

## FEDERALISM AND CIVIL RIGHTS: THE MEREDITH CASE

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In 1962, the University of Mississippi admitted James Meredith as its first Black undergraduate. This event in American history required the commitment of the United States government to protect the civil rights of an American citizen. Moreover, this federal commitment, official state opposition, and unofficial popular protest combined to render the desegregation of the university, an event of enormous expense, both in human lives and money.

The account of this event describes and analyzes our system of government—federalism. A federal system of government is one formed by a compact, between or among states wherein the states surrender their individual sovereignty to a central authority, but retain limited residuary powers of government.<sup>1</sup> This division of political power demands a courteous code of behavior, “comity,” between the states and the central authority. Within our system of government, the United States Constitution is the compact by which the two levels of government are bound.<sup>2</sup> Presumably, when the Constitution is clear in its dictates, the system of federalism works smoothly. Yet when the Constitution is unclear in its authority or when there is a serious conflict between state and national interests, our normally stable form of government can turn into a teeter-totter of disharmony, with brute power and political necessities competing with sound reason as the legitimizing force. This Article tells of such a conflict, wherein the federal government’s interest in insuring a Black citizen’s civil rights clashed with the State of Mississippi’s interest in maintaining racial segregation.

The Meredith case is a patchwork of interwoven stories ranging from a Black man’s dream to a President’s nightmare. The characters are as distinctive and dynamic as those of a Shakespearean drama. James Meredith, the protagonist, was a Black man with a burning desire to pursue an academic degree at his state’s flagship university. But in 1961, the University of Missis-

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1. For a general discussion of American federalism, see Diamond, *Commentaries on The Federalist: The Federalist on Federalism: “Neither a National Nor a Federal Constitution, But a Composition of Both,”* 86 YALE L.J. 1273 (1977). For the Kennedy Administration’s view of American federalism see B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964). For a critique of the Kennedy Administration’s view see Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007 (1966).

2. The nature of this authority is expressed in the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

*U.S. CONST.* art. VI, cl. 2.

issippi ("Ole Miss") was racially segregated and did not accept Black students. Ross R. Barnett, the antagonist, was the governor of the State of Mississippi, with a sworn allegiance to the United States Constitution but an even greater dedication to the segregationists who elected him to office to protect and defend their way of life. Attorney General Robert Kennedy and his Civil Rights Chief, Burke Marshall, were the members of the Kennedy Administration directly responsible for the enforcement of federal law. John F. Kennedy was the President caught in the middle of this drama, who sought peace between the parties in conflict but whose actions instead contributed to riot and bloodshed.

### I. THE LEGAL BATTLE

James Meredith saw the inauguration of John F. Kennedy, as a propitious moment and, on January 21, 1961, applied for admission to the all-White state university at Oxford, Mississippi.<sup>3</sup> He may have found encouragement as well in the apparent civil rights commitment of a unique federal presence in the South, the judicial presence. The United States Court of Appeals for the Fifth Circuit, dominated by a group of unlikely heroes, appeared determined to enforce the federal rule of law in the South.<sup>4</sup>

Whatever his motivation, this young Black man anticipated President Kennedy's commitment to equal rights for Blacks. To promote this commitment, Kennedy's Civil Rights Advisor, Harris Wofford suggested that "[f]ootholds of token school desegregation should be established in each Deep Southern state. This should include the admission of Negroes to institutions of higher education in each state."<sup>5</sup>

Predictably, the university officials at Ole Miss rejected the idea of token desegregation, and rejected Meredith's application as well.<sup>6</sup> As a result, in early June, 1961, Meredith brought an action against the university officials in the federal district court at Meridian, Mississippi. This case, *Meredith v. Fair*,<sup>7</sup> was the start of the Oxford incident and introduced another cast of characters. Judge Sidney C. Mize was a federal district judge whose court would try the facts and first rule on Meredith's right to be admitted into Ole Miss.

The early judicial history of the *Meredith* case shows an interplay between a determined yet procedure-bound court of appeals and a recalcitrant district court judge who was a master of dilatory tactics. Meredith sought a temporary restraining order (T.R.O.) mandating his immediate admission into Ole Miss in order to safeguard whatever rights he would have while awaiting a final decision as to his rights. Instead of issuing the T.R.O., Judge Mize set a hearing for a preliminary injunction for June 12th, the last day for Meredith to enroll in the summer session. On June 12th, Judge Mize postponed the hearing until July 10 due to a "calendar conflict." There were other similar delays.

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3. A. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* (1978).

4. J. BASS, *UNLIKELY HEROES* (1981).

5. H. WOFFORD, *OF KENNEDYS AND KINGS* (1980).

6. F. READ and L. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* (1978). This volume is extremely helpful in understanding the role of the United States Court of Appeals, Fifth Circuit, in the *Meredith* Case.

7. 199 F. Supp. 754 (S.D. Miss. 1961).

Finally, on December 12, 1961, Judge Mize decided against issuing a preliminary injunction on Meredith's behalf. He determined that "the overwhelming weight of the testimony [was] that the plaintiff [Meredith] was not denied admission because of his color."<sup>8</sup> Judge Mize took a total of six months to reach this decision, which was contained in a four-page report. These delays cost Meredith the opportunity of enrolling in both the summer and the fall semesters.

Immediately following Judge Mize's December decision, Meredith appealed to the Fifth Circuit, hoping to preserve his chances for admission to the spring semester in February, 1962. A Fifth Circuit panel of Judges Wisdom, Tuttle, and Rives, expedited matters and issued a decision exactly one month after Judge Mize's decision. The Fifth Circuit panel in its decisions found that, in order to set matters straight, it had to review Judge Mize's findings of fact, normally the well-guarded preserve of the trial courts.

