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United States Commission on Civil Rights
1965



**A REPORT ON EQUAL
PROTECTION IN THE
SOUTH**

United States Commission on Civil Rights
1965

Members of the Commission

JOHN A. HANNAH, *Chairman*

EUGENE PATTERSON, *Vice Chairman*

FRANKIE M. FREEMAN

ERWIN N. GRISWOLD

REV. THEODORE M. HESBURGH, C.S.C.

ROBERT S. RANKIN

WILLIAM L. TAYLOR, *Staff Director*

LETTER OF TRANSMITTAL

THE UNITED STATES COMMISSION ON CIVIL RIGHTS
Washington, D.C., November 4, 1965.

THE PRESIDENT

THE PRESIDENT OF THE SENATE

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The Commission on Civil Rights presents to you this report pursuant to Public Law 85-315 as amended.

The report presents and analyzes information concerning discriminatory law enforcement practices in several southern communities. This information was obtained by the Commission from extensive investigations in 1964 and a public hearing held in Jackson, Mississippi, in February 1965. The Commission has found that too often those responsible for local law enforcement have failed to provide equal protection of the laws to persons attempting to exercise rights guaranteed to them by the Constitution and the laws of the United States.

Because of the seriousness of the problem and the ineffectiveness of existing remedies, we urge your consideration of the facts presented and of the recommendations for corrective action.

Respectfully yours,

JOHN A. HANNAH, *Chairman*
EUGENE PATTERSON, *Vice Chairman*
FRANKIE M. FREEMAN
ERWIN N. GRISWOLD
REV. THEODORE M. HESBURGH, C.S.C.
ROBERT S. RANKIN

ACKNOWLEDGMENTS

This report would not have been possible without the cooperation of many private citizens and government officials.

The Commission acknowledges the generous assistance of many Federal officials who assisted the staff in ways too numerous to mention. Particular mention should be made of John Doar, Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, and representatives of the Federal Bureau of Investigation, who assisted the staff in its investigation and preparation for the hearing; officials of the Veterans Administration, who permitted the Commission to use the Jackson Veterans Administration Center for its hearing; and the United States Marshal and his staff in Mississippi, who provided a variety of services.

The Commission is grateful to the many private citizens and public officials who gave generously of their time and knowledge to Commission staff members who visited their communities.

Beginning in 1961, the Mississippi State Advisory Committee to the U.S. Commission on Civil Rights, now under the leadership of Dr. A. B. Britton, Jr., sponsored public meetings throughout the State to provide Mississippi citizens of both races the opportunity to discuss the State's civil rights problems. In some communities, the meetings were a dangerous enterprise as well as a novel and difficult undertaking. Members of the Advisory Committee braved pressure and criticism in their own communities as they made a significant contribution to the improvement of race relations in Mississippi.

Finally, the Commission is indebted to the staff of the General Counsel's office which carried these projects to successful completion under the able and vigorous leadership of William L. Taylor, now Staff Director of the Commission. The present

General Counsel, Howard A. Glickstein, and the former Deputy General Counsel, Michael O. Finkelstein, directed the following members and former members of the Commission staff in the investigations, the conduct of the hearing, and the preparation of this report and the previously published report, *Voting in Mississippi*: Klaire V. Adkins, Jeffrey M. Albert, Robert H. Amidon, Mary V. Avant, Edward B. Beis, Richard F. Bellman, Gwendolyne T. Belva, John G. Birkle, Joyce M. Butler, Robert A. Cook, Jonathan W. Fleming, Sandra E. Ford, M. Carl Holman, Charles C. Humpstone, Clarence H. Hunter, Ivan E. Levin, Louise Lewi-son, Roy Littlejohn, JoNell M. Monti, Elisabeth I. F. Murphy, Brian M. Olmstead, Beryl A. Radin, Leda Rothman, Samuel J. Simmons, Betty K. Stradford, Naomi S. Tinsley, and Edwin D. Wolf.

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INTRODUCTION

[A]ll executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution. . . . [U.S. Constitution, article VI, § 3]

I, . . . do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; . . . [Miss. Constitution, article 14, § 268—Oath of Office Required of Public Officials in Mississippi.]

For those in authority . . . to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. [Mr. Justice Frankfurter, *concurring in Cooper v. Aaron*, 358 U.S. 1, 22 (1958)].

This report is a study of the failure of local officials in several Southern States to adhere to their oath of office to support the Federal Constitution. The Commission, since its inception, has continually received and investigated complaints from many States, particularly in the South, that local law enforcement officials were depriving American citizens of their constitutional rights. In an interim report issued in 1963, the Commission found that there had been “open and flagrant violation of constitutional guarantees in Mississippi.”

In 1964 the Commission staff began investigations in Mississippi, Alabama, Georgia, and Florida, which focused on the failure of local officials to prevent or punish acts of racial violence and on interference by these officials with the assertion of constitutional and statutory rights by Negroes, including the right of public protest. The cities studied in the initial investigation—Greenwood and Jackson, Mississippi; Gadsden, Alabama; St. Augustine, Florida; and Americus, Georgia—were chosen because the Commission had received complaints that in each of these communi-

ties attempts by Negroes to assert rights consistently met with violence and suppression. The allegations indicated that instrumentalities of local government were being used to preserve the traditional subservient position of the Negro.

These and earlier investigations indicated that, although problems of racial violence and discrimination in law enforcement existed in a number of States, the problems were most serious and widespread in Mississippi. Accordingly, the Commission decided to hold an open hearing in Mississippi to assess objectively and in context the status of law enforcement in that State. The Commission recognized that an in-depth study of one State would not necessarily imply that similar practices existed in communities throughout the South. Comparable complaints, however, from a number of communities elsewhere in the South suggested that verification of some complaints would confirm the existence of a wider problem.

In preparing for the hearing, the Commission staff visited numerous counties where widespread racial violence had occurred or where particular problems of law enforcement were reported to exist. The counties finally chosen for presentation at the hearing were located in different parts of the State: Adams and Pike Counties in the southwest; Jones County in east central; Madison County, north of Jackson; and Leflore and Washington Counties in the Delta. The Commission staff visited these counties and interviewed victims of racial violence and local officials responsible for law enforcement.

The Commission's hearings were held in Jackson in February 1965. In accordance with the statute regulating such hearings, the Commission first met in executive session on February 10-11 at the Federal courthouse. At this time it afforded an opportunity for persons whom it determined might be defamed, degraded, or incriminated in public testimony to be heard privately. Notices were sent to 32 persons, 10 of whom appeared. Portions of this testimony, determined by the Commission not to degrade, defame, or incriminate, have been used in this report.

The public sessions of the hearing were held in the auditorium of the Veterans Administration Center in Jackson beginning on February 16 and continuing through February 20, 1965. The first portion of the hearing dealt with denials of the right to vote to Negroes, and the Commission has issued a report of its findings on this subject entitled *Voting in Mississippi*. The second part of the hearing was devoted to law enforcement. The more than 30 witnesses included Negro citizens, law enforcement officials, and leaders of both the white and Negro communities. At the conclusion of the hearing, the Commission heard panels of Mississippi attorneys, businessmen, and religious leaders who discussed the racial problems of their State. All of these proceedings were open to the public, were well attended and widely publicized.

This report reflects the results of the Commission's hearing in Mississippi and its staff investigations in that State and in Alabama, Florida, and Georgia. The results of these investigations are reported in Part I. In appraising the effectiveness of existing Federal remedies, the Commission staff analyzed legal authority and held conferences with a number of Federal law enforcement officials including representatives of the Civil Rights Division of the Department of Justice, the Office of the United States Marshal, and the Federal Bureau of Investigation. The results of this appraisal appear in Part II. Part III of the report contains findings and recommendations.

Since the Commission's investigation and hearing, prominent citizens in some southern communities have issued public statements calling for impartial and effective law enforcement. Nevertheless, serious racial crimes continue in certain areas and some local officials fail to prevent or punish them. The persistence of unpunished racial crimes emphasizes the need for additional Federal action to secure to all Americans the equal protection of the laws guaranteed by the Constitution.

PART I.

DENIALS OF CONSTITUTIONAL RIGHTS

CHAPTER 1.

THE LEGACY OF VIOLENCE

Racial violence against Negroes in the South is lawlessness with a history and a purpose. First with explicit and then with implicit legal sanction, violence has been used since the early days of slavery to maintain and reinforce the traditional subservient position of the Negro. Contemporary problems of violence against Negroes should be viewed in the context of this long history.

SLAVERY

Negro slaves in the early days of slavery had "no rights which the white man was bound to respect."¹ Slaves were considered property, without personal rights, and thus were unprotected by the general criminal laws applicable to other persons.² Although in the late 18th century some slaveholding States began to pass special statutes making certain types of violence against slaves—such as murder or manslaughter—punishable criminal offenses,³ in practice these statutes offered slight protection to Negroes. Not all types of criminal assault were interdicted,⁴ and a

¹ Taney, C. J., in *Scott v. Sanford*, 60 U.S. (19 How.) 690, 701 (1856).

² See Cobb, *The Law of Negro Slavery* §§ 83-93 (1858).

³ Compilations of these statutes may be found in Cobb, *op. cit. supra* note 2, § 87 n. 2; and in Stroud, *Sketch of the Laws Relating to Slavery* 36-40 (1827).

⁴ Cobb, *op. cit. supra* note 2, § 95; Henry, *Police Control of the Slave in North Carolina* 75 (1914). See, e.g., *Commonwealth v. Booth*, 2 Va. Ca. 394, 1 Catterall 139 (1824) (assault); *State v. Piver*, 2 Haywood 79, 2 Catterall 15 (N.C. 1799) (manslaughter). In some States, fugitive slaves were declared outlaws and could be killed or assaulted with impunity. Cobb, *op. cit. supra* note 2, §§ 113-20; Henry, *supra* at 37; Stroud, *op. cit. supra* note 3, at 100-05.

slave was not permitted to testify against a white man.⁵ As a result, most violence against slaves was either not punishable or not punished by the law.

In theory, free Negroes were protected by the criminal law. But, in fact, they fared little better than the slave, since almost any conduct, such as "impertinence," was deemed sufficient provocation to justify an assault by a white man.⁶ The free Negro, like the slave, was not permitted to testify against his white assailant.⁷ Free Negroes could lawfully be stopped at night and whipped by white vigilante patrols if they failed to produce written proof of emancipation.⁸

The legal relationships inherent in the institution of slavery established a tradition of Negro inequality which continued after emancipation and the end of the Civil War. As one authority commented: "[W]hite people during the long period of slavery became accustomed to the idea of 'regulating' Negro insolence and insubordination by force with the consent and approval of the law."⁹

RECONSTRUCTION

In March 1865 Congress established the Bureau of Refugees, Freedmen and Abandoned Lands—known as the Freedmen's Bureau—to protect and assist the former slaves.¹⁰ From its inception the Bureau was deeply involved in the administration of justice. The continuing refusal of State courts to accept the testimony of a Negro against a white led to the establishment of Freedmen's Bureau courts to adjudicate civil and criminal cases

⁵ Cobb, *op. cit. supra* note 2, § 104; Stroud, *op. cit. supra* note 3, at 66.

⁶ See, e.g., *Ware v. Canal Co.*, 15 La. 169, 3 Catterall 525 (1840); *State v. Harden*, 2 Speers 152, 156, 2 Catterall 350 (S.C. 1832) ("... words of impertinence . . . addressed by a free Negro, to a white man, would justify an assault and battery."); *State v. Jowers*, 11 Iredell 555, 2 Catterall 151 (N.C. 1850) (free Negro's insolence to white excuses assault because he "has no master to correct him.").

⁷ See note 5 *supra*.

⁸ See Cobb, *op. cit. supra* note 2, §§ 113-15; Henry, *op. cit. supra* note 4, at 28-52.

⁹ Johnson, "Patterns of Race Conflict," in *Race Relations and the Race Problem* 125, 130 (Thompson ed. 1939).

¹⁰ Act of March 3, 1865, ch. 90, 13 Stat. 507.

between the races.¹¹ In the fall of 1865 the Southern States reacted to the intrusion of these Federal courts by passing laws which extended the protection of most of the general criminal laws to Negroes and permitted them to testify against whites.¹² Where such laws were passed, Freedmen's Bureau courts were abolished or suspended and full responsibility for the administration of justice with respect to Negroes was returned to the States. Local Bureau agents, however, continued to attend trials involving Negroes and to report incidents of discriminatory treatment.¹³ These reports and subsequent congressional investigations revealed that despite a theoretical improvement in legal status, Negroes remained virtually unprotected by State criminal processes.

In the winter of 1865-66, the Joint Congressional Committee on Reconstruction conducted the first Federal investigation of racial violence in the South. After hearing extensive testimony, the Committee concluded that emancipated slaves were subjected to acts of "cruelty, oppression, and murder, which the local authorities were at no pains to prevent or punish."¹⁴ There was ample evidence to support this conclusion. In southwest Mississippi, for example, during a four-day period in November 1865 more than 50 Negroes reported to the local Freedmen's Bureau that they had been whipped and assaulted by white men. These complaints were then referred to the civil authorities, but, with one exception, no action was taken.¹⁵ Similar conditions were said to exist in western Mississippi. A Freedmen's Bureau official there stated in a report:

[A]s to protection from the civil authorities, there is no such thing outside of this city. There is not a justice

¹¹ Bentley, *A History of the Freedmen's Bureau* 64-68 (1954).

¹² *Id.* at 167. See, e.g., Miss. Laws 1865, ch. IV, at 82.

¹³ Bentley, *op. cit. supra* note 11, at 156.

¹⁴ *Report of the Joint Committee on Reconstruction*, H.R. Rep. No. 30, 39th Cong., 1st Sess. vii, xvii (1866). Although there was widespread criticism of the report itself, other investigators with differing viewpoints reached similar conclusions. Compare *Report of Benjamin C. Truman Relative to the Condition of the Southern People and the States in Which the Rebellion Existed*, S. Exec. Doc. No. 43, 39th Cong., 1st Sess. 1, 10-11 (1866).

¹⁵ *Report of the Joint Committee, supra*, pt. III, at 184.

of the peace or any other civil officer in the district, eight (8) counties of which I have charge, that will listen to a complaint from a negro. . . .¹⁶

In April 1866, a few months after publication of the Joint Committee Report, the first Federal civil rights act was passed. This act was intended to secure “the full and equal benefit of all laws for the security of person and property for Negroes.”¹⁷ But it was soon evident that legislation alone could not solve the problem. Officials of the Freedmen’s Bureau throughout the South continued to report that it was “almost impossible for Negroes to get justice in the State courts despite the Civil Rights Bill.”¹⁸ A Bureau official in Tennessee reported the murder of 35 Negroes by gangs of whites during an 18-month period and stated that “not one single murderer of this vast number has yet been punished by a court of justice in Tennessee. . . .”¹⁹ An official from the North Carolina Bureau charged:

Sheriffs, constables and magistrates are very unwilling to take cognizance of the complaint of any freedman against a white man and it is only by a reminder from the Bureau agent or military authority that they are induced to do their duty. . . .²⁰

Charges of this nature led first to reactivation of the Bureau courts in 1866 and then to an extension of the Bureau itself by Congress in 1868. It was later estimated that Bureau courts heard as many as 100,000 complaints a year.²¹

After ratification of the 15th amendment, the violence and intimidation which had surrounded attempts by Negroes to vote and

¹⁶ *Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana*, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2, 78 (1865).

¹⁷ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

¹⁸ Bentley, *op. cit. supra* note 11, at 158.

¹⁹ Letter of Ass't. Commissioner Caslin, January 11, 1868, in T. D. Elliot papers (National Archives).

²⁰ Letter of Agent G. S. Hawley, January 15, 1868, in T. D. Elliot papers (National Archives).

²¹ Bentley, *op. cit. supra* note 11, at 152, 158.

to exercise their other newly won rights continued to grow.²² Much of the violence was perpetrated by the Ku Klux Klan which, by 1869, had become a powerful terrorist organization.²³ Attempts by various States to control Klan activities were unsuccessful.²⁴ The growth of vigilante terror led to a second major congressional investigation by a Joint Select Committee in 1871. Lengthy hearings were held on the extent of violence and the conduct of local law enforcement officials in most of the Southern States.²⁵ The purpose was to investigate allegations that the "execution of the laws and the security of life and property were . . . most seriously threatened by the existence and acts of organized bands of armed and disguised men, known as the Ku Klux."²⁶

The testimony was much the same as in 1865. The Lieutenant Governor of Mississippi summed up the experience in his State by testifying that where an outrage against a Negro was involved, "it would have been impossible to have convicted anybody in the State courts as organized." He added that he did not know of a single case in which a white man was convicted for crimes against Negroes and that he knew of only one case in which indictments against whites were returned.²⁷ The sheriff of Lowndes County, Mississippi, reported "six or eight" cases of Negroes whipped by hooded men in his county, but he testified that he had never heard "of a single instance in which they have been brought to justice or punishment in any manner for any of these crimes."²⁸ Although the Mississippi legislature had enacted a law in July 1870 making it a crime for persons "masked or in disguise" to

²² U.S. Commission on Civil Rights, *Freedom to the Free* 46-47 (1963) [hereinafter cited as *Freedom to the Free*].

²³ *Ibid.*

²⁴ *Id.* at 47.

²⁵ *Report of the Joint Select Committee to Inquire Into the Condition of Affairs in the Late Insurrectionary States*, Rep. No. 41, 42d Cong., 2d Sess. (1872). The report and the testimony taken fills 13 volumes. [The report and hearings of this Committee are hereinafter cited as *Select Committee Report*.]

²⁶ *Select Committee Report*, pt. 1, at 2.

²⁷ *Select Committee Report*, pt. 11, at 591.

²⁸ *Select Committee Report*, pt. 12, at 678.

terrorize or beat any person, a year and a half later there had been no prosecutions under this Act.²⁹

Witnesses from Alabama, Georgia, and South Carolina told the same story. The Provisional Governor of Alabama testified that he knew of only one indictment of persons responsible for violence against Negroes and in that case the defendants were acquitted.³⁰ The former Chief Justice of the Alabama Supreme Court stated that he did not know “of any case where they [the Ku Klux Klan] have been punished.”³¹ A former sheriff of Habersham County, Georgia, testified that there had been five or six fatal shootings of Negroes in his county, but that no one had been punished. When asked whether these acts were committed openly, he replied, “There was no masking, and no necessity for masking to shoot a negro in that county.”³² The Attorney General of South Carolina testified, “There have been a great many outrages committed, and a great many homicides, and a great many whippings . . . [but] no convictions, and no arrests. . . .”³³

In its report the Committee concluded that although southern courts and juries generally administered justice fairly, in cases involving the Ku Klux Klan “the evidence is equally decisive that redress cannot be obtained against those who commit crimes in disguise and at night.” The reasons were difficulty of identification, perjured testimony, the Klan oath, and “the terror inspired by their acts, as well as the public sentiment in their favor in many localities, [which] paralyzes the arm of civil power.”³⁴

THE JIM CROW ERA

The 1871 investigation of Klan activity was the last full-scale hearing by the Federal Government on racial violence in the South.

²⁹ *Id.* at 864.

³⁰ *Select Committee Report*, pt. 8, at 92.

³¹ *Id.* at 493.

³² *Select Committee Report*, pt. 6, at 488.

³³ *Select Committee Report*, pt. 3, at 48-49.

³⁴ *Select Committee Report*, pt. 1, at 2-3.

Congressional attention in later years has focused on the narrow problem of lynching. This most violent form of racial attack, defined as an illegal killing by a group of persons "under the pretext of service to justice, race or tradition,"³⁵ became a recurring subject of congressional investigation. Between 1920 and 1950 congressional committees conducted numerous hearings on anti-lynching bills and received testimony on the incidence of lynching and the performance of local law enforcement officials.³⁶

Although lynching statistics do not tell the whole story, they do provide some evidence of the more general problem of racial violence and the failure of law enforcement.³⁷ During the period between 1881, when the first "Jim Crow" law was enacted,³⁸ and 1960, when the "sit-in" campaigns began,³⁹ more than 4,700 lynchings were reported in the United States—3,441 of the victims were Negroes. More than three-quarters of these lynchings occurred in the 11 States of the Old Confederacy, where more than four-fifths of the victims were Negroes. The worst year for lynching was 1892, when 230 such deaths were reported. Since then the number has steadily declined. Not more than 10 have been re-

³⁵ This is the definition in 1951 *Negro Year Book* 276, published by Tuskegee Institute. The standard lynching figures come from research conducted by Tuskegee Institute.

³⁶ *Hearings Before the House Committee on the Judiciary*, 66th Cong., 2d Sess., ser. 14 (1920); *Hearings Before the House Committee on the Judiciary*, 67th Cong., 1st Sess., ser. 10, pt. 1 (1921); *Hearings on S. 121 Before a Subcommittee of the Senate Committee on the Judiciary*, 69th Cong., 1st Sess. (1926); *Hearings on S. 24 Before a Subcommittee of the Senate Committee on the Judiciary*, 74th Cong., 1st Sess. (1935); *Hearings on H.R. 801 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. (1940); *Hearings on S. 42, S. 1352, and S. 1465 Before a Senate Subcommittee on the Judiciary*, 80th Cong., 2d Sess. (1948); and *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 81st Cong., 1st and 2d Sess., ser. 18 (1950).

See also *Hearings on the Ku Klux Klan Before the House Committee on Rules*, 67th Cong., 1st Sess. (1921); and *Hearings on S. Res. 97 Before a Subcommittee of the Senate Committee on Privileges and Elections*, 68th Cong., 1st Sess. (1925), an investigation of Klan influence and violence relating to the nomination and election of Earle B. Mayfield, U.S. Senator from Texas.

³⁷ See, e.g., Alexander, *The Ku Klux Klan in the Southwest* (1965); Ames, *The Changing Character of Lynching* (1942); Chadbourne, *Lynching and the Law* (1933); Raper, *The Tragedy of Lynching* (1933); White, *Rope and Faggot* (1929).

³⁸ Tenn. Laws 1881, ch. 155, at 211.

³⁹ *Freedom to the Free* 176-77.

ported in any year since 1935, and in several years during the 1950's there were no reported lynchings.⁴⁰ Lynchings frequently resulted from the failure of local law enforcement officers to protect a prisoner in their custody. Moreover, in most cases the lynch mob went unpunished, even when the victims were taken from law enforcement officers or when members of the mob bragged about it afterwards.⁴¹ From 1882 to 1940 there were only 40 cases in which lynchers were prosecuted; convictions were obtained in only a handful of these cases.⁴²

RECENT EVENTS

Although there have been few reported lynchings in recent years, such incidents as the murder of three civil rights workers in Neshoba County, Mississippi, in June 1964, clearly indicate that serious acts of violence may result from attempts to exercise Federal rights. During the past 10 years, unofficial reports on the extent and nature of violence show that the increased attempts by Negroes to gain equal rights have been met by repeated violent attack.

The Southern Regional Council estimated there were a total of 225 incidents of racially motivated violence in the South from January 1955 through January 1959. These included six Negroes killed and 73 persons (some of them white) shot,

⁴⁰ 1961 Report of the U.S. Commission on Civil Rights, *Justice* 267-68 [hereinafter cited as *Justice Report*]. In addition to successful lynchings, there were attempted lynchings which were prevented by law enforcement officials or private citizens. From 1913 to 1929, when there were 730 lynchings, an additional 569 were reportedly prevented; from 1937 to 1951, when there were 53 lynchings, an additional 334 were reportedly prevented. Southern Committee on the Study of Lynching, *Lynchings and What They Mean* 25 (1931); Raper, *op. cit. supra* note 37, at 32; 1951 *Negro Year Book* 278.

