THE UNITED STATES OF AMERICA IS ENTITLED TO NO RELIEF FOR ANY VIOLATION BY THESE APPELLEES OF ANY RIGHTS TO EDUCATION SECURED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

RESPONSE TO POINT III OF UNITED STATES THAT IT HAS STANDING TO ASSERT THE CLAIM SET FORTH IN ITS PETITION

Both the appellant, James H. Meredith, and the "Amicus Curiae", United States, have sought to justify the restraining orders and have sought a preliminary injunction on the ground of violation by the original defendants and by the new defendants (the State of Mississippi and its officers) of a right to education secured by the Fourteenth Amendment of the Constitution of the United States.

Notwithstanding its designation as "amicus curiae", the United States is now claiming that it is a party; we have not conceded its right to be a party (compare our Brief, p. 36, with U. S. Brief, p. 28) but have argued that the United States might not become a party and seek the relief sought without unlawfully changing this into criminal contempt proceedings.

The United States is now claiming the right as a party, intervening at the appellate level, to join the State of Mississippi as a party defendant and is directing the main thrust of its attack against the acts of the other defendants as "state action," (Brief of United States pp. 26, 27, footnote 5: "***That suit essentially sought relief against state action, and the interference alleged in our petition, although involving other officials, is also state action."

The United States goes further and talks about "privity" (U.S. Brief, pp. 26, 27, fn. 5: ***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. ***" The United States thus charges that all the defendants' actions were "state action" and, necessarily, that they were in privity with the state.

Two questions are squarely presented: (1) may the United States enforce the alleged right to education of the Complainant, James H. Meredith, under the Fourteenth Amendment of the Constitution of the United States, and (2) does this Court have jurisdiction of such a suit against "state action" of the State of Mississippi, either directly or through its officers.

1. The United States does not have any rights, power or authority to enforce the alleged right to education of the Complainant, James H. Meredith, under the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." (Emphasis is ours unless otherwise noted)

It has often been held that the United States is not a "person" under such a Constitutional provision, and it certainly is not a "person" subject to the jurisdiction of the State.

In U.S. v. Nedo Oil Co., D. C., La., 90 Fed. Supp. 73, aff. C. A. 5, 190 F. 2d 1003, a State statute making mineral rights imprescriptible for nonuser as against the United States was held not to violate the equal protection clause of the Federal Constitution because the United States was not a "person" within the meaning of the Constitution, and also was not within the jurisdiction of the State within the meaning of the Fourteenth Amendment of the Constitution. In so holding, this Court said:

> "An examination of the terms of the Fourteenth Amendment establishes that it is not applicable, first, because the United States is not a 'person' within the meaning of that term as used in that Amendment, and second, the United States is not 'within the jurisdiction' of Louisiana as that phrase is used in the Fourteenth Amendment.
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> "It has repeatedly been held that a sovereign is not a 'person' within the meaning of the Fourteenth

Amendment. Scott v. Frazier, D. C., 258 F. 699; Riley v. Stack, 128 Cal. App. 480, 18 P. 2d 110; Los Angeles County v. Superior Court in and for Alameda County, 128 Cal. App. 522, 18 P. 2d 112; People of New York v. Long Island R. Co., 60 How. Prac., N. Y., 395; Commissioners of State Ins. Fund v. Dinowitz, 179 Misc. 278, 39 N. Y. S. 2d 34.

". . . In United States v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742, 743, 85 L. Ed. 1071, which held that the United States was not a 'person' within the meaning of Section 7 of the Sherman Act, 15 U. S. C. A. Section 15 note, Roberts, J., said: . . . 'Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. . .'

"Tested by this standard, the United States is clearly not a 'person' within the meaning of the Fourteenth Amendment. That Amendment was adopted at the close of the Civil War for the specific purpose of guaranteeing Negroes their freedom. . . The term as used in other provisions of the Fourteenth Amendment clearly indicates that the United States is not a 'person' as the word is used in that Amendment. . .

"This interpretation is also supported by the cases which have arisen under Section 1 of the Fourteenth Amendment. That section provides: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' (Emphasis ours)

"The phrase, 'subject to the jurisdiction thereof', had been held to cover those persons, and only those persons, subject to the power of a state and under allegiance to it. United States v. Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890; Elk v. Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643. Since the United States is not subject to the power of any other sovereign not under allegiance to any state, the cases decided under Section 1 of the Fourteenth Amendment would seem likewise to indicate that the United States is not 'within the jurisdiction' of Louisiana as that phrase is used in the Fourteenth Amendment."

Or see the language in Scott v. Frazier, 258 Fed. 669, as follows:

". . . This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. . . Has the state, then, any rights under the Fourteenth Amendment? That question must be answered in the negative. The amendment protects only the rights of 'persons'. This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state.

The Civil Rights Act, 28 U. S. C. A. 1343, gives the District Court original jurisdiction of a civil action to be commenced "by any person". The Civil Rights Act was enacted in order to enforce rights given persons under the Fourteenth Amendment (Davis v. Foreman, 251 F. 2d 421, cer.

den. 2 L. Ed. (2) 1148). In Mickey v. Kansas City, 43 F. Supp. 739, the Court in holding that a corporation could not bring an action under the Civil Rights Act, used the following language:

> "At the outset it should be noted that Watchtower Bible & Tract Society, a corporation, is made a plaintiff. It has been repeatedly held that the remedy provided under that portion of Paragraph 14 of Section 41, Title 28 U. S. C. A., pertains exclusively to natural persons, and not to corporations."

See the general expressions in Wong Wing v. U.S., 41 L. Ed. 140, quoted with approval in Alexander v. Alexander, 140 F. Supp. 925, to the effect that the language "any person" in a Constitutional provision "is broad enough to include any human being who is a citizen of the United States."

Or "The rights created by the due process and equal protection clauses of the Fourteenth Amendment are guaranteed to the individual and the rights established are personal rights." Shelly v. Kraemer, 92 L. Ed. 1161; McGhee v. Sipes, 92 L. Ed. 1161.

The question was definitely determined in Hague v. Committee for Industrial Organizations, 83 L. Ed, 1423, 307 U. S. 496. An action was brought for alleged tortuous invasion of civil rights by persons acting under color of state authority by the respondents in the Supreme Court. The Court allowed the relief to the individual respondents but denied it to the corporate respondent and the labor organization. The Court stated:

> "The respondents, individual citizens, unincorporated labor organizations composed of such citizens, and a membership corporation, brought suit in the United States District Court against the petitioners, the Mayor, the Director of Public Safety, and the Chief of Police of Jersey City, New Jersey, and the Board of Commissioners, the governing body of the city.
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> . . .
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> "Natural persons, and they alone, are entitled to the privileges and immunities which Sec. 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit." (Emphasis ours).

In Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492, there was involved the Civil Rights Act, which gave a cause of action against any "person" depriving plaintiff of his civil rights, i. e., 42 U.S.C.A. 1983. The Court held:

"A municipal corporation is not within the ambit of Rev Stat Sec. 1979 (42 USC Sec. 1983) and is not a 'person' within the meaning of that statute, which gives a right of action against every 'person' who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution."

This decision was followed by the Supreme Court in Egan v. City of Aurora, 365 U. S. 514, 5 L. Ed. 2d 741.

In United States v. Cooper Corporation, 312 U. S. 598, 85 L. Ed. 1071, involving an interpretation of the Sherman Act, the Court, in holding that the United States was not a "person" entitled to maintain an action for treble damages under the act, stated:

"The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights. The Sherman Act, however, created new rights and remedies which are available only to those on whom they are conferred by the Act. . .

"Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. . ."

In United States v. United Mine Workers, 330 U.S. 258, 91 L. Ed. 884, involving the Clayton Act and the Norris-La Guardia Act, the Court held that the Acts did not forbid the United States to intervene by injunction in private labor disputes, stating:

". . . The Act does not define 'persons'. In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. . ."

This Court had before it the question of who was a "person" under 42 U.S.C.A. 1983, giving any "party injured" by deprivation of civil rights a cause of action at law or equity against any " person" so depriving him. The Court in Charlton v. City of Hialeah, C.A. 5, 188 F. 2d 421, certiorari denied, 96 L. Ed. 631, in holding that a municipality was not a "person" under this Act, stated:

". . . The Civil Rights statute, 8 U.S.C.A. Sec. 43, has been held to extend only to cases where a 'person' acting under color of a statute, ordinance, regulation, custom, or usage, of a state or territory, deprives a citizen or other person of a right, privilege, or immunity secured by the Constitution and laws of the United States. . .

"We are unable to find any indication that the civil-rights statute was intended by Congress to create such a liability on the part of the municipality itself, as

distinguished from the 'person' who committed the acts which deprived the plaintiff of his civil rights. . ."

This decision was followed by this Court in Hewitt v. City of Jacksonville, 188 F. 2d 423. To the same effect see Graves v. City of Bolivar, D. C. Mo., 154 F. Supp. 625.

