

of all Alabama National Guard troops, both air and army.

Q Were you in charge of the Alabama National Guard on September 9, 1963?

A Yes, sir.

Q Did you receive an Executive Order Number Thirteen from the Governor of Alabama on the evening of September 9?

A Yes, sir.

Q When did you receive that order?

A Approximately seven ten, p.m., Central Time.

Q And I would like to ask you if this is a copy of the order which you received?

A Yes, sir.

Q Was it -- was the order that you received typewritten or written out in longhand or mimeographed?

A It was typewritten.

Q Now, would you read to the Court the first paragraph of Exhibit 9, please?

A (Reading) "Executive Order Number Thirteen of the Governor of Alabama. Having heard that State law enforcement officers engaged in preserving law and order in Mobile, Tuskegee, and Birmingham, Alabama, have been enjoined at the insistence of the Attorney General of the United States from the lawful performance of their duties."

Q Thank you. Now, subsequent to receiving that Executive Order of the Governor of Alabama, what did you do, General Harrison?

A I was in conference with the Governor and his staff subsequent to receiving this.

Q And was that at the State Capitol, sir?

A Yes, sir.

Q And then what did you do with respect to any of the troops under your command?

A They were put on a one-hour alert.

Q Did you make -- did you issue any orders for the assignment of any National Guard troops on the evening of September 9?

A We did; yes, sir.

Q Would you tell the Court in your own words what that -- those orders were? Let me ask you first, were the orders written or oral?

A My orders?

Q Yes?

A Oral.

Q All right, would you tell the Court what those oral orders were?

A We assembled in Tuskegee seventy-seven officers and enlisted men, at the Tuskegee Armory; in Birmingham we assembled a hundred and sixty-four; in Mobile we assembled a hundred and thirty-one. And those orders were to stand by in the armory for further word from me until five o'clock the following morning.

Q Did you then -- did you thereafter issue any additional orders?

A I did.

Q And would you tell the Court -- first of all, let me ask you, were these additional orders oral or in writing?

A Oral.

Q Would you tell the Court what those additional orders were?

A They were to move to the schools, the three schools in Birmingham that had been integrated, or attempted to integrate, the one school in Mobile, and the one school in Tuskegee; and at that time, when enrollment started the next morning, they were to maintain the existing status of those schools, as applied in each city.

Q In maintaining the existing status of that -- of those schools, what did you -- what do you mean by that?

A To turn back colored people that were attempting to enter the schools; we felt at this time it was detrimental to law and order.

Q You knew at that time that on September 9 that white students had been permitted to attend those schools, but that the State Troopers had turned back the Negro children?

A Yes, sir.

Q And your instructions to your -- or your orders to your soldiers under your command was to perform that duty of turning back the Negro children?

A Yes, sir.

Q But not the white children?

A Yes, sir.

Q Now, did the soldiers under your command carry out those orders?

A No, sir.

Q And did you receive any order from the Governor of the State of Alabama countermanning Executive Order Number Nine?

A Number Nine?

Q Yes -- excuse me, Number Thirteen?

A No, sir; it was not necessary, after we were federalized.

Q What was the -- what -- what order did you receive; did you receive any order from anyone with respect to your troops following the time that you ordered the soldiers to the respective schools?

A Yes, sir; at seven sixteen, Eastern Daylight Time, we received an order from Washington federalizing the entire National Guard, both air and army.

Q And was that -- was that order oral or in writing at that time?

A At six o'clock we received it orally, which we took down in shorthand, and about nine thirty we received the TWIX.

Q What is a TWIX, for the record, sir?

A A telegram, we call it.

Q And did you this morning before Court opened furnish me with five -- six copies of this telegram you received?

A I did, sir.

Q Would you -- I would like to hand you one of these, and would you identify it?

A Yes, sir; this is the same copy that I gave you.

MR. KOHN: No objection to your introduction of that.

MR. DOAR: I would like to have that offered in evidence, your honor.

THE CLERK: Plaintiff's Exhibit number 10.

JUDGE JOHNSON: It will be admitted.

MR. DOAR: And I hand the Clerk five extra copies, for the Court.

Q After the Guard was federalized -- I will strike that question. What -- what do you mean when you say that you were ordered to have the Guard federalized?

A By that we mean that the National Guard at that time goes under the control of the President of the United States.

Q Did you -- subsequent to that time did you receive any orders for transmittal to the Guard soldiers that were stationed at the various schools to which you have referred?

A I don't follow you.

Q Did you get any orders to -- did you transmit any -- secure any orders to those soldiers with respect to their duties?

A After federalization?

Q Yes?

A Yes, sir.

Q What were those orders?

A To return to their armories immediately.

Q And from whom did you receive that order? I mean did you receive it from --

A It came from the Department of Army; it is in this telegram.

Q I see. Are you sure that it is in that particular telegram?

A No, it is in the other one, other copy that I gave you.

Q I see. I hand you then a -- a copy of a second TWIX which you have identified as subsequent orders from the Department of Defense with respect to certain of the National Guard forces of Alabama; is that right?

A Yes, sir; correct.

Q Does this particular copy show the time?

A The time it was received?

Q Uh, huh?

A No, sir; it doesn't; only the date.

