

1 process that came to Mississippi in that action is concerned,  
2 we claim two things, and I believe perhaps the Government's  
3 reply discusses only one. We claim two things: It cannot  
4 serve process in original actions, which we have just dis-  
5 cussed, and across state boundaries.

6 CHIEF JUDGE TUTTLE: Where is process required  
7 under any procedures that have -- what process is required  
8 to give notice of an intent to prosecute a criminal contempt?

9 MR. CLARK: Your Honors adopted the District Court  
10 Rule 42-b and directed the Government to proceed in accord-  
11 ance with it, and that is the only place that I know that it  
12 does come from, because 401 makes no provision for it what-  
13 soever, 401 just simply says courts have the power to punish  
14 for contempt, such as disobedience of their orders.

15 CHIEF JUDGE TUTTLE: Is this a proper place to  
16 discuss this question as to whether or not the Court may not,  
17 by giving adequate notice and time to prepare and the right  
18 to confront witnesses, put a person on trial for alleged  
19 criminal contempt without giving any written notice or  
20 process of any kind? Is this the time to discuss that  
21 question in what you are now discussing? I understand that  
22 to be the law.

23 MR. CLARK: Judge, I don't understand it to be the  
24 law in the sense that the Government would admit or the  
25 Government contend that 42-b is nothing but a rescript

1 of existing procedures and place that over the authority of  
2 the law, and I understand that there is only one time when  
3 an oral charge would be permitted, and that is when the man  
4 is standing before the judge and can hear him. Other than  
5 that, it is a notice and must take the form of a show cause  
6 order or order for arrest, and it must state what the grounds  
7 are.

8 CHIEF JUDGE TUTTLE: But it must comply, you say,  
9 with the other restrictions that apply to the issue of process  
10 by a district court?

11 MR. CLARK: I say that 42-b is strictly a district  
12 court rule, because I think that the statute of Congress  
13 that authorized the Supreme Court to make the rule and  
14 make all of the Rules of Criminal Procedure clearly  
15 delineated two different jurisdictions that it was address-  
16 ing. One is the jurisdictions that were affected by  
17 proceedings before verdict, and every court listed in that  
18 statute is a district court or a lower court that has  
19 original jurisdiction.

20 JUDGE BROWN: The Federal Rules of Criminal  
21 Procedure expressly provide they shall apply to courts of  
22 appeal and the United States Supreme Court.

23 MR. CLARK: They absolutely do, Judge Brown, and  
24 all of them that are directed to procedures after verdict  
25 are supported by a statute of the United States giving

1 authority to the Supreme Court to make those rules, but the  
2 procedures that apply before verdict cannot rise above the  
3 statute that authorized their creation, because lower  
4 federal courts have to be created by Congress.

5 JUDGE BELL: For you to prevail on this point, we  
6 would have to hold that the Court of Appeals could not try a  
7 person for criminal contempt.

8 MR. CLARK: That is exactly right, sir.

9 JUDGE BELL: All right.

10 JUDGE BROWN: Even in Louisiana, so that you don't  
11 cross state boundaries?

12 JUDGE BELL: Just couldn't try them -- period?

13 MR. CLARK: That is right. I don't think that  
14 there is a proper proceeding in criminal contempt that a  
15 court of appeals of the United States is presently authorized  
16 to bring under the statutes creating jurisdiction in this  
17 Court or under any of the implied powers that are vested in  
18 this Court.

19 CHIEF JUDGE TUTTLE: Can the Supreme Court do it,  
20 in your view?

21 MR. CLARK: Yes, sir, in their original jurisdic-  
22 tional capacities.

23 JUDGE BELL: Because they are not a creature of  
24 statute, they are set up under the Constitution? Is that the  
25 argument?

1 MR. CLARK: To many extents, yes, sir, and I think  
2 Judge Tuttle has the Ship (?) Case in mind, and I think that  
3 the --

4 JUDGE TUTTLE: I have.

5 MR. CLARK: And the Supreme Court certainly con-  
6 ducted contempt proceedings there, and I would point out  
7 to the Court in the argument on contempt that there are  
8 quite some serious questions of procedural irregularity,  
9 and particularly the matter of review.

10 CHIEF JUDGE TUTTLE: I have not only the Ship (?)  
11 case in mind but the general basic question of whether you  
12 would contend the Supreme Court of the United States does  
13 not have, whether it be inherent or what, the power to  
14 punish for contempt of its own orders. You do not say that  
15 it has no such power?

16 MR. CLARK: Criminal contempt?

17 CHIEF JUDGE TUTTLE: Criminal contempt for the  
18 violation of its own orders.

19 MR. CLARK: Criminal contempt for violation of its  
20 own orders would have to be vested in the Supreme Court of  
21 the United States in matters where it had original jurisdic-  
22 tion. Now the question of when it was exercising its  
23 appellate jurisdiction and contempt occurred presents a far  
24 different question.

25 JUDGE BROWN: That is the Ship Case. That is all

1 they had there.

2 MR. CLARK: That is right, and it is a question,  
3 as far as I am concerned, Judge, of who reviews. We know  
4 under the Green Case that one of the reasons that we don't  
5 have constitutional guarantees is because of the right of  
6 review.

7 JUDGE BELL: To go to the heart of the thing, the  
8 Supreme Court has more power than the inferior court because  
9 it is created by the Constitution and it is a separate  
10 branch of the Government, and the Court of Appeals and the  
11 District Court, created by Congress, have such powers as  
12 Congress gives them. If there is any argument you can  
13 make, it seems to me that is bound to be the basis of it.

14 MR. CLARK: They have construed themselves beyond  
15 that whenever they wanted to, as far as contempt is con-  
16 cerned. Contempt powers are what the court says it has  
17 without regard to what Congress gave to it or what the  
18 Constitution gave to it or anything else, as far as the  
19 present law.

20 JUDGE BELL: I understand, but you are saying that  
21 is wrong?

22 MR. CLARK: Oh, yes, sir.

23 JUDGE WISDOM: Could you have a court that would  
24 not be able to punish for contempt?

25 JUDGE BROWN: The Court of Appeals. That is what

1 he says.

2 MR. CLARK: Punish for contempt?

3 JUDGE WISDOM: Enforce its own orders through  
4 contempt proceedings.

5 MR. CLARK: No, sir, no, sir. I don't think there  
6 is any question but what 1651 and the decisions with regard  
7 to the ancillary jurisdiction of this Court give it a  
8 complete range of powers to see to the enforcement of its  
9 own orders by civil contempt remedies, and I claim basically  
10 that criminal contempt is a crime, and I don't care what  
11 type of sui generis or quasi criminal label you put on it,  
12 it is nothing but a crime, and I don't think this Court has  
13 any right to originate a criminal action.

14 JUDGE BELL: Now we are getting to the point of  
15 the thing. There is something I'd like to know about: How  
16 does the Court of Appeals have someone punished, whom they  
17 feel is in criminal contempt of their order? There is no  
18 way to do it.

19 MR. CLARK: Certainly! By directing the Govern-  
20 ment to bring an action, just as you did here. My objection  
21 is --

22 JUDGE BELL: Bring it where?

23 MR. CLARK: In the District Court where you could  
24 have directed the Government to bring this one, in my  
25 opinion, because I think when you told them to bring it

1 under 42-b, the only place they could have brought it was a  
2 district court.