We deem conclusive the holding of this Court in United States v. Alabama, C. A. 5, 267 F. 2d 808, reversed because of specific amendment to the statute by the Civil Rights Act of 1960 (74 Stat. 86), 363 U.S. 602, 4 L. Ed. 2d 982:

> "Interesting and engaging as these speculations are, we will not indulge in them here, but, confining ourselves to the sole question for determination, whether the statute supports the jurisdiction asserted, we will state simply but categorically that we agree with the district judge that neither on its face nor in its history, taken alone or in connection with civil rights legislation in general, is there any reasonable basis for holding that, in providing 'whenever any person, * * *', the congress intended to, or did, provide for suit against a sovereign state.
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> "Without elaborating upon it, as under the settled law of the cases we could do in extenso, it is sufficient for us to simply say that, under the principle which has been, and still is, controlling upon the federal courts, whatever congress might or could do in providing in a civil rights action for conferring federal court jurisdiction over a state, it has never heretofore done so and it has not in terms done so in the statute invoked here.
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> "Absent such specific conferring of jurisdiction, a federal court would not, indeed could not assume jurisdiction over a sovereign state without a precedent determination that, though the jurisdiction had not been expressly conferred, the language of the invoked statute carried the necessary, the unavoidable implication that the congress upon the gravest considerations and after the utmost thought and deliberation had intended to and did confer it.
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> "Reading the statute as one will, such an implication cannot be found in it. For it cannot be reasonably contended that the congress intended in a situation of this kind, where both the complaint and the Alabama statutes themselves, of which we take judicial knowledge, plainly show, that no exception or objection is, or can be, made on any kind of constitutional grounds to the will of the state there expressed, or that there is any need for, or justice in, finding authority under this statute to sue the state itself for the wrongs upon the statute and upon it perpetrated by its allegedly unfaithful servants."

This Court thus approved that said by the District Judge therein, 171 F. Supp. 720, 729:

> "There is no doubt that such authority would be appropriate--and even in certain circumstances necessary--

if Congress intended to give full and complete authority to the Attorney General of the United States to enforce the constitutional rights here involved. This Court judicially knows that the Civil Rights Act of 1957 was a compromise measure and the compromise reflected an intention on the part of Congress to give limited authority—as opposed to full and complete authority—in this field. A reading of the legislative history of this Act impresses this Court with the fact that if it had then been mentioned that this Act authorized the United States to sue a state for preventive relief, the Act would not yet be passed."

The Supreme Court of the United States, in reversing, was careful to point out that the change in law was its reason; it said in part, 362 U.S. 604, 4 L. Ed. 2d 984:

"We hold that by virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State. In so holding we do not reach, or intimate any view upon, any of the issues decided below, the merits of the controversy, or any defenses, constitutional or otherwise, that may be asserted by the State."

It is highly significant that Congress has amended the civil rights legislation so as to authorize specifically suits by the United States against the states in voting situations only. See 1961 Supp., 42 U.S.C.A., Section 1971 provides:

"(a) All citizens of the United States who are otherwise qualified by law to vote. . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President. . ..

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section,

the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

The Congress is presumably satisfied with this Court's interpretation of the Civil Rights Act of 1957, as it existed prior to the 1960 amendment; because this Congress has not further changed the law. It has had ample opportunity to do so, since the final decision in the Alabama Case was by the Supreme Court on May 16, 1960.

So far as we know, the constitutionality of the 1960 amendment as to voting rights has not been tested.

Thus as a general rule where the word "person" is used in a statute it is not construed as including a sovereign entity. Cases can be found where the word in some statutes has been so interpreted. These few instances depend on the special language of the statute involved and in each and every case the sovereign entity is always acting not in its sovereign capacity, but rather is engaging in commercial businesses and transactions such as other "persons" are accustomed to conduct. NO CASE HAS HELD THAT THE UNITED STATES GOVERNMENT ACQUIRED ANY RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The correctness of the above rule is further substantiated by the well established rule that:

2. Only persons directly discriminated against or personally aggrieved by State action can enforce any rights under the Fourteenth Amendment.

The question of discrimination violating the Fourteenth Amendment cannot be raised except by person belonging to the class alleged to be discriminated against, and the complaining party must show discrimination against himself as a person and injury to him therefrom. This rule applies to all cases affecting civil rights of every kind. *

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*Interesting examples are: White persons may not question the constitutionality of a statute on the ground that it discriminates against colored persons. Wheeler v. State, 219 Miss. 517, 63 So. 2d 517, certiorari denied, 346 U.S. 852, 98 L. Ed. 367. Nor may a male question the validity of a statute under the Fourteenth Amendment as discriminating against women by excluding them from jury service. State v. James, 96 N.J.L. 132, 114A. 553, 16 A.L.R. 1141.

The Supreme Court of the United States has never departed from the rule announced in McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151, 59 L. Ed. 169. There, five Negro citizens of Oklahoma began this action against certain railroads to restrain these companies from making any distinction in service on account of race. Under an Oklahoma statute the railroads were providing sleeping cars and dining cars exclusively for White persons and no similar accommodations for Negroes. The Court held that these Negroes could not obtain equitable relief against the railroads because it was not alleged that any one of the complainants had ever traveled on any one of the railroads in question, or had ever requested transportation on any of them in a sleeping car or dining car; i.e., they were not persons actually discriminated against or actually aggrieved by compliance by the railroads with the State statute. The Court in so holding stated:

> "The allegations of the amended bill, so far as they purport to show discriminations in the conduct of these carriers, are these:
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> " 'That . . . the said abovenamed defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the state of Oklahoma. . .'
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> "We agree with the court below that these allegations are altogether too vague and indefinite to warrant the relief sought by these complainants. It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; . . . Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed." (Emphasis ours).

Not only has the above case never been overruled, but it was very recently re-affirmed by the Supreme Court of the United States in Bailey v. Patterson, 368 U.S. 346, 7 L. Ed. 2d 332; 369 U.S. 31, 7 L. Ed. 2d 512, where certain Negroes living in Mississippi sought injunctions to enforce

their alleged constitutional rights. The Court in a Per Curiam opinion in December, 1961, 7 L. Ed. 2d 332, held:

> "This is a motion for an injunction to stay the prosecution of a number of criminal cases in the courts of Mississippi pending an appeal to this Court from the judgment of a three-judge Federal Court . . . In addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts. On the record before us the motion for a stay injunction pending appeal is denied." (Emphasis ours).

In the final opinion, 7 L. Ed. 2d 512, the Court used the following language:

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach of peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part. McCabe v. Atchison, T. & S. F. R. Co., 235 US 151, 162, 163, 59 L ed 169, 174, 175, 35 S Ct 69. . ."(Emphasis ours.)

Rule 23, Federal Rules of Civil Procedure, only authorizes or permits a class suit by one or more of the persons making up the class. The person suing in behalf of the members of a class must be a member of the class which he is supposed to represent. Hickey v. Illinois Central Railroad, C.A. 7, 278 F. 2d 529; Rock Drilling, Blasting, Etc. v. Mason & Hanger Co., C.A. 2, 217 F. 2d 687; Augustus v. Board of Public Instr., D.C. Fla., 185 F. Supp. 450.

The law on this issue is set out in Brown v. Ramsey, C.A. 8, 185 F. 2d 225, where the Court used the following language:

> "At the very threshold of this case, we are met with the question of the capacity of the appellants to maintain this action for either declaratory or injunctive relief. 'It is the individual who is entitled to the equal protection of the laws* * *. It is the fact, clearly established, of injury to the complainant–not to others–which justifies judicial intervention' to protect rights under the 14th Amendment to the Constitution of the United States. McCabe v. A., T. & S. F. Ry. Co., 235 U. S. 151, 161-162, 35 S. Ct. 69, 59 L. Ed. 169. 'It is fundamental that these cases concern rights which are personal and present.' . . .
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> "It is obvious that the seven appellants enrolled in the elementary schools are not qualified to maintain an action to redress discrimination against students of high school or junior college age. Nor are students of high school age competent plaintiffs in suits charging discrimination against students of junior college age and qualifications. . . ." (Emphasis ours).

Therefore, The United States is not a "person" being deprived of "life, liberty or property," nor is it a "person within. . . (a state's) jurisdiction" being denied "the equal protection of the law", within the meaning of the Fourteenth Amendment to the Constitution of the United States of America. The United States does not complain of discrimination against itself; it could not.

The United States seeks to justify (U.S. Brief, pp. 28 and 29) its strange status as "amicus curiae" by citation of Bush v. Orleans Parish School Board, 191 F. Supp. 871, (affirmed, 368 U.S. 11, 7 L. Ed. 2d 75, wherein the Court stated, 191 F. Supp. 876: ". . . It should also be stressed that the government appeared at the court's request. The Justice Department was not intervening to protect a special interest of its own. Nor was it to champion the rights of the plaintiffs or defend the harassed School Board. It came in, by invitation, to aid the Court in the effectuation of its judgment, to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States'." (Double emphasis by the Court).

It is submitted that the United States may act either as the arm of the Court "in vindicating the authority of the federal courts" (Bush v. Orleans Parish School Board, 190 F. Supp. 861, 866 (E. D. La. 1960) or as a litigant enforcing its rights either in its sovereign capacity or in its proprietary capacity. But the right of the United States to act as an arm of the court in some special cases does not give the United States the right to act as an arm of the court without complying with lawful requirements for such action.