⁴¹ *Hearings on S. 121, supra* note 36, at 42.

⁴² *Hearings on H.R. 801, supra* note 36, at 60. For other statistics of prosecution for lynching and attempted lynching, see Chadbourn, *op. cit. supra* note 37, at 13-16; *Hearings on S. 121, supra* note 36, at 19; *Hearings Before Subcommittee No. 3, supra* note 36, at 33. For specific cases of failure to prosecute, see *id.* at 51, 146-47, 149. For cases of such failure in situations other than lynching in South Carolina, see *Hearings on H.R. 801, supra* at 98.

beaten, or stabbed. Sixty homes were bombed, burned or otherwise attacked, and six schools and eight churches were bombed or burned. In only a few cases were any persons arrested or prosecuted by local authorities.⁴³

The number of incidents increased greatly after 1961 as a result of organized civil rights activity. In Mississippi alone, from January 1961 through May 1964, more than 150 serious incidents of racial violence were reported.⁴⁴ In the summer of 1964, when civil rights organizations conducted a concerted drive in Mississippi, reports were received of 35 shootings, 30 bombings, 35 church burnings, 80 beatings, and at least 6 murders. In only a few cases were those responsible arrested or prosecuted by local authorities.⁴⁵

The effect of these incidents extends beyond the victims and has a grave impact on the entire community. Every assault or murder which goes unpunished reinforces the legacy of violence—the knowledge that it is dangerous for a Negro to depart from traditional ways. Thus, a vicious attack upon one Negro may deter others from challenging the accepted framework of subservient behavior and status.

In its hearing and staff investigations the Commission sought to determine whether the failure of State and local law enforcement officials to arrest and seek convictions of persons responsible for racial violence constituted a discriminatory failure to enforce State criminal laws. The results of the Commission's inquiries are presented in the following chapters.

⁴³ Southern Regional Council, et al. *Intimidation, Reprisal, and Violence* 15-30 (1959).

⁴⁴ News Release, Voter Education Project, March 31, 1963 (mimeo); U.S. Commission on Civil Rights, Staff Memorandum, "A Chronology of Violence in Mississippi," dated March 23, 1964.

⁴⁵ Herbers, *Communiqué from Mississippi*, N.Y. Times, Nov. 8, 1964, § 6 (Magazine), p. 34.

CHAPTER 2.

FAILURE TO INVESTIGATE AND SOLVE INCIDENTS OF RACIAL VIOLENCE

Local officials in Mississippi today retain primary responsibility for law enforcement as they have since the organization of the Mississippi Territory. During 1963 and 1964 law enforcement officials were confronted with severe outbreaks of racial violence in many parts of the State and, for the most part, failed to apprehend the persons responsible for these acts.¹ The Commission investigated the reasons for such failures at its Mississippi hearing by questioning under subpoena sheriffs and police chiefs from counties where there were frequent and serious incidents of violence.

ADAMS COUNTY

Adams County, in the southwestern corner of the State bordering on the Mississippi River, has a population that is 50 percent Negro. The white community in Adams County has been intensely hostile to any form of civil rights activity. The grand wizard of a State Ku Klux Klan group lives in Natchez,² the county seat, and the Americans for the Preservation of the White Race, another extremist group, was founded there.³ Although there was little civil rights activity in Adams County in 1964,

¹ Federal law enforcement officers were also active in Mississippi during this period. See, e.g., p. 162, *infra*. See generally *FBI Appropriation 1966*, 81-86 (FBI reprint, 1965).

² *Hearings in Jackson, Miss., Before The U.S. Commission on Civil Rights*, February 16-20, 1965, Vol. II, at 153 (1965). [The transcript of the public session is hereinafter cited as "T." and the transcript of the Executive Session is hereinafter cited as "T.E."].

³ Charter of Incorporation, Americans for the Preservation of the White Race, June 25, 1963, on file in the office of the Secretary of State, Jackson, Miss., Book 143, at 25.

efforts of civil rights groups elsewhere in the State touched off a series of violent attacks against local Negroes who were apparently selected at random. In addition, whites in the community who employed Negroes in other than traditional positions, or who were suspected of sympathy with their demands, were harassed or boycotted.⁴ An apparent purpose of this violence was to prevent any assertion of rights to equality by local Negroes.

From September 1963 to September 1964, in Adams County and the surrounding area, four Negroes were whipped and a white civil rights worker assaulted; one Negro was shot and seriously injured, and at least one Negro was murdered. There were also cross-burnings on several occasions and arson attempts on two Negro homes, as well as destruction by fire of four Negro churches and a Negro cafe. A climax was reached on the night of September 26, 1964, when the homes of the mayor of Natchez and a prominent Negro contractor were bombed. Law enforcement authorities failed to solve any of these cases.⁵

Two Negroes who were victims of whippings by gangs of hooded men in Adams County testified before the Commission. Alfred Whitley, a 52-year-old Negro janitor at the Armstrong Tire and Rubber Plant in Natchez, testified that on February 6, 1964, when returning from work, he was stopped near his home by a group of armed and hooded men who blindfolded him and took him in a car to Homochitto National Forest. There they stripped him, told him they knew he was the "leading nigger in Natchez, in the NAACP, and the Masonic Lodge" and demanded to know the identity of his "white leader." When Whitley, who was not a member of either of these organizations, was unable to give them any information, they beat him with a bull whip, lashed his face with a leather strap, and

⁴No testimony was heard concerning these incidents. The victims were unwilling to testify because of fear of reprisal. See U.S. Commission on Civil Rights, *Staff Report of Investigation of Incidents of Racial Violence, Adams County, Mississippi, September 1963-1965*, January 31, 1965 [hereinafter cited as *Adams County Report*] T. 461, 468.

⁵*Adams County Report*, T. 461-68.

threatened to kill him with a shotgun. After the beating, Whitley was told to run, was shot at, but managed to escape. He required hospital treatment for his injuries.⁶

Several days later, on February 15, Archie Curtis, a 56-year-old Negro undertaker who was chairman of the local Negro voter registration drive, received an emergency ambulance call. When he and his helper, Willie Jackson, arrived at the designated place, several armed and hooded men appeared and took them at gunpoint to a remote part of the county. Curtis was ordered to hand over his NAACP card. When he denied membership in the organization, he was partially stripped and whipped. His assistant was also beaten. After warning Curtis to tell no one of the incident, the gang left. He required medical care for his injuries.⁷

The law enforcement officer responsible for investigating these cases was Sheriff Odell Anders of Adams County.⁸ His investigations appear to have been brief and unproductive, and no arrests were made.

While in the hospital Whitley was interviewed by Sheriff Anders. Although he was unable to identify any of his assailants, he did name a man who had been driving in front of him in a suspicious way just before he was abducted. The sheriff's investigation records, produced in response to the Commission's subpoena, consist of 24 typewritten lines, undated, recording only his interview with Whitley. No interview with the man named by Whitley or any other possible witness or suspect is recorded. The half-page report closes with the statement: "We followed every lead and found nothing."⁹ When asked whether he had interviewed the man named by Whitley, Sheriff Anders testi-

⁶ T. 96-101.

⁷ T. 91-95.

⁸ After Curtis' beating Sheriff Anders requested and received the assistance of agents from the Mississippi Highway Safety Patrol. T. 137. Patrol investigators apparently participated in some investigations, but, with two exceptions, kept no records. Testimony of T. B. Birdsong, Commissioner of Public Safety, T. 438-40. For a discussion of the powers of Highway Patrol, see ch. 5, note 2, *infra*.

⁹ Investigation Report of the beating of Alfred Whitley, undated, T. 497.

fied that he had seen the man, as well as 25 to 40 other men who worked at the Armstrong plant, but destroyed the records which, he said, were unrelated to the case "so that it won't incriminate these people."¹⁰

The sheriff's office also investigated the beatings of Archie Curtis and Willie Jackson. Deputies interviewed Curtis and Jackson and examined the ground at the scene of the beating. The victims were unable to give any identifying information.¹¹ Again the sheriff's investigation records consist of a single, undated, typewritten page recording the original interview. No interviews with possible suspects are recorded.¹²

The records in other cases in Adams County reflect equally limited investigations. For example, the sheriff's investigation of the burning of two Negro churches on the night of July 12, 1964, is recorded in a report consisting of some 10 typewritten lines, dated the day of the fires. It describes the sheriff's trip to the site of both churches, his contact with other law enforcement agencies, and includes the following statement:

A number of people were contacted. No motive was ever established. No one saw anything. No evidence was found around the churches. Cases are still open and being investigated.¹³

Sheriff Anders testified that, "It's the opinion of all law enforcement officers that there are maybe not over 10 or 12 or 15 people doing every bit of violence in Adams County. . . ." ¹⁴ He believed that the hooded men who beat Whitley, Curtis, and

¹⁰ T. 138.

¹¹ T. 92-93.

¹² Investigation Report of the beating of Archie C. Curtis and Willie Jackson, undated, T. 496.

¹³ Investigation Report of the burning of Jerusalem Baptist and Bethel A.M.E. Churches, T. 497. The report originally read "63 people were contacted." The words "a number of" were inserted in pencil.

¹⁴ T. 140.

others were members of the Ku Klux Klan,¹⁵ but testified that he had “no idea” of the strength or activities of this organization.¹⁶

Almost half the incidents of violence which occurred in Adams County during 1964 took place in the city of Natchez. The city’s police chief, J. T. Robinson, testified that despite great effort he had been unable to solve a single one of the cases of racial violence. As he explained: “The witnesses don’t give you any clues at all, and there are very few witnesses that you can come up with.”¹⁷ Although he thought he knew who was responsible for racial violence, he had not made any arrests because, “I don’t think we can make a case stick.”¹⁸

There was no indication that Chief Robinson investigated any extremist groups although he said he knew they were operating in the area. He did not know the names of these groups or whether any were known as the Ku Klux Klan;¹⁹ neither did he know their objectives or whether he had interviewed any of their members in investigating incidents of violence.²⁰ He did not know whether the Klan was responsible for cross-burnings, or what the burning crosses meant, except that he had been told they stood for “unity.”²¹ He testified that he was not aware of any meetings of these groups in the county, except for one held by the Klan, at which he was a spectator, and another by the Americans for the Preservation of the White Race, at which he was the principal speaker.²² He found the Klan meeting and speeches “very impressive” and commented that “I couldn’t see anything that night that would make you think that they were anything but upstanding people.”²³

¹⁵ T. 148.

¹⁶ T. 140.

¹⁷ T. 152.

¹⁸ T. 163.

¹⁹ T. 152.

²⁰ T. 160.

²¹ T. 159.

²² T. 155, 158. Chief Robinson’s topic was “What the general public could do to assist law enforcement.”

²³ T. 158.

The only arrests related to civil rights activity made by Chief Robinson in 1964 were of civil rights workers. George Green, a Negro, was arrested for running a red light and then charged with auto theft "merely to check on him and to see who he was and to give us a legal charge to charge him."²⁴ When his white companion, Bruce Payne, went to the police station to seek Green's release, he was told to see the chief. Chief Robinson told Payne that he would not arrest him but that the police could not protect him from the local people who were "rough" and would "tear [his] head off." According to Payne, Robinson added that his officers were armed, and that if the civil rights workers caused trouble, there would be "some slow walking and some sad singing."²⁵

Mayor John J. Nossier of Natchez, however, testified that in an effort to end violence, he called the head of the Klan in Adams County. The next day the mayor's house was bombed and severely damaged. The day after the bombing, Nossier met with the Klan leader.²⁶ According to the mayor, the Klan leader subsequently told him that if they had not met, there "would have been bloodshed in the streets of Natchez."²⁷

As a result of the violence, the Negro community took steps to protect itself. George West and Reverend Willie S. Scott, Negro leaders in Adams County, told the Commission that "self-protection is one of the first laws of nature," and testified that during the violence of 1964 "more guns and ammunition were sold in Natchez and Adams County than at any time in the history of Adams County."²⁸

One month following Mayor Nossier's meeting with the Klan, the Natchez Ministerial Society sponsored the publication of a

²⁴ Testimony of J. T. Robinson, T. 157.

²⁵ T. 73. Payne was, in fact, followed when he left Natchez the next day and attacked by four men. See pp. 50-51, *infra*.

²⁶ Testimony of Mayor Nossier, T. 112.

²⁷ T. 114. Mayor Nossier's discount food stores were first boycotted by whites in Natchez because of his suspected sympathy to Negroes and later by Negroes because of his meeting with the Klan. T. 112.

²⁸ T. 131.

statement by local groups which urged civic assistance to law enforcement officials.²⁹ A large number of patrolmen sent by the State Highway Patrol to the Natchez area stopped cars and confiscated weapons of both whites and Negroes. Negro leaders in the community expressed the belief that the presence of these officers was responsible for preventing further racial crimes.³⁰

Violence broke out again a year later. On August 27, 1965, George Metcalfe, the president of the Adams County chapter of the NAACP, was seriously injured when a bomb attached to his automobile ignition exploded.³¹ This incident set off renewed demands by Negroes in Natchez for equal rights, including police protection. When they threatened to march in protest, Governor Johnson sent National Guardsmen to the city to prevent violence.³² The Guard was withdrawn after five days.³³ No arrests have been made in connection with the Metcalfe attack.

MADISON COUNTY

Madison County, a poor rural county in central Mississippi, just north of Jackson, has a population approximately 70 percent Negro. Civil rights workers have been active in Canton, the county seat, since 1962. The violence which occurred in 1964 was primarily directed at them, at their headquarters, the "Freedom House," and at local churches. In Madison County from June 1963 to September 1964, five Negroes were wounded by gunshot and the Freedom House was bombed twice and shot at on three occasions. Three other buildings in the Negro community were bombed, and four Negro churches were destroyed by fire. There were also several assaults on Negroes and white civil rights workers. In only two cases were the persons responsible for this violence arrested and prosecuted, and in both in-

²⁹ T. 120-21. The statement is reprinted at T. 469.

³⁰ Testimony of George West, T. 132, 136.

³¹ WCNS, UPI Washington News Wire, August 27, 1965, No. 123.

³² N.Y. Times, Sept. 3, 1965, p. 1.

³³ UPI, *supra*, September 7, 1965, No. 44.

stances the defendants pleaded no contest and received minimal fines.³⁴

The testimony of Sheriff Jack Cauthen of Madison County concerning his handling of several of these cases revealed hostility to civil rights activities which evidently affected his conduct in office.

In 1964 Mirza Hamid Kizilbash, a citizen of Pakistan, was an assistant professor at Tougaloo College, an integrated institution in Madison County. Kizilbash testified that on May 29, 1964, he was attacked and beaten on the head with a club by a gang of unmasked white men shortly after attending a civil rights meeting in Canton. The gang released him, warning that he would be killed if he returned to Canton.³⁵

After receiving medical attention, Kizilbash reported the incident, as well as the license number of a car which he believed was driven by one of his assailants, to the Mississippi Highway Patrol. Two days later he described the attack in a letter to Sheriff Cauthen and invited the sheriff to contact him for further information.³⁶ Sheriff Cauthen testified that he never received this letter,³⁷ but that he learned of the incident from the Highway Patrol and through "rumors."³⁸

A week later the president of Tougaloo College, Dr. A. D. Beittel, telephoned the sheriff and inquired about the case. The sheriff testified: "I told him that there had been no formal complaint made to me and I knew nothing of the matter."³⁹ Beittel then gave him the identifying information supplied by Kizilbash. Cauthen testified that after receiving this call from Beittel he checked out the license number:

³⁴ See U.S. Commission on Civil Rights, *Staff Report of Investigation of Incidents of Racial Violence and the ASCS Election, Madison County, Mississippi, 1963-1964*, January 31, 1965, [hereinafter cited as *Madison County Report*] T. 473-79.

³⁵ T. 225; *Madison County Report*, T. 475. Kizilbash believes he would have been murdered if his white companions had not told the gang he was an Indian and not a Negro. He found this "the greatest irony of my existence here." T. 228-29.

³⁶ T. 222-26.

³⁷ T. 245.

³⁸ T. 259-61.

³⁹ T. 245.

I found out that the owner of that car, who is a very responsible person in Canton, said he had no control over that car that night. The car was taken. It was beyond his knowledge, without his knowledge. He didn't know anything about it whatsoever.⁴⁰

Sheriff Cauthen testified that he never attempted to interview Kizilbash because any evidence proffered would be stale after the week's delay.⁴¹ He also stated that "if [Kizilbash] wanted to file a complaint, if he had a complaint to make, I felt that my office was the place to make that complaint."⁴² He had no records pertaining to the case.⁴³

Although the sheriff kept no records of this or any other investigation of incidents of racial violence,⁴⁴ the extent and nature of his efforts are revealed in reports of other State investigators.

One case involved the burning of the Willing Workers Meeting Hall at the Mt. Pleasant Church on August 11, 1964. The hall had been used as a Freedom School. The report of State investigators in this case mentions neither Sheriff Cauthen nor any of his deputies as present or participating in the investigation.⁴⁵ About two weeks later the sheriff arrested Joseph Lee Watts, a Negro civil rights worker, because he had reportedly referred to the Church as the "building we burned."⁴⁶ Watts was charged with "investigation,"⁴⁷ given a lie detector test, questioned about his connection with the burning, and

⁴⁰ *Ibid.*

⁴¹ T. 245-46.

⁴² T. 254.

⁴³ T. 425.

⁴⁴ Sheriff Cauthen testified that a deputy sheriff from his office participated in investigations of incidents which occurred within the city of Canton, but that no investigation records were kept by his office. He also stated that his men investigated incidents which occurred outside Canton in conjunction with State officials and the FBI. He did not keep records of these activities. T. 425-27.

⁴⁵ Investigation Report of the burning of the Willing Workers Meeting Hall in Gluckstadt, dated August 11, 1964, T. 498-99.

⁴⁶ *Ibid.*; *Madison County Report*, T. 477.

⁴⁷ *Madison County Jail Docket* (copy in Commission files).

released. The case was later presented to the grand jury in Madison County, which refused to indict.⁴⁸

On the night of September 17, two more Negro churches in Madison County were burned to the ground: St. John's Baptist Church near Valley View and Cedar Grove Baptist Church near Canton. Sheriff Cauthen, according to the State report, began his investigation by going to the Freedom House in Canton at 3:30 a.m. and arresting George Washington, Jr., a Negro civil rights worker, for possessing a pistol without a permit.⁴⁹ At the time of this arrest, George Raymond, another civil rights worker, told the law enforcement officers present that he had been informed that "a local police officer was seen at the [St. John's Baptist] church just before it was burned and was seen leaving the church after it had burned."⁵⁰ The sheriff told State officials that he intended to act on this information by contacting the District Attorney "to see if any charges can be placed on George Raymond for this accusation."⁵¹

Because he had not kept any investigation records, Sheriff Cauthen prepared a special report which he submitted to the Commission. The report disclosed that the sheriff interviewed the two Negroes who were George Raymond's informants. They asserted that they had seen one of the deputies in the vicinity of the church at the time it had burned. The sheriff responded to this assertion by taking the Negroes to the Mississippi Highway Patrol Headquarters for polygraph tests. The sheriff was accompanied by the accused deputy. According to Cauthen's report, each of the Negroes was interviewed separately by the two officers and each denied he had seen the deputy. There is no indication that the accused deputy was questioned about the allegations against him.⁵²

⁴⁸ Interview with Carsie Hall, Esq., attorney for Mr. Watts, September 1964.

⁴⁹ Investigation Report of the burning of St. John's Baptist Church and Cedar Grove Baptist Church, dated September 16 and 17, 1964, T. 500-01.

⁵⁰ T. 501.

⁵¹ *Ibid.*

⁵² Report of Jack S. Cauthen, sheriff, Madison County, Mississippi, dated Feb. 18, 1965, T. 481, 484-85.

The balance of the sheriff's investigation of the St. John's Baptist Church burning included a visit to the site and interviews with the deacons of the church and civil rights workers in Valley View, a few miles away. He did not interview anyone else.⁵³ There is no record of any investigation by the sheriff's office of the burning of the Cedar Grove Baptist Church.⁵⁴

Sheriff Cauthen's hostility to civil rights workers, evidenced by the arrests of Joseph Lee Watts and George Washington, Jr., was again demonstrated in an arrest he made in connection with the December 1964 election of the Agricultural Stabilization and Conservation Service (ASCS) of the United States Department of Agriculture.

In this election for ASCS county committeemen, Negroes appeared on the ballot for the first time and civil rights workers engaged in a campaign to encourage Negro farmers to vote.⁵⁵ Department of Agriculture policy permitted observers from civil rights organizations to be present at the polling places and to provide assistance to voters.⁵⁶ This was explained to local law enforcement officers, including Sheriff Cauthen, as well as to white ASCS committeemen and the white owners of the stores used as polling places.⁵⁷

At a polling place in a grocery store, a white civil rights worker, Elayne DeLott, was an observer. Sheriff Cauthen arrived about 9:30 a.m. and ordered her to leave the store. He told her she could see everything from outside. She complied with this order. After the sheriff left, an ASCS committeeman told her she could return. About an hour later the sheriff returned and, over the objection of the ASCS committeeman, again ordered Miss DeLott to leave the store. When he returned later and again found her inside, he arrested her for "investigation." Although

⁵³ *Id.*, at 483-85.

⁵⁴ *Ibid.*

⁵⁵ T. 232.

⁵⁶ T. 233.

⁵⁷ T. 242.

no charges were brought, he required a \$250 bond before releasing her.⁵⁸

During the Commission hearing Sheriff Cauthen was questioned about this arrest, which appeared to interfere directly with Federal policy in the election. The sheriff testified that he had ordered Miss DeLott out of the store because she was blocking the polls and voters would have had to walk around her.⁵⁹ He arrested her because her presence inside the store "was a threat to the peace and dignity of that polling place, of the city of Canton, and Madison County."⁶⁰ Despite repeated questioning, however, the sheriff was unable to say what Miss DeLott had done to justify this conclusion. He admitted that he had not received a complaint from the store owner or any of the ASCS committeemen,⁶¹ and that Miss DeLott had not made any loud noise or otherwise created a disturbance.⁶² The only grounds offered by the sheriff to support his arrest for breach of the peace were that Miss DeLott had disobeyed his orders and that "she had a very decidedly strong odor that was very unpleasant."⁶³

Sheriff Cauthen made no effort to conceal his commitment to white supremacy. He and his chief deputy were members of the steering committee of the local White Citizens Council, a group devoted to "the unity of the white people."⁶⁴ The

⁵⁸ *Madison County Report*, T. 479; Jail Docket showing arrest of Miss Elayne DeLott, Madison, County, Miss., dated December 3, 1964, *Exhibit No. 20* (unpublished). Sheriff Cauthen testified that he usually does not require bonds in arrests for investigation. T. 248.

⁵⁹ T. 246.

⁶⁰ T. 247.

⁶¹ T. 247.

⁶² T. 249.