Q The date?

A It was approximately thirty minutes after the original TWIX.

Q I see.

MR. DOAR: I would like to offer this second telegram in evidence.

THE CLERK: Plaintiff's Exhibit number 11.

MR. KOHN: No objection.

MR. DOAR: And hand the Court --

JUDGE JOHNSON: 11 will be admitted.

Q The two Exhibits, Exhibit 10 and 11, reflect that -- that these telegrams were delivered by yourself to Governor Wallace?

A That is correct, sir.

Q Do you recall when that was done?

A Immediately after receipt of them; it must have been between nine thirty and ten o'clock, a.m., but we already had the verbal instructions, which he had a copy of, too, at the same time.

MR. DOAR: Thank you.

CROSS EXAMINATION:

BY MR. KOHN:

Q General Harrison, in listening to your direct testimony, I believe you used the word, "Detrimental to law and order"; did I understand you to mean that you construed the proposed integration of that school detrimental to law and order?

A Yes, sir.

Q Do you now still have that same opinion?

A Yes, sir.

Q Birmingham?

A Yes, sir.

Q Mobile and Tuskegee?

A Yes, sir.

Q General Harrison, did I understand you to say, or to mean, or am I concluding correctly, when the Guard is federalized, after it has once been called out under the Executive State Order, that that in effect voids the Executive Order or the written directions from the Governor of the State?

A That is correct, sir.

Q There is no -- there is no other kind of order or communication

that is needed to void the prior order of the Governor?

A No, sir.

Q General Harrison, since the federalization of the National Guard, have you received any further communication from the Governor, about this situation?

A I received one yesterday; yes, sir.

Q Would you mind letting me -- before you read it, let me have a copy of it so I may show the counsel for the Government?

A (Presented)

Q Thank you, sir.

(Mr. Kohn presented paper to Mr. Doar, after which Mr. Doar and Mr. Kohn had whispered conference at counsel table)

MR. DOAR: Go ahead; you offer it, and I will object to it.

MR. KOHN: All right.

Q Now, don't answer any questions I am getting ready to direct to you, and don't do anything that I ask you, because the gentleman representing the Government over there is going to object, and then we will have to await the directions of the Court; do you understand that, General?

A Yes, sir.

Q I have in my hand, and I won't read it, a letter to General Harrison dated September 23, 1963, and signed by Governor Wallace --

MR. KOHN: -- and I would like for the Court to

inspect it so they will know what I am talking about.

(Mr. Kohn presented paper to the Court)

JUDGE JOHNSON: It will be admitted; it will be admitted in evidence.

MR. KOHN: Sir? Thank you.

THE CLERK: Defendant's Exhibit number 1.

WITNESS: I have one extra copy.

MR. KOHN: Wait just a minute; I would like to get it back when they get through with it.

JUDGE JOHNSON: The Court has read it.

MR. KOHN: I would like to use that, have it handed back to me, please, sir.

JUDGE JOHNSON: It is in evidence.

MR. KOHN: I would like to -- if there is no objection, I would like for General Harrison to read that.

JUDGE JOHNSON: We have read it.

MR. KOHN: All right; I wanted it in the record; you object to him reading it?

JUDGE JOHNSON: I say that the Court has read it.

MR. KOHN: Yes, sir; I wanted it in the record enumerated, if there is no objection.

JUDGE JOHNSON: It is an Exhibit in the case; it is part of the case record.

MR. KOHN: All right; thank you, sir.

Q General Harrison, did you get that letter from the Governor's

Legal Adviser yesterday?

A Yes, sir.

Q As a military officer and -- and the Adjutant General of Alabama, do you know of any document or order that is necessary to come from the Governor that would keep you from going back to Tuskegee under that original order that the Governor had that was federalized by the Guard, so to speak?

A Will you state that question again?

Q I will try to clear it up; it was a compound, complex question. Are you under any orders from the Governor of Alabama at the present time to object or interfere with the attendance of these Negro students, either at Murphy High School in Mobile, Alabama, or at the high school in Tuskegee, Alabama, or at the three high schools in Birmingham, Alabama, or three schools if they are not high schools?

A No, sir.

Q Then do I understand you correctly to say that the federalizations of the Guard made that Executive Order from the Governor to you relative to those schools void?

A Right, sir; correct, sir.

Q Since September the 9th or 10th -- and I will state it that way because it was early in the morning, I don't really know what date it was -- since the Guard was federalized, has the Guard or any component or unit thereof under your directions, or anyone else's direction, to your knowledge interfered, prevented,

or attempted to interfere or prevent the attendance of any of these Negro schools at any of these five schools that we are talking about?

A No, sir.

Q Are you familiar with the announced policy of the Governor that after a particular school, and these particular schools, have been integrated pursuant to the activity of the United States Government, that he bows to that superior authority?

A Yes, sir.

Q Is it a fact, and did I understand you correctly to say when you were being examined on your direct examination, that your Guard had been or is on what is known as an informal alert?

A Yes, sir.

Q Is it now under what is known as an informal alert?

A Yes, sir.

Q Is the basic reason for that to be ready to preserve the law and the peace and the domestic tranquility of this State if ordered to do so?

A Yes, sir.

