THE "JUDGMENT OF CIVIL CONTEMPT" ENTERED BY THIS COURT IS NOT VALID AS A JUDGMENT OF CIVIL CONTEMPT.

The "Judgment of Civil Contempt" entered by this Court against Governor Ross R. Barnett and Lieutenant Governor Paul B. Johnson, Jr. is not valid as a judgment of civil contempt for the following reasons:

(1) Title 18, U.S.C.A., Sec. 401, which provides in part that a Court of the United States "shall have power to punish by fine or imprisonment" (Emphasis Added) contempts of its authority applies to civil as well as criminal contempts; (2) No fine other than a compensatory fine to be paid to the complaining party can be assessed as a punishment for civil contempt, and the "Judgment of Civil Contempt" entered by this Court provides that the fines to be levied be paid to the United States; (3) No showing of damages or injuries sustained by Appellant, James H. Meredith, as a result of the alleged violation of this Court's orders by Governor Ross R. Barnett and Lieutenant Governor Paul B. Johnson, Jr., has been shown and absent such showing, no fine can be imposed for civil contempt; (4) The "Judgment of Civil Contempt" entered by this Court did not provide for a remittitur of the punishment to be imposed upon compliance with this Court's orders, thus making the imposition of such punishment one for criminal, not civil contempt.

Firstly, it must be taken to be the law that the provisions of Title 18, U.S.C.A., Sec. 401, that a Court of the United States "shall have power to punish by fine or imprisonment" (Emphasis Added) contempts of its authority apply to civil as well as criminal contempts.

Estes vs. Potter (5th Cir. 1950), 183 F.2d 865, cert. den. 340 U.S. 920, 95 L.Ed. 664, was a purely civil contempt for failure to answer questions propounded by immigration inspectors pursuant to federal statutes. The defendant asserted his Fifth Amendment rights against self-incrimination as a defense to his refusal to answer. In discussing the punishment that could be levied for civil contempt, this Court said at 183 F.2d 866:

> "The proceeding is one of civil contempt, which is not punishable by both fine and imprisonment for the same offense; but that does not preclude the court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or vice versa. Sec. 401 of the New Criminal Code, 18 U.S.C.A. Sec. 401; Penfield Co., etc., v. Securities and Exchange Comm., 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117, 1124." (Emphasis added).

And, United States vs. Montgomery (U.S.D.C. Montana 1957) 155 F.Supp. 633, was also a purely civil contempt case. At 155 F. Supp. 637, the Court said:

> "A court of the United States has power to punish by fine or imprisonment, at its discretion, such contempt of its authority as 'disobedience or resistance to its lawful writ, process, order, rule, decree, or command.' Title 18 U.S.C.A. Sec. 401. This applies to civil as well as criminal contempt proceedings. When a fine is imposed in civil contempt proceedings, it is punishment for past contemptuous conduct. Imprisonment in civil contempt cases is ordered where the defendant refuses to do an affirmative act required by an order mandatory in its nature. Gompers v. Bucks Stove & Range Co., supra; Penfield Co. v. S.E.C., 330 U.S. 585, 594, 67 S.Ct. 918, 91 L.Ed. 1117." (Emphasis Added)

Thus, as a preliminary matter, it is clear that the United States Court of Appeals for the Fifth Circuit does not have the power to impose a punishment of fine and imprisonment upon the respondents Barnett and Johnson in this purely civil contempt proceeding.

The other three contentions of respondents will not be discussed separately, because the cases involving these points contain a discussion of two or more of them, and for the sake of convenience, we will deal with the other three contentions on a case-by-case basis.

Cliett v. Hammonds, (5 Cir. 1962) 305 F.2d 565, was a civil contempt case in which the district court entered an order that unless the defendant, Mrs. Cliett, purged herself of contempt within 30 days, she was to be confined in jail for a period of 90 days.

On appeal, this Court affirmed in part and reversed in part the order of the district court, on the grounds that the automatic imposition of the unconditional 90-day jail sentence after failure of defendant to purge herself constituted punitive, not coercive punishment, and was thus in the nature of criminal, not civil contempt.

This Court, speaking through Judge Brown, at 305 F.2d 569, used the following pertinent language which we think is controlling in this case:

> "Thus, with respect to the very element of the jail sentence itself, a specific time (30 days) was allowed in which she could purge herself. Had she done so within that period, the confinement was expressly remitted entirely. Thus far the objective of the judgment was to coerce the recalcitrant party into compliance with the Court's decrees. That is the mark of civil contempt. Coca-Cola Co. v. Feulner, S.D.Tex., 1934, 7 F.Supp. 364. The sanction imposed by the judgment is commonly referred to as remedial. But after the expiration of that 30-day period without compliance, the 90-day jail sentence automatically became unconditional in execution and duration. No provision was made for release from imprisonment once the 90-day confinement commenced. This was unrelated to contemporary compliance with the Court's decree." (Emphasis Added)

The judgments of civil contempt entered in this cause by this Court have the same flaw as the penalty imposed by the district court in Cliett v. Hammonds, supra. In this case, as in Cliett, Respondents were given a specific time to purge themselves of civil contempt. Here, as in Cliett, after the expiration of said specific time, the punishment to be imposed automatically became unconditional in execution and enforcement. In each case there was no provision for the remission of the penalties imposed after the expiration of the specific time within which the parties could purge themselves. In this case, the judgment of civil contempt entered against Governor Barnett does not provide for a remission of the imprisonment or fine upon his compliance with the orders of this Court, and the same is true as to the fine imposed upon Lieutenant Governor Johnson. We submit that if this Honorable Court follows its holding recently made in Cliett v. Hammonds, supra, that it will hold in this case that the punishments for civil contempt imposed upon Governor Barnett and Lieutenant Governor Johnson are for criminal, not civil contempt, and should be set aside or modified so as to make the punishment imposed solely for civil contempt.

Boylan v. Detrio (5th Cir. 1951) 187 F.2d 375, was a civil contempt case where the district court imposed a fine without any showing that the complainants had been injured by defendant's failure to obey the injunctive order. In discussing the judgment that may be meted out for civil contempt, this Court said (187 F.2d 379):

> "In these cases the requisites and conditions of civil contempt and of the remedial orders appropriate thereto were all present.

