

Carl W. Balcher, Chief
General Crimes Section

January 21, 1963

MTU:rar

Marshall T. Golding

In re McShane; Suggested Strategy

Our strategy in this case is to attempt to minimize the area in which the State can offer oral proof at a public hearing on the petition, and if possible to shape the case to a stage where the requested relief can be granted without the necessity of any public hearing whatsoever. In our brief on the merits in regard to the paragraph (c) (2) aspect of the petition we have urged the contention that only by evidence sufficient to raise a substantial doubt as to whether a situation existed or reasonably could have been thought to exist requiring McShane to take action, can a defense to the petition be made requiring denial of the writ. Our intention, therefore, is (1) to attempt to restrict the State in any oral hearing to presenting evidence on this point, precluding them from going into the more general area of what actions should have been taken to deal with the situation, and (2) if it can be ascertained before oral hearing that the State has no evidence to present relevant and material to the issue as above limited, to obtain judgment without oral hearings.

There are a number of procedural steps that we can take to achieve this end. One possibility is to request that the court require the State to specify in its answer what it alleges the facts to be and to support its allegations with affidavits. We will then have the right under 23 USC 2243 to go behind the conclusory allegations of the affidavits by propounding written interrogatories to the affiants. The answers to the interrogatories may disclose that the affiants do not in fact have a sufficient factual basis for their conclusions (or the conclusions that the State will attempt to infer from their affidavits) to rebut our prima facie case within the standards set down in Brown v. Cain.

If the answers to the interrogatories leave open the possibility that the State has rebuttal to our prima facie case, we can then probe a little deeper by taking the affiants' depositions, pursuant to the Civil Rules. Since this procedure allows us to cross examine

the affiants in person, and follow up each of their answers with further questions that the answers suggest, we may be able to show that their proposed testimony is so inherently incredible that a formal hearing will not be necessary to arrive at that conclusion.

If we wish to adopt this course, however, we will have to request more in our petition than that the State "certify the true cause of detention by documentary evidence," since "documentary evidence" is a broad term which is not limited to affidavits alone.

There are, moreover, some drawbacks to this procedure. It is highly unusual for a petitioner to attempt in his petition to limit the manner in which a response to his claim can be made, and Section 2246 does not in reality provide authorization for so doing. That Section deals not with how a return shall be made to the petition, but rather with the mode in which the issue shall be determined after the return is made. It provides primarily for evidence orally or by deposition; the additional discretion of the court to receive affidavits would seem to be intended to allow the court to receive evidence of uncontravertible facts without requiring the appearance of the affiant.

If we make a formal attempt to get the court to limit the manner in which the State may respond to our petition and fail, this may weaken, if only psychologically, our attempts later to take advantage of the discovery and related procedures of the Civil Rules. If we succeed, this may also weaken our chances of there-after making use of other discovery procedures of the Rules, as well as of obtaining a pre-trial conference, as the Court (at the State's urging) may adopt the position that his order set out the procedure to be followed, and nothing is to be either added to or subtracted from it.

We are therefore better advised not to attempt to tell the State how it should answer and make its case. Rather, we should let it answer in any way that it will, but attack its answer if it is insufficient, and seek to make full use of the Civil Rules to narrow the issues and perhaps achieve our remedy without the necessity of an oral hearing.

The petition should state all the facts necessary to make our *prima facie* case; i. e., facts which, if uncontroverted, would disclose that a situation existed which reasonably made McShane believe

it was necessary to take action, that the action he took was reasonable in light of the situation, and that his indictment and arrest was thus for doing his official duty. A return which consists of a mere general denial would then be insufficient. If the general denial includes a denial that petitioner was indicted and arrested, it would be frivolous. If it denies everything except the indictment and arrest, it would amount to denying that McShane had orders to act on. We would then prove our case by proving the orders, and since a contention that McShane went beyond his orders is in the nature of an affirmative defense which is not put in issue by a general denial, see Federal Deposit Ins. Corporation v. Siraco, 174 F.2d 350, 352 (C.A. 2, 1949), the State would be precluded from offering any evidence at all concerning whether the situation was such as to require McShane to take action. We would then be entitled to judgment immediately, see Stretton v. Shaheen, 176 Fed. 735 (C.A. 5, 1910), or at the very least the court would require a further and more sufficient return. See United States ex rel. Bielowzicka v. Commissioner of Immigration, 3 F.2d 551, 552 (C.A. 2, 1924); Carlson v. Landon, 186 F.2d 183, 188-189 (C.A. 9, 1950). In short, the State can create an issue only by specifically denying the facts upon which petitioner bases his contention that he reasonably believed it necessary to take action, and specifically alleging that the situation was such that no reasonable man could believe action was necessary. Compare Carlson v. Landon, supra, p. 189.

If the state supports its return by affidavits, we can serve the interrogatories above noted. If it does not, we can serve an interrogatory upon the respondent (the sheriff) pursuant to Civil Rule 33, requiring him to state with precision just what are the State's contentions and how the State will support them, including the names of the witnesses the State intends offering. See cases listed under Note 30 to Rule 33. (The interrogatory can also probably be used even if respondent supports his return with affidavits.) It is possible that the interrogatory will disclose that the State has no evidence to offer that is actually relevant and material, in which case we can move immediately for summary judgment. If, on the other hand, the interrogatory leaves open the possibility that the State may have relevant and material evidence, we can proceed in one of two ways, depending on the case.

exact nature of the answers to the interrogatory. We can ask immediately for a pre-trial conference under Rule 16, or we can take depositions of the witnesses and then ask for the pre-trial conference. The pre-trial conference can be used to limit the issues to only the material question, precluding the State from offering evidence on anything else. If, as a result of the conference, it appears that there are not material issues to be tried, summary judgment may be had. Irving Trust Company v. United States, 221 F.2d 303, 305 (C.A. 2, 1955); Holcomb v. Aetna Life Insurance Company, 255 F.2d 577, 580-581 (C.A. 10, 1958); Berger v. Brannan, 172 F.2d 241 (C.A. 10, 1949); Esman v. Granger, 141 F. Supp. 37, 39 (W.D. Pa., 1956), aff'd on d. et. op., 239 F.2d 384 (C.A. 3, 1957)

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

State of Mississippi v. McShane

Pleadings

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

IN THE MATTER OF THE PETITION OF
JAMES P. McSHANE
FOR A WRIT OF HABEAS CORPUS

NO. _____

ORDER

James P. McShane, petitioner in the above-styled cause, having been produced before this Court forthwith by J. W. Ford, Sheriff of Lafayette County, Mississippi, in pursuance of a writ of Habeas Corpus issued; and

It appearing to the Court that a hearing should be held in this matter on _____, and that notice should be served on the Attorney General of the State of Mississippi, the District Attorney County Attorney of Lafayette County, Mississippi, for the Third District of Mississippi, and J. W. Ford, Sheriff of Lafayette County, Mississippi; and that pending said hearing, the petitioner, James P. McShane, should be released on his own recognizance;

IT IS HEREBY ORDERED

(1) That a hearing be held on the date aforesaid in the Federal Courtroom of the United States Post Office and Courthouse Building in Oxford, Mississippi, at _____ o'clock _____,

(2) That notice be given by the clerk to the state officers as set out above by mailing to each of them a certified copy of the Petition and of this Order;

(3) That the petitioner, James P. McShane, be released on his own recognizance to appear at the aforesaid hearing and then abide the further orders of this Court.

This the _____ day of November, 1962.

DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

IN THE MATTER OF THE PETITION OF
JAMES P. McSHANE
FOR A WRIT OF HABEAS CORPUS

NO. _____

ORDER

Upon reading the verified complaint of JAMES P. McSHANE, and good cause being shown, it is hereby ordered that a Writ of Habeas Corpus issue out of this Court, directing the production of the body of JAMES P. McSHANE before the Court, instantar, at Oxford, Mississippi.

Dated: November _____, 1962.

DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

IN THE MATTER OF THE PETITION OF
JAMES P. MCGHANE
FOR A WRIT OF HABEAS CORPUS

NO. _____

P E T I T I O N

TO THE HONORABLE CLAUDE F. CLAYTON, JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Your petitioner, JAMES P. MCGHANE, of the City of Alexandria, County
of Alexandria, State of Virginia alleges as follows:

First: That he is and was Chief United States Marshal, and on
September 30, 1962 was in addition deputized a Deputy United States Marshal
for the Northern District of Mississippi.

Second: That he is unlawfully imprisoned and detained by J. W. Ford,
Sheriff of Lafayette County, State of Mississippi, under and by virtue of
a warrant of arrest issued in Lafayette County, Mississippi, charging your
petitioner with a violation of Section 2087.5 of the Mississippi Code of
1942 and amendments thereto (Incitement to Riot). That petitioner is advised
that the offense with which he is charged allegedly occurred on September 30,
1962, and that he is charged by an indictment returned by the Special November
Term Grand Jury of the Circuit Court of Lafayette County, Mississippi on
November 16, 1962.

Third: That the said imprisonment and detention is unlawful for the
following reasons:

(a) That on September 30, 1962, your petitioner was engaged in his
official duties at the direction of his superiors in the United States
Department of Justice and in pursuance of an order issued by the United
States District Court for the Southern District of Mississippi, Jackson

Division, and an order issued by the United States Court of Appeals for the Fifth Circuit, to wit, an order dated September 13, 1962, issued by the aforesaid District Court enjoining Charles Dixon Fair, President of the Board of Trustees of the State Institutions of Higher Learning et al, inter alia, not to refuse to admit James H. Meredith immediately to the University of Mississippi as a student; and an order dated July 28, 1962, by the aforesaid Court of Appeals ordering Charles Dixon Fair, President of the Board of Trustees of the State Institutions of Higher Learning, et al, inter alia, to admit James H. Meredith to the University of Mississippi on the same basis as other students "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."

(b) That from approximately 4 o'clock P. M. on September 30, 1962, your petitioner was stationed at the University of Mississippi, Oxford, Mississippi, under the orders of his superiors in the United States Department of Justice to assist in carrying out the aforesaid orders of the United States District Court for the Southern District of Mississippi, Jackson Division and the United States Court of Appeals for the Fifth Circuit. That officials of the Department of Justice were present at that time in the Lyceum building of the University of Mississippi and were then and there conferring with officials of the University of Mississippi on the methods by which the aforesaid Court orders would be carried out. That your petitioner was placed in charge of all United States Deputy Marshals at the University of Mississippi on September 30, 1962, and that a part of his assignment was to direct the protection of the Lyceum Building so that the conference between Department of Justice officials and University officials could be conducted unhindered and in safety.