3 JUDGE BELL: You think that would allow that --  
4 you think the statute would allow in this case the Government  
5 to proceed in the District Court?

6 MR. CLARK: Exactly the same way, Judge. They  
7 could have proceeded without an order if there was a suffi-  
8 cient factual basis for the charge, they could have pro-  
9 ceeded without an order from you to --

10 JUDGE TUTTLE: -- prosecute?

11 MR. CLARK: -- prosecute for a crime under 1509,  
12 under 241 and 242, and under the other criminal statutes  
13 that would have covered the charges, if true.

14 JUDGE BROWN: But where does the District Court  
15 -- it is also a creature of statute -- where does it find  
16 the power to punish, criminally punish, for contempt of an  
17 order of any other court than itself?

18 MR. CLARK: Under 1345 in which it is given  
19 original jurisdiction of actions in which the United States  
20 is a party and under 3231 of Title 18 in which all violation  
21 of the laws of the United States are made susceptible to  
22 original jurisdiction in the District Courts, because, you  
23 see, Your Honors, this really laps over into my argument  
24 on contempt. I think contempt is nothing but a crime, and  
25 I think that the District Courts of the United States are

1 created by statute to try crimes, and I think if it is going  
2 to be a question of criminal contempt where the act is done,  
3 it is a question of saying, Now we are going to punish you  
4 for something that you have done in the past, not to get  
5 their court orders complied with, because that is a part of  
6 the entire proceeding, and if you have got appellate juris-  
7 diction at the time when the offense against Your Honors is  
8 committed, then certainly you have the right in that pro-  
9 ceeding under 1651 or the inherent power or ancillary power,  
10 to proceed in civil contempt to enforce or to order sanc-  
11 tions that would bring about enforcement, and this I don't --  
12 I don't want to get confused.

13 JUDGE BELL: What are the two Code sections again  
14 that you say the Government would be authorized to bring  
15 this proceeding in a district court?

16 MR. CLARK: Under Title 28, Section 1345. If you  
17 consider this action *sul generis* and a type of a civil  
18 proceeding, under Title 18, Section 3234, 1, 2, 3, you  
19 consider it a criminal offense. These are the jurisdictional  
20 statutes or the venue section.

21 CHIEF JUDGE TUTTLE: You say it is a crime, it is  
22 nothing but a crime?

23 MR. CLARK: Nothing but a crime.

24 CHIEF JUDGE TUTTLE: And, therefore, the second  
25 citation, the older one, would be applicable, because these



1 men could be proceeded against only by a grand jury, indict-  
2 ment of a grand jury of the Southern District of Mississippi,  
3 to be tried if a true bill is returned in the Southern  
4 District of Mississippi before the District Court and a jury?

5 MR. CLARK: Yes, sir, under 18. Now you have to go  
6 into the Federal Rules which Congress authorized to be  
7 created for district courts, and one of the Federal Rules  
8 replaced an earlier venue statute, and the statute was then  
9 removed from the Code, and Rule 18 fixes venue at that point  
10 where the offense occurred, where the act occurred.

11 JUDGE BELL: This citation you had in the brief  
12 you filed this morning, by Justice Holmes, where he said  
13 contempt was to his mind a crime -- at least he thought that  
14 it was -- that was under a dissenting opinion, wasn't it?  
15 You didn't note that it was a dissenting opinion.

16 MR. CLARK: No, sir, that was not a dissenting  
17 opinion.

18 JUDGE BELL: It was not?

19 MR. CLARK: No, sir, not the one by Justice  
20 Holmes. It was a quotation from New Orleans vs. New York  
21 Mail Steamship Company, in which the Supreme Court said  
22 criminal contempt is a criminal offense and the fine imposed  
23 is a sentence in a criminal case.

24 JUDGE WISDOM: Of course, it does not have all the  
25 attributes of a crime, because the case must be brought in

1 the district where the court sits.

2 MR. CLARK: I wouldn't agree with that, Judge.

3 JUDGE WISDOM: And not in the district where the  
4 contempt may have taken place.

5 MR. CLARK: I know that there are constructions of  
6 the contempt power in which the courts have fixed their own  
7 venue, and I say that an appellate court or a District Court  
8 of the United States can't determine for itself what venue it  
9 has.

10 JUDGE WISDOM: Historically, too, it is not pre-  
11 ceded by an indictment --

12 MR. CLARK: In criminal contempt?

13 JUDGE WISDOM: -- by a Grand Jury.

14 MR. CLARK: Unless you are willing to take the  
15 Fifth Amendment out of the Constitution, it has to be.

16 JUDGE BELL: Well, you know, under Section 3691,  
17 which we have been proceeding under for 90 years, there is  
18 no grand jury indictment. There is a jury trial, but, as  
19 far as I know, the only thing that requires you to have a  
20 grand jury presentment is a dissenting opinion in Green.  
21 There is no constitutional background or anything else for  
22 a grand jury presentment. But you are going to argue that  
23 later?

24 MR. CLARK: Yes, sir, we are, and I say not only  
25 are you getting me ahead of myself, but also Judge Montgomery

1 is going to principally address himself to the rights under  
2 the statutes, and he is not as much concerned with grand  
3 jury as I am, because I don't think there is any way around  
4 the fact that there is no law and no court in the United  
5 States of America that is superior to the Constitution of  
6 the United States.

7 JUDGE BROWN: Does this wipe out your argument?  
8 We have touched about nearly all of this, haven't we? How  
9 many does this wipe out?

10 MR. CLARK: Let me see, Judge. Just to sum up, I  
11 did mention, without emphasizing, the fact that the Govern-  
12 ment filed their application in a civil proceeding contrary  
13 to Gompers, if you are going to go under Gompers. The  
14 Court ordered them to initiate criminal contempt, and  
15 criminal contempt has got to be a separate action, and we  
16 contend their application should have been filed in 20,240.

17 JUDGE BROWN: Can that be done now?

18 MR. CLARK: Well, we are here to answer the one  
19 that is here now, but, as Mr. Green put it -- and I want to  
20 emphasize this to the Court as strongly as I can -- we are  
21 interested in substance and not in form. We don't want to  
22 waive our clients' rights, but we don't -- we are not here  
23 on the technical side of an argument; we are here on the  
24 basic constitutional side of the argument.

25 JUDGE BROWN: For the full protection of everything

1 you have said, it seems to me, Mr. Clark, imperative for a  
2 full review of this case, whatever comes, that there be in  
3 the record of the criminal contempt, by whatever number it  
4 is called, so much of the papers in the Meredith vs. Fair  
5 case that at least show how the Government got into the case  
6 on September 18th at Hattiesburg, the applications for  
7 injunctions, the injunctions of September 25th, the various  
8 show cause orders, the show cause orders for civil contempt  
9 hearings that showed the nature of the service and notice  
10 of those injunctions.

11 Excuse me just a moment, Your Honors.

12 (Discussion among Counsel, off the record.)

13 MR. CLARK: We do. That was my idea, and I wanted  
14 to be sure that other counsel associated with me agreed.  
15 I certainly think to get a conception of what we are talking  
16 about here that the background has to be known, just as  
17 the facts would have to be known if facts would bear on  
18 legal issues, and, of course, there are facts that bear on  
19 the legal issues here, and I think that they are going to  
20 have to be presented to this Court and to any other court  
21 that is going to make an independent review of the matter.