> These requisites are that a civil contempt exists only where there is a disobedience of court orders to the damage of the other party and the punishment is by imprisonment to coerce the performance of an affirmative act or by the imposition of a fine to compensate the injured party for actual loss or damage suffered because of the disobedience of an order or decree of the court made for his benefit.
>
> "In Parker v. U. S., 1 Circ., 153 F.2d 66, 163 A.L.R. 379, one of the cases mainly relied on by appellees, it is said: 'In civil contempt proceeding a punitive fine cannot be imposed upon respondent, and where a fine is imposed 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 court.'
>
> "In U. S. v. United Main Workers of America, 330 U.S. 258, 67 S.Ct. 677, 680, 91 L.Ed. 884, it was declared: 'Where compensation is intended in civil contempt proceeding, a fine is imposed payable to complainant but fine must be based on evidence of complainant's actual loss (from the contempt), and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.'" (Emphasis Added)

It is settled by the Boylan case and other authorities that the punishment to be imposed for civil contempt may be coercive or remedial; if coercive, the penalty to be imposed is imprisonment until compliance, and if remedial, the punishment to be imposed is a fine payable to the complaining party to compensate him for past violations of the court's order. See Gompers v. Bucks Stove & Range Co. (1911), 221 U.S. 418, and United States v. United Mine Workers of America (1947), 330 U.S. 258. In Gompers, supra, the Court said (221 U.S. 451):

> "But, as we have been shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant."

And in the case of Champion Spark Plug Co. v. Reich (U.S.D.C., W.D. Mo. 1951) 98 F.Supp. 242, the Court said at Page 244:

> "The present proceeding is one for alleged civil contempt. As said by the Supreme Court, in McComb v. Jacksonville Paper Co., 336 U.S. 187, 69 S.Ct. 497, 499, 93 L.Ed. 599: 'Civil * * * contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.' The plaintiff seeks a compensatory order in this case. Such order could not be made in the absence of a showing that the plaintiff has actually sustained damages.

It is clear that in order for the complaining party, in this case James H. Meredith, to be awarded any compensatory damages by way of fine as a punishment for civil contempt, said complaining party must show by competent proof the extent of the injuries or damages sustained by him because of the failure to obey a court order.

Babee-Tenda Corporation v. Scharco Manufacturing Co., (U.S.D.C., S.D., N.Y. 1957) 156 F.Supp. 582, was a case involving purely civil contempt. Plaintiff asked the court for the following fines to be imposed on defendant for its benefit: (1) $5,987.23 for counsel fees and disbursements in preparing for and prosecuting the contempt proceeding; (2) $19,681.20 because of lost sales caused by the defendant's violation of the injunction.

The court allowed the $5,987.23 fine for counsel fees and other expenses of the litigation, but disallowed the $19,681.20 for lost sales because plaintiff did not make competent proof as to its damages or injuries as to this item, the figure being arrived at by guess and speculation. The Court said (156 F.Supp. 588):

Yanish v. Barber (9th Cir. 1956) 232 F.2d 939, was a civil contempt case. In discussing the fine that may be imposed in a civil contempt case, the Ninth Circuit said (232 F.2d 944):

> "A fine imposed 'must not exceed the actual loss to the complainant caused by * * * violation of the decree * * *' Parker v. United States, 1 Cir., 1946, 153 F.2d 66, 71, 163 A.L.R. 379; Boylan v. Detrio, 5 Circ., 1951, 187 F.2d 375, 379; Christensen Engineering Co. v. Westinghouse Air Brake Co., 2 Cir., 1905, 135 F. 774, 782, and 'the imposition of a fine which bore no relation to the injury suffered * * * was unauthorized', Eustace v. Lynch, 9 Cir., 1935, 80 F.2d 652, 656, 'Such fine must of course be based upon evidence of complainant's actual loss * * *', United States v. United Mine Workers of America, 330 U.S. 258, at page 304, 67 S.Ct. 677, at page 701, 91 L.Ed. 884; Christensen Engineering Co. v. Westinghouse Air Brake Co., supra, 135 F. at page 782; Boylan v. Detrio, supra, 187 F.2d at page 379. 'Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision.' Christensen Engineering Co. v. Westinghouse Air Brake Co., supra, 135 F. at page 782; Norstrom v. Wahl, 7 Cir., 1930, 41 F.2d 910, 914."

United States v. Green (2d Cir., 1957) 241 F.2d 631, aff. 356 U.S. 165, 2 L.Ed.2d 672, involved purely criminal contempt, the offense being "jumping bail", and the court sentenced defendants to three years imprisonment for this contempt. In affirming the judgment of the district court, the Second Circuit said (241 F.2d 633):

> "In a civil action ordinarily the proceeding is only remedial and imprisonment is imposed only to coerce compliance; but it may also be punitive, provided its penal character be clearly enough disclosed from the outset."

> "Plaintiff's claim of actual damages must be established by competent evidence and the amount must not be arrived at by mere speculation or conjecture."

It is also the law that if all or any part of a fine assessed as a punishment for contempt is payable to the United States where the United States is not the complainant that the imposition of such a fine is for criminal and not civil contempt.

In Norstrom v. Wahl (7th Cir. 1930) 41 F.2d 910, the defendant was found in contempt and the Court imposed a fine of $1,000.00 upon him, with $500.00 thereof to be paid to the United States and $500.00 to the complaining party. At 41 F.2d 912 the Court said:

> "It is important to classify the proceeding here--whether for civil or criminal contempt, or both--since the order for payment to the United States of part of the fine imposed can be supported only in a proceeding for criminal contempt, and for payment of part to the plaintiff only in one for a civil contempt." (Emphasis Added)

In Nye v. United States (1941), 313 U.S. 33, 85 L.Ed. 1172, the Supreme Court, in discussing whether a contempt order entered by the district court was civil or criminal, said (313 U.S. 43, 85 L.Ed. 1177):

> "The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor." (Emphasis Added)

The Supreme Court there held the punishment imposed to be for criminal contempt.