That from the time of their arrival at the University at about 4 o'clock P. M., United States Deputy Marshals stationed at the Lyceum Building were constantly harassed to an ever increasing degree by a crowd of ever increasing size. That this crowd hurled lighted bottles filled with gasoline and threw rocks and other dangerous objects at the Deputy Marshals and that prior to 8 o'clock P. M. numerous injuries resulted. That this crowd smashed vehicles and manhandled private individuals and did not respond to appeals to desist this conduct and permit your petitioner and the Deputy Marshals under his command to assist in carrying out the orders of the aforesaid District Court and the Circuit Court of Appeals. That it was at this point (at approximately 8 o'clock P. M.) that your petitioner finally directed that tear gas be fired to disperse the attacking crowd. That this order was given with great reluctance and would not have been issued had there been any other reasonable alternative consistent with public safety.

WHEREFORE: JAMES P. McSHANE, your petitioner, prays that a Writ of Habeas Corpus issue out of this Court to the aforesaid J. W. Ford, Sheriff of Lafayette County, Mississippi, commanding him forthwith to have the body of your petitioner before this Court, together with the cause of his detention, and to abide the further order or orders of this Honorable Court.

JAMES P. McSHANE
Petitioner

Date: _____, 196

STATE OF MISSISSIPPI

COUNTY OF LAFAYETTE

JAMES P. McSHANE, being duly sworn, deposes and says that he is the petitioner in the foregoing petition for a writ of Habeas Corpus, is familiar with the facts alleged therein, and knows of his own knowledge that such facts are true.

JAMES P. McSHANE
Petitioner

Sworn to and subscribed before me this the ____ day of _____, 1962.

WILLIAM T. ROBERTSON, CLERK

(SMAL)

BY _____

DEPUTY CLERK

MISSISSIPPI STATUTES

§2087.5 Disorderly conduct--may constitute felony, when.

1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

§2087.5, Mississippi Statutes (Continued)

shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars (\$200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment; and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of such breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SOURCES: Laws, 1960, ch. 250 §§1-3.

CROSS REFERENCES: §§2046.5, 2087.7, this title.

REFERENCE: See generally, 17 Am Jur 187, Disorderly Conduct.

Annotations

Words as disorderly conduct. 48 ALR 87.
Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 ALR 1152.

INDICTMENT

THE STATE OF MISSISSIPPI, }
LAFAYETTE County. } ss.

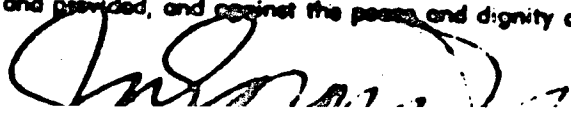
In the Circuit Court of Lafayette County, at the Special November Term,
in the Year of Our Lord Nineteen Hundred and Sixty-two

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men of Lafayette County, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths presents:

That JAMES P. McSHANE

In said County, on the 30th day of September, A. D., 1962,
under circumstances such that a breach of the peace may be occasioned,
did unlawfully and feloniously use physical acts, to-wit: the order-
ing of tear gas to be fired into a crowd assembled at University,
Mississippi, and thereby causing tear gas to be fired in said crowd;
and such conduct did lead to a breach of the peace and did incite a
riot in the place aforesaid; and as a result of said breach of the peace
and riot, another person, to-wit: Walter Ray Gunter, was killed; in
violation of Section 2087.5 of the Mississippi Code of 1942 and
amendments thereto;

contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Mississippi



The State of Mississippi }
LAFAYETTE COUNTY

INSTANTER CAPIAS

TO THE SHERIFF OF LAFAYETTE COUNTY—GREETING:

We Command you to take the body of James P. McShane

if to be found in your County, and him safely keep, so that you may have his body before the Judge of our Circuit Court now in session, for the County aforesaid, at the Court House thereof, in the City of Oxford, Miss., INSTANTER, then and there to answer the State of Mississippi upon a charge exhibited against him by the Grand Jury of said County, for Inciting a Riot

Herein fail not and have you then and there this writ with your endorsement thereon, showing how you have executed the same.

Witness my hand as Clerk with Seal of said Court affixed, this 16th day of Nov 1962

Verna H. McElreath Clerk

By _____ D. C.

STATE OF MISSISSIPPI }
COUNTY OF LAFAYETTE

I, Mrs. Verna H. McElreath, Clerk of the Circuit Court of aforesaid County and State, do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears

recorded in _____ Book, at page _____
records now on file in said Clerks office.

Given under my hand and official seal, this 20

November 1962
Verna H. McElreath
Mrs. Verna H. McElreath, Clerk

D. C.

BACK

STATE OF MISSISSIPPI }
COUNTY OF LAFAYETTE }

I, Mrs. Verna H. McElreath, Clerk of the Circuit Court, of aforesaid County and State, do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears

Book, at page _____
and Clerk's office.

Witness under my hand and official seal, this 20 day of November, 1967
Mrs. Verna H. McElreath
Mrs. Verna H. McElreath, Clerk

By _____ D. B.

INDICTMENT

CIRCUIT COURT

Lafayette County

Special November Term, 19 62

THE STATE OF MISSISSIPPI

JAMES P. MOCHLAND

A TRUE BILL:

Wm. H. Moss

WITNESSES' NAMES

Wm. H. Moss
Verna H. McElreath

Subscribed and sworn to before me this _____ day of _____, 1962
Clerk

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

State of Mississippi v. Moore

Correspondence

*Trial File
Correspondence Subfile*

**United States Department of Justice
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF MISSISSIPPI
OXFORD, MISSISSIPPI**

November 26, 1962

RECEIVED

NOV 28 1962

Department of Justice
Washington 25, D. C.

CRIMINAL DIVISION

Special Attention: Honorable Robert J. Rosthal
Deputy Chief
General Crimes Section

Re: State of Mississippi v. McShane

Dear Mr. Rosthal:

This date Mr. Ray assigned me to assist him in all facets in connection with the above-referenced case.

We had been discussing this matter during the last several days concerning our chance, if any, to quash the indictment now pending. I have made a cursory examination. The cases in connection with this matter seem to be few; however, I have found a 1905 Mississippi case styled Fuller v. State, reported in 37 Southern at page 747. The following language is found and I think it pertains to our case:

"The circuit judge being a conservator of the peace, and, in the discharge of his duty, having the peace and quiet of the entire district much at heart, being well advised as to the conditions existing in every locality within his district, his charge to the grand jury is intended to direct their deliberations into the channel which will result in the greatest good to the people of the entire county where the grand jury is impaneled. But while it is the duty of the circuit judge to so direct the attention of the grand jury, and while he is vested with vast power and fullest discretion in choosing the statutes upon which he will base his charge to the grand jury, and while he stands as a sentinel to watch and guard the interest of the people, and has authority to suggest to the grand jury the course their investigation should take, he is not a prosecutor of any particular individual, no matter how flagrant and notorious his violations of the law by current report or popular rumor may be. It is

M. Y.

98-1-3043

NOV 28 1962

Mr Foley | GEN. CRIME SEC. DIV

Memorandum Robert J. Rosthal

2

November 26, 1962

province of the circuit judge and his duty to inveigh against crime of all kinds and in every quarter, but it is a usurpation of power to denounce individuals, or to specifically direct the attention of the grand jury to any named person."


The case of United States v. Smyth, a 1952 District Court case from the Northern District of California and cited as 104 Federal Supplement at page 230, contains a full discussion of the grand jury. The language found at page 232 under heading (6-11) is certainly not encouraging and footnote No. 36 at the bottom of page 292 is likewise not encouraging. I have not "run out" the Mississippi case as we do not have a Shepard's Citator for our Southern Reporter.

As I indicated, I have only made a cursory examination finding my cases under the general topic Grand Jury, key No. 23.

We would appreciate your advices in connection with this matter. Would you favor us with your advices in connection with our thoughts on this matter at your earliest convenience.

Yours very truly,

H. M. RAY
United States Attorney

By 
J. L. PRICHARD
Assistant United States Attorney

JLP/clg

DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

State of Mississippi v. Moore

Investigation

ROBERT KENNEDY DENOUNCES JURY

It Did Not Constitute All
Evidence in Mississippi

By ANTHONY LEWIS

Special to The New York Times
WASHINGTON, Nov. 16

Attorney General Robert F. Kennedy responded sharply today to charges by a Mississippi grand jury against local officials. The Lafayette County grand jury could not or did not consider all the evidence available at the riot at the University of Mississippi on Sept. 30, Mr. Kennedy said.

He emphasized that "all Federal actions on Sept. 30 were made by prearrangement with Governor [Ross R.] Barnett of Mississippi." He said it was "significant" that the grand jury did not report [this] fact.

Department of Justice officials have said it was Governor Barnett's idea to bring James H. Meredith to the campus on the evening of Sept. 30. They said he had made the suggestion in a telephone conversation with Attorney General Kennedy that morning.

In several telephone talks on Sept. 29, the Justice Department has said, Governor Barnett gave firm assurances that the Negro student and Federal marshals would be admitted to the campus without opposition and that state forces would preserve order.

Instead, in the view of the department, the state police pulled out at the critical moment when the rioting began, and Governor Barnett continued to make provocative speeches to the Mississippi public.

Look to Court Proceedings

The hope of the Department of Justice is that Governor Barnett's role—the one they say he has concealed from his own state—will be delineated during the criminal-contempt proceedings against him that will begin soon.

The United States Court of Appeals for the Fifth Circuit ordered the department yesterday to bring criminal-contempt charges, putting aside a long-pending civil-contempt case. Criminal contempt will require a full trial, with all evidence brought out.

In September the court found that the Governor had committed civil contempt in obstructing its orders to admit Mr. Meredith to the university.

Mr. Kennedy took specific issue with one charge made by the Mississippi grand jury. This was an accusation that Mr. Meredith "was housed in a university dormitory in direct opposition to the university's orders."

The Attorney General said: "Arrangements for Mr. Meredith with the assistance of officials of the university."

Mr. Kennedy noted that he had said shortly after the riot that the marshals had "acted with great bravery and restraint."

"Investigation since then by the F.B.I. and reports of newsmen more than sustain that position," he added.

To his statement Mr. Kennedy attached two brief journalistic accounts of the riot. One was by Sterling Slapney of the magazine U. S. News and World Report, the other by Tom Lankford of The Birmingham News.

Both articles said the marshals had taken no action for a long time despite extreme provocation from the crowd.