We submit that the United States has not answered and cannot answer the logic in McNeil v. U.S., C.A. 1, 236 F. 2d 149, 153, 61 A.L.R. 2d 1075, discussed in our Brief, p. 38, and re-quoted in part here:

> "Although there does not appear to be much express authority on the point, we believe that logic, and to some extent precedent as well, supports the proposition that civil contempt proceedings may be instituted only by the parties primarily in interest.
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> "It would appear from these authorities, and indeed from the very nature of the judicial function, that the trial court can have only a public as distinguished from a private interest in the enforcement of its own decrees. It seems to us, therefore, that regardless of what label may be appended to the proceedings by the court, any action of contempt

initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong. 'A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court.' United States v. International Union, etc., 1951, 88 U.S. App. D.C. 341, 190 F. 2d 865, 873."

The United States is trying to attain the same public purpose the trial court did in the McNeil Case, justifying its action as an arm of the Court; but, if the Court itself could not proceed in criminal contempt under the guise of civil contempt, without complying with the requirements for criminal contempt, surely the arm of the Court could not.

We direct the Court's attention to its comprehensive discussion of contempt in Parker v. United States, C.A. 5, 1953, 153 F.2d 66, 69, 70, 71:

"The Supreme Court has had many occasions to emphasize the importance of the distinction between a proceeding in civil contempt and one in criminal contempt. . . .

"Proceedings in civil contempt are between the original parties and are instituted and tried as a part of the main cause. Though such proceedings are 'nominally those of contempt' (Worden v. Searls, 1887, 121 U.S. 14, 26, 7 S. Ct. 814, 820, 30 L. Ed. 853), the real purpose of the court order is purely remedial—to coerce obedience to a decree passed in complainant's favor, or to compensate complainant for loss caused by respondent's disobedience of such a decree. If imprisonment is imposed in civil contempt proceedings, it cannot be for a definite term. Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at pages 442-444, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A., N.S., 874; In re Kahn, 2 Cir., 1913, 204 F. 581. The respondent can only be imprisoned to compel his obedience to a decree. If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature. If a compensatory fine is imposed, the purpose again is remedial, to make reparation to a complainant injured by respondent's disobedience of a court decree. . . . If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled as of right to an order in civil contempt imposing a compensatory fine. Union Tool Co. v. Wilson, 1922, 259 U.S. 107, 42 S. Ct. 427, 66 L.Ed. 848; Enoch Morgan's Sons Co. v. Gibson, 8 Cir., 1903, 122 F. 420, 423; L. E. Waterman Co. v. Standard Drug Co., 6 Cir., 1913, 202 F. 167. The court has no discretion to withhold the appropriate remedial order. In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold punishment for the past act of disobedience. An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct.

"On the other hand, a proceeding in criminal contempt is a separate and independent proceeding at law,

with the public on one side and the respondent on the other. The purpose of sentence in such a proceeding 'is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions.' Ex parte Grossman, 1925, 267 U.S. 87, 111, 45 S.Ct. 332, 334, 69 L.Ed. 527, 38 A.L.R. 131. Therefore, in such a proceeding imprisonment may be imposed for a definite term. Stewart v. United States, 8 Cir., 1916, 236 F. 838. Or respondent may be subjected to a punitive fine. Such a fine is usually payable to the United States. But without derogating from the punitive character of the proceeding, the court may have power to order the fine to be paid in whole or in part to some person injured by the contumacious act. Michaelson v. United States, 1924, 266 U.S. 42, 65, 45 S.Ct. 18, 69 L.Ed. 162, 35 A.L.R. 451.

"The respondent is entitled to due notice of the nature of the proceeding against him—whether of criminal or civil contempt. In re Guzzardi, 2 Cir., 1935, 74 F.2d 671; McCann v. New York Stock Exchange, 2 Cir., 1935, 80 F.2d 211, 214; Federal Trade Commission v. A. McLean & Son, 7 Cir., 1938, 94 F.2d 802. If respondent is answer- a charge of criminal contempt, he 'is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.' Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at page 444, 31 S.Ct. at page 499, 55 L.Ed. 797, 34 L.R.A., N.S., 874. If he is called to answer a civil contempt proceeding, a punitive fine cannot be imposed upon him. Where a fine is imposed in such a proceeding, it must not exceed the actual loss to the complainant caused by respondent's violation of the decree in the main cause plus complainant's reasonable expenses in the proceedings necessitated in presenting the contempt for the judgment of the court. Christensen Engineering Co. v. Westinghouse Air Brake Co., 2 Cir., 1905, 135 F. 774, 782; Eustace v. Lynch, 9 Cir., 1935, 80 F.2d 652, 656.

"Since the complainant in the main cause is the real party in interest with respect to a compensatory fine or other remedial order in a civil contempt proceeding, if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated. Worden v. Searls, 1887, 121 U.S. 14, 7 S.Ct. 814, 30 L.Ed. 853; Gompers v. Bucks Stove and Range Co., 1911, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A., N.S., 874. Such proceeding not having been instituted to punish for a contumacious act in vindication of the court's authority, the court has no such independent interest in maintaining in force its order imposing a compensatory fine as would justify it in transmuting the proceeding into one for criminal contempt, with the fine now regarded as punitive. But the required vacation of the remedial order, in the event supposed, does not trench upon the power of the court, in a proper case, to vindicate its own authority by punishment of an offender for a criminal contempt. Criminal and civil proceedings for contempt are not mutually exclusive. In both Worden v. Searls, supra, and Gompers v. Bucks Stove & Range Co., supra, the court made clear that the termination of the civil contempt proceedings was without prejudice to the power of the court to institute a separate and independent proceeding for criminal contempt. And see Parker v. United States, 1 Cir., 1942, 126 F.2d 370, 382. Such a proceeding would of course require a

new citation and would have to be tried in accordance with the procedures and limitations applicable to criminal contempt.

"There is no doubt that the contempt proceeding in the case at bar was instituted and maintained throughout as one of civil contempt. This is true, despite the fact that the petition for attachment for contempt was filed by the United States. McCrone v. United States, 1939, 307 U.S. 61, 59 S. Ct. 685, 83 L. Ed. 1108. The United States was acting in its capacity as complainant in the original equity suit brought to compel Green Valley Creamery, Inc., to comply with the milk marketing order of the Secretary of Agriculture and to make the required payments into the equalization pool operated by the Market Administrator; and the purpose of the contempt petition was to obtain for the Market Administrator as agent of the United States the benefit ot the decree in the equity suit. The compensatory fine was measured by the loss to the Market Administrator occasioned by Parker's disobedience of the interlocutory and final decrees in such suit."

This Court, in the Parker Case, thus specifically stated that "the court has no such independent interest in maintaining in force its order imposing a compensatory fine as would justify it in transmuting the proceeding into one for criminal contempt . . ."; with deference, we repeat that, if the Court has no such interest in this proceeding, the United States has none either.

The Parker Case is conclusive on the question of contempt. It clearly sets forth the earmarks of criminal contempt set forth in our Brief, pp. 37-41, all of which, with deference, are present in this proceeding:

(1) The fines are not compensatory to the complainant and are not based on proof of actual loss by the complainant; (2) the contempt proceedis to vindicate the authority of the court and "*** to vindicate that (restraining) order ***" (U. S. Brief, p. 29; (3) the proceedings "are between the public and the defendant, and are not a part of the original cause." (Gompers v. Bucks Stove & Range Co., 212 U.S. 418, 444, 445, 55 L. Ed. 797, 808); and (4) the proceedings are sought to be tried after the original complainant has secured the relief sought.

On the third earmark, note that said on page 3 of the Brief for the United States:

"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." (Emphasis ours)

The United States is, in effect, admitting that its action is separate from the main suit already "finally adjudicated."

If the United States wishes to bring criminal contempt proceedings, it may do so in the proper court and in accordance with law; but, with deference, this is neither the court nor the proceeding for such a trial.

We submit, with deference, that the United States was not entitled to file its Petition herein and is not entitled to enforce any rights James H. Meredith may have to an education under the Fourteenth Amendment to the Constitution of the United States.

3. This Court does not have Jurisdiction in this Action To Enjoin "State Action" of the State of Mississippi, either directly or indirectly.

The United States admits that this Court does not have original jurisdiction and seeks to invoke ancillary jurisdiction under the all writs statute (U.S. Brief, p. 9). But ancillary jurisdiction presupposes original jurisdiction as a predicate and justification for the ancillary relief.

In the case at bar, learned counsel for the United States state, U.S. Brief, p. 26, that: "***That (Meredith) suit essentially sought relief against state action. ***" But learned counsel apparently ignore our citation of Louisiana Land and Exploration Gompany v. State Mineral Board, C.A. 5, 229 F. 2d 5, and Stone v. Interstate Natural Gas Co., C.A. 5, 103 F. 2d 544, affirmed, 308 U.S. 530 (our Brief, p. 42).

We agree with counsel that this suit has always been one against "state action." It was against a board which, under the law of Mississippi, is a mere agency or arm of its principal, the State. Although the Board of Trustees of State Institutions of Higher Learning has the management

and control of state colleges, with "general supervision of the affairs of all the institutions" (Section 6724(b), 1960 Supp., Recompiled Mississippi Code of 1942), it does not have the statutory authority to sue and be sued. See Mississippi Constitution, Section 213-A and section 6719 et seq., Recompiled Mississippi Code of 1942. Whether the Board is a separate corporate entity is a question of state law (Louisiana Land & Exploration Board v. State Mineral Board, C. A. 5, 229 F. 2d 5) and certainly there has as yet been no determination of this question binding upon the State of Mississippi, which has not been heard.