In McCrone vs. United States (1939) 307 U.S. 61, 83 L.Ed. 1108, the petitioner refused to give testimony to an internal revenue agent pursuant to a federal statute. After his refusal

to testify, the district court ordered petitioner to give testimony, but he remained adamant. Petitioner was then found in contempt for his failure to obey the court's previous order to testify before the agent and was ordered held in jail until he purged himself of contempt by obeying the order to testify.

In deciding that the contempt was civil, not criminal, in nature, the Supreme Court said (307 U.S. 64, 83 L.Ed. 1110):

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." (Emphasis Added)

United States v. Onan (8th Cir., 1951) 190 F.2d 1, cert. den. 342 U.S. 869, 96 L.Ed. 654, dealt only with civil contempt. There, the opposing party moved for an order for the informer-plaintiffs to show cause why they should not be held in contempt of a prior order of the court. The district court found the informer-plaintiffs in contempt, and ordered them to pay a fine of $2,500.00 to be paid to the moving parties to compensate them for damages sustained by the contemptuous acts. The Court of Appeals affirmed the judgment, holding that the punishment sought and meted out was wholly remedial, and pointed out that the proceeding was instituted by counsel for appellees and not by the United States attorney, and that the order adjudging appellants in contempt awarded damages to appellees, which clearly marked the proceeding as civil, not criminal.

For the reasons above stated, Respondents submit that the "Judgment of Civil Contempt" entered by this Court against them in this cause is not valid as a judgment of civil contempt.

In any event, it is well settled that as to the confinement aspect of the punishment imposed for civil contempt, confinement can only be imposed in order to compel the doing of an affirmative act required by the terms of a valid injunction or restraining order. See United States v. Montgomery, 155 S.Supp. 633, 637 and Gompers v. Bucks Stove and Range Co., 221 U.S. 418.

The restraining orders issued by this Court against Governor Barnett and Lieutenant Governor Johnson were prohibitory, and did not require the performance of an affirmative act. The only requirements of affirmative acts imposed upon these persons by this Court are contained in the purge requirements, and of course, the purge requirements cannot and should not go beyond the scope of the original restraining order.

Thus, it follows that Governor Barnett and Lieutenant Governor Johnson cannot be imprisoned for civil contempt in this case, because the conditions precedent for such imprisonment punishment do not exist.

To the extent that this Court's "Order of Civil Contempt" was based upon the petition for citation for civil contempt filed by the United States, we respectfully submit it was clearly erroneous. As pointed out previously, only the opposing party in the main lawsuit can institute proceedings for civil contempt, which are for its benefit.

Much reliance has been placed upon the case of Bush v. Orleans Parish School Board, 191 F.Supp. 871 (1961), but that case only strengthens our position here. In Bush, the United States was brought in as amicus curiae only for the purpose of vindicating the court's authority. Under the universal rule, the only proceedings for contempt that could have been instituted by the United States in Bush would have been proceedings for

criminal, not civil, contempt. The following language used by the court in Bush is pertinent here, and clearly shows that the government there came in as amicus solely for the purpose of vindicating the authority of the court. At 191 F. Supp. 876, the court said:

> "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.'
>
> . . . As we have said, the government entered the case only to vindicate the authority of the court."

It follows that the only contempt proceedings that could be initiated by the United States here are those in criminal contempt.

AN ORDER OF CONTEMPT CANNOT EXTEND OR ADD TO THE TERMS OF AN INJUNCTION ORDER ON WHICH SUCH CONTEMPT IS BASED.

None of the present defendants were enjoined by virtue of the injunctive order of this Court of July 28, 1962.

The only injunctive orders of this Court which are related to the contempt proceedings against Governor Barnett and Lieutenant Governor Johnson are the temporary restraining orders issued September 25, 1962.

For convenience of reference, the order issued on the petition of the United States as amicus curiae temporarily restrains the following conduct:

"1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his attending, or seeking to attend, the University of Mississippi;

"2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Meredith's enrolling or seeking to enroll, or attending the University of Mississippi;

"3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

"4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

"5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty."

Other specific action is prohibited as to proceeding with regard to criminal and injunctive actions in Hinds County, Mississippi.

Governor Barnett and Sheriff Gilfoy are restrained under appellant's restraining order from taking:

"*** any actions or doing any act calculated to or which does interfere with the admission, registration, or attendance of appellant at the University of Mississippi.

"*** any action to enforce or serve the injunction obtained by the Governor on September 20, 1962 in the Chancery Court of Hinds County, Mississippi, First Judicial District, against registration and attendance of appellant at the University of Mississippi.

"***any action to enforce any other injunction obtained in the State Courts of Mississippi against appellant, his agents and attorneys, the University of Mississippi, or any of its officials, or employees, which has the effect of interfering with the registration, enrollment, or continued attendance of appellant at the University of Mississippi."

The Governor and all other officials, agents, or employees of the State of Mississippi are restrained from:

"*** making application for any future injunctions in the state courts of Mississippi, or any other courts, directed against the appellant, his agents and attorneys, or officials and employees of the University of Mississippi, which are designed to impede and obstruct the registration and attendance of appellant at the University of Mississippi."

The Governor alone is restrained from:

"*** ordering the state police of Mississippi or any state officials, or employees, or other persons, to arrest, obstruct, or otherwise interfere with the freedom of movement of appellant."

In the judgment of civil contempt, Governor Barnett was found in contempt of both of the above orders and was ordered arrested and fined $10,000.00 per day unless he showed to the Court within five days:

1. That he was fully complying with the terms of the restraining orders; and

2. That he had notified all law enforcement officers and officers under his jurisdiction or command:

"(a) To cease all resistance to and interference with the orders of the 5th Circuit and the District Court; and

(b) To maintain law and order at and around the University and cooperate with the 5th Circuit and the U. S. in the execution of the 5th Circuit's and District Court's orders, to the end that Meredith was permitted to register and remain as a student under the same conditions applicable to all other students."

Lieutenant Governor Johnson was judged to be in civil contempt in the restraining order issued by the United States and was required to pay a fine of $5,000.00 per day unless he showed within five days that from the instant of the issuance of the order he had been and was in full compliance with the terms of the order, and intended to obey the order in the future, and would during any times he was Governor make the notifications required of Governor Barnett above. (At this juncture it might be appropriate to observe the completely penal nature of the punishment as to Lieutenant Governor Johnson, who was not to be given one second to begin his compliance; his fine started unless five days later he could show that from the instant the order was issued he had already been in compliance. Under any interpretation, the order was not remedial to secure compliance unless compliance existed already, thus it could serve no remedial purpose.)