Text of Mississippi Grand Jury's

Report on Rioting at University in Oxford

Special to The New York Times
OXFORD, Miss., Nov. 15 — Following is the text of the report of the Circuit Court grand jury of LaFayette County for the special term of November, 1962:

Final Report of Grand Jury

To Hon. Walter M. O'Barr Jr., Circuit Judge:

We, your grand jury, duly elected, empaneled, sworn and charged at and for the Special November, 1962, Term of the Circuit Court of LaFayette County, Miss., beg leave to submit this our final report of the acts and proceedings had and done by and before said body at the term of Circuit Court aforesaid.

We have been in session for five days and during said time have made the various inspections which Your Honor and the law directed us to do. From and during our deliberations we have examined 81 witnesses and have found 16 true bills of indictment and five no true bills of indictment.

We have by committee examined the county home and found that the inmates were being properly fed, clothed and housed. The commode in the county home is in desperate need of repair and the lights in the hall need repairing. We request that these repairs be done as soon as possible.

We have by committee examined the courthouse and the county records and have found everything in good order. The books appear to be well kept and the monies properly accounted for. The janitor is to be commended for the excellent job he is doing in keeping the courthouse clean and in good shape.

We further submit this our report of investigation of incidents occurring at the University of Mississippi on Sept. 30-Oct. 1, 1962:

The grand jury has investigated incidents at the university when Negro James H. Meredith attempted to register as a student on Sept. 30, 1962, in great length and detail.

19 Witnesses Heard

We have heard the testimony of 19 witnesses and have studied reports of state investigators and of investigations made by the Federal Government which have been made available to us. These reports include statements made to the investigators and certain documentary evidence.

At the outset, the grand jury reports that it has been objective in arriving at the following findings and our purpose has been to seek the truth. After much consideration and consultation, it is our opinion that the following findings are based upon credible evidence and represents the true situation:

When the Federal Government attempted to register Meredith, university officials were not given proper notice of the time the registration would take place. When Federal marshals entered the campus along with Federal attorneys and the Mississippi Highway Patrol, Federal authorities were told that registration could not take place on Sunday and that any registration would have to be accomplished the following day. Despite this, Federal marshals were placed around the Lyceum Building for no apparent reason and this action, without a doubt, served no useful purpose.

Meredith was housed in a university dormitory in direct opposition to the university's orders. This action was done in an arbitrary manner and without any consultation on procedure. Federal marshals and attorneys took over the Lyceum Building and its facilities over the objections of the university and with no valid reason. We find that this arbitrary and unnecessary action definitely contributed to the events which followed since the Lyceum Building is symbolic of the university and is its most hallowed building. The encircling of the Lyceum by the marshals when it was definitely known that registration could not occur on Sunday did nothing but enflame the situation. Such action was apparently done for the sole purpose of agitating and provoking violence.

Order to Fire Tear Gas

At 8 o'clock P.M. when the order to fire tear gas was given by Chief Marshal James P. McShane, the situation did not warrant such drastic action. The order was given without notice and at a time when the Mississippi Highway Patrol was successfully moving the crowd back at the request of the Federal Government. Specifically, a request was made by United States Deputy Attorney General Nicholas deB. Katzenbach to Col. T. B. Birdsong to move the crowd back and the Highway Patrol was in the process of carrying out this request when the tear gas was fired.

Until the gas was fired, the actions of the crowd consisted primarily of shouting, name-calling, taunts, the flicking of cigarettes, and the throwing of eggs and small rocks. It is true that a coke was thrown and there was some evidence of a brick being thrown. Despite this, the Highway Patrol had control of the situation until the gas was fired, with no warning, into the backs of the patrolmen and university police. This, we conclude, was done for the purpose of inciting a riot.

We find that this illegal action on the part of Chief Marshal James P. McShane set off the tragic violence which followed.

Much has been said about the Mississippi Highway Patrol and its actions in assisting in keeping order after the riot commenced. In this regard,

we find: (1) at 8 P.M. and prior thereto the patrol was guarding all entrances to the university and keeping out all unauthorized personnel and doing all in its power to maintain law and order at the specific order of Gov. Ross R. Barnett. (2) When the gas was fired without just cause and without warning directly into the backs of the patrolmen, about 35 of whom were in the area of the Lyceum, several were injured, and one, almost fatally. Several students were also injured by the firing of the tear gas. (3)

Such action on the part of the marshals caused great commotion among members of the patrol, and especially so, since they were in the process of assisting the marshals. (4) In order to restore order and efficiency to the Highway Patrol, Colonel Birdsong ordered a general assembly to reorganize. The patrolmen assembled at one of the entrances to the campus and were advised to return to their respective posts and to do all things possible to restore order and to prevent all unauthorized persons from entering the university campus. The patrolmen performed this mission until relieved at the point of bayonets by the U. S. Army in the early morning of Oct. 1. (5) All during the night the patrolmen kept their posts without relief and turned back hundreds of outsiders whose apparent desire was to contribute to the violence. Without the valiant efforts of the Mississippi Highway Patrol, hundreds of lives could have been lost. We commend the Mississippi highway patrolmen for their dedicated action. We find that they discharged their duties in a highly commendable manner in the face of most trying circumstances.

In Re: Death of Walter Ray Gunter

Mr. Walter Ray Gunter, age 23, was shot to death at about 11 P.M. on Sept. 30th. He was standing on some drainage tile, 18 to 20 inches in height, at the southwest corner of a science building then under construction. This point is about 200 yards southwest of the Lyceum Building. Mr. Gunter was there as an observer and was facing the Lyceum Building. His position placed him higher than the people in front of him. At the time the marshals were firing tear gas into the crowd immediately in front of Mr. Gunter. The marshals were facing the position taken by Mr. Gunter and were armed with .38-caliber pistols as well as night sticks and tear gas guns. That just prior to the time that Mr. Gunter was shot, the crowd had rushed the marshals and the marshals were counter-charging into the crowd. Mr. Gunter was hit in the forehead by a copper-coated lead bullet used in Western and Winchester ammunition.

which was fired from a .38-caliber Special Smith & Wesson revolver which caused a wound measuring 0.8 cm. in horizontal diameter and 0.9 cm. in vertical diameter which caused his death. We find that the shot was fired by party unknown and that the bullet was a stray.

In Re: Death of Paul Guihard

We find that Mr. Paul Guihard's body was discovered at about 9 P.M. on Sept. 30th. He was lying face up near Ward Hall, a girls dormitory, at a point about 200 yards northeast of the Lyceum Building and at this point the Lyceum is not visible due to the Fine Arts Building located between the position of the body and the Lyceum. He was shot by a .38 Special Smith & Wesson revolver which fired a lead bullet of a type used in Remington & Peters ammunition. The bullet entered the body in the right lower back with the bullet ranging upward and penetrating the heart. Laboratory examinations indicated that the pattern of gunpowder residue found on Mr. Guihard's brown coat was similar to one that would be produced at a muzzle-to-garment distance of less than one foot.

Mr. Guihard was murdered by a party unknown at the present time.

We have been informed by the U.S. Attorney General's office that ballistic tests of all .38-caliber Smith & Wesson revolvers in the possession of Federal officers at Oxford on Sept. 30 and Oct. 1 is being conducted and to date we are told about 360 such weapons have been tested and the bullets compared with those which killed Mr. Guihard and Mr. Gunter. In addition, the Federal Bureau of Investigation has tested about 83 weapons of all types taken from private individuals during the pertinent period and all tests have proved negative.

Much evidence was presented the grand jury concerning the treatment of students and other people arrested by the Federal marshals on the dates in question. We find that many cruel and inhuman acts of violence were inflicted by the marshals on these people. There is evidence that these prisoners were refused adequate medical treatment and food and confined in extreme discomfort. One specific instance of brutality was when a young man badly wounded and in need of immediate medical treatment was kicked down the stairs in the Lyceum

Building by a marshal whose name is unknown to the grand jury. There were many instances of innocent people being detained for long periods of time without proper food and without charges being placed against them. We feel that such conduct on the part of the Federal marshals was the direct and proximate result of the fact that the marshals were inexperienced and had received very little, if any, proper training. That they consisted of Border Patrol and prison guards and other Federal employes ill equipped to handle such an assignment.

Charge 'Poorest Judgment'

In general, we find that the Federal people exercised the poorest judgment possible in remaining around the Lyceum and keeping Meredith on the campus after they had discovered as early as 4 P.M. that he would not be registered on Sunday.

Reviewing all the evidence and testimony before this grand jury concerning the aforementioned events, we find that the university officials, especially Mr. Hugh Clegg [assistant to the chancellor], Dean L. L. Love and Chief Burnes Tatum [of the campus police] conducted themselves in a most commendable manner and we express our appreciation to these gentlemen for their conduct during this regrettable affair.

We also commend Sheriff Joe Ford and the members of his office for their conduct in the face of the most trying circumstances. The Highway Patrol we have previously commended for their conduct and we would especially like to commend Col. T. B. Birdsong for his conduct in the handling of the situation.

It is our recommendation that the investigations into the deaths of Mr. Walter Ray Gunter and Mr. Paul Guihard be continued.

Guard Is Commended

In spite of the fact that we find that the leadership of the Federal marshals was one of the poorest sort and the hasty action of Marshal James P. McShane actually

precipitated the riot, we feel that the marshals are to be commended for not firing their pistols directly into the crowds and thereby causing many more deaths. Our own National Guard is to be commended for its conduct.

It has also been brought to the attention of the grand jury and evidence has been heard before this body that certain instructors at the university are not helping the current situation by the making of certain statements which might be construed to inflame the situation further and there has been evidence of conduct on the part of some instructors, very few in number, which would tend to inflame the present situation at the university. It is the feeling of the grand jury that all parties involved, including students, instructors and officials, should be very guarded in their conduct so that a more normal situation might exist at our university at the present time. We are advised that the State Investigating Committee is in the process of investigating certain statements made by one of these instructors to his class which would tend to further promote unrest and we certainly recommend that this investigation be continued. It being the desire and wishes of the grand jury that the university be permitted to function as efficiently as possible and afford our children the best education possible.

And now having concluded our labors we beg leave to be discharged as by law required subject to recall by this Honorable Court as the law directs.

This the 16th day of November, A.D. 1962.

(Signed William H. Moss
Foreman

(Signed) R. L. Young Jr.
Clerk

The New York Times.

NEW YORK, SATURDAY, NOVEMBER 17, 1962.

MISSISSIPPI JURY SAYS U.S. MARSHAL TOUCHED OFF RIOT

Indictment Is Said to Charge
McShane, but Names Are
Secret Pending Arrests

ALLEGATION IS DENIED

Soldier Also Reported to Be
Accused in Dispute Over
University Integration

Text of the grand jury report
will be found on Page 10.

