IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES H. MEREDITH,

Appellant,

v.

CHARLES DICKSON FAIR, et al.,

Appellees

No. 19475

UNITED STATES OF AMERICA,

Amicus Curiae and Petitioner,

v.

STATE OF MISSISSIPPI, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF THE UNITED STATES, AS AMICUS CURIAE, FOR TEMPORARY RESTRAINING ORDER

I.

The courts of the United States have inherent power to enjoin interference with and obstruction to the carrying out of their orders.

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), affirmed 367 U.S. 908.

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La.), affirmed 368 U.S. 11.

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La.), affirmed 365 U.S. 569, and affirmed sub nom New Orleans v. Bush, 366 U.S. 861.

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La.), affirmed 365 U.S. 569.

Faubus v. United States, 254 F. 2d 797 (C.A. 8), cert. denied 358 U.S. 829.

United States v. Louisiana, 180 F. Supp. 915 (E.D. La), stay denied 364 U.S. 500.

II.

Relief can properly be granted on the application of the United States.

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), affirmed 367 U.S. 908.

Faubus v. United States, 254 F. 2d 797 (C.A. 8), cert. denied 358 U.S. 829.

III.

The arrest of persons on account of their exercise of their right to attend schools free from racial discrimination and pursuant to court order constitutes an obstruction to the court order.

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La.), affirmed 368 U.S. 11.

IV.

State court injunctions which interfere with federal rights exercised pursuant to a federal court decree are void.

Thomason v. Cooper, 254 F. 2d 808 (C.A. 8).

V.

The doctrine of "interposition" is of no legal effect and can provide no justification for obstruction of or defiance of orders of courts of the United States.

Aaron v. Cooper, 358 U.S. 1.

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La.).

Respectfully submitted,

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No. 441

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

THE STATE OF MISSISSIPPI, ET AL., PETITIONERS

v.

JAMES HOWARD MEREDITH AND
THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

BURKE MARSHALL,
Assistant Attorney General,

HAROLD H. GREENE,
Attorney,

Department of Justice,
Washington, D.C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 661

THE STATE OF MISSISSIPPI, ET AL., PETITIONERS

v.

JAMES HOWARD MEREDITH AND
THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals has entered no opinions in connection with the orders and judgments sought to be reviewed by the petition for a writ of certiorari.

JURISDICTION

The temporary restraining order was entered by the court of appeals on September 25, 1962. The judgment of civil contempt against

petitioners Barnett and Johnson was entered by the court of appeals on September 28 and September 29, respectively. On October 29, 1962, the court of appeals issued its preliminary injunction. The petition for a writ of certiorari was filed December 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States had standing to institute proceedings ancillary to the cause of Meredith v. Fair to protect and effectuate the judgments and orders of its courts in that action.

2. Whether the court of appeals had jurisdiction to entertain proceedings ancillary to the case of Meredith v. Fair.

3. Whether petitioners were validly served in Mississippi with the temporary restraining order issued by the court of appeals in Louisiana.

4. Whether petitioners were amenable to the injunctive process of the court of appeals.

5. Whether the civil contempt proceedings are now moot.

STATUTES INVOLVED

The following statutes and rules are reprinted in the Appendix, infra pp. 28 U.S.C. 547, 28 U.S.C. 1404, 28 U.S.C. 2281, 28 U.S.C. 2284, and Rules 4(f) and 4(g) of the Federal Rules of Civil Procedure

STATEMENT

On June 25, 1962, the United States Court of Appeals for the Fifth Circuit in the case of Meredith v. Fair, 305 F. 2d 343, certiorari denied, 371 U.S. 828, reversed the district court and entered an opinion declaring the right of James H. Meredith to attend the University of Mississippi without discrimination. On July 28, 1962, the court of appeals, upon presentation of its mandate to the district court, issued an order requiring the defendants, their servants, agents, employees, successors, assigns, and all persons acting in concert with them to admit James H. Meredith to the University of Mississippi and to refrain from any act of discrimination relating to his admission and continued attendance. This injunction was to remain in effect until "such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders . . . ." (emphasis added) (R. 44). On September 14, 1962, the district court entered an order in accordance with the mandate of the court of appeals.

On September 18, 1962, the United States moved the court of appeals for permission to appear as amicus curiae in the case of Meredith v. Fair. The court of appeals granted the motion and entered an order authorizing the United States to appear as amicus "with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the [illegible]

Starting on September 13, 1962, Governor Barnett and other officials of the State of Mississ[illegible] engaged in a series of acts designed to frustrate and obstruct the orders of the court of appeals and of the district court. These included the repeated proclaimed invocation by the Governor of the doctrine of interposition;[1] prosecution of Meredith for perjury;[2] enactment of a statute making it a misdemeanor to attempt to enroll in an institution of higher learning while a charge of moral turpitude is outstanding;[3] and the filing of various state court actions by Governor Barnett to enjoin Meredith's admission to the University.[4]

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[1] On September 13, Governor Barnett invoked the interposition doctrine in a state-wide radio and television broadcast and called upon the people of the state to refuse "in every legal and every constitutional way, and every way and every manner . . . available to submit to illegal usurpation of power by the Kennedy Administration. * * * (Govt. Ex. 4, Hearing 10/12/62). As we relate infra, the Governor several times more "interposed" himself and the "sovereignty of the State of Mississippi" between the University and the federal courts.