In reversing Judge Mize, the panel stated, "This case was tried below and argued here in the eerie atmosphere of never-never land. Counsel for appellees argue that there is no state policy of maintaining segregated institutions of higher learning and that the court can take no judicial notice of this plain fact known to everyone . . . . We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges."<sup>9</sup> The Fifth Circuit then remanded the case to the district court for a trial on the merits, with instructions to expedite the proceedings. Meredith still had to prove that he was being discriminated against personally.

On February 3, 1962, Judge Mize held, on remand, that Meredith had failed to show that he was denied admission to Ole Miss because of his race. In reaching his decision, Judge Mize commented that the Fifth Circuit's taking judicial notice that Mississippi's segregation policy was simply a matter to be considered with all other evidence and was not a conclusive finding of fact. He went on to add,

The proof shows on this trial, and I find as a fact, that there is no custom or policy now, nor was there any at the time Plaintiff's application was rejected, which excluded qualified Negroes from entering the University. The proof shows, and I find as a fact, that the University is not a racially segregated institution.<sup>10</sup>

Judge Mize's decision was then decided squarely in contradiction to the Fifth Circuit's findings.

Next, Meredith moved the case back to the Fifth Circuit seeking an injunction pending appeal. This remedy was sought in order to preserve Meredith's standing in the case. With all the judicial delays, Meredith could complete his requirements and graduate from the state's Black college before the case was ever decided.

On February 12, 1962, a Fifth Circuit panel, Rives, Wisdom, with Tuttle dissenting, refused Meredith's request for an injunction pending appeal. The panel lacked the district court record, and thus could not act promptly on Meredith's request. In rejecting Meredith's request for injunctive relief, the

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8. *Meredith v. Fair*, 199 F.Supp. 754, 757 (S.D. Miss. 1961); *aff'd*, 298 F.2d 696 (5th Cir. 1962).

9. *Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1967).

10. *Meredith v. Fair*, 202 F.Supp. 225, 227 (S.D. Miss. 1962); *Meredith v. Fair*, 305 F.2d 341 (1962) (injunction denied).

Court stated that Meredith could avoid losing standing by not fulfilling his graduation requirements.<sup>11</sup> In other words, Meredith would have to sacrifice his educational goals in order to proceed with his claims against Ole Miss. Meredith responded by formally appealing Judge Mize's decision on the merits.

On June 25, 1962, Judges Wisdom and Brown, with DeVane (district judge sitting by designation) dissenting, reversed Judge Mize's opinion that Meredith was not the victim of racial discrimination. Judge Wisdom wrote for the majority:

"A full review of the record leads the Court inescapably to the conclusion that from the moment the defendants discovered Meredith was a Negro, they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity."<sup>12</sup>

Judge Wisdom was critical of the incredible delays in litigation exhibited by both Judge Mize and the defendants' counsel when he wrote:

As a matter of law, the principle of 'deliberate speed' has no application at the college level; time is of the essence. In an action for admission to a graduate or undergraduate school, counsel for all the litigants and trial judges too should be sensitive to the necessity for speedy justice.<sup>13</sup>

The Fifth Circuit panel again remanded the case to Judge Mize. This time the case was remanded with specific directions to the lower court to issue an injunction ordering the officials at Ole Miss to enroll Meredith into the original student body. This order to the district court came over a year after Meredith had filed his complaint against Ole Miss.

But Meredith's legal battle was still not over. Judge Mize did not issue the injunction on Meredith's behalf for another three months. This delay was due to the actions of a member of the Fifth Circuit. On July 18, 1962, and on three other occasions, Circuit Judge Ben F. Cameron, of Mississippi, issued a stay<sup>14</sup> of the Fifth Circuit's reversal of Judge Mize's decision. He believed that Ole Miss should be given time to apply to the United States Supreme Court for a writ of certiorari. This was a renegade act since Judge Cameron had not even been a member of the panel that had reversed and remanded Judge Mize's decision.

Judges Wisdom, Brown, and DeVane reconvened and vacated Judge Cameron's first stay and reissued its earlier mandate on July 27, 1962. Blunt and to the point, Judge Wisdom warned: "In this case time is now of the quintessence. Time has been of the essence since January, 1961, when James Meredith . . . applied for admission to the University of Mississippi."<sup>15</sup> Then Judge Wisdom admonished Judge Cameron for acting so radically:

The Court is bigger than a single judge. Assuming, but without deciding, that Judge Cameron is indeed a judge of 'the court rendering the judgment,' we hold that the Court determining the cause has inherent power to review the action of the single judge, whether or not the single judge is a member of the panel. . . . *And, it is unthinkable that a judge who was not a member of the panel should be allowed to frustrate the mandate of the Court.*<sup>16</sup>

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11. *Meredith*, 305 F.2d at 342 (5th Cir. 1962).

12. *Id.* at 344.

13. *Id.* at 352.

14. 7 RACE REL. LAW REP., 741-45 (1962).

15. *Meredith*, 306 F.2d at 375.

16. *Id.* at 376 (emphasis in original).

Judge Wisdom reported that the other members of the Fifth Circuit agreed with this rational and basic judicial principle.

The panel reissued its earlier mandate, stating precisely what injunction Judge Mize should issue. The panel went further to insure its decision would be obeyed by issuing its own preliminary injunction, to be binding until Judge Mize's permanent injunction was both issued and fully obeyed:

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 . . . this Court herewith issues its own preliminary injunction enjoining and compelling each and all of said parties to admit plaintiff-appellant to, and allow his continued attendance at the University of Mississippi . . . on the same basis as other students.<sup>17</sup>

The Fifth Circuit's preliminary injunction was the direct result of both Judge Cameron's intervention and the recalcitrance of Judge Mize.

