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.

MEMORANDUM ON BEHALF OF THE UNITED STATES

I

By its order of September 28, 1962, this Court found Ross R. Barnett in contempt of its restraining orders entered on September 25, 1962. This finding was

based upon evidence that Governor Barnett personally and through law enforcement officials of the state, acting under his direction, physically prevented James Meredith from entering the University of Mississippi as a student in accordance with the order of the Court of July 28, 1962.

Governor Barnett's conduct was found by this Court to have the deliberate and announced purpose of preventing compliance with the Court's order. Nevertheless, because the proceeding was in civil contempt and remedial in purpose, the Court gave Governor Barnett until October 2, 1962, to show that he was fully complying with the terms of the Court's restraining orders entered on September 25, 1962. The order of contempt provided that unless the Governor showed such compliance he should be committed to the custody of the Attorney General and pay a fine to the United States of $10,000 per day. In order to show full compliance, the Court required that the Governor show that he had stopped doing the acts which the court had enjoined, and that he had started to do what he should have done all along as Governor of the State of Mississippi, that is:

> ". . .that he [had] notified all law enforcement officers and all other officers under his jurisdiction or command:
>
> "(a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;

"(b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi to the end that James H. Meredith be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students."

On October 2, Governor Barnett appeared before this Court for the first time through his counsel. In answer to questions from the Court, counsel stated that the Governor was in full compliance with the Court's order, and would fully comply with orders of the Court in the future to the extent he was physically able to do so. Counsel showed through representations to the Court that James Meredith had been permitted to enter as a student at the University without interference from Governor Barnett or other state officials, and that Governor Barnett had twice called upon the people of Mississippi in general terms to keep the peace.

There is no dispute that Governor Barnett had then ceased his affirmative interference with compliance with the Court's order of July 28, and was to that degree in compliance with the Court's orders of September 25 and September 28. He did in fact, between the contempt order of the Court on September 28, 1962, and the hearing on October 2, 1962, cease the physical resistance to the orders of the Court which he had previously undertaken personally and through other state officials. Law enforcement officials of the state did not interfere with the entrance of federal

law enforcement officers to the campus of the University of Mississippi on Sunday, September 30. Instead, by pre-arrangement with the Governor, the federal officials were met by state law enforcement officers and were escorted onto the campus. Statements were made to the federal officials that the state officers would cooperate with them in maintaining order. In addition, James Meredith was accompanied by state as well as federal officials when he personally entered the campus of the University and no attempt was made to interfere with that event.

The significance of this much compliance with the orders of the Court by Governor Barnett should not be underestimated. By reason of the Governor's arrangement to have Meredith enter the University on September 30 a conflict between state and federal law enforcement officials which had previously seemed inevitable was avoided.

Nevertheless, Governor Barnett has clearly not made a showing that he has purged himself of contempt as required by the September 28 order of this Court. He has shown a cessation of prior resistance to and interference with the order of the Court. He has not shown what instructions, if any, were given to the law enforcement officers of the state under subparagraph (b) of the order of September 28. All of the state court orders, the arrest warrants, the state court actions brought by the Governor, and the si

proclamations of September 13, 20, 24 and 25 are still outstanding as far as appears on the record.

This is not a failure of detail, or merely a lack of any showing of what specific instructions were given. There has been no showing that state law enforcement officers in fact made efforts to maintain law and order at the University or to cooperate with federal officers. During the height of the riot at Oxford on the night of September 30, no state police were present. The Court can notice that law and order was maintained on the night of September 30 and the morning of October 1 and since then only by several hundred deputized federal marshals and thousands of troops sent to Oxford at the command of the President of the United States to put down widespread civil disorder in that area.

Further, at the hearing on October 12 counsel for the Governor retracted their statements that the Governor intended in the future fully to comply with the orders of the Court. While the exact position of the Governor is now unclear, the Court must assume for the present that the Governor intends to comply only with such orders of the Court as he feels are consistent with the policies and laws of the State of Mississippi, and that the Governor will not notify law enforcement officers of the state, as required by the order of September 28, that they should maintain law and order at and around the University and cooperate

with federal officers to the end that James Meredith be permitted to remain as a student at the University under the same conditions as apply to all other students.

This being so, the Court would be justified in imposing upon the Governor the sanctions set forth in its order of September 28th.

Upon oral argument, counsel for the United States advised the Court that the Government did not believe that, in view of the important step taken by the Governor in ceasing interference with the Court's orders, the sanction of imprisonment would now serve a useful, remedial purpose. Law and order at the University, and the personal protection of Mr. Meredith, are still being achieved through a force of federal troops. The Government is presently unable to advise the Court when this will cease to be necessary.

On the other hand, the Governor has failed to show that he has purged himself of contempt. He has failed to show that he has or will exercise the basic responsibility of the Chief Executive Officer of the State of Mississippi to preserve both law and order within the borders of that state. Under these circumstances, we believe that the Court should impose the other sanction set forth by the order of September 28, and that the Court should continue to impose that sanction until the Governor has issued the instructions called for by the order of September 28.

It should be fully recognized that the Governor of a state can as effectively interfere with the desegregation order of a federal court by refusing to enforce the law as by active acts of obstruction. He controls the executive branch and the law enforcement machinery of the state government. It was accordingly proper for the Court in its order of September 28 to require the Governor, in order to purge himself, to show that he was not interfering with the Court's order by inaction as well as to show that he had ceased active defiance.

In the light of the remedial purposes of the proceeding, it is appropriate now for the Court to use the sanction of a fine to compel compliance with the affirmative provisions of the Court's order. The sanction of imprisonment would have been necessary if the Governor had not ceased his active and physical interference with compliance with the Court's order. It may again be necessary, and might also be appropriate as a punishment for criminal contempt. But what is required now is for the Governor to take affirmative steps in his capacity as Governor to maintain law and order in the vicinity of Oxford and to see that the orders of the Court are not interfered with by the citizens of Mississippi or anyone else. The use of fines for this purpose is fully in keeping with the United Mine Workers case, 330 U.S. 258, 304-305, upon which this Court based its order of Septe

28. For the principal restraining order which Governor Barnett has violated was sought by the United States as a friend of the Court, to protect the integrity of the processes of the Court. And it is the United States which has suffered immense financial as well as other harm from the course of action followed by the Governor since September 13, and from his failure to meet the requirements of subparagraph (b) of the order of September 28.

We believe that it is within the discretion of the Court whether the full amount of the fine set forth in the order of September 28 should now be imposed for the period since October 2, 1962 until the hearing on October 12, 1962. The full amount of the fine is justified by the amount of damage -- financial and otherwise -- done the United States by the Governor's failure to uphold the law. Any ambiguity as to the requirements imposed by the Court for the period between October 2 and the hearing on October 12 is due entirely to erroneous representations made on behalf of the Governor at the October 2 hearing. In any event, however, we believe that the full amount of the fine of $10,000 per day should be imposed from the date of any further order issued by this Court until the Governor issues the required instructions.

A proposed order to accomplish these ends is attached to this Memorandum. The order also contains a paragraph designed to require, if the Court so

desires, that the Governor submit a signed statement to the Court on the steps taken by him in compliance.

II

In the event it should become necessary, this Court would, of course, have the power to order the arrest of Governor Barnett.

