

Trial

ORIGINAL

**UNITED STATES OF AMERICA
FIFTH CIRCUIT COURT OF APPEALS**

.....
UNITED STATES OF AMERICA
VS.
ROSS R. BARNETT
and
PAUL B. JOHNSON, JR.
.....

NO. 20240
(Criminal)

HEARING ON ORDER TO SHOW CAUSE,
held on the 8th day of February,
1963, Room 222, Post Office
Building, New Orleans, Louisiana.

DIETRICH & WITT, Inc.
- STENOGRAPHERS -
National Bank of Commerce Bldg.
New Orleans

1 APPEARANCES:**2 For the Plaintiff:****3 THE HONORABLE BURKE MARSHALL,**
4 Assistant Attorney General of
5 the United States;**6 LEON JAWORSKI, Esq.;****7 WILLIAM H. VAUGHAN, JR., Esq.;****8 and****9 JOHN DOAR, Esq.,****10 Department of Justice,**
11 Civil Rights Division,
12 Washington, D.C.**13 For the Defendants:****14 HONORABLE JOE T. PATTERSON,**
15 Attorney General,
16 State of Mississippi;**17 DUGAS SHANDS, Esq.;****18 GARNER W. GREEN, Esq.;****19 FRED B. SMITH, Esq.;****20 JUDGE M. B. MONTGOMERY;****21 M. M. ROBERTS, Esq.;****22 JOSHUA GREEN, Esq.;****23 and****24 CHARLES CLARK, Esq.****25 HELEN R. DIETRICH,**
Reporter.

...000...

P R O C E E D I N G S**26 CHIEF JUDGE TUTTLE: We have for hearing this**
27 morning the matter of the United States against Ross R.

1 Barnett and Paul B. Johnson, Jr., set down for hearing of
2 all of the preliminary motions. We have just delayed about
3 five minutes to canvass the situation, and it appears to us
4 that with respect to all matters except one, the Respondents
5 should be heard from on their motions first. The one
6 exception appears to be that the United States has filed a
7 motion to strike the pleading of the State of Mississippi
8 and the brief of the State of Mississippi on the ground that
9 the State of Mississippi is not a party to the contempt
10 proceeding. The Court feels that as to that matter the
11 burden is on the United States to present its motion to
12 strike, and the Court will, therefore, hear that matter and
13 dispose of that matter, and then after we know who is to be
14 heard from on the merits of these motions, we will proceed
15 then with the Respondents having the opportunity to proceed.

16 Is there any question as to the correctness of
17 that procedural decision, gentlemen? (NO RESPONSE)

18 You may proceed then, Mr. Jaworski.

19 MR. JAWORSKI: May it please the Court, the motion
20 filed by the United States of America is directed to the
21 motion and plea of the State of Mississippi. Our motion is
22 based on the proposition that the State of Mississippi is
23 not a party to this proceeding. Under the authorities that
24 we have cited in our memorandum, which we have passed to
25 Counsel for the Defendants, it is indicated that a proceed-

1 ing of this nature is an independent proceeding, is not one
2 that is connected with any matter out of which the order may
3 have issued that it is charged with disobeying. Accordingly,
4 the State of Mississippi is not a party to this proceeding;
5 there are only two parties to this proceeding: Ross Barnett
6 and Paul Johnson, and they, and they alone, stand charged
7 before this Court with a contempt of this Honorable Court.

8 Now there is nothing that is raised in the motion
9 and the plea of the State of Mississippi that has any bearing
10 on any issue in this case, it being the position of the
11 United States of America that the only issue that is in this
12 case is whether Ross Barnett and Paul Johnson have wilfully
13 disobeyed the orders of this Honorable Court.

14 JUDGE BROWN: Mr. Jaworski, --

15 MR. JAWORSKI: Yes, sir.

16 JUDGE BROWN: -- do you think there is anything
17 raised in the State of Mississippi's pleading or brief that
18 was not raised in the briefs or papers of the two respondents?

19 MR. JAWORSKI: I know of nothing, Your Honor. Of
20 course, let it be understood that what is raised in the
21 motion and in the pleading of the State of Mississippi, in
22 our view, is immaterial to this proceeding and has no bear-
23 ing upon the issues in this proceeding.

24 We would like to point out to the Court that we
25 should not get to a consideration of that inasmuch as they

1 are not properly and appropriately before the Court. So
2 not only because they are not a party to this proceeding --
3 they have not asked to intervene, have not been allowed to
4 intervene --

5 JUDGE JONES: Would a petition for intervention
6 lie in a criminal contempt proceeding?

7 MR. JAWORSKI: I have never heard of one, Your
8 Honor. Insofar as the authorities go that I have examined,
9 I have found none, and I would say, Your Honor, to your
10 question, that I do not believe that such a proceeding lies,
11 for the reason that the charges are directed against those
12 who are accused of having wilfully disobeyed the orders of
13 the Court, and they alone, and there is no place for
14 anyone else to enter such a proceeding.

15 CHIEF JUDGE TUTTLE: I would assume, Mr.
16 Jaworski, that a court considering either an ordinary
17 criminal case or any civil case could, if it saw fit to do
18 so, on proper request permit any party who said it was
19 interested in the outcome of the litigation but was not a
20 party to it -- could, as I say, permit it to file a brief
21 and consider the brief, if it saw fit to do so.

22 MR. JAWORSKI: I know of no reason why the Court
23 wouldn't have that authority either on the basis of amicus
24 curiae or whatever designation the Court may wish to make,
25 but an intervention in a normal and ordinary sense I do not

1 believe would lie in a proceeding of this kind.

2 After all, we have before us two parties, two
3 defendants, in a proceeding that the Court have designated
4 as quasi criminal, as sui generis, and they, and they alone,
5 are asked to answer the charges that have been brought in
6 the application in this cause.

7 For those reasons, may it please the Court, we
8 believe that the motion should be stricken.

9 CHIEF JUDGE TUTTLE: Mr. Green?

10 MR. GREEN: May it please the Court, this is a
11 most extraordinary case, and standing on behalf of the
12 State of Mississippi, as I originally told you, the State
13 views this situation as one in which, under the great case
14 of Cunningham v. Neagle, 135 U.S. 1, 34 L. Ed. 55, it is
15 entitled to protect those who acted for it and on its behalf
16 in manner and form as they did act, and that those acts,
17 if Your Honors please, so thus done on its behalf in good
18 faith, were the acts of the State, and, as Your Honors
19 recollect, in that case, why, Justice Field was under
20 attack and the Marshal was appointed, and it came to pass
21 that Justice Field, being in that situation that the Marshal
22 was called upon to commit murder --

23 CHIEF JUDGE TUTTLE: At least to kill the
24 assailant.

25 MR. GREEN: -- to kill the assailant, Your Honor,

1 and the question was -- what? Now when he killed the
2 assailant, why, habeas corpus was brought in the court in
3 California, in the State Court, in order to discharge
4 Marshal Neagle from all responsibility to the State of
5 California for the killing, on the ground that Justice Field
6 was an officer of the United States and that he was entitled
7 to the protection of the United States in his person and to
8 the whole United States Army to stand behind him and see
9 that he got protection, and when the State called in ques-
10 tion, with deference, that which it was the duty of the
11 United States to protect, why, it was obligatory upon
12 the United States forthwith to come in and do the needful in
13 the premises.

