OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MISSOURI, ET AL., Petitioners v. KALIMA JENKINS, ET AL.

CASE NO: 88-1150

PLACE: WASHINGTON, D.C.

DATE: October 30, 1989

PAGES: 1 - 52

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

MISSOURI, ET AL., :

Petitioners :

v. : No. 88-1150

KALIMA JENKINS, ET AL. :

Washington, D.C.

Monday, October 30, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

H. BARTON FARR, III, ESQ., Washington, D.C.; on behalf of the Petitioners.

ALLEN R. SNYDER, ESQ., Washington, D.C.; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 88-1150, Missouri v. Kalima Jenkins. Mr. Farr?

ORAL ARGUMENT OF H. BARTON FARR, III

ON BEHALF OF THE PETITIONERS

MR. FARR: Thank you, Mr. Chief Justice. May it please the Court:

The issues in this case are important ones regarding the nature and extent of federal judicial power. The Eighth Circuit has held that a federal court, in seeking to remedy a constitutional violation, can give higher authority for state taxes than state law allows, and it further has held that the district court properly exercised that authority in this case.

We think that the court of appeals was wrong on both counts. In our view, a federal court can't authorize a government to tax its citizens without its consent, and it certainly can't do so without showing that no other remedy and no other means of financing is available.

Now, before turning to the merits, I'd like to spend a few minutes on the issue of jurisdiction in this Court. The basic issue seems to us pretty straightforward: did the court of appeals treat our rehearing petition, which sought en banc review, as a petition for rehearing as well as one for en

banc?

If it did, and several circuits have made an express practice of treating petitions this way, then it seems clear to us that under the rules the time for seeking review in this Court was tolled until after the petition was denied.

Now, the Eighth Circuit has said itself how it treated this particular petition. In an order that it entered nunc pro tunc it said that it had denied petitions for rehearing with suggestions for rehearing en banc, and it corrected its earlier order to reflect that fact.

QUESTION: Mr. Farr, we occasionally run into a situation here where a court of appeals or a state court will enter a judgment nunc pro tunc where the Petitioner has had his time for certiorari expire just so that the person will be able to petition in what they think is a timely manner. This would be somewhat disturbing, I think, if there were any thought that the court of appeals had just kind of given a break to your client.

MR. FARR: Well, Your Honor, I don't think there's any reason to treat the order in that particular way for a couple of reasons.

First of all, there's certainly nothing on the face of the order or anything that it suggests that it is simply doing that as an accommodation to the parties.

Secondly, it is in fact the regular practice of the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Eighth Circuit to treat petitions for rehearing en banc as petitions for rehearing with suggestions for rehearing en banc, just as several other circuits do, as I say, express a --

QUESTION: A regular practice?

MR. FARR: I'm sorry?

QUESTION: A regular practice?

MR. FARR: That is what we understand from the clerk's office, that this is a practice that was instituted well before the petition was filed in this case and that the court of appeals does follow, and it is -- our understanding is the only reason it was not followed in this case was simply a matter of inadvertence in the clerk's office.

QUESTION: So there are no instances in which that was not done?

MR. FARR: Your Honor, I can't certainly say that I know of no instances in which it was not done. All I can say is that I do understand that from a period of time beginning, I believe, sometime in 1987, that the court has been following this practice as a general matter and they have --

QUESTION: The Eighth Circuit has no rule to that effect, does it?

MR. FARR: It does not have an express rule to that effect, no.

QUESTION: Was there anything in the petition for

rehearing en banc that indicated that it was intended to serve both purposes?

MR. FARR: No, Your Honor, there was not. Now, I would say, though, I don't think that in any sense the court of appeals are or should be limited by what is specifically asked for in the petition.

As I say, in these other circuits which do have it as an express matter of rule, there is no requirement that, in order for the rule to come into play, you actually have to have said, I would like rehearing from the panel, in the process of applying for rehearing at all. They simply have decided as a matter of internal court business that that would be the more flexible way to deal with these, in fact, I think to eliminate some of the confusion that has arisen out of problems like this one.

QUESTION: The petition -- it used the word rehearing.

MR. FARR: I'm sorry?

QUESTION: It used the word rehearing, at least.

MR. FARR: Our particular petition did, yes.

QUESTION: It didn't say just a suggestion.

MR. FARR: That's correct.

QUESTION: It said rehearing.

MR. FARR: It used the word rehearing specifically, that's correct.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Mr. Farr, did you say our clerk's office treats this as a permissible practice?

MR. FARR: Just when -- I'm sorry if I wasn't clear. It's the Eighth Circuit's clerk's office that I was talking about.

QUESTION: Oh, I see.

MR. FARR: What they have informed us, just once again, is that when a petition is filed, even if it is entitled Petition for Rehearing en Banc, it has become the regular practice of the Eighth Circuit to treat that as a petition for rehearing with a suggestion for en banc. And what the court did, therefore, in its order -- its amended order -- was simply to --

QUESTION: But didn't you say they treat it as tolling the time when you're --

MR. FARR: Well, if a petition for rehearing is filed, that does toll the time under this Court's rules.

QUESTION: If it's a petition for rehearing by the panel.

MR. FARR: Well, in fact, the court's rules state a petition for rehearing. They don't specifically specify the panel, but I think that is at least --

QUESTION: But that's what it means.

MR. FARR: That is my understanding of what it means --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: And the practice of this Court, I assume, is to treat both a suggestion for rehearing, or a petition for rehearing en banc, as not tolling the time?

MR. FARR: Your Honor, my understanding is that the practice in this Court is that if the court of appeals issues an order and says, we have essentially treated this only as a suggestion for a rehearing en banc, this Court has not taken that to toll the time.

But again, I would like to go back and say that is not what the Eighth Circuit has done here. The Eighth Circuit has said, we have treated this as a petition for rehearing with a suggestion for rehearing.

QUESTION: Well, but that was by a nunc pro tunc order which perhaps it didn't have any authority to enter. I mean, if there wasn't any jurisdiction they can't come in later and create it by that kind of an order.

MR. FARR: Your Honor, I don't know of anything that would prevent a court of appeals, certainly before this Court has ruled on a petition, from saying we have made a mistake in the form of our order, or the order should have read differently from the particular order that was entered and we would like to correct that order and to reflect it. That seems to me fully within the power of the court of appeals.