Federal courts have been held to have the authority to enter a judgment that a contemnor be imprisoned until he purges himself of contempt. See Uphaus v. Wyman, 360 U.S. 72, 81 (1959).

Since that is so, it follows that the Court has power to issue an order to a U.S. Marshal directing him to carry out its judgment of imprisonment by taking the contemnor into physical custody, and such orders have, in fact, been issued. United States v. Shipp, 214 U.S. 386, 483 (1909); In re Delgado, 140 U.S. 586, 587 (1891); Wilson v. United States, 65 F. 2d 621, 622 (C.A. 3, 1933); In re Allen, 13 Blatch C.C. Rep. 271 (D. Vt. 1876).

The power to arrest applies to the Governor of a state as to any other citizen. State officials are as amenable to federal process, orders, judgments and warrants as other litigants. Georgia Railroad & Banking Company v. Redwine, 342 U.S. 810 (1952); Ex Parte Young, 209 U.S. 123, 160 (1908); Cooper v. Aaron, 358 U.S. 1. (1958); cf. Bush v. Orleans Parish School Board, 188 Fed. Supp. 916, 922 (E.D. La. 1960), aff'd 365 U.S. 569. This must be so or the supremacy cl[illegible]

of the Constitution (Art. VI, U.S. Constitution) would be largely meaningless. This rule applies to the governor of a state. Sterling v. Constantin, 287 U.S. 279, 393 (1932); Davis v. Gray, 16 Wall. 203 (1872).

The necessary corollary of decisions holding that a governor may be enjoined and is otherwise amenable to process is that, if he violates an injunction, he is subject to precisely the same judicial sanctions as are applicable to any other litigant in the federal courts.*/

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*/ Decisions dealing with the power of a state court to arrest a state governor (see Rice v. Draper, 207 Mass. 577, 93 N.E. 2d 821 (1911), State ex rel. Roob v. Stone, 120 Mo. 438, 255 S.W. 376 (1894); cf. Vicksburg Ry Co. v. Laury, 61 Miss. 102), are irrelevant. The considerations of separation of powers (and the anomaly of [illegible] a state governor to exert the ultimate police sanction against himself) obviously have no application to the situation here.

III

At the hearings on both September 28 and October 12, the Court expressed concern at the amount of judicial time which was required to effect compliance with its orders. In this connection, it should be noted that the actual terms of the preliminary injunction asked by the Government are narrowly designed to prevent interference and obstruction of the Court's order so that there can be no real misunderstanding as to what kind of acts would violate the order. In any event, the procedure followed in the United States v. Shipp, 214 U.S. 471, is available both for further proceedings on this contempt proceeding and for any contempt matters which might arise under the preliminary injunction asked by the United States. In United States v. Shipp, 203 U.S. 563 (1906), an information for criminal contempt was filed in the Supreme Court against a number of persons who were charged with having violated an order of the Court allowing an appeal and requiring the safekeeping of the defendant in a state criminal proceeding. Certain preliminary questions of law were raised by the defendants and passed upon by the Court itself. 203 U.S. 563. However, the Court thereafter appointed a "commissioner" in the case, "to take and return the testimony in this proceeding, with the powers of a master in chancery, as provided in the rules of this court; but said commissioner shall not make any findings of fact or state any conclusions of law." 214 U.S. at 471.

Upon the basis of the testimony taken before the commissioner, the rule to show cause was made absolute as to a number of the defendants (214 U.S. at 425), and attachments for the bodies of the contemnors issued (214 U.S. at 483).

Respectfully submitted,

Burke Marshall
Burke Marshall
Assistant Attorney General

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

Harold H. Greene
Harold H. Greene
Attorney, Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum of Law 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:

Thomas H. Watkins, Esq.
Suite 800, Plaza Building
Jackson, Mississippi

John C. Satterfield, Esq.
340 First National Bank Building
Jackson, Mississippi

Charles Clark, Esq.
P. O. Box 1046
Jackson, Mississippi

Garner W. Green, Sr., Esq.
800 Electric Building
Jackson, Mississippi

Honorable Joe T. Patterson
Attorney General, State of
Mississippi
Jackson, Mississippi

Constance B. Motley, Esq.
10 Columbus Circle
New York, New York

R. Jess Brown, Esq.
1105-1/2 Washington Street
Vicksburg, Mississippi

Dated this 13th day of October, 1962.

Harold H. Greene

Harold H. Greene
Attorney, Department of Justice

PROPOSED JUDGMENT AND ORDER OF CIVIL CONTEMPT SUBMITTED ON BEHALF OF THE UNITED STATES

This Court having on September 28, 1962 adjudged Ross R. Barnett to be in contempt of its temporary restraining order entered on September 25, 1962 upon application of the United States, amicus curiae, and having provided that Ross R. Barnett should pay a fine of $10,000 per day and should be committed to and remain in the custody of the Attorney General unless on or before October 2, 1962 at 11:00 a.m. he showed the Court that he was fully complying with the terms of the restraining order and that he had notified all law enforcement officers and all other officers under his jurisdiction or command:

(a) To cease forthwith all resistance to and interference with the orders of this Court and the District Court for the Southern District of Mississippi;

(b) To maintain law and order at and around the University and to cooperate with the officers and agents of this Court and of the United States in the execution of the orders of this Court and of the District Court for the Southern District of Mississippi, to the end that James H. Meredith shall be permitted to register and remain as a student at the University of Mississippi under the same conditions as apply to all other students; and

Ross R. Barnett on October 2, 1962 having

represented to this Court through his counsel that he was, so far as he could do so, fully complying with the orders of this Court, and that he would to the best of his ability maintain law and order and comply in the future with the orders of the Court; and the Court having in reliance upon that representation withheld imposing any sanction for contempt, and having put the matter over to October 12, 1962 for a further showing by Ross R. Barnett of his compliance with the order of this Court; and

This Court having regularly convened on October 12, 1962 to hear such further showing as Ross R. Barnett might have regarding his compliance with the prior order of this Court; and it appearing from statements of counsel for Ross R. Barnett and for the United States that Ross R. Barnett had in fact ceased his affirmative obstruction and interference with the orders of this Court with respect to the admission and attendance of James H. Meredith at the University of Mississippi; but Ross R. Barnett having made no showing that he had notified all law enforcement officers and all other officers under his jurisdiction and command that they should do the things set forth in subparagraphs (a) and (b) of this Court's order of September 28, 1962; and Ross R. Barnett through his counsel having represented to this Court, contrary to the representations made on October 2, 1962, that he would comply with the orders of this Court only when such compliance was in his judgment consistent with his duties as Governor of the State of Mississippi pursuant to the Constitution and laws of the State of Mississippi; and

The Court having this day entered a preliminary injunction which requires Ross R. Barnett to take the same action and refrain from the same action as required and forbidden in this Court's temporary restraining order of September 25, 1962;

NOW THEREFORE THE COURT FINDS that Ross R. Barnett has not purged himself of his contempt of this Court's order of September 25, 1962, as required by the order of September 28, 1962; and that Ross R. Barnett still is in contempt of the Court's order of September 25, 1962; and

IT IS ORDERED that Ross R. Barnett forthwith pay to the Clerk of this Court $10,000 per day on account of his contempt during the period October 2, 1962 to October 12, 1962, being a total amount of $100,000, and that he hereafter pay a fine of $10,000 per day until such time as he shall (1) issue to all law enforcement officers and all other officers under his jurisdiction or command the instructions required by subparagraphs (a) and (b) of this Court's order of September 28, 1962; and (2) submit to the Court a signed statement showing in detail in what manner he is complying and intends to comply with the orders of this Court of September 25, 1962, September 28, 1962, and this date.