In the case of Terminal Railroad Assn. of St. Louis, et al v. United States of America, et al, 226 U.S. 17, the Supreme Court was faced with an identical legal situation. They stated:

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree. (Authorities cited)"

This case has been followed in several of the circuits, i.e. Star Bedding Co. v. England Co., 239 F.2d 537 (8th Cir.). See also Cyclopedia of Federal Procedure, 3rd Edition, Vol. 15, Contempt, Section 87.23.

civil contempt is purely remedial and not punitive. Compliance is the only test. As the Court in this case has pointed out, a finding at any time that a party is not in civil contempt in no way precludes the later issuance of a rule to show cause why the same party is not in civil contempt at a subsequent date. By exactly the same reasoning, it is only fair that compliance be judged on the basis of what presently exists, especially as to public officials who are entitled to a strong presumption that they will act properly in the future. We respectfully submit that the Court does not have the authority to require a showing by the chief executive of a sovereign state that he never will exercise the official discretion vested in him by the people in any manner which could conflict with any provision of orders as broad and all-inclusive as the temporary restraining orders issued in this cause.

We call to the Court's particular attention in the order obtained by the United States: Paragraph 2 which would foreclose any civil action as to the attendance of Meredith and Paragraph 4 which forbids interference by any means with this Court's order. These prohibitions would certainly encompass legal appeals as well as threats to the public safety caused by or at the instance of Meredith himself.

In the order obtained by appellant, the same objections are certainly present as to the first section set out above. Also, the injunction clearly goes beyond the Eleventh Amendment in the paragraph enjoining all State officials from acting to seek future relief from any court, and the last paragraph obviously puts an aura of protection around Meredith which is enjoyed by no member of this Court or any other citizen of this Nation, and to which he is clearly not entitled.

However, the above objections pale into insignificance beside the second paragraph of the contempt judgment wherein the Governor and Lieutenant Governor were required to perform acts they have no legal authority to perform under the laws of the State of Mississippi. This was clearly an expansion of the original restraining orders beyond any issue made or which could have been made therein or in the real lawsuit. The Board of Trustees who were properly parties have the responsibility for maintenance of law and order on the University campus; the Governor has authority to act only when this force breaks down or fails or refuses to act. The Lieutenant Governor, of course, is only the President of the State Senate.

Neither of these officials have ordered any officials to resist or interfere with the orders of this Court, and no such official is now so interfering or resisting. Neither purge requirement is less than an unwarranted expansion beyond the plain meaning of the proper terms of the Temporary Restraining Orders of September 25, 1962.

With deference we submit this Court may not and should not adjudge compliance by such terms.

THE FEDERAL COURTS HAVE NO POWER TO MANDATORILY REQUIRE THE GOVERNOR OR LIEUTENANT GOVERNOR OF A STATE TO PERFORM THE CONSTITUTIONAL AND STATUTORY DUTIES OF HIS OFFICE IN ANY PARTICULAR MANNER.

Under the Constitution of Mississippi the Governor is the Supreme Executive Officer of the State. It would not be possible to detail the multitude of duties imposed on him but among them is that of Commander in Chief of the State Militia when not called into the service of the Nation. He directs all executive business of the State; he is the directing head of all executive departments of the State Government and may require information from them as to the status of their departments at any time; he is required to see that the laws of the state are faithfully executed; he may call the legislature into extraordinary session when the circumstances require; he is required to communicate to each regular session of the legislature the condition of the State and recommend the passage of such measures as he may deem expedient and he is answerable to the people for failure to perform his duties only by way of impeachment (Sec. 50, Constitution of Mississippi).

To admit the power of this Court to arrest the Governor and place him in prison or to otherwise to coerce the Governor to perform the will of this Court and not his own in the exercise of his official powers would be to make of the Governor of a sovereign state only a puppet of the Court and install this Court as Governor of the sovereign State of Mississippi.

If this Court has the power to assume mandatory injunctive control of the official powers of the Governor, by that same power it would be able to assume the powers of the legislative branch and prescribe by its mandate what laws the legislature should or should not pass.

With the sovereign powers of the state so pre-empted by this Court, the people of the State would no longer be subject to the control of a "Republican Form of Government", such as guaranteed by Article 4, Section 4, of the Federal Constitution, which republican form of government is and of necessity must be a government by officers duly chosen by the people.

Such encroachment on the sovereign powers of Mississippi, as a State, could well mark the beginning of the end of the dual system of sovereignty, federal and state, under which this nation was established.

With the sovereign power of the states usurped by the Federal Government, there would be no need for United States Senators and Representatives to represent the people of a puppet state and a once sovereign state would be reduced to a helpless dependency of the Federal Government.

In addition to the constitutional questions involved there still remains the consideration of public policy. Under our system of dual sovereignty of the state and the United States, it would be unseemly for the officials of one sovereignty to exercise any power in such a way as to hinder and interfere with the exercise of sovereign powers by the other. Such exercise would destroy the balance of equal sovereignty, prevent cooperation in attainment of common

objectives, and undermine the spirit of unity which has and should pervade the Federal Union.

It is for these reasons, no doubt, that according to the presently established law, the Chief Executive of a State has been uniformly held to be immune to the subpoena of any Court. Such principle of law is clearly stated in 16 C.J.S., p. 382, Sec. 159:

> "It is well settled that public officials are not bound to disclose state secrets or to submit public papers to judicial scrutiny. Partly on this ground, and partly because of the immunity of the executive form judicial control on account of the tripartite separation of powers, it seems now to be undisputed that courts cannot compel the attendance of the chief executive as a witness. The same doctrine has been applied where the governor of a state refused to obey a subpoena directed to him as an individual and requiring him to produce in court an engrossed copy of a statute and deposition, and also where that officer had been subpoenaed to appear before the grand jury and give testimony concerning riots which were under investigation."