Judge Cameron attempted repeatedly to stay the court's dictate. This time, Meredith's counsel went to Circuit Justice Hugo Black for assistance. Looking for guidance, the Court requested that the Justice Department to intervene and file an amicus curiae brief supporting the Fifth Circuit's opposition to Judge Cameron's stays. On September 10, 1962, Mr. Justice Black, himself a southerner from Alabama, issued an order vacating all of Judge Cameron's stays. His opinion read:

I agree with the Court of Appeals that the stays issued in this case can only work further delay and injury to movant while immediate enforcement can do no applicable harm to the University or other respondents. I further agree with the Court of Appeals that there is very little likelihood that this Court will grant certiorari to review the judgment of the Court of Appeals, which essentially involves only factual issues.<sup>18</sup>

Mr. Justice Black made it clear that this was not solely his opinion:

Although convinced that I have the power to act alone in this matter, I have submitted it to each of my Brethren, and I am authorized to state that each of them agrees that the case is properly before this Court, that I have the power to act, and that under the circumstances I should have exercised that power as I have done here.<sup>19</sup>

This opinion of Mr. Justice Black, supported by his Brethren, effectively served as a second court order to Ole Miss to enroll Meredith.

On September, 13, 1962, Judge Mize signed a long-overdue permanent injunction ordering the officials at Ole Miss to admit Meredith and allow him to attend the university.<sup>20</sup> On that same day, Mississippi Governor Ross Barnett went on statewide television to vow that the state's schools would not be integrated and that Meredith would not be admitted into Ole Miss. He invoked the doctrine of interposition, assuming the embodiment of the sovereignty of the state in himself and attempting to interpose himself between the authority of the federal government and the people of Mississippi.<sup>21</sup>

With this official denial of compliance with its direct order, the Fifth Circuit followed the Supreme Court's lead and designated the Justice Department

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17. *Id.* at 378-79.

18. *Meredith*, 83 S.Ct. 10, 11 (1962); 7 RACE REL. LAW REP. 745-46 (1962).

19. *Meredith*, 83 S. Ct. at 11.

20. 7 RACE REL. LAW REP. 746 (1962). *Meredith v. Fair*, 313 F.2d 532 (5th Cir. 1962); *cert. denied*, 372 U.S. 916 (1963).

21. 7 RACE REL. LAW REP. 748 (1962).

as *amicus curiae* to the court on September 18, 1962.<sup>22</sup> The Attorney General of Mississippi, Joe Patterson, was bellicose as he prepared for the oncoming legal battle. His response to the Justice Department's involvement in what he believed to be a state matter was to compare Robert Kennedy to "a 'jackass' braying at 'a great American eagle' [Mississippi]."<sup>23</sup>

Facing local defiance to the enforcement of its orders, on September 20, 1962, the Fifth Circuit panel entered a temporary restraining order against the State of Mississippi, its Governor Barnett, and all its officials, to prevent their interference with the enrollment of Meredith.<sup>24</sup> On September 21, the Court entered its order to show cause why the Board of Trustees and certain administrative officials of the university should not be held in civil contempt.<sup>25</sup> On September 24, the Fifth Circuit, sitting *en banc*, ordered that the Board of Trustees take all steps necessary to register Meredith at Jackson, Mississippi, on September 25.<sup>26</sup>

Meanwhile, Attorney General Robert Kennedy began a series of telephone conversations to negotiate a peaceful resolution of the matter with Governor Barnett. On September 17, 1962, Governor Barnett requested that the Justice Department register Meredith at Jackson, rather than at Oxford where everyone else would register.<sup>27</sup> The next day, the Attorney General replied that he would not change the location of registration but would ask Meredith to wait until the following Monday instead of registering on Thursday.<sup>28</sup> But Meredith and his lawyer refused to push his registration back another day. It had been over a year and a half since his initial application.<sup>29</sup> Thus, September 20th was to be the date of Meredith's registration and Oxford was to be the place.

Despite cordial telephone conversations with Attorney General Kennedy, Governor Barnett was hardly a cooperative partner in the federal system. On the agreed day of registration, Barnett personally blocked Meredith's entry through the school hall doorway. The scene was a bit ludicrous. As Meredith approached, the only Black civilian within 200 yards, surrounded by White marshals, Barnett inquired, "Which of you is James Meredith?"<sup>30</sup> Any possible humor ended when an attorney from the Justice Department who was escorting Meredith asked Barnett, "Do you realize that this puts you and the other officials in contempt of a federal court order?" Barnett replied, "Are you telling me I'm in contempt, or does that take a judge?"<sup>31</sup> The Meredith entourage decided to back away and try again at a later date.

Once again, on September 25th, Barnett refused to allow Meredith to enroll at Ole Miss. Following this second interference by Barnett, the Fifth Circuit, was asked and issued an order to show cause why Barnett should not

22. *United States v. Barnett*, 330 F.2d 369, 370-71 (5th Cir. 1963); 7 RACE REL. LAW REP. 748 (1962).

23. V. NAVASKY, *KENNEDY JUSTICE* (1971).

24. *Id.* at 375.

25. *Id.* at 372.

26. *Id.* at 373.

27. *Id.* at 165-66.

28. *Id.* at 167-69.

29. J. MEREDITH, *THREE YEARS IN MISSISSIPPI* (1966).

30. R. SHERRILL, *GOthic POLITICS IN THE DEEP SOUTH* (1969).

31. R. BARRETT, *INTEGRATION AT OLE MISS* (1965).

be cited for civil contempt.<sup>32</sup> Again, on September 26th, Meredith was refused enrollment; this time the Lieutenant Governor, Paul Johnson, substituted for Barnett at the school hall door.