Done this _____ day of October, 1962.

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. 86[illegible]

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,

BURKE MARSHALL
Assistant Attorney General

JOHN DOAR
Attorney, Department of Justice

J. HAROLD FLANNERY
Attorney, Department of Justice

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,475

JAMES H. MEREDITH

v.

CHARLES DICKSON FAIR, ET AL.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF UNITED STATES FOR DESIGNATION AS AMICUS CURIAE

I

Courts Can Call Upon Law Officers of The United States To Serve As Amici Curiae

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1946)

Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514 (C.A. 3, 1948)

II

The United States Has A Legal Interest In The Due Administration of Justice And The Protection of The Integrity of the Judicial Process

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908 (1961)

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La., 1961), affirmed 368 U.S. 11 (1961)

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La., 1960), affirmed 365 U.S. 569 (1961), 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., 1960), affirmed 365 U.S. 569

Faubus v. United States, 254 F. 2d 797 (C.A. 8, 1957), cert. denied, 358 U.S. 829 (1958)

Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La., 1961), affirmed 368 U.S. 515 (1962)

Allen v. State Board of Education, No. 2106 (E.D. La.)(Order of March 17, 1961)

Angel et al. v. State Board of Education, No. 1658 (E.D. La.)(Order of March 17, 1961)

Davis v. East Baton Rouge Parish School Board, No. 1662 (E.D. La.)(Order of March 17, 1961)

cf:

United States v. Louisiana, 180 F. Supp. 916 (E.D. La., 1960), stay denied, 364 U.S. 500

In re Debs, 158 U.S. 564, 584 (1895)

United States v. California, 332 U.S. 19 (1946)

Sanitary District of Chicago v. United States, 266 U.S. 405 (1928)

Kern River Co. v. United States, 257 U.S. 147 (1921)

United States v. Throckmorton, 98 U.S. 61 (1878)

Vitamin Technologists, Inc. v. Wisconsin Alumni Research Foundation, 146 F. 2d 941 (1945)

XII

In Connection With Its Amicus Participation, The United States Can Be Authorized To File Pleadings and Briefs, submit Evidence and Make Arguments

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908 (1961)

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La., 1961), affirmed 368 U.S. 11 (1961)

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La., 1960), affirmed 365 U.S. 569 (1961) 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., 1960), affirmed 365 U.S. 569

Faubus v. United States, 254 F. 2d 797 (C.A. 8, 1957), cert. denied, 358 U.S. 829 (1958)

Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La., 1961), affirmed 368 U.S. 515 (1962)

Allen v. State Board of Education, No. 2106 (E.D. La.) (Order of March 17, 1961)

Angel et al. v. State Board of Education, No. 1658 (E.D. La.) (Order of March 17, 1961)

Davis v. East Baton Rouge Parish School Board, No. 1662 (E.D. La.) (Order of March 17, 1961)

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, As Amicus Curiae and Petitioner, v. STATE OF MISSISSIPPI, et al., Defendants.	

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO MOTION BY THE STATE OF MISSISSIPPI TO DISSOLVE TEMPORARY RESTRAINING ORDER

The State of Mississippi has filed motions to dissolve the temporary restraining order issued by this Court upon application of the United States on September 25, 1962, and to dismiss the contempt proceedings now pending against Ross R. Barnett and Paul B. Johnson, Jr.

The issues which the State seeks to raise regarding the pending contempt proceedings will not be dealt with in this Memorandum. This Court has heretofore held that the State of Mississippi has no standing to appear upon behalf of the individual contemnors. Neither Governor Barnett nor Lt. Governor Johnson has filed in his own behalf a motion to stay or dismiss.

The issues raised by the State in its Motion to Dissolve the Temporary Restraining Order relate to

the basic jurisdiction of this Court and to the nature of the claim asserted in the petition filed by the United States. There is no claim that the temporary restraining order, if the Court has jurisdiction of the subject matter and the parties and if the United States has standing to sue, was improvidently granted.

The basic contentions of the State may be stated as follows:

(1) This Court lacks jurisdiction of the subject matter of the claim stated in the petition.

(2) This Court has no jurisdiction and cannot acquire jurisdiction of the persons of the defendants named in the petition.

(3) The United States has no standing to assert the claim stated in its petition.

Each of these assertions will be considered separately. Certain other matters of claimed legal defense will be discussed at the conclusion of the discussion of the above three contentions.

I

This Court Has Jurisdiction of the Subject Matter of the Claim

The State does not urge that the petition fails to state a claim upon which the United States is entitled to relief. In light of the precedents such assertion could hardly be made. Faubus v. United States, 254 F.2d 797 (C.A. 8, 1957), cert. den. 358 U.S. 829; Bush v. Orleans Parish School Board, 191 F.Supp. 871 (E.D. La., 1961), aff'd. 367 U.S. 908. The State contention is that this Court cannot grant the relief to which the petition entitles the United States and that such relief should be sought from the District Court. This contention is without merit.

Before considering the legal authorities bearing upon this Court's jurisdiction, certain of the State's misconceptions regarding the nature of the claim set forth in the petition should be corrected.

A. Nature of the Claim

In its petition the United States alleges that the legal issues between the plaintiff, James H. Meredith, and the defendant University officials and Board of Trustees have been finally adjudicated. The present proceeding does not involve any claim of right of the United States to participate in that adjudication. Nor does the United States seek to affect the result of that proceeding. The facts alleged in the petition of the United States are separate and distinct from those involved in the basic law suit, which this Court decided in its judgment of reversal on June 25, 1962.

The petition alleges that while the Meredith case was pending in the District Court, while it was pending on appeal to this Court, and since the case has been returned to the District Court pursuant to this Court's mandate of July 28, 1962, the various defendants named in the petition have actively engaged in a program to frustrate the implementation of this Court's judgment of June 25, 1962, and any order of the District Court which has been or might be entered pursuant to that judgment. This program of obstruction has been part of an official and announced policy of the State of Mississippi. The petition alleges that the policy has been announced by both the Chief Executive of the State (paragraph 25) and by the State legislature (paragraphs 17 and 18). The policy has been implemented by calling upon all officials of the State to ignore the orders of this Court and of other federal courts with respect to the subject matter of the Meredith litigation and to

actively obstruct the implementation of those orders (paragraphs 17, 25 and 32). The defendants are alleged to have taken concrete steps to obstruct the federal courts in accordance with the state policy. They have done so by means of invalid injunctive suits in state courts (paragraphs 28 and 29), by criminal prosecution of Meredith (paragraphs 21, 26 and 29), and by legislation which is clearly directed against Meredith personally (paragraph 30).

The petition alleges that both the purpose and effect of the conduct of the defendants is to prevent and discourage James H. Meredith from attending the University of Mississippi pursuant to the judgment and orders of this Court and of the District Court.