22 JUDGE JONES: You think they are not before us in  
23 this proceeding?

24 MR. CLARK: In 20,240? Certainly. Recited in  
25 the Government's application, sir.

1 CHIEF JUDGE TUTTLE: I will tell you that 20,240  
2 is a designation for the convenience of the Court, to file  
3 certain papers in this Court, and my view of it -- it may be  
4 wrong -- my view of it is that this doesn't change the  
5 character or designation of anything that is now before the  
6 Court.

7 MR. CLARK: Well, Judge, it can't be criminal  
8 contempt then.

9 CHIEF JUDGE TUTTLE: It may not be, it may not be,  
10 but all I am saying is the number which is assigned to these  
11 papers was not assigned to these papers as a determination  
12 of any legal question by the Clerk of this Court.

13 MR. CLARK: I have always understood that the  
14 title that you put on, the caption that you put on a  
15 pleading can't determine what it is; it is a question of  
16 what the pleading asks for that starts it of.

17 CHIEF JUDGE TUTTLE: That is the point I wanted to  
18 make.

19 MR. CLARK: The only other point I make, Judge  
20 Brown: on the application itself, if it is going to start  
21 a criminal proceeding, it should have been verified. There  
22 are cases on both sides of that. We have filed a brief  
23 memorandum in which we have made our point. The Government  
24 filed an opposing memorandum in which they have taken a  
25 contrary view. We do contend it should have been verified

1 and should have been an original proceeding.

2 JUDGE BROWN: When we issued the order of  
3 January 5th, were we required to expunge from our minds and  
4 recollections what we saw and heard from witnesses and  
5 news reel films in the proceedings in September and October  
6 -- not as a determination of guilt or innocence here but as  
7 a basis of probable cause, and how is the Court aided in  
8 any degree by an affidavit from an attorney or special  
9 assistant attorney general of facts which it already at  
10 least knows sufficiently to think that there is a basis  
11 for their existence?

12 MR. CLARK: Well, to answer your question, can  
13 I reserve part of it to contempt?

14 JUDGE BROWN: Right.

15 MR. CLARK: But our point, and our only point, is  
16 that you are charging the governor of a state with a  
17 criminal act when he attempted to move to protect the state,  
18 and I submit to this Court that the Attorney General of the  
19 United States ought to have been willing to swear -- that  
20 the charges that he made of failure of a governor to try to  
21 keep peace should have been verified by him, and I have got  
22 case authority to support it, and I simply make the point.  
23 I know there is a conflict in the decisions.

24 JUDGE BELL: You don't think that goes to the  
25 substance of this matter, do you, Mr. Clark, whether or not

1 the complainant verified a complaint? You can always come  
2 in later and verify a pleading. That seems to me a highly  
3 technical thing, and I know you want to get to the real heart  
4 of the case.

5 MR. CLARK: Yes, sir, and I have made the point  
6 and I have presented my contentions to Your Honors, and there  
7 it is.

8 The next motion, the second alternative motion,  
9 suggests lack of venue or jurisdiction, and it has been  
10 covered by exactly the argument that I have made to you  
11 before, and I would want to ask Your Honors to allow me --  
12 and I will make a motion if it is necessary -- I detect a  
13 typographical error on page 3 of the motion that is entitled,  
14 "Second Alternative Motion . . .", in Paragraph IV on that  
15 page.

16 CHIEF JUDGE TUTTLE: You want to correct a  
17 motion or a pleading?

18 MR. CLARK: It's a motion.

19 CHIEF JUDGE TUTTLE: He wants to correct a  
20 motion. Be sure you get this.

21 MR. CLARK: The correction is to the Second  
22 Alternative Motion of Governor Barnett and Lieutenant  
23 Governor Johnson to Dismiss for Lack of Venue. In the  
24 Governor's motion the mistake occurs on page 3 in Paragraph  
25 IV and in the first line of that paragraph. It reads,

1 "Title 28 U. S. Code, Section 3231," and it should read,  
2 "Title 18 U. S. Code, Section 3231."

3 CHIEF JUDGE TUTTLE: With no objection from  
4 Counsel, that correction will be made in the original  
5 document. Is that what you would like to have done?

6 MR. CLARK: I thank Your Honor. And the same is  
7 applicable to the motion of the Lieutenant Governor, also  
8 the third page and in Paragraph IV.

9 CHIEF JUDGE TUTTLE: Title 18 instead of 28?

10 MR. CLARK: Yes, sir. The change is that Title  
11 28 should be changed to Title 18. There is no point in that  
12 motion that I want to urge to this Court that has not been  
13 urged in what I have previously said.

14 The Third Alternative Motion is Grand Jury  
15 Indictment.

16 The next pleading in sequence of filing was a  
17 demand for trial by jury.

18 The Fourth Alternative Motion was to dismiss  
19 because this Court cannot summon a constitutional jury now  
20 that it has been demanded.

21 I think that we could have certainly waived trial  
22 by jury and it was incumbent on us to make a demand for it  
23 before we were entitled to it, and we have done that prior  
24 to asking the Court to rule to dismiss for failure of  
25 ability to call it.



1           The next motion is a motion for severance and it  
2 is filed independently on behalf of all of these or both of  
3 these officials, and because we knew that we were going to  
4 eventually move for severance if the Court would not sustain  
5 us in other motions is the reason that we filed separate  
6 pleadings for each of them. The Court has, of course, said  
7 that we don't waive any right by making all of our pleadings  
8 at one time.

9           On the motion for a severance, I think that if that  
10 matter is properly considered a criminal matter or a  
11 criminal proceeding, that these defendants would be entitled  
12 to a severance. The Government, as I understand, takes only  
13 the position that it is discretionary with the Court. They  
14 don't oppose the severance for any procedural reasons or  
15 for any reasons of law.

16           JUDGE BROWN: You think that is a standard? We  
17 do have discretion?

18           MR. CLARK: If Your Honor please, the question  
19 of the charges of a conspiracy presents me with my only  
20 difficulty. If conspiracy were not charged in some of the  
21 counts, then I would contend to Your Honors that under my  
22 theory that this is strictly and solely a criminal proceed-  
23 ing, that we were entitled to a severance and not to be tried  
24 together, but there are two counts out of the four in the  
25 Government's original application which were rescripted

1 into the Court's show cause order which allege conspiracy,  
2 and I don't know enough criminal law to tell you today  
3 whether or not they would have a right to a severance, but  
4 I think as a matter of policy that they should have a  
5 severance and I think as criminal defendants, certainly  
6 as to part of the charges there should be a severance, and  
7 I think if you are going to sever it as to Counts 1 and 2,  
8 then it ought to be a complete severance as to all counts.

9 JUDGE JONES: Your motion for severance is in no  
10 way dependent upon a determination of the question of venue  
11 that you have interposed?

12 MR. CLARK: No, sir. The motion for severance,  
13 Judge Jones, would not even be presented to Your Honors for  
14 consideration until such time as you had overruled the  
15 preceding motions to dismiss, so at the time that we  
16 presented to you, you would have already ruled against  
17 us, so it would not be dependent.