In Stone v. Interstate Natural Gas Co., C. A. 5, 1939, 103 F. 2d 544, 547, affirmed, 308 U. S. 522, 84 L. Ed. 530, this court declared:

> "We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is descriptio personae. Smietanka, Collector, v. Indiana Steel Co., 257 U.S. 1, 42 S. Ct. 1, 66 L. Ed. 99. The Three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. The State of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued. She could not under the Eleventh Amendment, U. S. C. A. Const. have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in United States v. Lee, 106 U.S. 196, 222, 1 S. Ct. 240, 27 L. Ed. 171. See also Sage v. United States, 250 U.S. 33, 39 S. Ct. 415, 63 L. Ed. 828; Hussey v. Crane, 222 U.S. 88, 93, 32 S. Ct. 33, 56 L. Ed. 106; Carr v. United States, 98 U.S. 433, 25 L. Ed. 209; Stanley v. Schwalby, 162 U.S. 255, 16 S. Ct. 754, 40 L. Ed. 960. Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; and as she is not bound by the former judgment against her officers, he is not."

This decision raises another point: James H. Meredith could could not have sued the State of Mississippi, either directly or indirectly through its agents, in the District Court of the United States without violating the Eleventh Amendment to the Constitution of the United States. There was no original jurisdiction in this case for such a suit as a predicate for ancillary jurisdiction. Almost directly in point is the decision of this Court in The Louisiana Land and Exploration Co. v. State Mineral

Board, C.A. 5, 229 F. 2d 5, 7, 8, wherein this Court held:

"The narrow question presented on this appeal is whether the within action is, in effect, a suit against the State. Appellant contends that this question must be answered in the negative. First, it is argued that the State Mineral Board is a separate and distinct corporate entity, possessing all of the usual powers incident to corporations, and that this was sufficient to vest the District Court with jurisdiction based upon diversity of citizenship. Whether or not appellant is right in this contention must be determined by the law of the State. *** Thus, the fact that the legislature chose to call it a corporation does not alter the Board's characteristics so as to make it something other than what it actually is, a mere agent of the State. Accordingly, it is clear that when the Board sues or is sued, it appears in Court as an agent of its principal, the State. We, therefore, are of the opinion that this suit against the State Mineral Board, a mere agency or arm of the State, is in effect, a suit against the State which may not be sued by a citizen of another State under the Eleventh Amendment to the Constitution of the United States. Cf. State Highway Commission of Wyoming v. Utah Const. Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262.

"This brings us to a consideration of appellant's second point which is that the Eleventh Amendment is inapplicable and does not bar the present suit against a State agency which wrongfully has exceeded its statutory authority. This contention is likewise without merit for the reason that the complaint is directed against the State Mineral Board in its official capacity, not against its members individually, and because the acts complained of are not without, but clearly within the Board's statutory power. It is true that the complaint did allege that the Board's action was 'ultra vires' and cast 'illegal' clouds upon plaintiff's title, but these allegations were not and could not be based upon any lack of statutory power on the part of the Board to advertise ***for lease bids upon 'all lands owned by the State.' The Larson case makes it clear that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law. This does not mean, as was pointed out in the Larson decision, that a government officer is thereby necessarily immunized from liability, if his action is such that liability would be imposed by the general law of torts, but only that in this situation the action itself cannot be enjoined, since it is also the action of the sovereign. It is therefore plain that the State Mineral Board cannot be enjoined in this suit since the compulsion which the court is asked to impose would be compulsion against the sovereign; and for that reason the suit is barred by the Eleventh Amendment, not because it is a suit against the Board, but because it is, in effect, a suit against the State."

In Great Northern Life Insurance Co. v. Read, 322 U.S. 51, 88 L. Ed. 1124, the United States Supreme Court held that suit could not be brought against the Insurance Commission of Oklahoma to recover taxes because of the Eleventh Amendment, saying:

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. ***(Citations). Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. * * * (Citations). A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents action against a state by its own citizens without its consent. Hans v. Louisiana, 134 U.S. 1, 10, 33 L. Ed. 842, 845, 847, 10 S. Ct. 504."

In Petty v. Tennessee-Missouri Bridge Commission, C. A. 8, 254 F. 2d 857, 861, the court held:

"In Ford Motor Co. v. Department of Treasury of Indiana, supra., the Supreme Court states (323 U.S. at page 467, 65 S. Ct. at page 352):

" '***The Eleventh Amendment declares a policy and sets forth an explicit limitation on Federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.'

"***

"It has uniformly been held that Federal judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or laws of the United States. * * *

"* * *The Amendment does not by its terms bar a citizen from suing his own state. However, the Supreme Court has squarely held that a state cannot be sued without its consent in a Federal Court by one of its own citizens. Hans v. State of Louisiana, 134 U.S. 1 * * *."

It is respectfully submitted, first, that this action as originally brought was beyond the original jurisdiction of the District Court as a suit against the State of Mississippi in violation of the Eleventh Amendment to the Constitution of the United States, so that this Court never had appellate jurisdiction herein; and second, that, this action as amended in this Court to sue the State of Mississippi, directly, was beyond the appellate, ancillary jurisdiction of this Court.

For this second point, we rely especially on Missouri v. Fiske, 290 U.S. 18, 78 L. Ed 145.

Therein, the will of Ehrhardt D. Franz had been probated, leaving his estate to Sophie Franz, his wife, for life, with remainder to his ten children. The wife transferred certain securities, in part belonging to

her husband's estate, to a trustee to hold for her life; but the contents of the trust were complicated by stock dividends and transfers. Protracted litigation arose as to this trust and, in 1924, this suit was brought in the U. S. District Court by one of the sons to determine his interest and for an accounting and security for his protection. The bill was dismissed for want of parties and an amended bill was filed. The Court thus stated the facts in part, 78 L. Ed. 148:

> "* * *On an ancillary bill, it appearing that the Federal Court had first acquired jurisdiction over the subject matter in an action quasi in rem, defendants Sophie Franz and her trustees were enjoined from prosecuting a suit in the circuit court of the City of St. Louis for the determination of the same issues. Franz v. Franz (C. C. A. 8th) 15 F. (2d) 797. The present suit in the Federal Court then proceeded to decree, in 1927, which, * * * was affirmed by the Circuit Court of Appeals in the following year. Buder v. Franz (C. C. A. 8th) 27 F. (2d) 101.
>
> "* * *This decree, as stated by the Circuit Court of Appeals in the decision under review (62 F. (2d) pp. 151, 153, 154), determined the rights of the present respondents by virtue of the remainders under the will of Ehrhardt D. Franz. The decree, as thus construed, determined that certain shares, with their increase through stock dividends, were corpus of the estate of Ehrhardt D. Franz, and not income, and hence that Sophie Franz had only a life interest. * * *
>
> "Later, in 1930, Sophie Franz died and her estate is in the course of administration in the Probate Court of the City of St. Louis. Her executor, in view of the decree of the Federal Court, did not include the shares above mentioned in his inventory of her estate. Thereupon, in 1931, the State of Missouri procured the issue, on behalf of the State, of a citation in the Probate Court to compel the executor to inventory these shares as assets of the estate of Sophie Franz. The State of Missouri then moved in the Federal Court for leave to intervene * * * to protect the State's right to inheritance taxes * * *. The application for intervention was granted.
>
> "* * * The present respondents (with others) answered the petition in intervention denying that the decree of the Federal Court had been limited as alleged and setting up their rights under the decree as res judicata. They asked that the petition be dismissed and that their motions for distribution be sustained.
>
> "Shortly before filing this answer the present respondents brought their ancillary and supplemental bill of complaint to enjoin the State of Missouri from 'prosecuting further the said citation in the Probate Court' and 'from seeking or obtaining any order, decree, or judgment therein' until the further direction of the District Court. The Circuit Court of Appeals, in sustaining the jurisdiction of the District Court to entertain the bill for this purpose, stated that the extent to which that jurisdiction should be exercised was 'the protection of the jurisdiction and decrees of the trial court;'

"that it did not extend to matters not involved in the main litigation. 62 F. (2d) p. 157."

This situation was, therefore almost the same as that at bar except, if anything, it was stronger for the United States since the proceeding was by ancillary bill in the District Court as to a matter quasi in rem.

The Court, in part, stated the law as follows, 78 L. Ed. 147, 149, 150, 151, and 152:

> "By an ancillary and supplemental bill of complaint in the District Court of the United States, respondents sought an injunction against the State of Missouri restraining the State from prosecuting certain proceedings in the Probate Court of the City of St. Louis * * *. The Circuit Court of Appeals reversed the order of dismissal, holding that the Eleventh Amendment was inapplicable, in the view that the ancillary and supplemental bill had been brought to prevent an interference with the jurisdiction of the Federal Court. 62 F. (2d) 150 * * *.
>
> "* * *
>
> "* * * The Eleventh Amendment is an explicit limitation of the judicial power of the United States. * * * However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' Re New York, 256 U.S. 490, 497 * * *. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution of laws of the United States. * * *
>
> "The ancillary and supplemental bill is brought by the respondents directly against the State of Missouri. It is not a proceeding within the principle that suit may be brought against state officers to restrain an attempt to enforce an unconstitutional enactment * * *. Here, respondents are proceeding against the State itself to prevent the exercise of its authority to maintain a suit in its own court.
>
> "The proceeding by ancillary and supplemental bill to restrain the State from this exercise of authority is unquestionably a 'suit'. * * * Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a state. This conception of the Amendment has had abundant illustration. * * * (Citations).
>
> "* * *This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process.