Attorney General Kennedy gradually added more forces to assist in Meredith's attempted enrollment. On the first attempt at enrolling Meredith, his escorts were four federal officials, three marshals and an attorney.<sup>33</sup> On the second attempt, only one more attorney was added to the escort party.<sup>34</sup> By the third attempt, a more substantial force of unarmed marshals came face to face with the Lieutenant Governor who was accompanied by over eighty state sheriffs.<sup>35</sup> Violence threatened on that occasion. There was some pushing and shoving between the two factions, and fortunately, no violence resulted from any of these initial meetings of forces.

On September 27, 1962, the Attorney General told Governor Barnett that he was prepared to send about thirty armed marshals to ensure Meredith's enrollment.<sup>36</sup> That same day, a party of about fifty marshals was dispatched to Oxford to enroll Meredith. By late afternoon, a crowd gathered on the Oxford campus to meet the marshals.<sup>37</sup> Governor Barnett warned the Meredith convoy by calling the Attorney General and stating "There are several thousand people in here in cars, trucks . . . We don't know these people . . . There is liable [sic] to be a hundred people killed here."<sup>38</sup> The Attorney General ordered the convoy to turn around though it had driven within an hour's drive from Oxford.<sup>39</sup>

The following day, the Fifth Circuit continued its attempt to enforce its orders and deliver justice to Meredith. The Court held an *en banc* hearing to decide whether Governor Barnett should be held in civil contempt of court.<sup>40</sup> Sitting in New Orleans, the Court found decisive evidence of the Governor's defiance of its orders, including newsreel movies of the Governor standing in the school hall door refusing to let Meredith enter. The Governor chose to ignore the Court's summons to appear, and even refused to respond to the summons. Chief Judge Elbert T. Tuttle expressed the court's frustration over the whole matter, as he made an unorthodox plea to Assistant Attorney General Burke Marshall:

I think I do state the views of the Court that the Court has practically exhausted its powers in the circumstances. I am sure it is a planned policy of our Government that a court have no power to execute its orders. It would be unfortunate no doubt if a court had that power . . . It seems to me that the Court has nearly exhausted its power to accomplish what this Court has repeatedly said Mr. Meredith is entitled to, which is admission to the University of Mississippi and . . . the time has about come . . . when the burden now falls on the Executive Branch of the Government.<sup>41</sup>

Burke Marshall responded with determination, "The executive branch

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32. *Barnett*, 330 F.2d at 375 (1963); 7 RACE REL. LAW REP. 759 (1962).

33. READ, *supra* note 6, at 227-28.

34. *Id.* at 233.

35. *Id.* at 233-34.

36. NAVASKY, *supra* note 23, at 209-10.

37. *Id.* at 217.

38. *Id.*

39. *Id.* at 209.

40. *Meredith v. Fair*, 313 F.2d 532 (1962).

41. READ, *supra* note 6, at 235-36.

. . . will use whatever force, physical force, is required."<sup>42</sup> The Chief Judge replied, "I do hope and assume that the executive department has in mind the fact that an order of this kind may be frustrated by delays as well as by failure to act."<sup>43</sup> This sentiment, pressing the Executive Branch into immediate action, was expressly echoed by various judges on the Court.<sup>44</sup> Further, the court warned that a criminal contempt charge against Barnett could be forthcoming.<sup>45</sup>

## II. THE RIOT

On September 29, 1962, President John F. Kennedy became personally involved in the Meredith matter. In a telephone discussion with Governor Barnett, the President reasoned, "I don't know Mr. Meredith and I didn't put him in the University, but on the other hand under the Constitution, I have to carry out the orders of the Court . . . I would like to get your help in doing it."<sup>46</sup> After the telephone call, the President turned to the Attorney General and said "You know what that fellow said? He said, 'I want to thank you for your help on the poultry problem.'"<sup>47</sup> Despite Barnett's attempt to avoid the issue, the parties reached an agreement that Meredith would enroll on Sunday, September 30, 1962, at the Oxford campus.

This would be the final showdown. Enrollment was planned for a Sunday with the hope that few people would be on campus following an "away" football game.<sup>48</sup> A sizable force of over 400 marshals, equipped with gas masks and tear-gas dispensers, has assembled.<sup>49</sup> They wore side-arms hidden in shoulder holsters under their jackets.<sup>50</sup> Upon their arrival at Oxford, the marshals positioned themselves around the University administration building, the Lyceum.<sup>51</sup> There, they acted as decoys to draw attention from Baxter Hall, the men's dormitory in which Meredith would be stationed under the protection of marshals. They were clearly discernible in their white helmets marked "U.S. Marshal", business suits, bright orange riot vests, and arm bands.<sup>52</sup>

Upon the arrival of the marshals, a crowd began to gather on the Oxford campus. More and more people streamed in throughout the evening, reaching an estimated number of nearly 2,000.<sup>53</sup> As the crowd grew into a mob, individual insults turned into group-chanted threats. The verbal assaults were then accompanied by physical assaults; the marshals were spat upon and pelted with an array of items, from cigarette butts to bricks.<sup>54</sup> By 7:30 p.m.

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42. *Id.* at 236.

43. *Id.*

44. *Id.*

45. *Meredith*, 313 F.2d at 533 (1962).

46. SCHLESINGER, *supra* note 3, at 318.

47. *Id.* at 320-21.

48. CIVIL RIGHTS 1960-66 (L. SOBEL ed. 1967). It has been suggested that Saturday game day might have been the best day to register Meredith as most of the students would be away at the game. SCHLESINGER, *supra* note 3, at 321. This assumes that the students would be the only source of trouble, but the facts proved otherwise.