18 JUDGE BELL: What District Court do you contend  
19 the cases ought to be in?

20 MR. CLARK: In the District Court in which the  
21 criminal act alleged to have been done allegedly occurred.

22 JUDGE BELL: I understand that is the law, but I  
23 asked you what court you contend it ought to be in, the  
24 Southern District or the Northern District of Mississippi.

25 MR. CLARK: Well, it is a little bit vague in the

1 charges, but I think there are parts of the actions -- as  
2 far as the Lieutenant Governor is concerned, his actions  
3 in the second count took place in the Northern District.  
4 The Oxford district, -I think the Court can take judicial  
5 notice- is in the Northern District. The place where the  
6 conspiracy occurred is uncharged in the Government's  
7 application, but I presume that a conspiracy -- in fact, I  
8 know that a conspiracy can be prosecuted wherever any of  
9 the essential action in the conspiracy takes place, and, if  
10 there are two or four more jurisdictions or venues that  
11 something occurred in, then it is optional with the Govern-  
12 ment which district they would file it in, but certainly  
13 obviously every one of these actions took place in —  
14 Mississippi, because these people are charged with doing  
15 official acts, and when the Governor of Mississippi comes  
16 to Louisiana, he is not the Governor of Mississippi, he is  
17 a visitor in Louisiana, so that everything that is charged  
18 is bound to have taken place in either the Northern or the  
19 Southern District, depending upon what the Government would  
20 develop as it proves its case. We are not sufficiently  
21 advised by the application now.

22           The last motion is a motion to strike the third  
23 and fourth charges, and I would only say this in introduction  
24 to it: The Government contends in its memoranda, as I  
25 understand it this morning, that by filing this plea we show

1 that we had sufficient notice of the charges, and in response  
2 to that argument I would call to Your Honors' attention that  
3 the order entered by Judge Rives for the Court specifically  
4 said that we didn't waive anything.

5 JUDGE RIVES: That is my impression, you don't  
6 waive a thing on earth, and the fact that you are arguing  
7 certain things, you don't waive anything that you filed  
8 your motions on or anything in your brief, so you need not  
9 try to cover everything in your argument. As I see it,  
10 nothing is waived here.

11 MR. CLARK: The substance of the motion, after  
12 we have passed this point that this motion waives something  
13 else -- the substance of my argument would be that the  
14 charge of failure to maintain peace and order is bound to  
15 be related to an order subsequently entered by this Court,  
16 which we contended the Court had no authority to enter.  
17 Your temporary restraining order did not lay a charge on  
18 the Governor to take any particular peace-keeping steps.  
19 He has his duties and his responsibility for peace-keeping,  
20 but this Court did not lay any additional burden on him in  
21 its temporary restraining order issued against him, and we  
22 think that that charge cannot be supported as a contempt of  
23 the restraining order, and Your Honors will recall that we  
24 argued previously the Terminal Railroad case, that you  
25 can't broaden an injunction even though you might later

1 wish to. You can enter a subsequent and more sweeping  
2 injunction as an injunction, but you can't come along in  
3 a purge order and broaden the basis of the injunction itself  
4 without going through the formalities of actually having  
5 another injunction proceeding.

6 CHIEF JUDGE TUTTLE: What you are saying is, isn't  
7 it, that you cannot punish a person for violating an order  
8 unless the order that he is charged with violating prohibited  
9 him from doing the things that he is now charged with doing?

10 MR. CLARK: Or requires him to do it in some  
11 different way.

12 CHIEF JUDGE TUTTLE: You are now turning over to  
13 the Government --

14 MR. CLARK: Yes, Your Honor.

15 CHIEF JUDGE TUTTLE: -- on everything? The  
16 Court will take a ten-minute recess.

17

18

(Whereupon, a ten-minute recess was  
19 taken.)

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1 AFTER THE RECESS:

2 CHIEF JUDGE TUTTLE: All right, Colonel.

3 MR. JAWORSKI: May it please the Court, quite a num-  
4 ber of the arguments that have been submitted to the Court by  
5 distinguished Counsel for the Respondents are arguments that  
6 I know he is asserting in good faith. I am confident he  
7 believes what he is presenting to the Court, but I also  
8 firmly believe that most of those arguments have been  
9 already settled by decided cases by the United States  
10 Supreme Court. Some of the doctrines and some of the matters  
11 that are being here asserted have already been renounced and  
12 repudiated.

13 In our briefs we cite to the Court a number of  
14 Supreme Court decisions that we think dispose of most of  
15 the arguments that have been here advanced. May I take up  
16 with the Court first the basic matter, which I do not believe  
17 calls for much argument.

18 It would, of course, be a rather strange and a  
19 rather anomalous situation if the District Court had the  
20 right to punish for contempt of orders issued by that court  
21 and the United States Supreme Court had the right to conduct  
22 and punish criminal proceedings for violations of orders  
23 issued by it, but that this Court and other courts of appeal  
24 should be deprived of that right.

25 JUDGE CAMERON: Is there any Court of Appeals

1 decision where any state officer has ever been punished by  
2 a Court of Appeals action for contempt of one of its orders?

3 MR. JAWORSKI: There is none that has come to our  
4 attention, Your Honor. There is a statute that covers and  
5 governs the right, along with usages of law, of this Court  
6 to punish in criminal contempt, and that statute we have  
7 cited in our brief, and we consider it to be basic.

8 JUDGE CAMERON: Do you know of any case where a  
9 Court of Appeals has punished anybody, state officer or  
10 otherwise, for violating one of its orders?

11 MR. JAWORSKI: A United States Court of Appeals?

12 JUDGE CAMERON: Yes.

13 MR. JAWORSKI: There is none that we have to  
14 present to Your Honor, because under the statutes here, the  
15 statutes that we want to present to the Court, no such pro-  
16 ceeding has been brought.

17 JUDGE BELL: Yes, there are two, the Dollar Case,  
18 Court of Appeals of the District of Columbia --

19 MR. JAWORSKI: Was that criminal contempt?

20 JUDGE BELL: No, civil.

21 MR. JAWORSKI: I was confining my answer to  
22 criminal contempt.

23 JUDGE BELL: Two civil.

24 CHIEF JUDGE TUTTLE: I imagine there are a good  
25 many Labor Board cases in which Courts of Appeal have

1 punished for criminal contempt.

2 MR. JAWORSKI: That is very true, a number of them.

3 JUDGE BROWN: We have had a number of them filed  
4 here.

5 JUDGE CAMERON: That is under special statute;  
6 that is not under the regular appellate power of a Court of  
7 Appeal. I looked in your brief, and I have never been able  
8 to find one myself. The Dollar Case finally went over as  
9 moot, I think.

10 MR. JAWORSKI: Well, it wasn't a criminal contempt  
11 proceeding, Your Honor. In my judgment, at least my  
12 recollection was that it wasn't, and accordingly I didn't  
13 cite it.

14 JUDGE CAMERON: It would be making new law as  
15 far as Court of Appeals contempts are concerned if we would  
16 hold these gentlemen under criminal contempt, would it not?

17 MR. JAWORSKI: I do not think that there is any  
18 precise precedent in a case of this type, no, sir. Now the  
19 statute itself, Title 18, United States Code, Section 401,  
20 in words that are plain to me provides that:

21 "A court of the United States shall  
22 have power to punish by fine or im-  
23 prisonment, at its discretion, such  
24 contempt of its authority, and none  
25 other, as --



• • • •

"(3) Disobedience or resistance to its  
lawful writ, process, order, rule,  
decree or command."