Chief Justice Marshall is quoted in Miles vs. Bradford, Governor of Maryland, Md. Rep. 22, p. 170, as saying in Marbury vs. Madison, 1 Crouch 145:

> "That the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.'"

and following this language the Supreme Court of Maryland added:-

> "The Chief Magstrate or the Governor of the State bears the same relation to the State that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges and exemptions."

In Hawkins v. The Governor of Arkansas, 1 Ark. Rep. p. 586, the Arkansas Supreme Court stated the same rule of law as follows:

> "Then the Governor of the State is not amenable to the Judiciary for the manner in which he performs, or for his failure to perform, his legal or constitutional duties. His actions being political, must of course be politically examined in the manner pointed by the constitution."

The same rule of law has been announced by the Courts of thirteen other states, said decisions being styled as follows:

> Hawkins v. Governor, 1 Ark. 570; Bisbee v. Drew, Gov., 17 Fla. 67; Low v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; People v. Yates, 40 Ill. 126; State v. Warmoth, 22 La. Ann. 1; In re Dennett, 32 Maine 508; Southerland v. Governor, 29 Mich. 320; Rice v. Governor, 19 Minn. 103; State v. Governor, 39 Mo. 388; Insuiries by Governor, 58 Mo. 369; State v. Governor, 1 Dutch. 331; Mauran v. Smith, 8 R. I. 192; Turnpike Co. v. Brown, 8 Baxter 490; Houston Railroad Co. v. Randolph, 24 Texas 317; Donnelly v. Roosevelt, Governor (1932) 259 N.Y. S. 356.

In Donnelly vs. Roosevelt, Governor, supra, the Supreme Court of New York considered the exercise of judicial control over then Governor Franklin Delano Roosevelt:

> "(12,13) While as a general practice arbitrary power has no place in our system of government, judicial authority is clear and well established that in the functioning of the departments of government, executive, legislative, and judicial, the Constitution has enumerated the powers and defined the limitations of each. One cannot encroach upon the other and have the balance of powers preserved. The respondent, as Governor of the State is immune from interference by judicial process and free from judicial control

in his performance of executive powers. A sphere of duty has been established for the executive, and within that orbit of power the exercise of his judgment and authority is immune from judicial encroachment.

(14) Courts have no power over his person, and they cannot commit him for a disobedience of judicial process. For errors, if any, of law or of fact in the proceeding now pending before him, he is responsible, not to the courts, but to the people, and to his own conscience."

In Vicksburg & Meridian R. R. Co. vs. Robert Lowry, Governor of Mississippi, the Supreme Court of Mississippi said:

"The consideration that disobedience of the writ may be followed by imprisonment until compliance, is decisive against the propriety of its issuance against the governor in any case. The chief executive power of the State is vested in him. It is his duty to see that the laws are faithfully executed. The power of the State is at his command for this purpose. He may in cases of emergency convene the legislature. He has important functions as part of the law-making power. It would be his duty to employ the power of the State at his command to maintain the rightful authority of the judiciary and enforce its judgments. May that judiciary imprison him for refusal to obey some order it may make to operate on him as the chief executive of the State? Whence comes this ascendancy of the judiciary over the executive? They are co-ordinate departments, created alike by the constitution, declared to be distinct, and to be kept separate as to the exercise of the powers confided to each."

The same rule is stated in 16 C.J.S., p. 831, Sec. 158, as follows:

"It is a rule of general application that a court will not by means of an extraordinary remedy or prerogative writ such as mandamus, injunction, prohibition or certiorari, interfere with or control executive and

administrative officers or boards in the exercise of their discretion."

High's Extraordinary Legal Remedies, 3rd Ed. p. 128, states:

> "While it may be conceded that the doctrine of the cases cited in the preceding section, allowing mandamus to the chief executive officer of a state as to the performance of purely ministerial duties, has much to commend it in the very strong reasoning adduced by the different courts in its support, yet the weight of authority is clearly opposed to this doctrine. And the courts of Arkansas, Georgia, Illinois, Indiana, Mississippi, Louisiana, Missouri, Michigan, Maine, Minnesota, New Jersey, Rhode Island, Florida and Tennessee have by a uniform current of authority established the doctrine that the chief executive of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the legislature may have required at his hands."

We sincerely hope that this Court will not sound the death knell of our constitutional form of government in this nation by asserting control over and thereby taking unto itself by the mandatory injunctive process the performance of the official duties of the Governor of a sovereign State. The foregoing authorities establish, we submit, that this Court has no such power.

THE GRAVE CONSTITUTIONAL PROBLEM PRESENTED HERE CAN ONLY BE SOLVED BY REQUIRING A PROPER LITIGATION OF THE ISSUES RAISED.

We respectfully submit that the true issue which emerges from the numerous actions taken by this Court and by the executive head of the Government of Mississippi is an issue of proper procedure which is essentially based on the constitutional power of each of the actors.

If an action of the executive (in his official capacity and not his personal capacity) creates an intrusion upon an individual right, the only proper procedural and constitutional way to test the intrusion is an original judicial challenge of the executive discretion which produced the conflict. Cf. The Three Judge court proceedings in Strutwear Knitting Co. v. Olsen, 13 F. Supp. 384 and Sterling v. Constantin, 287 U.S. 378 where specific and exclusive jurisdiction to prohibitively enjoin state action under 28 U.S.C.A. 2281 is exercised.

Since discretionary action by the executive arises from the exercise of an equal constitutional authority with the authority of the judicial process, such executive action is not and cannot be a contempt of the judicial process per se. An examination of the executive action under threat of judicial contempt asserts a paramount judicial authority which does not constitutionally exist.

The judicial branch has declared Meredith's right to attend the University. As to the school authorities who were defendants in this cause, the matter is res judicata. Their action was properly challenged as a contempt, however, the

independent discretion exercised by the chief executive officer of the State was not an action of contempt for this Court's decree even though such decision amounted to a breach of the rights Meredith secured as against the college board.

This action of the executive did not raise an ancillary or collateral question in the Meredith case. It raised a completely independent judicial issue calling for a judicial determination as to the correctness of the executive decision of the State.

Meredith or the United States should have instituted a judicial proceeding to determine the validity of that action. They created the constitutional problems here present when they required the Governor to answer injunctive and contempt processes of this Court in this cause when his independent executive decision had never been judicially examined in a proper proceeding.