49. P. SCHEIPS, *Enforcement of the Federal Judicial Process by Federal Marshals*, in BAYONETS IN THE STREETS (R. Higham ed. 1969).

50. *Id.*

51. *Id.* at 46-47.

52. *Id.* at 47.

53. *Id.*

54. *Id.*

that evening, the mob began attacking innocent bystanders, news reporters, photographers, and the marshals.<sup>55</sup>

The local police gave the marshals little support. Within a short time, most of the local police had vanished from the scene. Some of the local police were helpful.<sup>56</sup> On the other hand, a staff member of the Navy ROTC reportedly saw and heard a highway patrolman explain to some rioters how to make a molotov cocktail.<sup>57</sup>

The rioting greatly escalated, even as President Kennedy delivered a nationally televised address on the situation at Ole Miss.<sup>58</sup> The rioting mob outnumbered the federal marshals by at least three to one.<sup>59</sup> Under siege, with many injured, the marshals followed the President's personal order not to shoot except to protect Meredith's life.<sup>60</sup> As they were under attack for hours, some bleeding, the marshals were ordered to protect themselves by discharging tear gas into the rioting mob.<sup>61</sup>

News of the extent of the riot had not reached the President by the time of the broadcast. The President had prepared a speech for a different, more peaceful occasion. His speech told of his belief that Meredith's safety could be realized by local responsibility under the federal concept: "Even among law-abiding men few laws are universally loved. But they are uniformly respected and not resisted."<sup>62</sup> The President appealed to the students at the university to act with that same sense of honor "[won] on the field of battle and on the gridiron. . . ."<sup>63</sup> He was unaware of the growing threat of outside agitators, many of whom might be armed. He continued, "You have a new opportunity to show that you are men of patriotism and integrity. For the most effective means of upholding the law is not the state policemen, or the marshals, or the National Guard. It is you."<sup>64</sup> There is no reason, he concluded "why the books on this case cannot now be quickly and quietly closed . . . ."<sup>65</sup>

At the end of his broadcast, the President received word that his words were falling on deaf ears. The President reacted by calling Governor Barnett to urge him to restore peace.<sup>66</sup> The Governor replied that he could go to Oxford with a mike to announce that Meredith would be removed.<sup>67</sup> It was actually over three hours after the rioting was beyond control that Barnett made his first public gesture towards law and order by broadcasting a request that everyone vacate the area.<sup>68</sup> Later Robert Kennedy reflected on his brother's agony:

"It was a nervous time for the President because he was torn between, per-

55. BARRETT, *supra* note 31, at 144-45.

56. SCHEIPS, *supra* note 49, at 47; BARRETT, *supra* note 31, at 155; READ, *supra* note 6, at 241.

57. BARRETT, *supra* note 31, at 157-58; READ, *supra* note 6, at 244.

58. READ, *supra* note 6, at 240-41; BARRETT, *supra* note 30, at 148-49; W. LORD, *THE PAST THAT WOULD NOT DIE* (1965) at 211-12.

59. SCHEIPS, *supra* note 49, at 47.

60. READ, *supra* note 6, at 246.

61. SCHEIPS, *supra* note 49, at 47; READ, *supra* note 6, at 240-41.

62. READ, *supra* note 6, at 240-41; LORD, *supra* note 58, at 211-12.

63. Public Papers of the Presidents of the United States: John F. Kennedy, 1962, Number 420 at 728.

64. READ, *supra* note 6, at 241; LORD, *supra* note 58, at 211-12.

65. *Public Papers, supra*, note 63 at 728.

66. READ, *supra* note 6, at 243; LORD, *supra* note 58, at 219.

67. *Lord, supra* note 58.

68. READ, *supra* note 6, at 241.

haps an Attorney General who had botched things up and the fact that the Attorney General was his brother. . . . We could visualize another great disaster, like the Bay of Pigs, and a lot of marshals being killed or James Meredith being strung up."<sup>69</sup>

The Administration had prepared for the possibility of the use of troops. Days before the issuance of the permanent injunction to enroll Meredith, the Department of the Army realized that it might have to support the marshals.<sup>70</sup> The plans included a force of over 4,000 military police and infantry troops with five task forces which would be staged at Memphis Naval Air Station at Millington, Tennessee.<sup>71</sup> When the marshals were sent in, almost five thousand federal troops were on alert at the Memphis Station and near Oxford, including helicopters manned by members of a Marine Air Group.<sup>72</sup> Additionally, over three thousand men of the Mississippi National Guard were ready to be federalized under President Kennedy's order.<sup>73</sup> On September, 28, 1962, two days before the riot, as maps of Mississippi were unrolled in the Pentagon War Room, Robert Kennedy told one of his aides that he understood now how Hitler had taken over Germany: "Everyone in Mississippi is accepting what this fellow [Barnett] is doing. There are no protests anywhere — from the bar or from professional men or from professors. I wouldn't have believed it."<sup>74</sup>

Even with this impressive assemblage of military force, the Administration nonetheless had incorrectly assumed that the federal marshals would get the cooperation of the state and local officials to bring about Meredith's enrollment peacefully. Earlier on "riot Sunday," the Attorney General had asked Deputy Attorney General Nicolas Katzenbach whether he had plans for the afternoon; if not, he would be put in charge of the "Oxford operation."<sup>75</sup> The mood was light. Robert Kennedy bade Katzenbach goodbye and good luck, jokingly stating, "If things get rough, don't worry about yourself; the President needs a moral issue."<sup>76</sup> It was about 2:30 p.m. when the Attorney General told Secretary of the Army Cyrus R. Vance that "the plan was for the marshals to go it alone today."<sup>77</sup>

The Administration had dispatched Katzenbach to run operations in Oxford because of his known stance against the use of troops. So it was a great surprise when Katzenbach, faced with the possibility of further injury to the marshals and threats of increased violence, telephoned Washington to advise the President to call in the troops.<sup>78</sup>

Norbert Schlei, of the Office of Legal Counsel, had just completed drafting the Executive Order and Proclamation which the President would have to sign to call out the troops, when he received a telephone call from Burke Marshall. "The deal is off," Marshall said, "The President wants to sign those

69. SCHLESINGER, *supra* note 3, at 324.

70. SCHEIPS, *supra* note 49, at 44-45.

71. *Id.*

72. SCHEIPS, *supra* note 49, at 46.

73. *Id.*

74. Schlesinger, *supra* note 3, at 320.

75. *Id.* at 322.