In short, the petition alleges that the defendants have unlawfully prevented and are seeking to prevent the judgment, mandate and orders of this Court from being carried into effect.

B. Significance of District Court Precedents

The State points out in its Memorandum that prior to the instant case, obstruction of school desegregation decrees has been dealt with by the district courts. From this circumstance, the state draws the conclusion that only the district courts have power to deal with such obstruction. In considering this contention it is important to consider the bases upon which the district courts have acted.

An original suit to enforce rights under the Fourteenth Amendment to attend public schools without racial discrimination can be initiated only in a district court. The district court has original jurisdiction by virtue of Sections 1331 and 1343 of Title 28 U.S.C. It is this jurisdiction which the district courts have exercised in the many school desegregation suits across the country.

When a district court has entered a final judgment in a school desegregation case in exercise of its jurisdiction under §1331 and 1343, and is thereafter obstructed in effectuating its decree, the jurisdictional situation changes. Further exercise of jurisdiction is not for the purpose of litigating the rights between the original parties, but to effectuate and preserve the jurisdiction of the court previously exercised and to uphold the integrity of the court's decrees. That a different basis of jurisdiction is relied upon is made clear by a careful examination of the cases.

In McSwain v. County Board of Education of Anderson County, 138 F. Supp. 570 (E.D. Tenn., 195[redacted] the District Court entered a final judgment requiring the defendant school officials to admit Negro applicants

to the high school in Clinton, Tennessee, without racial discrimination. Thereafter, the defendant school officials filed a petition with the district court seeking injunctive relief against interference and harassment by John Kasper and others. The injunction was issued and several of the persons who had been added as defendants and who were named in the injunction were later held to be in contempt. On appeal it was urged that the district court had no jurisdiction to entertain the petition against John Kasper and his co-defendants. Concededly, they were not acting under color of the laws of the State of Tennessee and under normal circumstances the disturbances, assaults and breaches of the peace which they had committed would be cognizable only in the courts of the state. Nonetheless, the court of appeals, relying upon and specifically citing the all-writs statute, 28 U.S.C. 1651, concluded that "The District Court had jurisdiction to issue the injunction." Bullock v. United States, 265 F. 2d 683, 691 (C.A. 6, 1959).

The District Court for the Eastern District of Arkansas was faced with a similar situation in the case relating to desegregation of the Little Rock public schools. A plan for desegregation had been approved by the District Court (Aaron v. McKinley, 143 F. Supp. 855) and the Court of Appeals had affirmed (Aaron v. Cooper, 243 F. 2d 361 (C.A. 8, 1957)). Thereafter the Governor of Arkansas prevented the carrying out of the desegregation decree by his use of the Arkansas National Guard. The district court, upon application of both the United States and of the original plaintiffs, enjoined the Governor and t[redacted] commandant of the Guard. In sustaining this exercise of jurisdiction, the Court of Appeals held that "It was

proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgments, and to prevent them from being thwarted by force or otherwise." Faubus v. United States, supra, at pages 804-805. Although the Court of Appeals did not state whether this exercise of jurisdiction was based upon the all-writs statute or upon the inherent power of a court to protect and effectuate its judgments, it is clear that the district court's jurisdiction was regarded as ancillary to the main case and not as primary.

In Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908, the court made it equally clear that in bringing in new parties and enjoining interference with its prior orders, it was exercising ancillary and not primary jurisdiction. The Court emphasized that its exercise of power was not only independent of the issues in the basic law suit, but was not even dependent upon the initiative of the litigants in the original law suit. In this connection the court quoted from Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 1001, 88 L. Ed. 1250:

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims. . . . [191 F. Supp. at 878, fn. 16].

In no instance when a district court has exercised jurisdiction to protect its prior orders in a school desegregation case has it purported to exercise primary jurisdiction. In each case it has enjoined obstruction or interference through exercise of its ancillary jurisdiction, whether by virtue of 28 U.S.C. 1651

or its inherent power to effectuate its decrees. Accordingly, it is of no significance that a court of appeals lacks primary jurisdiction of a school desegregation suit. The only question here pertinent is whether the Court of Appeals has ancillary jurisdiction, as does the district court, to protect its judgments, mandates and orders by the injunctive process.

C. The Court of Appeals May Act to Protect Its Jurisdiction.

Ancillary jurisdiction, whether based upon the inherent power of the court to protect and effectuate its jurisdiction or upon the all-writs statute, reposes in all courts, both trial and appellate. The United States clearly called upon this Court to exercise its ancillary jurisdiction; it did not, and it does not now, purport to invoke original jurisdiction of any sort.

"An ancillary suit in equity is 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." Caspers v. Watson, 132 F. 2nd 614, 615 (CA 7, 1942), cert. denied, 319 U.S. 757, 87 L. Ed. 1709, 63 S. Ct. 1176; Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), 78 L. Ed. 1230, 54 S. Ct. 695; Root v. Woolworth, 150 U.S. 401 (1893), 37 L. Ed. 1123, 14 S. Ct. 136.

"Special statutory authority is not necessary to authorize a federal court to exercise its ancillary jurisdiction." Carter v. Powell, 104 F. 2nd 428, 430 (C.A.5, 1939), cert. denied, 308 U.S. 611, 84 L. Ed. 511, 60 S. Ct. 179.

Moreover, in the exercise of ancillary jurisdiction, courts may proceed without regard to the statutory limits of jurisdiction which would restrict the court were the proceedings original. Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934), 78 L. Ed. 1230, 54 S. Ct. 695; Krippendorf v. Hyde, 110 U.S. 276, (1884), 28 L. Ed. 145, 4 S. Ct. 27; Dewey v. West Fairmont [redacted] Coal Co., 123 U.S. 329, 333 (1887), 31 L. Ed. 179, 8 S. Ct. 148; Caspers v. Watson, 132 F. 2nd 614 (C.A.7, 1942), cert. denied, 319 U.S. 757; Glens Falls Indemnity

Co. v. United States, 229 F. 2nd 370 (C.A.9, 1955); Walmac Co. v. Isaacs, 220 F. 2nd 108, 113-114 (C.A.1, 1954).

And ancillary jurisdiction may be exercised by an appellate court in aid of its appellate jurisdiction just as it may be exercised by a trial court in aid of its jurisdiction. National Brake Co. v. Christensen, 254 U.S. 425 (1921), 65 L. Ed. 341, 41 S. Ct. 154; Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A.7, 1922), affirmed, 261 U.S. 399 (1923), 67 L. Ed. 719, 43 S. Ct. 458.

D. Issuance of the Mandate Does Not Exhaust the Power of the Court of Appeals.

The State argues, however, that the "enforcement of a final decree remanded to a District Court lies in the hands of that Court." (Memorandum, p. 20). Presumably it follows that the issuance of the mandate exhausts the power of the Court of Appeals to act with respect to the case.

We agree that the jurisdiction of courts of appeals is appellate rather than original. We agree also that the appellate function is exercised by a review of the record made in the district court, followed by a mandate to that court, and that normally the appellate function does not involve the taking of evidence or the addition of parties at the appellate level. But the question here concerns not generalities about the usual functions of an appellate tribunal; what is involved is the power of a federal court of appeals to protect and make effective its appellate jurisdiction in appropriate cases by ancillary proceedings.