Q Are there any units of the National Guard at the present time out on any activity in Alabama, other than the normal training activities?

A None except those that are still in federal status.

Q Do you know of any State order that would keep you from helping to preserve the peace if you were called upon by proper

authority to do so?

A No, sir.

MR. KOHN: Thank you, General.

JUDGE JOHNSON: Redirect.

MR. DOAR: None, your honor.

JUDGE JOHNSON: You want to excuse this witness,
gentlemen?

MR. DOAR: Yes, your honor.

MR. KOHN: You can be excused, General; thank you,
sir. Mark that letter an Exhibit number 1 for us, please, sir.

THE CLERK: (Nodded to indicate affirmative reply)

MR. DOAR: Your honors, the Government -- Government
rests.

MR. KOHN: We call Mr. Al Lingo, Colonel Al Lingo.

ALBERT JENNINGS LINGO, a Defendant, having been duly sworn, testified
as follows:

DIRECT EXAMINATION:

BY MR. KOHN:

Q Will you please state your full name?

A Albert Jennings Lingo.

Q What capacity do you have with the State of Alabama?

A Director, Alabama Department of Public Safety.

Q Will you please state briefly whether or not the -- or the
different divisions of the Alabama Department of Public Safety?

A Name the different divisions?

Q Yes, sir?

A There is five divisions; Highway Patrol, Drivers' License, Investigation, Service or Training Division; I believe that gets --

Q Would it be factual to call the Motor Patrol State Troopers?

A Troopers, State Troopers; that's right.

Q Is that the new name they go by, have on their arms --

A That is correct, sir.

Q -- State Troopers? Colonel Lingo, where were you on August 9 -- I beg your pardon -- on September 9, 1963?

A In Birmingham.

Q What were you doing in Birmingham?

A I was on orders from the Governor to go to Birmingham.

Q For what purpose?

A To maintain law and order and to carry out this Executive Order.

Q Well, I am sure that on cross examination you will have a chance to talk about the Executive Orders; I will confine my examination to something else right now. Colonel Lingo, were you in Tuskegee any time on September 9 or 10th?

A No, sir; I was not there the 10th.

Q Were representatives of the Department of Safety --

A I -- I had representatives there; yes, sir.

Q Under your orders?

A Yes, sir.

Q Colonel Lingo, in your capacity as head of the Safety Department of the State of Alabama, or Director, I believe Director is the correct term?

A That is correct.

Q Prior to receiving these Executive Orders, or whatever you want to term them that you have in your lap, did you receive any direct information, verbal, written, telephonic, telegram, or otherwise, concerning a specific or general tenseness in Mobile, Alabama?

A Yes, sir; I did.

Q Tuskegee, Alabama, and Birmingham, Alabama, immediately prior to September 9, 1963?

A I did.

Q From whom, generally, did you get that information, the general public or officials of your organization?

A Officials of my organization and also the general public.

Q Prior to taking the position that you now hold, were you not in business in Eufaula, Alabama?

A That is correct, sir.

Q Isn't it a fact, or is it a fact, that at one time several years ago, or many years ago, you were a member of the Highway Patrol?

A That is correct, sir.

Q Under the late beloved Bibb Graves?

A Correct.

Q Would you say, Colonel Lingo, in your official capacity that you

are properly informed concerning tenseness in Mobile, Tuskegee, and Birmingham relative to this situation that we are talking about to have an opinion of whether there was tension or not?

A Yes, sir; I am.

Q I shall ask you about Mobile; do you think that prior to September 9 and September 3, 1963, and on those dates, and on September 10, 1963, that great tension existed in Mobile, Alabama?

A It did.

Q Would your answer be the same as to Tuskegee and Macon County?

A It would.

Q Would your answer be the same as to Birmingham?

A It would.

Q And as to Birmingham, it -- has not history proven you correct, sir?

A That is correct, sir.

Q Colonel Lingo, is it a fact that your Department of Safety is right this minute engaged in helping preserve peace and law and order in Alabama?

A That is correct, sir.

Q In Birmingham?

A Yes, sir.

Q In Selma?

A Selma.

Q At the request of any public officials?

A Yes, sir.

Q Would you name them?

A Selma, the Sheriff; Birmingham, the Chief of Police and the Mayor.

Q Colonel Lingo, since the date that the Alabama National Guard was federalized, which I believe to be the correct date September 10, 1963 --

A (Nodded to indicate affirmative reply)

Q -- has your Department, under your orders, done anything, taken any action, written anything or said anything, or physically taken any action that would prevent or did prevent any of these Negro students from entering Murphy High School in Montgomery and continuing to enter there, the high school in Tuskegee, Alabama, and the three integrated schools in Birmingham, Alabama?

A None whatsoever.

Q Colonel Lingo, are you familiar with the announced policy of the Governor of this State, or as George C. Wallace as Governor of the State of Alabama, that as specifically referring to the integrated schools of Murphy and in Tuskegee and in Birmingham that he has bowed to the federal authority, superior federal authority, and he no longer has any order or activity in existence to interfere further with those students; are you familiar with that?

A I am familiar with that; yes, sir.

Q That is your understanding?

A That is his announced policy.

Q And have you heard the Governor say that?

A Yes, sir.

MR. KOHN: You can take the witness.