And then Section 402 of Title 18, after providing  
for prosecution of criminal contempt involving wilful dis-  
obedience to "any lawful writ, process, order, rule, decree  
or command of any district court of the United States or  
any court of the District of Columbia," provides again that:

"This section shall not be construed to  
relate to contempts committed in the  
presence of the court, or so near thereto  
as to obstruct the administration of  
justice, nor to contempts committed in  
disobedience of any lawful writ, process,  
order, rule, decree or command entered  
in any suit or action brought or prosecuted  
in the name of, or on behalf of, the  
United States, but the same, and all  
other cases of contempt not specifically  
embraced in this section may be punished  
in conformity to the prevailing usages  
at law."

In our judgment though, the right of this Court  
to punish in criminal contempt is statutory, that it also

1 has that right wholly apart and independent from any  
2 statute. In our judgment, there has never been a time that  
3 a court of competent jurisdiction couldn't punish for any  
4 contempt of its orders, both civil and criminal, and if it  
5 were denied that right, it would in effect be impotent to  
6 carry out some of its processes should they be challenged  
7 and defied.

8 JUDGE BROWN: Of course, that certainly would be  
9 true as to coercive orders in the nature of civil contempt,  
10 but does it necessarily follow in criminal contempt, a right  
11 to punish somebody for disobedience?

12 MR. JAWORSKI: Yes, under the common law and  
13 under usages of law entirely apart from statute, Your  
14 Honor, that right is vesting and is inherent in this Court.

15 Now insofar as the individual motions are con-  
16 cerned, I think that perhaps it would be better for me to  
17 take them in the order in which comment was made and  
18 briefly give the Court our views. We have filed a  
19 memorandum here that treats with each one of those.

20 The Motion to Dismiss for Lack of Process. Under  
21 questioning of the Court, it is my understanding that there  
22 is no point made as to any factual situation with regard to  
23 the service, that the only point that Counsel makes in ef-  
24 fect is that this Court is powerless and can under no  
25 circumstances issue process in connection either with its

1 temporary restraining order -- and that it was void and  
2 invalid for reasons that Counsel has asserted, or that  
3 insofar as this particular proceeding is concerned, a  
4 contempt proceeding, it is also powerless, and, as I under-  
5 stand his argument, the only court that could proceed would  
6 be a district court in Mississippi.

7 JUDGE RIVES: Well, that is all that has been  
8 argued.

9 MR. JAWORSKI: Yes, sir.

10 JUDGE RIVES: They haven't waived anything,  
11 don't waive anything.

12 MR. JAWORSKI: I fully understand that, Your  
13 Honor. I am fully in accord with that, but as to those  
14 matters, let me first suggest -- because some of the ques-  
15 tions that were asked bear upon it -- certainly the evidence  
16 that relates to the issuance of the temporary restraining  
17 order and its defiance, its alleged defiance, and violation  
18 are matters that are going to have to be developed on the  
19 merits of this case. We understand that. We do not agree  
20 that some of the arguments that might be asserted with  
21 respect to the claim they were invalid gave anyone the  
22 right to disobey them, because there are United States  
23 Supreme Court decisions to the contrary, but certainly we  
24 do agree that that is a matter that will be developed upon  
25 the merits of the case.

1           Now insofar as the notice of that particular in-  
2 junction is concerned and its service, that is a matter  
3 that will be developed upon the merits of the case.  
4 Certainly again we feel that this is no question -- it has  
5 been developed before that there was proper service.  
6 Certainly if it is to be contended by the Defendants that  
7 they did not have actual notice of the injunction in connec-  
8 tion with the charges that are made of alleged defiance and  
9 wilful disobedience, they will be given an opportunity, of  
10 course, to show that by way of defense.

11           JUDGE BROWN: All they have to do is say "Not  
12 Guilty," don't they, and that puts the whole burden on  
13 the movants, the Government?

14           MR. JAWORSKI: That is a burden we will be very  
15 pleased to assume, please the Court, and there will be no  
16 question about the evidence that will be adduced, but the  
17 point I am making is that it isn't a matter insofar as this  
18 particular motion is concerned before the Court. It goes  
19 to the merits and to the question of defense.

20           Now insofar as the service of these particular --  
21 in this particular proceeding I am talking about now --  
22 insofar as the show cause order is concerned, I understand  
23 there is no question raised as to the physical fact of  
24 service.

25           CHIEF JUDGE TUTTLE: No question raised for the

1 purpose of today's argument?

2 MR. JAWORSKI: For the purpose of today's argument,  
3 yes, sir.

4 CHIEF JUDGE TUTTLE: They may still, if they are  
5 advised to do so, say, if the Court goes to a hearing on  
6 the merits, that they had no notice, no adequate notice  
7 as required. You understand that, of course.

8 MR. JAWORSKI: I understand that, Your Honor.  
9 Of course, under the rule and under all of the decisions  
10 that I have been able to find, it would appear that all  
11 they are entitled to is notice of the pendency of charges  
12 with some adequate description of what the charges are and  
13 then an appropriate period of time to defend, and all of  
14 those things we recognize, and we certainly would want  
15 each of them to be upheld.

16 With respect to the power of the Court and the  
17 right of this Court to execute service, to have officers  
18 execute service in the State of Mississippi, it is clear to  
19 me that if this Court has jurisdiction over the State of  
20 Mississippi as well as the other states that are included  
21 within this circuit, this Court's jurisdiction, obviously  
22 the writs and the processes must also extend to the State  
23 of Mississippi, and that again is statutory, and it is a  
24 matter that we have set out in our brief. I do not think  
25 that I need to belabor that particular argument.

1           On the motion with respect to the alleged improper  
2 and insufficient application, which it is claimed should  
3 have been verified, I think that the comments made by  
4 members of the Court with respect to the uselessness of  
5 verification in a situation of this type were entirely  
6 apropos. There is no decision since the enactment of  
7 Rule 42-b that even makes reference to the requirement of a  
8 verification, because the entire approach to it and the  
9 sense of it all is that it is a matter of notice and, as I  
10 believe Judge Tuttle said, actually it doesn't even have to  
11 be written notice. The entire requirement is one to make  
12 certain that the person knows of what he is charged and is  
13 given an opportunity to defend.

14           Actually here the charges were set out in great  
15 detail. There have been no questions raised that they don't  
16 understand what we are talking about; no one has said that  
17 any of the charges are vague; it has simply been said that  
18 this Court should have had before it a verified application.

