No. 661

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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THE STATE OF MISSISSIPPI, ET AL., Petitioners

v.

JAMES HOWARD MEREDITH, ETC., Respondent

(UNITED STATES OF AMERICA, Amicus Curiae)

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

BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES
FOR LEAVE TO BE ADDED AS PARTY-RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 661

THE STATE OF MISSISSIPPI, ET AL., PETITIONERS

v.

JAMES HOWARD MEREDITH, ETC., RESPONDENT

(UNITED STATES OF AMERICA, AMICUS CURIAE)

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

BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES
FOR LEAVE TO PARTICIPATE AS PARTY-RESPONDENT

The Solicitor General correctly states in his motion that the United States was not served as a respondent at any time in the subject proceedings. At no time has the United States been a Party-Respondent to these proceedings. They never occupied any status in the court below other than the court delineated status of an amicus curiae. No application has been made to this court by the United States to be permitted to participate as a party in this case in this court as amicus curiae. The motion by the United States is therefore not timely and should be denied.

POINT I.

AN AMICUS CURIAE IS NOT A PARTY

This rule has been clearly defined by the United States Court of Appeals for the Fifth Circuit in the case of City of Winter Haven, Fla. v. Gillespie, 84 F.2d 285; cert. den. Partridge-Cannon Co. v. Gillespie, 229 U.S. 606, 57 S.Ct. 232, 81 L.Ed. 447. The court, in its opinion, used the following language:

> ". . . in view of their appearance in the cause not as parties, but as amici curiae a preliminary question arises as to whether the appeal should be entertained or dismissed.
>
> "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 those 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 say 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 as intervenors. 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 [illegible]. They are not named in, they are not responsible to, and they are not bound by, [illegible]. They are without standing [illegible]. [illegible] Federal Practice, vol. 2, [illegible]; [illegible] Jurisprudence, vol. 2, [illegible] 46 and 7."

The Winter Haven case was cited with approval by the Seventh Circuit in the case of Clark v. [illegible], 205 F.2d 915, in support of the proposition that an amicus was not a party. To the same effect are the following state court decisions:

> Second Nat. Bank, for Use of Federal Reserve Bank of [illegible]delphia v. Faber, 332 Pa. 124, 2 A.2d 747, 749.
>
> State v. City of Albuquerque, 31 N.M. 576, 249 P. 242, 248.
>
> In re Perry, 83 Ind.App. 456, 148 N.E. 163, 165.

2 Am.Jur. 680, Amicus Curiae, § 4, states the rule in this language:

> "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. An amicus curiae is restricted to suggestions relative to matters apparent on the record or to matters of practice. His principal function is to aid the court on questions of law."

3 C.J.S. 1046, Amicus Curiae, § 1, defines the status of amicus curiae in the following language:

> "An 'amicus curiae,' literally meaning a friend of the court is one who, as a stranger, then a judge is divested of discretion, may inform the court. The term is also sometimes applied to a person who is not a proper or necessary party, but who is allowed to appear to protect the interest of a party he represents.

"Distinguished from intervention. Leave to appear as amicus curiae differs from intervention in that the intervenor becomes a party to the litigation, and is bound by the judgment, while, as stated in § 3 c infra, an amicus curiae does not become a party to the proceedings."

In § 3 a of the same work, it is stated:

"The office of an amicus curiae cannot be subverted to the use of a litigant in the case, and it has been held that it is beyond his office to involve the action of the court upon issues of fact not confined to jurisdictional matters."

§ 3 c states:

"As an amicus curiae is not a party to the suit and cannot assume the functions of a party; he cannot take upon himself the management of the suit as counsel, being without any control over it whatsoever, and he has no right to institute any proceedings therein. He must take the case as he finds it, with the issues made by the parties."

The only respondent in this matter has waived the filing of any reply to the Petition for Certiorari in this cause (telegram of counsel dated January 2, 1963). The amicus curiae below, who has not even been admitted to such status in the proceedings before this court, has no right to assume the direction and control of the litigation on appeal. In 3 C.J.S. 1051, Amicus Curiae, § 3 c (6), that text points out the following rules governing the function of an amicus on an appeal matter:

". . . no person can prosecute an appeal or writ of error unless he is a party or privy, or in some way aggrieved by the judgment, an amicus curiae has no right to prosecute an appeal or writ of error or to maintain a bill of review or a bill in the nature of a bill of review, and the court cannot appoint an amicus curiae to represent it on appeal. Moreover, an amicus curiae has no authority to give notice of appeal or suggest a diminution of the record, and questions raised by him and not by parties to the litigation will not be considered on appeal. He has no right to move to strike out the statement of facts. A citation on appeal issued to him by direction of the court is insufficient to bring any of the parties into court."