JUDGE JOHNSON: Cross.

CROSS EXAMINATION:

BY MR. DOAR:

Q Mr. Lingo, prior to the 2nd day of September, did you confer with any local law enforcement officials in Macon County with respect to the situation there?

A My representatives did.

Q Do you know whether or not they conferred with the Sheriff?

A That I don't know.

Q Have you got any -- did you at that time have any orders to your Troopers not to confer with the Sheriff of Macon County?

A No; no, sir.

Q Did any information subsequent to those conferences come to you with respect to the situation in -- in Macon County?

A You mean the tenseness, tenseness of it?

Q Yes, from the Sheriff?

A Not from the Sheriff, no.

Q Did you have any request from the Sheriff to send Troopers into Macon County --

A No, sir.

Q -- to assist him?

A No, sir.

Q Did you have any request from the Mayor of Tuskegee to send Troopers into Tuskegee on September 2?

A Not on September 2, but a later date I did have.

Q I see. Now, prior to September 3, in Mobile, did you personally confer with the Sheriff of the City -- Mobile County asking with -- what the situation was in that City with respect to tension?

A I had my representatives to ask different people around over the County and City what the situation was.

Q Did they confer with the Sheriff?

A That I don't know, I -- yes, sir; they did; yeah, they did.

Q Did they confer with the Chief of Police or the head of the Police Department?

A I am sure they did.

Q Did either the head of the Police or the Sheriff's Department request the State Highway Patrol to come into the City of Mobile on September 3?

A Not to my knowledge.

Q Prior to September 4, in Birmingham, did you confer with the Sheriff of Jefferson County with respect to the situation there?

A Not with the Sheriff; no, sir.

Q And did you confer with the Mayor or the Chief of Police?

A My representatives did.

Q Did either -- did the Sheriff request you to send your representatives into Jefferson County on the 4th of September?

A Not on the 4th, no.

Q Did the Mayor or the Chief of Police?

A Not on the 4th.

Q Now, the -- for the record, would you identify Mr. C. W. Russell?

A Yes, sir; he is my assistant.

Q And Mr. Joe Smalley?

A He is Commander of the Highway Patrol Division.

Q And Mr. Walter L. Allen?

A He is Commander of the Service Division, which is educational.

Q Mr. Claude Prier?

A He is the Captain of Troopers.

Q And is that -- is he in charge of one of the Districts?

A He is in charge of the Opelika District.

Q And does the Opelika District include Macon County?

A It does.

Q And Mr. Payne?

A Captain Payne is with the Drivers' License Division.

Q Now, is it not a fact that Mr. Prier was in charge of the Troopers at Tuskegee, Alabama, after you left on September 3?

A That is correct, sir.

Q And he continued to be in charge of the Troopers there until September 9 when they were withdrawn?

A Correct, sir.

Q And Captain Payne was at Birmingham during that period; is that right?

A That is correct, sir.

Q And Joe Smalley was at Mobile?

A Mobile.

Q And was Mr. Russell on duty at either of the three cities involved?

A He -- he was at Mobile.

Q And Mr. Allen?

A Mobile.

Q And who was in charge of Mobile, the Mobile operation?

A Colonel Russell.

Q Colonel Russell. Now, you were served with a summons and complaint and a temporary restraining order in the case of the United States versus George C. Wallace and others on the evening of September 9?

A That is correct, sir.

Q Did you communicate that fact to the Governor?

A I did.

Q And did you advise the Governor that you had been served with a temporary restraining order?

A I did.

Q Do you recall what time you did that?

A Approximately ten o'clock.

Q What -- what orders did you give to the State Highway Patrol after you were served with the temporary restraining order?

A I told them that we had been enjoined, that we would not keep the Negroes from going to school.

Q Did you direct or did you issue any order with respect to the removal of the Highway Troopers from Tuskegee?

A No, sir; we were to maintain law and order, although we had been enjoined from interfering with the Negroes, we would maintain law and order at the schools if necessary.

Q Did you -- did you direct your Troopers to return to the school at Tuskegee on the following day, that is, Tuesday?

A That was after we were enjoined?

Q Yes?

A No.

Q Did you direct them not to return?

A I directed them not to return, because I found that later on that night that the federal troops would be there.

Q You mean the National Guard would be there?

A The National Guard would be there, yes.

Q The Alabama National Guard?

A Right.

Q And is that the same situation with respect to Mobile and Birmingham?

A That is correct, sir.

Q You withdrew the Troopers from both of those places?

A From the school, itself; yes.

Q Yes, that's right. During the period that -- immediately prior to the opening of school in Mobile this fall, did you know whether or not any Highway Troopers under your direction made any arrests of any persons that attempted to disturb the peace?

A Not to my knowledge.

Q And was any arrest made or any disorders quelled at Tuskegee by your Troopers?

A No, sir; I think our presence prevented that.

Q And was any arrest made in Birmingham by your Troopers?

A There have not -- been quite a number of arrests made, yes.

Q At the schools by your Troopers?

A Not necessarily at the schools.

MR. DOAR: That's all.

MR. KOHN: Just one question, Colonel Lingo.