"The question, then, is whether the purpose to protect the jurisdiction of the Federal Court, and to maintain its decree against the proceeding of the State in the State Court, removes the suit from the application of the Eleventh Amendment. The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a Federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. * * * And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a Federal court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplemental bill in order to enforce a decree.

"The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting state. * * *.

"* * *

"* * *The contention that the question of ownership of the shares has been finally determined by the Federal Court affords no ground for the conclusion that the Federal Court may entertain a suit against the State, without its consent, to prevent the State from seeking to litigate that question in the State Court.

"The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to dismiss the ancillary and supplemental bill.

"Reversed."

This case has not been departed from and is controlling on the point that this Court does not have ancillary jurisdiction to award James H. Meredith relief. The Circuit Court of Appeals therein enjoined the State for "the protection of the jurisdiction and decrees of the trial court." (62 F 2d 157) and was reversed for doing so. Since the ancillary jurisdiction of this Court is only in aid of its appellate jurisdiction, which is bounded by and predicated upon the original jurisdiction of the District Court, necessarily this holding applies equally to ancillary decrees for the protection of decrees of this Court.

That prohibited was "the enforcement of equitable rights and the prosecution of equitable remedies * * * by an individual against a State. * * * *" 78 L. Ed. 150. An injunction has been sought herein by a petition and process has been served upon the State of Mississippi as a party defendant; no one can deny that this is an equitable suit being commenced and prosecuted within the prohibition of the Eleventh Amendment, this

being in an action wherein James H. Meredith is still the complainant and wherein the only appellate jurisdiction rests upon the original jurisdiction of his suit. This demonstrates conclusively, with deference, that this Court has no ancillary jurisdiction herein to award James H. Meredith any further relief. The reason is simply that this Court has only appellate jurisdiction to exercise herein and it necessarily is based upon and circumscribed by the original jurisdiction possessed by the trial court. 2 Am. Jur., "Appeal and Error," Section 11, p. 851; 4 C.J.S., "Appeal and Error," Section 39, p. 152, fn. 78-81; see also, "Appeal and Error," Section 1453, p. 576, in Vol. 5, C.J.S. "* * *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." (U.S. Brief, p. 9).

The Eleventh Amendment to the U. S. Constitution prohibited James H. Meredith from directly suing the State of Mississippi in an action in the original jurisdiction of the District Court; and the Fiske Case prohibited him from invoking the ancillary jurisdiction of that Court and, necessarily, this Court for such a suit.

Therefore, whatever may be the interest of the United States in vindicating the orders of this Court, no ancillary jurisdiction can exist in this Court to help James H. Meredith sue the State of Mississippi, without its consent.

We have already demonstrated that the United States of America has no possible right to any form of relief herein on its own behalf and the United States candidly admits that "* * *The present proceeding does not involve any claim of right of the United States to participate in that adjudication (between the plaintiff, James H. Meredith, and the defendant University officials and Board). Nor does the United States seek to affect the result of that proceeding. * * *" (U. S. Brief, p. 3). In short, the United States claims to assert its own right and not James H. Meredith's, not realizing that this is James H. Meredith's suit and cannot be brought against the State of Mississippi, in any event. The United States overlooks the Fiske Case, with deference, and its express holding that

ancillary jurisdiction may not exist to protect the Court's decrees or vindicate the Court as against the State.

It is, therefore, respectfully submitted that this Court lacks jurisdiction of this cause and should dismiss the same.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES H. MEREDITH,

Appellant,

v.

CHARLES DICKSON FAIR, et al.,

Appellees.

UNITED STATES OF AMERICA
Amicus Curiae and Petitioner,

v. NO. 19475

STATE OF MISSISSIPPI; ROSS R. BARNETT, Governor of the State of Mississippi; JOE T. PATTERSON, Attorney General of the State of Mississippi; T. B. BIRDSONG, Commissioner of Public Safety of the State of Mississippi; PAUL G. ALEXANDER, District Attorney of Hinds County, and WILLIAM R. LAMB, District Attorney of Lafayette County; J. ROBERT GILFOY, Sheriff of Hinds County, and J. W. FORD, Sheriff of Lafayette County; WILLIAM D. RAYFIELD, Chief of Police of the City of Jackson, and JAMES D. JONES, Chief of Police of the City of Oxford; WALTON SMITH, Constable of the City of Oxford,

Defendants.

BRIEF OF DEFENDANTS

Thomas H. Watkins
Malcolm B. Montgomery
Charles Clark, Special Assistant Attorney General

Joe T. Patterson, Attorney General for the State of Mississippi
Green, Green & Cheney
Satterfield, Shell, Williams & Buford

Attorneys for Defendants.

Because of the time element involved, this brief is being written in separate subdivisions and, in some instances, by separate counsel. Time will not permit the several separate points to be completely correlated. We also respectfully direct the Court's attention to the fact that this brief is intended only to supplement the brief previously filed and both briefs should be considered.

We ask the Court's indulgence in this regard.

EVERY MATTER PRESENTED TO THIS COURT SINCE JULY 27, 1962, SHOULD HAVE BEEN PRESENTED TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

The United States District Court for the Southern District of Mississippi has issued a permanent injunction in this cause. It thus has full and continuing jurisdiction of this cause of action.

The United States is an amicus in that Court. It should have filed any "ancillary" motions or pleadings there. If it had done so the present jurisdictional problems could have been avoided and the continuing supervision of its injunctive process could be carried on without interruption and thus could have avoided the concern of some of the members of this Court as to interruption of "ancillary" writs.

The United States could, under 28 U.S.C.A. 1345, have filed an original suit in the District Court for all of the relief it has sought here, or it could have proceeded in that Court independently or at the request of the Court in a new cause in criminal contempt, whereas independent proceedings in this Court in such a contempt action would still raise grave questions of jurisdiction since such criminal proceedings must be in a separate cause, and only the District Court is vested with jurisdiction thereof.

Appellant could have proceeded in the District Court in civil contempt or for the entire "ancillary" relief here sought. The appellant could also have proceeded in a separate action against those he alleged to be thwarting his judicially established rights. This Court of Appeals has the power at all times to determine if its mandate is being properly executed by the lower court. It possesses the right of mandamus if the District Court fails to properly interpret or execute this Court's mandate. (And under some authorities, the validity of which we question, it could commence civil contempt proceedings in this Court for violations of orders entered by the District Court under this Court's direction.) Thus this Court would not part with authority to supervise the District Court's functions.

The United States District Court for the Southern District of Mississippi is judicially and geographically so situated, and because of its single judge composition so functions, that the Federal judiciary, as well as the parties of this litigation, would have been infinitely less burdened if the proceedings here had properly been brought in the United States District Court for the Southern District of Mississippi. Cf. Phillips v. United States, 312 U.S. 246.

THIS COURT DOES NOT HAVE ORIGINAL OR ANCILLARY JURISDICTION OF THE CLAIM ASSERTED BY THE UNITED STATES AS A PARTY AGAINST THE STATE OF MISSISSIPPI.

A.

THE CLAIM OR CAUSE OF ACTION, IF ANY, ASSERTED BY THE UNITED STATES IS SEPARATE AND DISTINCT FROM THE CLAIM ASSERTED BY THE PLAINTIFF, JAMES MEREDITH.

The United States seeks to intervene as a party plaintiff and to add as a party defendant, the State of Mississippi. It asserts that such action is necessary in order to safeguard the due administration of justice and the integrity of the judicial processes of the United States. The Government's claim is unique and is completely foreign to the facts and law involved in the original action. The facts and law constituting the original action have been settled by this Court, and are no longer being litigated thereby.

The claim of the Government is a separate, distinct and independent claim having no common ground with the original action. The Government is attempting to assert its sovereign interest to safeguard its judicial processes against impairment by obstruction and/or circumvention. If the United States has a claim or cause of action against the State of Mississippi, in this or any other type of suit, the right to maintain that claim or cause of action is not predicated upon the right to intervene as a party plaintiff in a suit instituted by private plaintiffs seeking to secure their constitutional rights. The cause of action or claim of the United States, if any, cannot

be settled by any law or facts as presented in the main action.

This main and original action of plaintiff was for the litigation of Fourteenth Amendment rights, which the United States cannot litigate in behalf of the plaintiff or any other individual party. The Government's interest has no connection with the original action. The United States is asserting a general principle as to its national sovereignty in regard to all judicial processes and is not limited to the decree rendered in this cause. It is not bottoming its cause of action upon the Government's right to enforce this particular Court decree, but upon the broad principle that the United States has the duty to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States. It is this interest that the Government is attempting to assert and any benefit, if any, derived by this Court or the plaintiff herein will be merely as third party beneficiaries.

This is squarely and unequivocally a controversy between the executive power of the United States and the executive power of the State of Mississippi. The controlling law and facts in the determination of this controversy are completely new and foreign to the facts and law controlling the original action.