By CLAUDE SITTON
Special to The New York Times

OXFORD, Miss., Nov. 16 — Chief United States Marshal James J. P. McShane was reported today to have been indicted on state charges arising from the University of Mississippi segregation riot.

The LaFayette County grand jury, in a public report today to the Circuit Court, accused Mr. McShane of deliberately inciting the riot last Sept. 30 by ordering the use of tear gas.

A mob of students and outsiders besieged the university administration building after James H. Meredith, a Negro, was escorted onto the campus under Federal court orders. Two men were killed and hundreds of persons were injured before Federal troops quelled the outbreak.

Allegations Are Denied

In Washington, the Justice Department immediately issued a denial of the allegations by the grand jury against Mr. McShane and the more than 350 deputy marshals who assisted him here.

Attorney General Robert F. Kennedy said the grand jury "could not or did not consider all the evidence available about the riot."

A second indictment was said to have been returned against Pfc. Dominique Niglia of the 716th Military Police Battalion of Fort Dix, N.J. He was among 500 military policemen and 15 deputy marshals left behind to protect Mr. Meredith after the main body of 12,000 soldiers was withdrawn from the Oxford area.

Private Niglia was returned to Fort Dix after he was accused of firing his rifle into a dormitory several weeks ago during a student demonstration against Mr. Meredith's continued presence on the campus.

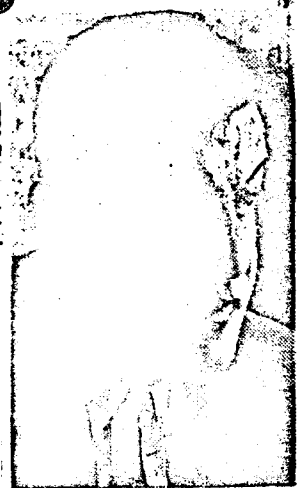
Names Not Disclosed

Under Mississippi law, the names of persons indicted are not made public until they have been arrested or extradition proceedings against them have been started.

The judge to whom the grand jury reported would say only that two indictments had been returned in connection with the dispute at the university. He implied that one indictment involved a prominent person.

Despite the accusation against Mr. McShane in the grand jury report, court officials declined to confirm publicly that he had been indicted. They also refused to say what charges were involved in the two indictments related to the desegregation controversy.

A state segregation statute aimed at Negro demonstrators provides that a person charged with inciting a riot that re-



Associated Press

REPORTED INDICTED:
James J. P. McShane, chief U. S. marshal. He was said to have been indicted at Oxford, Miss. He was accused of deliberately inciting riot last Sept. 30.

MISSISSIPPI JURY ACCUSES MARSHAL

Continued From Page 1, Col. 1
suits in death may be tried for murder. The penalty is execution in the gas chamber or life imprisonment.

However, legal authorities contend that neither Mr. McShane nor Private Niglia could be tried in a Mississippi court because both had been acting in their Federal capacities.

A lawyer pointed out that the Federal Judicial Code provides that cases of this type involving an officer of a Federal court or a member of the armed forces may be removed to the Federal court of the district in which the alleged offense took place.

Further, if the Federal district judge finds that no substantial issue exists in the case, he may dismiss it without referring it to a jury.

The 23 grand jurors, most of whom are middle-age farmers, presented their findings to Judge Walter M. O'Barr after a five-day investigation. In his charge to the panel, the judge had denounced President Kennedy, Attorney General Kennedy and the Federal officials who took part here in enforcing the desegregation orders.

Judge O'Barr was appointed to his present term by Gov. Ross R. Barnett. Mr. Barnett's defiance of desegregation rulings involving the university brought a directive from the United States Court of Appeals for the Fifth Circuit yesterday ordering the Justice Department to file criminal contempt proceedings against him.

Judge O'Barr is a plaintiff in a \$40,000 damage suit against the university. The suit was filed at the National Convention of the NAACP in Los Angeles.

Boys in Courtesy Car

A Kennedy courtesy car carrying the judge and three other Mississippians to a convention party was involved in a collision with another automobile. Judge O'Barr has contended that as a result of injuries suffered in that accident his back, neck and right arm "still trouble me."

The suit is still pending in the Superior Court of California for the County of Los Angeles. Attorneys for Mr. Kennedy attempted to have the President dismissed as a party to the suit, which also includes a rental automobile agency and the owner of the other automobile, but the move was rejected by the court.

Depositions were recently taken from the Mississippians involved in the accident and a deposition is reportedly to be taken soon from Attorney General Kennedy who was the President's campaign manager at the convention.

There had been considerable speculation here that the grand jury would indict the President and his brother. But Judge O'Barr told newsmen that the prominent person named "was not the President or the Attorney General."

He asserted that the offenses involved justified extradition, and said, "I am sure that an attempt will be made to extradite them."

Provocation Is Charged

In its report, the grand jury contended that the deputy marshals had inflamed the situation by encircling the university administration building, called the Lyceum.

"Such action was apparently done for the sole purpose of agitating and provoking violence," the jurors asserted.

They argued that State highway patrolmen had been moving the mob back at Mr. McShane's request when he ordered the te gas fired.

The report cited some of the incidents that took place before the gas was used. It did not mention that Army trucks had been set afire or that soldiers and newsmen had been attacked.

The Highway Patrol had control of the situation until

the gas was fired, with no warning, into the backs of the patrolmen and university police," the jurors said. "This, we conclude, was done for the purpose of inciting a riot."

Deny Police Withdrew

"We find that his illegal action on the part of Chief Marshal James P. McShane set off the tragic violence which followed."

The jurors denied that the highway patrolmen had refused to assist the marshals or had withdrawn from the campus and allowed the mob to take over.

They said that several patrolmen had been injured, one "almost fatally," by the gas and that its use had caused "great commotion among members of the patrol."

Col. T. B. Birdsong, State Commissioner of Public Safety, ordered the patrolmen to report to a spot off the campus to regroup, the grand jurors said.

Colonel Birdsong's action had not been previously reported. However, State Senator George Yarbrough, President Pro Tempore of the Senate, who was Governor Barnett's personal representative on the campus that night, told a newsmen the next day that he had ordered the withdrawal of the patrolmen. The Senator said that the arrival of the marshals had removed the patrol's authority to act.

The grand jury said the patrolmen had returned to the campus and had attempted to restore order. "The patrolmen performed this mission until relieved at the point of bayonet by the U.S. Army in the early morning of Oct. 1," it found.

Highway Patrol Praised

"Without the valiant efforts of the Mississippi Highway Patrol, hundreds of lives could have been lost," it said.

Walter Ray Gunter, a local jukebox repairman killed in the riot, died of a wound in the forehead inflicted by a "stray" bullet, the report said.

The second man killed, Paul Guihard, an Agence France Presse reporter, was found to have been shot in the back by a .38-caliber special Smith & Wesson revolver.

"Mr. Guihard was murdered by a party unknown at the present time," the jurors said.

The grand jury reported that it had received much evidence concerning the treatment of persons arrested by the marshals.

"We find that many cruel and inhuman acts of violence were inflicted by the marshals on these people," they said. "There is evidence that these prisoners were refused adequate medical

treatment and food and confined in extreme discomfort."

The report attributed the alleged brutality to the marshals' lack of training and experience.

However, the marshals were praised by the jurors "for not firing their pistols directly into the crowds and thereby causing many more deaths."

Shots Pierced Fire Hose

The only reported incidents in which marshals used their pistols took place when they shot into a fire hose wielded by members of the mob.

Faculty members, some of whom had spoken out against efforts to place blame on the marshals, received a veiled warning in the report.

"Certain instructors at the university are not helping the current situation by the making of certain statements which might be construed to inflame the situation further," the report said. "And there has been evidence of conduct on the part of some instructors, very few in number, which would tend to inflame the present situation at the university."

The grand jurors said they had been advised that the State Investigating Committee was inquiring into statements by one instructor to a class that "would tend to further promote unrest."

Action Under Consideration

FORT DIX, N. J., Nov. 16—Private Niglia is assigned to Company B of the 716th Military Police Battalion here.

Maj. Mark Bottorff, public information officer, said tonight:

"The matter of possible disciplinary action against Private Niglia in connection with his activities at the University of Mississippi is still under consideration by the Army. But no action has yet been decided upon."

OXFORD!

THE MISSISSIPPI NATIONAL GUARD STANDS FAST!

THEY had the look and the bearing of soldiers.

Out in the boondocks South, East and West of Oxford, Miss—a quiet, neat small Southern town distinguished by the adjacent University of Mississippi campus—CP tents, orderly rows of parked GI vehicles, and further back, the clusters of pup tents fitted to the rolling piney woods and the browning meadows—looked like any of a hundred bivouac areas at maneuvers, or field training.

In fatigues, boots, and steel "pots," officers and men went quietly about their duties. No air of crisis; no tension—"no sweat" as the seasoned GI would put it.

They were Mississippi National Guardsmen, of the 108th Armored Cavalry Regiment, and the 1st and 2d Battle Groups, 155th Infantry. ("Stand Fast" one reads on the blue and white crest on the latter's fatigue jackets—words immortalized by their long-ago Commander, Jefferson Davis, at a crucial point in Mexican War battle).

At first glance, you wouldn't suspect that these were men who days before had gone through an ordeal—physical, mental and moral. You wouldn't notice until you wondered why that lean young Captain was carrying his arm in a vivid blue sling. Then the hard-used look of many of the vehicles might catch your eye—and suddenly it would dawn on you that there wasn't an unbroken windshield in the lot; that here and there was a shattered headlight. On closer inspection, you might find a jeep or two bearing unmistakable bullet holes.

For some of these Guard units were the first, and others among the first, military units involved in the memorable night of 30 Sep-1 Oct, 1962, on the normally-placid campus of "Ole Miss" and on the streets of downtown Oxford.

It was a night that had put the training, the discipline, the sense of duty, the professional competence, and in many instances the courage of citizen-soldiers to a test which they passed with flying colors.

"FEDERALIZATION," AND THE TROOPS ASSEMBLE

Trouble had been brewing over the Federally-supported attempts of a young Negro to enroll in "Ole Miss."

The night of Saturday, 29 Sep, President John F Kennedy signed an Executive Order authorizing Defense Secretary Robert S McNamara to call the entire Mississippi Army and Air National Guard into Federal service, and to take whatever steps Mr McNamara felt necessary to carry out Federal court orders. In a Nationally-televised address the following night, the President explained he felt the Mississippi National Guard was "the most appropriate instrument should any be needed to preserve law and order while United States Marshals carried out the orders of the court and prepared to back them up with whatever other civil or military enforcement might have been required." And he made a point of noting that the 155th Infantry, whose 1st and 2d Battle Groups were among the contingent that was rushing to Oxford not long after his address was concluded, is "one of the 10 oldest Regiments in the Union and one of the most-decorated for sacrifice and bravery in six wars."