[2] On September 14, the District Attorney of Hinds County, Mississippi, instituted this prosecution, and on September 20 the Hinds County court tried Meredith in absentia, convicted him, and sentenced him to imprisonment for one year and payment of a $300 fine. An earlier prosecution on the same charge instituted by the same district attorney on May 28, 1962, had been enjoined by the court of appeals on June 12, 1962. The court of appeals enjoined the arrest of Meredith under the conviction arising out of the second prosecution on September 20, 1962 (R. 47).

[3] The statute also made it a misdemeanor to aid and abet in the commission of the offense. Enforcement of the Act against Meredith or any other person in connection with Meredith's admission to the University was enjoined by the court of appeals the day the Act was signed by the Governor as emergency legislation (R. 47).

[4] See Govt. Exs. 8 and 9, Hearing 10/12/62. Earlier, on September 10, 1962, the Chancery court of Jones County, Mississippi, had issued an injunction in a private suit forbidding Meredith and the officers of the United States Department of Justice from taking

On September 20, 1962, Governor Barnett issued a Proclamation directing the Board of Trustees of Institutions of Higher Learning to refuse admission to the University of Mississippi to James Meredith. (Govt. Ex. 7, Hearing 9/28/62.) The Board of Trustees thereupon appointed Governor Barnett Registrar of the University of Mississippi for the purpose of dealing with the registration of James Meredith (Tr. 459).

On the afternoon of September 20, 1962, James Meredith presented himself to the University of Mississippi for registration as a student. Governor Barnett refused him admission and delivered to him a Proclamation covering such denial (Govt. Ex. 8, Hearing 9/28/62).

On September 24, 1962, Governor Barnett issued a Proclamation (his fourth) in which he reaffirmed the legal obligation of all public officials of the State of Mississippi not to "acquiesce, impair, waive or surrender any of the rights of the sovereign state of Mississippi," which rights were being directly usurped "by the federal government through the illegal use of judicial decree." Governor Barnett further declared that any arrest or attempt to arrest any state official in the performance of his official duties by any representative of the federal government be illegal, and such federal representative is "to be summarily arrested and jailed by reason of such illegal acts in violation of this executive order and in violation of the laws of the State of Mississippi." (Govt. Ex. 9, Hearing 9/28/62.)

On September 29, 1962, Governor Barnett directed all sheriffs and all law enforcement officials

Mississippi to proceed "to do all things necessary that the peace and security of the people of the state would be fully protected (Govt. Ex. 10, Hearing 9/[illegible]/62). On that same day the court of appeals, upon motion of the United States, issued a temporary restraining order against petitioners, in essence enjoining them from further obstructing the performance of obligations or the enjoyment of rights under the order of the court entered in Meredith v. Fair on July 28, 1962, and the order of the district court entered September 13, 1962 (R. 131). This temporary restraining order, together with a notice of hearing on the preliminary injunction (R. 135), was that day served upon petitioners in Mississippi (Govt. Ex. 4, Hearing 9/28/62, pp. 15-16).

On the afternoon of September 25, 1962, James Meredith again attempted to register at the University of Mississippi. At that time Governor Barnett refused him registration and delivered to James Meredith a Proclamation purporting to finally deny him admission to the University of Mississippi (Govt. Ex. 11, Hearing 9/28/62). Upon motion of the United States, the court of appeals that evening issued an order directing Governor Barnett to show cause on September 28, 1962, why he should not be held in civil contempt of the temporary restraining order (R. 163).

On September 26, 1962, James Meredith again presented himself for registration at the University of Mississippi, and again was refused, this time by Lt. Governor Johnson acting on behalf of Governor Barnett. Thereafter, the court of appeals upon

1962, why he should not be held in civil contempt of the temporary restraining order (R. 173). Pursuant to these orders to show cause, the court of appeals on September 28 and September 29, 1962, held hearings on the matter of the civil contempt of Governor Barnett and Lt. Governor Johnson, respectively. After receipt of evidence introduced by the United States, and upon failure of either defendant to appear, the court of appeals adjudged Governor Barnett and Lt. Governor Johnson each to be in civil contempt (R. 213, 238).

On October 1, 1962, James Meredith, accompanied by United States Marshals, finally entered the University of Mississippi. On October 19, 1962, after a hearing at which petitioners appeared but failed to introduce evidence, the court of appeals issued its preliminary injunction (R. 464).