It is clear that proceedings may be had in a court of appeals which involve something other than review of the record made in the district court. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), 1 L. Ed. 290, 77 S. Ct. 309. Such proceedings may be had either prior to the attachment of appellate jurisdiction -- as in the LaBuy case -- or they may occur after the mandate has issued to the district court. See discussion, infra. The test in each case is whether the proceeding involved can properly be said to be ancillary to the appellate function of the court and to a case to which the jurisdiction of the court has attached or may attach in the future.

In Toledo Scale Co. v. Computing Scale Company, 261 U.S. 399 (1923), 67 L. Ed. 719, 43 S. Ct. 458, the Supreme Court upheld an order of the Court of Appeals for the Seventh Circuit directing the District Court to issue an injunction the purpose of which was to protect a judgment of the Court of Appeals. Previously, the Court of Appeals had upheld the validity of a patent held by the Computing Scale Company and the case was sent back to the District Court for an accounting. The accounting resulted in a decree for profits of more than $400,000 in favor of the Computing Scale Company. The Court of Appeals affirmed the decree but stayed its mandate to permit an application to the Supreme Court for writ of certiorari. On the day the Court of Appeals took this action, the Toledo Scale Company brought suit in the United States District Court for the Northern District of Ohio and again challenged the validity of the Computing Scale Company's patent. The Computing Scale Company then directly petitioned the Court of Appeals for the Seventh Circuit requesting

that the court enforce its decree by enjoining the Toledo Scale Company from continuing with its suit in the Ohio District Court. A response was filed in the Court of Appeals by the Toledo Scale Company. The Court of Appeals, on the basis of the pleadings filed and argument heard, which raised issues never presented to the District Court, concluded that the petition of the Computing Scale Company was "ancillary to the original jurisdiction invoked" and ordered the issuance of the injunction prayed for. 281 Fed. 488 (C.A. 7, 1922). The Supreme Court affirmed, holding that the injunction was "within the power of the Circuit Court of Appeals" (261 U.S. 399, at 426, 67 L. Ed. 719, 43 S. Ct. 458), relying upon the all-writs-statute (now 28 U.S.C. 1651).

To be sure, in Toledo Scale, as the State correctly points out, the mandate of the Court of Appeals to the District Court had not yet gone down at the time the appellate court acted to protect its judgment. But that this is irrelevant is shown by subsequent decisions. In United States v. United States District Court, 334 U.S. 258 (1948), 92 L. Ed. 1351, 68 S. Ct. 1035, the very question at issue was whether the Court of Appeals could take action to compel compliance with a mandate which had already issued. Said the Supreme Court (334 U.S. 258, at 264, 92 L. Ed. 1351, 68 S. Ct. 1035):

> It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court [citing case]. That function may be as important in protecting a past exercise of jurisdiction

as in safeguarding a present or future one (emphasis added).[1/]

See also, United States v. Smith, 331 U.S. 469 (1947), 91 L. Ed. 1610, 67 S. Ct. 1330, where the Supreme Court held that the Court of Appeals had power to issue mandamus

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1/ That there may be circumstances in which jurisdiction remains in the court of appeals for certain purposes even after issuance of the mandate is reflected also in cases such as Individual Drinking Cup Co. v. Public Service Cup Co., 262 Fed. 410 (C.A. 2, 1919); S. S. Kresge Co. v. Winget Kickernick Co., 102 F. 2nd 740, 742 (C.A. 8, 1939), and Epstein v. Goldstein, 110 F. 2nd 747 (C.A. 2, 1940), where appellate courts construed or clarified their mandates without recalling them. See also In re Gamewell Fire-Alarm Tel. Co., 73 Fed. Rep. 908 (C.A. 1, 1896), where a petition was filed with the Court of Appeals requesting leave to reopen a case in the District Court because of newly discovered evidence. The petition was filed with the Court of Appeals after that court had affirmed the decree of the lower court and had issued its mandate. Nevertheless, the Court of Appeals entertained the petition and held (73 Fed. Rep. at 911):

> We have no doubt that an application may be made, as in this case, after the judgment, after the issue of the mandate, and after the close of the term at which the judgment was entered, subject to certain limitations as to time arising out of the equitable doctrine of laches, and other possible exceptional limitations.

Subsequently, the decision in the Gamewell case was approved by the Supreme Court. In National Brake Co. v. Christensen, 254 U.S. 425, 431 (1921), 65 L. Ed. 341, 41 S. Ct. 154, that Court stated:

> That leave to file a supplemental petition in the nature of a bill of review may be granted after the judgment of the appellate court, and after the going down of the mandate at the close of the term at which judgment was rendered, was held in In re Gamewell Co., 73 Fed. Rep. 908, in a carefully considered opinion rendered by the Circuit Court of Appeals for the First Circuit, reciting the previous consideration of the question in cases in this Court. We think these cases settle the proper practice in applications of this nature.

Accord: Brown v. Brake-Testing Equipment Corporation, 50 F. 2nd 380 (C.A. 9, 1931). See also Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1946), 90 L. Ed. 1447, 66 S. Ct. 1176, where the Court of

and prohibition to compel vacation of a District Court order granting a new trial after affirmance of the conviction by the Court of Appeals. And see, In re Chicago R.I. & P.R. Co., 162 F. 2nd 257 (C.A. 7, 1947), cert. denied, 332 U.S. 793 (1947), 92 L. Ed. 374, 68 S. Ct. 21.

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1 / (Cont.)

Appeals for the Third Circuit permitted inquiry into the validity of a judgment that had been rendered many years previously. There, a decree was entered sustaining a patent of the Universal Oil Products Company (6 F. Supp. 763). That decree was affirmed by the court of appeals (78 F. 2nd 991) and certiorari was denied by the Supreme Court (296 U.S. 626 (1935), 80 L. Ed. 445, 56 S. Ct. 149), but its validity was challenged before the Court of Appeals in subsequent proceedings in related cases. The Court of Appeals thereupon caused an investigation to be conducted of the earlier decree and, at the conclusion of the investigation and following a report of a master, vacated the earlier decree and ordered the cause reargued. The Supreme Court affirmed the power of the Court of Appeals to act as it did, noting that (328 U.S. 575, at 580, 90 L. Ed. 1447, 66 S. Ct. 1176): "the inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."

B. The Court Of Appeals May Act By Order Directly Upon Litigants

The State would further argue, however, that the decisions discussed above show merely that an appellate court may direct the District Court to take steps to protect the past, present, or future jurisdiction of the Court of Appeals, but that the appellate tribunal may not act to protect its jurisdiction by proceeding directly against litigants. To issue direct orders, as distinguished from orders operating through the District Court -- the argument goes -- is an exercise of original jurisdiction not vested in a court of appeals.

There is no good reason for assuming that, in the protection of its own orders and its own jurisdiction, a court of appeals is as limited as the State would have it. It is "fundamental that a court of equity has the inherent power to issue such orders and injunctions as may be necessary to prevent the defeat or impairment of its jurisdiction." In re Quick Charge Inc., 69 F. Supp. 961, 969, (W.D. Okl. 1947). The power to render a judgment includes the power to enforce that judgment by appropriate process. United States v. King, 74 F. Rep. 493 (C.C. E.D. Mo., 1896).