Between the President's Federalization order Saturday night, and his address to the Nation roughly 24 hours later, much had been happening. Radio and TV had spread word of the Federalization, but, as with the "Berlin Crisis" mobilization a year ago, it was hours before the troops themselves got "the word" officially. Some hours' delay occurred while precise language of the callup directive to Mississippi's Adjutant General William P Wilson was being worked-up in the Pentagon. That word then was passed down through the normal chain-of-command alert and mobilization plans, by telephone. Initial instructions called simply for assembly at home stations and institution of appropriate home station training.

Meantime, combat and support units of the Active Army were being assembled, some of them initially at Millington Naval Air Station near Mem-

phis, approximately 80 miles North of Oxford. This was the inception of a force that eventually was to mushroom to approximately 20,000 officers and men in the immediate Oxford area or within fast reach at Memphis and Columbus, Miss. Of these, 3,050 were Guardsmen. It became an all-components force, with some Marine helicopter units; even a Navy jeep rigged with insecticide-spray gear appeared later to spray Army and Guard bivouac areas.

By noon Sunday, at least 80% of Mississippi's Guardsmen had checked in at their armories and air bases. Gen Wilson, personally exempt from the callup, soon made it clear that the response had been as expected. "The National Guard," he said, "was mobilized in accordance with a mobilization plan which has been practiced on many occasions. The response on this occasion was completely satisfactory. There have been absolutely no incidents of any individual willfully refusing to report for mobilization. When the call went to the National Guard units, they did not know the purpose for which they were being called, and therefore responded in the same manner as though they were being mobilized for a real—and I say again, a real—National emergency."

Commanders Briefed

Early Sunday morning, Commanders of the 108th Armored Cavalry and the two Battle Groups—Colis James G Martin, at Tupelo; Marion D Odell of the 1st BG, at Laurel, and Robert I. Gray of the 2d, at Amory—were receiving telephoned orders from the Adjutant General's Office and Hq of Mississippi's part of the 31st Infantry Division. Those orders alerted them to assignment to an Oxford task force, and instructed them to report early that afternoon to Brig Gen Charles Billingslea, who only days before had assumed command of the 2d Inf Div and had set up a CP at Memphis.

A 2½-hour conference among Gen Billingslea and the Guard and other commanders and staffs pulled together many loose ends. For one thing, as Gen Billingslea explained later, it clarified

THE NATIONAL GUARDSMAN



Order restored, "doughs" of the Guard's 2d Battle Group, 155th Infantry, settle-in on the University of Mississippi campus. Came time for relief by paratroopers, and Guardsmen who found friendly neighbors on Sorority Row plying them with non-issue delicacies, were in no hurry to leave for a bivouac area in the boondocks!

—(Wide World Photos)

in his mind just what the Guard had in men and equipment actually on hand as against TOE; just how it was dispersed; how quickly it could move and act. It showed, for example, that the 108th was the most immediately-available and suitable organization—its units spread across Northern Mississippi and roughly centered around Oxford; its Troop E in Oxford itself; the 2d/155th relatively close, too, in the Northeastern part of the State; the 1st/155th much further away, toward the Southern end of the State, its most distant Company about 250 miles South of Oxford.

Organizations were assigned to arbitrarily-chosen general objective areas around Oxford—areas which, through personal reconnaissance, the respective Commanders later were able to nail-down specifically: the 108th in a meadow and gently-rolling hills two miles South of the town (an area it shared with 2d Inf Div Hq); the 2d BC in piney woods six miles to the East, and the 1st in rolling wooded country 15 miles West. Commanders were told to prepare to close into their objective areas not later than 1000 Monday, but not to move from home stations without direct orders from Gen Billingslea. A command decision: no tracked vehicles or crew-served weapons.

Back to their Hq, and the long-distance lines buzzed again with "the word" to subordinate Commanders. At the dozens of armories, packing and loading got underway; in some instances, drawing of vehicles from central storage compounds, and preparation of movement orders.

But as Sunday evening wore on, things started popping. At Oxford, several hundred US Marshals were on

duty on the campus as crowds converged there. Back at their armories, Guardsmen began picking up radio news flashes, and rumors. Rioting had begun. At his home not far from the "Ole Miss" campus, Maj Eugene Gratz, 108th Communications officer, former newspaperman and now a Federal Probation Officer, could hear tear gas shells popping—something was about to "break" for the Guard units, still on "standby." It did—and in a matter which may be unprecedented in US history.

Guard Unit Sent In by Presidential Authority

A growing, increasingly angry crowd had made the white-pillared Lyceum—administrative center of the University—its objective, and Marshals the targets of threats and a constant shower of missiles, even of rifle firing. There, too, Nicholas Katzenbach, Deputy Attorney General, who'd been sent from Washington to take charge for the Justice Dept, was established, finding himself not only handling legal aspects of the matter but administering and commanding his scratch force of legal aides and Marshals. In helmet liners and with tear gas guns, the latter found themselves embattled. As Mr Katzenbach related later, he'd been in innumerable telephone conversations with President Kennedy and Attorney General Robert Kennedy, and they were better-posted on the chaotic situation than military authorities at their Memphis Hq.

Down at the modern brick and steel Troop E Armory, about a mile straight down University Avenue from the Lyceum, Capt Murry Falkner (insurance salesman and nephew of the late, famed

author William Faulkner had his Troop assembled. At about 2:00, he got a phone call. Mr Katzenbach on the line: by direct authority of the President, Mr Katzenbach instructed, Capt Falkner was to move his unit to the Lyceum and use whatever means were necessary to relieve the pressure of the mob; how soon could he get there? "In about 10 minutes," was the Troop Commander's reply. One quick phone call to his Squadron Commander, Lt Col James R Williams, for an unhesitating and emphatic confirmation of the order from an unusual source, and Troop E—less Cooks—was rolling in four jeeps, two "sixlys" and a weapons carrier. The trucks had their tops lashed-down—a circumstance which soon was found to be fortunate for the measure of protection it gave the troopers inside, from missiles the little convoy was to receive.

Gas masks were donned. The mob's fury became evident as the Troop approached "the Circle," a grassy, tree-dotted expanse ringed with University buildings flanking the Lyceum at its Western end. It was chaotic. Campus lights had been shattered; apart from the vehicles' headlights, only light shed on the tumultuous scene came from the Lyceum, or from burning cars. A veritable shower of bricks, chunks of concrete, pieces of pipe, rocks—anything throwable—rained on the vehicles and the troops. Capt Falkner was an early casualty with a broken arm from one of nine bullets which—after relative calm had descended—he found in his jeep. (And six bullet holes in one jeep windshield.) But broken arm or no broken arm, the Troop Commander led his convoy around the Circle and past the Lyceum. His numbers inadequate to execute Mr Katzenbach's request to surround the Lyceum, Capt Falkner posted his men in extension of the line of Marshals. At Mr Katzenbach's request, he advanced to the edge of the crowd with a battery-powered "bull horn" and attempted an appeal to reason. Volume was lacking to carry his voice over the turmoil; a second attempt with another power megaphone had no more success: "it just made the mob mad," Capt Falkner related later.

Meantime, missiles had taken toll of the Troopers, as it had of the Marshals—six or seven of the Troop E men had had to be carried into the Lyceum (four of them battered severely enough that in later days they were put on custodial duty at the Armory, taken over by that time by Lt Gen Hamilton Howze's XVIII Airborne Corps Hq). One of his officers, Lt Virgil T Metts, Jr, was temporarily out of action, hit hard in the chest with a missile; another, Lt Robert E Crowe, had been sent to the local airport with three trucks and drivers to meet the arriving

OXFORD: THE MISSISSIPPI NATIONAL GUARD STANDS FAST!

Gen Billingslea. At about 0330, when a period of purely relative lull had set in, Capt Falkner was persuaded to leave and get his broken arm set, and for several hours, Mississippi OCS Cadet Pau M Moore found himself in command.

(The Federalization, and particularly the troop movement to Oxford, threw a wrench into Mississippi National Guard OCS training schedules; in bivouac areas special blue helmet liners signaled the presence of Cadets who were getting the most practical kind of training. Staff and faculty members were caught-up in the Federalization, too, of course, and a doubling-up of weekend sessions after things simmered down was in prospect).

TROOPERS AND DOUGHBOYS GET THE "GO" ORDER

While this lone Troop was moving into action, Gen Billingslea, from Memphis, was giving the "go" command to the 108th and the two Battle Group Commanders, and they immediately were on the phone to their Squadron and Company Commanders.

Verbal, fragmentary orders served to get all Troops of the 108th—less the three Tank Companies, held at home station—on the road. Closest to Oxford each of the 2d Squadron's Troops moved independently and direct to the troubled college town.

(Among Infantry elements coming from other parts of the State, there was

opportunity to issue written Operations Orders when it assembled at rendezvous points. On USPA & FO authority, doubling-up was done at commercial gas stations—owners trusted out of bed in some instances to provide the service on a credit card basis.)

Arriving from Tupelo at Troop E's Armory with a combat group at about 1150, Col Martin learned for the first time of the Oxford unit's commitment to action and found that his 2d Squadron Howitzer Battery and Troop G had reached the Armory a few minutes ahead of him. Phoning Mr Katzman at the Lyceum, Col Martin received instructions to commit immediately any forces he had, and using whatever force necessary to relieve pressure on the bullet-pocked Lyceum.

With ammunition in their pockets and orders to load only on an officer's command, and scabbarded bayonets on their rifles, Maj Warwick B Beane, Regimental S3, led the approximately 97 officers and men up the Avenue to the same kind of greeting as Troop E had received, as soon as they hit "the Circle," the windshield of Maj Beane's jeep was shattered. Troop E's Capt Franklin was knocked out of action with a bleeding mouth and a smashed finger. Snaking their way around or over debris and obstacles, they got to the Lyceum and stationed Troopers on the North side and rear of the Lyceum. An attempt was made to turn trucks around and drive to an athletic field to light it for helicopter landing, one truck tarp was set aflame, another truck's radiator was pierced by a bullet. Some where about this time, too, precise times became a bit hazy during this hectic night. Gen Billingslea and a Regular Army MP Company arrived from Memphis by air.

Squadrons Committed

Meantime, Squadron Commanders and staff officers were arriving at the Armory. Lacking maps of the "Ole Miss" campus, a rough sketch took shape on a blackboard, from bits and pieces of recollection by Guardsmen who had some familiarity with the layout. That formed the basis for an operational plan.