QUESTION: Yes, but when it comes here, we have to determine whether the petition to us was timely or not.

MR. FARR: Well, that's correct, Your Honor. There's no question, this Court has to determine whether to give effect to the order of the Eighth Circuit or not. I'm not saying that -- that that is not an issue before the Court.

What I am saying, though, is that there is no good reason not to give effect to the order of the Eighth Circuit, because it is reflecting its practice, and what the Eighth Circuit says, at least in its order, was in fact what it did in this case, and I don't think there's any reason to second-guess the Eighth Circuit on that.

One other point I would make, at least as some independent evidence to suggest that the Eighth Circuit is not engaging in some sort of device or sham, here, is what happened with the mandate.

Under the rules of -- the federal Appellate Procedure Rule 35, the mandate would not automatically be stayed simply by a petition or suggestion for rehearing en banc. But there's no question, in this case, that the mandate was automatically stayed.

There is no order staying that, but the mandate did not issue until after the petition was denied, so we think that what the court's order says is consistent with, in fact, the way the court showed it treated the petition at the time the petition was filed.

Now, turning to the merits, as I have said, the case

involves questions first about whether federal courts can ever give authority for higher state taxes and, second, whether they could do so here. And these questions involve, I think, some common issues about just what judicial power is and how it ought to be exercised.

I begin with what I think are two relatively uncontroversial propositions. First of all, that the federal courts do have broad remedial powers to correct for constitutional violations.

The second point, however, is that that power is subject to limitation, in particular, limitations that are drawn from the Constitution itself. And these limitations can be of different kinds.

For example, they can be absolute limitations, ones that completely bar the use of judicial power in a particular circumstance, or they can be more flexible. They can be limitations that allow the courts to exercise power but require the courts to take account of other important institutional interests.

Now, for example, in the first category I think a federal court simply could not tell a senator or a congressman to refrain from activities which are protected under the speech and debate clause, and in fact the Court so held in Eastland v. U.S.S.F in 421 U.S. Nor do we think a federal court could tell the President that it had to appoint a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

particular Cabinet official. Sovereign immunity, where it applies, can be an absolute barrier to relief.

But then there are other doctrines which fall under the second category, doctrines like comity and judicial restraint, which -- which do require the courts to give weight to other branches of government or, in the case of comity, to state and local governments.

It's simply not correct, therefore, as a starting point for this discussion, to say that a federal court can always bring about a particular result, or should always bring about a particular result in a case before it, and indeed, the particular case cited by the Eighth Circuit for the idea that courts generally must have the power to carry out their particular orders is Marbury v. Madison, a case in which this Court held that it did not have the power under Article 3 to give the relief that the litigants sought.

Now, what has happened in this particular case is that the courts below have ventured into new ground. We believe for the first time ever, a federal court has authorized a government to assess and levy taxes that its citizens haven't authorized.

There seem to be some very good reasons, and I will discuss them, why this power may be absolutely beyond the reach of the federal courts.

QUESTION: As the case comes to us, then, we --

we're dealing with an -- an authorization by a court to a local body to levy a tax, rather than -- rather than the court itself purporting to, itself to tax?

MR. FARR: Your Honor, I have stated it that way because first of all I don't think it makes any difference which of the two it is. I think they're both improper, but just to save quibbling over it, I think what in fact happened is that the district court ordered the school district to levy the tax. The Eighth Circuit then essentially said well, we will authorize, we will change this slightly so that we will authorize the school district to levy the tax. There is no question, however, that if the school district said, now that we've been authorized to levy the tax, we've decided not to levy it, that an order would be forthcoming, at least under the way the courts below have treated it to date. So I think that the authorization is in fact one that is backed up by the order.

QUESTION: Are you talking about the future or the one year, '91-'92? I thought there was some difference in the order for the future and for the one year?

MR. FARR: Well, the -- there certainly was an order that applied before -- to a tax year before the court of appeals got involved, that's correct, Justice O'Connor. After that what they're saying is, we'll follow a -- simply a different procedure, where we authorize the district --

QUESTION: Do we not have at issue the levy for '91-'92? That's not --

MR. FARR: I'm sorry?

QUESTION: The levy for '91-'92 is not before us, then?

MR. FARR: Well, I think that the order runs to not just the particular levy that the court had ordered, but indeed, the order to set levies in the future, so I --I would think all of them --

QUESTION: But do we have both questions before us, or do we not?

MR. FARR: I believe that both questions are before you, Justice O'Connor.

QUESTION: And for at least for one year, the --the court below ordered the tax --

MR. FARR: That's correct.

QUESTION: -- to go into effect --

MR. FARR: That's my understanding.

QUESTION: -- and for the future authorized the board to levy the increased tax?

MR. FARR: That's correct.

QUESTION: Mr. Farr, is the district court following the modifications that the Eighth Circuit put on?

MR. FARR: Is the district court following --

QUESTION: Yes.

MR. FARR: It will. What the parties by agreement, Your Honor, said for this particular tax year, we would not go through that particular process because the case was pending in this Court, but there's certainly no question, I think, that the district court intends to follow that.

QUESTION: And what alternative did the court below have? How was it going to achieve what it had determined had to be achieved in the absence of the money?

MR. FARR: Well, Your Honor, I think the question is -- if I understand it -- how would it achieve it in the absence of the tax? Now, I think there are two questions there. First of all, if you simply isolate the funding, and as I will say, we don't think that's the correct thing to do, but if you simply isolate the funding, then we think the court should have addressed the question of whether it would have been less intrusive, as we believe it is, to simply put all of the funding responsibility on the defendants jointly.

We think, although that obviously does have an effect on the state, that that is a less intrusive use of judicial power.

QUESTION: Well, are they -- are the state and the school district jointly and severally liable here?

MR. FARR: There is some dispute about that in the lower court, but some of the orders clearly read that way, Your Honor, yes, they do.

QUESTION: Well, let's assume they are jointly and severally liable, what could the court have done, just order the state to pay it all?

MR. FARR: Your Honor, we think that would have been a less intrusive form of financing if the question came to that. Now, I want to make clear, our position here is that that is not the only alternative that the court --

QUESTION: But it is one alternative?