ARGUMENT[1]

1. Petitioners contend that the court of appeals erred in permitting the United States to intervene in the case of Meredith v. Fair, and in permitting the United States as intervenor to assert

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[1] Petitioners seek review of sixteen orders entered by the court of appeals in the cases of Meredith v. Fair and United States of America v. [illegible] (Pet. pp. 2-4). We find it unnecessary to discuss the following orders:

1) Orders (c), (e), and (m) (Pet. pp. 3-4) were directed to the Board of Trustees of Institutions of Higher Learning of Mississippi, not parties to this petition.

2) Orders (d), (g), (h), and (j) (Pet. pp. 3-4) were issued on application of the plaintiff in the case of Meredith v. Fair and do not concern the United States as a party only to the ancillary cause of United States v. Mississippi.

3) Orders (i) and (k) (Pet. p. 4), as Show Cause orders, merged in the judgments of civil contempt and are not proper subjects for review by certiorari.

Accordingly, we will address ourselves only to the following orders:

1) Temporary Restraining Order - September 25, 1962.

2) Judgments of Civil Contempt - September 28 and September 29, 1962.

3) Preliminary Injunction - October 19, 1962.

Petitioners also seek to raise several issues with respect to the sentence conditionally imposed upon them by the court of appeals should they fail to purge their civil contempt. However, since the court of appeals has yet to determine whether petitioners have purged themselves, and, therefore, whether the sentence shall be imposed, these questions are prematurely raised. [illegible] v. [illegible], 364 U.S. 307, 314; cf. Cleveland Bar Ass'n v. [illegible], 367 U.S. 1, 11.

private Fourteenth Amendment rights (Br. 15, 17, 20). It is evident from these contentions that petitioners misconstrue the role of the United States in these proceedings.

When the United States first appeared as amicus curiae before the court of appeals (R. 18), the legal issues between the plaintiff, James H. Meredith, and the defendant University officials and Board of Trustees had been finally adjudicated. 305 F. 2d 343 (C.A. 5). We disclaimed any intent or claim of right to participate in that adjudication or to affect its result. What we did seek to do was to preserve and effectuate the judgment, mandate, and orders issued by the court of appeals and the district court in the case of Meredith v. Fair as against the concerted effort by petitioners to obstruct and frustrate the implementation of those orders (R. 4). Therefore, when the United States moved for a temporary restraining order against petitioners and, upon violation of that order, proceeded against them in civil contempt, it proceeded not as intervenor in the case of Meredith v. Fair, but as moving party asserting a distinct interest in the ancillary proceedings of United States v. Ross Barnett, et al.

The unique interest of the United States in preserving the integrity of its courts and in protecting their decrees from actual or threatened obstruction, an interest separate and apart from any Fourteenth Amendment or other rights asserted by parties to the original case, is well established. Bush v. Orleans Parish School Board, 191 F. Supp. 871, 877-78 (E.D. La.), affirmed per curiam, Louisiana Legislature v. United States, 367 U.S. 908;

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La.), affirmed sub nom. New Orleans v. Bush, 366 U. S. 212.

In asserting this interest and as a natural corollary to it, the United States undoubtedly has standing to initiate proceedings ancillary to private litigation. This is particularly true where, as here, the court in its order admitting the United States as amicus curiae has specifically invited it to initiate whatever proceedings necessary "to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." (R. 18). See Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), affirmed sub nom. Legislature of Louisiana v. United States, 367 U.S. 908; Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515; Feldman v. United States, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 827.

In a related contention, petitioners claim that the court of appeals erred in permitting the United States to institute proceedings in civil contempt (Pet. 49). The point is equally without merit. The authority of the United States to institute criminal contempt proceedings in no way precludes it from seeking redress through civil contempt. See [illegible] v. United States, 367 U.S. 61; United States v. [illegible], 330 U.S. 258, 302; [illegible] v. United States, [illegible] F. 2d 66, 71 (C.A. 1). [illegible] In re [illegible], 158 U.S. 564, 581-83. As indicated [illegible], the temporary restraining order which petitioners violated was issued upon motion of the United States in a proceeding initiated by the United States to preserve the integrity of its courts and to prevent the deliberate obstruction of their decrees. The United States had a specific and compelling interest in securing compliance with this order -- an interest quite apart from its general concern with the prosecution of criminal contempt proceedings to punish violations of all federal court orders.

2. Petitioners contend further that even if the district court could have acted,[1] the court of appeals was without jurisdiction to entertain the proceedings initiated by the United States to protect and effectuate its decrees (Pet. 18, 31). This contention is without merit. The orders issued by the court of appeals were entered within the proper scope of its ancillary jurisdiction.

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[1] Petitioners do not urge, as indeed they could not, that no cause existed for any court to act. The record decisively demonstrates that the orders of the court were being flagrantly disregarded and the integrity of the judicial processes of the United States subjected to a grave and serious threat.