The various other units had been rolling in from around midnight—and (0200), prepared for commitment—and tear gas, which hadn't been available when the earlier units were committed piecemeal, was issued. Lt Col Guy J Gravelle, Jr, and his 1st Sq were to move straight West up University Avenue to the campus, Maj William E. Callcott and his 3d Sq to circle around to the North side of the campus and come in on "the Circle" from that

National Guard

Elliot

of the 108th Armored
and the 1st and 2d Battle
of the 15th Infantry. The
one of the oldest regiments
Army National Guard; its
"STAND FAST, MISSIS-
is the battle cry of Colonel
David at the Battle of
Vista, in the Mexican War
1847.

Mississippi National Guard,"
said I... spokesman
replied mag-
President's call,
and men are doing
Army spokes-
emotion, said
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Copyright



For their troops who heeded Jefferson Davis' Mexican War injunction to Mississippi forebears to "Stand Fast," Commanders of Oxford Task Force outfits receive Army Secretary Cyrus Vance's citation, through Lt Gen Hamilton H Howze, XVIII Airborne Corps CG. Recipients are (L to R) Col David B Wilson, 134th Surgical Hospital; Col James G Martin, 108th Armored Cavalry Regt; Col Robert L Gray, 2d Battle Group, 155th Infantry, and Col Marion D Odell, 1st BG, 155th.

—United Press International

direction. Medics were left at the Armory.

Hours had passed but the crowd hadn't lost its ugly mood; the 2d Sq ran the gauntlet of abuse by crowds along streets; one missile caught the Squadron Commander in the mid-section, some of the force absorbed at the cost of two packs of cigarets he'd tucked into his fatigues. A crude road block of timber and concrete barred the roadway; Col Graylee's driver, PFC Jerry Mears, crashed his jeep through it, debris flying in all directions, the mob's shower of missiles continuing unabated, vehicular radio power packs getting knocked-out, one after another, and "Molotov cocktails" (gasoline filled

flaming pop bottles; flying—one firing a "six-by" top.

Turning onto the grass to bypass the flaming wreckage of three cars, the convoy halted in front of the Lyceum about 15 Marshals running forward to cover detouring of the men with a tear gas barrage. "Glad to see you," Col Graylee quoted Gen Billingslea as exclaiming when the Squadron Commander reported to him. "I think we can get something done now."

The situation on the campus still was like a scene from Dante's "Inferno" pitch dark, several thousand men and youths milling among the trees on "the Circle" and "the Grove" just beyond, and among the University streets. Tear

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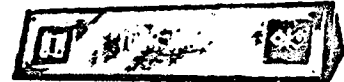
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gas fumes added into the Lyceum. Regular Army MPs, Cavalrymen, Marshals, vehicles, were crisscrossed into a relatively small area in front of and around the Lyceum.

The 3d Sq had moved in, dismounted from the Northern edge of the campus. With gas and the bayonets fixed it moved to "the Circle" in a column of six and came out in front of a line of MPs and Marshals taking its share of hubbub on the way, but making effective use of tear gas, under cover of their U.I. marks. One officer's steel helmet took on a prominent crease, apparently indented by a piece of pipe; one man was blown by an other chunk of heated pipe. Within minutes, the grinding of trucks heralded the 1st Sq's arrival, and the Regiment was complete.

Gen. Billingslea's A-1 had a force capable of sweeping back the mob. The 3d Sq drew the mission of pressing East down University Avenue and pushing the crowd across a bridge spanning railroad tracks; the 1st Sq to clear the Northern side of the campus.

THE MOP-UP

More distant from Oxford the two Battle Groups were enroute meeting first units of the 2d BG, reaching Oxford at about 0220, the entire organiza-

OXFORD: THE MISSISSIPPI NATIONAL GUARD STANDS FAST!

tion closing by 0430. Reporting by phone from Troop E's Armory to Gen Billingslea at the Lyceum, Col Gray was ordered to move onto the campus and secure the power station. In column of files, it moved up University Avenue, lead elements arriving when, as Battle Group officers noted later, the rioting appeared to have subsided—at least, this organization was not subjected to the barrage which had greeted its predecessors on the scene.

But officers and men of the 3d Squadron of the 108th saw a different picture: as they moved East against the rioters, the latter scattered with nothing to stop them—until they saw Col Gray's doughboys closing-in from the other direction. Caught between the two bodies of troops—the Troopers especially fired-up after a hard time on the campus and after seeing Col

"strange" vehicles were clattering the grassy meadow in which it sits, perhaps 50 yards back from a State highway. It had become Col Martin's Regimental CP; later, it was to be marked on maps with the three-star symbol of a Corps CP, its officers and supply rooms bearing the signs of staff sections, two-by-fours and plywood shaping sides of the Drill Floor into other cubicles, "hot lines" direct to the Pentagon and elsewhere being run into the building, cots clattering the rear end of the Drill Floor; a small city of CP tents noisier just outside. And in the midst of things it had served, too, as guard-house for scores of captured rioters.

But that was to come later. About the time the 155th 2d BG was marching toward the campus, Col Martin set out to report in person to Gen Billingslea for further instructions. As he

For the Guard, that was the last specific action.

It had come out of the whole episode with upwards of 40 officers and men injured badly enough to require doctors' attention.

Guard and Active Army units took over assigned sectors of the campus while Active Army troops stayed under downtown. Check points rigidly controlled access to the campus. The night's concentration of tear gas fences still lingered when the time-honored order was issued, "Police the men," and lead after lead of bricks, rocks, chunks of concrete, pop-bottles, lumber, expended tear gas shells, shot-out light globes and what not were tossed away. Pop tents blossomed momentarily as the troops settled-in temporarily.

The 1st BG, 155th Inf, had completed its long haul up from Southern, Mississippi and closed into its area, 17 miles West of Oxford, without incident—and beaten their estimated closing time by between two and three hours.

Ramming into Oxford with some of his staff and all Company Commanders to learn the situation and the lay of the land, Col Odell and his party hadn't gone far before someone in a speeding car, approaching from the other direction, flung a whiskey bottle which shattered the lead jeep's windshield. It was a quick and dramatic introduction to the kind of experience their comrades had gone through, and which they themselves might expect if committed—which they weren't. But wild rumors still filled the air: a crowd of 1,000 angry men was assembling here, another mob was assembling there, to move on Oxford, the stories went. For a time, the 1st operated check points at highway intersections well to the West of Oxford, on the lookout for weapons and possible trouble-makers, but the necessity of that precaution vanished within a relatively short time. The 1st soon swung into a training program, as did both its brother organization, the 2d, and the 108th, when relieved by RA units.

Troop reaction to the whole experience was characteristic. A remark that field training, after this, "will seem like Boy Scout camp," seemed to sum-up the consensus.

And one of the lessons quickly learned by men who normally despise wearing steel helmets, in a situation like this, "the pot is a soldier's best friend!"

Formal mobilization procedures had largely gone by the boards in this "crash" situation. For the Oxford task force. Physicals, ID card processing, and the mountains of paperwork such as harassed units in the "Berlin Crisis"

KEY FACTS MISSISSIPPI GUARDSMEN

1. The 1st BG, 155th Inf, of the 1st Mississippi National Guard and its subordinate units are the only National Guard units in the State which are fully equipped for possible emergency at any time.

2. The 1st BG, 155th Inf, is based at Natchez, Miss., on the Mississippi River, near Natchez, and is equipped with a cargo of 1,100 tons of supplies.

3. The 1st BG, 155th Inf, is the only National Guard unit in the State which is capable of moving tens of thousands of people from the State in the event of a major disaster.

4. The 1st BG, 155th Inf, is the only National Guard unit in the State which is fully equipped for possible emergency at any time.

5. The 1st BG, 155th Inf, is the only National Guard unit in the State which is fully equipped for possible emergency at any time.

Martin's jeep windshield shattered as he drove up—31 members of the mob were corralled by the Cavalrymen. By this time, darkness was disappearing and fugitives could be distinguished, hiding behind trees and in shrubbery.

In the 1st Squadron's Sector, Howitzer Battery's men charged and dispersed a group of 40 to 50 rioters and snared several prisoners.

TROOPS FIRE, ROUND-UP RIOTERS

By dawn, Regular Army Infantry and additional Military Police troops were beginning to arrive at Oxford; by this time, too, rioting had shifted largely from the campus to "the Square" downtown.

The normally-quiet Troop E Armory had become the focal point for the greatest concentration of military visitors it had seen since its dedication; while its usual occupants were having their hands full at the Lyceum, Regimental, Squadron, Battle Group and other Commanders and staff officers and other visitors had been in-and-out;

crossed a critical street intersection between Armory and University, a mob stoned his jeep. Given command by Gen Billingslea of a "Campus task force" comprising his own Regt, the 2d BG, 155th, and two Regular Army MP Battalions, he ran the same missile gantlet on the way back to the Armory. For several hours, every vehicle that traversed the intersection was bombarded. Though it lay in another outfit's area of responsibility, Col Martin had had enough: he sent two 40 man task forces to eliminate the sore spot, employing a double envelopment. And his orders were specific: they were to capture the rowdies, even if they had to shoot. The mob advanced as one task force dismounted; the troops fired over their heads, and the rioters scattered—only to see the second body of Guardsmen bearing-down on them, and the latter, too, fired high. As one of the Guardsmen put it later: "They came to a screeching halt. You can see the black marks where their heels dug into the pavement." Forty-two prisoners were marched-off.

mobilization could come later. "AR 135-300's for the birds," was one of the politest, more printable comments about the mobilization Reg. In effect, the order was: "Git up and git!" and the troops got with what they had—in time to make their weight felt. But the uncommitted units, which remained at home, did get involved in the standard procedures. The Miss ANC, for example, ran 450 men through physicals in two days.

MEDICS LEND A HAND

Less spectacular but no less dramatic was the employment of still a fourth element: a composite unit of seven doctors and 16 enlisted men from Col David Wilson's 134th Surgical Hospital and the 106th Medical Battalion's Clearing Company, at Jackson. In response to a Third Army request, Col Wilson—director of the University of Mississippi Hospital at Jackson—and his group were flown on Monday morning to Oxford and reported to the University infirmary, from which the night's casualty load had been lifted by that time. The Guard medics (the 134th had only recently come off "Berlin Crisis" active duty, by the way) augmented the efforts of the 2d Infantry Division's Clearing Company, set up in the "Ole Miss" stadium, later establishing a holding station at the local airport—a focal point of much of the military activity—until the Army's 15th Field Hospital arrived, less its professional complement, the Guard physicians filling the gap until relieved after about 48 hours of Oxford service.