B.

ANY CLAIM OR CAUSE OF ACTION BY THE UNITED STATES AGAINST THE STATE OF MISSISSIPPI MUST ORIGINATE IN THE UNITED STATES SUPREME COURT OR A FEDERAL DISTRICT COURT.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme

Art. 2, the United States Constitution.

"Except as otherwise provided by act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress." Title 28, Judiciary and Judicial Procedure, U.S.C.A., Sec. 1345.

C.

THE UNITED STATES HAS NO RIGHT OF INTERVENTION UNDER RULE 24 (a), F.R.C.P.

The United States has radically changed its position in this cause. It now claims that the order of the Court allowing it to intervene as amicus curiae was really an order permitting it to intervene as a Party to this litigation so that it could assert, not the court's rights, but its own rights against non-parties. It does this in the obvious recognition that the 11th Amendment prevents any suit against the State of Mississippi except in an action where it is a party. Its latest change of position leaves it in an equally untenable position. This Court has accepted the Federal Rules of Civil Procedure as valid here by way of analogy, since the Supreme Court has approved their use for the trial of rights in the Federal Judiciary.

There is no statute of the United States granting an unconditional right in behalf of the United States to intervention.

The interest of the United States is a unique interest of a general and indefinite character and is not the interest included in Rule 24 (a)(2), F.R.C.P.

"It is well settled that the only interest which entitles a person to the right of intervention in a case is a legal interest as distinguished from an interest of a general and indefinite character which do not give rise to definite legal rights." Jewell Ridge Coal Corporation v. Local No. 6167, 3 F.R.D. 251. See also Radford Iron Co., Inc. v. Appalachian Electric Power Co., 62 F.2d 940.

"Under Rule 24 (a)(2) allowing intervention when representation of applicant's interest by existing

is or may be bound by the judgment in the action, both conditions must be shown to exist before intervention is authorized. If both are not established there can be no intervention as of right, however great may be the applicant's interest."
Barron and Holtzoff's Federal Practice and Procedure, Sec. 597.

Conceding arguendo that the Government has a legal interest any judgment or decree in the main action would not and could not be binding upon the United States. Said decree already rendered concerns only a personal interest belonging to the plaintiff, James Meredith.

D.

PERMISSIVE INTERVENTION UNDER RULE 24 (b), F.R.C.P. CANNOT BE APPLICABLE HERE AS TO THE UNITED STATES.

No statute of the United States confers a conditional right upon the United States to intervene.

The claim or cause of action, if any, of the United States does not involve an action of law or fact in common with the main action. (We respectfully refer the Court's attention to the discussion developed in Sub-section "A", that this proceeding is in reality a separate, distinct and independent claim.)

E.

THE CIRCUIT COURT OF APPEALS DOES NOT HAVE ANCILLARY JURISDICTION OF THE CLAIM OR CAUSE OF ACTION, IF ANY, ASSERTED BY THE UNITED STATES AGAINST THE STATE OF MISSISSIPPI

"The ancillary process must be 'to aid, enjoin, or regulate the original suit. * * * to prevent the relitigation in other courts of the issues heard and adjudged in the original suit, * * *.'"
O'Brien, et al. v. Richtarsic, 2 F.R.D. 42, p. 44.

It is apparent from the discussion of the claim asserted by the United States that said claim or cause of action does not fall into the category of any claim or cause of action that could in anywise be ancillary to the main action of this case. The Government's contention that it has a claim or

cause of action to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States is not in aid of or to litigate the original suit, which suit has already been terminated as to the controlling facts and law. Said Government claim or cause of action could and should be litigated in a separate proceeding as above discussed.

F.

PERMISSIVE INTERVENTION
AND ANCILLARY ACTION.

Assuming arguendo that the United States has a cause of action or claim founded on facts and law common to the main action, the intervention by the United States would rise, at the most, to the dignity of a permissive intervention and not to an intervention of right. The Government could not intervene in this main action because the Circuit Court of Appeals does not have original jurisdiction as to a controversy between the United States and the State of Mississippi, said original jurisdiction being in the United States Supreme Court or a Federal District Court. Being a permissive intervention, said claim or cause of action must rest upon its own jurisdiction and cannot be sustained upon the jurisdiction of the main claim.

> "Assuming, as intervenor contends, that the claims for infringement against others than the defendants in the main suit are the present subject of permissive joiner * * * and that adjudication of them did not 'unduly delay or prejudice the adjudication of the rights of the original parties' * * * independent grounds of federal jurisdiction must nonetheless be found to exist." (Emphasis Supplied) Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141, p. 155.

"a permissive counter-claim must be supported by independent grounds of federal jurisdiction."
Barron and Holtzoff's Federal Practice and Procedure, Sec. 392, p. 784.

G.

PROCEDURE UNDER
RULE 24 (c) F.R.C.P.

"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."
Rule 24 (c) F.R.C.P.

Application for leave to intervene should be made on motion and may not be presented ex parte. See In Re Finger Lakes Land Co., Inc. (W.D., N.Y., 1939), 29 F.Supp. 50. It is clear from a reading of this rule and the cited case that the United States must file a motion to intervene, that due and proper notice must be given to the State of Mississippi and that a due and proper hearing on said motion must be held giving the State of Mississippi a right to be heard in this matter.

NO VALID SERVICE OF PROCESS WAS HAD ON THE NON-PARTIES, NOW "DEFENDANTS" IN THIS COURT

We recognize at the outset that the service of process in an original action in the Court of Appeals is a complete novelty and that there is no precedent for it; however, it is the universal rule that the returns of officers must control on the question of their service of process since they can neither bolster nor impeach their written returns. Evidence, even moving pictures, cannot change this basic rule.

As to service of all process in this cause, including the Temporary Restraining Order issued at the motion of the United States to Governor Barnett, Marshal McShane, in his return, states he "tendered" it to him. There is no return whatsoever supporting service of such process on Lieutenant Governor Johnson and no finding of fact is made by the Court in its order of contempt as to service of even the Temporary Restraining Order on him. The Court's judgment of civil contempt does contain a conclusion of law that the Court acquired jurisdiction over his person but this conclusion is unsupported by any fact finding.

The return on the Show Cause Order to Governor Barnett shows that Deputy Marshal Emerton attempted to make service on the Governor without showing in any way that personal notification to the Governor resulted. As to the Lieutenant Governor, Deputy Marshal Rowe's return shows he left a copy of the Show Cause Order with the Lieutenant Governor's wife less than forty-eight hours prior to the hearing set thereon. The attempted

service of the Show Cause Order on Governor Barnett was also made less than forty-eight hours prior to the hearing and in both instances the hearings were scheduled for points outside of the State of Mississippi far from the homes of these officials. Both the Chief of U. S. Marshals and officers of the Department of Justice were in personal contact with Lieutenant Governor Johnson in Oxford, Mississippi, when these attempts at service were being made elsewhere.

Except in limited classes of property actions where in rem procedures permit process to reach across state lines, the boundaries of sovereign states and not the boundaries of United States Districts for its Circuit Courts of Appeal have always controlled the validity of service of process, cf. Hess v. Pawloski, 274 U.S. 355; Wuchter v. Pizzutti, 276 U.S. 24.

Service of process must accord with a rule or statute of the United States or a law of the state in which a suit is filed. Royal Lace Paper Works v. Pestguard Products, 240 F.2d 814. Service here, insofar as the contempt actions against the Governor and Lieutenant Governor are concerned did not accord with such rule, statute or law.

Separate and apart from the question of valid service of process, the hearings in this cause with regard to contempt citations to the Governor and Lieutenant Governor lacked due process under the 5th and 14th Amendments to the Constitution of the United States. Roller v. Holly, 176 U.S. 398. In that case, the Supreme Court of the United States held that five days notice to a non-resident in another state was insufficient to constitute reasonable notice or due process of law, cf. re Green, 8 L.Ed.2d 198.

THE UNITED STATES AS AMICUS CURIAE AND THE APPELLANT CONTINUOUSLY HAD THE BURDEN OF AFFIRMATIVELY SHOWING THAT THIS COURT HAD JURISDICTION TO HEAR AND DETERMINE THEIR PETITIONS FOR ANCILLARY RELIEF.

This Honorable Court, being an Appellate Court, can exercise only appellate and not original jurisdiction. Title 28, U.S.C.A. 1291. The petitions of the amicus and the appellant for new relief against new parties could not be maintained by this Court unless they were properly ancillary to this Court's appellate jurisdiction. Neither petition alleges any independent jurisdictional grounds.

This Court reversed and remanded this case with directions to the District Court for the Southern District of Mississippi on July 27, 1962. Appellees contended that these proceedings were without authority and that the judgment and mandate of this Court issued July 17, 1962, directing the District Court to retain jurisdiction, properly concluded this Court's appellate function. Assuming, arguendo, that the Court had some residual appellate jurisdiction that did permit it on July 28, 1962 to enter an order of injunction against the parties to this litigation, then this injunctive order and it alone would form the only element of appellate jurisdiction which could now be vested in this Court. This order provides by its own terms that it is effective only:

> "Pending 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 by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University,**"

During the course of oral argument Judge Brown opined that the parties against whom the preliminary injunctive relief was sought had failed to meet the burden of proving that this injunction had not expired of its own terms. Some of the members of the Court stated that they had read or heard via news media of events which caused them to feel that the injunction might not have expired by its terms.