MR. FARR: That is one alternative, that's correct. We believe there is another alternative, however; the court, if it was going to increase the burden of the state, should have examined whether it was possible to reach the constitutional goal by means that didn't put such an enormous burden.

But -- so I think both of those should be considered. But we do think one of them would be the possibility of saying that the state, as the sovereign body, would be responsible for seeing that the financing was obtained.

QUESTION: Well, what -- what is there in the record that indicates the court did not consider those less intrusive alternatives?

MR. FARR: Well, Your Honor, we believe that there is simply -- the record will stand on its own, that there is no adequate discussion by the court of looking at and

rejecting the various alternatives that we are talking about. I mean --

QUESTION: Now, when you're talking about alternatives, are you talking about alternatives to the substantive provision of -- provisions of his order, or just funding?

MR. FARR: What we are -- essentially, what we are talking about is both, Your Honor. Because I don't think that they can be taken, one from the other, at least in our view of how the court ought to exercise power.

What we think should happen is that a court, in -- in putting together remedies, must be aware, from the beginning, of the particular financing concerns that are being caused by the remedy. And if you look just very briefly at the history here, from the very first order, remedial order, in June of 1985, the court indicated that the school district was going to have difficulty raising really any significant funding to contribute to the remedy.

The very next year, however, the court, with only the very briefest conclusory discussion of cost, adopted, at the urging of the school district itself, an experimental remedial program, which went well beyond any remedial program ever ordered in a school desegregation case.

Ten months after that, when the school district had come back in, in the meantime, and said, we don't have the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

funding for that order, the court issued another unprecedented order in a facilities -- you know, on facilities programming, to -- to impose another hundred of millions of dollars in -- in liability on the defendants, again, with only the briefest discussion of the cost. [Inaudible] --

QUESTION: So your position is that before this -- the district court can either order a tax or order the state to pay for funding, it must make a finding on the record that there are no remedies or alternatives other than the ones that it is adopting that are sufficient to meet the remedial objectives that the court has decreed?

MR. FARR: That's correct, Your Honor. We think that is the process. We're -- we're not saying that -- that there's a specific result that we're asking for here. Obviously, that is something that the court would be required to determine itself. But in terms of the process, we believe that that is something that, in exercising equitable powers, and -- and let me stress again, I'm assuming at the moment we're -- that there is an -- a power to tax somewhere at the end of this, but before exercising any equitable powers that put these unusual burdens on, the court should engage in just that sort of analysis, and make proper findings.

And --

QUESTION: Did the state help out the court by making a lot of suggestions as to how it might have been done

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

differently?

MR. FARR: Your Honor, we did. We made suggestions at -- at every stage. Now, the court didn't accept --

QUESTION: Including how the money could be raised? I'm not talking about the -- the -- the nature of the remedy, I'm talking about how to fund the remedy. Did the state come in and say, why don't you put it all on the state, Your Honor? That -- then -- then there wouldn't be any problem.

MR. FARR: We did not say that, Your Honor, because --

QUESTION: But you're saying it now.

MR. FARR: What we are saying is that we believe that is an alternative that is preferable to ordering the tax. And that in terms of looking at how judicial power is exercised, that that would be less intrusive than the order to tax, even assuming that the power to tax exists at all. But --

QUESTION: Mr. Franken -- I'm sorry, had you finished your answer? I --

MR. FARR: Yes, Your Honor.

QUESTION: No, I just want to say, it's a little dog in the manger, isn't it? To not propose that below, and then come in and say, he should have laid it all on us.

MR. FARR: Well, Your Honor, what we have said, and what we, in fact, are saying here is that we think that should

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

be considered in conjunction with a look at the remedy itself, to determine whether all of the funds are needed. That that is the full exercise of equitable power that we are asking the court to examine.

We are not even here suggesting that the proper result is simply to say, let's ignore whether these costs are absolutely necessary or ignore the burdens they may put on a particular defendant, just let's shift the money around. That's not our position in this court, and that was not our position in the courts below.

QUESTION: May I just ask this? If we just confine our attention for a moment to the question we granted cert on, you -- you'll recall we limited the grant to the question of power. On that issue, isn't it clear that the position you're advocating is against the best interests of your client?

MR. FARR: Your Honor,

QUESTION: It puzzles me --

MR. FARR: -- it's only against the best interests of the client if two assumptions are made. First of all, that the court will not consider in exercise -- the issue of exercise of power as to how it properly should be determined -

-

QUESTION: Well, I'm assuming we just -- just answered the question we granted cert to decide -- the question of power.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. FARR: Well, Your Honor, let me say -- and I'll come back to it, that I -- that I think that what I'm talking about is fairly encompassed within the question the court did grant, but the other assumption, of course, that has to be made is that the only interest of the state is the financial one. And I think that's not true. That there is a question here both of the sort of sovereignty of the state and its state laws, and essentially the commission that the state has from its people.

And I think that is the thing that is so troubling about an order that involves the power to tax is that, in this particular case, what it says to the state is -- or says to the school district -- you have authority now from the court itself to levy a tax that the citizens have not given you authority to levy -- in fact, it specifically denied you the authority to levy.

And the idea of taxation without representation, which is of course a catchy slogan, but I think it's something more than that, too. I think it's rooted in the idea that the power to take property from citizens -- the government's power to take that property is -- is exercised through elected representatives and not through courts, unless there is individual adjudications, which of course we don't have here.

So, the -- that is the principle that the state does believe is one that is -- is worth preserving and that its

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

laws simply shouldn't be set aside because the court feels that that would be a more convenient way of achieving its goal.

QUESTION: Well, Mr. Farr, your argument makes it sound like what you're saying is there's no power to tax because it's too expensive -- this program is too expensive.

MR. FARR: Your Honor, the -- the --

QUESTION: Is that what you're urging?

MR. FARR: Well, I've -- I've jumped around, and let me make clear that there are two different points that I'm urging. The first is that there is no power to tax, period. That federal courts simply don't have the power to say to a legislative body or a school district, whatever, the people have not given you this authority, but I, as a federal judge -- - [inaudible] --

QUESTION: Even if there is no other alternative to remedy --

MR. FARR: That ultimately would --

QUESTION: -- desegregation order?