REDIRECT EXAMINATION:

BY MR. KOHN:

Q I will read, to refresh your recollection, the Respondents or Defendants in this action that we are now talking about; Governor George C. Wallace, and for the record his official residence is at Montgomery County, Alabama, isn't it?

A Yes, sir.

Q City of Montgomery?

A Yes, sir.

Q Albert J. Lingo; your official residence is Montgomery?

A Right, sir.

Q You are stationed at Montgomery?

A That is correct, sir.

Q C. W. Russell?

A Montgomery.

Q Joe Snelley?

A Montgomery.

Q Walter L. Allen?

A Montgomery.

Q Claude Sutton Prier?

A Opelika.

Q T. L. Payne?

A Montgomery.

MR. KOHN: Thank you, sir; that's all.

JUDGE JOHNSON: Next witness.

MR. KOHN: No further witnesses.

JUDGE JOHNSON: Rebuttal?

MR. DOAR: No rebuttal, your honors.

JUDGE JOHNSON: All right. I believe, gentlemen, the Court will take a recess for ten minutes at this time. Court will be in recess ten minutes.

(At which time, 11:12 a.m., a recess was had until 11:27 a.m., at which time the hearing continued)

JUDGE JOHNSON: There has been a request from the counsel for the Defendants for oral argument in this case.

MR. KOHN: Yes, sir.

JUDGE JOHNSON: That request has been transmitted to the members of the Court; it is the feeling of the members of this Court that oral argument may be proper in the case. The request is for twenty minutes, I believe, to the side; is that correct?

MR. KOHN: Your honor, I won't use the twenty minutes, but I am glad you give me that.

JUDGE JOHNSON: The Court will grant twenty minutes to the side for oral argument, and we will recess at this time so that you gentlemen may, if you desire, complete the preparation for your oral argument until one thirty.

MR. KOHN: I am ready now, if it suits the Court, but the Court's convenience.

JUDGE JOHNSON: We will recess until one thirty, and we will hear your oral argument.

MR. KOHN: Thank you, your honor.

(At which time, 11:28 a.m., a recess was had until 1:35 p.m., at which time the hearing continued)

JUDGE JOHNSON: All right, gentlemen. You want to divide your time, Mr. Doar?

MR. DOAR: I believe I will, your honor.

JUDGE JOHNSON: All right, have the Clerk, if you want to, Mr. Kohn, to remind you on your time so you can time yourself.

MR. KOHN: Please. Thank you.

MR. DOAR: If the Court please, the facts in this case are very simple. The issue is the right of the Governor of the State of Alabama to keep Negro children out of five schools in Alabama by force, by force in the face of clear Federal Court orders directing these Negro children be admitted to the schools. Now, if the Governor of the State of Alabama is correct that he has the power and the authority and the right to do this, then Governor Wallace's orders, Executive Orders, become supreme and unchallengeable, and they override all conflicting rights of all citizens of this country, and they become unreviewable by this Court, and they become a higher law than the Constitution and the federal law of this country. To state the proposition states only that what Governor Wallace is urging in this case is that the law of the United States should yield to force, and it is very clear that this is not the rule of law in this country. This Court has held, the United States Supreme Court has held, that the Governor of a State has no power to obstruct a lawful court order. As recently as last June, the Honorable Judge Lynne, the case involving the University of Alabama, spoke to Governor Wallace, and spoke to him in these words: "The Governor of a sovereign State has no authority to obstruct or prevent the execution of the lawful orders of a court of the United States." At the same time, Judge Lynne spoke further to Governor Wallace, and he said, "The concept of law and order, the very essence of a republican form.

of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it." Now, it has been suggested here that the possibility of violence at one or more of these schools constituted some sort of a legal basis for the action of Governor Wallace in issuing these Executive Orders and sending State Troopers out to these schools to keep these students out of the schools by force. The Supreme Court in Cooper versus Aaron has settled that proposition to the effect that such a possibility of violence is no legal defense to interference or to a delay in the carrying forward of a court order providing for the desegregation of schools. As the Circuit Court of Appeals said in Cooper versus Aaron, "The time has not yet come in these United States when an order of a federal court may be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto." Now, the fact of the matter is, although it is not necessary for this decision, that there is very little evidence, except opinion, that there was any violence or unlawful acts of any citizens in opposition to this order. The fact is, this record shows that the only opposition to the compliance with the federal courts' orders in this case, except for some arrests in Birmingham, was the resistance and obstruction by the Governor of the State. So we say to this Court that it has the power and

the duty to issue this order to require the Governor to cease his obstruction. Now, it has been suggested that, in the brief filed by the Governor, that the case is now moot, because the Governor has said publicly that once the seg--- desegregation takes place that he will cease all resistance and not interfere any further. I think the Court's attention should be drawn to the fact that in this case Governor Wallace did not cease his resistance when the complaint was filed; he did not cease his resistance when he was aware of the fact that he, as well as other law enforcement officials of the State of Alabama, had been directed and enjoined and ordered to cease interfering with desegregation of these schools. He only ceased -- and as a matter of fact, he continued to resist, and he affirmatively called upon more force to resist decrees of this Court by activating the National Guard of Alabama and directing General Harrison to send a number of soldiers -- a number of soldiers out to these schools, not to enforce law and order, not to keep the peace, but to maintain the status, which was to keep these children out of the schools. Now, in the face of that, in the face of that evidence, it does not seem to us that a statement now, once the Governor has been served with a court order, that he will comply, would be any justification for this Court not to issue the preliminary injunction. To be sure that the Governor of the State of Alabama, from this time on, will comply with the orders of this Court, we respectfully say that that is what is needed in this case. Now, in summary, then, here