As sacred as the decisions of this Court may be in binding the rights of the parties to private litigation before them, such decision can, under our constitutional form of government, be no more sacred than the executive decisions entrusted by the people to their Governor. For the courts, the executive and the legislative branches of our government exist only for the people, to do their bidding and protect their rights.

If, in such an independent judicial proceeding, the decision made by the executive is reviewed and found to be incorrect, and if after such determination he should persist, then the correct and constitutional remedy is not by mandatory

injunction or mandamus or other affirmative judicial remedial writ which attempts to set the determination of the judiciary in place of or above the determination of the executive and which could lead to the exact equivalent of his impeachment and removal from office but it is by way of prohibitory injunction for which he cannot be imprisoned or by the remedy of impeachment provided for by the State Constitution.

The Court may also, in the event of the Governor's failure to abide by their proper decision, mandatorily enjoin, not him, but, the agencies or forces through which he may seek to accomplish this act of executive discretion.

The Court can use physical force through the form of its marshals in the Eastern District of Louisiana or the district wherein it sat. 28 U.S.C.A., Sec. 547. (This is the only force legally appropriate to enforce its decrees which are not laws. Cf. 10 U.S.C.A. Sec. 332,333, in the light of the repeal of 42 U.S.C.A. 1993.) These marshals may assemble a posse comitatus or other appropriate aid, and the executive intrusion may be physically removed, but he cannot be arrested and thus indirectly impeached.

The results may be substantially the same, to-wit the execution of the Court's decree, but the difference in procedure required is vital to constitutional principles.

Our thoughts cannot help but to recur to the words of Judge Griffith in the case of State v. McPhail, 180 So. 387, wherein he pointed out:

". . . it is true that no writ of injunction or mandamus or other judicial remedial writ will run against the Governor or any member of the Legislature, in his official capacity; but whenever they, or any of them, or any other officer acting or assuming to act for the government, puts into action any agency which comes into collision with the private personal or private property rights of any person within the jurisdiction of the state, such personal and property rights of the citizen and their infringements are always subject to inquiry and redress by the courts, as against any unauthorized act by any officer of the state, whatever his character and rank may be, and all appropriate judicial process will be directed to and against his agents or agencies--and against the officer himself, other than those expressly above mentioned; . . ."

It is respectfully submitted that while prohibitory injunction as to the Governor was improper in the present proceedings, the order with regard to contempt thereof against him was completely improper in any proceeding, for it not only provided for the Governor's arrest, but also included mandatory purge requirements beyond the constitutional competence of this Honorable Court. Neither the Constitution of the United States nor the Constitution of the State of Mississippi has declared any of the three branches of government to be the supreme or controlling branch and no power has been vested in this Court to remove the executive head of a state. That power has been lodged by the people exclusively in the process of impeachment and nowhere else.

No graver constitutional issue has ever faced this Court and while it is more than understandable that the Court demands compliance with its judicial decree, it is less than constitutional for that compliance to be obtained by the extra-lawful use of armed forces or by the assertion of a supremacy

on the part of this Court which we with the greatest possible deference submit it does not possess.

The Government has cited no case, nor could it cite any case, which contains any precedent whatever for a federal or state court ordering the arrest, and in effect, causing the impeachment of, a governor of a sovereign state.

THE FEDERAL JUDICIARY CANNOT ENJOIN OR MANDAMUS THE FUTURE PERFORMANCE OF A DISCRETIONARY ACT BY A STATE EXECUTIVE OFFICER.

The question of how or whether the Federal Judiciary has a right to discipline executive officers of a state for past acts will be discussed elsewhere in this memorandum but the sole point to be discussed here concerns the court's requirements in connection with purgation that relate to compelling a state executive officer to presently state the course of his future conduct. In the case of Scott v. Donald, 165 U.S. 107, the Supreme Court of the United States considered a class action injunction against peace officers as a class or group and expressly rejected the right or authority to grant such injunctions in these words:

> "The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the state of South Carolina. We have, indeed, a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the constitutional of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction."

In Watson v. Buck, 313 U.S. 287, the Supreme Court held that a statement by an officer that he intends to perform his

duties is not a sufficient justification to warrant a federal court from enjoining all state prosecuting officers in the state of Florida from acting in any way to enforce a statute that is, in fact, unconstitutional.

In Moyer v. Peabody, 212 U.S. 78, the United States Supreme Court approved of the arrest and detention by a governor of an individual who the chief executive of a state thought should be arrested to put down a threatened insurrection. The Court stated:

> "So long as such arrests are made in good faith and in the honest belief they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office on the grounds that he had not reasonable ground for his belief . . . The ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

As Mr. Justice Frankfurter pointed out, this executive decision must not always be to try to find the leader or key man in a mob, but can be directed against the cause of the insurrection. In Feiner v. New York, 340 U.S. 268, he stated:

> "It is not a constitutional principle that in acting to preserve order the police must proceed against the crowd, whatever its size and temper, and not against the speaker."

To truthfully respond to the purge requirements and to the questions asked by this Court, it would be necessary for the executive of this state to abdicate his obediance to his oath of office and say that regardless of what his discretion dictated he should do in some conceivable future situation or inconceivable future situation, he would always choose to leave James Meredith in attendance at the University of Mississippi on the same grounds as other students. A presumption

exists that when discretion is vested in a public official this discretion will be correctly excerised. Wilkes v. Dinsman, 7 Howard 89, Mullan v. U.S., 140 U.S. 240; Suttlesworth v. Birmingham Board of Education, 358 U.S. 101.