In Sawyer v. Dollar, 190 F. 2d 623 (C.A.D.C. 1951), vacated as moot, 344 U.S. 806, 73 S. Ct. 7, 97 L.Ed. 628 (1952), the Court of Appeals held that it had power to enforce, by its own processes, and by way of a civil contempt proceeding, a District Court order entered by its direction in haec verba. The Court said (190 F. 2d at 634, 642):

This court, having directed the United States District Court for the District of Columbia to enter a judgment on mandate in terms prescribed by it, has the power to punish for contempt those who disobey or resist the order or mandate so entered by the District Court. Merrimack River Sav. Bank v. City of Clay Center, 1911, 219 U.S. 527, 31 S. Ct. 295, 55 L. Ed. 320; Toledo Scale Co. v. Computing Scale Co., 1923, 261 U.S. 399, 43 S. Ct. 458, 67 L. Ed. 719.

* * * * *

Toledo Scale Co. v. Computing Scale Co. held that when a District Court enters an order by direction of a Circuit Court of Appeals, and that order is disobeyed, the Circuit Court of Appeals has power to punish summarily for the disobedience. In that case the order of the District Court was in the words of the Circuit Court of Appeals, as in the case now before us. And the punishment there was in civil contempt, as in the order now being entered in the present case. We are of the opinion that the decision in Toledo Scale Co. v. Computing Scale Co. is not only "good law" but is a binding authority upon the point. If it is not the law, Courts of Appeals are impoten[illegible]

in respect to decrees which they formulate and direct a District Court to enter.[2/]

In addition to pointing out correctly that the decision in Sawyer was vacated by the Supreme Court because it had become mooted,[3/] the State objects to the Sawyer case on two grounds: (1) the Court of Appeals there enforced its previous orders not by an injunction but by a contempt proceeding, and (2) no additional parties were involved. We submit that these distinctions are of no significance.

2/ And see Merrimack River Savings Bank v. Clay Center, 219 U.S. 527, 31 S.Ct. 295, 55 L. Ed. 320 (1911) where the Supreme Court held that, irrespective of the issuance of an injunction by a lower federal court, the wilful removal beyond the reach of the lower court of the subject matter of the litigation or its destruction, pending an appeal, is a contempt of the appellate jurisdiction of the Supreme Court. A fortiori, if the lower court has issued an injunction at the direction of an appellate court, violation of that injunction would vest in the appellate court jurisdiction to take whatever action necessary to protect its judgment.

3/ Whatever may be the effect of a vacation on the ground of mootness insofar as the lower courts in the District of Columbia are concerned, the opinion in the case is as persuasive here as this Court deems it to be.

F. A Court of Appeals May Issue Injunctions in Aid of its Jurisdiction

Courts of Appeals traditionally issue injunctions in the nature of stays to preserve the status quo pending appeal. Beyond that, however, like district courts, they can issue injunctions which are ancillary to the main proceeding and necessary to preserve and effectuate the jurisdiction of the court.

As the Supreme Court explicitly stated in Toledo Scales, supra (261 U.S. at 426, 43 S. Ct., at 465, 67 L. Ed. at 730):

> Under §262 of the Judicial Code, [the Court of Appeals] had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. It could, therefore, itself have enjoined the Toledo Company from interfering with the execution of its own decree * * *.

In National Labor Relations Board v. Underwood Machinery Co., 198 F.2d 93 (C.A. 1, 1952), the Court of Appeals for the First Circuit had entered a decree enforcing an order of the National Labor Relations Board requiring the payment of back pay by an employer to an employee. The Board then petitioned the Court of Appeals to restrain a creditor of the employee from instituting a state court proceeding to carry into effect attachments of part of the back pay, which would have delayed compliance with the Court of Appeals decree. Although the Court of Appeals, in the exercise of its discretion, decided not to grant the relief requested, it concluded that (198 F.2d at 95):

> We have no doubt of the ancillary jurisdiction of this court, under 28 USC §1651, to entertain the present petition of the Board for a restraining order in effectuation of our decree entered in the main proceeding * * *.

Chief Judge Magruder, dissenting, would have granted the relief requested by the Board in the exercise of the court's ancillary jurisdiction under 28 U.S.C. 1651 (198 F.2d at 96).

Judge Magruder relied upon National Labor Relations Board v. Sunshine Mining Co., 125 F.2d 757 (C.A. 9, 1942). There the Court of Appeals had entered a decree enforcing a back pay order against an employee. Subsequently, on petition of the Board, the Court of Appeals granted an injunction restraining estranged wives and creditors of the employees from maintaining state court actions seeking to attach the back pay.

These decisions indicate that appellate courts no more than district courts are limited in their choice of means of protecting their orders. Injunction, just like mandamus or contempt, is merely a means by which the court exercises its ancillary power to protect its general jurisdiction. As we have demonstrated, the courts of appeals possess the power in an ancillary proceeding to effectuate their appellate jurisdiction. The choice of means obviously depends upon the circumstances.

Nor is it an objection to an ancillary injunctive proceeding before the court of appeals that the proceeding involves the filing of pleadings, the appearance of witnesses, the introduction of evidence and the determination of factual matters not raised in the court below. Although the requirement for such proceedings is less common in an appellate court than in a court of first instance, as we have shown, there is every reason why the two types of courts are parallel in their need for ancillary jurisdiction to protect

their orders and parallel in their power to entertain such proceedings.

In Toledo Scales, supra, the petition filed in the Court of Appeals raised factual issues. Consequently, an answer was filed and a hearing had. See Toledo Scale Co. v. Computing Scale Co., 281 Fed. 488 (C.A. 7, 1922). As noted, the Supreme Court affirmed the judgment rendered by the Court of Appeals as a result of its hearing. Similarly, in In re Door, 195 F. 2d 766 (C.A.D.C., 1952), testimony was offered and cross-examination conducted in a contempt proceeding before the Court of Appeals for the District of Columbia. See also, United States v. Lynd, No. 19576 (C.A. 5, 1962). Cf. United States v. Shipp, 214 U.S. 386, 29 S.Ct. 637, 53 L. Ed. 1041 (1909), and Universal Oil Products Company v. Root Refining Company, 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946), where appellate courts appointed masters to take evidence which the courts then considered and evaluated.

In short, it is clear that, even though a court of appeals would have no jurisdiction to entertain an application for an injunction as an original matter, it is not so limited when it acts in an ancillary proceeding to protect its appellate jurisdiction.

II

This Court Has Jurisdiction of the Defendants Named in the Petition

By its very nature an ancillary proceeding will often raise factual issues not embraced within the original litigation. Whether the ancillary proceeding is in a district court or a court of appeals, its disposition may require the subpoenaing of witnesses, the receipt of evidence, findings of fact and affirmative relief. In its Memorandum the State seemingly concedes that a district court may, in such ancillary proceeding, avail itself of all process and procedures available in the primary litigation. The State urges, however, that a court of appeals, in exercising its ancillary jurisdiction, is limited in certain regards to the procedures ordinarily attendant upon the appellate process itself. The court of appeals, while it can subpoena witnesses, hear testimony, and receive exhibits, cannot, says the State, summon new parties to appear before the court even though such parties may be necessary for full and effective relief in connection with the court's ancillary jurisdiction.