14 Now in this case, if Your Honors recollect, there
15 are a number of statutes whereunder and whereby the State
16 has assumed to make the acts in this case that were done by
17 those defendants, its action, and to assume to indemnify
18 them against all loss arising therefrom. They have gone to
19 the extent of passing an act whereunder and whereby the
20 property of these parties for judgments of contempt rendered
21 against them so far as the State is concerned are not
22 collectible, and in this connection our viewpoint is that
23 Mr. Barnett and Mr. Johnson stand in precisely the same
24 situation as was the case in the Neagle Case. Now there
25 there was habeas corpus, but here, if Your Honors please,

1 the man is not in actual custody. This Honorable Court is
2 the custodian of the entire litigation where all matters
3 that bear on it and have to do with it are to be determined,
4 and our appeal, therefore, is to the source whence the
5 authority is, and our thought was that in a case of that
6 sort, why, that the State of Mississippi, who is named in
7 the injunction and who is scrambled time and again in it,
8 and Ross Barnett, Governor, and Ross Barnett, the individual,
9 are so severed and divided that you can't tell which is
10 which and what is where, and the net result is that we are
11 anxious, if Your Honors please, to get to the end of that
12 which has stirred up and caused so much trouble, and in
13 order to do it, we are asking, if Your Honors please, that
14 the principals that stand for Barnett and that stand for
15 Johnson shall be heard, in other words, to kind of vouch,
16 to warranty, in the instant matter, and, if need be, why,
17 we will be perfectly willing to let them join in the motion
18 claiming under and through that protection which the State
19 of Mississippi owes to both of them, and, therefore, we are
20 seeking to get to an end of that which has long existed
21 (rather than) to take technical grounds and raise questions
22 of this sort -- why, as, with deference, that which is not
23 appropriate in the premises.

24 Now, if Your Honors please, the other basis on
25 which that motion -- if Your Honors have glanced through the

1 brief that was filed in the case -- the other basis for that
2 motion was this: that the sole jurisdiction, if Your Honors
3 please, viewing us in the same relation that existed here,
4 was as to the admission, admission of the student to the
5 University, that when he applied there, under the law of
6 the State of Mississippi, there were administrative
7 procedures under the Constitution and under the statutes
8 whereby, before he became a student and could have that
9 which he gain would, there had to be administrative rulings,
10 and when those administrative rulings, if Your Honors
11 please, were made, they had under the delegation from the
12 Legislature and from the Constitution and standing as
13 statutes -- little laws, they are called, in the 276th and
14 in another place they are called statutes of the United
15 States. They were not, if Your Honors please, facts in
16 the true sense, and the differentiation, if Your Honors
17 please, between "the facts" and "the law" as delegated is
18 that which makes us think, with deference, that we can in
19 this aspect be properly heard, because, as it stands, the
20 State is, under its duty to protect them, asserting that the
21 very moment that this administrative order was made by the
22 University in its capacity as a corporation, why, that there
23 was set up that which is the predicate whereunder Mr.
24 Barnett and Mr. Johnson became bound automatically --

25 CHIEF JUDGE TUTTLE: Mr. Green, may I ask this

1 question: --

2 MR. GREEN: Yes, sir.

3 CHIEF JUDGE TUTTLE: This premise that you are
4 proceeding on, if that is correct, this argument is really
5 an argument that what this Court did in deciding the
6 appellate case of Meredith against Fair was wrong, that
7 this Court did not have the power or at any rate made an
8 erroneous decision in that case, is that not correct?

9 MR. GREEN: Our contention is if Your Honors
10 treat it as a question of fact whereas under the law of
11 Mississippi it was a question of law whether this Court --

12 CHIEF JUDGE TUTTLE: As far as this Court is
13 concerned, it has decided that question in Meredith against
14 Fair, has it not? Right or wrong, it has decided that
15 question.

16 MR. GREEN: At that time, the State was not a
17 party to that transaction.

18 CHIEF JUDGE TUTTLE: I understand.

19 MR. GREEN: It was not heard on that at all.

20 CHIEF JUDGE TUTTLE: But in order to prevail on
21 this particular argument, you would have to take the basis
22 that our decision was an erroneous decision and should in
23 some way be set aside?

24 MR. GREEN: So far, if Your Honor please, as
25 Barnett and Johnson and the State, they were not parties nor

1 did they litigate those things which were decided at that
2 time, and our viewpoint is that, quoad them, this is res
3 novus, whereas under the Constitution they are entitled to a
4 hearing and to be vouchsafed those things which they would
5 have had had they been parties ab initio.

6 CHIEF JUDGE TUTTLE: Of course, I am sure you are
7 aware of the fact that the Defendants Fair, Et Al., did
8 file a petition for certiorari and that has been denied?

9 MR. GREEN: That has been denied, Your Honor.

10 CHIEF JUDGE TUTTLE: So that that decision by this
11 Court you would say under normal circumstances is now binding
12 on this Court?

13 MR. GREEN: If Your Honor please, there is a
14 second petition there -- and if Your Honor will --

15 CHIEF JUDGE TUTTLE: Is there something still
16 pending there?

17 MR. GREEN: Yes, sir, and in that case, if Your
18 Honor will recollect, when Mr. Justice Black passed on that,
19 he said that he was refusing it on the ground that it was
20 a factual transaction, a question of fact.

21 CHIEF JUDGE TUTTLE: But the Court later -- after
22 Mr. Justice Black's denial of the stay, the Court itself
23 denied certiorari?

24 MR. GREEN: That is perfectly true, Your Honor,
25 but on the basis that the Judge, who said he had consulted

1 everybody about it and who wrote that statement, had passed
2 on the situation, he passed purely when he did on the
3 assumption that the question which I direct Your Honors'
4 attention to wasn't in the case.

5 JUDGE BROWN: Mr. Green, I have two questions.

6 MR. GREEN: Yes, sir.

7 JUDGE BROWN: First, is there any contention made
8 in the papers filed by the State of Mississippi that is not
9 made in the papers filed on behalf of either one or both of
10 the respondents?

11 MR. GREEN: I should answer that question, Your
12 Honor, that there is common ground all the way through.

13 JUDGE BROWN: And, No. 2, am I correct in under-
14 standing that Attorney General Patterson is appearing in
15 his official capacity as counsel for the two respondents?

16 MR. GREEN: Your Honor, he has delegated that
17 duty to me, and he is right here to vouch for me.

18 JUDGE BROWN: Well, I don't mean to question your
19 standing, but I was merely trying to clear up --

20 CHIEF JUDGE TUTTLE: -- that the same counsel do
21 appear?

22 JUDGE BROWN: That the same counsel do appear.

23 MR. GREEN: Same counsel.

24 CHIEF JUDGE TUTTLE: All three -- the State of
25 Mississippi and Barnett and Johnson?

1 MR. GREEN: Yes, Your Honor. The thing runs
2 through the whole thing, and we stand on common ground, and
3 what we were trying to do, if Your Honors please, was as
4 the originator of that whereon Barnett and Johnson stood, to
5 say to Your Honors that as a sovereign state we asked them
6 to do, by our Constitution and law, that which they did do.
7 They did it in a proper manner. When they did it in a
8 proper manner, with deference, under the decisions of
9 Neagle and the cases that follow it, why, we are obligated
10 to defend them to the uttermost, and to do that, why, we
11 come to the fountain source. And that is our proposition.