19           Now verification in a situation of this type  
20 where the Court directed that an application be filed, and  
21 directed the Attorney General and those whom he might desig-  
22 nate in his department to file them, it would be an anomaly  
23 to have asked the Attorney General to have sworn to these  
24 charges. He signed the application, as did the Assistant  
25 Attorney General and as did an attorney in the Department of

1 Justice, but the verification would have added nothing to  
2 it. It would have been a useless matter.

3           But far beyond that, the cases that Counsel have  
4 cited as sustaining the claim that there should be some  
5 verification -- and let me point out again there is absolute-  
6 ly nothing under Rule 42-b that requires it, but those cases  
7 are not in point. The National Labor Relations Board case  
8 vs. Arcade/Sunshine Co., Inc., cited in their memorandum,  
9 at 122 Federal Second -- we haven't had a chance to reply  
10 to it, because, frankly, I didn't even see the memorandum  
11 until yesterday after we got here, but it was a case  
12 decided before Rule 42-b and it simply made reference to  
13 the fact that it may be good practice to do it but did not  
14 set it out as a requirement. The other case that is cited  
15 in their memorandum, a Federal case, simply said that they  
16 were assuming, without deciding, that an affidavit should  
17 have been filed in that case. It wasn't a case that  
18 involved the United States; it wasn't a case that involved  
19 an application that the Court had ordered; but they made  
20 no determination, no decision, with respect to the necessity  
21 of filing such an affidavit. I don't look upon it as any-  
22 thing that relates to any substantial right or any right of  
23 any type on the part of the Respondents, the important  
24 thing being that they have notice and that they have  
25 adequate time to prepare their defense.

1 JUDGE BROWN: Well, now, notice, Mr. Jaworski.  
2 There is some ambiguity in the show cause order in contrast  
3 to the Government's application as to the particular order  
4 which they are charged with having disobeyed. It merely  
5 says "the order of September 25th." Is there any way of  
6 clarifying whether that is the order issued at the behest  
7 of the United States or at the behest of Meredith?

8 MR. JAWORSKI: Now to be very frank with Your  
9 Honor, I will accept your statement, of course, that you  
10 look upon it as an ambiguity. I had not done so, but in  
11 order to make it abundantly clear, it is the order that  
12 was issued on the application of the United States, and we  
13 certainly want the record to be entirely clear so that  
14 there couldn't be any question about it, that it is the order  
15 that is involved, and we certainly want to let the record  
16 show that that is our position. If there is any doubt in  
17 Counsel's mind about it, we certainly would like to make  
18 that clear now.

19 CHIEF JUDGE TUTTLE: Equating or paralleling the  
20 practice in a true criminal proceeding, I presume you can  
21 treat the arguments made by Counsel as a motion for a bill  
22 of particulars, and you are now attempting to clarify the  
23 matter by stating in the record here that the request for  
24 the -- that your motion for the issuance of the citation  
25 did refer to, and intended to refer to, the temporary



1 restraining order issued at the behest of the United States  
2 Government?

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

4 CHIEF JUDGE TUTTLE: Well, the Court, I assume,  
5 can, based on that statement by Counsel, amend, if necessary,  
6 its citation to give clear notice to the Respondents that  
7 this is what the Court meant in its citation. I will ask my  
8 colleagues if they are prepared now to do that in the  
9 record.

10 (Discussion among the Court off the  
11 record.)

12 CHIEF JUDGE TUTTLE: If there be any question  
13 about it, it is entered in the record by the Court's order  
14 that the citation heretofore issued contemplates the  
15 restraining order issued on the 25th of September at the  
16 behest of the United States Government.

17 JUDGE GEWIN: Mr. Clark, does that clear the  
18 matter up for you?

19 MR. CLARK: You are now changing the terms of your  
20 order?

21 CHIEF JUDGE TUTTLE: All I am saying is if the  
22 language used -- the Court is now stating in the record that  
23 we referred to the order, the restraining order of  
24 September 25th issued at the behest of the United States  
25 Government. Now, of course, if this doesn't clarify it and

1 you contend later that you haven't notice, you can make that  
2 point whenever you get to it.

3 MR. CLARK: I understand what the Court says.

4 JUDGE GEWIN: As I understood your argument, you  
5 were questioning which order was the one under which they  
6 were proceeding, and seeking to find out, and stating that  
7 defenses applicable to one would not be applicable to the  
8 other.

9 MR. CLARK: Yes.

10 JUDGE GEWIN: And I just wonder if you are now  
11 sufficiently informed as to which order the Government is  
12 proceeding under.

13 MR. CLARK: For the purpose of proceeding today,  
14 I am, sir.

15 CHIEF JUDGE TUTTLE: I will ask the reporter to  
16 please write out this passage we have just had and the  
17 ruling of the Court on that matter so we will have it  
18 available to us please, I mean in advance of writing out the  
19 rest of the record.

20 MR. JAWORSKI: On the question of venue, obviously  
21 if this is the court against which the contempt committed  
22 sits and the Court is going to determine that proceeding,  
23 I don't believe I need to argue that further, although I  
24 have several cases cited, United States Supreme Court  
25 decisions, in our memorandum, but, of course, Counsel's

1 argument is not so much based on the fact that this Court  
2 shouldn't hear proceedings here sitting as it does. His  
3 argument is that this Court just doesn't have any  
4 jurisdiction or power to hear a criminal contempt proceeding  
5 and that the only court that could hear it would be a  
6 district court in Mississippi.

7           On the question of the severance, that is discre-  
8 tionary with this Court. We have undertaken to be of aid to  
9 the Court by citing authorities in our brief that hold that  
10 it is entirely discretionary, and, as I understand Counsel's  
11 argument, Counsel realizes that under the authorities this  
12 matter is one that is discretionary with the Court.

13           JUDGE WISDOM: Do you take any position on the  
14 question of severance, on the propriety of severance?

15           MR. JAWORSKI: We did not in our memorandum, Your  
16 Honor, and I would say, if I may make this point, we are  
17 convinced that there would be no prejudice that could pos-  
18 sibly be asserted by either of the Respondents if the Court  
19 should determine that the severance should not be granted.  
20 If we are to consider the situation that confronts this  
21 Court, its being a busy court and sitting en banc as it  
22 does, it would seem to me that the Court would seriously  
23 consider trying the two Respondents in one proceeding, that  
24 is, approaching it from that standpoint. I think that  
25 perhaps the only thing that I could do in the position that

1 I occupy is to suggest to the Court that it is discretionary  
2 and that in our judgment there would be no prejudice that  
3 would flow from the Court trying both of the Respondents in  
4 one proceeding.

5 JUDGE BROWN: Now I have read all of the papers,  
6 but I haven't had a chance to study them sufficiently. Is  
7 there any distinction drawn in any of the motions filed  
8 between the Respondent Governor Barnett and the Respondent  
9 Lieutenant Governor Johnson?

10 MR. JAWORSKI: The only one being that there are  
11 counts that relate, as Your Honor doubtless knows, to  
12 Governor Barnett that do not relate to the Lieutenant  
13 Governor, and also vice versa, and then there are two  
14 counts that relate to them together, so -- but the courts  
15 have upheld -- and we cite the Bullock Case, which is a  
16 United States Supreme Court case -- they have upheld the  
17 right of the Court to go ahead and try defendants in one  
18 case where the situation was much more extreme than this  
19 particular case. I mean there were occurrences that weren't  
20 as allied and as related as the occurrences that are in-  
21 volved in the charges here brought against these two  
22 Respondents.

23 On the subject of the assertion that the charges  
24 in -- I believe the reference is to the third and fourth  
25 counts, but I believe Counsel's argument was primarily with

1 respect to the fourth count as not constituting a disobedi-  
2 ence of the temporary restraining order entered by this  
3 Honorable Court on September 25th. I believe that a look at  
4 that order and what has been here charged will answer that  
5 contention.