It seems that what the United States really seeks is an order of this Court requiring the Governor and the Lieutenant Governor to guarantee police protection to James Meredith. In the first place, this is a legal impossibility for either of these officers in view of the statutes of this state which have been left with the Clerk of this Court. Under these statutes, police authority at the University is lodged in the police officials employed by the Board of Trustees for this purpose and there has never been any showing that these officials have done otherwise than to fully cooperate in policing the campus of the University to the best of their ability or that the Board of Trustees has failed to employ as many such police officials as the requirements of peace and order and its budget would allow. The Governor alone can call out the state militia otherwise the sheriff, constable or other police official is charged with the duty and responsibility of enforcing law and order. The governor cannot call out the militia unless he has a request therefor from a circuit judge or sheriff of a particular district or unless he finds that they are willfully refusing to enforce the law. There is no state police force. The Highway Patrol is that and that alone. This wish of the government is directly contrary to the holding of Consolidated Coal & Coke Co. v. Beale, 282 F. 934. In that case the judge was asked to send not the governor of a state, but the deputy marshals of the court to guard private property against anticipated interference by parties who had already been enjoined by that court

from interferring with the property or in the alternative for a certificate to the president that a state of insurrection existed within the county. The court refused to undertake the custody and guarding of the property through its own court officials even though it had an injunction outstanding for the property to be left alone. The Court stated:

> "The primary question involved is whether the guarding of an industry under such circumstances is the function of a court of equity. Neither specific statutes nor the general statutory equity jurisdiction as interpreted by the familiar usages of equity, confers any such power upon this court. The textbooks recognize no such right. No reported case affirms its existence."

If a court would not send its own marshal to guard property that it had enjoined to be left alone, it certainly could not have ordered an independent executive to do that which it would not send its own ministerial officers to do.

As to the request to the judge to certify to the president that a state of insurrection existed, the court relied on the Supreme Court case of Martin v. Mott, 12 Wheat. 19 and stated that that discretion was in the President and not in the court.

> "Whenever a statute gives a discretionary power to any person to be excerised by him upon his own opinion of certain facts it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.
>
> "Therefore, it is thought that this court should not undertake to make in advance a decision of that which is solely for the determination of the President of the United States; that is to say, the necessity of using troops in a state in any given emergency. Orderly administration of the affairs of the government is never more important than in difficult times. In such orderly administration the function which this court is now asked to exercise belongs exclusively to the executive, and not to the judicial, branch of the government."

As to the requirement of maintaining law and order at and around the University, we would also respectfully refer the Court's attention to the Three Judge District Court case of Strutwear Knitting Co. v. Olsen Governor, 13 F.Supp. 384, in which the Court held that it was:

> ". . . without power to command the executive branch of the state government to perform the duties imposed on it with respect to the maintenance of law and order. The conclusive discretion in that regard is vested in the executive."

THE CIVIL CONTEMPT CITATIONS AGAINST GOVERNOR BARNETT AND LIEUTENANT GOVERNOR JOHNSON ARE MOOT

The plaintiff has obtained all relief prayed for and granted against the original defendants in this proceeding. There is no issue pending between him and them and this Court found upon the citation for contempt against all of the original defendants that they were not then and never had been in contempt. A state of compliance with the orders of this Court now exists as to the original defendants in this action.

As to the new parties defendant-appellees, the only possible purpose of the restraining orders and civil contempt proceedings by the plaintiff and the new plaintiff-appellant was in aid of obtaining that which has now been accomplished, i.e., compliance with the order or judgment of the Court. As compliance with the orders of the Court does in fact exist, civil contempt is moot. This proceeding being one in civil contempt against new parties (even if the Court originally had jurisdiction to maintain it) the contempt proceedings and the restraining orders on which they are based necessarily fall.

Perhaps the leading case is that of Gompers vs. Buck's Stove & Range Company, 221 U.S. 417, 55 L.Ed. 797, 809, in which civil contempt proceedings were brought on the ground that the parties had disobeyed an injunction granted in that proceeding. The Supreme Court of the United States held as

follows:

"Congress, in recognition of the necessity of the case, has also declared (Rev. Stat. 725, U. S. Comp. Stat. 1901, p. 583) that the courts of the United States 'shall have power . . . to punish by fine or imprisonment . . . contempt of their authority,' including 'disobedience . . . by any party . . . to any lawful . . . order . . . of the said courts.' But the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case, because it is both unnecessary and improper to make any decree in this contempt proceeding.

"For, on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of Buck's Stove & Range Co. v. American Federation of Labor. This court therefore declined to further consider the case, which had become moot, and those two appeals were dismissed. 219 U.S. 581, ante, 31 Sup. Ct. Rep. 472. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled, - of

course, without prejudice to the power and right of the court to punish for contempt by proper proceedings. Worden v. Searls, 121 U.S. 27, 30 L. ed. 858, 7 Sup. Ct. Rep. 814. * * *"

Of course, whether or not a proceeding in criminal contempt will lie in this case is not before the Court or involved in this proceeding.

Civil contempt is for the remedial purpose of producing compliance. There is in fact no violation and no threatened violation can be presumed. Watson vs. Buck, 313 U.S. 817. As long as compliance with the orders of the Court does in fact exist civil contempt is moot.

In the case of Harris v. Texas & Pacific Railway Company, 196 F.wd 88, decided by the Court of Appeals of the Seventh Circuit in 1952, a civil contempt proceeding was brought against Mrs. Linkins for her failure to comply with an order of the District Court requiring her to submit certain documents to the Court for examination. In that case, Mrs. Linkins did not at any time personally comply with the injunctive order of the Court. Her individual act became unnecessary due to the acts of others - i.e., the case was tried and determined without Mrs. Linkins' having otherwise purged herself of contempt. The Court held as follows:

" . . . . The district judge held Mrs. Linkins to be in contempt because she 'would not permit the papers to be examined,' and committed her to the

custody of the Attorney General 'until she shall obey said subpoena duces tecum issued out of this court, or is discharged by due process of law.' Mrs. Linkins was released on her own recognition in the sum of $1,000 and an appeal was taken to this court from the order adjudging her to be in contempt of court and committing her to the custody of the Attorney General.

* * * * *

"The order of the district court sought only to coerce Mrs. Linkins to produce records in the custody of the Board so that Harris might have them, or copies thereof, available for possible use in the trial of suit against the railway company. The order was coercive in nature, and not punitive; it did not impose a fine or a definite sentence. It is clear that the contempt involved in non-compliance with the order was civil contempt.

"The courts have consistently ruled that civil contempt proceedings are abated by a termination of the proceedings out of which they arose. United States v. United Mine Workers of America, 330 U.S. 258, 295, 67 S.Ct. 677, 91 L.Ed. 884; Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451, 31 S. Ct. 492, 55 L.Ed. 797; United States v. International Union, D.C.Cir., 190 F.2d 865, 874; Parker v. United States, 1 Cir., 153 F.2d 66. . . ."