⁶³ T. 251. Incidents of violence against other civil rights observers occurred at this and other polling places on election day. No arrests were made. *Madison County Report*, T. 478-79. These incidents were said to have deterred Negroes from participating in the election. Testimony of Claude Moore, T. 236-38. As a result, the Department of Agriculture voided the elections in two districts in Madison County due to interferences by nonfarmers which may have affected the election results. U.S. Dept. of Agriculture press release 1059-65, dated April 2, 1965.

⁶⁴ *Madison County Herald*, Feb. 27, 1964, p. 1.

sheriff testified that the Citizens Council was “invaluable” in assisting him and that he was “proud to be a member.”⁶⁵

Law enforcement was also ineffectual in Canton, the county seat of Madison. During 1963 and 1964, City Police Chief Dan Thompson was unable to solve nine of the eleven reported shootings, bombings, and beatings involving civil rights workers which occurred within the city. He attributed his failure to “lack of information.” He said he received “little cooperation” from the Negro community, and believed that with cooperation “we would have had a better chance to solve them.”⁶⁶ Like Sheriff Cauthen, he was a member of the steering committee of the local White Citizens Council.⁶⁷

The Commission examined in detail the conduct of Chief Thompson’s men in their investigation of one incident—the June 8, 1964, bombing of the Freedom House in Canton.

George Washington, Sr., a leader in the Negro community and owner of the Freedom House (which he rented to civil rights workers), testified that he heard an explosion at the house on the evening of June 8. Since there did not appear to be any damage to the building, he did not report the incident to the police until the next morning.⁶⁸ Washington described the police investigation:

[When the police arrived, they said] ‘What about this bombing last night?’ I said, ‘Well, something threw a bomb up there in the Freedom House last night.’

[They said] ‘Why didn’t you call us?’ I said, ‘I didn’t think it was my responsibility to call you all because there are people living in the house and they have a telephone in the house and I thought it was their responsibility to call you all.’ ‘It was your responsibility to call us.’ They said . . . ‘We’re going to send your so-and-so to the

⁶⁵ T. 256.

⁶⁶ T. 266–67.

⁶⁷ Madison County Herald, Feb. 27, 1964, p. 1. See also, testimony of Rev. George McCree, T. 207.

⁶⁸ T. 217.

penitentiary.' . . . I said, 'For what? Somebody bombed my house and you are talking about sending me to the penitentiary?' They said, 'Yes, we are going to send you to the penitentiary and try to get you 10 years.' [They said] 'Get in the car.' And some profane language. I said, 'Get in the car? Do you have a warrant for me?' 'No, we don't need a warrant. Get your so-and-so in the car.'

* * * * *

When I got to the station they said, 'Get your so-and-so out.' . . . I said, 'You are going to allow me to make a phone call and get a lawyer.' He said, 'No, I ain't going to let you talk to nobody. Get in the jailhouse.'

Just as I went into the jailhouse, I wasn't expecting anything, I was struck right up over the right eye.

* * * * *

It only kind of staggered me. I couldn't see too well. I had to throw my hand up over my eye and hold it because it was hurting.⁶⁹

He was jailed and then brought into an interview room where he was interrogated by an officer:

[He] began to question me when I sat down, asking me questions about the march⁷⁰ and so forth, and about me letting those people stay in my house. . . . He heard that I was giving them free rent, wasn't charging them anything. He said I was backing the movement 100 percent, and that I ought to leave town and go on to Washington, D.C., somewhere where there was COFO headquarters, go there and stay. . . .

* * * * *

⁶⁹ T. 218-19. The blow caused permanent injury to Washington's eye. T. 220.

⁷⁰ On May 28, 1964, the Council of Federated Organizations attempted to conduct a "Freedom March" to the county courthouse in Canton to register to vote. *Madison County Report*, T. 474.

I was struck again. I was sitting up there smiling. He said, 'Wipe that smile off your face. You act like you ain't concerned.' He went to strike me again and I threw my hands over there and caught part of it. He said, 'It just makes me sick to look at you.'

[Question] During the entire interrogation did they ask you any questions about the bombing of the COFO house?

MR. WASHINGTON: Yes, sir; he asked me about it. I told him I didn't know who did it. But he told me I did know who did it. He said, 'It wasn't nobody but some of those COFO workers.' I told him I didn't think they would do anything like that.⁷¹

This interrogation lasted more than three hours, after which Mr. Washington was released.⁷² When Washington reported the beating to Police Chief Thompson, the chief told him that he was sorry it had happened and "guaranteed that it wouldn't happen anymore."⁷³ The chief's only action was to question the officer concerned, who denied the beating.⁷⁴

The police investigation file in this case consisted of a two-page report which, according to police, was prepared from notes after the Commission subpoenaed the records.⁷⁵ The report is devoted primarily to Washington's failure to call the police about the bombing until the next morning. It reveals that, in addition to Washington, the only other person interviewed by the police was a civil rights worker living in the house.⁷⁶ No arrests were made.⁷⁷

Conduct of this character by law enforcement officers has led to a deep fear and distrust of such officials among the Negroes of

⁷¹ T. 219.

⁷² T. 220.

⁷³ T. 221.

⁷⁴ Testimony of Chief Thompson, T. 267.

⁷⁵ Report of Investigation of the bombing of the Freedom House, undated, T. 268-69.

⁷⁶ *Ibid.* The records in other cases subpoenaed by the Commission from Chief Thompson were of comparable quality.

⁷⁷ *Madison County Report*, T. 475.

Madison County. Reverend George McCree, a Negro minister in Canton, told the Commission that Negroes believed the police themselves were implicated. "A lot of this violence, I believe, and we believe, is done by them or with the knowledge of the law enforcement officers of Madison County."⁷⁸ Chief Thompson testified that he knew nothing of such allegations.⁷⁹ Reverend McCree testified that other Negroes shared his opinion about law enforcement officials, and stated:

I served a number of years in the Armed Forces. I was in the invasion of France. I have never seen the fear in people, even during the invasion of France, as I saw in the Negroes of Madison County when I went there.⁸⁰

PIKE COUNTY

Of all the counties in Mississippi, Pike County, which is in southwestern Mississippi on the Louisiana border, experienced the most extensive violence in response to civil rights activity. Tension was created in the county in the spring of 1964 when the Council of Federated Organizations announced a summer civil rights project.⁸¹ Even before civil rights workers arrived in late June, there were cross-burnings, a bombing, and assaults on four persons—two whites and two Negroes.⁸²

The first of the beatings occurred on June 8, 1964, when three white men from the North, Louis Asekoff, Andre Martinsons, and Rene Jonas, came to McComb to collect information for a magazine article. They interviewed city officials and Negro leaders. As they left McComb to drive to Jackson, they were followed to the city limits by a police car. About 15 miles north of McComb, just outside Pike County, they were forced to the side of the road by cars which had followed them. Asekoff was held at

⁷⁸ T. 205.

⁷⁹ T. 267.

⁸⁰ T. 206-07.

⁸¹ Testimony of Sheriff Warren, T.E. 27.

⁸² See *Staff Report of Investigation of Incidents of Racial Violence, Pike County, Mississippi, 1964*, January 31, 1965, T. 449-60 [hereinafter cited as *Pike County Report*].

gunpoint while the gang beat Martinsons and Jonas with brass knuckles.⁸³

Asekoff called Police Chief George Guy in McComb and reported the beating.⁸⁴ Chief Guy took no action because the incident did not occur within the city of McComb.⁸⁵ Sheriff Warren of Pike County testified that he knew about the case but took no action because the beating took place in Lincoln County. He said he felt no obligation to investigate because, "I didn't know about it. It wasn't reported to me. I read it in the newspaper." He stated that he did not receive any inquiry concerning the incident from the sheriff of Lincoln County.⁸⁶

Three days later Ivey Gutter, a 54-year-old Negro who was a life-long resident of Pike County, was stopped as he walked home from work by three men wearing hoods and armed with pistols and shotguns. He was accused of being a member of the NAACP and attacked and beaten with metal clubs. Severe injuries were inflicted which required hospital care. When interviewed by the sheriff, Gutter was able to describe the car used by his assailants but could offer no other identifying information.⁸⁷

The sheriff's investigation file in this case consists of three-fourths of a page, stating Gutter's story. There is no record of any attempt to interview witnesses or suspects, to visit the scene, or to search for the car described by Gutter.⁸⁸ Sheriff Warren testified, however, that after receiving a tip from Gutter, he made an unsuccessful trip to a neighboring county to search for the car.⁸⁹

A week later a Negro mechanic named Wilbert Lewis was abducted by a group of armed men wearing black hoods when he answered a call to repair a car. The men stripped him, tied him to a tree, and interrogated him about the NAACP and COFO.

⁸³ *Pike County Report*, T. 450-51.

⁸⁴ *Ibid.*

⁸⁵ Testimony of William Wiltshire, attorney for Chief Guy, T.E. 64.

⁸⁶ T. 15-16.

⁸⁷ *Pike County Report*, T. 451.

⁸⁸ Investigation report of the beating of Ivey Gutter, dated June 11, 1964, T. 493.

⁸⁹ T. 16.

When he was unable to provide any information, they whipped him with a cat-o'-nine tails and ordered him to warn his friends that this was only a sample of the punishment for civil rights activities.⁹⁰

Sheriff Warren testified that he did not investigate the case because it was not reported to him.⁹¹ But Lewis was interviewed by a deputy sheriff the next day,⁹² and the sheriff testified that he "might have discussed" the case with the FBI.⁹³ The FBI informed the Commission that Lewis subsequently identified one of his assailants from photographs shown to him by Federal agents and that this information was given to Sheriff Warren.⁹⁴ The sheriff denied having received it.⁹⁵ He had no records pertaining to this case.⁹⁶

These assaults—which went unpunished—marked the beginning of a period of intensive racial violence in Pike County. From June to November 1964, 13 Negro homes, a Negro Masonic Hall, and a Negro church were bombed; two Negro churches were destroyed by fire, two were damaged, and another escaped damage when a firebomb failed to ignite. Local Negroes and white civil rights workers were shot at and beaten. During a four-month period of mounting violence law enforcement officials were unable to apprehend persons responsible.⁹⁷

Sheriff Warren testified that he investigated all the incidents which were reported to him and which did not occur within the city of McComb.⁹⁸ In conducting these investigations he worked with Highway Patrol officers and FBI agents.⁹⁹ Ac-

⁹⁰ *Pike County Report*, T. 451-52.

⁹¹ T. 17.

⁹² *Pike County Report*, T. 451-52.

⁹³ T. 22-23. See also testimony of Police Chief Guy, T. 38.

⁹⁴ Memorandum in Commission files, dated February 23, 1965.

⁹⁵ T. 22.

⁹⁶ T. 16.

⁹⁷ *Pike County Report*, T. 449-60.

⁹⁸ T. 18.

⁹⁹ T. 20-21. Patrol investigators did not keep any records of the Pike County investigations. Testimony of T. B. Birdsong, T. 438-40.

ording to Sheriff Warren, the responsibility for his failure to solve these cases rested with the Negro community itself. He complained that Negroes refused to report bombings to him, but instead called Federal agents, who then notified him. Sheriff Warren believed that the resulting delay of 15 to 20 minutes, which permitted the culprits to get away, was fatal to the investigation.¹⁰⁰

One case which the Commission examined in detail suggests a source of the sheriff's difficulties with the Negro community. On August 28, 1964, an explosion occurred at the home of Willie Dillon, a Negro mechanic. Dillon testified that during the evening he had been working in his yard repairing a car for a civil rights worker. He had stopped at about 12 or 12:30 and was inside his home when the explosion occurred. Mrs. Dillon called the FBI. When Federal agents arrived, they were accompanied by Sheriff Warren and other local officers. The sheriff and his deputies questioned both Mr. and Mrs. Dillon, as well as their children, concerning their civil rights activities. According to Mr. Dillon, when the sheriff learned that Mrs. Dillon had been involved with the civil rights movement, he accused them of knowing "something about" who was doing the bombing. He said the Negroes were responsible for the violence and were blaming it on whites.¹⁰¹ Mr. Dillon told the officers that the only reason he could see for anyone to bomb his house was that he was working on a "COFO car."¹⁰² This information did not lead to a solution of the bombing, but did result in the arrest of Mr. Dillon:

So then they went to the COFO car and they searched it and said it had been run. I told them, 'Yes, it had been run because I had been working on it trying to see would it start.' And so they searched and searched. I had to hang a light in a chinaball [sic] tree in the

¹⁰⁰ T. 20.

¹⁰¹ Warren also issued a public statement to this effect. See note 112, *infra*, and accompanying text.

¹⁰² T. 6.

yard from my electric line coming into the house. They looked and seen that there and they said, 'Well, we're going to take you to jail.' And I said, 'For what?' And they said, 'For stealing electricity and running a garage without a license.' I said, 'I don't have a garage. If this chinaball tree is a garage, well I guess I'm running one.' And they told me, 'Well, we're going to take you to jail.'¹⁰³

Dillon was taken to jail at 3 a.m. The next afternoon, without seeing an attorney, family, or friends, he was brought before a justice of the peace. He pleaded guilty and was sentenced to three months and \$100 for stealing electricity and five months and \$500 for operating a garage without a license.¹⁰⁴ Dillon explained the reason for his guilty plea:

I pleaded guilty because I had no other choice but to plead guilty. I had no lawyer. And in the jail in McComb, whatever the law said, that's what it is. . . . That's the way it always has been.¹⁰⁵

After sentencing, Dillon was allowed to see his wife for the first time since his arrest. He served a month in jail before he was released on bail by a Federal court. The case was then dismissed upon payment of court costs.¹⁰⁶

When asked what evidence he had that Dillon was operating a garage, Sheriff Warren replied, "Well, in Mississippi, we think if a person is under a shade tree working on automobiles for hire, he is operating a garage."¹⁰⁷

Dillon's prosecution and sentence for operating a garage without a permit were apparently unique in Pike County. The sheriff admitted that he had never arrested anyone else on this charge.¹⁰⁸ A former police justice in McComb testified that

¹⁰³ *Ibid.*

¹⁰⁴ *Pike County Report*, T. 456.

¹⁰⁶ T. 7-8.

¹⁰⁸ *Pike County Report*, T. 456.

¹⁰⁷ T. 26.

¹⁰⁶ *Ibid.*

in misdemeanor cases the normal sentence was \$100 and 30 days, with the prison sentence suspended, and that in more than seven years on the bench he had never sentenced anyone to jail for more than three months.¹⁰⁹

The sheriff's investigation file of the bombing of Dillon's home consists of a single page dated the day of the bombing, which recounts the interview with Dillon and his arrest and conviction. No other investigation is recorded.¹¹⁰

Subsequent bombings resulted in further arrests of Negroes. In McComb, on September 20, 1964, the home of a prominent Negro woman and a Negro church were bombed. A crowd of Negroes gathered at the home following the bombing. When local, State, and Federal officials arrived, bottles and rocks were thrown at them. This incident led the sheriff—who had not previously requested help to prevent violence—to call the Highway Patrol for assistance. The patrol responded the next day by sending 50 men to McComb. During the next three days the sheriff and the patrolmen arrested approximately 25 Negroes, charged them with criminal syndicalism, and held them on \$5,000 bail each. Subsequently, bail was reduced by a Federal court and defendants were released after a month in jail. Ultimately, these charges were dismissed by agreement between the county attorney and the defense.¹¹¹

Sheriff Warren chose to believe that Negroes or civil rights workers were responsible for the violence. On the day he called for the Highway Patrol, he stated publicly that the bombs had been planted by civil rights workers.¹¹² A few days later he picked up two local Negro leaders in the middle of the night. One was brought in under armed guard, interrogated, cursed, and threatened, "if you damn niggers don't tell me the next time

¹⁰⁹ Testimony of Robert W. Brumfield, T. 52-54.

¹¹⁰ Investigation report of the attempted bombing of the home of Willie J. Dillon, dated August 28, 1964, T. 494-95.

¹¹¹ These facts are alleged in petitions for removal in *State v. Lewis, et al.*, Civil Nos. 3604-23, 3635, S.D. Miss., Sept. 29, 1964. See also motion to remand filed by defendants.

¹¹² T. 18-19.

there is a bombing, I am going to skin you. . . ." ¹¹³ The other was taken to Jackson in handcuffs, held in jail, and given a lie detector test.¹¹⁴ Although he made these investigations of civil rights workers and local leaders, the sheriff testified that he was unable to obtain any knowledge of the membership or activities of white supremacist groups, such as the Ku Klux Klan or the Americans for the Preservation of the White Race, which were known to be active in the area.¹¹⁵

Most incidents of violence which occurred in Pike County during 1963 and 1964 took place in or near the city of McComb. Police Chief George Guy of McComb, who gave a deposition to the Commission, stated that he was unable to solve any of these incidents or to halt the attacks on the Negro community. His reason was "lack of information and lack of good hot suspects to work on."¹¹⁶ He also said that because he did not have any men trained as detectives,¹¹⁷ he turned the investigation of violence over to other law enforcement agencies, which had "special men that knew how to do it probably a lot better than [his] men did."¹¹⁸

In October 1964, Chief Guy did arrest 12 civil rights workers on charges of operating a public food handling establishment without first getting a permit. The basis of the charges was that they prepared food for civil rights workers living at the McComb civil rights headquarters. At the trial the charges were dismissed against all but one of the defendants, who was found guilty and fined \$100.¹¹⁹

For a time Chief Guy was both chief of police and president of the local chapter of the Americans for the Preservation of the White Race. In this capacity he attended several chapter meet-

¹¹³ Testimony of Curtis C. Bryant, T. 68.

¹¹⁴ Interview with Rev. Ned Taylor, Pike County minister, October 1964.

¹¹⁵ T.E. 28.

¹¹⁶ T. 35.

¹¹⁷ T. 37.

¹¹⁸ T. 35.

¹¹⁹ Memorandum in Commission files, dated September 22, 1965; T. 59.

ings. Although he said his presidency was public knowledge, he did not believe that Negroes in the community were aware of it. At the time of the hearing, he was no longer president and did not have a membership card. Like Sheriff Warren, he testified that he had no knowledge of the aims, activities, or membership of either the APWR or the Klan.¹²⁰

In fact, just such a group was responsible for the violence in Pike County. The terror in Pike County receded at the end of September. An accidental discovery by a private citizen of a cache of arms, followed by investigation by State and Federal officers, led to subsequent confessions by several suspects and the arrest of 10 white men.¹²¹ The confessions of the arrested men revealed that they had formed an organization called the "South Pike Riflemen's Association," which was a klavern of the Ku Klux Klan. The group met weekly to carry out bombing raids.¹²² It had also purchased an arsenal of weapons.¹²³

On the basis of the confessions, a Pike County grand jury indicted the group for conspiracy and for unlawful use of explosives (a capital offense) in connection with the bombing of three of the fourteen Negro homes. The defendants subsequently admitted responsibility for most of the other incidents.¹²⁴

The defendants were never tried on these indictments. According to local officials, the confessions were the only evidence obtained against them.¹²⁵ Because of the absence of other evidence and the district attorney's doubts concerning the admissibility of the confessions, he agreed that defendants would receive suspended sentences if they pleaded guilty or *nolo con-*

¹²⁰ T. 39-41.

¹²¹ T.E. 31, 71; T. 30, 54.

¹²² Hearing Before Board of Inquiry, Illinois Central Railroad, Dec. 7, 1964, at 9. This hearing was held in connection with the dismissal of five of the men who had participated in the raids and were employed by the Illinois Central.

¹²³ T. 42. The group was an affiliate of the National Rifle Association, which enabled it "to purchase arms and ammunition at a lower price." T.E. 92-93.

¹²⁴ *Pike County Report*, T. 459; testimony of District Attorney Joe T. Pigott, T. 22.

¹²⁵ T.E. 79-80.

tendere.¹²⁶ The indictments for conspiracy were settled by \$500 fines and suspended sentences of six months in jail. The indictments for unlawful use of explosives were settled without fines and with suspended sentences of five years in jail.¹²⁷

Following these arrests, there were several additional incidents of racial violence at the end of October 1964. Unlike the earlier incidents, these attacks—including shootings and a whipping—were directed against whites, and in particular against a local family which owned several grocery stores employing Negroes. These incidents were solved in a week by the arrest of six white men who pleaded guilty to misdemeanor charges and who were sentenced to a year in jail. These sentences were not suspended.¹²⁸

In late October a small number of leading white citizens, who had become “greatly disturbed about the incidents . . . formed a group to try to determine what, if anything, [they] could or should do to help solve the problems.”¹²⁹ On November 17—the eve of a publicized testing of public accommodations in the city—the group, calling itself “Citizens for Progress,” issued a statement signed by 650 persons, which was published as a full-page advertisement in the local newspaper.¹³⁰

This statement recalled the “acts of terrorism . . . against citizens both Negro and white,” and expressed a conviction of the necessity “for equal treatment under the law for all citizens regardless of race, creed, position or wealth. . . .” For the

¹²⁶ Testimony of District Attorney Joe T. Pigott, T.E. 73. The belief that the confessions would be inadmissible was based on the fact that they were obtained from the defendants after prolonged questioning without an attorney. T.E. 71-73; T. 54.

¹²⁷ Three defendants were indicated for conspiracy, three for unlawful use of explosives, and four for both offenses. *Pike County Report*, T. 459-60. One of the defendants subsequently violated the terms of his probation by threatening to bomb the home and office of the manager of the company for which he worked. His suspension was revoked and he was ordered to serve his six months' sentence. Telephone interview with Robert Reeves, Pike County Attorney, June 18, 1965.

¹²⁸ *Pike County Report*, T. 460.

¹²⁹ Testimony of Robert W. Brumfield, T. 46.

¹³⁰ T. 47; *Enterprise-Journal* (McComb, Miss.), Nov. 17, 1964, p. 9.

purpose of "restoring peace, tranquillity and progress," the signers urged the reestablishment and maintenance of order and respect for law; the ending of harassing arrests; the disqualification from public service of persons who were members of subversive organizations; the elimination of economic threats and sanctions; the reestablishment of avenues of communication and understanding between the races; the widest possible use of citizenship in the selection of juries; and a greater citizenship interest in the selection, support, and constructive criticism of public servants.¹³¹

Although the statement was not signed or endorsed by law enforcement officials, and was met a few weeks later by a counterstatement of "Pike County Conservatives,"¹³² its publication evoked a "heartened" response from the Negro community in McComb¹³³ and set an example which was followed by statewide groups.¹³⁴ It marked an end, at least for the time, to racial violence in Pike County.

SUMMARY

During 1963 and 1964 substantial racial violence occurred in Adams, Madison, and Pike Counties, Mississippi. The local authorities—sheriffs and police—were ineffective in controlling this violence or apprehending the persons responsible. The testimony of these officials at the Commission's hearing and the records which they produced in response to subpoena, disclosed investigations that ranged from nonexistent to perfunctory. Records and testimony also indicate that in some instances officials treated civil rights workers not as victims but as suspects. Hostility to Negroes

¹³¹ *Ibid.* This statement is reprinted on pp. 40-41.

¹³² This statement was entitled "Straight Talk About Pike County." See *Enterprise-Journal* (McComb, Miss.), Dec. 10, 1964, p. 1.

¹³³ *Enterprise-Journal* (McComb, Miss.), Jan. 4, 1965, p. 1.