12 JUDGE BELL: I don't understand the point you are
13 trying to make. Mississippi is not claiming to be a party,
14 as I understand your argument, but claiming to be something
15 like a friend of Barnett and Johnson, or they are the
16 principals, you say?

17 MR. GREEN: Yes, Your Honor.

18 JUDGE BELL: You are claiming Mississippi is a
19 party to this matter?

20 MR. GREEN: Mississippi is named as a party to
21 this matter, yes, sir.

22 JUDGE BELL: Not in this contempt citation?

23 MR. GREEN: I beg your pardon?

24 JUDGE BELL: Not in this immediate proceeding?

25 MR. GREEN: No, it isn't in the immediate pro-

1 ceeding, but, as I say, there is such a potpourri that you
2 can't tell when he is Governor and when he is an individual
3 and when the State. They are all mixed up together in the
4 thing, and the State stands before this Court as the one
5 that is responsible, if Your Honor please, for that which
6 was done in the manner and form as it was done, and says to
7 this Court with confidence -- all that we can present --
8 that its laws were complied with by these two men in manner
9 and form as it would have complied with them had it been an
10 individual and personified instead of an ideal corporation.

11 JUDGE BELL: Well, that precise defense can be
12 made by Governor Barnett and Lieutenant Governor Johnson.
13 It is not necessary for Mississippi to make that defense.
14 You don't have to be a party to make that point. I just
15 don't understand what we are arguing about.

16 JUDGE WISDOM: Mr. Green, is it your position
17 that the State of Mississippi could proceed by habeas
18 corpus, for example, to protect one of its servants should
19 that servant be prosecuted and confined as a result of an
20 act taken on behalf of the State? That is essentially your
21 position, isn't it?

22 MR. GREEN: If Your Honor please, if pursuant to
23 the order that was made back there on September 23rd the
24 Attorney General had taken in charge Mr. Barnett or Barnett
25 and Johnson and had them in the jailhouse, why, our viewpoint

1 is that we could have sued in the State Court on habeas
2 corpus and had them discharged from the custody of the
3 United States on the ground that they were not guilty of any-
4 thing of which this Court had authority to convict them.

5 JUDGE BELL: Or do anything else to protect them,
6 but that doesn't mean you are a party in this proceeding.
7 You can do all those things to protect your servants, but I
8 don't understand why you are arguing that Mississippi has
9 got to be a party or even claim to be a party. I am not
10 talking about the restraining order; I am talking about
11 this contempt proceeding.

12 MR. GREEN: Your Honor, I can't see very well,
13 and my son, who is a member of the Bar, has a statement
14 from the decision, which I ask him please to read.

15 MR. JOSHUA GREEN: If Your Honors please, in
16 the case of Fitts vs. McGehee, 172 U.S. 516, in discussing
17 the Eleventh Amendment --

18 JUDGE WISDOM: That is in your brief?

19 MR. GREEN: No, sir.

20 JUDGE WISDOM: What is the citation?

21 MR. GREEN: Fitts vs. McGehee, 172 U.S. 516, 19
22 Supreme Court, 269, 43 Law Ed. 535.

23 " * * * To secure the manifest
24 purposes of the constitutional exemption
25 guaranteed by the eleventh amendment

1 requires that it should be interpreted,
2 not literally and too narrowly, but
3 fairly, and with such breadth and
4 largeness as effectually to accomplish
5 the substance of its purpose. In this
6 spirit it must be held to cover, not
7 only suits brought against a state by
8 name, but those also against its officers,
9 agents, and representatives, where the
10 state, though not named as such, is,
11 nevertheless, the only real party against
12 which alone in fact the relief is asked,
13 and against which the judgment or decree
14 effectively operates. * * *

15 JUDGE BELL: Then you are claiming that
16 Mississippi is Governor Barnett and Lieutenant Governor
17 Johnson?

18 MR. GARNER GREEN: Yes, sir.

19 JUDGE BELL: That this contempt proceeding is
20 really against the State of Mississippi. That brings in
21 the Constantin case.

22 MR. GREEN: Exactly so, Your Honor.

23 JUDGE BROWN: Are you asking that Mississippi
24 stand the risk of having a sentence imposed against it?

25 MR. GREEN: Yes, Your Honor.

1 JUDGE BROWN: Or a fine?

2 MR. GREEN: Yes, sir. We stand here as the
3 employer who is responsible. If I hired a man to do some-
4 thing and he did just what I told him to do, I would be
5 responsible. The State -- the people have elected Governor
6 Barnett and Lieutenant Governor Johnson to occupy these
7 positions. They have taken those positions. They swore to
8 do that which their conscience dictated; they did, to the
9 best of their ability, that which their conscience dictates,
10 and when they so did, our viewpoint is that it is the duty
11 of the State, if Your Honors please, to be right here and
12 to see, with all the force that we can, that that which
13 they did is recognized as lawful and that they are not
14 castigated as lawbreakers when, with deference, there was
15 nothing further from their intention, and the forms and
16 formalities can be avoided: it is perfectly glad to have
17 the name put there so as the primary and secondary
18 responsibility in that could be made apparent, but the
19 thing that we are trying to do, if Your Honors please, is
20 to fulfill the obligation which we owe to those men when
21 they undertook to do that which we couldn't do because we
22 were an ideal person without power to speak. They spoke
23 for us, and when they said no, we said no, and when that
24 was wrong, if it was wrong under the law, we are here, if
25 Your Honors please, to say to you that we will defend our

1 right to say no, and, if any formalities could change the
2 thing, say, we are perfectly glad to do it. We want to get
3 to the merits, we want to get to the end of the thing, we
4 want to get it out of the papers and out of the discussions
5 which have been had and which have caused so much trouble
6 in the past, and theoretically, if it is strung out this
7 way and that way, why, the future holds no promise of any
8 peace, and what we want, if Your Honors please, is peace
9 from the sole source wherefrom it may move, and I address
10 the Court as that source.

11 CHIEF JUDGE TUTTLE: Is there anything further
12 on behalf of the Government?

13 MR. JAWORSKI: Only this, may it please the Court:
14 I think it should be pointed out in answer to the argument
15 made by Counsel that there were other parties to this
16 injunction proceeding, the injunction that was issued by
17 this Court, other than these two defendants, other than the
18 State of Mississippi. There were many who were made parties
19 to that proceeding, but only these two stand before the
20 Court, the two defendants or respondents, and they alone.
21 They are the only ones that are charged, and the fact that
22 there may have been other parties to the proceeding out of
23 which the injunction issued that was disobeyed by the two
24 who stand charged with having disobeyed, I should say --

25 JUDGE WISDOM: Of course, that is not responsive

1 to Mr. Green's argument.

2 MR. JAWORSKI: Well, I thought---

3 JUDGE WISDOM: -- because his is not merely that
4 there are other parties or even, we'll say, that Mississippi
5 might have been named a party originally. It seems to me
6 his argument is that Mississippi stands here now as, in
7 effect, the employer speaking for its servants.