The general rule that new parties may not be added to a lawsuit at the appellate level is distinguishable from the present situation. The distinction is that between the appellate process itself and proceedings ancillary to that process. An appellate court is by its very nature a court of "review." It reviews what the district court has done and corrects errors. In properly performing this function it must necessarily limit its consideration

to the record upon which the district court based its decision. It must also, of necessity, limit its judgment to the parties who were before the district court. The issues, the evidence, and the parties are the same. In contrast, an ancillary proceeding cannot be so limited. An ancillary proceeding by its very nature involves issues, evidence, and very often parties, which are extrinsic to the primary proceeding. To inhibit the addition of parties would defeat the very purpose of the proceeding and would ignore its "ancillary" nature. The State in its Memorandum merely points out the obvious when it notes that process and procedures appropriate for ancillary proceedings are more akin to the customary procedures in a district court than they are to the procedures followed in appellate courts. To deduce from this a general rule of law accords neither with reason nor decided cases.

Abundant authority may be found for the proposition that new parties may be added in connection with an ancillary proceeding. The rule has been well stated by the Court of Appeals for the Seventh Circuit in Natural Gas Pipeline Co. v. Federal Power Commission, 128 F.2d 481, 484 (C.A. 7, 1942) as follows:

> "Where a court has jurisdiction of a cause of action and the parties, it has jurisdiction also of supplemental proceedings which are a continuation of or incidental to and ancillary to the former suit even though the court as a federal tribunal might not have had jurisdiction of the parties involved in the ancillary proceeding if it were an original action. In other words, inasmuch as such jurisdiction is ancillary, a federal court is not precluded from exercising it over persons not

> parties to the judgment sought to be enforced. 25 C.J. 696 and 697; 21 C.J.S., Courts, §88, page 136. [Emphasis added.]

In the Natural Gas Pipeline Company case, supra, the court relied on Labette County Commissioners v. Moulton, 112 U.S. 217, 5 S.Ct. 108, 28 L.Ed. 698 (1884). In that case, a court had entered judgment against a township upon bonds issued by the county commissioners in behalf of the township. Subsequently, the plaintiff sought a writ of mandamus to compel the commissioners to assess and collect a tax to satisfy the judgment. It was contended that the court, if it should act upon such a petition, would be exercising original jurisdiction which, under the particular facts, it did not have. But the Supreme Court declined to accept this reasoning, saying (112 U.S. at 221):

> It is quite true, as it is familiar, that there is no original jurisdiction in the circuit courts in mandamus, and that the writ issues out of them only in aid of a jurisdiction previously acquired, and is justified in such cases as the present as the only means of executing their judgments. But it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced. [Emphasis added.]

See also Lewis v. United Air Lines Transport Corporation, 29 F. Supp. 112, 115 (D. Conn., 1939) where Judge Hincks wrote:

> It must be noted that the scope of ancillary jurisdiction depends only upon the subject-matter of supplemental proceeding. The number, identity or relationship of the parties affected by the supplemental proceedings have nothing to do with the existence of ancillary jurisdiction over the subject-matter. Thus it has long been established that ancillary

> jurisdiction over the subject-matter may obtain even though the supplemental proceeding brings in new parties.

And Judge Hincks also said (29 F. Supp. at 116):

> ... the existence of ancillary jurisdiction depends wholly upon a relationship of subject-matter as distinguished from the relationship of the parties. * * * If, then, the test is the need of relief to the party bringing the supplemental proceeding, it is immaterial whether the relief sought is directed against a party or against a stranger to the principal action.

Ancillary jurisdiction extends to additional parties, even though the court would lack jurisdiction over such parties were the ancillary proceeding original in nature. McCosh v. McCormack, 159 F.2d 219, 226 (C.A. 5, 1947) (cross-claim); United Artists Corp. v. Masterpiece Productions, 221 F.2d 213 (C.A. 2, 1955) (compulsory counterclaim); Vaughn v. Terminal Transport Co., 162 F. Supp. 647 (E.D. Tenn., 1957) (third-party action).

In the exercise of their ancillary jurisdiction to prevent obstruction to the carrying out of school desegregation decrees, the district courts have regularly added as parties defendant persons having no legal relationship to the original litigants. Thus in Faubus v. United States, supra, the commander of the Arkansas National Guard was added as a defendant and was enjoined. At various stages in the New Orleans desegregation case the State, the governor, the secretary of state, various legislators, the sheriffs and district attorneys of all parishes in the state, the mayors and chiefs of police of all cities, and several commercial banking houses were added as parties in the exercise of the court's ancillary jurisdiction.

Bush v. Orleans Parish School Board, supra. As already noted, the district court in the Clinton, Tennessee, school case added John Kasper and a number of local townspeople as defendants. Bullock v. United States, supra.

A commonly exercised type of ancillary jurisdiction is that of the contempt power. The case of Sawyer v. Dollar, supra, involving contempt proceedings in a court of appeals for violation of a district court order after the mandate on appeal had gone down, has already been discussed. It is interesting to note at this point, however, that the respondents in the contempt proceeding included persons who had not been parties in either the district court or, on the appeal, in the court of appeals. Charles Sawyer, the Secretary of Commerce, had been the sole defendant in the district court. The order entered by the district court on remand was directed against Mr. Sawyer personally. Nonetheless, when other persons, including several attorneys connected with the Department of Justice, acted with Sawyer in violating the court's order, they were all cited for contempt by the Court of Appeals. Clearly, the Court of Appeals could not have added them as parties appellant or appellee while the appeal was pending. They could have been added as litigants to the primary litigation, if they could have been added at all, only at the district court level. Nonetheless, the court of appeals in the ancillary proceeding assumed jurisdiction of their persons for the purpose of compelling compliance with the district court order.

Smith v. American Asiatic Underwriters, 134 F.2d 233 (C.A. 9, 1943); Wenborne-Karpen Dtyer Co. v. Cutler Dry Kiln Co., 292 Fed. 861 (C.A. 2, 1923); and Holland v. Board of Public Instruction, 258 F.2d 730 (C.A. 5, 1958), which the State cites, are inapposite, for they deal solely with the propriety of joining additional parties in appellate courts to litigate the merits of the controversy decided in the district court.[4] The situation is obviously different where, as here, the merits of the controversy (i.e., Meredith's right to admission to the University of Mississippi) have been foreclosed ever since this Court's decree of June 25, 1962, and the proceedings in this Court are ancillary only, i.e., they are concerned solely with enforcement of this Court's adjudication of the merits.[5]

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[4] With respect to the Smith and Wenborne-Karpen cases, supra, see also the earlier opinions dealing with the merits, 127 F.2d 754 (C.A. 9, 1942), and 290 Fed. 625 (C.A. 2, 1923), respectively.

