think that the
15 Appellant takes the position that the Governor has had two
16 opportunities now to purge himself of contempt of this
17 Court's order. I was frankly shocked, as I feel the Court
18 must have been, by the statements made by Mr. Clark today
19 that he did not have the authority to say what he said to
20 this Court on October 2nd. I think that what this Court has
21 to do today is to find that the Governor has not purged
22 himself, and this Court ought to impose the sanctions which
23 the order itself contains, because I think it is within the
24 power of the Governor and it would be remedial for him to
25 notify all law enforcement officers and all other officers

1 under his jurisdiction to do what is required by (a) and (b)
2 of this order.

3 Now it is not my understanding that he has done
4 that. There is nothing in this record today which I see
5 which is tantamount to an order by the Governor of
6 Mississippi to all law enforcement officers and all other
7 officers under his command to comply with (a) and (b) of this
8 Court's order, and we say that he can do that, he can issue
9 an order to the State Police and to all other law enforce-
10 ment officers to maintain order on the campus at the
11 University of Mississippi, and that is not being done. The
12 law and order, as I understand it, is being maintained by
13 the United States, but this Court's order requires Governor
14 Barnett to cooperate with the United States in the mainte-
15 nance of law and order, and I think the reason the students
16 are continuing to throw rocks and whatever else they are
17 doing on the campus is wholly and solely because the
18 Governor has not (1) cooperated in maintaining law and order,
19 and (2) has not ordered the law enforcement officers of the
20 State of Mississippi to do so. So that would be entirely by
21 way of remedial relief to the Plaintiff in this case for the
22 Court to impose the sanctions which it has already set until
23 such time as the Governor does issue the notice to all law
24 enforcement officers to do (a) and (b).

25 JUDGE GEWIN: Judge Tuttle, may I ask Mr. Clark a

1 question or two?

2 JUDGE TUTTLE: Certainly.

3 JUDGE GEWIN: Mr. Clark, may I propound a question
4 or two to you. I refer to the document which is the
5 transcript of the proceedings which took place in this Court
6 on the 2nd day of October, 1962, here in Room 222, Post
7 Office, New Orleans, when you, Mr. Satterfield, and Attorney
8 General Patterson appeared before a panel of this Court and
9 made the representation that you then and there represented
10 the Governor and the Lieutenant Governor of the State of
11 Mississippi, Ross R. Barnett and Lieutenant Governor
12 Johnson, and were making representations for them and on
13 their behalf and as their counsel. You remember that
14 occasion?

15 MR. CLARK: Yes, sir, I do.

16 JUDGE GEWIN: Now do you in any way now modify,
17 amend, or change what you said to the Court at that time?

18 MR. CLARK: Judge Gewin, I would say no, sir. The
19 remarks that I made to you were because I know that this
20 Court at that time, from the reaction you have expressed
21 today, did not construe what I said at that time in the
22 sense that it was said and within the authority that I had
23 to say it.

24 JUDGE GEWIN: I don't want to get into the
25 authority behind the words or the construction of the words.

1 MR. CLARK: Yes, sir.

2 JUDGE GEWIN: Do you take the same position before
3 the Court -- I am speaking to you now as an officer of the
4 Court --

5 MR. CLARK: Yes, sir.

6 JUDGE GEWIN: -- do you take the same position and
7 make the same representations to this Court now that you
8 made on the occasion mentioned?

9 MR. CLARK: I do not make those representations
10 in the same words, because I am sure that the words were
11 misunderstood by the Court, and as an officer of the Court
12 and as a man standing here before you and wanting to tell
13 you exactly what I -- to present my clients' position to
14 you, I would now present it to you in different words, but
15 please understand me on one thing, sir: I have not meant to
16 say today that Governor Barnett is going to turn his back on
17 James Meredith or to send anybody in to intimidate him or
18 harass him or threaten him. All I am saying is that I have
19 a positive requirement from my clients today, the Governor
20 of the State of Mississippi and the Lieutenant Governor of
21 the State of Mississippi, to make it absolutely plain to
22 this Court that as far as future actions are concerned, they
23 do not construe their activities to date to have constituted
24 a violation of the Court's temporary restraining orders, and
25 they want to represent to you that as far as future action is

1 concerned, they cannot in their best judgment come before
2 this Court now and say on next Thursday or two weeks from
3 now or whenever the forces are diminished or removed, I will
4 take a specific action, or I will at that time follow this
5 Court's decree. They will say to you: I will preserve law
6 and order in the State of Mississippi to the best of my
7 ability.

8 JUDGE GEWIN: Well, of course, we are not asking
9 them to do something that is impossible, but taking the
10 words without interpreting what you think we mean or inter-
11 preting the authority behind the words, do you affirm what
12 was said in court on the occasion mentioned?

13 MR. CLARK: I do not, sir.

14 JUDGE GEWIN: You do not?

15 JUDGE TUTTLE: You made it plain, I think, when
16 you were here before that you couldn't honestly do that now
17 in the light of what you now understand we think the words
18 mean.