8 MR. JAWORSKI: He did say that as his last argument
9 Your Honor, but I understood his first point to be that
10 because the State of Mississippi had been a party to the
11 original proceeding --

12 JUDGE WISDOM: I think that was part of it.

13 MR. JAWORSKI: -- that it had a place, yes, and
14 that is the argument I was answering.

15 I would like to also call the Court's attention
16 to the case of Gomers vs. Buck's Stove, which is cited in
17 our Memorandum, and in which it is pointed out by the
18 United States Supreme Court that while proceedings for
19 civil contempt are between the original parties and are
20 instituted and tried as a part of the main cause, on the
21 other hand, proceedings at law for criminal contempt are
22 between the public and the defendant and are not a part of
23 the original cause. So, whatever the original cause may
24 have been, the fact remains that here the charge is lodged
25 against these two defendants and them alone, and we ask the

1 Court to sustain our motion.

2 MR. GREEN: May it please the Court, our friends
3 filed a brief in this case, in the civil case, in which they
4 stated our position, and, frankly, I believe they stated it
5 better, from my viewpoint, than I have been able to state
6 it to the Court. My son will read the statement.

7 MR. JOSHUA GREEN: On pages 26 and 27 of their
8 brief, footnote 5, referring to the ancillary action, said
9 that the suit, although essentially it sought relief against
10 state action and the interference alleged in our petition,
11 although involving other officials, is also state action.
12 They were talking, if Your Honors please, about the petition
13 that they filed for intervention, and they said in their
14 brief and in their petition also that it was state action,
15 and they went on to say --

16 JUDGE BROWN: Can you identify that brief you are
17 reading from a little better?

18 MR. JOSHUA GREEN: If Your Honor please, I do not
19 have it. That is the brief which was filed in Cause No.
20 19,475 on behalf of the United States, and I don't have any-
21 thing other than the page number. It was just labelled
22 "Brief of the United States."

23 JUDGE BROWN: Page what?

24 MR. GREEN: Pages 26 and 27, Footnote 5. I don't
25 have the date -- I am sorry -- I don't think it was dated.

1 It goes on to say -- goes on and talks about "privity,"
2 saying: "At least until most recently original defendants
3 were acting for the state and in a sense for the state
4 officials who were added on September 25th."

5 CHIEF JUDGE TUTTLE: The Court will take a short
6 recess to pass on this motion.

7

8 (Whereupon, a brief recess was taken.)

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10 (REPORTER'S NOTE: The Brief referred
11 to by Counsel was not available to
12 the Reporter for verification of
13 either the direct quotation or the
14 paraphrased portion thereof.)

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1 AFTER THE RECESS:

2 CHIEF JUDGE TUTTLE: The Court considers Mr.
3 Green's response in two alternative manners, that is, first
4 he argues that the State of Mississippi is entitled to
5 appear as a party to the proceeding, and then we understood
6 from his last suggestion that, if any technical steps need
7 be taken to have the position of the State of Mississippi
8 presented to the Court, that we take those or permit him to
9 take those technical steps.

10 The Court appreciates the brief filed on behalf
11 of the State of Mississippi and will consider it carefully.
12 We consider the motion to encompass a request that we permit
13 the State to appear amicus curiae if we do not feel that the
14 State can be made a party to the litigation.

15 The Court by a majority vote has decided that the
16 State of Mississippi cannot be made a party to the litigation,
17 and, therefore, the motion of the Government striking
18 the response of the State of Mississippi will be granted.
19 On the other hand, the Court does grant the right of the
20 State of Mississippi to appear as amicus curiae. We will
21 consider the brief along with all of the other briefs filed,
22 and, if it appears, after all argument has been had on behalf
23 of the Respondents in the proceedings, that there are matters
24 covered in the appearance or the offered appearance by the
25 State of Mississippi that have not been adequately covered

1 by oral arguments as to the named respondents, the Court will
2 then consider a request on behalf of the State of Mississippi
3 as amicus curiae to present orally any matters that its
4 Counsel feel may not already have been adequately covered.

5 Is there any other matter to be stated with
6 respect to this proposition?

7 MR. CLARK: Yes, sir, Your Honor.

8 CHIEF JUDGE TUTTLE: Mr. Clark.

9 MR. CLARK: I simply want to inquire of the Court
10 as to whether the Court would hold that by this ruling the
11 State has not waived its right to claim the Eleventh
12 Amendment protection. I am not sure that the officials of
13 the State can claim it for the State. The State does not
14 desire to waive it, but desires to insist upon its rights
15 under the Eleventh Amendment.

16 CHIEF JUDGE TUTTLE: I think, Mr. Clark, the Court
17 has ruled that the State in this proceeding can't claim any-
18 thing. The Court, of course, has ruled that -- or doesn't
19 have to rule -- that the Respondents can claim for their
20 protection any doctrine, Eleventh Amendment or otherwise,
21 that may appear to them to be appropriate.

22 MR. CLARK: Yes, Your Honor. Waiver was the
23 question that I had in mind.

24 CHIEF JUDGE TUTTLE: The State hasn't waived
25 anything.

1 MR. CLARK: We want the Court to clearly understand
2 that the State claims the Eleventh Amendment. Of course, if
3 the Court overrules the claim, that is --

4 CHIEF JUDGE TUTTLE: Well, of course, the State --
5 if we have ruled incorrectly as to the right of the State to
6 be a party to it, the State may be advised to make some
7 point of that on some appeal, or the Defendants, the
8 Respondents, may have the right. We have entered an order
9 already in which we have stated that nothing filed herein
10 constitutes any waiver of any rights thought to be held by
11 any of the parties.

12 Is there any other matter with respect to the
13 ruling of the Court? (NO RESPONSE)

14 Well, then you may proceed on behalf of the
15 Respondents, urging the various motions filed in their
16 behalf, Mr. Clark.

17 MR. CLARK: May I inquire of Your Honors as to
18 what your desires would be on procedure. Do you desire to
19 take the motions en masse and have a presentation from us,
20 or does the Court desire for us to present the motions
21 separately? I would suggest to Your Honors that a separate
22 presentation might be more desirable. Most of the presenta-
23 tions will be very brief. The presentation with regard to
24 the claim of a right to a grand jury presentment or indict-
25 ment and the trial by jury will be somewhat involved, but I

1 would think that the matters claimed by the Defendants on
2 the other motions could be very briefly presented, and I
3 think that it might be more meaningful to the State if
4 they were presented and then opposed singly as they were
5 filed.

6 CHIEF JUDGE TUTTLE: Does Counsel have any differ-
7 ing view on that?

8 MR. JAWORSKI: Well, may it please the Court,
9 either way would be agreeable with us. It occurs to us
10 though that if the arguments were made at least on all of
11 the motions that they don't consider to be major motions --
12 as I understood Mr. Clark, he limited that to two -- if
13 those could be presented at one time and we argued at one
14 time in response to them, it seems to me that it might
15 facilitate matters as far as the Court is concerned.

16 CHIEF JUDGE TUTTLE: Just one apparent objection,
17 Mr. Clark, to your suggestion that you would have the right
18 to argue and then response and then rebuttal on each of
19 these seven or eight different grounds, my only feeling is
20 that I believe I could retain all that is said during one
21 day, but I will ask my colleagues which way they would
22 rather have it done. I think we have your questions in
23 mind.

24 (Discussion by the Court off the
25 record.)

1 CHIEF JUDGE TUTTLE: The Court has decided, Mr.
2 Clark, to split this in the way that you probably suggested
3 yourself as an alternative. If you will, argue all of the
4 motions with the exception of the motions touching on the
5 right of the Respondents to have a grand jury presentment
6 and jury trial, and then we will let those be argued
7 separately.