In the case of Knetsch v. U.S., 364 U.S. 361, 81 S.Ct. 132,5 L.Ed. 128, this court announced that an amicus curiae could not supply a point omitted in the briefs and positions taken by the parties and that where a point was made only in a brief filed by an amicus curiae, it would not be considered by the court.

In the later case of Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447, rehearing denied 329 U.S. 823, 67 S.Ct. 24, 91 L.Ed. 700, this court ruled that the fact that an amicus curiae might be asked by the court to plead or to take other proceedings properly taken by parties, does not serve to change the relationship of the amicus to the court. The court stated:

"The relationship of these lawyers to the court,

after it recognized them as amici, remain throughout only that of amici."

In the case of Walker County Lumber Company v. Edmonds, (Tex.Civ.App.) 298 S.W. 610, 612, the court, referring to the office of amicus curiae, stated:

"This office is to aid the court and for its personal benefit and cannot be subverted to the use of a litigant in the case."

POINT II.

THE UNITED STATES CANNOT USE THE OFFICE OF AMICUS CURIAE, TO WHICH IT HAS BEEN ASSIGNED IN THE COURT OF APPEALS, AS A DEVICE TO ENABLE IT TO BECOME AN ACTIVE PARTY-RESPONDENT ON THIS APPEAL IN LIEU OF THE REAL RESPONDENT HEREIN

This court has pointed out that it will not sanction an impermissible action because it is cleverly or uniquely performed. The court has said that it matters not whether a scheme is "ingenuous" or "ingenious", or whether it is "sophisticated" or "simple-minded"; devices which are used to accomplish ends that are not permissible will be prohibited. The United States cannot use the high and time-honored office of amicus curiae to assume direction and control of individual litigation asserting 14th Amendment rights. Shelley v. Kraemer, 344 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, and [illegible] v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, clearly provide that 14th Amendment rights, which form the basis of the liti-

gation involved in the present appeal, are personal and individual rights belonging to natural persons alone. The United States cannot, as amicus curiae or otherwise, assert claimed violations of the individual respondent's 14th Amendment rights.

A study of the legislative history of recent civil rights legislation shows a concerted endeavor to secure statutory authorization for the federal government to litigate on behalf of individuals claimed violations of their constitutional rights; and, with the single exception of the Civil Rights Act of 1957 (42 U.S.C. § 1971 (c)), this history discloses that the Congress has refused to grant such authority. See the testimony of Attorney General Brownell reported in 1957 "Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the U. S. Senate," 85th Congress, First Session, commencing on page 1, on page 46 and on page 180. To the same effect is the testimony of Attorney General Brownell before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives, 85th Congress, First Session.

At no point does the record in this matter indicate that the discussion was one in which the authority of the court was being threatened or flouted because of the apathy of the private litigants. On the contrary, the record discloses that

the respondent immediately moved to file contempt proceedings and secure injunctive orders, both to secure his alleged rights and to secure compliance with the decrees of the court.

The motion of the United States to intervene in this appeal as a Party-Respondent is improper and should be denied.