By the evening of Tuesday, 2 Oct, all Guard units had been released to their bivouac areas, operational duties on the campus and in the town being taken over by Active Army units—and those, too, gradually phasing-out as a week passed.

By that time, according to some of the 108th's officers, it wasn't everyone who was real-anxious to pull off the campus: some of the Troopers had drawn Sorority Row ("Miss America" Row it's called unofficially now, in recognition of the number of beauty contest winners it has supplied), and by the time withdrawal orders came, they had established an *entente cordiale* with many of their lovely neighbors. "They weren't in any hurry to leave," declared one officer.

No time was lost in swinging into a realistic and stimulating training program. With Marine cooperation, Guardsmen were organized into eight-man squads (geared to the capacity of the Marines' helicopters) and given an intensive course in quick tactical loading and disembarking from choppers for combat. They were given a load of riot control training against a back-

ground of close, personal acquaintance by many of them. Every organization formed a composite "Ready Company" and blew the whistle on it for test response, in daylight and in dark.

Somewhere, reports had spread that the troops hadn't been fed. "Hell, it wasn't because we didn't have the rations—we just didn't have the time to eat," explained one who'd been in the thick of things, with the nodded concurrence of others who'd been there, too. At any rate, it wasn't long before packages began arriving from home with all kinds of goodies. By the following weekend, scores of Moms, Pops, kid sisters and brothers had found their way into the depths of the boondocks, bearing fried chicken, cakes, pies.

Still with his unit, broken arm and all (his CO said he'd let himself be kept away from the outfit no more than 12 hours in the entire week), Capt Falkner told how the Oxford townsfolk had looked after Troop E's creature comforts: businessmen and others had sent out gallons of ice cream, soft drinks, and all kinds of delicacies.

Every bivouac area had its well-patronized PX. There were movies. TV sets started appearing.

Commanders declared morale was high, and all were quietly proud of their men's soldierly attitude and discipline. It had been a trying situation to say the least, and one officer declared with utter frankness: "We were scared to death, but when they started throwing those bricks, we were ready to go!" Obscenities that shocked even seasoned veterans who're accustomed to colorful GI language aroused almost as much resentment among the Guardsmen as did missiles hurled by the rioters. The fact that great numbers of the rioters were "visitors" from well beyond their own State's borders, didn't set well, either.

There was a sprinkling of "Ole Miss" students among the officers and men who were called upon to march onto the campus in a role they never had dreamed of. Capt Ned Williams, 108th Motor Officer and an Asst Professor of the University, was off at Columbia University in New York on a sabbatical and working on a doctorate when he was summoned back. Several members of the Mississippi Legislature were on duty with their Guard units at Oxford. Two pro football players, Bobbie Franklin and Ed Khayat, hustled back from Cleveland, O. and Washington, DC, to be with the 108th.

GUARDSMEN PRAISED FOR SPEEDY REACTION, DISCIPLINE

Nowhere was any word except praise heard for relationships among troops of all components. Guard Commanders described Gen Billingslea as "tops" and



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lauded Army cooperation. The first night in bivouac had been downright chilly for the Guardsmen—two blankets per man were inadequate. An airlift brought in GI mountain sleeping bags with air mattresses before another nightfall. Windshields and headlights had to be replaced wholesale—a quick authority for local purchase was granted. The 108th was short a particular type of battery, lower-echelon Supply people weren't sure they could issue to Guard units. "topside" got wind of it—the batteries were forthcoming, but quick!

The Guard's performance drew praise. On the hot spot for hours if anyone was, and in a position to know, Mr Katzenbach focussed praise on Oxford's "Choogy" Falkner whose Guard unit was the first Army element to reinforce the hard-pressed Marshal force. "He deserves great credit for bringing that group through," Mr Katzenbach said. "That is in the highest tradition of the service." He'd hoped that the mere appearance of an Army

—Continued on page 48

OXFORD!

-Continued from page 9

element would put a damper on the mob. Events showed that was optimistic in view of the mob's size and its temper. As for Capt Falkner himself, "he's extremely good with his men; I think he's a fine officer," Mr Katzenbach declared.

Oxford's Mayor Richard W Elliott said he'd "heard some mighty good comments about" the Guardsmen and reflected that his home town unit, first on the scene, "relieved the situation considerably," and the Guardsmen "are to be commended for this service."

Gen Billingslea appraised the Mississippi Guardsmen as having done "a first-class job." It was a rapidly-moving situation; one that called for speedy response and speedy action—and, to the senior troop commander on the scene, the Guard's response was impressive. "First, there was the speed with which they reacted to the movement order," he said—and he noted especially the Southernmost, 1st BG's, arrival hours before they'd been expected. "Second, in operation, reaction was rapid," Gen Billingslea went on. "During the entire period of time, the discipline of the units was best exemplified by the men's acceptance of what had to be done."

Much higher up the line there was an awareness of the Guard's fine performance, too. "Your quick response to the President's call to active duty and your efficient performance since that time merit the highest praise for the Mississippi National Guard," said Army Secretary Cyrus R Vance in a message which Gen Howze delivered in person to Cols Martin, Gray, Odell and Wilson in a simple ceremony at Troop E's Armory, his temporary CP, after the situation had calmed. "Please extend to all members of your command my sincere appreciation for their splendid military performance on a difficult mission. I know that your unit will continue to meet the highest standards of military performance until your presence on active duty is no longer necessary."

As this article was being written, some of the Active Army units had returned to home stations from the Oxford area; all Mississippi Army and Air Guardsmen except those at Oxford had been released from active duty, and of the latter, 30% were being let go; the end of an unpleasant duty, well-performed in a soldierly manner, appeared in sight.

The veterans of Oxford were standing tall, as well they might. Regardless of unit, they had heeded the injunction inscribed on the crest of Jefferson Davis' old Regiment: "Stand Fast!" ♦

CONFERENCE IN COLORADO

-Continued from page 17

Heywood further reported that Alabama, California, Florida and Puerto Rico already had expressed interest in playing host to the NGA in 1965 or later.

They readily accepted, too, a succinctly-phrased recommendation presented by North Dakota's Edwards for his Constitution and By-Laws Committee, that the Assn give its President flexibility in determining numbers of members on various Standing and Special committees.

The three-year terms of the Assn's officers expire next year; under the rotational schedule for Executive Council representation, the two slots for each of two Army and two Air Force Areas were open this time. On recommendation of caucuses involving States in those areas, the Delegates reelected New Jersey's Cantwell and Vermont's Maj Gen Francis W Billado from the First Army; reelected new Mexico's Maj Gen John P Jolly and chose Texas' Maj Gen Thomas S Bishop from Fourth Army; elected Minnesota's Brig Gen John R Dolny and Kansas' Edward R Fry from Tenth Air Force, and chose two new members—Alabama's Brig Gen George R Doster and Georgia's Gov Vandiver from the Fourteenth AF.

Then, in the presence of two Governors, innumerable civilian and military "brass," and approximately 1,800 Guardsmen and guests and their ladies, Gen Harrison pinned the Assn's Distinguished Service Medal on the breasts

of three officers who have contributed long and faithful service to the Guard and its Association: New Mexico's retired Lt Gen Charles C Sage, the California Air National Guard's Maj Gen Clarence A Shoop, and Georgia's Chief Executive, A. Lee W. W. J. Secretary of the British "Death March" of 1941, postwar Adjutant General of his State, Gen Sage had served on the "Army Section 5" Committee and on the NGAUS' Executive Council and many of its committees. A Guardsman since 1933, veteran of ETO combat, Gen Shoop has been Chairman of the "Air Section 5" Committee, a member of the Assn's Executive Council, Chairman of its Air Affairs Committee, and member of its Public Relations Committee.

Gov Vandiver, a postwar Georgia Air National Guardsman who retired as a Maj Gen after having served as the "Peach State's" Adjutant General, was cited for his service in that capacity, as Lt Gov. and as Gov. Starting as a Private in Jan, 1913, the Chief Executive became a bomber pilot. From 28-year-old Mayor of Lavonia, to his State's Adj Gen at the age of 31, he was elected Chief Executive a few years later by an unprecedented 80.5% of the popular vote. He served on the NGAUS' Executive Council and its Committee on Legislation, subsequently contributing greatly to the Guard's interests as Governor of own State and as a spokesman for his fellow-Governors on National Guard matters.

THE NATIONAL GUARD STATES ITS POSITION

Continued from page 24

for competition in the "Perry Matches" are too tight, this Resolution found. It recommended new standards of team eligibility; proposed continuation of the current funding policy for participation in the National Matches; active duty for training pay and allowances for participation in Army Area matches by 14-man rifle teams and 10-member pistol teams; creation and filling of a permanent position of National Guard Marksmanship Coordinator, and periodic meetings between him and a committee of Team Captains or Coaches to improve standards and quality of marksmanship and instruction.

POL and Repair Part Funding (Indiana). Requirements to attain an ever-increasing state of mobilization-readiness run head-on into funds restrictions on fuel and repair parts support, which hurt training, this Resolution asserted. It asked the Chief, NGB, to analyze POL and repair part funding inadequacy as it relates to training requirements.

Marshall Research Foundation Virginia. The Assn went on record as endorsing the purpose of the George C. Marshall Research Foundation, campaigning for erection and perpetual endowment of a museum and research center at Lexington, Va.

Commendation, TAC and MATS (Air Affairs Committee) The NGAUS commended both Tactical Air Command and Military Air Transport Service for having "continually exhibited great understanding and appreciation of the problems of the citizen-armed." TAC "sought to adopt programs and policies which utilize the proven capabilities of the Air Guard," said one Resolution. MATS made available its entire resources to the transition training and early operational readiness of ANG units, said another, both lauding the two agencies' "outstanding performance of duty, knowledgeable understanding of the Reserve Forces and vital contribution to the Air National Guard program."

THE NATIONAL GUARDSMAN

UNITED STATES GOVERNMENT

Memorandum

U.S. v. McShane

TO : Burke Marshall
Assistant Attorney General
Civil Rights Division
MS : Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel
SUBJECT: Protection of Federal Officers
from State Prosecution.

DATE: NOV 27 1962

Transmitted herewith for such use as it may
be to you is a copy of a memorandum dated
November 21, 1962, on the above-entitled matter.

Attachment

Burke Marshall
Assistant Attorney General
Civil Rights Division
Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel
Protection of Federal Officers
from State Prosecution.

NOV 27 1962

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Attachment

UNITED STATES GOVERNMENT

Memorandum

TO : Norbert A. Schlei
Assistant Attorney General
Office of Legal Counsel

DATE: November 21, 1962

FROM : Herzel H. E. Plaine

SUBJECT: Protection from State Prosecution of Federal
Officers Involved in Enrollment and Attendance
of James H. Meredith at University of Mississippi
(additional data).