¹³⁴ See, e.g., the resolution of the Mississippi State Bar Association, T. 490-92; the statement of the Mississippi Economic Council, T. 379; and the statement of the Mississippi Manufacturers Association, T. 382-83. Compare the numerous statements made in Greenville, Mississippi, described in Chapter 5, pp. 94-97, *infra*.

CITIZENS FO

The great majority of our citizens believe in law and order and are against violence of any kind. In spite of this, acts of terrorism have been committed numerous times against citizens both Negro and white.

We believe the time has come for responsible people to speak out for what is right and against what is wrong. For too long we have let the extremists on both sides bring our community close to chaos.

There is only one responsible stance we can take: and that is for equal treatment under the law for all citizens regardless of race, creed, position or wealth; for making our protests within the framework of the law; and for obeying the laws of the land regardless of our personal feelings. Certain of these laws may be contrary to our traditions, customs or beliefs, but as God-fearing men and women, and as citizens of these United States, we see no other honorable course to follow.

To these ends and for the purpose of restoring peace, tranquility and progress to our area, we respectfully urge the following:

1. Order and respect for law must be reestablished and maintained.
 - (a) Law officers should make only lawful arrests. "Harassment" arrests, no matter what the provocation, are not consonant with impartiality of the law.
 - (b) To insure the confidence of the people in their officials, we insist that no man is entitled to serve in a public office, elective or appointive, who is a member of any organ-

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ization declared to be subversive by the Senate Internal Security Sub-Committee or the United States Army, Navy or Air Force, or to take any obligation upon himself in conflict with his oath of office.

2. Economic threats and sanctions against people of both races must be ended. They only bring harm to both races.
3. We urge citizens of both races to reestablish avenues of communication and understanding. In addition, it is urged that the Negro leadership cooperate with local officials.
4. We urge widest possible use of our citizenship in the selection of juries. We further urge that men called for jury duty not be excused except for the most compelling reasons.
5. We urge our fellow citizens to take a greater interest in public affairs, in the selection of candidates, and in the support and/or constructive criticism of Public Servants.
6. We urge all of our people to approach the future with a renewed dedication and to reflect an attitude of optimism about our county.

We, the undersigned, have read and hereby subscribe and support the principles and purposes herein set forth.

(Note: Public officials and public employes have not been asked to sign this petition; some may have voluntarily done so. Anyone who can subscribe to these principles is invited to do so by contacting any signer.)

was also demonstrated by harassing arrests of civil rights workers engaged in lawful activities, and by law enforcement officials' publicized membership in organizations committed to white supremacy and the preservation of segregation.

CHAPTER 3.

FAILURE TO PROTECT OR PROSECUTE

Many of the incidents of racial violence described in the preceding chapter were clandestine attacks. In some cases, however, violence occurred in circumstances where law enforcement officers were or could have been present to take preventive action or make arrests. Nevertheless, in only a few cases, were arrests made for crimes of racial violence. The Commission investigated the manner in which police performed their duty to prevent violence and make arrests. It also studied the conduct of prosecutors in seeking indictments and obtaining convictions.

FAILURE TO PROTECT PERSONS EXERCISING FEDERAL RIGHTS

The failure of law enforcement officials to protect persons exercising Federal rights from violence interferes as decisively with the exercise of those rights as would a direct prohibition. The best known example of such interference is the 1961 Freedom Rides in Alabama.¹ In that instance, a Federal judge issued an injunction against the police requiring them to protect the Freedom Riders, stating that their prior failure was a direct interference with the right to travel in interstate commerce.² Since that time, as attempts by Negroes to exercise Federal rights in the South have increased, violence by private citizens against persons exercising these rights has also increased. The Com-

¹ See *1961 Report of the U.S. Commission on Civil Rights, Justice* 29-33 [hereinafter cited as *Justice Report*]. See also Marshall, *Federalism and Civil Rights* 66-68 (1964).

² *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961).

mission studied several cases in which law enforcement officers—although present and aware of the possibility of violence—failed to prevent such violence or to arrest the persons responsible.

Greenwood, Mississippi

In Greenwood, the county seat of Leflore County, two Negro brothers, Silas and Jake McGhee, tried repeatedly in July 1964 to attend the previously segregated Leflore Theater. The manager admitted them, as required by the Civil Rights Act of 1964, but angry crowds of whites gathered frequently at the theater, attempted to keep white patrons away by picketing with signs saying, "This is a nigger theater," and beat and harassed Negroes when they attended the theater. The building was also stoned by the crowds.³

Silas McGhee first attempted to attend the theater on July 5. He was attacked by a group of men. Although he reported the incident immediately to the city police, no arrests were made.⁴ His brother Jake McGhee was attacked at the theater on July 8. Following this assault, the police attempted to persuade the manager of the theater to sign a warrant for his arrest.⁵ On July 16 Silas McGhee was abducted by a gang of men who referred to his having attended the theater and who then beat him with pipes and boards. Although McGhee swore out a warrant before the justice of the peace, no arrests were made by local officials.⁶

During this period the manager of the theater and the McGhees made repeated requests to city officials for protection but received none.⁷ The police made no attempt to stop the violence or to

³ Record, Deposition of John Marchand, Dec. 11, 1964, *United States v. Sampson*, Civil No. GC 6449, N.D. Miss., Sept. 2, 1964.

⁴ Record, Deposition of Silas McGhee, Dec. 11, 1964, at 3-6, *United States v. Sampson*, *supra*.

⁵ Deposition of John Marchand, *supra* note 3, at 23-26.

⁶ Interview with Silas McGhee, Oct. 4, 1964. The men were subsequently arrested by agents of the FBI, *United States v. Belk*, No. GCr-659 (N.D. Miss.). Trial has been delayed pending the decision in *United States v. Guest*, *prob. juris noted*, 381 U.S. 932 (1965), see Ch. 6, *infra*, pp. 109-12.

⁷ Deposition of John Marchand, *supra* note 3; deposition of Silas McGhee, *supra* note 4.

disperse the crowds which, for three weeks, gathered in front of the theater. The only action taken by city officials was to close the theater temporarily, pursuant to a special ordinance enacted for that purpose.⁸ According to the manager of the theater, on one occasion the city officials told him that they were occupied protecting the city's other theater, which continued to refuse to admit Negroes.⁹

On July 26 the McGhees attended the theater and when they attempted to leave, they found a large, noisy, hostile crowd blocking their way. They called the police from inside the theater and requested protection. The police came but refused to escort the McGhees from the theater or to disperse the crowd. The McGhees were told: "You got yourselves in this damn mess, so get yourselves out."¹⁰ As they left the theater, Silas McGhee was struck in the face by a white man. Other whites in the crowd pummeled, kicked, and spat at them. When the McGhees drove away, a bottle was thrown through the car window, spraying glass in their faces. Followed by the hostile crowd, they were taken by a friend to a local hospital to be treated for injuries. The police chief refused to escort them home and, after several hours, the sheriff escorted them through the crowd.¹¹ No arrests were made although numerous police officers were present at both the theater and the hospital.¹²

A few weeks later Silas McGhee was shot and received a near fatal wound as he sat in a car in the Negro neighborhood. The police investigated but, again, no arrests were made.¹³

Following these events, the Department of Justice brought suit against the police and city administration, contending that the

⁸ Deposition of John Marchand, *supra* note 3, at 33-35, 54-56; Record, Deposition of Charles E. Sampson, mayor of Greenwood, Nov. 16, 1964, at 18, *United States v. Sampson*, *supra*.

⁹ Deposition of John Marchand, *supra* note 3, at 19.

¹⁰ Deposition of Silas McGhee, *supra* note 3, at 19.

¹¹ *Id.* at 18-23.

¹² Record, Deposition of Curtis Lary, Greenwood chief of police, Nov. 16, 1964, at 74-87, *United States v. Sampson*, *supra*.

¹³ *Id.* at 92-93.

failure to provide protection constituted a denial of the right to public accommodations in violation of the Civil Rights Act of 1964. An order was sought compelling the authorities to provide protection. Trial before a three-judge court was held in January 1965, but the case has not yet been decided.¹⁴

Laurel, Mississippi

On at least five occasions during the summer and fall of 1964, Negroes seeking service at lunch counters in Laurel were attacked by gangs of white men who regularly congregated outside the stores to wait for them. The first and most serious assault occurred on July 11, when two young Negro boys, Larry McGill and Jessie Harrington, sat down at the lunch counter at the S. H. Kress store. Before they could be served, two white men attacked them with small baseball bats. One of the boys was struck on the head and the other across the back. They were treated at a local hospital.¹⁵

The chief of police of Laurel, L. C. Nix, was present at the store, witnessed the beating, and arrested one of the attackers. He required the defendant to post an appearance bond of \$25 and then released him. When the case came up for trial, the defendant failed to appear and his bond was forfeited. No other proceedings were taken against him.¹⁶

Chief Nix defended his failure to take further action by stating that the defendant had the option not to appear and to forfeit his bond.¹⁷ He also noted that the victims had run off without making a complaint and had not appeared to testify.¹⁸ He admitted, however, that he made no effort to have them or other witnesses appear at trial; nor did he attempt to determine whether the injuries were serious enough to warrant initiating

¹⁴ *United States v. Sampson, supra.*

¹⁵ U.S. Commission on Civil Rights, *Staff Report of Investigation of Incidents of Racial Violence, Jones County, Mississippi, 1964*, January 31, 1965, T. 470-72.

¹⁶ Testimony of L. C. Nix, T. 174-75. At the time of this incident, Chief Nix also arrested Arthur Harmon, a Negro, for profanity and required him to post \$25 bond. Harmon, according to the complaint affidavit, had said "G-- d---." T. 178-79.

¹⁷ T. 177-78.

¹⁸ T. 179.

felony proceedings.¹⁹ He regarded the incident as “routine” and commented: “This was just an assault.”²⁰

St. Augustine, Florida

Law enforcement officials in St. Augustine failed to protect persons engaged in mass marches and attempts to use a previously segregated public beach.

During May and June 1964, there were frequent civil rights marches into the center of St. Augustine. Local law enforcement officials attempted to curtail night marches, in which as many as 400 participated, by ordering the marchers to disperse.²¹ When a Federal court held such an order to be an unconstitutional interference with first amendment rights,²² the police changed their tactics. The first march to take place after the Federal court order consisted of about 200 demonstrators. Although 50 to 75 local whites were gathered at one point along the route of march, only 10 to 15 policemen out of the 250 State and local officials who were in the city were present. Several of the marchers were attacked. According to the demonstrators, the police made only desultory attempts to protect them or to disperse the assailants.²³

The next evening 300 to 400 marchers were set upon by 100 local whites and more than 15 Negroes were seriously injured.²⁴ There were isolated attacks on demonstrators but no serious incidents in the period from June 11 to June 24.²⁵ In one attack, however, a white man stabbed a Negro girl with the end of a flag stick. She

¹⁹ T. 179-80, 183-84.

²⁰ T. 180.

²¹ *Young v. Davis*, 9 Race Rel. L. Rep. 590, 591-95 (M.D. Fla. 1964).

²² *Id.* at 597.

²³ Record, hearing on motion to intervene and motion to amend preliminary injunction, pp. 276-81, *Young v. Davis*, No. 64-133-Civ. J, M.D. Fla., June 13, 1964 [hereinafter referred to as *Davis Record*.]

²⁴ *Davis Record* 56-62; interviews with Mrs. Alta Green and Samuel Lyons, participants, Aug. 1964.

²⁵ See, e.g., *Davis Record* 189-90; interviews with Jerome Conway and Leonard Reed, Aug. 1964; SCLC records.

and another marcher fell to the ground and were immediately arrested for disorderly conduct.²⁶ On June 25, about 200 marchers were set upon by nearly 500 whites. Although there were 250 law enforcement officers in St. Augustine at this time, the march was scattered by the mob of whites and Negroes were chased through the streets of the city. At least 30 marchers were treated at the hospital for injuries.²⁷

The last march, on June 29, was protected by 300 law enforcement officers. Violence against the demonstrators was attempted but police intervened and prevented serious injuries. This was the only occasion on which more than two whites were arrested by the police for assaulting marchers.²⁸

During the same period, "swim-ins" at a segregated public beach about five miles from the center of St. Augustine resulted in repeated incidents of violence, usually caused by the same small groups of whites, many of them members of the Ancient City Hunting Club, a segregationist organization.²⁹ In attempting to use the beach, the demonstrators were exercising a right guaranteed by the 14th amendment to the Constitution.³⁰

The number of persons who took part in these demonstrations varied from about 25 to 100. On at least five occasions

²⁶ Interview with Leonard Reed. Governor Farris Bryant established a Special Police Force when he declared a state of emergency in St. Augustine. See p. 61, *infra*. The Special Force required all local law enforcement officers to deliver daily arrest records. Copies of these records and other arrest records maintained by the St. John's County sheriff's office are in Commission files [hereinafter cited as *Police Records*].

²⁷ SCLC records; interviews with Roscoe Halyard, Gayle Sanders, and numerous other participants; interview with Capt. James Prater, Florida State Highway Patrol, August 1964 [hereinafter cited as *Prater Interview*].

²⁸ *Police Records*; SCLC records.

²⁹ *Police Records*; *Prater Interview*; interviews with numerous participants. The exact nature of the Ancient City Hunting Club is unclear. According to the State Highway Patrol, its leader, Halstead (Hoss) Manucy, was responsible for "organizing opposition to the demonstrations," along with "Ku Klux Klan Attorney J. B. Stoner of Atlanta," and Rev. Connie Lynch. See "Racial & Civil Disorders in St. Augustine," Report of the Florida Legislative Investigation Committee appendix 19, at 115 (1965). Federal District Judge Bryan Simpson reportedly stated from the bench that the Club and the Klan were synonymous. *Id.* at 26-27.

³⁰ *Mayor and City of Baltimore v. Dawson*, 350 U.S. 877 (1955).

during this period, the demonstrators were assaulted, despite the presence of up to 200 law enforcement officers.³¹ The officers were advised prior to each attempt to use the beach, and were always present in strength when the demonstrators arrived. But according to the demonstrators, the police made little or no attempt to prevent the violence. Even though the attacks were carried out in the presence of the police, their records show that only a few of the assailants were arrested.³² In one case a person arrested for an assault during a morning demonstration was released a short time after his arrest and then took part in an afternoon assault.³³ When violence broke out, however, the demonstrators—not the whites³⁴—were usually ordered off the beach and many were arrested.³⁵

FAILURE TO PROSECUTE PERSONS RESPONSIBLE FOR RACIAL VIOLENCE

The Commission also investigated the conduct of prosecutors in the few cases in Mississippi in which persons were arrested for committing acts of racial violence. Most of these cases were never brought to trial and in the very few cases in which trials were held, defendants were either acquitted or received suspended sentences or minimal fines.

The officials responsible for instituting prosecutions to enforce State law are the county and district attorneys.³⁶ Both are elected officials—the county attorney by the county and the district attorney by a district composed of from two to seven counties.³⁷ The district attorney is charged with the duty of

³¹ SCLC records; interviews with participants; *Police Records*; *Prater Interview*.

³² Interviews with participants; *Police Records*.

³³ This arrest occurred on June 22, 1964. *Police Records*.

³⁴ This was denied by Captain Prater. See *Prater Interview*.

³⁵ SCLC records; *Police Records*.

³⁶ Miss. Code §§ 3915, 3920 (1956). The city prosecutor is responsible for prosecuting violations of municipal ordinances before the police justice. Miss. Code § 3374-103 (Supp. 1964).

³⁷ Miss. Code §§ 3147, 3238, 3910 (1956); 1394-1411.7 (Supp. 1964).

attending “the deliberations of the grand jury” and with prosecuting all criminal cases for the State in the circuit court.³⁸ The county attorney must “represent the State” before the grand jury and prosecute criminal cases in county and justice of the peace courts.³⁹

Neither district nor county attorneys investigate the cases they present to the grand jury. They are not authorized to have any legal or investigative staff, nor do they generally receive funds for investigation, for office expenses, or for secretarial assistance.⁴⁰ As a result, both prosecuting attorneys tend to rely heavily on the sheriff’s investigative services. As one prosecuting official described it:

[The district and county attorneys] usually don’t keep a lot of files in Mississippi; they depend on the sheriff. They don’t get a lot of voluminous reports and records; they have no facilities. The district attorneys have no investigators and must rely on the sheriff to furnish them any evidence they have.⁴¹

Southwestern Mississippi

In Adams and surrounding counties arrests were made in only two cases of racial violence. In one, involving the shooting on April 5, 1964, of Richard Joe Butler, a Negro, four men were arrested after being identified by the victim. According to the prosecutor, the case was not presented to the grand jury because he judged the evidence to be insufficient.⁴²

The second case involved an assault on Bruce Payne, a white civil rights worker who was a student at Yale College. Payne testified that on October 31, 1963, he and two companions left Natchez for Port Gibson, a town 40 miles away in Claiborne County.

³⁸ Miss. Code §§ 3920-21 (1956).

³⁹ Miss. Code §§ 3915-16 (1956). Not every county, however, has a county attorney, and in such situations, his duties are performed by the district attorney. Testimony of Earl T. Thomas, president of the Mississippi Bar Association, T. 305.

⁴⁰ Miss. Code § 3920.5 (Supp. 1964) (district attorney); Miss. Code § 3916.5 (Supp. 1964) (county attorney).

⁴¹ Testimony of Joseph Davenport, Jr., T.E. 169.

⁴² *Adams County Report*, T. 465.

They were followed by a police car and two other cars containing four white men. The police car turned off at the city limits, but the other cars continued. When Payne stopped at a gas station in Port Gibson, he was attacked and beaten by the men who had followed him. He reported the incident to the police chiefs of Port Gibson and Natchez and gave them the license numbers of the cars used by his assailants.⁴³

A few days later Payne and a companion were forced off the road just north of Adams County and shot at by one of the same men. He reported this incident, with identifying information, to the sheriff of Adams County and other officials. He was not contacted again by any law enforcement officers.⁴⁴

State officials took no action for a year. In the interim, Payne was interviewed several times by FBI agents and identified his assailants from photographs.⁴⁵ This information was given to the State Highway Patrol which, in turn, made it available to the Claiborne county attorney. In October 1964, when the county attorney received this information, he secured the arrest of four men who were then charged with the beating of Payne and were held for the Claiborne County grand jury.⁴⁶

Reliance on the sheriff for preparation of the Payne case resulted in a failure to prosecute. When the grand jury convened in January 1965, the case was not presented because Payne, the chief complaining witness, had not been asked to appear. During its hearing the Commission subpoenaed both the district attorney and the county attorney who were responsible for this case. Both admitted that they made no effort to advise Payne of the proceedings or to request his attendance.⁴⁷ Joseph Davenport, the county attorney, testified that he reminded the sheriff of the case a few weeks before the grand jury met and

⁴³ T. 70-71.

⁴⁴ T. 71-72. On both occasions Payne left his address and telephone number with the officials. *Ibid.*

⁴⁵ T. 72.

⁴⁶ Testimony of Joseph Davenport, Jr., T. 77-78.

⁴⁷ Testimony of Joseph Davenport, Jr., T. 78-79; testimony of T. J. Lawrence, T. 85-86.

requested him to notify the law enforcement officers who had been involved, as well as Bruce Payne “if he knew where he was.”⁴⁸ The sheriff told Davenport that he had notified the officers but had not notified Payne, because local FBI agents “told him they did not know” of his whereabouts. Although Davenport agreed that Payne “should have been there,” he testified that he took no further steps to secure his presence.⁴⁹

District Attorney T. J. Lawrence had the primary responsibility for presenting this case to the grand jury. He testified that in cases of violence he and the county attorney usually interviewed the witnesses and advised them of grand jury proceedings. When the grand jury convened, he requested the foreman of the jury to issue the necessary subpoenas which were then served by the sheriff. He did not regard this procedure as a duty, but as a “little extra good measure . . . to get the facts to present to the Fatal Twelve.”⁵⁰

Lawrence admitted that he did not give this “extra measure” in the Payne case. He did not interview Payne or other witnesses before the grand jury convened. Furthermore, when the witnesses failed to appear, he made no effort to secure their attendance for the next session of the grand jury because, as he said, “I didn’t know who to contact.”⁵¹ Lawrence’s reliance on the sheriff was so complete that he named that officer as responsible for presenting grand jury cases:

Commissioner GRISWOLD. Who is responsible for the presentation of cases to the grand jury in Claiborne County?

Mr. LAWRENCE. I would say the sheriff.⁵²

During his testimony at the Commission’s hearing, Lawrence publicly invited Payne and his companion, George Green, to ap-

⁴⁸ T. 78-79.

⁴⁹ *Ibid.*

⁵⁰ T. 83.

⁵¹ T. 84.

⁵² T. 82.

pear at the next session of the grand jury.⁵³ Payne subsequently received a subpoena and testified before the grand jury on May 17, 1965. No indictment was returned.⁵⁴

Forrest County

On July 10, 1964, Rabbi Arthur J. Lelyveld, from Cleveland, Ohio, was walking along a street in Hattiesburg in Forrest County, Mississippi, accompanied by two white civil rights workers and two Negro girls. He was assaulted and seriously injured by three white men who struck him repeatedly with an iron bar. Two of his assailants subsequently surrendered to Hattiesburg police and were released on \$2,500 bond on charges of assault with intent to maim. Rabbi Lelyveld received a subpoena in Cleveland and appeared before a Forrest County grand jury on August 7, 1964.⁵⁵

In an affidavit furnished to the Commission, Lelyveld stated that he was questioned by District Attorney James Finch before the grand jury and identified his assailants from photographs. His examination by Finch was confined almost entirely to these questions: why he had come to Hattiesburg; whether it was true that the white boys had been embracing the Negro girls before the attack took place; where he had slept during his visit to Hattiesburg; and whether Negroes were sleeping there as well.⁵⁶

When the grand jury failed to indict those identified by Lelyveld, the district attorney filed an information charging them with simple assault—a misdemeanor. They pleaded no contest to these charges, were fined \$500 and given 90 days hard labor, which was suspended.⁵⁷

⁵³ T. 81.

⁵⁴ Telephone interview with Bruce Payne, May 18, 1965; *FBI Appropriation 1966*, 84 (FBI reprint, 1965).

⁵⁵ Affidavit of Arthur J. Lelyveld, August 10, 1965.

⁵⁶ *Ibid.* According to his affidavit, Lelyveld told the grand jury that he had come to Hattiesburg for the National Council of Churches to participate in the Hattiesburg Ministers' Project. He denied that white boys had embraced Negro girls before the attack and stated that he had stayed at the headquarters of the Ministers' Project and slept beside a Negro colleague, the Reverend Dr. Donald Jacobs of Cleveland. In a letter to the Commission, dated Sept. 1, 1965, District Attorney James Finch stated, with respect to these allegations: "The State's Attorneys are not allowed, under the laws of Mississippi, to exert any influence upon the grand jury in their deliberations."

⁵⁷ Letter from James Finch, *supra*.