6           One of the orders of this Court directed against  
7 these Respondents and one of the orders telling them to  
8 desist and to refrain from interfering reads as follows:  
9 ". . . interfering with or obstructing . . ." and, of  
10 course, I am reading from the temporary restraining order  
11 of September 25th in the case of United States, Amicus  
12 Curiae -- "interfering with or obstructing by any means or  
13 in any manner the performance of obligations for the enjoy-  
14 ment of rights under this Court's order of July 28, 1962,  
15 and the order of the United States District Court for the  
16 Southern District of Mississippi entered September 13, 1962,  
17 in this action." That is Paragraph 4, "interfering with or  
18 obstructing by any means or in any manner the performance of  
19 obligations for the enjoyment of rights."

20           Now it is true that in the charge, in order to give  
21 full notice and tell the full story, that we do set out also  
22 what this Honorable Court said in its order relating to the  
23 purge, "to maintain law and order at and around the  
24 University and to cooperate with the officers and agents of  
25 this Court and of the United States in the execution of the

1 orders of this Court and of the District Court for the  
2 Southern District of Mississippi, to the end that James  
3 Meredith be permitted to register and remain as a student  
4 at the University of Mississippi under the same conditions  
5 as apply to all other students."

6           Now it is our contention that with respect to the  
7 counts in question, that they involve a wilful inaction or  
8 a wilful non-action that is as important insofar as the  
9 restraint, insofar as the interference is concerned as any  
10 overt act might be, the reason being that, as this charge  
11 sets out in full, these men were occupying positions of  
12 responsibility, positions of power, positions to control  
13 and positions to direct that no one else had, and in proper  
14 obedience of the orders of this Court, there should have  
15 been exercised these authorities and these rights to  
16 control that deliberately, so this charge says, and wilfully  
17 were not exercised in order to frustrate the orders of this  
18 Court.

19           Now that, we believe, is plain. It either  
20 happened or it didn't. It is our burden to show that that  
21 happened, and, if we do show it, then we believe that it  
22 involves a contempt of the orders of this Court.

23           That, may it please the Court, I believe answers  
24 the various motions that were made. I am, of course, pre-  
25 mitting any comment with respect to some of the matters

1 that came in relating to presentment or indictment by grand  
2 jury and trial by jury, because I understand they will be  
3 argued later. We do have authorities to present on those  
4 points.

5           MR. CLARK: May it please the Court, rather than  
6 delving into the exact wording of the temporary restraining  
7 order as opposed to the application of the Government, I  
8 would simply urge the Court to read the two. The temporary  
9 restraining order does not forbid in its terms the action  
10 charged as a violation of that order in the application of  
11 the United States, and that was the point that we made. And  
12 insofar as failure to keep peace and order in the third and  
13 the fourth counts, they were couched in identical language.

14           Mr. Jaworski's statement at the opening of his  
15 argument causes me to ask leave of the Court to retract a  
16 position that I took here. I did not realize that this  
17 response had been made, and that is that I would contend to  
18 the Court that insofar as criminal contempt is concerned,  
19 that neither this Court nor the Supreme Court of the United  
20 States would have any such authority. Now where the Supreme  
21 has original jurisdiction and acts originally and there is  
22 no right to appeal from its decisions, in those cases, then,  
23 I still think that contempt which amounts to a criminal  
24 contempt of the orders that might be entered in those causes  
25 of original jurisdiction would be no different from any

1 other crime against the sovereignty of the United States  
2 and it could not be proceeded with or punished in any  
3 different manner than any other crime could be.

4 CHIEF JUDGE TUTTLE: So it could not be proceeded  
5 against in the Supreme Court itself?

6 MR. CLARK: And I would say that the criminal  
7 contempt procedures, such as the Court held in Shipp should  
8 not have been held in the Supreme Court, should have been  
9 proceeded with as other crimes under the Constitution.

10 JUDGE BELL: Shipp being the wrong --

11 MR. CLARK: Yes, sir.

12 JUDGE BELL: Looks like you've got enough trouble  
13 now without getting us to try the Supreme Court and figure  
14 out what rights they have.

15 MR. CLARK: Judge, I want to be as consistent as  
16 I can.

17 JUDGE BELL: Yes.

18 MR. CLARK: I am not smart enough to be completely  
19 consistent, but I want to be as consistent as my limitations  
20 will let me, and I think that I had to retract that  
21 statement, because criminal contempt is a crime or it isn't  
22 a crime, and, if it is a crime or an offense within the  
23 meaning of the Constitution of the United States, my clients  
24 have rights that neither this Court nor the Supreme Court  
25 nor the Congress nor any other governmental functionary in



1 country can override.

2           One other point that I would make -- perhaps  
3 assuming some additional burden, but I feel I have to assume  
4 this -- is the point that violation of an injunction order  
5 issued by a court which has no jurisdiction of the subject  
6 matter cannot subject the person violating that order to  
7 criminal contempt proceedings. A void order is nothing and  
8 it cannot be violated.

9           JUDGE BELL: You saw the case on that point in  
10 Law Week last week?

11           MR. CLARK: No, sir.

12           JUDGE BELL: Square on the point.

13           MR. CLARK: Was it based upon the holding of the  
14 Supreme Court in the Mineworkers case?

15           JUDGE BROWN: No, an Eighth Circuit holding that  
16 it is voided. You cannot punish for criminal contempt.

17           MR. CLARK: I think that is clearly the rationale  
18 of the Mineworkers case and the subsequent Circuit Court  
19 case citing the Mineworkers case as authority for that  
20 proposition simply didn't delve deeply enough into the  
21 reasoning the Supreme Court used in the Mineworkers case.  
22 I don't think they meant to contend a void order could  
23 result in criminal contempt.

24           JUDGE RIVES: Lesley (?) vs. U.S., Eighth Circuit,  
25 decided January 16, 1963.

1 JUDGE WISDOM: Distinguishes, as you do, between  
2 a void --

3 MR. CLARK: -- an improper one the Court exceeded  
4 the bounds of discretion in, but if this Court had jurisdic-  
5 tion of us --

6 JUDGE RIVES: Cited 31 Law Week at page 2161?

7 MR. CLARK: 31 Law Week at page 2362.

8 CHIEF JUDGE TUTTLE: How do you apply that prin-  
9 ciple in this case, Mr. Clark?

10 MR. CLARK: If this Court had jurisdiction of  
11 Governor Barnett and Lieutenant Governor Johnson so that it  
12 could issue the temporary restraining order, if they did  
13 violate it, if they had the capacity to violate it or if  
14 they committed acts which violated it, then they cannot come  
15 to this Court and say it is improvident or your sound dis-  
16 cretion would have indicated you do otherwise, but our  
17 contention -- and I want to be sure the Court realizes this  
18 is our contention -- is the reason you can't proceed in  
19 criminal contempt is because you lack jurisdiction of the  
20 subject matter or the parties.

21 CHIEF JUDGE TUTTLE: Tell us why that is. What do  
22 you base that on, Mr. Clark?

23 MR. CLARK: Let's see. I base it on no different  
24 contentions, Judge Tuttle, than I did in the presentation  
25 that we made to you in the Meredith case, except for the one

1 more I announced to you this morning about interplay of  
2 the Eleventh and the Fourteenth Amendments, which was not  
3 properly argued to you.