THE STATE OF MISSISSIPPI, ET AL.,
Petitioners

BY: JOE T. PATTERSON, Attorney General
DUGAS SHANDS, Assistant Attorney General

MALCOLM B. MONTGOMERY
GARNER W. [illegible]
Special Assistant Attorneys General

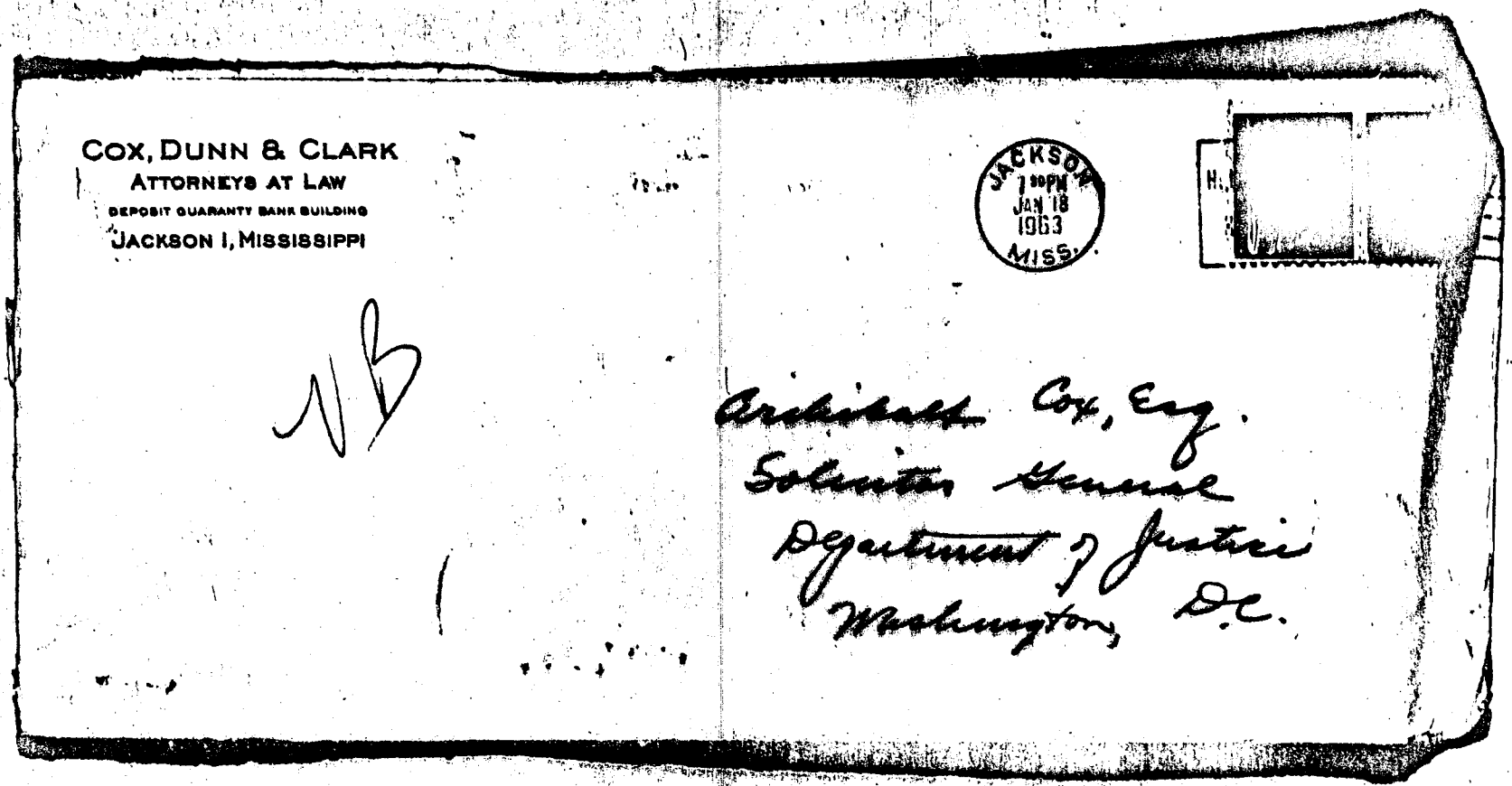
By _____
CHARLES CLARK
Special Assistant Attorney General
of the State of Mississippi
P. O. Box [illegible]
Jackson, Mississippi

CERTIFICATE OF SERVICE

I, CHARLES CLARK, one of the attorneys for petitioners herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the date shown below I served the foregoing BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES FOR LEAVE TO BE ADDED AS PARTY-RESPONDENT on James H. Meredith, Respondent, by mailing true copies thereof to: Constance B. Motley, Esq., 10 Columbus Circle, New York 19, New York, airmail postage prepaid; to R. Jess Brown, Esq., 1105½ Washington Street, Vicksburg, Mississippi, by first class mail postage prepaid (the distance being less than 500 miles), the attorneys of record for said respondent; and on the United States, Amicus Curiae, by mailing true copies thereof to: Burke Marshall, Esq., Assistant Attorney General; St. John Barrett, Esq.; and John Doar, Esq., Attorneys, Department of Justice, Washington, D. C., airmail postage prepaid, the attorneys of record for said Amicus Curiae.

DATED this 19th day of January, 1963.