we have a case where the Governor of a State has stated and acted in a way that has indicated that he will not obey until he is ordered to obey. It is unfortunate and tragic that the United States Government had to use superior force to compel the obedience of law in this State. Certainly the use of force is a last resort; but when the Governor of a State calls out the National Guard to obstruct and interfere and refuse to -- to prevent the carrying out of this Court's orders, and the orders of the Northern District and the Southern District of Alabama, then the United States has no other choice. What Governor Wallace was doing was using power, federal -- State power to paralyze the supreme law of this country. This is what this case is about; it's a case of where a Governor of a State is using the power of the State, not to sustain law, but as an instrument for thwarting law, and it is for that reason that we respectfully urge this Court to issue the preliminary injunction and to issue it in terms where it is clear that Governor Wallace should cease his obstruction, and furthermore, that he has a duty to see that law and order is maintained in and around those schools in such a way that there will be no further interference with the orders of this Court, and the order of the Northern -- the Court for the Northern District of Alabama, and the order of the Court for the Southern District of Alabama.

MR. KOHN: With the permission of the Court, I would like to address the Court from this position.

JUDGE JOHNSON: All right.

MR. KOHN: I don't agree with the illustrious counsel for the Government as to the actual issue before this Honorable Court. This is not a contempt proceeding for what Governor Wallace did do or did not do or has done. There is one issue in this case. A temporary restraining order has been issued by this Honorable Court, and this hearing precisely is for one thing, as I understand any possible construction of this complaint, and that is, should this preliminary injunction be issued? Now, I am not going to bore the Court with reading a lot of decisions or make any long speech about the Fourteenth Amendment; but we think, and I think, as a member of the bar, an officer of this Court, that when, any way and any time any case or any decision or any activity of the Federal Government or Court is predicated upon or based upon the Fourteenth Amendment to the Constitution of the United States, it is the duty of counsel to bring it before the Court, and I respectfully hope that this Court will be bold enough to force -- face that issue of the validity of the Fourteenth Amendment. It doesn't take any citation of authority to know, any sophomore in any high school in Alabama should know, if they don't know, that the Fourteenth Amendment was conceived in hate, born as an afterbirth of war, and apparently made legal at the point of the bayonet, and it has been a cancerous infestation of the Constitution since its inception, and some day, somewhere, I hope that the federal judiciary meets again the question of validity of the Fourteenth Amendment. I know that it has been

illuded or explained away on the grounds of this political question; I am familiar with those decisions. We think we have ample authority in our brief for this Court to pass upon this question. Now, to get back to the main issue -- and we may waive, I hope this Court understands, nothing that we have raised in our pleadings and acknowledged in our brief, that we do not insist on now by -- by not arguing; I haven't got the time -- but the main issue in this case is not what has been done, because the facts set out in this petition -- and I call the Court's attention, I believe that three out of four, or two out of five, of the affidavits attached to this petition are Government lawyers' affidavits. I believe there is a rule that courts ordinarily do not issue injunctions and other papers on the affidavits of counsel, and I mean no reflection on the excellent gentleman representing the Government. There is not one iota of evidence before this Court -- and that is what we go by, evidence, not what we might think or what we might read or anything else; evidence -- there is no evidence before this Court that under the acknowledged rules that a court goes by on issuing an injunction -- well, I will pass upon in a minute and quote from two decisions -- that is based in fact that would make an injunction necessary. I for one minute would not argue that this Court has the power to issue this injunction. I do argue seriously that this Court does not have the right, but let us assume that under the present status of the law that this Court has the right; I submit due to the lack of evidence that this Court should not issue this injunction,

because an injunction should never be issued, especially in a relationship between the sovereign power of the United States and any of the fifty states, including the State of Alabama, that is still in the Union, unless it is warranted by the facts and the necessity of it. Now, the Government's own witnesses did not have any evidence that any Department of the State of Alabama has any plans or has done anything or said anything from which one could reasonably construe that the interference is going to continue against these students at either of these five schools. Now, that is what we try an injunction case on, unless everything I have ever read means nothing. There is nothing in this Exhibit -- and if we need anything, factually speaking, to control a proper decision of this Court, I respectfully call the Court's attention to a deposition taken from the leading counsel in this case, and I especially direct your attention to page seventeen and page twenty-five of this deposition that is now before this Court as a part of this record, which amounts to a confession, as I construe it, that there is no evidence upon which the necessity for an injunction exists in this case. Now, just for a minute about the law of injunctions: I know this Court is thoroughly familiar with the law of injunctions, but I especially would like to use the decision of Hawks versus Hamill that the Court is well familiar with in 53 Supreme Court Reporter, quoted in the Fifth Circuit in the National Association for Advancement of Colored People against Gallion in 290 Federal Second Series, and very