Traditionally, an ancillary suit in equity is understood to be one growing out of a prior suit in the same court, dependent upon and instituted for the purpose of obtaining and enforcing the fruits of the judgment in the former suit. Comery v. Watson, 139 F. 2d 614, 615 (C.A. 7), certiorari denied, 319 U.S. 757; Local Loan Co. v. Hunt, 292 U.S. 234, 239; Root v. Woolworth, 150 U.S. 401. The power of an appellate court to conduct proceedings ancillary to the main cause in order to protect and effectuate its judgment or decree is well settled. Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A. 7), affirmed 261 U.S. 399; Sawyer v. Dollar, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 804; Merrimac River Savings Bank v. Clay Center, 219 U.S. 527. Moreover, this power may be exercised even though the lower court could have achieved the same result by conducting proceedings ancillary to its jurisdiction. Merrimac River Savings Bank v. Clay Center, supra; Sawyer v. Dollar, supra.

Nor was the court of appeals divested of jurisdiction on July 28, 1962, when its mandate issued to the district court. Even had the court of appeals not specifically reserved jurisdiction by the terms of the injunction issued by it on the same date (R. 44)[1], a number of decisions support the jurisdiction of

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[1] This is the injunction which this Court, through the denial of certiorari in the case of [illegible] v. Lair, 371 U.S. 823, refused to review.

appellate court to conduct further proceedings after its mandate has issued. United States v. United States District Court, 334 U.S. 258; National Supply Co. v. Leightenweg, 254 U.S. 425; Ford Refining Co. v. Universal Oil Products Co., 160 F. 2d 514 (C.A. 3), certiorari denied, 333 U.S. 312; Sweeney v. Fuller, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. [illegible].

Since the court of appeals had jurisdiction to act to protect its judgment in this case, it necessarily had jurisdiction to act effectively, including the power to receive evidence, Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A. 7), affirmed,

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1/ Cf. Universal Oil Products Co. v. Ford Refining [illegible] 258 U.S. 242, 246.

261 U.S. 399; Foot Refining Co. v. Universal Oil Products Co., 169 F. 2d 514 (C.A. 3), certiorari denied, 335 U.S. 812, make findings of fact, [illegible] issue injunctions, Palace Scale Co. v. Computing Scale Co., supra, and add parties. Universal Oil Products Co. v. Foot Refining Co., 328 U.S. 575, 580, as implemented on remand, 169 F. 2d 514, 525 (C.A. 3), certiorari denied, 335 U.S. 812; Sawyer v. Dalley, 190 F. 2d 623 (C.A. D.C.), vacated as moot, 344 U.S. 806; N.L.R.B. v. Underwood Machinery Co., 198 F. 2d 93 (C.A. 1); N.L.R.B. v. Sunshine Mining Co., 225 F. 2d 757 (C.A. 9). /

/ Any challenge to the jurisdiction of the court of appeals based on 28 U.S.C. 2281 (App.), providing for the formation of a three-judge court, is frivolous (Dr. 47). The constitutionality of Mississippi Senate Bill 1501 (Hearing 10/12/63, p. 33) was never called into question, and there could be no substantial question as to the constitutionality of Mississippi's Acts of Interposition, or Governor Barnett's proclamations declaring the supremacy of state law. See [illegible] v. [illegible], 369 U.S. 31, 32; [illegible] v. Amerada, 340 U.S. 1, 18; [illegible] v. Orleans Parish [illegible] Board, 188 F. Supp. 916, [illegible] (E.D. La.), [illegible] 359 U.S. 509; [illegible] v. Barnes, 327 U.S. 93, [illegible] Management, 340 U.S. 354, 361; [illegible] v. [illegible] Board, 351 U.S. 908. Cf. [illegible] v. [illegible], 244 F. 2d 797 (C.A. 8), certiorari denied, 355 U.S. [illegible]; Aaron v. Cooper, 261 F. 2d 97 (C.A. 8).

3. Petitioners further suggest that they were not validly served with the temporary restraining order issued by the court of appeals (Br. 16).

a. It is alleged, first, that service on them in Mississippi of process issued by the court of appeals while sitting in New Orleans violated Rule 4(f) of the Federal Rules of Civil Procedure. (App.). But it is well established that the Federal Rules of Civil Procedure do not apply to the courts of appeals. Mines v. Royal Indemnity Co., 253 F. 2d 111 (C.A. 6); Bethlehem Shipbuilding Corp. v. National Labor Relations Board, 120 F. 2d 126 (C.A. 1); Armour & Co. v. Kloeb, 109 F. 2d 72 (C.A.4). Cf. Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9. However, where as here, a court of appeals has fashioned no rule of its own regarding a particular matter, it may apply the Federal Rules of Civil Procedure by analogy. Mines v Royal Indemnity Co., 253 F. 2d 111 (C.A. 6); Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514 (C.A. 3), certiorari denied, 335 U.S. 812.

Since Rule 4(f) grants a district court personal jurisdiction over all persons served within the state in which it sits, a court of appeals logically may acquire personal jurisdiction over any person served within the circuit. Indeed, this Court has held that any geographical limits on the effective service of a federal court's process must be sufficiently broad to permit the court to exercise effectively the substantive jurisdiction conferred upon it. See Continental Bank v.