Leflore County

In addition to the Pike County cases discussed in the previous chapter,⁵⁸ there were only two other cases of racial violence in Mississippi in recent years in which a State grand jury returned an indictment against a white man. The first was the indictment of Byron de la Beckwith for the murder of NAACP leader Medgar Evers in Jackson on June 12, 1963. The murder and the subsequent prosecution attracted national attention, but after two trials had resulted in hung juries, the State dropped the case and Beckwith was released.⁵⁹

Less public attention was given to the shooting of James Travis, a Negro civil rights worker, on February 28, 1963. Travis was struck in the neck by a burst from a submachine gun and seriously wounded as he and two companions were driving on a highway outside the city of Greenwood.⁶⁰ Twelve bullets penetrated the car.⁶¹

When the FBI began its investigations a local white man voluntarily surrendered to the sheriff, confessed, and implicated a companion. The FBI investigation disclosed that spent bullets found inside his car were fired from the same weapon that fired the bullet recovered from Travis' neck.⁶²

A few weeks later a local grand jury indicted both men for felonious assault. The case was first scheduled for trial in May 1963, but prior to the trial date, defendants moved for a continuance to the next term of court, six months later. The State did not object.⁶³ The judge granted the continuance because "no person could . . . have obtained a fair and impartial trial in that court at that time, because of the community and the manner in which it was upset."⁶⁴

⁵⁸ See pp. 30-39, *supra*.

⁵⁹ N.Y. Times, Nov. 15, 1964.

⁶⁰ Testimony of George Everett, T. 274, 276.

⁶¹ T.E. 125.

⁶² T. 276. He was also seen in the car three hours before the shooting. T. 278.

⁶³ T. 274.

⁶⁴ Testimony of Judge Arthur B. Clark, T.E. 116-17.

The second trial date was November 25, 1963, the day of President Kennedy's funeral. Again the defense moved for a six-month continuance which the judge granted, again without opposition.⁶⁵ According to the judge:

[N]o person charged with an attempt upon the life of another by whatever means or in whatever manner could, in the state of the public mind, have anything more than short shrift at the hands of the jury.⁶⁶

A third trial was scheduled for May 1964. This time the State requested and obtained a six-month continuance because of the illness of its principal witness, the former sheriff who had taken the confession.⁶⁷ The fourth scheduled date for trial was in November 1964. District Attorney Everett, who had assumed office after the first continuance in May 1963, testified that he interviewed the officer who had taken the confession a few days before the trial. Everett stated that he learned for the first time of circumstances which, in his judgment, rendered the confession inadmissible.⁶⁸ Since he did not believe the other evidence in the case would support a conviction, Everett moved that the trial be permanently adjourned.⁶⁹ As a result, no trial has been held or is scheduled and the investigation has been closed.⁷⁰

⁶⁵ T. 274.

⁶⁶ T.E. 117.

⁶⁷ T. 274.

⁶⁸ T. 275, 278.

⁶⁹ T. 275.

⁷⁰ T. 275, 280-81.

CHAPTER 4.

OFFICIAL INTERFERENCE WITH THE EXERCISE OF FEDERAL RIGHTS

Failures by State and local officials to prevent violence or punish those responsible has not been the only obstacle to the assertion of Federal rights by Negroes. State and local officials, by deliberately abusing legal processes, have thwarted or attempted to punish citizens exercising or attempting to exercise these rights.¹

In its study of these abuses, the Commission focused on the reactions of State and local officials to attempts by Negroes peacefully to assemble, publicly to protest denials of civil rights, and to obtain access to public facilities and public accommodations. The communities studied were Jackson, Greenwood, and Laurel, Mississippi; Gadsden, Alabama; Americus, Georgia; and St. Augustine, Florida.

Official response was manifested in various ways in these cities. Frequently it took the form of judicial and legislative efforts to prohibit constitutionally protected activity. Mass arrests of persons attempting to exercise rights were common. Discrimination and arbitrariness were prevalent in the setting of bail, in sentencing, and in the handling of juveniles. Prison conditions were alleged to be intolerable in several of the cities.

¹Problems of private racial violence and misuse of legal processes to prevent exercise of rights are not mutually exclusive. As indicated in previous chapters, private violence is frequently accompanied by harassing arrests. In areas covered in this chapter, legal repression of civil rights activity was sometimes accompanied by private violence which went unpunished. See, e.g., the failure of law enforcement officials to prevent or punish violence against demonstrators in Laurel, Greenwood, and St. Augustine described in Chapter 3, *supra*.

FEDERAL RIGHTS INVOLVED

In recent years demonstrations and public protests have become a prime method of asserting and publicizing demands for equal rights for Negroes.² In cases resulting from efforts to suppress and interfere with demonstrations, the Supreme Court of the United States has held that peaceful protest demonstrations that do not unreasonably interfere with valid local functions—such as the regulation of traffic—are encompassed within the rights of free speech, assembly, and petition for redress of grievances guaranteed by the 1st and 14th amendments.³

Because the communication of demands through public protest activity necessarily interferes with activities of other members of the community, courts have held that the right of public assembly is not entitled to as broad a protection as the right of free speech or the press.⁴ Thus, courts have attempted to delimit the scope of protected activity:

A restriction . . . designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. . . . [One could not] contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a

² In 1963 alone, more than 900 protest demonstrations occurred in 115 southern cities. Southern Regional Council, Inc., *Synopsis of Recent Developments*, No. 4, Dec. 31, 1963, p. 1.

³ See *Edwards v. South Carolina*, 372 U.S. 229 (1963).

⁴ See *Cox v. Louisiana*, 379 U.S. 536 (1965).

public or private building, and allow no one to pass who did not agree to listen to their exhortations.⁵

But the permissible extent of a demonstration may be related to the seriousness of the wrong protested:

[I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against.⁶

Although it is valid for a municipality to regulate use of its streets by requiring a license to parade, licensing regulations may not be administered in a discriminatory manner.⁷ Neither may the regulation be so broadly drawn that the licensor may use his discretion to stifle free communication.⁸ In addition, the fact that a demonstration “induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger” will not remove it from constitutional protections, nor will it “permit a State to make criminal the peaceful expression of unpopular views.”⁹

The problems surrounding the legality of protest demonstrations are not raised by attempts to utilize previously segregated public facilities and public accommodations. The 14th amendment has long been held to prohibit a State, its agencies, its subdivisions, or its officials from enforcing or requiring or practicing segregation in public facilities or requiring segregation in public

⁵ *Id.* at 554-55.

⁶ *Williams v. Wallace*, 240 F. Supp. 100, 106 (M.D. Ala. 1965) upholding the right of hundreds of persons to march from Selma to Montgomery, Ala., to protest voting denials. See also *Kelly v. Page*, 335 F. 2d 114 (5th Cir. 1964).

⁷ *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

⁸ Such an ordinance, therefore, must contain standards for the exercise of the licensor's discretion. *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Schneider v. State*, 308 U.S. 147 (1939). See Katzenbach, *The Protection of Political Rights*, 24 Fed. B.J. 18, 27 (1964).

⁹ *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

accommodations.¹⁰ Furthermore, the Civil Rights Act of 1964 leaves no doubt as to the right to use public accommodations free from any interference from private citizens or public officials.¹¹

LEGISLATIVE AND JUDICIAL INTERFERENCE

Americus, Georgia.—In 1962, anticipating mass demonstrations, the Americus City Council amended the city's parade ordinance to require a permit if five or more persons desired to parade.¹² Soon after demonstrations began, the Council enacted an ordinance restricting picketing to business hours, limiting the number of pickets to two per block, and requiring them to remain twenty feet apart.¹³ The Council later enacted ordinances that made it unlawful to refuse to comply with lawful orders or directions of police officers¹⁴ and required persons to leave any public or private building on request of the owner or person in charge.¹⁵ When large numbers of demonstrators were arrested for violating these ordinances, the Council passed another ordinance compelling city prisoners to pay jail fees in order to secure their release.¹⁶

St. Augustine, Florida.—The St. Augustine City Commission, in June 1963, responded to picketing by enacting an ordinance that prohibited picketing which interfered with normal pedestrian traffic or sought to persuade persons not to do business with the establishments being picketed.¹⁷

¹⁰ See *Robinson v. Florida*, 378 U.S. 153 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955). See also Civil Rights Act of 1964, 42 U.S.C. § 2000b (1964).

¹¹ 42 U.S.C. § 2000a-2 (1964). See *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965).

¹² Code of Americus City Ordinances, § 23-3 (1963). The permit must be applied for at least ten days prior to a parade.

¹³ Code of Americus City Ordinances, § 15-27.1.

¹⁴ Code of Americus City Ordinances, § 15-35.1.

¹⁵ Code of Americus City Ordinances, § 15-19.1.

¹⁶ Ordinance of August 9, 1963, Americus, Georgia.

¹⁷ Emergency Ordinance No. 167-A, passed June 19, 1963.

In May and June 1964 large groups of demonstrators staged a series of night mass marches.¹⁸ Police ordered the leaders to halt these marches,¹⁹ and a few days later the city council imposed a 9 p.m. curfew on all persons under the age of 18.²⁰ As the demonstrations continued and met violent interference, Florida Governor Farris Bryant issued an executive order proclaiming a state of emergency and banning night marches during this emergency.²¹

Mississippi.—In April 1963, three days after local Negroes and civil rights workers began marches to the county courthouse in Greenwood to protest denials of the right to vote, the city council reacted by issuing a proclamation prohibiting all large organized groups from going on the streets or sidewalks of the city.²² The council then broadened the city's parade ordinance to require a permit for virtually every use of the streets and sidewalks other than ordinary transit.²³ City officials stated that no permits would be issued for demonstrations, explaining that this was necessary to prevent violence by whites.²⁴ When demonstrations resumed in 1964, the council again issued a public order prohibiting organized groups from using public sidewalks or streets.²⁵

¹⁸ Interview with Dr. Robert B. Hayling, St. Augustine SCLC leader, August 7, 1964 [hereinafter cited as *Second Hayling Interview*].

¹⁹ *Young v. Davis*, 9 Race Rel. L. Rep. 590, 594 (M.D. Fla. 1964).

²⁰ *Id.* at 595. The police order and the curfew were vacated by a Federal court, which held that they constituted an unconstitutional interference with first amendment rights. *Id.* at 597.

²¹ 9 Race Rel. L. Rep. 1515, 1516 (1964). Violation of the order was to be punished by imprisonment up to six months and a fine of \$500.

²² Interview with Charles E. Sampson, mayor of Greenwood; Hardy Lott, city attorney; B. F. Hammond, police commissioner; and Curtis Lary, chief of police, May 20, 1964 [hereinafter cited as *Greenwood City Interview*]. Statement to the public from Greenwood City Council, April 1, 1963.

²³ Ordinance of June 21, 1963, amending § 76 of Art. IX of the ordinance of Nov. 20, 1953, City of Greenwood, 8 Race Rel. L. Rep. 1196 (1963). Penalty for violation of this ordinance is \$100 or 30 days.

²⁴ *Greenwood City Interview*. Pursuant to the order and the ordinance, police dispersed attempted demonstrations before they left the Negro neighborhood. Memorandum in Commission file.

²⁵ *Greenwood City Interview*.

The most sweeping legislation adopted to restrict demonstration activity was passed by the Mississippi legislature early in 1964 in response to an announcement by civil rights workers that a "Summer Project" involving hundreds of persons was to be held in the State. Criminal measures were enacted which limited certain kinds of demonstrations,²⁶ prohibited the printing or distribution of printed material advocating boycotts,²⁷ provided municipal authorities with increased powers to deal with anticipated trouble,²⁸ and prohibited advocating, teaching, or aiding in criminal acts designed to effect any political or social change.²⁹

In addition to legislation, officials in Jackson, Mississippi, and Gadsden, Alabama, sought and obtained State court injunctions prohibiting demonstrations.³⁰ The injunctions were issued *ex parte*—without an opportunity for the demonstrators to present arguments against their issuance or terms.³¹ There were no arrests under the Jackson injunction³² but numerous arrests were made subsequently under the Gadsden injunction.³³

ARRESTS OF DEMONSTRATORS

In the six communities studied, Commission investigation disclosed that persons who demonstrated or attempted to use public

²⁶ Miss. Code § 2318.5 (Supp. 1964) (limited picketing and mass demonstrations which would interfere with public business and the administration of justice).

²⁷ Miss. Code § 2236.5 (Supp. 1964).

²⁸ Miss. Code § 3374-132(2) (Supp. 1964) (municipal authorities granted power to restrict movement of citizens when there exists a danger to public safety); Miss. Code § 3470 (Supp. 1964) (communities authorized to enter mutual assistance pacts to pool personnel, equipment, and supplies in order to quell disturbances); Miss. Code § 2087.9 (Supp. 1964) (prohibiting refusal to comply with orders or commands of law enforcement officers).

²⁹ Miss. Code §§ 2066.5-01-02, -03, -04 (Supp. 1964).

³⁰ The order in Jackson prohibited unlawful acts of parading, demonstrating, boycotting, trespassing, picketing, and any demonstration at churches. *Jackson v. Salter*, 8 Race Rel. L. Rep. 433 (Ch. Hinds Co. 1963). The Gadsden order prohibited the blocking of sidewalks, streets, or entrances to stores. *State ex rel. Flowers v. Robinson*, 8 Race Rel. L. Rep. 848 (Cir. Ct. Etowah Co. 1964).

³¹ *Ibid.*

³² Interview with Jack Young and Carsie Hall, Jackson Negro attorneys, June 10, 1964 [hereinafter cited as *Jackson Attorney Interview*].

³³ Interview with Circuit Judge A. B. Cunningham, July 2, 1964, [hereinafter cited as *Cunningham Interview*].

accommodations or facilities were immediately ordered to disperse and were arrested if they refused to do so. The action of local officials indicated they did not consider whether the activity of those arrested was statutorily or constitutionally protected or whether, in fact, the persons arrested were engaged in harmful activity.

Participants in mass marches rarely had an opportunity to proceed more than a few blocks before they were arrested—usually under an ordinance requiring a permit to parade. Officials often made arrests before the marchers could proceed past the Negro section of town. Since Negroes were unable to give public expression to their grievances through the use of public assembly, they submitted to arrest in order to publicize their protest.

Gadsden, Alabama.—Sit-in demonstrations in Gadsden began in June 1963 with groups of 75 to 100 demonstrators protesting segregated restaurants and lunch counters.³⁴

A few days after the first sit-in, city officials obtained a State court injunction that prohibited demonstrators from blocking sidewalks, entrances to stores, and traffic, but expressly permitted certain types of peaceful demonstrations.³⁵ The next afternoon, when 300 Negroes gathered in front of the county courthouse, 235 persons were arrested for violating the injunction.³⁶ That evening a large group of Negroes assembled on the courthouse lawn to protest the arrests; they were driven from the lawn by Alabama State troopers using cattle prods and nightsticks.³⁷

³⁴ Interview with Q. B. Adams, Rev. W. A. Baskerville, Leon Ballou, and Bishop G. W. Garrison, Negro leaders, June 30, 1964 [hereinafter cited as *Gadsden Leaders Interview*]; interview with Tony Reynolds, chief sheriff's deputy, and Felton Yates, deputy sheriff, July 1, 1964 [hereinafter cited as *Reynolds Interview*]; interview with managers of W. T. Grant, Woolworth's, Murphy's, and Sears Roebuck stores, July 2, 1964.

³⁵ Record, *Ex parte Robinson*, Case No. 9584, Cir. Ct., Etowah County, June 25, 1963.

³⁶ *Ibid.*; *Gadsden Leaders Interview*; Etowah County Jail Book.

³⁷ *Gadsden Leaders Interview*; interview with Leslie L. Gilliland, mayor, and Joseph Hubbard, police commissioner, July 1, 1964; *Reynolds Interview*. The FBI investigated 22 complaints by victims alleging injuries from excessive force by State troopers. Memorandum in Commission files.

More arrests under this injunction followed throughout the summer. Protest activities ended with the arrest of 233 demonstrators during a march in August.³⁸

Laurel, Mississippi.—The Commission's investigation in Laurel centered on attempts by Negroes to eat at previously segregated lunch counters following the passage of the Civil Rights Act of 1964. Notwithstanding the clear legislative mandate establishing the Federal right to equal use of public accommodations, in December 1964 Laurel officials arrested integrated groups of persons who sought to obtain service at a local coffee shop.³⁹ Laurel Police Chief L. C. Nix made these arrests pursuant to warrants alleging that those arrested "willfully and unlawfully, with intent to provoke a breach of the peace, refused to leave the Pinehurst Coffee Shop."⁴⁰ Each of the arrested defendants was charged with breach of the peace and required to post \$101 bond. Chief Nix justified his action principally on the ground that as a local police officer he had no duty to determine the rights of the defendants under Federal law.⁴¹ When asked whether he had any obligation to enforce Federal law in Mississippi, Chief Nix replied, "My obligations are to enforce State laws, local ordinances, and to preserve the peace."⁴² He was then questioned as follows:

Commissioner GRISWOLD. Have you heard of the public accommodations provisions of the Civil Rights Act?

Mr. NIX. Yes, sir.

Commissioner GRISWOLD. Do you regard them as law in Mississippi?

Mr. NIX. Yes, sir.

³⁸ Etowah County Jail Book; *Gadsden Leaders Interview*.

³⁹ *Jones County Report*, T. 470. The public accommodations section of the Civil Rights Act of 1964 had been declared constitutional by the United States Supreme Court prior to the arrests. *Heart of Atlanta Motel v. United States*, 379 U.S. 261 (1964); see also *Katzbach v. McClung*, 379 U.S. 294 (1964).

⁴⁰ Arrest records produced in response to Commission's subpoena.

⁴¹ T. 181-82.

⁴² T. 181.

Commissioner GRISWOLD. Do you regard it as your responsibility to enforce them in Mississippi?

Mr. NIX. I don't believe I can enforce the segregation or the desegregation of a place.

Commissioner GRISWOLD. Have you not taken an oath to support and defend the Constitution of the United States?

Mr. NIX. Yes.

Commissioner GRISWOLD. Do you not regard that oath as binding?

Mr. NIX. Yes, sir.⁴³

Jackson, Mississippi.—Police in Jackson adopted the policy of immediate arrest in dealing with protests. Arrests were made without any apparent effort to determine whether those arrested were engaged in constitutionally protected activity.

When nine college students staged a "sit-in" at the Jackson Public Library in March 1961, they were arrested for breach of the peace.⁴⁴ When hundreds of Freedom Riders came to Jackson in 1961 challenging segregated transportation facilities, most of them were immediately arrested.⁴⁵ When local Negroes demonstrated in 1963 for improved job opportunities, desegregation of public accommodations and facilities (including schools), and the establishment of a biracial committee, they were arrested.⁴⁶ When demonstrations were held in 1965 protesting the convening of a special session of the State legislature to rewrite Mississippi voting laws, Jackson officials again reacted by arresting hundreds of demonstrators.⁴⁷

In every march, the participants were asked to disperse and, upon failure to do so, were arrested and charged with violating

⁴³ *Ibid.*

⁴⁴ See Jackson (Miss.) Daily News, March 29, 1961, p. 1.

⁴⁵ See, e.g., Lusky, *Racial Discrimination and Federal Law: A Problem in Nullification*, 63 Colum. L. Rev. 1163 (1963).

⁴⁶ These demonstrations are documented in testimony presented in a suit brought by the NAACP against city officials. Record, *NAACP v. Thompson*, 321 F.2d 199 (5th Cir. 1963) [hereinafter cited as Record, *NAACP v. Thompson*].

⁴⁷ Jackson Daily News, June 15, 1965, p. 1. Most of those arrested were charged with parading within a permit. *Guyot v. Pierce*, Civ. No. 22,676, 5th Cir. June 15, 1965 (enjoining enforcement of city parade ordinance pending appeal).

the city's parade ordinance,⁴⁸ an ordinance which does not specify any standards for granting or denying a permit.⁴⁹ Negroes and civil rights workers were also arrested on various charges during attempts to use segregated city parks,⁵⁰ during "pray-ins" at white churches,⁵¹ and while picketing business establishments in downtown Jackson.⁵²

Greenwood, Mississippi.—Demonstrators in Greenwood also were ordered to disperse immediately and, in some cases, were arrested during their numerous marches in 1963 and 1964 to the county courthouse to encourage voter registration.⁵³ Although city officials told Commission investigators that demonstrations were peaceful and orderly,⁵⁴ every attempt to demonstrate during 1963 was repressed by police.

In 1964 the pattern varied somewhat. Police permitted picketing at the courthouse, but removed white civil rights workers from the picket line, took them to the police station where they were photographed and fingerprinted, and later returned them to the courthouse.⁵⁵ On one occasion, pickets were arrested when they refused to comply with an order restricting picketing to one side of the courthouse. On another occasion, persons were arrested when they refused to obey an order to limit pickets to 10 voting age residents of Leflore County.⁵⁶

⁴⁸ Record, *NAACP v. Thompson* 222; Jackson Daily News, June 15, 1965, p. 1. The one exception to this was the march permitted for the funeral of Medgar Evers.

⁴⁹ The Jackson City Code provides: Section 594—That it shall be unlawful for any person, firm, or corporation to have any parade along, over, or upon any street or avenue of the City of Jackson, or to use by driving over or across or upon any of the streets or avenues of the City of Jackson, Mississippi, without first obtaining a permit from the mayor for such parade, and providing further that any person, firm, corporation, or association shall not use any other streets or avenues than those designated.

⁵⁰ Memorandum in Commission files.

⁵¹ *Ibid.*; Jackson Police Arrest Docket.

⁵² Record, *NAACP v. Thompson*; Jackson Police Arrest Docket.

⁵³ Interview with Samuel Block, SNCC leader in Greenwood, May 18, 1964.

⁵⁴ *Greenwood City Interview.*

⁵⁵ Memorandum in Commission files.

⁵⁶ *Ibid.* On October 16, 1964, the Department of Justice agreed with city officials to dismiss a Government suit against city officials alleging voter intimidation in exchange for their assurances that the city would not interfere with registration activity. See *Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 1302-03 (1965).

Americus, Georgia.—On several occasions in 1963, Negro teenagers in Americus attempted to purchase tickets at the white entrance to the town's movie theater. When they were refused, they protested by standing silently against the wall of the building. When they failed to obey the police order to disperse, they were arrested.⁵⁷ Marches protesting these arrests brought further arrests under a statute prohibiting parading without a permit.⁵⁸

On August 8, violence erupted when police attempted to stop a march, which was started by a small group of Negroes and grew to nearly 200 as it moved through the Negro district. The police seized one of the leaders and jabbed him with a cattle prod when he refused to move. Stones were thrown at the police and attempts were made to free the arrested leader. The police dispersed the other demonstrators by firing shots over their heads. In the melee, several officers and at least five demonstrators were injured. Three civil rights leaders were arrested and charged with attempt to incite insurrection, assault with intent to kill, riot, unlawful assembly, attempt to escape, and aiding an attempt to escape.⁵⁹ The rest of the summer's demonstrations ended in arrests.⁶⁰ On one occasion nearly all those arrested alleged that they were prodded and struck with night sticks by the police during the arrest.⁶¹

St. Augustine, Florida.—Demonstrations began in St. Augustine in June 1963 after the breakdown of negotiations between civil rights groups and local officials. The civil rights groups were seeking the formation of a biracial committee, integration of public fa-

⁵⁷ Americus Recorder's Court Docket, July–August 1963; Record, p. 147, *Aelony v. Pace*, Civil Nos. 530, 531 M.D. Ga., 1963 [hereinafter cited as *Aelony Record*]. Following the theater's first refusal to sell tickets, Negro teenagers began to picket the movie theater, as well as various downtown stores which refused to hire Negroes. The pickets attempted to comply with the town's extremely restrictive picketing ordinance.