quickly, in laying down the principles governing the issue of injunctions; "There is another path of approach that brings us to the same goal, an approach along the line of the law of equitable remedies." And I am reading from a decision by Mr. Justice Cardozo, that I believe all of us can agree -- all of us can agree was an excellent Justice of the Supreme Court during his tenure, from page 243, paragraph two. "Caution and reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.'" And skipping, and come down to the middle of the same paragraph, on page 243, quoting; "A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium." The gist of that case -- and if I remember correctly -- and I believe it does say so, that *Hawks versus Hamill* was quoted in the *National Association for Advancement of Colored People - Gallion* case, 290 Federal Second 337, at page 342, paragraphs three and five: "We entertain no doubt but that the district court had jurisdiction to entertain a complaint seeking an injunction against officers of a state to prevent the deprivation of or interference

with a right created and guaranteed by the United States. But this should not be done unless there is a danger of irreparable injury which is imminent." And they quote Fenner versus Boykin. Then, going on down, they quote Hawks versus Hamill, quote; "There must be an exceptional circumstance and a clear showing of a necessity" -- I shall repeat -- "of a necessity for the protection of constitutional rights for an injunction to justify interference by the issuance of the writ." Now, I don't think this Court is interested in a judicial way -- they may be from the standpoint of a citizen or of an Alabamian and an American and a Judge -- but officially in this case, the scope of judicial decision on the case that is before this body on this occasion is one thing, as I see it, under the petition, under the exhibits, that is, the complaint, and from the witnesses from that chair, not what some particular Judge might think the Governor might do or the Governor may not do. It's a truism in our bifurcate and dualistical relationship on the part of the State Government, the Federal Government, that the flag of caution must persist, and that regardless of how mad or how outraged a particular Judge may be about a particular activity of any particular official, we try these cases not from our personal opinions, but from the established law of the land, and that is all that any of us are interested in in this case. Now, let's take the facts, and then I shall conclude. I believe that every man from the witness stand today said he had no evidence about any further interference from the Governor, and

I believe most of them were familiar with the pronounced -- announced repeatedly and habitual pronouncements of the Governor of this State that he bows to federal authority. And I go back to this one thing, in this case, a judicial edict pronounced by this Court is an implied insult to the Chief Executive of this State, because it would read into it, "We think you are not going to live up to what you publicly announce," and I believe everybody in this room and in Alabama that can read and hear knows, regardless of what they may think of any alleged affiance or alleged defiance of a court order or anything else, that Governor Wallace is doing his level best to maintain peace and order at the time we are hearing this injunction, that there is no living man or woman or official representing the State of Alabama or purporting to represent the State of Alabama that is doing one thing to interfere, either in Mobile, Alabama, Tuskegee, or Birmingham, but on the contrary, and it is evidence before this Court, the Highway Patrol today is in Selma, Alabama, if Chief Lingo, if I remember him correctly, and in Birmingham, Alabama, and at the request of those officials. Now, is this a time -- is this a time -- yes, this Court is -- has to be and is unmindful of the passions and the tragedy of the hour; but this Court can take judicial notice that the relationship between the Government of the United States on one part -- and we are all citizens of that -- of this great country, regardless of our disagreements on the interpretation of law -- and the State of Alabama are not on,

you might say, a normal equilibrium. Now, is this any time, is this any occasion, and I say this with not any threat to this Honorable Court, but submitting a question, is there any necessity, regardless of the power of the Court, regardless of the right of the Court, the necessity and the wisdom and the duty fuse into the proper word that I would like to leave as I sit down; is this a time under the lack of evidence in this case and under the statement on deposition of the chief counsel for the Government in this case, based on the facts alone, is there one iota of evidence that makes this preliminary injunction in order, right, or wise at this hour?

JUDGE JOHNSON: Mr. Doar.

MR. DOAR: Your honors, Mr. Kohn addresses the Court as if there were no outstanding federal court order at this time against the Governor of the State. By so addressing the Court, it seems to me he misconstrues the factual situation. Governor Wallace is complying now because he is under a court order. To argue that the court order should not continue because he is complying, and it would disrupt State-Federal relationships doesn't -- seems to me to miss the point. If Governor Wallace had stated publicly that he will respect the Constitution of the United States, if he would -- had stated publicly that he would carry out his oath of office to support the Constitution of the United States, if he had stated publicly that he will respect federal court orders in the proper sphere of their influence, then

under those circumstances there might be no necessity for an injunction. But on the contrary, and I want to reiterate the point that we urge this Court, Governor Wallace has not ceased to resist and has not ceased to use force to resist until the Federal Government at the last instant was required to remove soldiers from his command in order to make him comply. And for that reason, your honors, we respectfully urge you to continue the order in operation and to issue the preliminary injunction against the Governor of the State of Alabama.

JUDGE JOHNSON: Mr. Kohn.

MR. KOHN: Nothing further.

JUDGE JOHNSON: This Court will take this matter under consideration and in due course file its opinion and order.

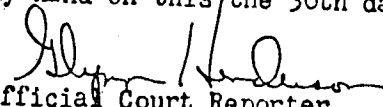
MR. KOHN: Thank you, your honor.

