

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COUNCIL OF FEDERATED ORGANIZATIONS,
et al.,

Petitioners-Appellants,

-versus-

L. A. RAINEY, et al.,

Defendants-Respondents.

STATE OF NEW YORK)
 (ss.:
COUNTY OF NEW YORK)

WILLIAM M. KUNSTLER, being duly sworn, deposes
and says:

1. I am one of the attorneys for the petitioners and am fully familiar with the details of the within action which is an action for a permanent and temporary injunction restraining the respondents from conspiring to utilize or utilizing force, violence or any terroristic act to deter, impede or punish the petitioners and all classes of citizens they represent from exercising their rights, privileges and immunities as citizens of the United States, and to require the appointment of United States Commissioners for every county of the State of Mississippi to insure the protection of the petitioners and all classes of citizens they represent. I am submitting this affidavit in support of petitioners' application for emergency relief.

2. The verified complaint herein, a copy of which is attached hereto, was duly filed on July 10, 1964 in the court below (Exhibit A). The following day, Chief Judge William Harold Cox, on the complaint alone, issued an order to show cause returnable before District Judge Sidney Mize in Meridian, Mississippi, on July 23, 1964, why temporary relief should not be granted. Said order is attached herewith (Exhibit B).

3. Prior to the Meridian hearing, petitioners subpoenaed some thirteen persons, including the Sheriff and Deputy Sheriff of Neshoba County, prepared voluminous documentary evidence and arranged for the presence in court of some nineteen voluntary witnesses.

4. On or about July 21, 1964, petitioners were served with a motion to quash the service of process on behalf of respondent WHITE CITIZENS COUNCILS OF MISSISSIPPI on the ground that there was no such organization. A copy of said motion is attached hereto (Exhibit C).

5. At the commencement of the hearing on July 23, 1964, petitioners were served with motions to dismiss and answers on behalf of respondents RAINEY, PRICE AND BIRDSONG, copies of which are attached hereto (Exhibits D, E, and F) as well as motions by GWIN COLE, a subpoenaed witness, to quash the subpoena and to require the petitioners to show probable cause for the production of certain records. (Exhibits G and H).

6. Despite petitioners' insistence that the only issue pending before him was the application for a temporary injunction set forth in the order to show cause, and over their strenuous objections, the District Judge adjourned the hearing until July 30, 1964, in Hattiesburg, Mississippi, in order to hear argument on the motions to dismiss. Prior to the close of the hearing, petitioners served and filed a motion for a temporary restraining order (Exhibit I), and an affidavit of ROBERT WEIL together with exhibits thereto in support of said motion (Exhibit J), which were marked as Plaintiffs' Exhibit No. 1 (P-1). No decision on said motion was rendered by the District Judge.

7. The District Judge also stated that the first order of business at the Hattiesburg hearing would be argument on the motions of respondents RAINEY, PRICE and BIRDSONG to dismiss the complaint.

8. In announcing the adjournment of the hearing, the District Judge stated that he did not believe that he would take live testimony in Hattiesburg if the affidavits there submitted would be sufficient to furnish a basis for decision. Petitioners objected strenuously to this ruling but the court adhered to it. However, it was clearly understood that should the affidavits prove insufficient for an equitable decision, live testimony would then be taken.

9. At the close of the hearing, counsel for the respondents asked the District Judge to order the three petitioners who had verified the complaint to be present and available in Hattiesburg as possible adverse witnesses for the defense. Although petitioners insisted that these three persons be subpoenaed, the District Judge ordered them to be present in Hattiesburg on July 30, 1964, for this purpose.

10. In view of the fact that all of the three persons concerned are civil rights workers serving the Council of Federated Organizations (COFO) in important capacities, that they work in Jackson, which is less than two hours by car from Hattiesburg and that they would not be needed, if at all, until the close of petitioners' case and after argument on the motions to dismiss, they remained in Jackson prepared to journey to Hattiesburg in ample time to be present when required.

11. This decision was further occasioned by the fact that the District Judge had made it quite clear that the issue as to whether there would be any live testimony at all would not be decided by him until (a) he had heard argument and decided

respondents' motions to dismiss the complaint; and (b) he had read the affidavits and come to the conclusion that he needed live testimony in order to arrive at an equitable decision.