We respectfully submit that this was not the burden of the "defendants." With deference we submit this was improper since the entire jurisdiction for the Court to entertain these admittedly ancillary petitions, and to issue its ancillary injunctive orders against nonparties, was based upon the continuing validity vel non of the injunction of July 28, 1962. These moving parties had the continuous, self-asserted burden of proving to the Court that such jurisdiction did exist.

Judge Tuttle speaking for the Court in the case of Birmingham Post Co. v. Brown, 127 F.2d 127, pointed out:

> "No matter how the issue is raised, whether by motion, by answer, or upon the court's own initiative, the burden of proving all jurisdictional facts rests upon the plaintiff or persons asserting that the court has jurisdiction."

He also pointed out that every court of the United States was presumed to be without jurisdiction unless the contrary affirmatively appeared from the record. The question of jurisdiction is self-asserted and arises though the litigants themselves are silent. The question of jurisdiction can never become an affirmative defense.

See also Town of Lantana v. Hopper, 102 F.2d 118.

The "defendants" have asserted continuously that ne Court is without jurisdiction in this proceeding. As nis Court pointed out in the case of Williams v. Employers itual Liability Insurance Co., 131 F.2d 601, which was eversed at the instance of then Attorney, and now Judge, ives, if jurisdiction is challenged then the party sserting jurisdiction must support the existence of such rrisdiction by competent proof.

For all the foregoing reasons, it is submitted that ne Court lacks jurisdiction to hear, determine or proceed rrther with any matter related to the former appeal in eredith v. Fair, whether such proceedings be called "ancillary" r by any other name. Despite the foregoing, defendants are illing to furnish the Court with such additional information s the Court may require to show that, in fact, full good aith compliance has been had by all persons to whom the ourt's Order of July 28, 1962, was directed, and that verything sought to be accomplished by that Order has been ccomplished.

Such additional information will, of course, be rrnished without waiving the complete failure on the part of ne moving parties to meet the burden of proving jurisdictional acts, which burden they wholly failed to meet.

THE ACTS OF GOVERNOR ROSS R. BARNETT, CHARGED TO BE IN VIOLATION OF THE ORDERS OF THIS COURT, WERE DONE SOLELY IN HIS OFFICIAL CAPACITY AND THE SOLE DESIGN OF THE RESTRAINING ORDER AND TEMPORARY INJUNCTION IS TO FORCE HIM TO EXERCISE HIS OFFICIAL POWERS AND CONSTITUTES A SUIT AGAINST THE STATE

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another state in Chisholm vs. Georgia, 2 Dall. 419, provoked such angry reactions in Georgia and such anxieties in other states that at the first meeting of Congress after this decision what became known as the Eleventh Amendment was proposed and ratified with "vehement speed".

In Osborn vs. Bank of United States, Wheat.264,411-412, the Court laid down two rules, one of which has survived and the other of which was soon abandoned. The latter was the holding that a suit is not one against a state unless the state is a party to the record. This rule the Court was forced to repudiate seven years later in Governor of Georgia vs. Madrazo, 1 Pet. (26 U.S.) 110, in which it was conceded that the suit had been brought against the Governor solely in his official capacity and with the design of forcing him to exercise his official powers. In its opinion the Court said:

> "The claim upon the governor, is as governor; he is sued not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced not against the person, but the officer, and appeared to

have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the Chief Magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted, that the governor could be considered as defendant in his personal character, no case is made which justifies a decree against him personally."

See also Commonwealth of Kentucky vs. William Dennison Governor of Ohio, 24 Howard (65 U. S.) page 66, 97, to same effect and citing Governor of Georgia vs. Madrazo.

In Hagood vs. Southern, 117 U. S. 52,67, the Court stated:

"The bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the state was not in name made a party to the alleged contract, the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit and it could not be maintained for that reason."

The suit at bar, seeks nothing at the hands of Ross R. Barnett, an individual person. The demand made upon him, is not made personally, but officially. The decree sought against him ie: to compel him to perform the order of the Court, is

not sought against him personally but officially. The demand is that the Governor be required to do this and that in his official capacity as Governor. Under the three above cited decisions by the Supreme Court of the United States such demand is a demand against the State and the suit is a suit against the State and not the individual.

The State has immunity, under the Eleventh Amendment, to a suit against it by its own citizens, Hans Vs. Louisiana, 134 U. S. 1; Fitts vs. McGehee 172 U. S. 516; Duhne vs. New Jersey, 251 U. S. 311, 313; Ex Parte New York 256 U. S. 49. Meredith is admittedly a citizen of Mississippi.

With reference to the appearance of the United States as amicus curiae it is said in 2 Am. Jur., page 680, Section 4, that:-

> "He has no control over the suit and no right to institute any proceedings therein. It seems clear that an amicus curiae cannot assume the function of a party in an action or proceeding pending before the Court and that ordinarily, he cannot file a pleading in a cause."

In 3 C.J.S., p. 1050, Sec. 3 (5), the statement is found that:

> "The amicus curiae cannot file a pleading and hence a demurrer cannot be filed by an amicus curiae."

As to the status of an amicus curiae appointed by the Court it is said in 3 C.J.S., p. 1048, that:

> "The fact that the Court assumes to appoint one as amicus curiae does not

enlarge the authority of the amicus curiae."

The United States has not filed any original suit against the Governor or Lieutenant Governor in a Court of original proper jurisdiction and it is beyond its power to petition in its own right as amicus curiae for an injunction.

Am. Jur. 2d, p. 110, Sec. 3, says:-

> "An amicus curiae is heard only for the purpose of assisting the court in a case already before it, and the function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration. His principal or usual function is to aid the court on questions of law, but whatever the matter with reference to which an amicus curiae undertakes to inform the court, he should act in good faith,make full disclosure on the point, and suppress nothing with intent to deceive the court.
>
> An amicus curiae is not a party and cannot assume the functions of a party, an attorney for a party, or even a partisan. He has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties. Thus, an amicus curiae may not raise issues as to the constitutionality of a statutory provision where such issue is not raised by the parties to the action; and it has also been held that an amicus curiae may not raise a constitutional question which does not relate to the jurisdiction of the court.
>
> Ordinarily, an amicus curiae cannot file a pleading in the cause but is restricted to suggestions relative to matters apparent on the record or to matters of practice."

This Honorable Court has held that an amicus curiae has no standing or status except to advise and are not parties to a suit.

In City of Winterhaven vs. Gillespie, 84 Fed. 2d, 287, certiorari denied 299 U. S. 606, 91 L. Ed. 447, 51 S. Ct. 232, rehearing denied 301 U. S. 714, 81 L. Ed. 1365, 57 S. Ct. 927, this Court of Appeals for the Fifth Circuit held that a suit for a mandatory injunction is in its nature the same as a suit for mandamus and that they are not parties to the suit and have no standing except to advise the Court. In so holding the Court speaking through Judge Hutcheson said:-

> "We held in Normandy Beach Dev. Co. v. United States ex rel. Brown-Crummer Inv. Co., 69 F.(2d) 105, that the only proper parties to a mandamus suit are the relators who seek to compel performance of a duty, and those on whom the duty is imposed by law, and that intervening taxpayers, like these here, have no standing to appeal. Though this is a suit for injunction, it is for a mandatory one, and in its nature it is a suit for mandamus to direct officials of a city to proceed as they ought to do, and it may be questioned whether intervening taxpayers could any more appeal from a judgment in this suit than they could in that. We do not decide that question, however, for these appellants did not come into the cause of interveners. They came in by a pleading and order specifically fixing their status as and limiting it to, that of "friends of the court." They thus have no status except to advise, or, as they themselves put it, to "suggest." They are not named in, they are not parties to, and they are not bound by, the decree. They are without standing here to appeal. Hughes Federal Practice, vol. 1, § 37, p. 37; American Jurisprudence, vol. 2, p. 679, § § 4-6 and 7."

We respectfully submit that the United States, as amicus curiae, is not a party to this suit and consequently this suit cannot be construed to be a suit by the United States against the State of Mississippi. It is purely a suit by a citizen of Mississippi against the State of Mississippi,

THE STATE OF MISSISSIPPI AND ITS RIGHTS

When James H. Meredith filed his suit, the State of Mississippi was not named as a party; and the State was not brought into this Court until the suit was fait accompli. Having not had its day in court and not being bound by previous evidence (our Brief, p. 13, see also Stone v. Interstate Natural Gas Co., C.A. 5, 103 F. 2d 544), the State of Mississippi, with deference, makes this further statement of its rights, still reserving its objections to the jurisdiction of this Court.

1. The State qua State has been sought herein to be mandated. With deference, we deny the jurisdiction of the Court over her insofar as the rights assumed for James H. Meredith are concerned, there being as to education no specific Congressional legislation. Compare United States v. Alabama, 362 U.S. 602, 4 L. ed. 2nd 982, 267 Fed. 2nd 808, 171 F. Supp. 720, quoted and discussed elsewhere in this brief.

2. The State was not assumed to be brought in until September 25, 1962 after the cause in the District Court had been tried on the merits, appealed to this court and the mandate remitted: and so being, if a coercible party, it must be vouchsafed full right to be heard as res nova, but beware of the Eleventh Amendment. Morgan v. United States, 298 U.S. 468, 80 L. ed. 1288.