JUDGE JOHNSON: Recess court until further ordered.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

I, Glynn Henderson, Official Court Reporter of the United States District Court for the Middle District of Alabama, do hereby certify that the foregoing 83 pages contain a true and correct transcript of proceedings had before the said Court held in the City of Montgomery, Alabama, in the matter therein stated. In testimony whereof I hereunto set my hand on this the 30th day of September, 1963.


Official Court Reporter.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 20595

DWIGHT ARMSTRONG, ET AL,

APPELLANTS,

V.

THE BOARD OF EDUCATION OF THE CITY
OF BIRMINGHAM, ET AL,

APPELLEES.

AFFIDAVIT OF THEO. R. WRIGHT

Affiant is Superintendent of Schools of the City of Birmingham, and I have held this position since July 1, 1959. Before that time I was Assistant Superintendent of Schools for many years.

I am familiar with the issues involved in this case, and I have read the appellants' motion for injunction pending appeal. This affidavit is filed in opposition to that motion.

It is my considered judgment that under the circumstances as they now exist with respect to the administration and operation of the Birmingham school system it would be impossible to prepare and put into effect a plan for the desegregation of the Birmingham schools by desegregating the first grades of all elementary schools pursuant to non-racial geographic school attendance area lines, by September, 1963, as prayed in the motion for injunction.

The proposed order would involve a complete study of the current school census of Birmingham and a resurvey of the entire school population.

The total enrollment of pupils in the Birmingham schools

in January, 1963, was 73,300. There are 92 elementary schools in the system, and it is estimated that there will be 7,632 first grade pupils at the beginning of the next school year in September.

The organization of all classes for the school year beginning in September, 1963, has already been completed. Class schedules and individual teacher loads for the forthcoming term have been worked out in accordance with estimated enrollments at each school.

It is customary and in fact administratively necessary that we begin in January the administrative work necessary to organize for the school year beginning in September. At that time principals are required to estimate teaching loads and teacher assignments. The contracts with all teachers are negotiated on or before May 1 for the next school year. Substantially all such contracts have now been negotiated and signed by 2,491 teachers and supervisory personnel for the school year beginning in September. If there should be an unanticipated number of pupils required to be actually enrolled in the individual school during the fall term of the year, this would cause much confusion in regard to the number of teachers employed, and also in the budget.

The preliminary budget for the coming year has been fixed by the Board of Education and it is doubtful whether necessary arrangements could be made to provide for radical rearrangements of teaching and supervisory personnel and other problems which would be necessitated by the proposed order.

The assignment of prospective first grade pupils to the Birmingham schools for the ensuing school year is initiated

early in May when arrangements are made for parents to bring prospective pupils to the schools which they are expected to attend for interviews by the teachers and administrative staff. This has all been done for the forthcoming year.

The 1962-63 term of the Birmingham schools has ended and all of the teachers and most of the staff of the various schools have left for summer employment, travel or study in colleges throughout the United States. There would accordingly be substantially no available personnel for the great amount of work and preparation which would be required by the proposed order.

It would not be possible to determine the classroom and other facilities or the teaching assignments which would be required by a general rearrangement of the kind proposed in advance of the actual appearance of the pupils, as the Board has no experience upon which to base such estimates. In the event of any such general reorganization of the Birmingham schools, it would be of the utmost importance not only from the standpoint of school administration but in the interest of the pupils that the most careful selection of teachers be made for the mixed classes. This would involve not only consultation with the principals involved, but consideration of the wishes of the teachers themselves. Neither principals nor teachers are now available for this purpose.

The enormous administrative problems would make it impossible in any event to bring about the extensive rearrangement which would be required to desegregate the schools either by the first grade or any other grade, if conditions were otherwise normal. It happens that the Board is in the process

of constructing a new administration building on the location of the present building occupied by the Superintendent and staff. Bids will be open for the razing of the old building and construction of the new building on June 11, 1963. The majority of the records and supplies of the administrative office of the Birmingham schools have been boxed and marked for removal to various scattered temporary locations. In the absence of the teachers and other staff at the individual schools and with the curtailed staff in the central office as a result of the reconstruction, it is not believed that it would be humanly possible to make the necessary studies and arrangements to comply with any order of the character proposed in the motion.

The decree of the District Court directs the Superintendent and the Board to process in good faith and without regard to race all applications which may be received by individual pupils for admission to any of the Birmingham schools, as contemplated by the applicable state law. The office of the Superintendent and the Board are and have been prepared to deal in an orderly way with all such applications as required by the decree. The staff it is believed in the absence of unanticipated volume of applications would be able to deal with such applications prior to September, 1963, if they are presented within a reasonable time. The problem of dealing with individual applications in the absence of an unanticipated volume would not involve the administrative or budgetary problems presented by the requirement for a general desegregation order as contemplated by the motion.

/s/ Theo. R. Wright
THEO. R. WRIGHT

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, Ollie O'Brien Littlejohn, a Notary Public
in and for said State and County, personally appeared the above
named affiant, Theo. R. Wright, who being known to me and being
first duly sworn deposes and says under oath that he has read
the contents of the foregoing statement and that the facts
therein are true.

/s/ Theo. R. Wright
AFFIANT

Sworn to and subscribed before me
this 25th day of June, 1963.

/s/ Ollie O'Brien Littlejohn
Notary Public