CHARLES CLARK
Attorney for Petitioners
Address: P. O. Box 1965
Jackson, Mississippi



COX, DUNN & CLARK
ATTORNEYS AT LAW
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1963
MISS.

NB

Archibald Cox, Esq.
Solicitor General
Department of Justice
Washington, D.C.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20240

UNITED STATES OF AMERICA,

versus

ROSS R. BARNETT and PAUL B. JOHNSON, JR.

(April 9, 1963)

Before TUTTLE, Chief Judge, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

ORDER ON MOTIONS

PER CURIAM: Upon consideration of the following motions filed by the State of Mississippi and by the named respondents, and after argument of counsel;

1. The Motion of the United States to strike the Motion and plea of the State of Mississippi to dismiss the proceedings as being in violation of the Tenth and Eleventh Amendments to the Constitution is granted.

JUDGE CAMERON DISSENTING.

The following motions are denied.

1. Motions of Barnett and Johnson to dismiss all proceedings in original Action No. 20,240 for lack of process.
JUDGE CAMERON DISSENTING.

2. First alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 and all contempt proceedings in cause No. 19,475 based on improper and insufficient application.
JUDGE CAMERON DISSENTING.

3. Second alternative motions of Barnett and Johnson to dismiss original proceedings in cause No. 20,240 for lack of venue or jurisdiction.
JUDGE CAMERON DISSENTING.

4. Third alternative motions of Barnett and Johnson to dismiss all pending proceedings in criminal contempt for lack of Grand Jury presentment or indictment.
JUDGE CAMERON DISSENTING.

5. Fourth alternative motions of Barnett and Johnson to dismiss all proceedings in original action No. 20,240 for lack of jurisdiction to summons a constitutional jury.
[redacted].

Judges Cameron and Gewin are of the opinion that this question is necessarily involved in the question certified to the Supreme Court.

The Court does not now pass on the following:

1. Motions of Barnett and Johnson for severance.

2. Motion of Johnson to strike the third charge contained in the order to show cause of date January 4, 1963.

3. Motion of Barnett to strike the third and fourth charges contained in the order to show cause of date January 4, 1963.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

No. 614. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Robert L. Stern*, *Joseph J. Daniels*, *Harry S. Littman* and *Raymond N. Shibley* for petitioner. *Solicitor General Cox*, *Acting Assistant Attorney General Guilfoyle*, *Morton Hollander*, *Kathryn H. Baldwin*, *Richard A. Solomon*, *Howard E. Wahrenbrock* and *Peter H. Schiff* for the Federal Power Commission; *Aloysius J. Suchy* and *F. Clifton Lind* for the County of Wayne, Michigan; and *Frank J. Kelley*, Attorney General of Michigan, *Eugene Krasicky*, Solicitor General, and *Benjamin F. Gibson* and *Hugh B. Anderson*, Assistant Attorneys General, for Michigan Public Service Commission, respondents. Reported below: — U. S. App. D. C. —, 305 F. 2d 763.

No. 661. MISSISSIPPI ET AL. *v.* MEREDITH. Motion of the United States for leave to be named a party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Joe T. Patterson*, Attorney General of Mississippi, *Dugas Shands*, Assistant Attorney General, and *Thomas H. Watkins*, *Malcolm B. Montgomery*, *Garner W. Green*, *Peter M. Stockett* and *Charles Clark*, Special Assistant Attorneys General, for petitioners. *Solicitor General Cox*, *Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 761. HILTON HOTELS CORP. ET AL. *v.* URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Malcolm Anderson* and *Donald C. Bush* for petitioners. Reported below: 309 F. 2d 186.

Petition for Certiorari, filed August 1962 by State of Mississippi, denied October 8, 1962. No. 347. Copy in File Drawer.