MR. FARR: That ultimately would be the burden of our position, although, I would point out, of course, that in desegregation litigation, that has not proved generally necessary. The courts have been able to find remedies that will work and be effective without a tax. But logically that's -- that is the ultimate extent. But that is of course

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the logical point that one gets to any time one puts any limits on judicial power.

One can always look at a -- the particular exercise of power and say, if there weren't limits on these powers, we could quash the subpoena that the House subcommittee has issued, for example, which may infringe somebody's rights. That is -- so that is why you only obviously limit judicial power when the institutional considerations are of extreme importance. But we think they are of extreme importance in this particular case.

So that's the first point that we are making, that that power simply does not exist in federal courts, even, as you posit, in the most extreme case.

The second question, though, the second point we are putting, is that as an exercise of power, of equity and comity, that this is not the extreme case. If anything, it's the extreme case the other way, that the court essentially put itself into this whole and then said, having gotten into it, that there were only two ways to extricate itself, the tax and perhaps levying it all on the state. And we don't believe that that process should be looked at once the hole is dug.

Now I would say one -- one more word about power. I have made the point, I think, that the power, in and of itself, is an extraordinary power, but I think it can't just be viewed in isolation. I think the other thing that this

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

claim of power does is it concentrates, in the federal court, a range of powers that are really quite extraordinary, beginning with the power to declare what the Constitution means -- the power, of course, that everybody concedes -- to the power to issue orders for particular programs, orders that require state and local officials or federal officials, in some cases, to comply and implement those programs, and ultimately, now, the ability of the courts to try to go out and get the citizens to support these programs beyond the power that they have already given to their elected representatives.

That is a concentration, I believe, that is well beyond the idea of judicial power that is embodied in article three, which anticipated that courts obviously would have important power, but that power would be distributed, not just among the courts themselves, but among and -- and between other branches of government.

QUESTION: Well, Mr. Farr, let's assume that the school board or the local officials could have levied this tax under state law, that they had the power to do it. Could the court order them to enact a certain tax?

MR. FARR: That -- I am not sure of the answer to that question, Justice White.

QUESTION: Well --

MR. FARR: I think that it involves some of the --

the precise concerns that I'm talking about. It's still ultimately --

QUESTION: Well, I know, but part of your argument must be -- you say it's a job of the elected representatives to pass taxes, pass tax laws. And so I -- I would think from your argument you would answer the question, no --

MR. FARR: Well --

QUESTION: -- you cannot order the -- the authorities to pass a tax, even if you -- even if -- even if they have the power to do it.

MR. FARR: I think that is basically the position that I would take.

QUESTION: Well, I thought so.

MR. FARR: Let me at least explain what I see as the difference between the two. At least in that case, the citizens have authorized the legislature, or the school district, to impose those taxes on them. They have gone that far. Now I think the place where I have trouble with that exercise of judicial power is I think that people did that on the expectation that the legislature would, in fact, do it in its own judgment.

QUESTION: Well, would you say that -- would you say that the -- the federal court would be out of bounds if it said, well, we realize that there is this limitation on the local authority's taxing power, but we're going to declare

that unconstitutional because it's a -- it inhibits a -- what is a absolutely necessary remedy? We need some money for this remedy. So, that we are going to disregard that limitation on the grounds that it's unconstitutional.

MR. FARR: I -- I would think that's beyond the power of the court. If -- if it is unconstitutional --

QUESTION: Why? Why?

MR. FARR: If it is unconstitutional in and of itself, of course, if --

QUESTION: Well, what if it -- what if the -- what if the state just had a -- just had a rule on the books, you -- you shall have no power ever to comply with a court order? Can't you declare that unconstitutional?

MR. FARR: I think you can declare that unconstitutional.

QUESTION: Well, here's a limitation that absolutely inhibits a proper remedy for a constitutional violation.

MR. FARR: But I don't think -- Justice White, I don't think you can simply lump all limitations together. That's the thing. I think you have to look at the effect of what the court is doing. Virtually any order could be characterized in some way as simply striking down a particular limiting power. If that was true, then -- then judicial power would essentially be unlimited.

I think you have to look at what the effect of the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

order is. And if the effect of the order is to say, we're striking down a limitation on the power of the representatives of the people to obtain money from the people, that, in fact, is a tax levied under the authority of the courts. Whether it's characterized that way or not, that's what it is. And that's what we think the courts can't do.

Your Honor, if I could, I'd save the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Farr.

Mr. Snyder, we'll hear now from you.

ORAL ARGUMENT OF ALLEN R. SNYDER

ON BEHALF OF THE RESPONDENTS

MR. SNYDER: Mr. Chief Justice, and may it please the Court:

If this Court finds that it has jurisdiction in this case, and we believe there is a very serious question on that which I would like to address first, but the fundamental issue on the merits of the case is whether the court below properly exercised its power, its discretion and, we believe, its responsibility to ensure the implementation and the funding of the remedy determined by the court to be necessary to correct a clearly proven constitutional violation.

Now, turning first to the jurisdictional issue, we think that the clerk of this Court was correct in his initial determination that the 90-day statutory time limit for filing

petitions for writ of certiorari had run before any petition was filed and, thus, that there was a jurisdictional bar from this Court considering the case.

The state now relies basically on the nunc pro tunc order that was issued just a very few days after this clerk's -- this Court's clerk's determination, where the Eighth Circuit declared that it had denied petitions for rehearing and petitions for rehearing en banc.

This Court, in the Credit Company v. Arkansas Central Railway case, stated clearly that jurisdiction in this Court cannot be created by an order of a lower court or by a nunc pro tunc determination. The fact is, the very plain fact is that the state did not file a petition for rehearing below.

QUESTION: May I ask right there, supposing at the time the Eighth Circuit initially denied the petition for rehearing en banc, it had said the petition for rehearing and the suggestion for rehearing en banc are both denied, basically what they said in the nunc (inaudible). Say they had said that the first time.

What would your view of the case be then?

MR. SNYDER: Well, it obviously would be a more difficult case for us. But I would suggest that the language of this Court's Rule 20.4 makes this jurisdictional question turn not on what a lower court characterizes but, rather, the language of the rule says that the timely filing of a petition for

rehearing tolls the -- the time for review.