Rock Island Ry., 294 U.S. 683; United States v. Corrigan Construction Co., 322 U.S. 199. It follows that, just as this Court's process runs nationwide, United States v. Union Pacific R.R. Co., 98 U.S. 569, 603-04, and the district court's process runs throughout the state, the process of the court of appeals is effective throughout the circuit.

b. Petitioners also challenge the authority of the United States Marshals by whom they were served with process. Petitioners were served in Jackson, Mississippi, by deputy United States Marshals for the Northern and Southern Districts of Mississippi (Gov. Ex. 4, Hearing 9/28/62, pp. 15-16). It apparently is petitioners' theory, based on 28 U.S.C. 547(a) (App.), that while the court of appeals was sitting in New Orleans only a marshal for the Eastern District of Louisiana had authority to serve its process. This theory is without merit.

Any attempt by petitioners to challenge the venue of the court of appeals is similarly unavailing. By its very terms, Chapter 87 of Title 28 is inapplicable to appellate courts. See particularly 28 U.S.C. 1404 which expressly refers to change of venue in district courts. (App.). Moreover, even as to district courts the preferred rule is that original requirements of jurisdiction and venue need not be fulfilled in proceedings ancillary to the main cause. See Krippendorf v. Hyde, 110 U.S. 276; Landon v. Public Utilities Commission, 234 Fed. 152 (D. Kan.), reversed on other grounds, 249 U.S. 236; Higgins v. California Prune [illegible], 282 Fed. 550 (C.A. 2), subsequently vacated on other grounds, 3 F. 2d 896 (C.A. 2). See also 1 Moore's Federal Practice, pp. 1339-41.

28 U.S.C. 547(b) (App.), together with Rule 4(c) of the Federal Rules of Civil P[illegible] (App.), permits process to be served either by the marshal of the district in which the court issuing the process is held, or the marshal of the district in which service is made. 2 Moore's Federal Practice, p. 920; Graber v. Graber, 93 F. Supp. 281 (D.C. D.C.); MacNeil v. Gray, 158 F. Supp. 16 (D.C. Mass.). The only limitation on the authority of the marshal of the district in which service is made to serve process issuing from a United States court for another district--that such process otherwise be valid beyond the territorial limits of the issuing court, Ibid.--is inapplicable here.

4. Petitioners further argue that the sovereignty of the State of Mississippi and the official status of the individual petitioners rendered the court of appeals powerless to act (Br. 32, 35-46).

With respect to the alleged immunity of the State of Mississippi, it is only necessary to state that the Eleventh Amendment has no application to proceedings instituted by the United States. Monroe v. Mississippi, 292 U.S. 313; United States v. Texas, 143 U.S. 621; Bush v. Orleans Parish School Board, 188 F. Supp. 916, 922 (E.D. La.), affirmed 365 U.S. 569.

Petitioners' claim of immunity for the executive officers of the State of Mississippi is equally frivolous. Sterling v. Constantin, 287 U.S.

/ See discussion regarding the court of appeals territorial jurisdiction, supra, p. .

398, 903, 403; Bush v. Orleans Parish School Board, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569 (state executive, legislative, and judicial officers enjoined); Bush v. Orleans Parish School Board, 191 F. Supp. 871, 879 (E.D. La.), affirmed sub nom. Legislature of Louisiana v. United States, 367 U.S. 908 (same); Barnes v. United States, 254 F.2d 797 (C.A. 8) certiorari denied, 358 U.S. 829 (Governor Faubus).

1/ Petitioners also claim that the validity of the acts of state executive officers must be litigated in an independent action and cannot form a constitutional contempt of a court order issued in private litigation (Br. 42-43). Insofar as this claim has any merit, it suffices to point out that a separate proceeding was instituted against petitioners by the United States on September 25, 1963, when they were served with the court of appeals' temporary restraining order, and it was for violation of that order only that they were found by the court of appeals to be in civil contempt. If petitioners had cared to litigate the validity of their acts, they had ample opportunity to do so at the October 10, 1963, hearing on the preliminary injunction when originally issued. Significantly, they expressly declined to appear (Supplemental App. pp. 13-14).

These principles also dispose of the contention that the court of appeals lacked power to require petitioners to order the officers under their jurisdiction to cease interference with the order of the court and to cooperate in maintaining law and order on the University of Mississippi (Br. 25 et seq.). Since affirmative action is often required to purge contempt of a prohibitive decree, In re Pa-American Corp., 184 F. 2d 319 (C.A. 9), certiorari denied, 340 U.S. 883; Sawyer v. Baltar, 198 F. 2d 823 (C.A.D.C.), vacated as moot, 344 U.S. 884), a court undoubtedly has authority to require a contemnor to purge his contempt by doing that which in the first instance he was required to do. To contend that petitioners are immune from this rule because of their status as state executive officers is to ignore the holding in Sterling v. Constantin, supra. The court of appeals having jurisdiction to enjoin petitioners necessarily had jurisdiction to assure the effectiveness of its decree by requiring petitioners to purge themselves of their violation. See Sawyer v. Baltar, supra; Lester v. Parker, 235 F. 2d 787 (C.A. 9); Vaughan v. John C. Winston Co., 83 F. 2d 378 (C.A. 10); Mr. Foin v. Government of the Virgin Islands, 167 F. Supp. 708 (D.C. Virgin Islands) (governor mandatorily enjoined).