[5] The State argues (Memorandum, pp. 4-13) that since it and the state officers (other than the original defendants) were not parties prior to September 25, 1962, they are not bound by any antecedent orders. As we show supra, the power of the court to conduct ancillary proceedings necessarily includes the power to add parties. In any event, the State's argument deals only with the question of whether contempt proceedings can be had against persons not parties to the injunction claimed to be violated; it does not deal with what is here involved: the power of the court to entertain an injunction action against additional persons in the exercise of ancillary jurisdiction. Finally, on this point, it may well be that the defendants added on September 25 are in privity with the previous defendants and thus properly added even under the narrowest possible view. The Meredith suit has been against officials who were represented by the state attorney general. That suit essentially sought relief against state action, and the interference

(Footnote continued on next page)

5/ (Footnote continued from preceding page) alleged in our petition, although involving other officials, is also state action. At least until most recently, the original defendants were acting for the state, and, in a sense, for the state officials who were added on September 25. In that posture, it is reasonable to hold that the new defendants and the old defendants are sufficiently in privity even for contempt purposes -- certainly for additional relief purposes.

III

The United States Has Standing to Assert the Claim Set Forth in its Petition

The State of Mississippi contends further (Memorandum, pp. 36-41) that the United States had no standing to seek from this Court the issuance of the Temporary Restraining Order which prohibited the Governor, Lieutenant Governor, other state officials, and the State itself, from interfering with its orders and mandate of July 27-28, 1962. The United States has sought and obtained just such orders as the one here questioned in a number of similar cases.

This Court on September 18, 1962, granted the United States authority to appear as amicus curiae "in all proceedings in this action before this Court * * * [and the District Court] 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 due administration of justice and the integrity of the judicial processes of the United States."

As the State points out in its Memorandum, pp. 36, this order was something more than the ordinary authorization to appear as amicus curiae. It was, in effect, as the State concedes, permission for the Government to appear in the case in the status of a party to the proceedings. There is no doubt that this Court's order is valid.

In Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La. 1961), affirmed, 368 U.S. 11 (1961), 7 L.Ed.2d 75, 82 S.Ct. 119, and Hall v. St. Helena Parish School Board, 197 F.Supp. 649 (E.D.

La. 1961), affirmed 368 U.S. 515, 7 L.Ed.2d 521, 82 S.Ct. 529, the United States was granted the authority to, and did, file pleadings and seek injunctions on its own motion. See also, Allen v. State Bd. of Educ., No. 2106 (E.D. La.); Angel v. State Bd. of Educ., No. 1658 (E.D. La.); Davis v. East Baton Rouge Parish School Bd., No. 1652 (E.D. La.), in all of which the United States entered as amicus on March 17, 1961, and sought injunctions on its own motion. Similarly, the United States, joined by the original plaintiffs, filed pleadings against new defendants in Faubus v. United States, 254 F.2d 787 (C.A. 8, 1957), cert. denied, 358 U.S. 829 (1958), 79 S.Ct. 49; Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), affirmed, 365 U.S. 569, 5 L.Ed.2d 806, 81 S Ct. 754 (1961); and Bush v. Orleans Parish School Bd., 190 F.Supp. 861 (E.D. La. 1960), affirmed sub nom. New Orleans v. Bush, 366 U.S. 212, 6 L.Ed.2d 239, 81 S.Ct. 1091 (1961).

There can be, at this late date, no doubt of this Court's power to authorize the United States to institute injunctive proceedings, as it has done here. The State's objection, then, is wholly unsubstantial. Furthermore, the United States having standing to obtain the temporary restraining order, it necessarily has standing to vindicate that order by proceedings in civil contempt.

IV

The Governor, Lieutenant Governor and Other Officials of the State of Mississippi Are Proper Defendants

The State contends that it is the only real party in interest in this proceeding and that the Governor, Lieutenant Governor and the other officials

of Mississippi were improperly joined as defendants. In effect, the State is arguing that the Mississippi officials who have been made parties to this action are without responsibility for any of the acts they are alleged to have performed. This contention is totally erroneous, both procedurally and substantively.

A. Procedurally.

Rule 17 of the Federal Rules of Civil Procedure is the source of the "real party in interest" requirement of federal court litigation. The Rule, however, applies only to the capacity of the plaintiff, and not the defendant. It specifically provides that "every action shall be prosecuted in the name of the real party in interest" (emphasis added). Nothing in the Rule requires that the person sued be the real party in interest. Other provisions of the federal rules are designed to protect improperly joined defendants or persons with interests opposed to the plaintiff who have not been made parties to the litigation. Thus, Rule 24 permits persons to intervene in law suits under certain circumstances. This Rule, however, does not permit the intervenor to displace another party to the action merely by purporting to accept responsibility. Rather, where a party alleges that he has been improperly joined as a defendant, he must test this contention by moving to dismiss the suit as against himself. Here the State officials who have been joined as defendants have not moved to dismiss, and this Court has already held that these officials must personally make such a motion in order to challenge their joinder as defendants. It is clear, therefore, that the State of Mississippi has no basis for contesting the joinder

of the defendant state officials on the ground that they are not the real parties in interest.

B. Substantively.

More fundamentally, however, the State is in error when it contends that the defendant officials are not responsible for the acts they are alleged to have performed since they acted either pursuant to state law or under directions from a superior official. That individual governmental officials are responsible for their unconstitutional acts notwithstanding the fact that they are carrying out what state law commands of them is now too well settled to be questioned. Thus, in In re Ayers, 123 U.S. 443, 507 (1887), 31 L.Ed. 216, 8 S.Ct. 164, the Supreme Court made clear the nature of a state official's responsibility. The Court said:

> The Government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States which can shield or defend him from their just authority, and the extent and limits of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (emphasis added.)

While the quoted statement in Ayers was dictum, it has since been accepted by the Supreme Court and by

this Court as a proper statement of the applicable rule. See Ex parte Young, 209 U.S. 123, 159-160 (1908) 52 L.Ed. 714, 28 S.Ct. 441; Sterling v. Constantin, 287 U.S. 378, 393 (1932), 77 L.Ed. 375, 53 S.Ct. 190; United States v. Alabama, 267 F.2d 808, 811 (C.A. 5, 1959).

Nor can governmental officials excuse their disobedience of the law by claiming that they acted pursuant to the directives of a superior. Nelson v. Steiner, 279 F.2d 944 (C.A. 7, 1960), involved civil contempt proceedings against Justice Department and Internal Revenue officers. In rejecting a defense that the defendants had acted under instructions from a superior officer, the Court said (279 F.2d at 948):

> That the action of defendants was taken pursuant to instructions of superior authority is no defense. The executive branch of government has no right to treat with impunity the valid orders of the judicial branch. * * * And the "greater the power that defies law the less tolerant can this Court be of defiance" . . . .

See also Sawyer v. Dollar, 190 F.2d 623, 640, supra, where the Court said:

> [T]he directives of superior executive officials cannot nullify the court decree. . . .

Cf. United States v. Mine Workers, 330 U.S. 258, 306 91 L.Ed. 884, 67 S.Ct. 677 (1947).

CONCLUSION

Wherefore, it is respectfully requested that the motion of the State to dissolve the temporary restraining order be denied.

Respectfully submitted,

BURKE MARSHALL,
Assistant Attorney General

ST.JOHN BARRETT
HAROLD H. GREENE
DAVID RUBIN
HOWARD GLICKSTEIN
ALAN MARER
Attorneys
Department of Justice
Washington 25, D. C.