If the state had filed a timely petition for rehearing regardless of how it was characterized, we would concede that the time -- the time would be tolled even -- even regardless of the phrasing of the Eighth Circuit's rule.

QUESTION: But surely it's up to the Eighth Circuit what it takes before the Eighth Circuit to file a petition for rehearing.

MR. SNYDER: Justice Scalia --

QUESTION: Could the Eighth Circuit if it wished -- indeed, haven't some other circuits done so explicitly, said that when you file a petition for rehearing en banc, it shall be deemed to be a petition for rehearing with suggestion for rehearing en banc?

MR. SNYDER: Justice Scalia, we agree that a circuit court can do that and is certainly free to treat the petitions in any way it wishes.

First of all, I think there is a serious question whether in that way it can extend this Court's jurisdiction when the rule of this Court talks in terms of whether the parties have filed a timely petition for rehearing. But we really do not need to reach that question here, because, first of all, the Eighth Circuit did not -- does not have such a rule, as other circuits do.

Second of all, the -- the Eighth Circuit's opinion, even

its nunc pro tunc opinion, contrary to the suggestion of counsel, the nunc pro tunc opinion did not say we have elected to treat this petition as if it were a petition for rehearing by the panel. It simply said we have in front of us a petition for rehearing.

We have copied verbatim at page 489 of the joint appendix the entire petition for rehearing en banc that was filed by the state. I would respectfully suggest that that is not only entitled petition for rehearing en banc but, as counsel has essentially acknowledged this morning, it was in -- in form and in substance in every other way a petition for rehearing en banc which is actually the title used by the Eighth Circuit in its rules to describe an en banc petition. Some --

QUESTION: Mr. Snyder --

MR. SNYDER: -- circuits refer to them as suggestions.

QUESTION: Mr. Snyder, it's not only counsel who says that that's wrong but it's the Eighth Circuit. You're -- you're really -- you're really saying that despite the presence of some evidence to the contrary -- and I would think the failure of the Eighth Circuit to issue the mandate immediately is -- is substantial evidence that it didn't make up this view of the matter afterwards. Despite that evidence, we should say the Eighth Circuit was essentially lying when it said this is how we -- how we regarded this thing, now isn't that?

MR. SNYDER: Well --

QUESTION: You know, I -- I'm prepared to do that where -- where there is a lot of evidence to that effect, but --

(Laughter.)

MR. SNYDER: Justice Scalia, I do not suggest that; however, I do suggest that, first of all, the failure of the mandate to issue does not, in our view, indicate that the court was treating this as a petition for rehearing. In fact, we cited the United States v. Samuels case as an example of a case where the Eighth Circuit has held up a mandate because a judge was considering en banc treatment.

And so the circuit courts have the power to hold the mandate whether or not a rehearing petition has been filed.

QUESTION: Would the circuit court have had the authority during the pendency of this petition to amend the panel opinion? Suppose three judges of the panel had -- had thought it appropriate or -- or prudent to amend their opinion? Could they have done it?

MR. SNYDER: Justice Kennedy, yes. I think they can amend the panel opinion sua sponte or based on a petition, and a new panel opinion would be a new judgment. And under the language of the statute and of this Court's rules, a new judgment provides 90 days for a new cert petition.

However, if a party is relying on the timely filing of a petition for rehearing to toll the time and the judgment

hasn't been changed, there's no new judgment, we submit that the issue is whether a petition for rehearing was filed; and just as in the Credit Company v. Arkansas Central Railway case, I believe the fact is that the Eighth Circuit's opinion does not accurately describe what's at page 489 of the joint appendix. And I think that the state has in essence acknowledged that they did not file what they intended to be a petition for rehearing by the panel.

Now the question of whether the Eighth Circuit has a pattern and a practice and a regular custom of so treating it that might have lulled a party into filing something different or thinking as if there were a local rule that this would be treated differently, the state in its main brief cited as its principal support for the proposition that the Eighth Circuit has a regular practice the McDonnell Douglas case and said that that and other cases suggest this is how the Eighth Circuit treats all of these matters.

We responded in our brief by citing two published decisions that we found, and most of these rulings on en banc petitions, I believe, are unpublished. But we found two published decisions from 1985 where en banc petitions were denied and were labeled en banc petitions without any suggestion that they were treated or otherwise denominated as panel rehearing decisions.

In its reply brief, the state has come back in footnote 2

and says, "We are advised" that this practice of the Eighth Circuit that is not written anywhere -- it's not in its rules -- is more recent than 1985.

Well, there are two problems, we would submit, with this argument. First is that the McDonnell Douglas case on which they initially relied was a 1973 decision, and so we are surprised now to hear that the practice is allegedly more recent.

But more fundamentally, we do not believe that this Court's jurisdiction can or should rest on what counsel may or may not be advised by unknown persons and unknown details. There is nothing in the Eighth Circuit's rules or its internal operating procedures or any of its opinions that suggest that this is a standard practice.

We, frankly, do not know whether this is a practice that is more commonly used than not, or less commonly. We just don't know. And I believe that this Court should not have a policy of allowing jurisdiction by anecdote. I think the jurisdictional rules should be clearly written and should be interpreted and implemented in a way that the parties and the lower courts can know what they mean and can be governed accordingly.

QUESTION: You say, then, that unless there's a rule like there is in some other circuits, a practice uniformly followed by the circuit but not confided to rule, is not sufficient?

MR. SNYDER: I believe it would not be sufficient, Mr. Chief Justice, particularly because this Court I think is not in a good position to engage in evidentiary hearings or proceedings to try to determine what the practices might be.

The best evidence of such a practice if a circuit court wishes to adopt it is to put it in the rules, which would allow the parties to know when their time was running and when it wasn't; and not only the parties filing the petition but, hopefully, the parties who might be opposing the petition would like to know when the case is final.

Now turning, if I may, to the -- the merits of the argument here, the state's position comes down basically to the bald suggestion that in at least some cases the federal courts simply lack the power to ensure that constitutionally-required remedies are implemented and funded. We believe that that position is without any precedent in this Court's jurisprudence and is dangerously wrong.