4 JUDGE BROWN: Right. It is the one you made  
5 right on: that when our mandate issued, under those  
6 peculiar circumstances we lost jurisdiction, it was no  
7 longer pending before us as an appellate matter. Therefore,  
8 there was nothing to be incidental to.

9 MR. CLARK: As I say, nothing to take a purchase  
10 on. As I understood, the whole contention of the Government  
11 and the Appellant was that these proceedings were ancillary  
12 to something in Meredith, and I thought that you had nothing  
13 in Meredith for them to be ancillary to.

14 JUDGE BROWN: That brings me to a point.

15 CHIEF JUDGE TUTTLE: He hasn't quite answered my  
16 question on that. As to that, the Supreme Court denied  
17 certiorari on the validity of this Court's injunction  
18 against Fair and others. The Supreme Court has denied  
19 certiorari.

20 MR. CLARK: Yes, sir.

21 CHIEF JUDGE TUTTLE: O.K.

22 MR. CLARK: But there is --

23 CHIEF JUDGE TUTTLE: All right.

24 MR. CLARK: But there is a pending petition for  
25 certiorari as to the validity of the ancillary proceeding.

1 and there is no ruling on that yet.

2 CHIEF JUDGE TUTTLE: Well, that is the proceeding  
3 against these Respondents.

4 MR. CLARK: Yes, sir. And, as I urged to Your  
5 Honors at the time that we were presenting that, if you were  
6 going to contend that your ancillary jurisdiction from  
7 Meredith --

8 CHIEF JUDGE TUTTLE: You mean if we decided. We  
9 don't contend.

10 MR. CLARK: Yes, sir. I withdraw that.

11 JUDGE RIVES: That pending petition for certiorari  
12 is in a civil contempt proceeding?

13 MR. CLARK: Yes, sir, and involves the issuance of  
14 temporary restraining orders and contends this Court should  
15 not have overruled our order.

16 JUDGE BROWN: Your certiorari is from the order  
17 holding these two in civil contempt, even though --

18 MR. CLARK: That is a part of it.

19 JUDGE BROWN: -- the sanction was not fixed? Is  
20 that it?

21 MR. CLARK: That is a part of it. We take the  
22 position in our petition for certiorari in Cause No.  
23 661, October '62 Term, now pending before the Supreme Court  
24 of the United States, that this Court had no power and no  
25 authority to enter any order that it entered after the date

1 of its mandate and that the entire matter was a matter that  
2 should have been taken up with the District Court in the  
3 first instance and should have been proceeded with in the  
4 District Court if there was any obstruction, because the  
5 principal and every feature of what this Court held Meredith  
6 to be entitled to was an order or had become an order of  
7 the District Court of the United States in the Southern  
8 District of Mississippi.

9 JUDGE JONES: Of what does your petition for a writ  
10 seek review?

11 MR. CLARK: Every order entered by this Court sub-  
12 sequent to the time of its mandate.

13 CHIEF JUDGE TUTTLE: Which mandate?

14 MR. CLARK: The mandate to the District Court in  
15 the Meredith case.

16 CHIEF JUDGE TUTTLE: Well, there were two actually,  
17 a corrected mandate and at the same date of the issuance of  
18 the second mandate, as I recall it, this Court then issued  
19 its own injunction. Now have you attacked the validity of  
20 this Court's injunction that it issued on the same date  
21 that it sent the mandate to the District Court? That I  
22 think had already been passed on by denial of the first  
23 certiorari.

24 MR. CLARK: Judge, let me put it this way:

25 CHIEF JUDGE TUTTLE: Well, this is quite -- yes.

1 MR. CLARK: We asked the Court -- I am sure there  
2 was no overlapping between the first petition that has  
3 already been denied and the second petition. The second  
4 petition seeks review of every order entered in the United  
5 States Court of Appeals for the Fifth Circuit after  
6 September 18, 1962, and I believe that Your Honor is correct  
7 in that the stay proceedings --

8 JUDGE BELL: Wait just a minute.

9 MR. CLARK: -- the stay proceedings were prior to  
10 September 18, 1962, and the stay was for the purpose of  
11 getting the first petition for certiorari before the Supreme  
12 Court of the United States.

13 CHIEF JUDGE TUTTLE: But don't you agree with me  
14 that the Supreme Court of the United States has already  
15 denied certiorari on the application by you to overrule  
16 the injunction that was issued by this Court? This Court  
17 did --

18 MR. CLARK: Oh, yes, sir, yes, sir.

19 CHIEF JUDGE TUTTLE: This Court did issue --

20 MR. CLARK: -- the first injunction to the Board  
21 of Trustees.

22 CHIEF JUDGE TUTTLE: Right?

23 MR. CLARK: Yes, sir.

24 CHIEF JUDGE TUTTLE: And that has been denied by  
25 the Supreme Court already?

1 MR. CLARK: That is correct.

2 CHIEF JUDGE TUTTLE: So in ordinary understanding,  
3 the law of that case is now applicable in this Circuit as  
4 to the validity of that injunction?

5 MR. CLARK: For whatever a denial of certiorari  
6 means. It is the law of the case.

7 CHIEF JUDGE TUTTLE: There is no place else you  
8 can go to have it set aside?

9 MR. CLARK: Absolutely not.

10 JUDGE RIVES: Denial of certiorari doesn't add  
11 anything to the validity of our order.

12 CHIEF JUDGE TUTTLE: It is final, nothing pending  
13 on it.

14 JUDGE RIVES: No way to seek its review except  
15 in some entirely different matter.

16 CHIEF JUDGE TUTTLE: Does it come down to a ques-  
17 tion that that injunction which we issued and which has not  
18 been vacated by the Supreme Court, whether that injunction  
19 could be the basis of the ancillary proceedings against  
20 these Respondents when it appeared to this Court that  
21 they were obstructing the performance of that injunctive  
22 order? Isn't that where the question -- isn't that what it  
23 comes down to now?

24 MR. CLARK: Yes, sir, and everything that this  
25 Court did from September 18, 1962 forward was properly

1 cognizable only by a District Court, and that there was  
2 nothing left or remaining, and particularly, Judge, that if  
3 there was anything left to do under your order, that it was  
4 incumbent on the Government to make its proof, because that  
5 was jurisdictional.

6 JUDGE JONES: Aren't you making an indirect attack  
7 on the order of this Court where you failed in a direct  
8 attack on it?

9 MR. CLARK: No, sir, no, sir, because the only  
10 thing that we are charged with violating is the temporary  
11 restraining order of this Court of September 25th and the  
12 validity of that order has not been passed upon by the  
13 Supreme Court of the United States. The petition is still  
14 pending there for certiorari to this Court to review that  
15 particular proceeding. The only thing that was settled was  
16 that you did have the authority to issue a supplemental  
17 injunction to the Trustees, and, of course, under Alemite  
18 vs. State (?) and the entire line of cases that we cited  
19 to Your Honors that actually caused, in my opinion, the Court  
20 to issue the injunction directed against the State and  
21 Governor Barnett. In other words, the reason that you went  
22 forward with that proceeding is because you were convinced,  
23 I presume, that the previous injunction did not cover the  
24 situation.

25 CHIEF JUDGE TUTTLE: Well, of course, bear in mind