8 MR. CLARK: Yes, Your Honor. Shall I proceed now?

9 CHIEF JUDGE TUTTLE: Yes.

10 MR. CLARK: I understand that there is nothing
11 further to be said at this time other than the Court's
12 consideration of the brief already filed in this cause on
13 behalf of the motion and plea of the State of Mississippi,
14 our Second Alternative Motion, and I would call to the
15 Court's attention, if I may, please, that we were directed
16 by the Court's order to make all of our pleadings at one
17 time. We requested the Clerk to consider the pleadings as
18 alternatively filed so that the ones filed later would not
19 be even considered by the Court until the overruling of a
20 previous motion had made their consideration necessary, and
21 with the same indulgence by the Court and subject to the
22 same reservation of rights, I will move now to the first
23 motion filed on behalf of Governor Barnett, which was to
24 dismiss this action for lack of process.

25 We made two points, principally, one, that the

1 process in connection with the injunction itself was
2 improperly served.

3 This matter concerns itself with the meaning of
4 the Eleventh and the Fourteenth Amendments as well as the
5 meaning of the right of a court of appeals or any other
6 inferior federal court as established by Congress to issue
7 its processes across state lines, and by "processes," I
8 mean a summons and the commencement of an action.

9 JUDGE BROWN: Mr. Clark, clear me up: Does this
10 go to the Order to Show Cause issued in this criminal
11 contempt, or are you now talking about the September 25th
12 restraining order?

13 MR. CLARK: The September 25th temporary restrain-
14 ing order, Your Honor, and because the September 25th
15 temporary restraining order was issued as part and parcel of
16 the Meredith suit, I think that it necessarily brings into
17 play the interplay between the Eleventh and the Fourteenth
18 Amendments to the Constitution, and I realize that my
19 presentation now meets head-on some decisions by this Court
20 and by the Supreme Court and by other courts, which indicate
21 that when an official does an act which results in the
22 abridgement or violation of a Fourteenth Amendment right,
23 that he leaves his post as a state official and becomes as
24 any other citizen, so that when sued by the person who feels
25 that his rights are offended, that he cannot say, You are

1 suing the State, so that the State cannot claim the Eleventh
2 Amendment because the power of the Federal Judiciary does not
3 extend to a suit filed by any individual against a sovereign
4 state, and the point that I would make to Your Honors that
5 I don't believe has been adequately considered with regard
6 to the Government's intervention in the Meredith suit, and
7 aside from the question of the statutory right of the
8 Attorney General to assert an individual's rights under
9 the Fourteenth Amendment, the basic action is claimed by
10 the Governor to be a contravention of the Eleventh Amendment
11 for --

12 JUDGE BELL: That is, to make the Government
13 amicus curiae?

14 MR. CLARK: No, sir, Judge Bell. I mean if you
15 are going to issue a temporary restraining order against
16 the Governor of the State of Mississippi.

17 JUDGE BELL: On the application of the amicus?

18 MR. CLARK: Yes, sir, on the application of the
19 amicus.

20 JUDGE BELL: You say that contravenes the
21 Eleventh Amendment?

22 MR. CLARK: To enforce a Fourteenth Amendment
23 right belonging to James Meredith. Then he is in there
24 incorrectly for two basic reasons, and the most basic, and
25 the one that I address myself to now, is that the reason

1 that the injunction issued was because this Court felt that
2 action taken or about to be taken by this Governor and
3 these state officials would contravene the Fourteenth
4 Amendment rights of Meredith. Either they are acting for
5 the State or they are not acting for the State. If they
6 leave the protection of the State and act as individuals,
7 then they have not violated the Fourteenth Amendment rights.

8 CHIEF JUDGE TUTTLE: Is that just a -- does a
9 question arise in that situation by reason of it being the
10 Governor of the State as distinguished from a commissioner
11 of education of a state?

12 MR. CLARK: Judge Tuttle, I see no distinction
13 in my own mind, but I do not think that the research that
14 our office has done has shown that the particular conflict
15 that I argue to you now and urge to you now has ever been
16 properly brought to the Court's attention. I am aware of
17 the decisions that hold when they move into an action that
18 is called discriminatory or ruled discriminatory as a
19 violation of a Fourteenth Amendment right, that the suit
20 against them is not a suit against the state.

21 CHIEF JUDGE TUTTLE: I am thinking of a much broader
22 field of cases that have been decided. Maybe the point was
23 never raised, as you say, but, of course, the Federal Courts
24 have consistently, as proved by this Court, enjoined many
25 State officials by reason of State action that they are

1 charged with having taken. Now would your argument now being
2 made say that all of that action is --

3 MR. CLARK: -- unconstitutional and wrong.

4 CHIEF JUDGE TUTTLE: -- that those decisions are
5 wrong, all of those decisions are wrong?

6 MR. CLARK: Judge, I can't say the decisions are
7 wrong, and I wouldn't contend that to you. I say they would
8 be wrong if the point had been made to the Court that these
9 officials, Barnett and Johnson, do not waive and do strenuous-
10 ly urge to you that you are creating a hiatus --

11 CHIEF JUDGE TUTTLE: You do take the position that,
12 if the point had been raised in those cases --

13 MR. CLARK: -- they ought not --

14 CHIEF JUDGE TUTTLE: -- they could not have been
15 decided as they have been decided?

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

17 CHIEF JUDGE TUTTLE: That, of course, would include,
18 I presume, Brown against Topeka, because that was an action
19 against the City of Topeka, Kansas, which was alleged to be
20 state action.

21 MR. CLARK: Correct, sir.

22 JUDGE WISDOM: Isn't your argument implicit in
23 Ex Parte Young and a whole line of cases?

24 MR. CLARK: You will have to help me, Judge Wisdom.

25 JUDGE WISDOM: That is the one that started them off.

1 That is the first of the cases that held --

2 MR. CLARK: -- that they left the protection of the
3 State and it was not a suit against the State?

4 JUDGE WISDOM: That seems to me to be implicit in
5 any such action.

6 MR. CLARK: I just don't remember the case by name,
7 but I know there is a continuous line of decisions, and I
8 only urge to Your Honors that when you use the line of
9 reasoning that these men have stepped out from under the
10 umbrella of state protection and cannot claim the Eleventh
11 Amendment, then you have, in effect, destroyed the validity
12 of the assertion of the Fourteenth Amendment right, and
13 if Ex Parte Young involved the assertion of a Fourteenth
14 Amendment right, that is bound to be true.

15 JUDGE WISDOM: It seems to me implicit in all those
16 cases that you can't -- in the Faubus case and Bush against
17 Orleans where the amicus curiae secured a restraining order
18 against the Government.

19 JUDGE BELL: A state official doesn't escape the
20 Fourteenth Amendment because he is still operating under the
21 color of state law -- he may be wrongfully operating -- but
22 just because he is doing it wrong doesn't mean he is not
23 doing it under the color of the law. I don't think there is
24 much to that argument.

25 MR. CLARK: I make the point because I do not think

1 it was properly raised in the other cases.

2 JUDGE BELL: You make the point.

3 MR. CLARK: And I think if it had been, the cases
4 should have been decided contradictorily.

5 JUDGE JONES: Including Meredith vs. Fair?

6 MR. CLARK: Yes, sir, and I raise it on behalf of
7 Governor Barnett and Lieutenant Governor Johnson because it
8 was not properly raised in Meredith vs. Fair.