Counsel referred to Marbury v. Madison, which was in fact cited below, and one can go back as far as Marbury v. Madison and find where Chief Justice Marshall, at page 163 of that decision, said, and I quote, "The government of the United States has been emphatically termed a government of laws and not of men. It would cease to deserve this high accolation if the laws failed to furnish a remedy for a clearly vested" -- "for the violation of a clearly vested legal

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

right."

I think since Marbury v. Madison, it's been understood that the federal courts, once they accept jurisdiction of a case and have the power to hear the case and find a violation of the Constitution, have the power and have the duty to use their equitable discretion to find and to be sure that it is implemented, a remedy for that violation.

QUESTION: Why use the Constitution, Mr. Snyder? I assume it's just as bad for the state to violate a federal law. Indeed, when a state violates a federal law it's violating the Constitution, the Supremacy Clause.

So I -- I suppose you would say the same thing for -- for any violation of a law.

MR. SNYDER: Justice Scalia, I think -- I think that is the -- the implication of my position. I think the argument is stronger in the context of the kind of violation we have here, but I agree under the Supremacy Clause there should be a remedy for any violation of federal law.

We would acknowledge that in exercising the lower court's discretion and power, they should look to questions and issues of comity and of federalism and equitable principles. We agree that those should be considered in fashioning the appropriate remedies.

QUESTION: Suppose, Mr. Snyder, there -- there are a large number of people who are violating the federal law, a

really large number, and the courts' marshals can't possibly stop the violation, and the court says, you know, what I really need is an army and, you know, it tells the executive, the federal executive, this situation is out of control, they're violating federal law, and the executive, for -- for whatever reason, declines to use federal troops.

Now, do you think the Court has the power in -- in that situation, since it must stop the violation, to requisition the state national guard and direct it in -- in -- in battle?

MR. SNYDER: No. I think, Justice Scalia, that would be an inappropriate use of the Court's discretion --

QUESTION: I'm not talking about inappropriate. I'm talking -- never mind discretion. Does it have the power?

MR. SNYDER: I think as a matter of pure power --

QUESTION: It does.

MR. SNYDER: -- the Court is required to find the appropriate constitutional remedy.

Now there may be a -- there may be a possibility such as the one you posit, Justice Scalia, where a particular remedy or maybe even the only remedy would be unworkable or beyond any realistic limits.

In Lemon v. Kurtzman, which the state cites, and in some of the cases we cite --

QUESTION: No, I'm just talking about power. I'm just talking about power. Let's assume that it's practicable.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Does the Court have the power to do --

MR. SNYDER: If it is -- yes, if it is practicable.

Now I do think the questions of practicability, the courts -- this Court and -- and the courts low -- lower courts, have talked about equitable discretion being limited by principles of workability, practicability, feasibility, and I submit that the hypothetical that's been suggested of raising an army is not a feasible, practical, workable solution.

But I believe the courts have the power to find, if it is at all possible, a feasible and practical remedy for constitutional --

QUESTION: Well -- well, notice that -- that in the Little Rock incident, the President called out the troops, and I assume the President and Congress are here to assist the -- this federal court if it finds that Missouri is in violation of the Constitution and the federal court cannot correct it.

MR. SNYDER: I would hope that the -- the legislative and executive branches would cooperate with --

QUESTION: Well, so then it's not -- so then it's not necessarily a case where there's no other remedy.

MR. SNYDER: Well, in this case, turning to whether here there was any other remedy, it is absolutely true that in the courts below there were two possible remedies -- two possible

approaches to funding this remedy that were considered. The state has acknowledged that. The lower courts refer to it.

One possibility was to enjoin the provisions of the state law that otherwise prevented the school board from exercising the taxing power that it has. That was one option, and that's what the Eighth Circuit did. It did not directly levy a tax of its own. It enjoined a state law which prevented the local government from acting to -- to meet the constitutional duty.

QUESTION: Well, it certainly did more than that, at least for one year, did it not?

MR. SNYDER: The district court --

QUESTION: The district court did more than that.

MR. SNYDER: Yes, I agree that the district court, the way it phrased its order, it phrased it as implementing the tax order. The Eighth Circuit on review --

QUESTION: Has the district court ever implemented that order to increase the property tax levy to $4?

MR. SNYDER: The district court order was initially implemented prior to the Eighth Circuit's ruling. The Eighth Circuit on review -- and it's the Eighth Circuit's judgment, I would submit, that's here before this court for review -- the Eighth Circuit modified the district court's ruling to the extent that it said that the appropriate way to deal with this problem rather than directly calling for the tax was to enjoin

the state law that prevented the board from doing it. It is that order --

QUESTION: Well, for the future., I thought it left in place at least one or two years of levy.

MR. SNYDER: The levy had been in place prior to the Eighth Circuit's ruling, and the Eighth Circuit did not try to apply its ruling retroactively, keeping in mind that the practical effect of the Eighth Circuit's ruling was to -- likely still to allow for a tax.

QUESTION: So, the Eighth Circuit did not disapprove what had happened before. It left that in place, which included a levy at the rate of $4?

MR. SNYDER: Yes, it did leave the levy in place that --

QUESTION: Excuse me, I though that they affirmed that. They say we affirm the actions that the district court has taken to this point.

MR. SNYDER: Yes, Justice White.

QUESTION: And then modified the procedure for the future.

MR. SNYDER: For the future as of the day of that opinion.

QUESTION: So, they affirmed, expressly affirmed, that additional levy for those years.

MR. SNYDER: They affirmed the levy that had been in

place up to the date of the Court of Appeals opinion --

QUESTION: Yes.

MR. SNYDER: -- which had been about one year. And then --

QUESTION: All right. And as to that could the district court instead have ordered the state to pay all the costs?

MR. SNYDER: That is the second option to which I was referring. It was considered by the lower court, and we believe it is inappropriate at this stage for the state to be totally switching its position on that issue because in the district court when a motion was filed that raised the question of which of these options should be pursued, the state -- and we've included this in the joint appendix in toto -- the state filed pleadings that said that they recognized that under some circumstances the lower courts might have the authority to order a school district to implement a tax, or to be allowed to implement a tax, and that the state wasn't really taking a position in the district court on whether this was an appropriate case.

QUESTION: Well, the state's change of position, then and now, is not a very attractive posture, certainly, but that doesn't answer the legal question that we have to answer.