⁵⁸ Record, *Americus v. Turner*, Nos. 848–65, Recorder's Ct., Sept. 3, 1963; Recorder's Court Docket, July 19, 1963, Sept. 3, 1963.

⁵⁹ Record, *State v. Harris*, Super. Ct., Sumter County, Aug. 20, 1963, *passim*; *Aelony Record*, *passim*.

⁶⁰ *Aelony Record* 326–27; Record, *Americus v. Bowen*, Recorder's Ct., Sept. 19, 1963; Recorder's Court Docket.

⁶¹ Record, *Americus v. Fuller*, Nos. 867 *et seq.*, Recorder's Ct., Sept. 19, 1963; *Aelony Record*, *passim*.

cilities and accommodations, and employment of Negroes in responsible city jobs.⁶² From June to October, sit-ins were staged at a number of lunch counters. Although many of the demonstrators were arrested and charged with breach of the peace and conspiracy, the police did not interfere with peaceful picketing.⁶³

In 1964 an intensive effort was begun to integrate public accommodations in St. Augustine. During Easter Week hundreds of persons were arrested at several restaurants and lunch counters;⁶⁴ and a large number of students were arrested when they refused to comply with a police order requiring them to halt a march.⁶⁵

In April 1964 Dr. Martin Luther King went to St. Augustine at the request of local Negro leaders to lead protests against segregated public accommodations. During a 10-week period, 378 persons were arrested in 58 separate incidents. Demonstrators were held under a variety of charges, such as breach of the peace, trespass with malicious intent, violation of the undesirable guest statute, and conspiracy to commit these offenses.⁶⁶

BAIL

In the United States a person accused of a crime is presumed innocent until proven guilty by judicial process. Thus, the accused must be brought before the proper officials for arraignment and in non-capital cases is permitted his freedom prior to being convicted.

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and

⁶² Interview with Dr. Robert B. Hayling, Jan. 14, 1964 [hereinafter cited as *First Hayling Interview*].

⁶³ *Ibid.*

⁶⁴ Interviews with participants, August 1964; interview with Earl Johnson, Jacksonville attorney who defended many of the demonstrators, Aug. 1964 [hereinafter cited as *Johnson Interview*]; CCR Complaint Files, Nos. 4506, 4677; *Police Records*.

⁶⁵ *Police Records*; *Second Hayling Interview*; *Johnson Interview*. Interviews with participants, Aug. 1964.

⁶⁶ *Police Records*; interviews with participants, Aug. 1964.

serves to prevent the infliction of punishment prior to conviction⁶⁷

In order to insure the defendant's presence at trial, he may be required to deposit money or other collateral with the court as bail for his appearance at trial. Thereafter, he must appear or forfeit his deposit. He may post as bail a surety bond from an authorized bondsman, a bond secured by real or other property, or cash. In some cases, he may be released on his own recognizance without posting bail.

The eighth amendment to the Constitution provides that excessive bail may not be required,⁶⁸ and this provision probably applies to the States.⁶⁹ Most State constitutions also provide for the right to bail.⁷⁰ When a State "has provided a right to bail it may not . . . engage in such administration as arbitrarily or discriminatorily to effect denial or deprivation of the right to a particular accused."⁷¹ Thus, neither may excessively high bail be required nor may the nature of the collateral or the conditions imposed be unreasonable.⁷² Moreover, pretrial bail generally may not be denied in order to protect society from possible new crimes by an accused.⁷³ In the areas studied, how-

⁶⁷ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

⁶⁸ *Stack v. Boyle*, *supra*.

⁶⁹ The Supreme Court has not in recent years ruled on this question. In *Pilkington v. Circuit Court of Howell County*, 324 F.2d 45, 46 (8th Cir. 1963), the court stated: "We take it for granted that contrary to earlier cases . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment." The eighth amendment prohibition on cruel and unusual punishment has been declared applicable to the States. *Robinson v. California*, 370 U.S. 660 (1962).

⁷⁰ Paulsen & Kadish, *Criminal Law and Its Processes* 923 (1962). See e.g., Miss. Const. art. 3, § 29.

⁷¹ *Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir. 1964), *cert. denied*, 376 U.S. 965 (1964).

⁷² For example, requiring unencumbered real property and refusing to accept cash bond may effectively deny bail. See T. 326-28. Cf. *Rehman v. California*, 13 L. Ed. 2d 17 (1964) (Douglas in chambers); *Cain v. United States*, 148 F. 2d 182 (9th Cir. 1945).

⁷³ *Williamson v. United States*, 184 F.2d 280 (2d Cir. 1950); Freed & Wald, *Bail in the United States: 1964*, A Report to the National Conference on Bail and Criminal Justice, Washington, D.C. May 27-29, 1964, p. 5. Bail pending appeal ordinarily should be granted. *Leigh v. United States*, 8 L. Ed. 2d 269 (Warren, Circuit Justice, 1962).

ever, the requirement of excessively high bail bonds or the arbitrary refusal to accept usually acceptable collateral were devices commonly utilized to discourage protest demonstrations.⁷⁴ A clear pattern of abuse in the administration of bail was evident in Jackson, Americus, and St. Augustine.⁷⁵

Jackson, Mississippi.—The bail problems faced by demonstrators in Jackson in 1963 were particularly acute.⁷⁶ All property available for property bonds had been exhausted in the 1961 Freedom Ride cases⁷⁷ and no local surety company was willing to place bonds for demonstrators. Nor was it possible to obtain bonds from out-of-state companies. It is the policy of Mississippi courts to require that such companies obtain the counter-signature of a local agent, and local agents refused to countersign bonds for demonstrators.⁷⁸

⁷⁴ Freed & Wald, *supra*. In this study, prepared for the National Conference on Bail and Criminal Justice, bail abuses were found in civil rights cases: "Because the defendants in civil rights cases often welcome litigation, and their offenses carry comparatively small penalties, the danger of flight is small. A recent study of forfeitures bears this out. As a result, high bail in these cases can be explained only as punishment or to deter continued demonstrations." *Id.* at 53.

⁷⁵ The practices uncovered in these cities were not atypical. In interviews with civil rights attorneys who defended demonstrators in numerous southern cities, the Commission was informed that bail practices were abusive. For example, in Birmingham at the beginning of mass demonstrations in 1963, the statutory maximum bail for appearance or appeal was \$300. This amount was set uniformly in demonstration cases until the beginning of May 1963 when the Alabama legislature enacted a measure which permitted the setting of bail in misdemeanor cases up to \$2,500. This applied only to cities with a population of 350,000 or more—Birmingham is the only such city in the State. Act No. 8, May 2, 1963, 2d Special Sess. of Ala. Leg. In Savannah, Georgia, in July 1963, 15 persons were arrested and tried under the State's good behavior statute. They were convicted and appeal bonds ranged from \$15,000 to \$45,000. Commission memorandum, based on interviews with civil rights attorneys, April 10, 1964. See also *Jones v. Grimes*, 219 Ga. 585, 134 S.E. 2d 790 (1964) (judgment of Georgia lower court affirmed provided bail be reduced from the \$20,000 initially required to not over \$5,000).

⁷⁶ Under Mississippi law "any committing court, in its discretion, may allow any defendant, to whom bail is allowable, to deposit cash as bail bond in lieu of a surety or property bail bond. . . ." Miss. Code § 2486 (Supp. 1964).

⁷⁷ Lusk, *supra* note 46, at 1180.

⁷⁸ *Jackson Attorney Interview.*

Thus, the entire amount of bail had to be posted in cash.⁷⁹ When an arrest was made for violating a city ordinance (such as the parade ordinance) bail was set at \$100 for appearance at trial in police court; \$125 more was required to appeal for a trial *de novo* in county court; and, finally, an additional \$1,275 was set for an appeal to the circuit court. Thus, each case appealed to the circuit court required \$1,500 bail bond.⁸⁰ Although State statute permitted a maximum bail of \$500 for appearance at a trial *de novo*,⁸¹ the amount required of demonstrators—\$225—was substantially larger than that required for cash bonds⁸² in non-civil rights cases.⁸³

Defendants held for violation of State laws (such as disturbing the peace) were required to post \$500 bond—the legal maximum—for appearance at trial before the justice of the peace.⁸⁴ Bail for this offense in non-civil rights cases was usually \$25.⁸⁵ On appeal to county court, bail remained at \$500.⁸⁶ When an appeal was taken to the circuit court, an additional \$1,000 was required. The \$1,500 required was the maximum permitted under State law.⁸⁷

Jackson officials often increased the amount of bail required by “pyramiding” the charges—bringing multiple charges against the

⁷⁹ *Jackson Attorney Interview*. Furthermore, the county attorney required all defendants scheduled for trial during any week to appear on Monday for the calling of their cases. This resulted in several forfeitures of cash bonds. *Ibid*.

⁸⁰ *Ibid*.

⁸¹ Miss. Code § 1202 (1956).

⁸² When property bonds are posted, the amount must exceed \$200, since the county collection machinery is only available for the collection of forfeitures in excess of this amount; this has no application when cash bonds are posted. Miss. Code § 1834 (1956).

⁸³ *Jackson Attorney Interview*.

⁸⁴ *Ibid*. Miss. Code § 1834 (1956).

⁸⁵ National Conference on Bail and Criminal Justice, *Hinds County Survey* 6 (1964).

⁸⁶ *Jackson Attorney Interview*.

⁸⁷ *Jackson Attorney Interview*. \$1,000 of this \$1,500 represents an appearance bond and \$500 is a cost bond. \$1,000 is the legal maximum for an appearance bond under Mississippi law. Miss. Code § 1178 (1956). Mississippi law provides for a maximum cost bond of double the amount of anticipated costs. Miss. Code § 1175 (1956). Assuming \$250 is a reasonable maximum for court costs, \$500 would be the maximum cost bond permitted and for all practical purposes, \$1,500 would represent the legal maximum appeal bond.

demonstrators.⁸⁸ The purpose of pyramiding was particularly clear in cases where bail was required for several charges, but only one charge was presented at trial.⁸⁹

Gadsden, Alabama.—When mass arrests of Negroes and civil rights workers were made in Gadsden for alleged violation of a State injunction, bail was not set for more than a week and no judicial hearing was held during that time.⁹⁰ The circuit judge who had issued the injunction told Commission investigators that bail was delayed because the demonstrators made it difficult for the sheriff's office to process them after their arrest. He said that he was "not interested in their having bail if they were going back on the Street."⁹¹

Americus, Georgia.—Bail for Americus demonstrators was originally set at \$106 for each charge. The amount was increased to \$200, the legal maximum, as demonstrations continued.⁹² After the first few demonstrations, bail was further

⁸⁸ Jackson Police Arrest Docket (1963). For example, on July 18, 1963, a juvenile and an adult were arrested for passing out handbills without a permit. The juvenile was charged only with the substantive offense. The adult who accompanied him was also charged with contributing to the delinquency of a minor and was required to post a \$725 bond for the two offenses. Similarly, a civil rights leader was arrested in 1963 along with four juveniles at a sit-in and charged in separate counts with contributing to the delinquency of each of the minors. He was required to post bail for each count. *Jackson Attorney Interview.*

⁸⁹ For example, a number of persons attempting to integrate church services were charged with trespass and disturbing public worship, each a misdemeanor under State law. \$1,000 bail was required—\$500 for each charge—but only one charge was pressed at trial. *Jackson Attorney Interview.* The difficulties raised by Jackson bail requirements were heightened by protracted delays in processing appeals of demonstrations cases in State courts. As a result, bail bonds were tied up for several years. *Jackson Attorney Interview.*

⁹⁰ See p. 62, *supra* for a discussion of this injunction. Record, *Ex parte Robinson*, No. 9584, Cir. Ct., Etowah Co., June 25, 1963; *Cunningham Interview.* Bail was finally set when the court denied defendants' petition for habeas corpus, at which time, under Alabama law, bail was mandatory. Bail was set at \$500 for adults, \$300 for youths 18–21, and \$200 for teenagers 16–18.

⁹¹ *Cunningham Interview.* A Birmingham lawyer representing the demonstrators told Commission investigators that he called the judge to ask about bond for the prisoners and was informed that there would be no bail for violators of the injunction. Interview with Oscar Adams, Birmingham attorney, July 2, 1964.

⁹² Police Bail Records. Code of City Ordinances, § 19–2. Bail was set in the first instance by the chief of police for violations of city ordinances and by the sheriff for violations of State law. Interview with Walker Griffin, mayor of Ameri-

increased by the pyramiding of charges.⁹³ By August, most demonstrators had to post \$600 bond to obtain release; others were held in as much as \$12,000 bond.⁹⁴ Bail was set promptly, but authorities refused to accept property bonds from the area's only Negro bondsman even though they had accepted his bonds in the past.⁹⁵

Bail was denied in the cases of four Americus civil rights leaders who were charged with attempting insurrection—a capital offense.⁹⁶ In a taped interview, broadcast over a local radio station, the local prosecutor stated that he brought the prosecutions primarily to extract a promise from the four defendants to leave Americus in exchange for a dismissal of these charges.⁹⁷ The defendants remained in jail for 83 days until their release was ordered by a three-judge Federal court.⁹⁸

St. Augustine, Florida.—During the summer 1963 demonstrations in St. Augustine, persons arrested for sit-ins were charged

cus; Ross Chambliss, chief of police; and William Smith, city attorney, Aug. 12, 1964 [hereinafter cited as *Americus City Interview*]. \$106 is the amount of the maximum permissible fine. Code of City Ordinances, § 39. Commission investigators found from an examination of the Recorder's Docket, which does not indicate bail in every case, that bond required in most cases, such as disorderly conduct, fighting or assault, was below \$100. Investigators were unable to see the Police Bail Records showing bail set for persons other than demonstrators.

⁹³ *Americus City Interview*.

⁹⁴ Record, *State v. Harris*, Commitment Hearing, p. 155, Justice of the Peace Court, Sumter County, Aug. 20, 1963.

⁹⁵ *Americus City Interview*. Interview with John Lee Barnum, Jr., bondsman, Aug. 11, 1964 [hereinafter cited as *Barnum Interview*]. City officials contended that Mr. Barnum's property was insufficient to secure the bonds. Review of Mr. Barnum's tax statements and bank accounts by Commission investigators disclosed substantial property in excess of the face amount of the bonds. During the time that city officials were refusing Mr. Barnum's bonds, the clerk of the City Recorder's Court was accepting them for appeals. Telephone interview with H. Gatewood, clerk of the Recorder's Court, Sept. 21, 1964.

⁹⁶ See *Aelony Record*. Three of the four were also charged with unlawful assembly, rioting, assault with intent to kill, and resisting arrest. The fourth was also charged with unlawful assembly.

⁹⁷ *Aelony Record* 488.

⁹⁸ *Aelony Record*. The court ruled that the insurrection charge was unconstitutional and ordered that the defendants be admitted to bail on the other charges against them. See note 59, *supra*. The court set the maximum amount which the defendants could be required to post.

with one count of trespass and bail was set at \$100.⁹⁹ Those arrested during Easter Week 1964 were charged with three offenses; their bail ranged from \$100 to \$500 for each offense. The average bail for each adult arrested in the sit-ins that week was \$500.¹⁰⁰ Bail during the second series of demonstrations in 1964 was even higher. Five persons arrested during this period were required to post \$3,000 bond. Most of the demonstrators were assessed \$900. The total bail during this later period amounted to nearly \$200,000.¹⁰¹

In a suit brought on behalf of the demonstrators in June 1964, a Federal district court found that the sheriff, the chief of police of St. Augustine, and County Judge Charles C. Mathis, who were responsible for setting the bail, had abused their discretionary authority in demonstration cases.¹⁰² Judge Bryan Simpson stated that the actions of officials in fixing bail and subjecting demonstrators to intolerable jail conditions without trial constituted a form of "cruel and unusual punishment." He issued an interlocutory injunction directing that unless reasonable bail and appearance requirements were set (which he defined as not in excess of \$300 for each plaintiff), the trials of the demonstrators were permanently enjoined:

⁹⁹ Record, *Hayling v. Shelley*, Civil No. 63-201 M.D. Fla., Oct. 17, 1963. Most bail was set at a similar level for the remainder of the summer; however, some demonstrators arrested on August 31 were held in lieu of \$1,500 bail. For two defendants it was \$900 each and for six, \$1,500 each. These demonstrators had refused to leave the drugstore involved in the sit-in when ordered and the police employed cattle prods to compel them to leave.

¹⁰⁰ *Police Records*. Average based on 56 of 115 cases for which records were available.

¹⁰¹ *Police Records*; SCLC Records.

¹⁰² *Johnson v. Davis*, 9 Race Rel. L. Rep. 814 (M.D. Fla. 1964). Bail for whites who were arrested and charged with assault upon civil rights demonstrators and, in some cases, with possession of a deadly weapon, ranged from \$25 to \$100. *Police Records*. At the height of the demonstrations the attorney general of Florida came to St. Augustine and discussed the bail situation with the Chief of the Special Force and Judge Mathis. The Chief of the Special Force recommended that bail be raised for the whites who attacked Negro demonstrators. He was overruled. *Prater Interview*.

On one occasion in June 1964 bail was set at \$45 for a white man who had assaulted a demonstrator. A local segregationist leader present at the jail suggested that the bail be lowered to \$25; it was. *Ibid*. A number of the whites arrested were from out of state. *Police Records*.

The conclusion is inescapable that the appearance bonds in these cases were arbitrarily and capriciously fixed in grossly excessive amounts by the Defendants Davis and Mathis, either or both. . . . [T]he financial harassment of Defendants, or perhaps of the Southern Christian Leadership Conference, which sponsored the sit-ins, appears to be the purpose.¹⁰³

JAIL CONDITIONS

A frequent charge by persons arrested in mass demonstrations was that they were subjected to primitive and, in some cases, inhuman jail conditions. The Commission did not investigate jail conditions at the time that demonstrators were incarcerated. However, judicial inquiries and other reliable reports indicate that in a number of cases the allegations were of substance.¹⁰⁴

Americus, Georgia.—Following the arrests in Americus, most of the demonstrators were jailed temporarily in an abandoned office building and later transferred to jail facilities in neighboring counties. The complaints about all facilities were similar. Since the jails were mostly abandoned buildings, they had little or no functional plumbing.¹⁰⁵ One building had to be fumigated by the prisoners,¹⁰⁶ and in another there were not enough beds and no mattresses.¹⁰⁷ Prisoners were not permitted outside; one group was confined in a barracks for 38 days during August and September.¹⁰⁸ After a girl escaped from one jail, 26 girls were

¹⁰³ *Johnson v. Davis*, *supra* at 816.

¹⁰⁴ Mistreatment of Negro prisoners arrested in Selma, Ala., for example, was reported by the federal court:

"This harassment, intimidation and brutal treatment [by local law enforcement officials] has ranged from mass arrests without just cause to forced marches for several miles into the countryside, with the sheriff's deputies and members of his posse herding the Negro demonstrators at a rapid pace through the use of electrical shocking devices (designed for use on cattle) and night sticks to prod them along." *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

¹⁰⁵ *Americus City Interview*; interviews with demonstrators; *Aelony Record* 329, 330.

¹⁰⁶ Interviews with demonstrators.

¹⁰⁷ Interviews with demonstrators; *Aelony Record* 329.

¹⁰⁸ *Ibid.*

crowded into a dark punishment cell large enough for 12.¹⁰⁹ At all of the jails the prisoners were served four hamburgers once a day and no other food.¹¹⁰ City officials admitted that jail conditions were below standard due to the absence of facilities to handle the large number of persons arrested. They did not dispute the existence of unsanitary conditions but alleged that they were the fault of the prisoners.¹¹¹

St. Augustine, Florida.—Federal Judge Simpson described Sheriff Davis' custodial procedures for demonstrators in St. Augustine:

[He forced the demonstrators] outside their cells to remain exposed to the elements in an open unshaded fenced compound through the midday hours, and sometimes all day. This place contained makeshift, exposed and inadequate toilet facilities, which were a source of humiliation, degradation and shame to the mixed group of males and females, juveniles and adults, whites and Negroes forced to share their use. This was used only for these plaintiffs, not for other jail inmates.

The use of this compound, in Florida's 90-degree-plus June temperature, and in one severe storm, was sought to be justified by the Defendant Davis as compliance with three successive Grand Jury reports that the jail must be equipped with an exercise yard so that inmates could get exercise outside their cells.

Further punishment devised by the Sheriff was the crowding of 9 or 10 male plaintiffs together overnight into concrete "sweatboxes," 7' x 8'. The females, 21 in number, on the other hand, were forced on one occasion for an hour and 18 minutes into a circular

¹⁰⁹ Interviews with demonstrators.

¹¹⁰ *Americus City Interview.*

¹¹¹ *Ibid.*

padded cell 10' in diameter. This group included one polio victim, Mrs. Georgia B. Reed, on crutches and unable to stand without them.

Both the sweatboxes and the padded cell were so small that the occupants had to sit or lie down in relays. These latter practices were imposed as punishment for singing religious songs or praying in the jail. As to the use of the compound, the good Sheriff said further that this was to make the Plaintiffs tired and ready for sleep at nightfall, to discourage singing in advance.¹¹²

Judge Simpson concluded his findings of fact: "More than cruel and unusual punishment is shown. Here is exposed, in its raw ugliness, studied and cynical brutality, deliberately contrived to break men, physically and mentally."¹¹³

TRIAL AND SENTENCING

When trials of civil rights demonstrators were finally held, in some cities only after extended delays,¹¹⁴ they generally resulted in convictions and the imposition of harsh sentences.

Americus, Georgia.—In Americus, trials of many of the demonstrators were postponed by the city recorder, the man responsible for hearing cases involving violations of city ordinances. During the height of the demonstrations, the recorder suspended court in order to attend summer military camp. Recorder's Court, which normally meets once a week,¹¹⁵ did not

¹¹² *Johnson v. Davis*, *supra* note 96, at 817.

¹¹³ *Ibid.*

¹¹⁴ The Federal Constitution and the constitutions of forty-six States provide, in some manner, that a defendant is entitled to a speedy trial. In New York and Nevada prompt trials are assured by statute. In most States, statutes set forth the maximum period prior to trial. Paulsen & Kadish, *Criminal Law and Its Processes* 990 (1962).

¹¹⁵ Prior to suspending court, the Recorder refused to hear cases more often than once a week. He justified this position on the grounds that those arrested intended to violate the conditions of their probation and bail was available to all demonstrators as soon as they were booked by police. Interview with R. L. LeSueur, City Recorder, Aug. 12, 1964 [hereinafter cited as *LeSueur Interview*].

convene for four weeks.¹¹⁶ When the recorder returned, trials of demonstrators were held weekly and demonstrators were tried in order of arrest. As a consequence of this delay, and difficulty in obtaining bail,¹¹⁷ more than a hundred demonstrators were incarcerated for periods up to six weeks while awaiting trial for misdemeanors.¹¹⁸ Most of them were local teenagers.