5. Finally, petitioners allege that the entire matter of the civil contempt of Governor Barnett and Lt. Governor Johnson is moot. This manifestly is not correct.

While civil contempt proceedings necessarily end with a final settlement of the main cause, see [illegible] v. [illegible], 221 U.S. 418, such proceedings continue to be relevant so long as the object of the suit has not finally been achieved. See [illegible] v. United States, 127 F. 2d 844, 847 (C.A. 9). To support their claim of mootness petitioners must therefore assume the very fact which the court of appeals has yet to determine, namely, that petitioners have fully complied with the court's decree. Pending a determination of this question by the court of appeals, it cannot be said that the judgment of civil contempt is moot.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

HAROLD H. GREENE,
Attorney.

FEBRUARY 1963.

APPENDIX

STATUTES AND RULES INVOLVED

28 U.S.C. 547 provides in pertinent part:

(a) The United States marshal of each district shall be the marshal of the district court and of the court of appeals when sitting in his district, and of the Customs Court holding sessions in his district elsewhere than in the Southern and Eastern Districts of New York, and may, in the discretion of the respective courts, be required to attend any session of court.

(b) He shall execute all lawful writs, process and orders issued under authority of the United States, and command all necessary assistance to execute his duties.

* * * *

28 U.S.C. 1404 provides in pertinent part:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

* * * *

28 U.S.C. 2281 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. 2284 provides in pertinent part:

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

* * * *

Rule 4 of the Federal Rules of Civil Procedure provides in pertinent part:

* * * *

(c) By whom served.

Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

* * * *

(f) Territorial limits of effective service.

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

* * * *

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,475

JAMES H. MEREDITH,

Appellant

vs.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae and Petitioner,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF
THE UNITED STATES

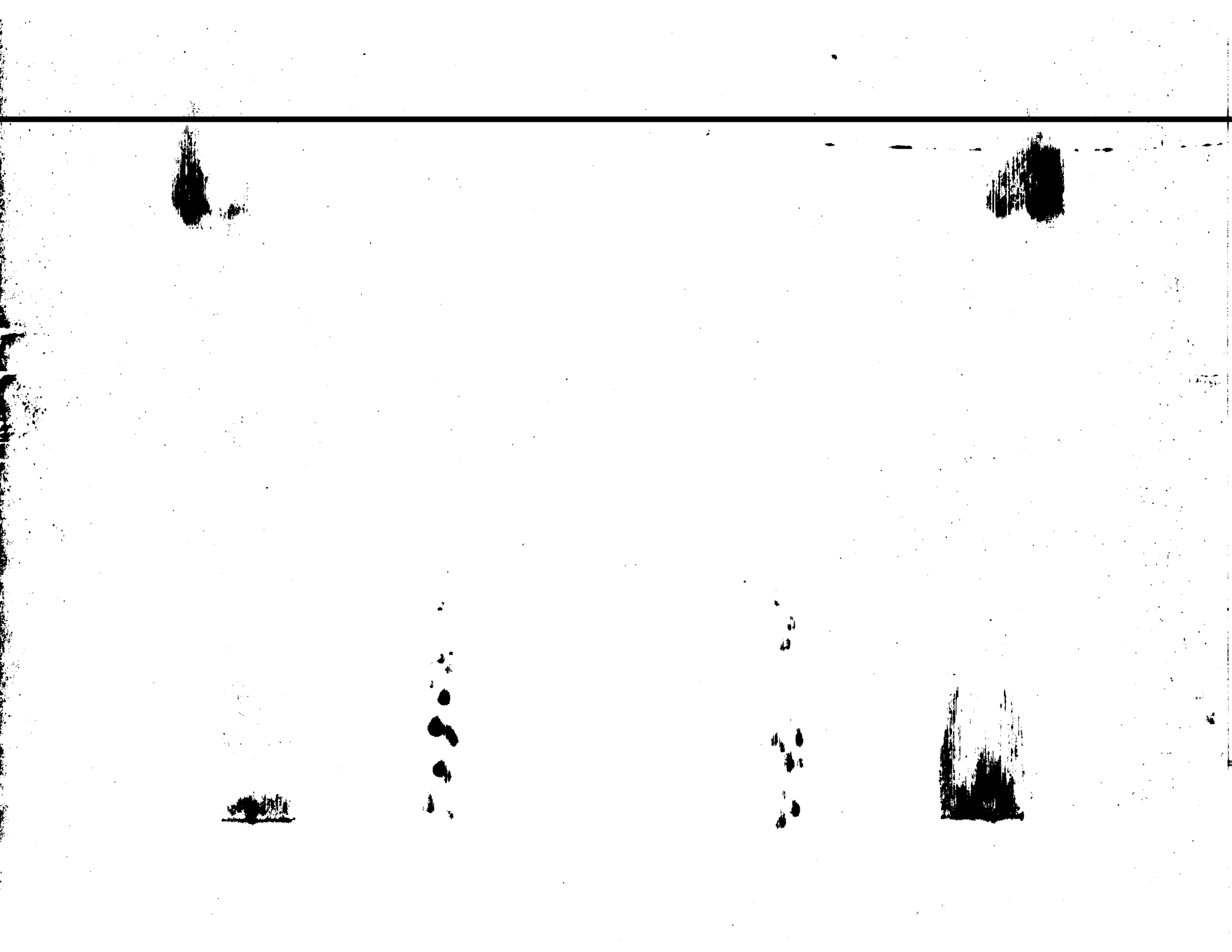
On September 28, 1962, this Court determined that Governor Ross R. Barnett was in civil contempt of the Court's order of September 25 restraining the Governor and other state officials from interfering with the admission and continued attendance of James Meredith as a student at the University of Mississippi. The Court's order of September 28 gave the Governor until October 2 to purge himself of contempt by ceasing interference and instructing all state officials subject to the Governor's direction