Now, should the district court have used this other alternative and ordered the state to pick up the entire cost

and thereby not have had to impose an actual tax levy at the local level --

MR. SNYDER: No --

QUESTION: -- that violated Missouri law?

MR. SNYDER: No, Justice O'Connor. In the circumstances here, we think the district court acted properly because we think that the principles of comity and federalism and equitable discretion require the district judge to look at the circumstances before him which included the positions of the parties.

Comity and federalism call for the courts -- they are not bars to the power of a court. They are practical and equitable considerations that a court should weigh, and they call upon the court particularly to look at the interests of the governmental defendants here --

QUESTION: But do you see no difference in levying an actual tax than to finding other means of paying the costs of such an order?

MR. SNYDER: Oh, I certainly agree, Justice O'Connor, there's a difference, and if the parties' positions had been different below, I think the equitable balance and the comity issues might have come out differently.

The fact is that the elected school board felt that it was appropriate for the citizens of Kansas City to pay a portion of the remedy here. The state --

QUESTION: But -- but -- am I not right, Mr. Snyder, that state law did not authorize them to levy this sort of a tax?

MR. SNYDER: That's basically correct, Mr. Chief Justice. It did authorize exactly this kind of a tax except that it had a limitation that it required a vote of the citizens of the district after the vote by the representatives.

QUESTION: Well, that's a condition to the exercise of --

MR. SNYDER: Absolutely.

QUESTION: -- of the taxing power.

MR. SNYDER: Absolutely.

QUESTION: And the citizens --

QUESTION: Just a minute. Is there any suggestion that this particular limitation was enacted to frustrate desegregation?

MR. SNYDER: No, Mr. Chief Justice. There is nothing in the record to suggest that.

We do believe, however, that cases like North Carolina v. Swann and other cases from this court suggest that if a state law has the effect of preventing the implementation of a constitutionally required remedy, to that extent, the state law can be overridden.

QUESTION: But if you have a state law saying that

students in school shall be segregated by race, it's one thing to override that sort of a law by saying that is -- that is itself unconstitutional. But it seems to me it's another thing to say that students shall not be segregated by race. This school district at one time did segregate them by race. We're now trying to find a remedy for that and get out into the area of how -- how municipal corporations raise money.

MR. SNYDER: Well, Mr. Chief Justice, I do not believe this court's cases limit the statutes that can be stricken where they interfere with the implementation of a remedy to those that are an independent constitutional violation, and I would cite, for example, Washington versus Fishing Vessel Association which we cited in our brief, where perfectly neutral state law provisions had the effect in that case of preventing the implementation of the remedy the court had already ordered was the right remedy.

And this court said that even seemingly neutral state laws, if they have the practical effect of stopping implementation of a constitutionally required remedy, can be overridden.

In this case, the state in the district court said that the one issue it cared the most about with regard to the funding was that the state felt it was wholly inappropriate for the state to pay any more money than it had already been ordered to pay, and it objected to joint and several liability

or any other basis for the state to pay part of the costs that otherwise the district would have to bear.

The district court, exercising his discretion in looking at principles of comity, saw that both governmental defendants, in essence, were agreed in saying that an order that allowed the school district to pay its share of the remedy allowed the citizens of the district to contribute when it had been found guilty of a constitutional violation as well, that that was the most appropriate remedy where both -- all the parties agreed that that was preferable to what the state now is saying should have been done below.

QUESTION: Well, counsel, in -- in any event, I take it you concede that this is a highly intrusive remedy.

MR. SNYDER: Yes.

QUESTION: This is a drastic remedy.

MR. SNYDER: It is an unusual remedy, Justice.

QUESTION: All right.

Wouldn't it make sense for this court to say that before such a remedy can be adopted, the district court must make an explicit finding that the remedy it seeks to fund in this way is the most reasonable and the most feasible, and perhaps the only essential way to implement the court's ultimate decree?

MR. SNYDER: Yes, I think that's a reasonable requirement, and it was met then.

QUESTION: And that was not done here.

MR. SNYDER: It was met here. I think if you read the opinions below, each of the remedial orders made explicit findings that this remedial decree was, "necessary" to cure the specific constitutional violations that were found, citing this court's Milliken versus Bradley, the need to tailor the remedy to the violation.

QUESTION: But we, of course, don't have question one on the cert petition before us, and I'm concerned that that puts the question here in a very abstract form.

MR. SNYDER: Well, it does. It does, I believe, place us in a position where we have a final determination that the lower courts appropriately tailored this remedy to the violations found, and we think they did. What -- they cited the appropriate legal standards, Milliken versus Bradley and other cases, in each of those cases.

QUESTION: But that's just not borne out by the record. It doesn't seem to me that there is an explicit finding that the substantial funding requirements here are essential to implementing the court's ultimate objective.

MR. SNYDER: Well, the word that was used repeatedly by the lower court is not essential. I believe the word was necessary, but I think it means basically the same thing.

And the lower court, starting in 1985, repeatedly recognized that it would be expensive to fund the remedy that

was needed for the very serious constitutional violations here.

QUESTION: Well, of course, in McCulloch versus Maryland, we said necessary means appropriate.

MR. SNYDER: Well, I think in the context that the district court used the word necessary, after citing Milliken versus Bradley, and finding that each of the provisions here was necessary to cure the constitutional violations, I believe the context suggests he was trying essentially to say that he found it essential.

QUESTION: Mr. Snyder, do we --we --I mean, do we really -- can we really believe that from this record? I mean -- it -- it is the case that half of the -- half of the elementary schools are magnet schools, and every single one of the secondary and high schools have been made magnet schools?

MR. SNYDER: Yes, sir.

QUESTION: One of them bought a farm so that it could specialize in farming. That -- that -- that was in the order.

A portion of the order rejected the state's claim that you didn't need so much money for painting and for repairing carpets because you could just paint the portions of the schools that needed repainting, and the court said no, that would -- that would not give a -- an adequate visual attractiveness that you -- you have to replace all of the

carpeting and paint the entire building.

And you think that all of this on its face represents a determination that this was essential to -- to cure the constitutional violation, so essential that we're going to raise taxes when the people don't vote for it?