19 MR. CLARK: Yes, sir, I couldn't do it. Would Your
20 Honors permit -- you know, the Governor has never -- the
21 Governor has never been permitted to present a legal
22 response, and I understand that this moment is not one to
23 extend the legal debate.

24 JUDGE TUTTLE: Wait a minute. The Governor has
25 never paid the Court the courtesy to respond to its first

1 order --

2 MR. CLARK: Yes, sir.

3 JUDGE TUTTLE: -- which was to appear in person
4 in the action.

5 MR. CLARK: I only spoke of the fact, sir, not the
6 cause of the fact, his position, his legal position in
7 response --

8 JUDGE TUTTLE: Of course, he is in contempt, No. 1,
9 by never having responded to the order to appear personally,
10 if the Court sought to take advantage of it. Now do you
11 want to make a legal argument?

12 MR. CLARK: Just a very brief one. I have here
13 extracts from the state laws of the State of Mississippi of
14 which this Court can take judicial notice, but I would like
15 to leave them with the Clerk of the Court in the event that
16 you have some question about who has the primary responsi-
17 bility for maintenance of law and order on the Ole Miss
18 campus in Lafayette County, and then what the Governor's
19 legal prerogatives are, what he could do.

20 JUDGE TUTTLE: It would be very simple for him to
21 do exactly what we said in the Court's order. If it doesn't
22 apply to anybody, it doesn't apply to anybody, but he won't
23 agree to do what we said in the order.

24 MR. CLARK: You speak now of the contempt order
25 instead of the temporary restraining order?

1 JUDGE TUTTLE: The contempt order, exactly what
2 was said -- a, b, and c -- in the contempt order. You are
3 not able to say to us, as you told us a while ago, that he
4 will comply with those requirements as far as he is
5 physically able?

6 MR. CLARK: Yes, sir, I cannot make that statement,
7 and further than that I say the legal position of the
8 Governor is that he is not required --

9 JUDGE TUTTLE: I understand.

10 MR. CLARK: -- to do those things because of this
11 Terminal Railway case -- I think it constitutes an extension
12 of the temporary restraining orders that were issued against
13 him. He can't be in contempt for something that was not
14 directed to him as an injunction. In other words, the purge
15 requirements couldn't extend to him.

16 JUDGE BELL: Well, he is willing to obey the
17 temporary restraining order, to in good faith comply with
18 the terms of the temporary restraining order?

19 MR. CLARK: I would have to phrase my response to
20 that in exactly the same language, Judge Bell, as to future
21 action. As to the past action, he claims that he hasn't
22 violated it, his actions have not constituted violation of
23 any temporary restraining order issued to him either in
24 behalf of Appellant's petition or Amicus's petition. Second,
25 as to future action, he will have to see the situation and do

1 what he considers his oath requires him to do at that time,
2 and he cannot now in his opinion --

3 JUDGE JONES: Did he take an oath to support and
4 uphold the Constitution of the United States?

5 MR. CLARK: My recollection is that is part of his
6 oath.

7 JUDGE JONES: I thought it was too.

8 MR. CLARK: I would say --

9 JUDGE RIVES: Mr. Clark, as a requirement or
10 permission to file briefs on the legal question --

11 MR. CLARK: Yes, sir.

12 JUDGE RIVES: -- might go to the validity of the
13 restraining order and the contempt order and all, --

14 MR. CLARK: Yes, sir.

15 JUDGE RIVES: -- do you desire beyond Monday for
16 the filing of those briefs?

17 MR. CLARK: No, sir, I believe that will be
18 sufficient, only this, unless the Court is going to make
19 some order today with regard to the contempt order, which I
20 believe to be a criminal contempt order and not pursuant to
21 the notice given here. I think that the terms of the
22 contempt order --

23 JUDGE RIVES: I am asking you. I don't see how
24 the Court can make an order with regard to the contempt order
25 until we have decided upon the jurisdictional questions that

1 are raised in your legal problems.

2 MR. CLARK: Yes, sir.

3 JUDGE TUTTLE: We have already indicated you can
4 have some additional time to file a brief.

5 MR. CLARK: Yes, sir.

6 JUDGE RIVES: If you want until Monday to file a
7 brief, I don't see how the Court could issue any order today
8 on -- contempt order.

9 MR. CLARK: Of course, this would be my position:
10 You have asserted jurisdiction. I have questioned it and
11 respectfully say, if I am right, of course, the contempt
12 would fall with it.

13 JUDGE RIVES: You will file your brief by Monday?

14 MR. CLARK: By Monday, yes, Your Honor.

15 JUDGE RIVES: You understand, do you, that the
16 restraining orders and all other orders issued by this Court
17 remain in effect?

18 MR. CLARK: In full force and effect, just as they
19 did before at the previous recess of this hearing, and would
20 Your Honor permit me to expand that nevertheless beyond the
21 Motion to Dismiss and into Cliett vs. Hammond and Estes vs.
22 Potter cases that I think control the contempt order? I
23 didn't understand that I had permission to file on that, but
24 I will present either orally --

25 JUDGE RIVES: I think we would be happy to have

1 your advice on any legal problems connected with the case.