12. The District Judge, who had, without notice, excused one of petitioners' key witnesses, MINNIE HERRING, the wife of the Neshoba County jailer, at their request ordered the other subpoenaed witnesses to appear in Hattiesburg on July 30. He also agreed that petitioners would be given an opportunity to take MRS. HERRING's deposition at some time in the future. Every indication was that a full hearing on all motions before him would be held by the District Judge and that on July 30 petitioners would have ample opportunity to respond to the motions to dismiss.

13. In view of the District Judge's ruling regarding affidavits, petitioners assembled almost two hundred affidavits from deponents throughout the State of Mississippi, reproduced sufficient copies thereof, and appeared in Hattiesburg prepared to submit them, as directed. In addition, petitioners' live witnesses were present when court opened at 9:00 a.m. on July 30th. Three of petitioners' subpoenaed witnesses were not present, one having been excused by petitioners, one by the District Judge (Mrs. Herring) and the other absent for alleged medical reasons.

14. Because petitioners had amended their complaint to include the correct name of respondent "WHITE CITIZENS COUNCILS OF MISSISSIPPI" as "ASSOCIATION OF CITIZENS COUNCILS OF MISSISSIPPI" (Exhibit K), the attorney for said organization had previously informed your deponent that he would withdraw his motion to quash and interpose a motion to dismiss similar to those previously interposed by respondents RAINEY, PRICE and BIRDSONG. This was done in Hattiesburg on July 30 (Exhibit L).

15. At the beginning of the Hattiesburg hearing, H. L. ROSENTHAL, resident counsel for petitioners, routinely asked the District Judge to admit ARTHUR KINOY, one of their attorneys and a member of the bar of this Court, for the purposes of this case, only. The District Judge deferred his decision on this request. He then stated that he had received a letter from the National Lawyers Guild, a bar association which has no connection whatsoever with the instant litigation. The letter, a portion of which he read aloud, consisted of congratulations to the bench and bar of Mississippi because of the recent resolution of the Mississippi State Bar Association recommending that its members accept civil rights cases notwithstanding their own personal views about such cases.

16. The District Judge then stated, to the utter bewilderment of the attorneys for the petitioners, that because of this letter he was interested in investigating out-of-state lawyers who were then practicing in Mississippi. He thereupon asked your deponent to stand and proceeded to interrogate him as to how many cases he had handled in the Northern and Southern Districts of Mississippi. Your deponent stated that he had been involved in between six and twelve cases in the Southern and perhaps one in the Northern District. The District Judge thereupon stated that he was appointing two of the respondents' attorneys, including the lawyer for the ASSOCIATION OF CITIZENS COUNCILS OF MISSISSIPPI, as a committee apparently to investigate petitioners' out-of-state counsel. Neither the scope of said investigation, its purpose, nor its objective was made clear to petitioners' attorneys who objected to the entire procedure.

17. Although it was impossible to determine the relevancy of this inquiry, the District Judge said that he was going to insist that your deponent take the stand and testify as to his legal activities in the State of Mississippi.

18. Your deponent did not take the stand because the attorney for respondents RAINEY, PRICE and BIRDSONG interrupted and said that he had another matter to bring to the court's attention. This was an alleged failure of the three petitioners who had verified the complaint to be present in court. Because of this alleged failure of three petitioners, he moved under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the entire complaint as against all eighteen petitioners and the six classes they represent. The attorneys for respondent ASSOCIATION OF CITIZENS COUNCILS OF MISSISSIPPI promptly joined in said motion.

19. Previously, the reasons for the absence of the three petitioners concerned at that moment and their/^{immediate}availability when required in the courtroom had been explained to the District Judge. Initially, the District Judge maintained that he had wanted the three petitioners before him in order to ascertain whether a bond for costs would be required. However, the reading of the transcript of the Meridian hearing in open court revealed that he was mistaken and that the presence of the three petitioners was the last order of business thereat and was totally unrelated to the question of a bond for costs. In fact, one of respondents' attorneys had warned petitioners that respondents intended to serve and file a motion for costs before the Hattiesburg hearing and no mention whatsoever of the desirability of the presence of the three petitioners had been made in connection with that warning. Furthermore, no such motion for a bond was ever served and filed by defendants, making it perfectly clear that respondents had abandoned that point.