9 JUDGE BROWN: I want to find out what may not be
10 included in this motion. Is the purpose of this motion to
11 dismiss for want of adequate process? Does it attack the
12 actual means or method of service in the State of Mississippi
13 on these two Respondents? In other words, what are we going
14 to have to do, try everybody on it, to know fully what
15 ought to be tried in fact?

16 MR. CLARK: Yes, in a very limited way, Judge Brown.
17 We contend, as we did in the original hearing, that -- Judge
18 Tuttle is correct -- that it is a legal question: who is the
19 marshal of this Court who has the power to serve process
20 and how should that process be served. And, of course, our
21 final point, the question of can a federal court serve a
22 process on the chief executive officer of a state.

23 CHIEF JUDGE TUTTLE: For the purpose of this motion,
24 you are assuming there was done what the return of service
25 shows was done?

1 MR. CLARK: Yes, sir. Now we weren't permitted to
2 argue before. I do want to urge an additional legal ground,
3 and I would say this is strictly a legal argument. I know
4 of no factual differentiation. The question I have in mind
5 is whether any officer can bolster or impeach his return,
6 and had we been permitted to object on the day the testimony
7 was offered about the way service was made, then I would
8 have objected to Mr. McShane testifying that he did something
9 that the return didn't show that he did or doing something
10 in addition to what his return shows he did, or something
11 different. I think when the officer makes his return, that
12 is his speech and he is through.

13 CHIEF JUDGE TUTTLE: The point I think Judge
14 Brown had in mind -- I think we both understand it -- if
15 there is a factual issue as to whether the official did
16 actually do with respect to Barnett what the return says
17 he did, that is available to you to question if the case
18 ultimately comes to trial of the facts.

19 MR. CLARK: Yes, sir, and I would want to reserve
20 that, but, as far as I know now, I make no point with you
21 now that this motion should be sustained because of any fact
22 situation whatsoever, and what I argue to you now is strictly
23 a point of law of the power of the Court to issue the
24 summons, whether it was a valid summons or not, and whether
25 it could be validly served by the people who undertook to

1 serve it.

2 JUDGE BROWN: You would assume though in the
3 normal course of the prosecution of the movant's case, in
4 criminal contempt they would have to show factually that
5 service of process, service of the retraining order, which
6 was disobeyed, had been made in a legal fashion? Or is
7 this something -- the reason I put it this way is that I
8 look upon this as somewhat of a pre-trial.

9 MR. CLARK: Yes, sir.

10 JUDGE BROWN: In the event we decide that the case
11 should go forward, --

12 MR. CLARK: Your Honor, the only --

13 JUDGE BROWN: -- we surely ought not to have any
14 uncertainty as to what has been proved. We have listened
15 to that testimony once. Do we have to listen to it again?
16 We probably do, unless there is --

17 MR. CLARK: Are you thinking now of the right of
18 confrontation?

19 JUDGE BROWN: Yes.

20 MR. CLARK: I don't know what constitutional
21 guarantees my clients have under present decisional law
22 under this action, which has been described by many courts
23 as *sul generis* and by the eminent prosecutor as quasi
24 criminal. I don't know when the Constitution begins to
25 protect us and stops protecting us, but at the present time

1 and for the purpose of the motion, we have no factual
2 dispute to offer to the Court or to urge to the Court, and I
3 only question your use of the word service. I don't know
4 whether it is service or notice that we are interested in
5 so far as the injunction is concerned, but that would be a
6 bridge that we could cross later. I am just urging now that
7 the Court had no power to issue the summons and the Court had
8 no power to issue -- rather to issue the temporary restrain-
9 ing order because of the conflict between the Eleventh and
10 the Fourteenth Amendments, and, secondly, because the legis-
11 lative history of the 1957 Civil Rights Act shows conclusively
12 that Congress was unwilling at that time to vest in the
13 Attorney General of the United States the right to protect
14 anybody's Fourteenth Amendment or Fifteenth Amendment rights.
15 They later decided to protect -- to authorize suits to
16 protect the Fifteenth Amendment rights, but I believe that it
17 is clear from Attorney General Brownell's arguments before
18 Congress that at that time the Attorney General of the
19 United States claimed no right to assert rights of
20 individuals under the Fourteenth Amendment, and I believe
21 that the case of U.S. vs. Alabama and Judge Cameron's
22 opinion touch very closely on the point that I make to the
23 second issue on the service of the temporary restraining
24 order.

25 JUDGE BELL: That is, the Government didn't have

1 the right to ask for the injunction?

2 MR. CLARK: Yes, sir.

3 CHIEF JUDGE TUTTLE: I understood you to say that
4 at this point what you are arguing is that the Government
5 didn't have a right to serve the restraining order. Is
6 this action by the Attorney General that you are attacking?

7 MR. CLARK: Yes, sir, because I think that we
8 have to question -- under service of process on a motion
9 to dismiss, there has to first be a valid process to be
10 served, and this is my point here, that there was never any
11 correct legal paper that was sent by any marshal to be
12 disposed of in any manner.

13 JUDGE BROWN: That is basically not because they
14 failed to do something in a technical way but had done
15 everything they possibly could?

16 MR. CLARK: The paper they had in hand was a
17 nullity.

18 CHIEF JUDGE TUTTLE: Now you are going to tell us
19 why? Why was it a nullity?

20 MR. CLARK: Because of conflict between the
21 Eleventh and the Fourteenth Amendments and because the
22 Attorney General had no right to come in court, amicus
23 curiae or otherwise, and seek an injunction in private
24 litigation.

25 CHIEF JUDGE TUTTLE: But we actually issued

1 restraining orders, one at the behest of the Attorney
2 General acting at our request, and, second, at the behest
3 of Meredith, Plaintiff in the lawsuit.

4 MR. CLARK: Yes, and this is a peculiar thing,
5 Judge. I am confused as to the interpretation the Government
6 has placed upon the order of this Court. The order of this
7 Court was related to the orders issued on the 25th, and
8 everything that the Government claims is in a situation in
9 which the only temporary restraining order they discuss is
10 the one that was obtained on behalf of the Government.

11 CHIEF JUDGE TUTTLE: Let's assume for the sake of
12 discussion that the Government did not have the power to
13 act, as we call it, amicus for this Court --

14 MR. CLARK: Yes, sir.

15 CHIEF JUDGE TUTTLE: -- In requesting temporary
16 restraining order, but that Meredith did, and we thereafter
17 issued a temporary restraining order --

18 MR. CLARK: Yes, sir.

19 CHIEF JUDGE TUTTLE: --which we stated to be in
20 response, if we did, to the Government's request or the
21 Attorney General's request. Would this vitiate this Court's
22 order if it was asked to issue one by Meredith as well as by
23 the United States?

24 MR. CLARK: And did issue both?

25 CHIEF JUDGE TUTTLE: And did issue two restraining

1 orders.

2 MR. CLARK: Then my position with Your Honor would
3 be that the temporary restraining order requested by
4 Meredith, if it could be done under the Eleventh Amendment,--

5 CHIEF JUDGE TUTTLE: I understand.

6 MR. CLARK: -- was a valid order, and that the
7 order issued at the request of Amicus on behalf of the
8 United States, so he claims, would be invalid, and I think
9 it would be a very material distinction for us to settle at
10 this point which temporary restraining order we are talking
11 about, because the Statutes of the United States make a
12 great distinction in your rights.

13 JUDGE BELL: Were they issued the same day?

14 MR. CLARK: Yes, sir.

15 JUDGE BELL: Both restraining orders?

16 MR. CLARK: Yes, sir, and I think that there is a
17 possibility that the original order of this Court could be
18 interpreted to relate to both of them.