Br-A Memorandum For The United States As Amicus Curiae on Motion For Vacation Of Stay Orders-(Supreme Court 8/31/62 (Motion is filed in Pleading File)

Br-B Memorandum Of Points And Authorities In Support Of Application Of United States For Designation As Amicus Curiae--(Court of Appeals, Fifth Circuit)

Br-C Memorandum Of Points And Authorities In Support of Application Of United States, As Amicus Curiae, For Temporary Restraining Order--(Court of Appeals, Fifth Circuit, 9/25/62

Br-D Memorandum and Statement of State of Mississippi In Support Of Motion to dissolve Temporary Restraining Order

Br-E Memorandum of the United States in Opposition to Motion By The State of Mississippi to dissolve Temporary Restraining Order

Br-F Brief For Appellant--(Court of Appeals, Fifth Circuit, 10/10/62

Br-G Brief of Defendants--(Court of Appeals, Fifth Circuit, 10/ /62

Br-H Memorandum On Behalf Of The United States--Court of Appeals, 10/15/62

Br-I Response Of The State Of Mississippi And Governor Ross R. Barnett And Lieutenant Governor Paul B. Johnson To Memorandum Filed On October 15, 1962, By The Amicus Curiae, 10/18/62

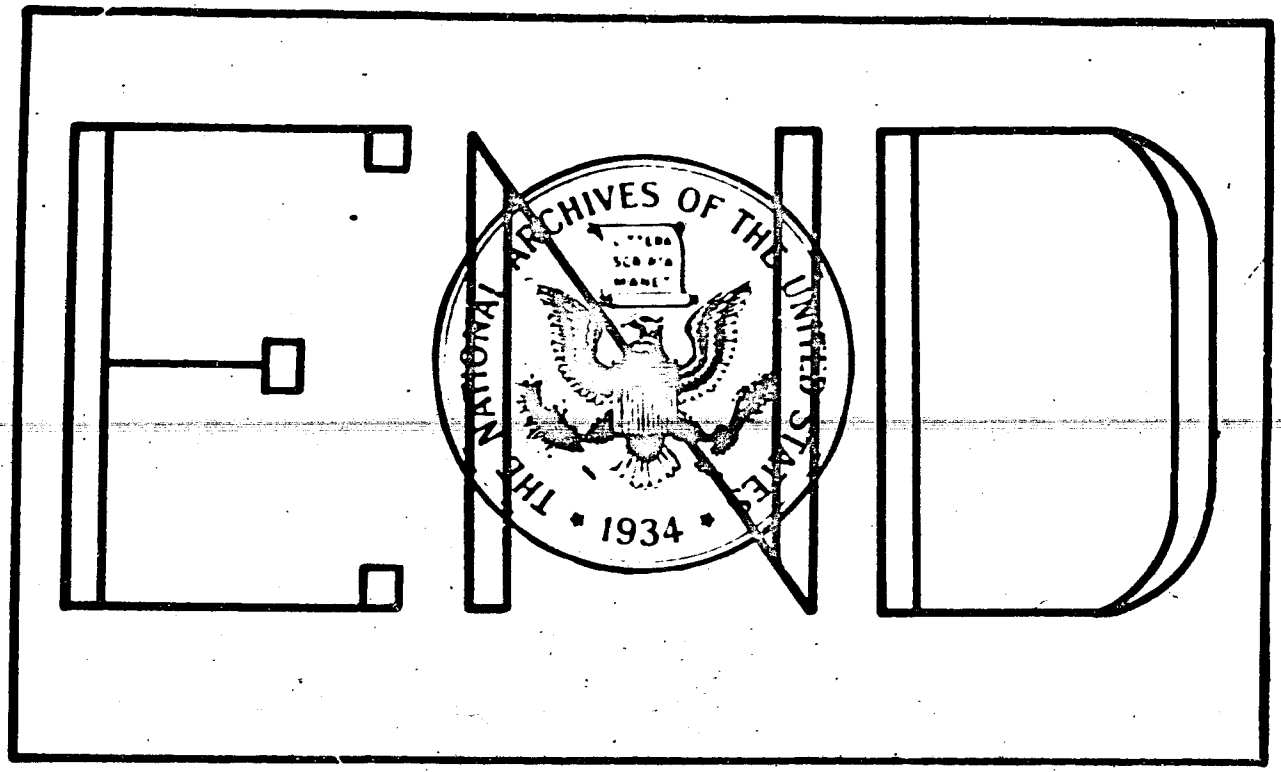
Br-J Further Statement And Memorandum On Behalf Of the United States In Response To The Memorandum Filed On Behalf Of Governor Ross R. Barnett On October 18, 1962 -- Court of Appeals, Fifth Circuit, 10/25/62

Br-K Supplemental Memorandum On Behalf Of The United States -- Court Of Appeals, 11/3/62

Br-L Petition for Certiorari, 12/61

Br-M United States Motion to be added as Respondent in Supreme Court

Br-N Mississippi Opposition to United States Motion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