This is in further reference to the memorandum on the same subject dated November 19, 1962.

Bail in Habeas Corpus

We noted that the remedy of habeas corpus may be available to the federal officer under 28 U.S.C. 2241(c) (2), as a means of effecting his complete discharge, when he is held by the state authorities.

1. The question has been raised, if the federal officer were on bail could the writ of habeas corpus be issued.

The cases make it clear that the petitioner for habeas corpus who is at large on bail is not entitled to the writ of habeas corpus. This was the specific holding in Stallings v. Splain, 253 U.S. 339 (1920), where an indictment had been issued in a state court and the defendant had given bail (in the District of Columbia) for his appearance in the state court to answer the charges against him. The Court said:
"Being no longer under actual restraint within the District

of Columbia, he was not entitled to the writ of habeas corpus. Wales v. Whitney, 114 U.S. 564." 253 U.S. at 343.

Wales v. Whitney, cited by the Supreme Court, held that there must be an actual confinement or the present means of enforcing it in order to obtain a writ of habeas corpus.

The rule has been followed in a number of cases where habeas corpus was applied for by persons on bail. In United States ex rel. Potts v. Rabb, 141 F. 2d 45 (C.A. 3, 1944), cert. denied, 322 U.S. 727, the Court pointed out that even though the petitioner was in custody for a short time before being admitted to bail, he was not entitled to the writ of habeas corpus, stating that he must be actually deprived of his liberty at the time the court grants the writ. In accord are United States ex rel. Walner v. Titterton, 61 F. 2d 909 (C.A. 7, 1932); and Rowland v. Arkansas, 179 F. 2d 709 (C.A. 8, 1950), affirming 85 F. Supp. 550, cert. denied, 339 U.S. 952.

Mackenzie v. Barrett, 141 Fed. 964 (C.C.A. 7, 1905), is sometimes cited for the contrary proposition that one under arrest, but at large on bail, is entitled to a writ of habeas corpus as though the arrest were accompanied by actual imprisonment. This is inaccurate. Actually, the proposition before the court and the holding was that the giving of a bail bond after the writ of habeas corpus issued did not abate the writ.

2. The holding in Mackenzie v. Barrett is in keeping with the answer to the second question respecting bail, namely:

May the federal officer, who is in custody of state authorities for a criminal prosecution and who has applied for a writ of habeas corpus to effect his discharge, be admitted to bail by the federal court pending the disposition of the habeas corpus proceedings?

The answer is that it is entirely appropriate for the federal court to admit the prisoner to bail once the writ has issued. Johnston v. Marsh, 227 F. 2d 528 (C.A. 3, 1955), 56 A.L.R. 2d 661, is a recent and leading case of the admission to bail of a state prisoner by a federal court on the return of the writ of habeas corpus pending its disposition. That the Supreme Court has recognized the validity of such procedure is shown in Stallings v. Splain, supra, where the Court, in recognizing the propriety of refusing habeas corpus to an applicant who was on bail, distinguished the case from the completely proper "position ordinarily occupied by one who is contesting the validity of his detention and who has been released on bail pending the habeas corpus proceeding." 253 U.S. at 343.

Coexistence of the Remedies of
Habeas Corpus and Removal.

In the memorandum of November 19, 1962, it was stated that the federal officer's right of removal of the state prosecution into the federal court does not exclude the remedy of habeas corpus where he is held by state authorities, and that there could be no doubt that the Congress intended the use of both remedies coextensively.

This is borne out both by the history of the statutory provisions and the nature of the remedies themselves.

The first permanent removal provision appeared in the Force Bill of 1833, Act of March 2, 1833, sec. 3, which bill was enacted to aid in overcoming the opposition in South Carolina to the collection of the customs. The Force Bill established the right of removal for customs officers. (The provision was in terms of "any officer of the United States . . . for or on account of any act done under the revenue laws of the United States or under color thereof etc.") Section 7 of the same statute granted, in general terms for the benefit of such officers, to a Justice of the Supreme Court or a judge of any district court of the United States, in addition to the authority already conferred by law,

"power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof."

Hence in 1833, both remedies were available, in the appropriate circumstances, for customs officers of the United States.

In the succeeding years, Congress expanded the removal provision to include other federal officers without altering the generally applicable habeas corpus provision, which it continued in later enactments or re-enactments to modern times. Thus, in the case of removal, the provision was extended to internal revenue officers during and after the Civil War period (see Act of March 7, 1864, ch. 20, sec. 9, 13 Stat. 14, 17; Act of June 30, 1864, ch. 173, secs. 50 and 173, 13 Stat. 223, 241, 303; Act of July 13, 1866, ch. 184, sec. 67, 14 Stat. 98, 171). The right of removal was further extended to officers of either House of Congress (Act of March 3, 1875, ch. 130, sec. 8, 18 Stat. 371, 401), to officers of the United States courts (Act of August 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of August 29, 1916, ch. 418, sec. 3, Article of War 117, 39 Stat. 619, 650, 669; re-enacted by Act of June 4, 1920, ch. 227, sec. 2, Article of War 117, 41 Stat. 759, 787, 811; 10 U.S.C. 1589), and to those

engaged in the enforcement of the National Prohibition Act (Act of October 28, 1919, ch. 85, title II, sec. 28, 41 Stat. 305, 307, 316). These enactments were largely brought together in 28 U.S.C. 76, 77 (1940 Ed.); and the modern provisions are now 28 U.S.C. 1442 and 1442a (plus procedure in 1446, 1447), which as we saw are applicable to any officer of the United States or any agency thereof, or to a member of the armed forces of the United States, acting under color of office or under certain other enumerated conditions derived from the earlier statutes.

On the other side of the statutory picture, the habeas corpus remedy of the Force Bill of 1833 was carried down through successive enactments to modern times in almost haec verba. See, Revised Statutes, section 753; 28 U.S.C. 453 (1940 Ed.); and currently 28 U.S.C. 2241, in particular paragraph (c)(2).

In connection with the enactment of the Act of August 23, 1916, 39 Stat. 532, supra, which extended the removal provision to an officer of the United States courts for acts done under the color of office, the Supreme Court in Gay v. Ruff, 292 U.S. 25, 38-39 (1934), quoted extensively from the House Judiciary Committee Report, H. Rept. 776, 64th Cong., 1st Sess., stating that the amendment was designed to give United States marshals

the same protection in the execution of process in all cases similar to that already enjoyed in cases arising under the revenue laws, e.g., Davis v. South Carolina, 107 U.S. 597 (1882).

It is thus apparent that Congress was simply gradually enlarging the classes of removals for trial without in any way detracting from the right of summary dismissal by habeas corpus when it was appropriate.

Indeed, the portion of the habeas corpus statute, 28 U.S.C. 2254, which currently requires exhaustion of state remedies before a writ of habeas corpus may issue to a person in custody pursuant to "a judgment of State court," is significantly limited to such type of custody. In the course of its enactment, there was excluded from this provision language which would have also applied the exhaustion requirement to custody pursuant to "authority of a State officer." H.R. 7124, 79th Cong., 2d Sess., section 2254, p. 138. See Hart and Wechsler, The Federal Courts and The Federal System (1953), 1299.

There is no doubt that the revenue and Treasury officers enjoyed the benefit of both remedies. See Tennessee v. Davis, 100 U.S. 257 (1879), removal; Loake v. Comptroller, 177 U.S. 459, (1900), habeas corpus; Ex parte Beach, 259 Fed. 956 (D.C. S.D. Cal. 1919), habeas corpus granted notwithstanding urging by the state of the existence of the remedy of removal.

The coexistence of the two remedies in connection with enforcement of the revenue laws was expressly recognized by the Supreme Court in Virginia v. Paul, 148 U.S. 107 (1893), although their use failed for procedural defects. Said the Court:

"The prosecution and punishment of crimes and offenses committed against one of the states of the Union . . . can be interfered with by the Circuit Court of the United States so far only as Congress, in order to maintain the supremacy of the Constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the Circuit Court of the United States for trial or a discharge of the prisoner by writ of habeas corpus issued by that court or by a judge thereof." Id. at 114.

Moreover, the nature of the two remedies indicates that they serve functions which are not equivalent, that they are measured by different standards, and therefore cannot be regarded as exclusive of each other. In removal, the interest of the Government is in seeing that the federal officer is assured a fair trial. Thus, on removal, the question of the guilt or innocence of the accused is not involved and the court is concerned only that the petitioner's claim has some foundation and is made in good faith, Colorado v. Symes, 286 U.S. 510, 519 (1932); and see Maryland v. Lopez (three cases), 270 U.S. 9, 36, 44 (1926).

On the other hand, in the case of habeas corpus, the federal court is concerned with the innocence or guilt of the accused federal officer and holds a summary hearing to determine whether his conduct was justifiable. If the court finds that his conduct was a lawful and proper performance of his official duties, the federal officer is entitled to a summary discharge and the right of prosecution by the state is terminated, In Re Eagle, 135 U.S. 1 (1890). The hearing on habeas corpus is summary, without a jury. Where the court is not satisfied with the federal officer's justification, such as where there may be conflicting evidence and genuine issues of fact in dispute, the court is justified in remitting the federal officer to trial, United States v. Lewis, 200 U.S. 1 (1906).

Thus, an application for a habeas corpus does not insure discharge but may very well ripen into a direction that trial shall take place either in the state court or, if petition for removal is timely made (before trial, 28 U.S.C. 1446(c)), in the appropriate federal district court.

Last there be any belief that removal has the same immediate and salutary effect for the accused achieved by discharge on habeas corpus, there are some statistics to the contrary. During the prohibition era, which was marked with

much violence in connection with enforcement of the Volstead Act, it was noted in 1927 that there were then 113 recorded homicides committed by prohibition enforcement officers and that state authorities had commenced prosecutions in 57 of these cases. Of these, 22 were removed to the federal courts where thirteen resulted in acquittals, one in a plea of guilty, one in a conviction, and seven were pending unresolved. Cited from Literary Digest, October 27, 1927, Vol. 65, p. 12, by Strayhorn, 6 North Carolina L. Rev. 123, 145 (1928).

The Administrative Office of the U.S. Courts has not gathered or preserved statistics on the removal cases (and has no breakdown which would identify the habeas corpus cases involving petitions by federal officers). However, from information reported in 1962, the Office was able to identify 15 cases of prosecutions of federal officers removed from state courts (including Puerto Rico), principally growing out of traffic violations, in which there have been several acquittals after trial, no convictions, and no result yet in the remainder.