3. On the merits, District Judge Mize specifically said:

> "The Registrar, on cross examination by attorney for Plaintiff, testified that if the application filed by the Plaintiff for admission were considered as still a pending application for admission that he would not accept the application of the Plaintiff, but that his rejection of the application for admission would be based not in the slightest on his race, but that the same rule would be applied if the applicant had been a white person; that the race of the Plaintiff did not enter into his judgment. ***."

In short, this was not a denial of Brown v. Board of Education, 349 U.S. 294, 99 L. ed. 1083, but an application of Waugh v. University of Mississippi, 237 U.S. 589, 59 L ed. 1131, 1137, wherein the Supreme Court declared:

> "This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the

right to pursue happiness and exercise rights and liberty are subject to some degree to the limitations of the laws, and the condition upon which the State of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the 14th Amendment."

Hamilton v. Board of Regents, 293 U.S. 245, 79 L. ed. 343.

4. The Legislature of Mississippi, vested with plenary power under Section 33 of the Mississippi Constitution, has spoken in divers statutes, but in this particular instance by (a) an Act of September 27, 1962, Senate Bill No. 1502; (b) an Act of September 20, 1962, Senate Bill No. 1501; and (c) an Act of September 28, 1962, House Bill No. 2, seeking to validate, as a sovereign, that precedently done by its officers, especially the Registrar at the University. These statutes evidenced their subservience to the Constitution as interpreted by the Supreme Court, but as to James H. Meredith forbade registration by reason of personal characteristics. The State affirmed her right thus to do and these statutes stand out as expressions entitled to constitutional protection under the Tenth Amendment. Whether that protection shall be termed "interposition" or by another name is substantially a question of semantics and not of constitutional authority. Thereunder, as its own, the State, subject to the Federal constitutional limitations, has declared that those similarly circumstanced to James H. Meredith may not enter because its Registrar had determined, under State law, that he was not entitled thereto, irrespective of the Brown Case, supra. The Registrar and University officials were skilled in their profession and, with deference, vested with a modicum of State authority when they acted. The Courts initially must regard that administratively done and legislatively approved as valid until vacated in accordance with the Federal Constitution and statutes. With deference, the Governor was not privileged to disregard these Mississippi laws until appropriately construed.

5. Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L. ed. 2nd 562, makes State adjudication as to validity and construction of these statutes a condition precedent to Federal action. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 3 L. ed. 2nd 1058; Harrison v. NAACP, 360 U.S. 167, 3 L. ed. 2nd 1152.

6. We shall substitute in place of James H. Meredith, a Negro, as Complainant, "James H. Eredith", Caucasian, possessed of precisely the same character and qualifications as James H. Meredith, save that one is black and the other is white. These statutes are, under Mississippi law, the precise equivalent of this act:

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

"SECTION 1. That 'James H. Eredith' (not James H. Meredith) is not entitled to register at the University of Mississippi and his previous exclusion by the Registrar is ratified, approved and confirmed.

"SECTION 2. That this act shall take effect from and after its passage."

7. As to constitutional construction, stare decisis is not strictly regarded. Glidden v. Zdanok, ____U.S.____, 8 L. ed. 2nd 671, 683.

8. The State is the owner and operator of the University. Thereasto, there are constitutional and statutory provisions presumptively valid and applicable; and to deprive it of that which is its own, it must be in personam a party. Compare Stone v. Interstate Natural Gas Co., CA 5, 103 Fed. 2nd 544, affirmed, 308 U.S. 522, 84 L. ed. 530. The laws of Mississippi are not to be overruled until determined under due form of law to contravene the U.S. Constitution.

9. The Supreme Court of Mississippi may alone under the State Constitution prescribe what the Governor and Lieutenant Governor may do or leave undone. When acting under her mandates, they are, with deference, not contemptuous. Henry v. State, 87 Miss. 1, 39 So. 856; Kennington-Saenger Theatres v. State, 196 Miss. 841, 18 So. 2nd 483.

10. It may be contended that these statutes enacted lawfully by the Legislature may be disregarded by this Court and treated as nullities because palpably a fraud on James H. Eredith; but note that this Court on appeal divided, District Judge DeVane declaring:

> "The one defense that leads me to dissent is the fear expressed by the appellees that Meredith would be a trouble-maker if permitted to enter the University of Mississippi. ***."

And the prevailing opinion specifically declared:

"* * * The most damaging bit is a psychiatry report dated April 29, 1960:

> "'This is a 26 year old negro S Sgt who complains of tension, nervousness and occasional nervous stomach. Patient is extremely concerned with the 'racial problem' and his symptoms are intensified whenever there is a heightened tempo in the racial problems in the U S and Africa. Patient feels he has a strong need to fight and defy authority and this he does in usually a passive procrastinating way. At times he starts a crusade to get existing rules and regulations changed. He loses his temper at times over minor incidents both at home and elsewhere. * * *."

And therein two Circuit Judges joined; but the other seven have not spoken so as to bind the State and prescribe a future course of conduct when the United States had moved in approximately twenty thousand men and, with deference, usurped power.

11. When the Registrar at the University acted, essentially, if there was to be judicial review, precisely that done should have been carefully preserved. California Co. v. State Oil & Gas Board, 200 Miss. 824, 27 So. 2nd 542. The Constitution and statutes, as questions of law, could be reviewed; and if there were no competent proof, reversal might be, but an administrative action should not be disregarded by the Court because thereasto its action is episodic. Public Service Commission v. United States, 356 U.S. 421, 2 L. ed. 2nd 886, 897. But the fundamental error, with deference, available to the State is that this question of trouble-maker or not is not to be decided upon by two members of the appellate Court composed of nine judges upon a preponderance of the evidence, when the Legislature, vested with fact finding powers and law-making authority, declared James H. Meredith to have been not entitled to registration.

12. With these statutes thus enacted, Congress has provided that invalidity must be declared by a District Court, Section 2281, Title 28 U. S. C. A.; and thereover this appellate Court is without jurisdiction since the exclusion was for personal characteristics other than race.

13. With "James H. Eredith" thus circumstanced, but withal a pacificist, he was taken up by the pressure group as an instrumentality whereby, under the guise of the Brown Case, supra, notwithstanding his

disqualification, the police power of Mississippi could be overthrown in the Federal Court. That deprivation of police power is that which in this aspect makes this case so serious and, with deference, justified all that the State officials in that behalf did.

14. There is, therefore, herein basically a modicum of State sovereignty which need not be herein precisely defined until the merits are reached, as thereasto there is no jurisdiction; but this valid modicum may not be impaired or suspended because so thus to do would violate Texas v. White, 74 U.S. 564, 19 L.ed. 227, 237. And the supreme question here is, may the United States destroy this relationship by blasting the modicum of State sovereignty remaining? This line of State sovereignty and Federal sovereignty has to be meticulously regarded, otherwise the Constitution fails. Compare South Carolina v. United States, 199 U.S. 437, 50 L.ed. 261; New York v. United States, 326 U.S. 572, 90 L.ed. 326; Detroit v. Murray Corporation, 355 U.S. 489, 2 L.ed. 2nd 441, 460.

15. James H. Meredith (here the assumption to conform to facts) malingered at Jackson College so as to not disqualify himself from entering the University. This action was deliberate and intentional. He became, under the pressure group, a crusader, vindicating alleged rights, not seeking an education. Appropriate qualification thereasto was requisite in accordance with State law. Had he not attempted to crusade -- making time of the essence and quintessence -- no such catastrophe would have occurred.

16. Let this Court, with deference, be mindful of its jurisdiction. The State, qua State, is not before the Court validly; and when the State officers do that of them specifically required by the Constitution and express statutes of Mississippi as will be interpreted by its own Supreme Court, as was the case here, it is not a case of contempt; for had they not done that which was in accordance with their judgment, as approved by the legislative acts and by Mississippi decisions as we contend, they would have been subject to impeachment. Obeying State sovereignty

cannot be punished when in good faith, in accordance with state statutes and decisions, and, with deference, in fundamental compliance with the Tenth Amendment of the U.S. Constitution, which as to this case stands as the law of the land.

17. That whereasto adjudication may herein be had does not involve the Fourteenth Amendment. The police power of the State, legislatively enacted, exists in the form of the statute hereinabove quoted. If the matter were again referred to the Legislature, we respectfully submit they would reaffirm and ratify, and make specific and precise that which precedently they made general so as to show that there was not an intention to in any way transgress under Brown v. Board of Education, supra. Frankly, as has been pointed out, the Brown Case sought to change fundamental customs. At the moment, it stands as the law. Whether it will continue so to do rests with the Supreme Court and the Congress; and when formally there declared, irrespective of the State's opinion, she has never deviated in any case one iota therefrom, and under an injunction should not be deprived of her rightful sovereignty. With deference, remember the Eleventh Amendment.

The State of Mississippi was brought into this action against its will and, with deference, continuously denies the jurisdiction of this Court over it under the Eleventh Amendment to the U.S. Constitution. Nothing herein heretofore done should be considered a waiver of its rights under the Eleventh Amendment but rather the statements and Motions herein made, must all be considered, with deference, as protestations against the jurisdiction of this Court over the State in this cause.