76. *Id.*

77. SCHEIPS, *supra* note 49, at 46.

78. SCHEIPS, *supra* note 49, at 47-48; READ, *supra* note 6, at 243.

documents. Go down and see him.”<sup>79</sup> Accordingly, under Executive Order No. 11,053, the President claimed the power to call out the troops.<sup>80</sup> Under recognized procedure, President Kennedy issued a proclamation ordering persons obstructing justice in Mississippi to desist and disperse. He also issued an executive order authorizing the Secretary of Defense to federalize the Mississippi National Guard.<sup>81</sup>

Understandably then, when the troops were called in, they were not prepared. Secretary of the Army Vance promised the President quick action, only to discover that in Memphis the troops had gone off alert after hearing the President’s speech reassuring a peaceful settlement of the matter.<sup>82</sup> The soldiers were armed only with demonstration-control nightsticks, not terribly useful against shotguns and molotov cocktails.<sup>83</sup> Katzenbach later accounted, “So they stood out in the dark at Memphis opening crates of guns and opening crates of [tear] gas . . . by flashlight.”<sup>84</sup>

Two hours after his initial request, Katzenbach asked the White House about the whereabouts of the Army.<sup>85</sup> Theodore Sorensen, who was present at the White House, said that the President “cursed himself for ever believing Barnett and for not ordering the troops sooner.”<sup>86</sup> The President called Vance at the Pentagon and General Creighton Abrams in Memphis. Robert Kennedy later recalled this call as “the worst and harshest conversation with [anyone] that I think I’ve ever heard him [President Kennedy] conduct.”<sup>87</sup>

At Oxford, things were looking bleak for the embattered marshals. With the President’s order, Katzenbach directed a company of the Mississippi National Guard, stationed at the Oxford Armory, to support the marshals on the campus.<sup>88</sup> A skeptical company commander confirmed Katzenbach’s authority with his commander and then led his men in three trucks and four jeeps through bottle, brick, and blockade to reach the campus.<sup>89</sup> Unfortunately, the small force of obedient Mississippians added little more than additional targets for the rioters.<sup>90</sup>

At the White House, the President continued to demand relief for the marshals. Secretary of the Army Vance reassured the President that the troops were on the way.<sup>91</sup> In fact, they were not, as Robert Kennedy recounted later:

That happened six, eight, ten times during the course of the evening. ‘They’re leaving in twenty minutes.’ We’d call twenty minutes later, and they hadn’t even arrived to get ready to leave. ‘They’re ready to go now,’ and they hadn’t been called out of their barracks to get into the helicopters yet. ‘They’re in the helicopters now.’ They were just forming up. ‘The first helicopter’s leaving and will be there in forty minutes.’ The first helicopter

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79. NAVASKY, *supra* note 23, at 230; READ, *supra* note 6, at 243.

80. RACE REL. LAW REP. 764 (1962).

81. *Id.*

82. SCHLESINGER, *supra* note 3, at 323.

83. *Id.*

84. *Id.*

85. *Id.*

86. SCHLESINGER, *supra* note 3, at 325.

87. *Id.* at 324.

88. SCHEIPS, *supra* note 49, at 48; READ, *supra* note 6, at 244-45.

89. LORD, *supra* note 58, at 221-22; READ, *supra* note 6, at 244-45.

90. LORD, *supra* note 60, at 221-22; READ, *supra* note 6, at 244-45.

91. SCHLESINGER, *supra* note 3, at 323.

went in the air and then circled and waited for the rest of the helicopters. You know, all that kind of business . . . [t]hey said they'd get there in two hours if I gave them the notice- they didn't arrive for five hours . . . it was so frustrating for the Army to continuously give false, wrong, inaccurate information.<sup>92</sup>

The arrival of the troops in Oxford came only with continued, agonizing delay. A company of troops, an advance unit of a military police battalion, arrived by helicopter at the University-Oxford Airport at two in the morning.<sup>93</sup> This was over six hours after reports of hidden snipers shooting at the marshals.<sup>94</sup> Earlier attempts to land on the campus itself had been unsuccessful.<sup>95</sup> The field marshal added further delay when he waited for his whole force to disembark and fall in before marching to the campus a half mile away.<sup>96</sup> Feeling great pressure, the President sent the commander an order for action:

"People are dying in Oxford. This is the worst thing I've seen in forty-five years. I want the military police battalion to enter the action. I want [the commander] to see that this is done."<sup>97</sup>

With this direct order, the battalion, marched to the Lyceum with bayonets affixed to their rifles.<sup>98</sup>

The remaining units of the military police battalion drove from Memphis and was assaulted along the way. Would-be saboteurs dropped a railroad tie from a railroad overpass onto a passing army truck, adding to the delay.<sup>99</sup> In the end, it took them over an hour to make the last half mile.<sup>100</sup> Once the Army reached Oxford, they routed the rioters and took over two hundred prisoners, twenty-four of whom were Ole Miss students.<sup>101</sup> At 6:15 a.m. on the morning of October 1, 1962, the company commander announced that the area was secured, over eight hours after the rioting had reached a heated level.<sup>102</sup>

In addition to property damage, at least 160 marshals were injured, some severely.<sup>103</sup> One marshal almost died from a gunshot to the neck. Twenty-seven other marshals suffered from gunshot wounds as well.<sup>104</sup> Sixteen of the Mississippi National Guard were injured.<sup>105</sup> Beyond this, two civilians died as a result of the riot.<sup>106</sup> The cost of resistance, in injury and in human life, had been high.