20. Moreover, one of respondents' attorneys stated in open court that the sole reason for his request that the three petitioners be present in Hattiesburg was in order to be called as adverse witnesses for the respondents on their direct case.

21. At the conclusion of the aforementioned colloquies about out-of-state lawyers and the temporary non-appearance of three petitioners, the District Judge announced that he was dismissing the complaint as to all petitioners, individually and as representative of their classes, on two grounds, namely: (1) pursuant to Rule 41(b); and (2) because the complaint failed to state a cause of action. His order to this effect is attached herewith as Exhibit L'. Petitioners thereupon stated to the District Judge that they intended to appeal to this Court. The District Judge then acknowledged that the record would indicate that an oral Notice of Appeal had been filed and that he had certified the appeal as being without merit.

22. Because there had been no oral argument as to whether the complaint stated a cause of action or not, and in view of the very limited argument permitted by the District Judge as to the applicability of Rule 41(b), your deponent vigorously complained that his clients had been denied their day in court and that there had been no hearing granted to them. It was pointed out that the District Judge had not followed his own procedure as outlined in Meridian and that, in effect, the complaint had been dismissed without even the most rudimentary type of a hearing or the submission of briefs by any party or the opportunity to be heard orally or in writing.

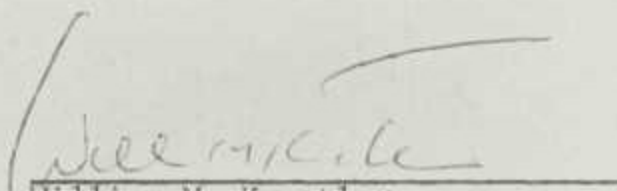
23. Because of the fact that no hearing was permitted by the District Judge, petitioners were unable to proffer the affidavits which they had obtained pursuant to his instructions in Meridian (Exhibits M to M), or to place their voluntary and subpoenaed witnesses upon the stand. In addition, they were unable to submit an amended motion for a temporary restraining order (Exhibit N), and an offer of proof in the event live testimony of the subpoenaed witnesses were not permitted (Exhibit O).

24. This Court will take judicial notice that violence against civil rights workers and Negroes in Mississippi is a daily occurrence. More than a dozen Negro churches have been burned since the summer volunteers entered the state. There have been unprovoked beatings of Negroes and civil rights workers by both the police and civilians; Negro homes and civil rights headquarters have been bombed; and the bodies of three young civil rights workers who disappeared on June 21, 1964, have just been discovered in Neshoba County. Shortly after the dismissal of this action, another church was burned and a minister and a civil rights worker who had sought medical attention for the latter, were brutally beaten in a physician's office. The discovery of the three bodies is tragic proof of the seriousness of the overt acts in the conspiracy charged in this complaint. The need for immediate protection was never more obvious and it should not require the termination of more lives, the injury of more people or the destruction of more property to bring about whatever relief the federal courts can afford and which the Congress, in enacting 42 U.S.C. 1989, clearly intended them to afford.

This bill, passed over President Johnson's veto in 1866, was, as Senator Trumbull, its floor manager explained, intended to afford "reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color... and to the prompt discharge of the duties of the act, it is to be the duty of the circuit courts ... from time to time, to increase the number of commissioners so as to afford a speedy and convenient means for the arrest and examination of persons charged with violation of the act." (underscoring supplied) Congressional Globe, January 12, 1866, at Page 211.

The measure of our democracy is its ability to respond to urgent need -- and the need was never more urgent than it is today in the State of Mississippi. Unless this Court acts now and affords these petitioners a day in court on their serious complaint, a reasonable opportunity to invoke judicial remedies designed to alleviate just such a situation of widespread violence will be lost and the federal forum which Congress has provided for citizens who attempt to secure for themselves or others the protections and guarantees of the Constitution and laws of the United States will be completely closed down.

WHEREFORE petitioners request that the emergency relief prayed for in their application be granted and for such other and further relief as to this Court may seem necessary or equitable in the premises.


William M. Kunstler

Sworn to before me this

5th day of August, 1964.