All the Americus demonstrators were convicted and sentenced to the maximum penalty—\$100 or 60 days labor on the streets. The recorder justified these sentences by stating that he had observed the violence that developed out of similar racial demonstrations in Albany, Georgia, and Birmingham, Alabama. When he sentenced demonstrators in Americus, he said, he “looked beyond what they had been doing” in order to discourage further demonstrations.¹¹⁹

Jackson, Mississippi.—Most demonstrators in Jackson were convicted of either a misdemeanor under State law or violation of city ordinances. In both instances, maximum penalties were imposed. The sentence for a misdemeanor was \$500 and six months;¹²⁰ for ordinance violation, \$100 and 30 days.¹²¹ Jail sentences were suspended on pleas of *nolo contendere*.¹²² These sentences were substantially greater than the sentences imposed for comparable offenses which did not involve civil rights.¹²³

¹¹⁶ The City Charter provides that the mayor is to act as recorder in the absence of the elected recorder. The mayor, however, refused to serve; nor would he appoint an acting recorder or lower the bail or release the demonstrators on their own recognizance. *LeSueur Interview; Americus City Interview*.

¹¹⁷ See discussion pp. 72–73, *supra*.

¹¹⁸ *City of Americus v. Turner, et al.* Nos. 848–65, Recorder's Ct., September 3, 1963.

¹¹⁹ *LeSueur Interview*. In non-civil rights cases in Americus, violators of city ordinances, in almost every instance, were given less than the maximum sentence. Memorandum in Commission files, summarizing study of Recorder's Docket.

¹²⁰ *Jackson Attorney Interview*.

¹²¹ Miss. Code § 3374–137 (1956). Under a 1964 amendment to this section, the maximum punishment for violation of municipal ordinances was increased to 90 days and a \$300 fine.

¹²² *Jackson Attorney Interview*.

¹²³ For example, the Jackson arrest docket from April 1, 1964, to June 1, 1964, shows 32 convictions for disturbing the peace or disorderly conduct. In 28 of the cases, the

Greenwood, Mississippi.—Demonstrators arrested in Greenwood in 1963 were usually sentenced to four months and \$200, either for breach of the peace or disorderly conduct.¹²⁴ These sentences were substantially greater than those imposed in non-civil rights cases. In Leflore County during the preceding year, there had been 19 convictions for disorderly conduct. In these cases, the average fine was \$7.37 and only two defendants were jailed. The average fine during the same period in non-civil rights breach of the peace cases was \$6.66.¹²⁵

Civil rights workers, who were known to the Greenwood officials, were subjected to repeated arrests for minor infractions of the law, followed by harsh and discriminatory fines and sentences. In February 1963, Samuel Block, the leader of the civil rights movement in Greenwood, was arrested for “uttering a public statement calculated to cause a breach of the peace.” Block had stated to the press that a fire which had destroyed a Negro garage in Greenwood was the result of a mistaken attempt to burn the civil rights office. He was convicted, sentenced to six months in jail, and given a \$500 fine. Neither the judge who sentenced him nor the city prosecuting attorney could recall another prosecution based on the utterance of a public statement.¹²⁶

In November 1963, three whites and two Negroes were arrested while collecting ballots in a mock election conducted by civil rights groups. They were charged with blocking the sidewalk, convicted, and fined \$100 each. The fines of the two Negroes, both 16 years old, were suspended on two years’ good behavior.¹²⁷

In the seven years preceding these convictions four persons unconnected with civil rights activity were found guilty of blocking

sentences were \$25 or less. In the remaining four cases, all of which involved civil rights demonstrators, the sentence was \$500 and six months in jail. Jackson Police Arrest Docket 1964. A similar pattern appeared with respect to convictions for trespass.

¹²⁴ Staff investigation report on fines and sentences imposed by local courts in Greenwood, Mississippi, 1963–64 [hereinafter cited as *Greenwood Sentence Report*] T. 485–90.

¹²⁵ *Id.* at 487.

¹²⁶ Interview with Judge O. L. Limbrough, Greenwood city judge, and Gray Evans, city prosecutor, May 20, 1964.

¹²⁷ *Ibid.*

the sidewalk. They were fined \$5 each in accordance with a schedule of fines used by the Greenwood city police.¹²⁸

JUVENILE PROCEEDINGS

Juvenile court proceedings are not technically considered criminal proceedings; rather they are special statutory proceedings, civil in nature but involving certain criminal principles. "The fundamental philosophy of the juvenile court laws is that a delinquent child is to be considered and treated not as a criminal but as a person requiring care, education and protection."¹²⁹ Since juvenile proceedings are designed only to educate and rehabilitate and not to punish, constitutional safeguards assured those accused of crimes generally are not applicable.¹³⁰ In the areas studied, however, local authorities used the broad discretion afforded them by the absence of safeguards to impose excessively harsh treatment on juveniles. In Jackson, Americus, and St. Augustine, juveniles who had been arrested in demonstrations were threatened with imprisonment and, as a condition of exoneration or release, were forced to promise that they would not participate in future civil rights activities.

Jackson, Mississippi.—More than half the total number of demonstrators arrested in Jackson during 1963 were juveniles.¹³¹ The first minors arrested were released to their parents on condition that the parents do "everything in [their] power . . . to keep that child from being involved in further demonstrations," and that the juveniles agree "to be responsive to the authority and

¹²⁸ *Greenwood Sentence Report*, T. 489-90. Another civil rights worker convicted of running a stop sign in October 1964 was fined \$50; in 58 out of 60 non-civil rights cases the fine was \$10 or less. *Id.* at 485.

¹²⁹ *Thomas v. United States*, 121 F. 2d 905, 908 (D.C. Cir. 1941).

¹³⁰ See *White v. Reid*, 125 F. Supp. 647 (D.C. 1954).

¹³¹ Record, *NAACP v. Thompson* 1676 (testimony of Juvenile Judge Guernsey). Under the Mississippi law in effect in 1963, the Youth Court had jurisdiction over all criminal cases involving persons under 18 years of age. Miss. Code § 7185-04 (1956). Legislation enacted in 1964 ousted the court of jurisdiction over offenses most frequently charged in connection with demonstrations. Miss. Code § 7185-03 (Supp. 1964).

to the discipline of the parents.”¹³² Juveniles arrested at a later date were also released to the custody of their parents, but their cases were held open for a period of one year. During this period, the juveniles were required to stay out of all demonstrations and “avoid any further violation of the law.”¹³³ They were also forbidden to participate in any demonstration even if it did not violate the law.¹³⁴

Americus, Georgia.—Approximately 125 juveniles were arrested during the Americus demonstrations,¹³⁵ and their cases disposed of in a unique manner. Some of them were released from jail upon payment of a jail fee of \$23.50, plus \$2 per day for food.¹³⁶ These fees were paid by parents who agreed to send their children to relatives living in the country. No court hearing was held in these cases;¹³⁷ of those juveniles who appeared in court (approximately 75% of those arrested) about 50 were sentenced to the State Juvenile Detention Home and placed on probation on the condition that they would not associate with certain leaders of civil rights organizations in Americus.¹³⁸

Many juveniles arrested in Americus were detained for long periods of time without bail or hearing. The juvenile court judge explained the reason for this in Federal court: “If one is bad enough to keep locked up, they’re not entitled to bail; and if they’re not bad enough, there’s no use to make them make bond.”¹³⁹

¹³² Record, *NAACP v. Thompson* 1677.

¹³³ *Id.* at 1684.

¹³⁴ *Ibid.*

¹³⁵ Aelony Record 308. The city court has jurisdiction over juveniles up to the age of 17. The court has discretion to waive its jurisdiction over the age of 16. City Judge James W. Smith elected to waive his jurisdiction over 16-year-olds. He testified in Federal court that he did so “to get rid of all of the cases I could.” *Id.* at 301, 310.

¹³⁶ This was pursuant to an ordinance passed during the summer. See p. 60, *supra*; *Aelony Record* 313.

¹³⁷ *Id.* at 312.

¹³⁸ *Id.* at 311, 315–16.

¹³⁹ *Id.* at 304.

One case involving a 14-year-old Negro girl bears special mention. The girl was arrested during a demonstration on August 8, 1963.¹⁴⁰ Because she was on probation from juvenile court as a result of a prior arrest in a civil rights demonstration and was afraid to appear again before that court, she told the police she was 17 years old.¹⁴¹ She was charged with assault with intent to kill, unlawful assembly, rioting, and aiding an attempt to escape. Bail was set at \$12,000. At a habeas corpus hearing in State court on October 1, the court learned that she was a juvenile and ordered her bound over to juvenile court; bail remained at \$12,000.¹⁴² The juvenile judge refused to lower her bail,¹⁴³ and she remained in jail until November 1, when a three-judge Federal court ordered the bail reduced.¹⁴⁴ She was in jail 87 days without any hearing of the charges against her.

St. Augustine, Florida.—Early in July 1963, following the first demonstration in St. Augustine, County Judge Mathis (who also serves as the St. John's County juvenile judge)¹⁴⁵ sent a letter to Negro leaders stating that parents and other interested persons should not permit juveniles to participate in civil rights demonstrations.¹⁴⁶ Following this notification, any juvenile who was involved in a picket line was removed by the police and sent home.¹⁴⁷

Juveniles were, however, arrested during a sit-in in July.¹⁴⁸ After adjudging them delinquents, Judge Mathis offered to place them on probation instead of sending them to prison, provided they refrain from all demonstration activity for an

¹⁴⁰ Record, *State v. Harris*, *supra* note 60, at 103.

¹⁴¹ *Aelony Record* 202, 209-10.

¹⁴² *Id.* at 198-99.

¹⁴³ *Id.* at 199, 304, 306.

¹⁴⁴ *Id.* at 473-75; 8 Race Rel. L. Rep. 1355 (M.D. Ga. 1963).

¹⁴⁵ Interview with Charles Mathis, County Judge, Aug. 3, 1964 [hereinafter cited as *Mathis Interview*].

¹⁴⁶ "Racial and Civil Disorders in St. Augustine," Report of the Florida Legislative Investigation Committee, p. 30 (1965).

¹⁴⁷ *Second Hayling Interview*.

¹⁴⁸ They were charged with breach of the peace, trespass, and violation of the undesirable guest statute.

indefinite period.¹⁴⁹ These terms were accepted by the parents, but not by all the children. Four rejected the restriction and were sent to the county jail for 30 days. Subsequently they were transferred to reform schools¹⁵⁰ and following extensive legal proceedings, they were released in January 1964, nearly six months after their arrest.¹⁵¹

During demonstrations in 1964, two hundred thirty-four juveniles were arrested.¹⁵² When these cases came before a Federal court, the juveniles were ordered released.¹⁵³ In issuing this order, Judge Simpson stated:

The customary procedure with respect to juveniles in Florida charged with misdemeanors is to release them to parents' custody to await trial. . . . Their detention without bond or release was an arbitrary and capricious act of harassment and cruel and unusual punishment on the part of [Judge] Mathis.¹⁵⁴

¹⁴⁹ *Mathis Interview*.

¹⁵⁰ The reform schools were, of course, segregated under Florida law. Fla. Stats. § 955.12 (1944). One of the girls was a senior in high school. Since the classes at the reform school only went to 10th grade, she missed an entire term of school. Interview with Joanne Anderson, Aug. 3, 1964.

¹⁵¹ The State Cabinet, sitting as Board of Commissioners of State Institutions, ordered the children released on the original conditions set by Judge Mathis. *Johnson Interview*.

¹⁵² *Police Records*; SCLC Records.

¹⁵³ *Johnson v. Davis*, *supra* note 102.

¹⁵⁴ *Id.* at 816

CHAPTER 5.

STATE AND LOCAL LAW ENFORCEMENT

The principal remedy for racial violence is effective State and local law enforcement. In Mississippi, the widespread failure of local officials to solve and prosecute cases of racial violence and the pattern of harassment of local Negroes and civil rights workers raise questions not only about their performance as individuals, but also about the institutions which they represent. In assessing the reasons for such failures and abuses, it is important to consider the nature of the office itself and its effect on the type of person selected and the quality of official conduct.

SHERIFFS

The office of sheriff in Mississippi, as in other Southern States, is closely linked in history and character to the early English sheriff.¹ During the last thousand years the sheriff's duty to enforce the law has remained remarkably unchanged. In Mississippi today, as in medieval England, the sheriff is the principal "conservator of peace in his county" with the duty to wield "the executive power for the preservation of the public peace."² He is re-

¹ Smith, *Police Systems in the United States* 66-67 (1960). See also Howard, *An Introduction to the Local Constitutional History of the United States* 302 (1889).

² *South v. Maryland*, 59 U.S. (18 How.) 396, 402, 403 (1855). See also Miss. Code §§ 4254-56 (1956). Smith, *op. cit. supra* note 1, at 67; German, Day & Gallati, *Introduction to Law Enforcement* 56 (1962). This is particularly true in Mississippi where the powers of the State Highway Safety Patrol are limited principally to the enforcement of the traffic laws. In 1964, in an apparent effort to strengthen local law enforcement, the Patrol was authorized to investigate violence. It was also given general police powers but only upon the issuance of a governor's proclamation. Miss. Code § 8082 (Supp. 1964). No such proclamation has been issued.

quired to arrest persons who break or attempt to break the peace within his view, to demand peace bonds for good behavior, to pursue and commit misdoers, and for these purposes to call out the men of the county—the *posse comitatus*.³

These duties require him not only to arrest persons suspected of crimes but also, by affirmative action, to prevent violence or breach of the peace. As one court has held:

His duties are not merely to apprehend those who have committed offenses but to prevent such offenses. . . . The duties imposed cannot be performed without some degree of activity and diligence to inform himself of conditions in his county. Certainly they preclude the idea that he may, without dereliction, shut his eyes to what is common knowledge in the community, or purposely avoid information, easily acquired, which will make it his duty to act. . . . [I]t is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses, and . . . it is a distinct neglect of duty for them to ignore common knowledge of law violations or to intentionally avoid being where they have reason to believe that such offenses are being committed. . . .⁴

The sheriff in Mississippi also has numerous civil functions that are unrelated to his law enforcement duties. Traditionally he has served as executive officer of the county courts, keeper and victualer of the jail, and, most significantly, as tax collector.⁵ Over the years the office has been encumbered by a host of new functions. The sheriff now acts in such diverse capacities as reforestation warden, librarian, inspector of child labor, and executive officer of certain State and county administrative agencies.⁶ In fact, these

³ *South v. Maryland*, *supra* note 2, at 402; Miss. Code § 4254 (1956).

⁴ *State v. Reichman*, 135 Tenn. 653, 664-65, 188 S.W. 225, 228 (1916). See also, *State v. Williams*, 346 Mo. 1003, 144 S.W. 2d 98 (1940); *Farmers Mut. Fire Ass'n of Shelby County v. Hunolt*, 81 S.W. 2d 977 (Mo., 1935); *In re Sulzmann*, 125 Ohio St. 594, 183 N.E. 531 (1932).

⁵ See Smith, *op. cit. supra* note 1, at 66-73.

⁶ See, e.g. Miss. Code §§ 2883, 3227, 4257, 4993, 6029, 6988, 6989 (1956).

new duties have multiplied to such an extent that, according to one Mississippi authority, the "purely civil functions of the office leave very little time for the performance of its traditional police duties."⁷

Selection

The sheriff is essentially a "political bird of passage,"⁸ and not a professional law enforcement officer. His election by the citizens of the county significantly affects and determines the manner in which he enforces unpopular laws. As one commentator notes:

[T]hey all reflect to a certain extent the mores of the county that has elected them. The sheriff who owes his election to a particular wing of the county, or a certain segment of public opinion, is not apt to enforce a state law unpopular with those who elected him. If gambling, prostitution, or Negro beating are part of the mores of the community, the sheriff often reflects this majority view in his handling of his office.⁹

The absence of a significant Negro electorate in Mississippi—the result of a purposeful and effective effort on the part of State and local officials to deny the franchise to Negroes¹⁰—insures that sheriffs will be responsible only to the white community.

⁷ Highsaw & Mullican, *Guidebook of the County Sheriff* 3 (1948).

⁸ Smith, *op. cit. supra* note 1, at 72.

⁹ Babcock, *State and Local Government and Politics* 111-12 (1962). See also Brookings Institution, *State and County Government in Mississippi* 625 (1932), and testimony of Robert Brumfield, T. 57: "If your citizens don't support the law, well, you have no law."

¹⁰ 1965 Report of the U.S. Commission on Civil Rights, *Voting in Mississippi* 1. In 29 Mississippi counties the majority of the population is Negro. U.S. Bureau of the Census, *U.S. Census of Population: 1960*, vol. 1, pt. 26, at 24-25 (1963). There are, however, no Negro sheriffs and at the time of the Commission's hearing, only seven percent of the State's Negro voting age population was registered to vote. *Voting in Mississippi, supra* at 60-61.

This problem is compounded by the lack of impartiality related to the absence of professional training. Since there are no qualifications for the office relevant to police duties,¹¹ persons are often elected who lack background or experience in law enforcement. Prior to his election, the sheriff of Madison County had been an instructor for 20 years in the local agricultural high school.¹² The sheriff of Adams County was a farmer who served for five years as an employee of the State Motor Vehicle Comptroller's Office.¹³ In short, "as a police officer he is usually untrained, frequently devoid of previous experience, and in most cases without special qualifications."¹⁴

The lack of training produces investigations which are often unsatisfactory. A State prosecuting official gave this description of the sheriff's police work:

Some are completely untrained; some have no knowledge of law enforcement or investigative matters; some hire men who do have; some do not hire such people. And it is very easy to tell when the cases are presented to a grand jury—where I hear them first—to tell which agency prepared the case by the way in which it has been investigated and prepared.¹⁵

The quality of the sheriff's performance is also affected by Mississippi law limiting him to a single term.¹⁶ This limitation

¹¹ The sheriff need only be a qualified elector, who believes in a Supreme Being, and who is not in default to local, State, or Federal governments. Miss. Code § 4232 (1956). Compare, Magna Carta (1215) (Men shall not be made sheriffs "unless they understand the law of the land, and are well disposed to observe it.")

¹² T. 244, 260.

¹³ T. 142-43.

¹⁴ Millspaugh, *Local Democracy and Crime Control* 14 (1936).

¹⁵ T.E. 129.

¹⁶ Miss. Const. art. 5, § 135; Miss. Code § 4232 (1956). A 1964 amendment to that section of the Mississippi Constitution permits the sheriff to succeed himself if he does not also hold the office of tax collector, but other statutes provide that the sheriff shall always be tax collector. Miss. Code § 4266 (1956). In Illinois, Kentucky, and West Virginia sheriffs are limited to one 4-year term and in Delaware they are limited to one 2-year term. See National Sheriff's Ass'n, 1965 *Directory of Sheriffs*. The English sheriff was similarly limited. See Karraker, *The Seventeenth Century Sheriff* 6 (1930).

on the office has been said to keep the sheriff from having any "interest in the development"¹⁷ and to result in his forced retirement:

[J]ust as he is beginning to learn the ins and out of his job; build up a reliable system of contacts and become familiar with the habits of the more predictable law offenders within his jurisdiction.¹⁸

The lack of continuity may also adversely affect investigations of pending cases. Although a sheriff is required to maintain records pertaining to the jail,¹⁹ he is not required to keep any investigation records. For example, Sheriff Anders of Adams County testified that he had no information concerning several unsolved cases of racial violence because the previous sheriff had failed to provide him with any records.²⁰

As a practical matter, the elective sheriff is not subject to any executive or administrative review or sanction. "Since the sheriff is elected by the people, he can be made responsible only in part or in a minor degree to any other authority."²¹ "Thus, there is generally no State authority to compel the enforcement of a law by local officers."²²

Compensation

The method of compensating the sheriff tends to discourage vigorous law enforcement activities. The sheriff receives fees for serving a summons, taking bail bonds, impaneling juries, and similar activities. But he is not entitled to any fee or even to reimbursement for expenses incurred in preventing or investigat-

¹⁷ T.E. 129.

¹⁸ Delta Democrat-Times (Greenville, Miss.), April 21, 1965, p. 2.

¹⁹ Miss. Code § 4248 (1956).

²⁰ T. 430.

²¹ Brookings Institution, *op. cit. supra* note 9, at 809. In Mississippi the law allows removal of a sheriff from office only upon conviction for willful failure to keep the peace or upon a finding by the Governor, after a hearing, that the sheriff had failed to protect prisoners in his custody from mob violence. Miss. Code §§ 2297, 4254, 4256 (1956).

²² Highsaw & Fortenberry, *The Government and Administration of Mississippi* 163 (1954). See also Brookings Institution, *op. cit. supra* note 9, at 809.

ing crime.²³ According to one sheriff, a fee system has this consequence:

If I pursue a robber and after much effort capture him, I receive only seventy-five cents from the county as an arrest fee. I get that much from every subpoena, from every jury summons and every warrant. The amount which I receive from police work does not pay for the gasoline which I use in the pursuit, to say nothing of the time my deputies use and which I must pay them for.²⁴

In addition, the sheriff is required to pay the salaries of any deputies he may need to hire out of the fees he receives.²⁵ This system discourages employment of a sufficient number of deputies. Sheriff Anders of Adams County testified that he normally used five deputies to patrol an area of approximately 450 square miles with a rural population of 12,000 persons.²⁶ As a result of racial violence during 1964, the sheriff requested and received assistance from State investigators and later hired additional deputies. The number of law enforcement officers remained admittedly inadequate. After several Negro churches had burned, the sheriff called together the Negro ministers, told them he could not protect all of their churches, and advised them to post armed guards themselves.²⁷

Sheriff Warren of Pike County used 10 deputies to cover an area approximately the same size as Adams County but with twice

²³ Miss. Code §§ 3936, 3952 (1956). There is a limited exception permitting payment of expenses not exceeding \$500 per annum in certain small counties. Miss. Code § 4171 (1956).

²⁴ Quoted in Moley, *The Sheriff and the Constable*, 146 *Annals* 32 (1929).

²⁵ Special statutes permit some payment out of public funds for a deputy in certain limited situations. See Miss. Code § 4172 (Supp. 1964) (applicable to not more than nine counties) and Miss. Code § 4235.5 (1956) (applicable to not more than six counties). Under an act of the 1964 Mississippi legislature (House Bill No. 564, approved May 22, 1964) sheriffs may appoint, with the approval of the Board of Supervisors, extra deputies who are to be paid out of "available" county funds. It is not known whether in any instance funds have been made available for this purpose.

²⁶ T. 143. *U.S. Census of Population: 1960, op. cit. supra* note 10, at 11, 82.

²⁷ T. 139.

its rural population.²⁸ Some of these men were part-time officers who worked only in the evenings and held other jobs during the day. He did not add to his force during the violent summer of 1964.²⁹

The principal source of the sheriff's income is the percentage fee he receives for collecting taxes. Mississippi is one of the few remaining States where the sheriff still holds the office of tax collector, as he did in England.³⁰ This aspect of the sheriff's office makes it highly profitable, particularly in the wealthier counties. For example, the present sheriff of Washington County reported a net income of \$34,156.97 for his first year in office and the sheriff of Adams County a net income of \$21,983.15.³¹ As one sheriff told the Commission, "We make our money on tax collection and lose it on law enforcement."³²

Jurisdiction

Both for tax collection and law enforcement purposes, the sheriff's jurisdiction extends only to the county line.³³ Consequently, he does not investigate incidents of violence which occur in other counties, even though the persons responsible may be thought to reside in his county.³⁴ Sheriff Warren of Pike County, for example, denied any responsibility for investigating the attack on Andre Martinsons and Rene Jonas, who were followed from Pike County, but beaten in Lincoln County.³⁵

As a county official, the sheriff is technically responsible for law enforcement within the cities of his county. But since he generally

²⁸ T. 14. *U.S. Census of Population: 1960, op. cit. supra* note 10, at 13, 86.