Later, the Attorney General reflected that once the shooting started, "the

92. *Id.* at 323-24.

93. SCHEIPS, *supra* note 49, at 48; READ, *supra* note 6, at 245.

94. READ, *supra* note 6, at 239-41.

95. READ, *supra* note 6, at 245.

96. SCHLESINGER, *supra* note 3, at 324.

97. *Id.*

98. SCHEIPS, *supra* note 49, at 48; READ, *supra* note 6, at 245.

99. READ, *supra* note 6, at 245.

100. SCHLESINGER, *supra* note 3, at 324.

101. READ, *supra* note 6, at 246.

102. SCHEIPS, *supra* note 49, at 48. Despite this announcement, rioting broke out in downtown Oxford at about 9 a.m., Oct. 1 and continued until near noon. The crowd, which had been beating soldiers, Blacks and newsmen, dispersed once the troops fired over their heads.

103. READ, *supra* note 6, at 246; SCHEIPS, *supra* note 49, at 48.

104. NAVASKY, *supra* note 23, at 235; SCHEIPS, *supra* note 49, at 48.

105. SCHEIPS, *supra* note 49, at 48-51.

106. *Id.* at 49; NAVASKY, *supra* note 23, at 235; READ, *supra* note 6, at 246.

only way to deal with that kind of operation is to have overwhelming force. The question of the evening would have been quite different if the troops had gotten there at the time they were supposed to have gotten there."<sup>107</sup> Still, Robert Kennedy took the blame for the incident, "I was the Attorney General. The fact that I said that the troops would arrive and they didn't was my fault."<sup>108</sup>

The Administration continued to dispatch more troops in anticipation of more riots. By October 2, 1962, there was a military build-up of about 14,700 troops including about 12,000 regulars deployed in the Oxford area.<sup>109</sup> Within four days, an overwhelming force of over 30,000 troops were made available for the Oxford operation, including about 10,000 federalized Mississippi Guard troops.<sup>110</sup>

When it was clear that the riots were over, troop deployment to regular duty stations quickly followed. By November, only two Regular military police companies and certain staff officers, 402 men in all, remained in Oxford.<sup>111</sup> The following month, this force was further reduced to only one company.<sup>112</sup> By July, 1963, with most of the troops withdrawn, 151 men remained as a protective force for Meredith.<sup>113</sup>

Following the deployment of troops, the Administration withdrew most of the federal marshals. A small group of about two dozen marshals took the place of almost 400 men with the Army still present. By mid-October 1962, only twelve remained and continued to provide Meredith with around-the-clock protection.<sup>114</sup>

### III. SIMPLE JUSTICE AND FEDERALISM

On the first of October, 1962, James Meredith was registered as a student at the University of Mississippi, almost two years after his initial application for admission.<sup>115</sup> The cost of his admission was sudden and tragic: it had cost Meredith much anxiety, two men their lives, others multiple injuries, \$5 million of the nation's treasury and President Kennedy much grief.<sup>116</sup>

The vehemence of the opposition to court ordered desegregation is not alone responsible for the tremendous price that was paid for Meredith's admission to Ole Miss. Given the level of opposition as it developed, it was important and necessary that the federal government respond vigorously. The confluence of opposition and response was responsible for the tragedy at Oxford. President Kennedy's retrospective statement on the matter put it well:

This country, of course, cannot survive if the United States Government and the executive branch do not carry out the decisions of the court. It might be a decision in this case which some people may not agree with. The next time it might be another matter, and this Government would unravel very fast.

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107. READ, *supra* note 6, at 240-41.

108. T. C. SORENSON, KENNEDY (1965).

109. SCHEIPS, *supra* note 49, at 48.

110. *Id.*

111. SCHEIPS, *supra* note 49, at 50.

112. *Id.*

113. *Id.*

114. READ, *supra* note 6, at 246.

115. READ, *supra* note 6, at 246.

116. SCHEIPS, *supra* note 49, at 48.

So there's no question in my mind that the United States executive branch had to take the action it did.<sup>117</sup>

Yet, it must be said that the Kennedy Administration failed in its handling of the Meredith affair, and that failure lies in the Administration's failure to properly identify the operative constitutional issue in question. The Administration wrongly viewed comity, courtesy between the federal government and the states, as the operative principle. That comity was uppermost in the mind of the Administration was explained by the Justice Department's Civil Rights Chief Burke Marshall during his lecture at Columbia University on "Federalism and Civil Rights."<sup>118</sup> While agonizing over the conflict between protecting the civil rights of individuals and giving deference to the position of local officials, Marshall noted that states' rights should take precedence because "law enforcement is primarily and ultimately a state or local responsibility."<sup>119</sup>

No doubt comity between and among governments is a virtue in a federal system that abhors constitutional crisis. But the Constitution, laws and court pronouncements of the federal government are "the supreme Law of the Land,"<sup>120</sup> and when governmental officials of the state of Mississippi sought to oppose the court's order to admit James Meredith, the operative constitutional principle was not longer comity but instead the supremacy of federal law. Judge John Minor Wisdom was right on target when he later summarized what the Meredith affair meant in constitutional terms:

[T]he significance of this case (U.S. v. Barnett) for the public lies in. . .the contempt of a Governor of a State against a Nation, against American federalism, as established in the constitution and as defined by the federal courts. The serious threat Governor Barnett posed was to the constitutional relationship of the states to the National Government. . . What cannot be overestimated. . .is the importance of federal courts standing fast in protecting federally guaranteed rights of individuals. To avoid further violence and bloodshed, all state officials, including the governor, must know that they cannot with impunity flout federal law.<sup>121</sup>

117. CHASE & A. LERMAN, KENNEDY AND THE PRESS, THE NEWS CONFERENCE (1965).

118. B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964).

119. *Id.* at 67-68 *passim*; SCHLESINGER, *supra* note 3, at 304-5.

120. Article VI, Clause 2 of the U.S. Constitution reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Citing *Marbury v. Madison*, U.S. (1 Cranch) 137(18), for the proposition that "It is emphatically the province and duty of the judicial department to say what the law is," *id.* at 177, in *Cooper v. Aaron*, 358 US 1 (1958), the Supreme Court opined that "It follows that [an] interpretation [of the federal Constitution or federal law] by this Court . . . is the supreme law of the land, and Art VI of the Constitution makes it of binding effect on the states . . ." *Id.* at 17.

121. *U.S. v. Barnett*, 346 F.2d 98 at 107 (5th Cir. 1965). On April 9, 1963, the Fifth Circuit, sitting *en banc*, split four-four on the question of whether Ross Barnett was entitled to a jury trial on criminal contempt charges against him. The issue of jury trial was complex and was certified to the U.S. Supreme Court. The Supreme Court held that Barnett was not entitled to a jury trial, with the caveat: "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty for petty offenses" [i.e. six months]. 376 U.S. 681, at 695, n.12 (1964). This put the Fifth Circuit in a "Catch-22" position: If it imposed a serious penalty, as some of its members were inclined to do in light of the severity of the offense, there would have been a right to trial by an all-white jury in Mississippi which would surely acquit Barnett. On the other hand, to avoid acquittal by jury, they

It was the Kennedy Administration's misplaced emphasis on comity that caused the Administration to fail to anticipate the strong resistance that the power structure in Mississippi would have to desegregation, and led to the tactical mishandling of the Meredith affair. Confusion as the true constitutional issue caused the Administration to ignore the lessons of the past like those provided by the Eisenhower Administration in the Little Rock desegregation crisis,<sup>122</sup> lessons that predicted the obstinate resistance of Mississippi state officials. Fortunately, the Meredith affair was a valuable lesson for one official of the Johnson Administration who later observed:

History has born out that Robert Kennedy's tactics were wrong. Everyone agrees that the states have the first responsibility. But how do you get them to exercise it? By telling them you don't have the power? Our theory is you tell them, 'If you don't do it, we will.' The Mississippi State Highway Patrol didn't start doing its job until the Bureau sent a hundred agents to Jackson in 1964. In that respect the Justice Department was late.<sup>123</sup>

It was the Kennedy Administration's misplaced emphasis on comity that caused Black leaders at the time to doubt the sincerity and resolve of the Kennedy Administration's commitment to racial equality. Martin Luther King, Jr. and James Baldwin reportedly reacted to the Administration's handling of the Meredith affair with despair:

It was not only the clumsiness and hesitancy with which the whole business was handled that depressed them, but the lack of moral conviction in the President's remarks as he spoke patronizingly of war heroes and football stars to the rioting students and yahoos in Oxford that awful Sunday night.<sup>124</sup>

King felt that the behind-the-scene dealings with Barnett "made Negroes feel like pawns in a white man's political game."<sup>125</sup> The opinions of these and other black leaders were hardly tempered by the fact that no one was ever convicted for participating in the Oxford riot.<sup>126</sup> The Kennedy Administration, having learned the hard way, later heeded the lessons of Oxford. When a federal court ordered the desegregation of the University of Alabama a year later and Alabama's Governor George Wallace barred the university's doors the Kennedy Administration was ready to respond with massive federal force and Wallace relented.<sup>127</sup>

This difference in the conduct and eventual outcome of the desegregation crisis in Alabama, in a state with a reputation for racism no less than that of Mississippi, suggests that a more perceptive strategy and more decisive tactics

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would have to levy a modest penalty, which some of the court's members felt would make a mockery of the criminal contempt order.

122. See R. Diamond, "Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Crisis," 11:2 NAT'L BLACK L.J. 151 (1989).

123. NAVASKY, *supra* note 23, at 172, quoting William Taylor, Staff Director of the Civil Rights Commission under President Johnson.

124. SCHLESINGER, *supra* note 3, at 327.

125. *Id.*

126. READ, *supra* note 6, at 246.

127. M. Frady, *Wallace* 148-170 (1968); J. Carlson, *George C. Wallace and the Politics of Powerlessness* 24-26 (1981); B. Jones, *The Wallace Story* 79-104 (1966). See also *Crisis: Behind a Presidential Commitment* (ABC News film, 1963) (available through Direct Cinema, Ltd.). To be sure, the Kennedy Administration attempted to resolve the expected confrontation through compromise. Attorney General Robert Kennedy's somewhat naive efforts in this regard during a personal meeting with Governor Wallace are related from a tape recording in M. Frady, *Wallace*, 151-169 (1968).

on the federal government's part might have lessened the tremendous price that was paid for desegregation at Ole Miss. In this is the tragedy of the Oxford affair, not that riots occurred or that lives were lost, but that through incisive early action by the federal government, the riot might have been avoided.