In the case of DeParcq vs, United States District Court, 235 F.2d 692, the Court of Appeals of the Eighth Circuit had before it a civil contempt proceeding against an attorney for having participated in a case without having been admitted to practice before the Court and in violation of one of its rules. Upon the finding of contempt, the attorney was cited to show cause why certain penalties concerning his practice should not be inflicted upon him until he purged himself of contempt. Meanwhile, the suit out of which the contempt proceeding arose was settled. On petition filed in the Court of Appeals for a writ of prohibition to the District Court, the Court of Appeals held as follows:

> " . . . . . The contempt proceeding was a part of the action between Dean and the Chicago Great Western Railway Company and the termination of that action automatically renders the contempt proceeding moot. Gompers v. Buck's Stove & Range Co., supra; Leman v. Krentler-Arnold Co., 284 U.S. 448, 52 S.Ct. 238, 76 L.Ed. 389; United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884; People ex rel. Hess v. Finn, 176 Misc. 407, 27 N.Y.S.2d 80. In Gompers v. Buck's Stove & Range Co., supra (221 U.S. 418, 31 S.Ct. 502) it is said, 'The present proceeding necessarily ended with the settlement of the main cause of which it is a part.' . . . ."

No temporary restraining order of this Court requires the dismissal of the criminal proceedings against the original plaintiff. No court of competent jurisdiction has ever declared any of the acts passed by the Legislature which are in question here, to be unconstitutional. The only restraints are restraints from enforcing these acts or acting further in the criminal proceedings and this has neither been done nor threatened.

The claim that Meredith is not being treated as any other student by other students or by persons other than the newly added defendant-appellees does not alter in any wise the point here made. The question for this Court with regard to civil contempt against these officials must be limited to whether or not they are violating the temporary restraining orders of this Court and the only proof made by those having the burden of proof shows that they are not in violation of such orders.

REPLY TO MEMORANDUM OF THE UNITED STATES

Most of the authorities quoted in the memorandum of the United States, Amicus Curiae, have previously been discussed in the original memorandum filed with this court.

The only matters which could be claimed to now be pending before this appellate court are the motions for preliminary injunctions by the Amicus and the Appellant, the Temporary Restraining Orders issued without notice, and the Contempt Judgments against the Governor and Lieutenant Governor of the State of Mississippi.

The thesis of the Government's memorandum is that while the court admittedly would have no jurisdiction to hear or determine these proceedings, as such, it has jurisdiction in this instance because all of these things are ancillary to a portion of the appeal of Meredith v. Fair.

It is our contention, as demonstrated in the foregoing brief. that ancillary jurisdiction cannot survive the termination of appellate jurisdiction in this Honorable Court, for by its very nature it presupposes the existence of basic appellate jurisdiction.

Throughout its memorandum the government adheres to its original position that it is here before this court as a friend of the court seeking to aid the court and not to assert a new and independent governmental right. It also adheres to its

original position that the relief sought is sought against individual persons who have so acted as to be stripped of their representative characted and unfrocked of their sovereign state immunity, i.e., In Re Ayres, 123 U.S. 443, and U.S. v. Alabama, 267 F.2d 808. Yet on argument of this case, the Attorney for the Amicus took the position that they were not an Amicus but a party asserting an independent right of the United States of America against the State of Mississippi.

The defendants here never contended that this court could not, in proper case, exercise the rights granted to it under 28 U.S.C.A., §1651, to issue writs in aid of its jurisdiction, but it continues to be our position that appellate jurisdiction of this cause has been exhausted. Obviously, neither 28 U.S.C.A., §1651, or any inherent jurisdictional power of this court can override the clear mandate of the Constitution of the United States expressed in the 11th Amendment, which prohibits an action against a state by an individual. The fact that this right of action may be asserted for the individual, as counsel for appellant now contends, by the United States as an Amicus, would be the clearest of subterfuges and would remain a patent violation of the 11th Amendment's prohibitions. No case cited by the Amicus has been affected by this direct constitutional prohibition.

Cases Distinguished

The Toledo Scale Company case and the Dollar case have

been previously discussed and distinguished in our original memorandum (see pages 30 & 35).

The cases of United States v. District Court and United States v. Smith involve mandamus. Under this procedure an appellate court can always require a District Court to properly execute its mandates, but this power does not extend the appellate jurisdiction of this Honorable Court to permit new actions against new parties in this court. While mandamus may result in adjusting rights between litigants, it cannot have the effect of causing adjudications as to non-litigants who have never had their "day in court". The cases cited involving appeals from the National Labor Relations Board, the Federal Trade Commission and various regulatory bodies are inapposite here, for in these cases the Court of Appeals was permitted by Act of Congress to exercise the function of the first or original court. As the 7th Circuit stated in the Natural Gas Pipe Line Co. case (Amicus's memorandum, page 22):

> "Thus, the Circuit Court of Appeals is the first forum in which a judicial hearing can be had to determine the legality of the order. In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board and various other administrative bodies. * * * Congress has made a grant of original jurisdiction to the court to reinforce, set aside or modify the commission's order. * * *"

In the Labette County case (Amicus's memorandum, page 23), the "Circuit Court" there referred to was the former court of original jurisdiction, now denominated the District Court.

On page 26, the Amicus indicates the most fundamental inaccuracy in its position in stating that"the merits of the controversy (i.e., Meredith's right to admission to the University of Mississippi) have been foreclosed ever since this Court's decree of June 25, 1962." Even as between the parties to this litigation, which resulted in the issuance of a permanent injunction, this statement is inaccurate. In reality, this is an attempt to preclude the litigation of an entirely separate issue, not involving the parties bound by the decree. This Honorable Court does not make laws. It interprets laws and determines controversy between parties brought to it on appeal. In continuing injunctive proceedings, its decrees are always subject to reexamination, for injunctions look to the future and are not issued as punishment or compensation for past acts.

Certainly the decision in this case does not bind non-parties in such a way as to preclude litigation by them of subsequent events. The position of the Amicus that it "needs" for this court to grant it extraordinary and extrajurisdictional relief (now claimed as an individual party right) can never be a substitute for the constitutional power which this court must constantly determine to exist.

Respectfully submitted,