19 JUDGE RIVES: As I understand this, the Govern-
20 ment's application for an order requiring Governor Barnett
21 and Lieutenant Governor Johnson to show cause why they
22 should not be held in criminal contempt is predicated on
23 criminal contempt of this Court for wilfully disobeying the
24 temporary restraining order entered on September 25, 1962,
25 in United States against State of Mississippi, et al. The

1 Government has confined itself to the one temporary restrain-
2 ing order issued at the instance of the United States, as
3 I understand it, and this is a separate proceeding under
4 the Gompers Case, and it is confined to the one restraining
5 order, as I read the pleadings.

6 MR. CLARK: And here is my point, Judge Rives:---

7 JUDGE BELL: The Government didn't raise this
8 point; they are not trying to dodge this.

9 MR. CLARK: Yes, sir. I want to know what the
10 Court's final order -- this was the sequence, as I understand
11 it: On November 15th, this Court said to the Government,
12 File criminal contempt proceedings to determine whether
13 either of these people is guilty of criminal contempt of
14 the orders of this Court. The Court didn't say anything
15 other than those words, the orders of this Court. Now I
16 readily admit that the application of the Government is
17 directed solely to the order entered at their behest.

18 JUDGE BELL: The reason you use the plural is
19 the other order involved is a civil contempt order, because
20 that has to do with Paragraph 4 of the notice though to
21 show cause. You see, there are some two orders involved.
22 Nobody has made a point of this. Either we are talking
23 about the amicus order of September 25th --

24 MR. CLARK: The order that this Court entered on
25 the 4th day of January directs us to show cause whether we

1 were in wilful disobedience and defiance of the temporary
2 restraining order of this Court entered on September 25,
3 1962, and that order is not specific as to whether you mean
4 the order entered on behalf of Meredith or the order
5 entered on behalf of the United States, and my only point
6 with the Court is that I think we are entitled at a very
7 early stage in this matter, perhaps before we argue our
8 right to trial by jury, to know procedurally just which
9 order is going to be involved. We wouldn't have the same
10 objections to a basic, legal, valid court order entered on
11 behalf of Meredith as we would to an order entered on
12 behalf of the United States.

13 But, Your Honors, by the same token, if you are
14 claiming contempt or if the Government is claiming contempt
15 of the order entered on behalf of the United States, then
16 we are in a very poor position under 3691, except by the
17 distinctions that we can show the Court, whereas, if it is
18 the Meredith order, then it is an entirely different matter.

19 JUDGE WISDOM: It is my recollection that in
20 United States vs. Raines, which is a voting case, the point
21 was made that you are making, and that the Supreme Court
22 said that the United States was suing in the capacity of
23 guardian of the public interest.

24 MR. CLARK: Yes.

25 JUDGE WISDOM: That was a voting case and not a

1 school case.

2 JUDGE BELL: A right under the statute?

3 JUDGE WISDOM: No, under the Civil Rights Statute
4 of 1957, not 1960.

5 MR. CLARK: Judge, my recollection is that the
6 Attorney General had congressional authority in the Raines
7 case, and I am not prepared to go further with that now,
8 except to say that I know of no statute that has ever raised
9 or has ever granted the Attorney General a right to sue in
10 Fourteenth Amendment cases, and we claim as our second point
11 of invalidity of the basic order, that the Government had
12 no right to come into the Meredith suit. It was not -- the
13 Court was not faced with a litigant who would not protect
14 the Court's order by proceeding in civil contempt.

15 CHIEF JUDGE TUTTLE: The point I was making --
16 this is the point I was making a while ago, and I think it is
17 still a valid point: If Meredith asked for a restraining
18 order and if the Attorney General asked for a restraining
19 order, would the illegality of the Attorney General's act,
20 if it be illegal, void the restraining order this Court
21 issued, even though it purported to issue in response to the
22 request of the Attorney General, since it had before it at
23 the same time a request by a person who could clearly request
24 us to issue that restraining order? Let's assume, in other
25 words, that the restraining order we are talking about is the

1 one requested by the Government, and let's assume that the
2 Government had no power to request it, as you are now
3 arguing --

4 MR. CLARK: Yes, sir.

5 CHIEF JUDGE TUTTLE: -- but the Court also before
6 it has a request by Meredith to issue a restraining order.
7 Would the fact that it issued or selected the language that
8 was suggested by the Attorney General to put in the restrain-
9 ing order make its restraining order a void order under
10 those circumstances?

11 MR. CLARK: Perhaps not, Judge, but I would want
12 you to consider, sir, that if that had been done, it would
13 have been Meredith's order.

14 CHIEF JUDGE TUTTLE: Well, --

15 MR. CLARK: Even though it had been cast in the
16 language suggested to you by the United States, it would
17 have been Meredith's order and would have put an entirely
18 different complexion on the matter.

19 CHIEF JUDGE TUTTLE: I get the point you are mak-
20 ing there. At that point, nothing would be done at the
21 behest of the United States Government.

22 MR. CLARK: In name of or behalf of the United
23 States, in proceeding to prosecute by them. We don't think
24 there was anyway, but certainly it would have been as clear as
25 a bell in your suggestion.

1 CHIEF JUDGE TUTTLE: It then would still be in the
2 case, the question of whether this proceeding for criminal
3 contempt is or is not brought by or on behalf of the United
4 States?

5 MR. CLARK: I would say if Your Honor's point
6 there would prevail, that it would take the other completely
7 out. I don't think there would be any chance that the
8 Government could then contend that Meredith's order, which
9 only Meredith had a right to get, was their order simply
10 because the Court had granted it on the same day that they
11 requested it.

12 JUDGE JONES: Couldn't the Court grant an order
13 without the motion of either Meredith or the United States,
14 an order to carry out the --

15 MR. CLARK: In civil contempt, Judge, I think that
16 the matter is completely within the discretion of the Court.

17 JUDGE JONES: What about the restraining order?

18 CHIEF JUDGE TUTTLE: It is the restraining order
19 he is talking about.

20 MR. CLARK: Oh, that is what I mean. Oh, pardon
21 me. The restraining order.

22 JUDGE JONES: Doesn't the Court have the power to
23 grant a restraining order to prevent the violation of its
24 own orders or decrees, even though it is not expressly
25 requested?

1 MR. CLARK: This gets into another phase of the
2 argument.

3 JUDGE JONES: Well, you --

4 MR. CLARK: There is a statute that clearly covers
5 any violation of an order of court or obstruction of an
6 order of court, and there is a question in my mind as to
7 whether the Court would be acting validly in presuming
8 before anything had been done that that statute of the
9 United States would be violated and thereby a criminal
10 act would be committed, and on that basis, on its own
11 motion, issue an injunction against something that has not
12 yet happened that would be a crime. That is the difficulty
13 I have in answering your reasoning. I don't have any other
14 answer for it other than what I have just told you.

15 JUDGE BELL: When the Governor of the State gets
16 on television and makes a speech which is printed in the
17 newspapers all over the United States that he is interposing
18 the power of the State of Mississippi against the power of
19 the Court, that the orders of the Court will not be carried
20 out in Mississippi, it seems to me that the Court would have
21 a right then to do something to get its order carried out. It
22 is not supposed to just give up and say, Well, we have been
23 interposed, we are out of business now. And if the Court
24 has got a right to issue orders, temporary restraining
25 orders, against people interfering with their court order,

1 then this whole argument you are making falls of its own
2 weight. It is bound to be included in the greater power
3 of the Court. It wouldn't make any difference who got the
4 order, the Government or whoever got it. It would be
5 included in the greater overall power of the Court to see
6 that its orders are carried out.