to maintain law and order so as to permit the continued attendance of Meredith at the University on the same basis as other students.

On October 2 the Governor appeared before the Court through his counsel and represented to the Court that he was in compliance with the orders of the Court. While these representations were retracted in part by counsel for the Governor at a further hearing on October 12, it appears still to be the position of the Governor that he is in compliance with the Court's order, and that the Court should accordingly not impose on him either imprisonment to compel further steps in compliance with the Court's order, or the fines which were set forth in the Court's order of September 28 to be imposed on the Governor in the event that he did not cease his contemptuous conduct. The Governor did not present any evidence of what specific actions he had taken at either hearing.

Counsel for Meredith at the hearing on September 28 opposed giving Governor Barnett any additional time in which to purge himself. At the hearing on October 12 plaintiff's counsel represented to the Court that they did not believe that the Governor had purged himself of his contempt, and that the Court should accordingly impose at that time the sanction of imprisonment on the Governor. Counsel did not, however, introduce any evidence in support of their position, and did not specify what further steps the Governor should be compelled to take.

At the hearings on October 2 and October 12, counsel for the United States represented to the Court that the Governor had complied at least in part



with the orders of the Court by ceasing his interference with the admission and attendance of Meredith at the University. Accordingly, counsel stated that they did not believe that the Court should now order the imprisonment of the Governor, but that the Court should impose the sanction of the fines which the Court stated would run against the Governor in the event that he had not purged himself by October 2.

The basis for the position of the United States was that imprisonment of the Governor would not serve a remedial purpose at that time since his interference with the Court's order had ceased. On the other hand, the United States believed that since the Governor had not fully purged himself, the Court should levy upon him the sanction which the Court stated in its order of September 28 would be imposed -- that is, a fine of $10,000 per day. This fine would be imposed because of his past failure to purge himself, and not for future coercive purposes such as would be necessary to justify the imposition of imprisonment.

The position of the Government was restated in its memorandum of October 15. Assertions of fact made by the Government were contradicted by counsel for the Governor in their memorandum of October 18, and on October 24, counsel for the Government represented again to the Court that the factual assertions made by counsel for the Government in court and in the memorandum of October 15 were accurate, and that any denials or contradictory assertions of fact made by counsel for the Governor were without foundation. Again, however, no evidence on

any of the controverted issues of fact was introduced for the benefit of Court. No response has been filed by counsel for the Governor to the October 24 memorandum filed by the United States.

At this stage of the proceedings, the parties are in dispute as to whether the Governor is or is not in compliance with the orders of the Court; as to whether the sanction of the fines imposed on the Governor by the order of the Court of September 28 should or should not be put into effect; and as to whether it is an appropriate coercive step for the future now to commit the Governor to the custody of the Attorney General until he takes further steps to purge himself of his contempt. A fundamental difficulty on the present record before the Court is the necessity of determining what further steps should be required of the Governor when the Court is not informed as to precisely what he has and has not done to comply thus far with the Court's orders. The Court is without an adequate factual record upon which to base its determination as to which of several possible courses it should follow. In addition, the Court is without the assistance of an adequate factual record upon which to make a determination whether criminal contempt proceedings should or should not be imposed on the Governor for his conduct in the past.

Upon the basis of the conflicting representations made by counsel for the Governor to the Court, and such facts as are available to the Government,

we adhere to the recommendations made to the Court at the hearing on October 12 and in the memorandum and proposed order submitted on October 15.

Nevertheless, neither the Court nor the Government has available at present a complete factual record upon which to base its determinations. This is also true of counsel for the plaintiff. Conflicting factual assertions have been made to the Court. Neither the Court nor the United States presently knows what, if any, instructions have in fact been given by the Governor to state officials with respect to the continued attendance of Meredith at the University.

In addition, within the past week, the factual situation has again been changed by the state highway patrol being made available, under terms and circumstances that are not clear, to maintain law and order at the University of Mississippi.