2 MR. CLARK: In the Monday brief?

3 JUDGE RIVES: In the Monday brief.

4 JUDGE TUTTLE: Anything that attacks the validity
5 of our finding of contempt or our having the authority to
6 impose the sanctions --

7 MR. CLARK: That you did impose?

8 JUDGE TUTTLE: That we did impose -- can be cover-
9 ed in this brief.

10 MR. CLARK: Yes, sir.

11 JUDGE BROWN: Let me ask you this, Mr. Clark. In
12 a civil contempt, civil contempt only, where a fine, a
13 coercive fine, is laid and it is conditioned upon a showing
14 of compliance, purgation, by a certain hour, and if a court
15 finds that he did not purge himself by that stated time, but
16 that, in spite of that, the order somehow was partially
17 enforced, does the court lack the power then to go back and
18 make him pay the fine which was asserted as a coercion?

19 MR. CLARK: Judge, you have asked me a double-
20 barreled question there, because basically I think that the
21 opinion written by yourself, Judge Rives and Judge Tuttle
22 concurring, in the Cliett case makes it impossible to impose
23 a fine in a civil contempt case, a conditional fine payable
24 to the United States in a civil contempt case. I think that
25 the analogy that you used there with regard to the 90-day

1 jail sentence is completely analogous to the fine portion
2 of this order. Where no remission is provided for, I think
3 it becomes an executed affair as soon as the interval,
4 whether you make it one minute or one day or thirty days,
5 has expired, and I think Estes vs. Potter keeps you from
6 imposing both fine and imprisonment for a single course of
7 what you call civil contempt, but I would say certainly that
8 if you took the other construction, that this Court would
9 have a discretionary authority, in my opinion. This is
10 really from the hip, but I will say that you have authority,
11 since (it is) remedial relief, to say if it has been
12 partially remedied, then a partial part of the sentence will
13 be imposed.

14 JUDGE TUTTLE: Mr. Marshall; do you want to be
15 heard on this?

16 MR. MARSHALL: I just had one suggestion to make
17 to the Court, also on the question of briefing. I gathered
18 from Mr. Clark's remarks that he has some doubt of the power
19 of the Court to impose sanctions, and particularly the
20 sanction of arrest, on a governor of a state. I would think
21 that it would be useful if the Court when it decides these
22 issues also decides that issue so that, if the Court feels
23 that it does have that power, it makes it entirely clear to
24 this Governor, so that we don't come in here at some other
25 later date and re-argue that question. I would suggest that

1 if the briefs could also cover that point, it would be ap-
2 propriate.

3 JUDGE TUTTLE: Do you propose to cover that point
4 in any brief that you want to file?

5 MR. MARSHALL: We would be glad to, Judge Tuttle.

6 JUDGE TUTTLE: And you also suggested that the
7 Government would like to file a requested form of order?

8 MR. MARSHALL: Yes, Judge.

9 JUDGE TUTTLE: We would be glad to have that. Of
10 course, we would be glad to have that from any party, includ-
11 ing the Respondents, but I guess they are not interested,
12 except that they would simply dispose of it and dismiss it,
13 so, if you will, file a formal requested order that you feel
14 is appropriate, and, Mrs. Motley, if you would, file what
15 you feel is appropriate under these existing facts.

16 MR. MARSHALL: By Monday, Judge Tuttle?

17 JUDGE TUTTLE: By Monday, if you will.

18 JUDGE BELL: Can you get a brief in on Monday on
19 the power of arrest of a governor?

20 MR. MARSHALL: Yes, Judge.

21 JUDGE WISDOM: You had that briefed already, I
22 guess?

23 MR. MARSHALL: Yes, Judge.

24 JUDGE TUTTLE: I think it is appropriate to say
25 the Court, as I said last time we were here en banc, has

1 appreciated the significance of this case to the extent that
2 we have felt it proper to meet en banc on these critical
3 issues. I don't know how much longer the Court can devote
4 the judicial time to it to have any further en banc hearings,
5 but this matter is submitted to the Court en banc and all
6 of the issues that we have discussed today will be disposed
7 of by the Court en banc, by those who are here today. Any
8 further motions that may come up later on, I simply want all
9 parties to know that the Court may decide to have them
10 decided by a panel of three judges, as the law clearly pro-
11 vides.

12 Is there anything further on either side? (NO
13 RESPONSE) Well, the Court will dispose of the matter as
14 soon as it can after getting the briefs on Monday. The
15 Court will now stand adjourned.

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....Thereupon, at 4:03 o'clock p.m.,
hearing in the above-entitled matters
was concluded....

C E R T I F I C A T E

1
2
3 I, Helen R. Dietrich, do hereby certify that
4 the above and foregoing (169 pages of typewritten
5 matter) is a true and correct transcription of
6 the stenographic (Stenotype) notes of the proceed-
7 ings herein, taken down by me, and transcribed in
8 part by me and in part under my supervision, on
9 the day and date hereinbefore noted, in the
10 above-entitled and -numbered cause now pending
11 before the Fifth Circuit Court of Appeals of the
12 United States.

13
14 
15 Reporter