MR. SNYDER: I do, and I recognize that this court, not having in front of it the full record -- after cert was denied, we've not transmitted all as part of the record here everything that went into those remedial determinations, and we have not briefed that issue, but I do believe that the record shows that the constitutional violations here were particularly pernicious and, in fact, resulted in the Kansas City school district becoming a 74 percent minority district because of the actions of the state and at an earlier stage the, the local officials, and that the only way to reverse what had occurred on this record was to try to make the -- to bring the quality of the schools up to where they would have been but for the violation and to try to attract back into the schools the people who were driven out of them.

QUESTION: Is it necessary to gold plate every school in order to achieve that result? If there is no way to get people to come back into the Kansas City schools except to make them all golden, the court could lay a tax for that.

MR. SNYDER: Well, obviously I find that hypothetical difficult to accept, but accepting that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

hypothetical --

QUESTION: Well, I -- you know --

MR. SNYDER: -- I would say, Justice Scalia, that the principle that I suggested earlier of feasibility and practicability and workability should be the limit on the court's discretion.

It would not, I submit, be feasible or practicable to gold plate all the schools.

QUESTION: All right.

MR. SNYDER: However, we think it is feasible to do what the court below did, which is to demand that these schools be brought up to the level comparable to other schools in the area so as to attract back in the students who left when the facilities were, "literally rotting" as was found below.

There were holes in the roofs. The buildings were rotting down, and water was pouring in, because the local and state authorities had stopped funding the schools. This is really --

QUESTION: But in the abstract way in which the question was presented here, none of those arguments are properly before us.

MR. SNYDER: I think that's correct, Justice Kennedy. I was trying to respond to the question of really whether the state is right in suggesting that you have to look

at the scope of the remedy together with the funding order.

I think that it is appropriate at this stage of the proceeding to accept the remedy which was found to be necessary, following the right precedents --

QUESTION: Even if that presents an abstract question divorced from the concrete realities of this case?

MR. SNYDER: Well, I think this court frequently will consider abstract or legal questions and will leave the factual determinations to the lower courts. I assume, perhaps presumptuously, but I assume when this court denied cert on question one, it felt that there was not a legal question worthy of review on question one, but felt that the issue raised by question two raised a legal question for review. I think they can be separated.

In conclusion, we really come back to the proposition with which we started, and that is that violations of constitutional rights we believe require the federal courts to use their discretion looking at principles of comity and federalism, looking at the practical circumstances of --

QUESTION: Well, Mr. Snyder, do you see any difference between -- on -- legally between what the district court did and what the court of appeals said should be done in the future?

MR. SNYDER: A small difference, Justice White. I think the practical --

QUESTION: But both of them -- both of them are proper?

MR. SNYDER: I think that the -- the district court's decision is not quite as easy to articulate the defense of as the Eighth Circuit decision. I think they're both proper.

QUESTION: Does that -- is that issue before us?

MR. SNYDER: I do not believe it is, Justice White.

QUESTION: You mean the money's already been collected, or what?

MR. SNYDER: Well, what I mean to say is, I think it's not before you because the Eighth Circuit in modifying the judgment -- I think it's that determination that this court should review and money was collected for the first year --

QUESTION: But it affirmed -- it affirmed what the district court did for a couple of years.

MR. SNYDER: Well, I think it was one year.

QUESTION: Is that issue before us?

MR. SNYDER: I think technically it is before you, but because the Eighth Circuit modified the judgment and really recharacterized what was done for the future, I don't believe that there's any violation.

QUESTION: Well, has the -- has that -- has what the district court did -- did the levy go into effect?

MR. SNYDER: Yes, sir.

QUESTION: And was the money collected?

MR. SNYDER: Yes, sir, it was although there was some that was paid under protest that remains awaiting this court's decision.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Snyder.

QUESTION: Thank you, Mr. Snyder. Mr. Farr, you have three minutes remaining.

REBUTTAL ARGUMENT OF MR. H. BARTON FARR, III

ON BEHALF OF THE PETITIONERS

MR. FARR: Thank you, Mr. Chief Justice. Just a couple of brief points.

Returning momentarily to the jurisdictional question, the Respondents take the position I think, as I understand it now, that what this Court ought to do is review the particular papers that were filed in the Court of Appeals, rather than taking the Court of Appeal's order at face value.

We don't think that is in fact a rule that is likely to lead to a great deal of certainty and we think that the Court of Appeals is entitled to treat the papers before it as a rehearing petition if it wishes to do so. As we have pointed out several times, several circuits do.

The difference between a case like this and --

QUESTION: Well, I'm -- you know, I'm not sure. Where you want certainty is ex ante. You want the person who

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

files this petition to know whether the consideration of it is going to toll his time to appeal and to tell him that he's only going to know that when the Court comes out with its decision that says well, we've treated this as this, or we've treated it as the other, that doesn't help, does it?

MR. FARR: But Justice Scalia, there's no such absolute certainty in any event. I mean, because everybody agrees, I believe that the Court can treat it as a petition for rehearing if it wants. It could grant it as a petition for rehearing, it could modify its opinion, all sorts of things could go on, and I think to allow the Courts that sort of flexibility as part of their own operating procedures simply makes sense even though there might be some less certainty on the front end as to what the particular litigant expects.

The difference between this and the Credit Company case I think is that a Court of Appeals can and should have the power to do that. What a Court of Appeals can't do is, it can't treat June 15th as if it were June 1st. That's just something that's wholly outside the ambit of the power of a Court of Appeals and therefore that purely -- that effort to convey jurisdiction by taking an action like that is literally outside its power.

The second point, briefly, on the question of the position below, just so it is understood, the state's position

has always been opposed to a tax. The school district, despite what it is saying right now, has at various times throughout the litigation said that the school district should bear none of the cost. We have said we as a general principle are opposed to that.

We think the school district should bear some of the cost, and we think that the Court should devise remedies that allows both of those principles to be carried out, where the state would bear a burden, the school district would bear a burden, and constitutional compliance would be achieved with both of them doing that.

The problem, as we have said, is that the Court simply ignored those considerations in developing the particular remedy and essentially made the kind of order that it led to, or the alternative of the state bearing all of it, a foregone conclusion.

Finally, I'd just like to say -- sorry?

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr. The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Missouri, et al., Petitioners v. Kalima Jenkins, et al.

No. 88-1150

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lona M. May

(REPORTER)