It is a matter of great public interest and national importance that whatever disposition is made of the pending charges against the Governor be accomplished upon the basis of as full a factual picture as possible. This is true not only as to the determination to be made by the Court, but also as to the recommendations to the Court which are to be made by the Government in the exercise of its grave responsibilities as amicus curiae.

Accordingly, we recommend to the Court that it appoint a master, in accordance with the procedure followed in the Shipp case, outlined in our memorandum

of October 15, to take whatever evidence the United States, the plaintiff, and the Governor may wish to present on his compliance with the orders of the Court; his arrangements with the United States for such compliance; the instructions given by him to the state highway patrol and other state officials; the conduct of the state law enforcement officials on September 30 and since that date; and his future intentions.

We believe that this course will best serve the vindication of the dignity of the Court, the national interest in careful resolution of a dispute between the United States and the Chief Executive Officer of one of the states, and the interest of the plaintiff in the effective realization of his constitutional rights. It will unavoidably mean further delay before the Court can resolve the issues before it. In the past such delay would have defeated the orders of the Court, which to be fully effective, required Meredith's admission and attendance at the University this semester. But that has been accomplished. The Governor has ceased overt interference with Meredith's attendance. Further interference has been enjoined by the Court's preliminary injunction issued October 19. The state law enforcement officials appear again to be available to enforce law and order on the University campus. Some disciplinary action has been and is being taken against University students responsible for continued demonstrations on the campus. And federal marshals and the military have insured the plaintiff's

continued attendance at the University and will continue to do so as long as is necessary. Under these circumstances we believe the advantages of a complete factual record significantly outweigh the disadvantages of further delay in ruling on the contempt action against the Governor.

Respectfully submitted,

Burke Marshall
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum on Behalf of the United States has been sent by Airmail, postage prepaid, to each of the following attorneys listed below, at the address indicated:

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Vicksburg, Mississippi

Dated this 3rd day of November, 1962.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,475

JAMES H. MEREDITH,

Appellant

vs.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae and Petitioner,

vs.

STATE OF MISSISSIPPI, et al.,

Defendants.

FURTHER STATEMENT AND MEMORANDUM ON BEHALF OF THE UNITED STATES IN RESPONSE TO THE MEMORANDUM FILED ON BEHALF OF GOVERNOR ROSS R. BARNETT ON OCTOBER 18, 1962

In their response filed October 18, 1962 counsel for Governor Ross R. Barnett assert that the United States has made incorrect statements of fact to the Court (page 1), has been "wholly inaccurate" in describing an arrangement with the Government for the entrance of James Meredith upon the campus of the University of Mississippi on Septembe[illegible]

(page 3), and has done so "for purposes which are necessarily beyond this case and have nothing to do with proper judicial proceedings or proper pleadings" (page 3).

The United States has a responsibility as amicus curiae to inform the Court of material facts bearing on the question what sanctions should be imposed now or in the future upon Governor Barnett because of his contempt of the order of this Court of September 25. This further memorandum and statement by the United States is filed pursuant to that responsibility.

1. The denial of any arrangement between the Governor and the United States for the entrance of Mr. Meredith on the campus of the University of Mississippi on Sunday, September 30, is without foundation. We reaffirm that the arrangement described in our previous memorandum was in fact made. To the extent that the counter-assertions of fact made in the response filed by the Governor are inconsistent with the existence of that arrangement, they are misleading.

In view of the importance of the issues in this case, and the gravity of the events that have occurred, the United States has under these circumstances a responsibility to advise the Court that if it deems the issue relevant to disposition of this matter, the United States stands ready to prove the details of the arrangement made and its context, and respectfully advises the Court that it should not, in the absence of such evidence, rely upon either the denial or counter-assertions of fact made on behalf of the Governor in the memorandum filed on October 18.

2. The response filed on October 18 on behalf of the Governor also to some degree raises an issue of fact as to the actions of the state police in the vicinity of the University of Mississippi on the night of September 30. The United States believes that resolution of this issue is not necessary to the determination which the Court is now required to make. The precise issue before the Court is not how the state police in fact acted that night, but what instructions the Governor had then and has since given the state police and other state officials, not only with respect to the maintenance of law and order, but also with reference to the various proclamations, law suits, and criminal proceedings and statutes which have constituted the pattern of attempted interference with the orders of this Court.

In our view Governor Barnett has still made no sufficient showing with respect to this important requirement.

In the event that the Court considers the question of the extent to which the state police did make an effort to enforce law and order at the University during the night of September 30 to be material to its present consideration, the United States is prepared to offer evidence on that point at any time.

Respectfully submitted,

Burke Marshall
BURKE MARSHALL
Assistant Attorney General

St John Barrett
St. John Barrett
Attorney, Department of Justice

I hereby certify that a copy of the foregoing Further Statement and Memorandum on Behalf of the United States attached hereto has been sent by Airmail, postage prepaid, to each of the attorneys listed below, at the address indicated:

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Dated this 24th day of October, 1962.

John Doar

John Doar
Attorney, Department of Justice