7 JUDGE WISDOM: Exactly the Fautus Case.

8 MR. CLARK: I don't question at all the power of
9 this Court under Section 1651 -- power under 1651 to issue a
10 temporary restraining order, but, as I understand, you have
11 taken me now a step further than that and say, Can the
12 Court issue this type of an order under 1651 in aid of its
13 jurisdiction, and this was for your determination as to
14 whether it was in aid of your jurisdiction or not, and, of
15 course, you know we raised many points with regard to the
16 fact that this Court could not rely on 1651 at that juncture
17 of the Meredith suit.

18 JUDGE BELL: Well, we ruled on that one time.

19 MR. CLARK: Yes, sir, in the Meredith Case.

20 JUDGE BELL: We also ruled on it in the civil
21 contempt proceeding, didn't we?

22 MR. CLARK: Yes, sir.

23 JUDGE BELL: -- which was ancillary to the Meredith
24 Case.

25 MR. CLARK: You now ask me whether the Court could

1 under 1651 or inherent powers or ancillary proceedings or
2 in some other way of its own initiative enjoin an act
3 before it had been done. I would say that in --

4 JUDGE BELL: When it was imminent.

5 MR. CLARK: In the imminence. Well, that is
6 certainly a part of it all.

7 JUDGE BELL: Yes.

8 MR. CLARK: And I don't think that your quotation
9 from the speech of the Governor is 100 percent accurate.

10 JUDGE BELL: I didn't mean to -- I was giving it
11 generally.

12 MR. CLARK: You gave your reaction or the
13 reaction that it had on you, and I would say that the ques-
14 tion of imminence of it ought to go to the parties. This
15 was a private litigation, and therein ends my contention
16 with regard to that.

17 JUDGE BROWN: Now this thing -- you didn't raise
18 this in the motion as such, but this is -- there is a
19 perfectly valid point you have to make, and that is to know
20 which of the two, or both, restraining orders of September
21 2nd you are charged with wilfully disobeying.

22 MR. CLARK: Yes, sir, and, Judge, I would disagree
23 with you. We made the point that no valid service of the
24 temporary restraining order issued on September 25th in
25 19,475 has ever been made on Governor Barnett and Lieutenant

1 Governor Johnson, and my point with you, the legal point
2 that supports that, is that document itself was a nullity,
3 the restraining order was a nullity, and, therefore, the
4 attempted service of it amounted to nothing.

5 The second point is that in this new, original
6 proceeding -- and I will try not to be as lengthy on the
7 other argument, because I know you want to move along -- we
8 say that the Court has no original jurisdiction and what
9 has happened here is that the Court has started an original
10 proceeding.

11 JUDGE BROWN: Where did the word original come
12 from? I don't see it on anything except papers that have
13 been filed on behalf of the Respondents. The Clerk never
14 called it --

15 MR. CLARK: It had to be original.

16 JUDGE BROWN: It had to be numbered, that is all.

17 MR. CLARK: It had to be original and separate
18 action. How can a separate action in this Court be anything
19 but an original action? It has a separate number -- 20,240
20 was never appealed to this Court from anywhere.

21 CHIEF JUDGE TUTTLE: You are speaking of the contempt
22 proceeding itself as being original?

23 MR. CLARK: Yes.

24 CHIEF JUDGE TUTTLE: You are saying we have no
25 power to start a criminal contempt proceeding?

1 MR. CLARK: Yes.

2 JUDGE BROWN: That is independent of the Fifth
3 Amendment, the Sixth Amendment, the Seventh Amendment,
4 Grand Jury indictments, and everything?

5 MR. CLARK: Yes, Your Honor.

6 JUDGE BROWN: That would apply to the Supreme Court
7 too?

8 MR. CLARK: No, sir, no, sir. If Your Honors
9 please, with deference to the Court, you are creatures of
10 statute, you have limited jurisdiction, and, just as Judge
11 Tuttle pointed out, in a General Motors or General
12 Acceptance Corporation decision, this Court only can do what
13 the statutes of Congress give you the jurisdiction and
14 authority to do.

15 CHIEF JUDGE TUTTLE: Plus those things that may
16 be inherent in every court.

17 MR. CLARK: Yes, Your Honor.

18 CHIEF JUDGE TUTTLE: -- which include possibly
19 the right to punish for contempt.

20 MR. CLARK: You have got your 1291 through 1294
21 statutes that establish jurisdiction in you of an appellate
22 nature, and certainly 1591 establishes a type of jurisdiction
23 in this court in aid of its principal jurisdiction, and then
24 there is the question that has been in the court system of
25 the United States since Seventeen --

1 CHIEF JUDGE TUTTLE: -- Eighty-One.

2 JUDGE BELL: -- Eighty-Nine.

3 CHIEF JUDGE TUTTLE: -- when the Hudson Case was
4 decided, but the Hudson Case was the first case I know of
5 where the Supreme Court of the United States said a court
6 has inherent power to punish for contempt, that it doesn't
7 have to have statutory jurisdiction.

8 JUDGE BROWN: While we say, and Gompers says, that
9 criminal contempt is created as a separate matter, isn't
10 it perfectly evident from everything you have had to say,
11 everything Mr. Green had to say, everything Mr. Jaworski had
12 to say so far that we do not divorce ourselves entirely from
13 the antecedent case, 19,475, and it is a part of this pro-
14 ceeding to the extent that either one or both of the parties
15 may be part of it? The best illustration is that our
16 order to the Government of November 15th bore the former
17 title, and yet the application of the United States
18 Government of December -- whatever it was -- bore the old
19 number. The first paper that bears the new number is the
20 Order to Show Cause as though it just came out of the blue,
21 and we all know that is not so.

22 MR. CLARK: Of course, we complained that the
23 action of the Government --

24 JUDGE BROWN: Just put all the papers in. That is
25 the thing to do, I think.

1 MR. CLARK: You directed the Government, as I
2 understand it, to institute proceedings, and they came along
3 and instituted them in 19,475. I make the point that it had
4 to be, under Gompers had to be a new and independent proceed-
5 ing. It had to be exactly what any other criminal trial
6 ever is in the courts of the United States. It is a proceed-
7 ing in which the United States says to a person that it
8 thinks is guilty of a crime, You have done something wrong
9 and we are going to try you for that wrong.

10 JUDGE RIVES: You say there is no statutory
11 authority in the Court of Appeals to have such a new and
12 independent proceeding?

13 MR. CLARK: Yes, sir.

14 JUDGE RIVES: Now why doesn't Section 401 of
15 Title 18, when it says "a court of the United States shall
16 have power to punish by fine or imprisonment, at its
17 discretion, contempt," why isn't that statutory authority?

18 MR. CLARK: I would estimate it would take me
19 five minutes to answer the question. May I pretermit it
20 until the argument on jury trial comes? I think it is very
21 important that Your Honors consider the statutory history
22 of where 401 came from and what 401 means and what the
23 Constitution means on top of it all, but I just want to be
24 sure that the Court understands that insofar as the proceed-
25 ings in criminal contempt in 20,240 are concerned and the