²⁹ T.E. 55-56.

³⁰ Miss. Code § 4266 (1956). See Howard, *op. cit. supra* note 1, at 302.

³¹ In 12 counties sheriffs reported net incomes of over \$20,000. Information obtained from Mississippi Department of State, Jackson.

³² Testimony of Sheriff Jack Cauthen of Madison County, T. 263.

³³ Millspaugh, *op. cit. supra* note 14, at 14.

³⁴ See, e.g., Testimony of Sheriff Anders of Adams County, T. 50-51; testimony of Sheriff Warren of Pike County, T. 15-16.

³⁵ T. 15-16.

has few deputies and is responsible for a relatively large area, he usually enters into informal agreements not to exercise law enforcement jurisdiction within city limits. Sheriff Warren of Pike County and Sheriff Anders of Adams County both testified that they had such agreements with the McComb and Natchez police departments.³⁶ The sheriffs relied on such agreements to justify their refusal to investigate city incidents.³⁷

POLICE

The sheriff's practice of delegating law enforcement duties to municipal police forces gives the municipal police chief primary responsibility for investigation and control of violence within his jurisdiction. The chief of police may either be elected by the city or appointed by the mayor or aldermen.³⁸ In either case, he is a salaried officer who is permitted to, and frequently does, succeed himself in office. He has no significant duties other than enforcing the law. As a result, the police chiefs frequently have had the benefit of extensive experience in law enforcement.³⁹ As the table on page 93 shows, the number of police officers was considerably larger both in absolute and proportional terms than the number of deputy sheriffs. Like the police chief, police officers are salaried men who are paid by the city and frequently serve on a long-term basis.⁴⁰

Despite the differences between sheriffs and police chiefs, there are significant deficiencies in police systems of law enforcement. Elected police chiefs are subject to the same pressures as sheriffs

³⁶ T. 18, 432.

³⁷ T. 15-22, 431-34.

³⁸ Miss. Code § 3374-35 (1956); T. 161-62.

³⁹ Chief Robinson, Natchez, has served as police chief for four years, T. 152; Chief Nix, Laurel, for six years, T. 174; Chief Guy, McComb, for 10 years; T. 33; Chief Burnley, Greenville, for six years, T. 206; Chief Thompson, Canton, for 21 years, T. 265.

⁴⁰ T. 161.

and a disfranchised Negro community is unlikely to be served adequately.

	Population ^a	Number of officers
Adams County	38,000	5 ^b
Natchez	24,000	40 ^c
Pike County	35,000	10 ^d
McComb	12,000	16-18 ^e
Madison County	33,000	12 ^f
Canton	10,000	10 ^g
Greenville	41,000	53 ^h

^a U.S. Census of Population: 1960, *op. cit. supra*, note 10, at 11-15.

^b T. 143.

^c T. 159.

^d T. 14.

^e T. 18.

^f Staff Memorandum in Commission files.

^g *Ibid.*

^h T. 296.

Moreover, there are no legal requirements that the police hire recruits without discrimination or that they disqualify persons who are members of extremist groups. It was disclosed at the Commission hearing that, except in Greenville, there were no Negro policemen in the problem areas studied. Even though all police chiefs who testified before the Commission said they would exclude extremists from their force, there was a difference of opinion as to what an extremist actually was. It was disclosed that the police chief of McComb had been a member of the Americans for the Preservation of the White Race (APWR).⁴¹ The police chief of Natchez testified that he would not exclude police officers who were members of the APWR.⁴² Though the police may have a better institutional framework than the sheriffs, their personnel selection procedures do not help to secure the employment of officers who will carry out law enforcement duties in an impartial and professional way.

⁴¹ T. 39-40.

⁴² T. 154.

PROSECUTORS

In Mississippi, as in other Southern States, the responsibility for prosecuting violations of State law rests with a county or district attorney, who depends almost entirely on the investigative services of the sheriff. The defects in the sheriff's office are thus not remedied by an independent prosecuting and investigating agency.⁴³ The local prosecutors may prosecute or fail to prosecute at will. The attorney general of the State has no power to remove district or county attorneys who fail to discharge their duties, to compel them to bring or refrain from prosecution, or to bring prosecutions himself upon their default.⁴⁴

A 1932 study of Mississippi county and local government stated that "a great portion of the failure of district attorneys to perform their duties properly can be traced, not to lack of knowledge, but to a feeling of security that their actions will not be reviewed."⁴⁵ Applied to prosecutions for racial violence, this finding still appears sound today.

GREENVILLE—A CONTRAST

The contribution that community support for impartial law enforcement, a professional police force, and firmly expressed intentions to enforce the law can make towards preventing racial violence was revealed in the Commission's study of Greenville, Mississippi. Greenville is the county seat of Washington County and the fourth largest city in Mississippi. When Negro leaders from Greenville appeared before the Commission, they were unanimous in expressing confidence in their law enforcement officials. James Edwards, chairman of the local NAACP, testified that the attitude of the Negro community towards law enforcement was "good" and that Negroes believed "we have one of the

⁴³ The prosecuting attorney is elected by the county or the district. Miss. Code §§ 3910, 3920 (1956).

⁴⁴ Miss. Code §§ 3836-41 (1956); Brookings Institution, *op. cit. supra* note 9, at 821-23. See also Highsaw and Fortenberry, *op. cit. supra* note 25, at 162-64.

⁴⁵ Brookings Institution, *op. cit. supra* note 9, at 471.

best police forces in the State, one of the best police forces that you will find. . . .”⁴⁶

The confidence of the Negro community in Greenville police can be attributed to the determination of city officials to have impartial and professional law enforcement.

The chief of police, William C. Burnley, Jr., had served as a law enforcement officer in Greenville for 25 years and is a graduate of the FBI National Academy. Members of extremist groups were not permitted to join the police department, and this policy was enforced by means of FBI checks of recruits and lie detector tests. Burnley’s entire immediate staff (seven officers) have attended the FBI National Academy. Other officers have received training as detectives. Unlike other police forces in Mississippi, since 1950 the Greenville police force has included Negro officers. At the time of the Commission’s hearing there were seven Negro police officers and several Negro crossing guards.⁴⁷

In the spring of 1964, when many Mississippi communities feared violence because of the announced arrival of civil rights workers, officials in Greenville took steps to prevent trouble. The mayor and the city council issued statements which underlined the city’s determination that law and order would prevail.⁴⁸ Mayor Dunne told the Commission, “This we meant and the people knew that we meant it.”⁴⁹ The city’s position was supported by public statements from citizens’ groups in Greenville and by the local newspaper.⁵⁰

The police displayed a similar attitude. Police Chief William C. Burnley, Jr., began a program of orientation and training for his officers in which he stressed their duty to enforce the law fairly and to prevent incidents of violence. The chief told his men that the policy would be, “Arrest no person regardless of who they are or what group they belong to unless they have violated the

⁴⁶ T. 283. Edwards added, “We are sorry we can’t say the same for the sheriff’s force. . . .” *Ibid.*

⁴⁷ Testimony of Chief Burnley, T. 299.

⁴⁸ T. 294.

⁴⁹ *Ibid.*

⁵⁰ T. 284, 289.

law.”⁵¹ Those who felt they could not accept this policy were invited to leave the department. The police chief and other officials also took steps to advise themselves fully of the membership and activities of the Klan and similar organizations.⁵²

The community was apprised in April 1964 of police determination to prevent violence. When the Ku Klux Klan, in a show of strength, burned crosses in communities throughout Mississippi, Greenville was the only place where the persons responsible for cross-burnings were arrested and prosecuted. Later, when civil rights workers arrived in the community, there were no incidents of violence against them, nor was a single worker arrested by the Greenville police on any charge.⁵³

On August 10, 1964, a white attacked a Negro, and, in a separate incident, a Negro attacked a white. Arrests were made almost immediately in both cases and identical fines imposed.⁵⁴ Following these incidents, Police Chief Burnley issued a statement:

The issue with us is not which race assaults the other, but rather the idea of professional law enforcement. We intend to enforce the laws of the state and city as written without regard to one's station in life. This is the only way that peace and order can be obtained and continued.⁵⁵

Chief Burnley testified at the hearing that his policy received “tremendous support from the community,” and that without such support he believed his effectiveness would have been greatly diminished.⁵⁶ Two leading members of the white community, Albert Lake and Leroy Percy, testified that they thought that the business and professional community contributed to the quality of law enforcement in the city of Greenville. As Mr. Lake commented, “Voluntary groups . . . have basically operated to give

⁵¹ T. 297.

⁵² *Ibid.*

⁵³ T. 298.

⁵⁴ *Ibid.*

⁵⁵ Delta Democrat-Times (Greenville, Miss.), August 12, 1964, p. 4.

⁵⁶ T. 298.

support to the governing body of the city and to the police force and to see that law and order was maintained.”⁵⁷ Mr. Percy expressed a similar view:

I think the basic reason for Greenville being the community that it is, is this: there has been a long history of responsible citizens willing to participate in local government, not only to involve themselves in voting and getting the vote out, but to serve as city councilmen, as members of the school board and so forth. I think that is basic.⁵⁸

In other parts of the State local citizens did not publicly express their opposition to violence and their support of impartial law enforcement until extensive violence had already occurred. In McComb, violence continued for five months before local citizens issued the “Statement of Principles.”⁵⁹ In Natchez, although a statement was prepared shortly after a series of whippings in February 1964, it was not published until October.⁶⁰ In February 1965 the Mississippi Economic Council (the State’s chamber of commerce) issued a statement urging compliance with Federal law.⁶¹

CONCLUSIONS

In many areas of Mississippi the failure of law enforcement officials to curb racial violence is largely attributable to the racially hostile attitudes of sheriffs, police chiefs, and prosecuting attorneys.

Law enforcement officers openly displayed racial hostility in many communities. In addition, failure to make prompt arrests, to take a firm stand against violence, and to announce an intention to punish law violators undoubtedly encouraged vigilantes to feel they could operate with impunity.

⁵⁷ T. 289.

⁵⁸ *Ibid.*

⁵⁹ See pp. 38-41, *supra*.

⁶⁰ See pp. 20-21, *supra*.

⁶¹ T. 379. Mr. Brumfield, of McComb, testified that the Mississippi Manufacturers Association, the Mississippi Association of Supervisors, and the Mississippi Sheriffs Association issued statements similar to the one in McComb. T. 49.

Business and community leaders also failed to act, or acted only belatedly, to discourage racial violence. In several Mississippi communities where violence occurred, there were citizens who were concerned about maintaining law and order but who did not take a public position. Only in Greenville was there early and continuing support by business and community leaders for police action against racial violence.

The responsibility for Mississippi's apparent inability to deal effectively with racial violence goes beyond the law enforcement officers involved. There are certain structural weaknesses in Mississippi's law enforcement institutions that require correction. Most notable is the sheriff system, which does not produce persons who are sufficiently trained, experienced, and responsible to enforce the law in communities hostile to Negro demands for equality. The office of sheriff is a lucrative political post, frequently held by men without background in law enforcement who reflect attitudes of the white community unrestrained by a sense of professional impartiality. In the counties studied, the limited nature of the sheriffs' investigations, the gross inadequacies in record keeping, and the practice of illegal or harassing arrests are examples of failures of the office. In violent times these failures have had tragic consequences.

The institutional framework has also influenced the conduct of prosecuting officials. The absence of any centralized State control or review of the county or district attorneys, as well as the sheriff, has resulted in what has been called a "local option on the enforcement of state law."⁶² With respect to civil rights, the local officials have opted for nonenforcement. In the Brookings Institution study previously referred to, it was found that the county government system tended to discourage "positive, vigorous and fearless administration."⁶³ It concluded that "so habitually and flagrantly has law been ignored by county officials that the situation may be viewed as contributing

⁶² Highsaw & Fortenberry, *op. cit. supra* note 25, at 163.

⁶³ Brookings Institution, *op. cit. supra* note 9, at 625.

in no small measure . . . to general disrespect for law.”⁶⁴

The defects of these institutions suggest changes in the structure of local law enforcement which might afford some improvement both in the caliber of the men chosen as officers and in their conduct in office. These include:

1. Changing the method of selection to insulate law enforcement officers from community prejudices.

2. Transferring to other officials those duties of the sheriff which are unrelated to law enforcement.

3. Changing the tenure of law enforcement officers (particularly sheriffs) to further insulate them from prejudices and enable them to develop professional competence.

4. Changing the system of compensation of sheriffs to encourage them to retain an adequate staff.

5. Formulating standards in recruitment and selection to weed out unqualified applicants.

6. Adopting training programs in professional techniques of law enforcement.

7. Requiring the keeping of records and reports of investigation.

8. Requiring nondiscrimination in selection of personnel.

9. Clarifying responsibilities for investigation of crimes in cases where more than one jurisdiction is involved.

10. Providing a statewide agency with general law enforcement jurisdiction.

11. Giving the State attorney general broad authority to prosecute for violation of State laws.⁶⁵

⁶⁴ *Id.* at 819.

⁶⁵ Recommendations 1, 2, 3, 4, 10, and 11 were made by the Brookings Institution in 1932. See Brookings Institution, *op. cit. supra* note 9, at 935-37.

PART II.

REMEDIES

Part I of this report examined practices of law enforcement officers in several communities in the South, particularly in Mississippi. The problem areas studied included the failure of local officials to prevent racial violence or to apprehend or punish those responsible for it, the failure of local prosecutors to pursue vigorously State criminal remedies, interference by local officials with the exercise of Federal rights, and abuse by local officials of the administration of justice.

Primary responsibility for correcting the problems described rests with the individual States. But the failure of the States to assume that responsibility has thrust much of the burden of remedying denials of Federal rights and protecting the integrity of the laws of the United States on the Federal Government. Part II of this report is devoted to an examination of the criminal, civil, and executive remedies available to the Federal Government, the uses to which these remedies have been put, and an analysis of their adequacy to deal effectively with the problems.

CHAPTER 6.

FEDERAL CRIMINAL LEGISLATION

There are certain Federal criminal sanctions which may be used to remedy failures of State law enforcement and the wrongful acts of private individuals discussed in preceding chapters. These statutes are penal in nature and are directed at punishing wrongs against society as a whole. They are enforceable only by the legal arm of the Federal Government, the Department of Justice. This chapter will consider the development and interpretation of the Federal criminal civil rights statutes and their enforcement by the Department of Justice.

DEVELOPMENT OF CRIMINAL REMEDIES

The first criminal laws enacted by Congress were designed primarily to protect the operations and property of the Federal Government and to provide a criminal code for areas of special jurisdiction, such as Federal lands, which were under sole Federal protection.¹ For 75 years this remained the principal function of such legislation.² Protection of the right to personal security was left to the general criminal laws of the States.

Reconstruction Legislation

The enactment of civil rights laws in the Reconstruction era, between 1866 and 1871, marked a departure from this tradition. Unlike previous Federal enactments, these laws were aimed at

¹ Act of April 30, 1790, ch. 9, 1 Stat. 112.

² See generally, Revised Statutes §§ 5323-505, 5533-50 (1874) (excluding the Reconstruction legislation).

protecting citizens in the exercise of rights and were occasioned by the failures of the States to prevent violence under general criminal laws.

In the first Reconstruction Act—"to protect all persons in the United States in their civil rights"—Congress enacted criminal and jurisdictional provisions of lasting importance.³ The purpose of this Act, passed in 1866, was nullification of the Black Codes and enforcement of the 13th amendment, which had been adopted the previous December.⁴ The Act declared that all persons born in the United States were citizens, entitled to equal rights in the courts, and "to full and equal benefit of all laws and proceedings for the security of person and property. . . ." ⁵ A denial of such rights by any person acting under color of law became a Federal offense.⁶ This provision, with certain textual changes,⁷ now survives as section 242 of the Criminal Code. It is the principal Federal instrument against violence or other unlawful action by officials. It provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.⁸

³ Act of April 9, 1866, ch. 31, 14 Stat. 27.

⁴ See Carr, *Federal Protection of Civil Rights* 37 (1947); Maslow and Robinson, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. Chi. L. Rev. 363, 366-67 (1953); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1325-27 (1952).

⁵ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

⁶ Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27.

⁷ The most significant of these was the addition of the word "willfully" in 1909. Act of March 4, 1909, ch. 321, § 20, 35 Stat. 1092.

⁸ 18 U.S.C. § 242 (1964).

The only other criminal law generally applicable to civil rights derives from the Act of May 31, 1870, which was passed principally to enforce the right to vote guaranteed by the 15th amendment.⁹ Declaring that all otherwise qualified citizens were entitled to vote without regard to race,¹⁰ the Act provided criminal punishments for bribery, threats, intimidation, or other unlawful attempts to prevent the free exercise of any right or privilege secured by Federal laws.¹¹ Although most of this Act was rapidly dismantled, first by the Supreme Court,¹² and then by Congress,¹³ the prohibition of conspiracies to deny Federal rights, has survived as section 241 of the Criminal Code. This section is the principal remedy against private racial violence:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.¹⁴

A third important piece of Reconstruction criminal legislation was the Ku Klux Klan Act of 1871,¹⁵ which punished conspiracies against the operations of Government officials or courts, or to deprive persons of equal protection of the laws.¹⁶ The Act also au-

⁹ Act of May 31, 1870, ch. 114, 16 Stat. 140.

¹⁰ Act of May 31, 1870, ch. 114, § 2, 16 Stat. 140.

¹¹ Act of May 31, 1870, ch. 114, §§ 4-6, 16 Stat. 140.

¹² *United States v. Reese*, 92 U.S. 214 (1876) (convictions under §§ 3 and 4 reversed and the sections declared unconstitutional on the grounds that the reach of the statute was broader than the grant of power of the 15th amendment.)

¹³ The Act of Feb. 8, 1894, ch. 25, 28 Stat. 36-37, repealed most of the Act of 1870 as a symbolic end to what remained of Reconstruction. See note 20 *infra*.

¹⁴ 18 U.S.C. § 241 (1964).

¹⁵ Act of April 20, 1871, ch. 22, 17 Stat. 13.

¹⁶ Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13-14.

thorized the President to use troops whenever conspiracies in any State so hindered the execution of State or Federal laws that persons were effectively deprived of their civil rights.¹⁷ This last provision is still law,¹⁸ but the heart of the Act—the prohibition of conspiracies to deprive persons of equal protection—was struck down by the Supreme Court in 1883, principally on the grounds that the 14th amendment did not empower Congress to punish acts by private persons.¹⁹

Thus, by 1894 much Reconstruction legislation had either been declared unconstitutional by the Supreme Court or repealed by a Congress exhorted to “let every trace of the reconstruction measures be wiped from the statute books.”²⁰ Since that time, Congress has acted repeatedly in other fields to preserve public order when the States have demonstrated their inability to do so. For examples,²¹ in 1910 it passed the Mann Act prohibiting white slavery²² after finding that “the evil is one which can not be met comprehensively and effectively otherwise than by the enactment of federal laws.”²³ In 1919 it made criminal the transportation, sale, and receipt of stolen vehicles in interstate commerce,²⁴ after finding that “State laws upon the subject have been inadequate to meet the evil.”²⁵ In 1934 it passed the Federal Bank Robbery Act,²⁶ after finding that bank robbers “are sufficiently powerful and well equipped to defy local police.”²⁷ And in 1954, because of the “dis-

¹⁷ Act of April 20, 1871, ch. 22 § 3, 17 Stat. 14.

¹⁸ See 10 U.S.C. § 333 (1964).

¹⁹ *United States v. Harris*, 106 U.S. 629 (1883). See also *Baldwin v. Frank*s, 120 U.S. 678 (1887). These sections were later repealed. Act of March 4, 1909, ch. 15, § 341, 35 Stat. 1153-54.

²⁰ S. Rep. No. 113, 53d Cong., 2d Sess. 8 (1893).

²¹ Each of the following statutes is based on the commerce clause, art. I, § 8, except for the Federal Bank Robbery Act, which was passed pursuant to the banking power construed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also *Westfall v. United States*, 274 U.S. 256 (1927).

²² 36 Stat. 825-27 (1910), 18 U.S.C. §§ 2421-24 (1964).

²³ H.R. Rep. No. 47, 61st Cong., 2d Sess. 10 (1909).

²⁴ National Motor Vehicle Theft Act, §§ 1, 3, 5, 41 Stat. 324-25 (1919), 18 U.S.C. §§ 2312-13 (1964).

²⁵ H.R. Rep. No. 312, 66th Cong., 1st Sess. 1 (1919).

²⁶ 48 Stat. 783 (1934), 18 U.S.C. § 2113 (1964).

²⁷ H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934).

courageously and alarmingly ineffective” efforts of the States to protect their citizens from dangerous fireworks, Congress prohibited the delivery of fireworks into States which prohibited or regulated their use “in order adequately to protect . . . children and other citizens from these preventable casualties. . . .”²⁸

In contrast to those efforts of Congress to protect Federal interests discussed above, no new Federal legislation of general applicability to the problem of racial violence has been enacted since Reconstruction days. As a result, sections 241 and 242—the remnants of Reconstruction laws—are still the principal Federal criminal remedies to deal with these difficult problems.²⁹

INTERPRETATION OF CRIMINAL REMEDIES

In its 1961 *Justice Report*, the Commission analyzed sections 241 and 242 and commented on their inadequacy as remedies.³⁰ The problems discussed in the *Justice Report* have not been corrected either by congressional action or by judicial decision. Those problems, and recent developments related to them, are briefly discussed below.

Significant barriers to obtaining convictions under these statutes arise from the connection required between the violent or unlawful action and the constitutional or statutory rights of the victim. As discussed at length in the *Justice Report*, the Supreme Court has held that in order to convict under section 242, the jury must find that the defendant acted “with the specific intent” to deprive the victim of recognized constitutional rights.³¹ Thus, an indictment

²⁸ H.R. Rep. No. 632, 83d Cong., 2d Sess. 1 (1954). 68 Stat. 170-71 (1954), 18 U.S.C. § 836 (1964).

²⁹ Other criminal statutes relate only to limited and specific civil rights crimes. See 18 U.S.C. §§ 1581, 1583, and 1584 (1964) (slavery and peonage); 18 U.S.C. § 243 (1964) (exclusion of jurors on racial grounds); 18 U.S.C. § 594 (1964) (intimidation of voters); 18 U.S.C. § 837 (1964) (interstate transportation of explosives with intent to damage or destroy property); Voting Rights Act of 1965, §§ 11, 12, 79 Stat. 437, 443-44 (intimidation of voters; vote frauds; deprivation of registration or voting rights secured in other sections of the Act).

³⁰ 1961 *U.S. Commission on Civil Rights Report, Justice* 45-55 [hereinafter cited as *Justice Report*].

³¹ *Screws v. United States*, 325 U.S. 91 (1945).

under section 242 must charge and the prosecution prove that the defendant acted not merely from malice but "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite."³²

The requirement of proof of "specific intent" does not materially affect the nature of the evidence presented by the prosecution in section 242 cases. With or without this requirement, the prosecution must still prove that the officer acted without justification, and the evidence adduced for this purpose is the same evidence relied on to prove specific intent. But in order to find specific intent the jury is required to infer from this evidence that the victim's constitutional right was known, or should have been known, to the officer, and that he acted in defiance or reckless disregard of this right.

This leads both to curious distinctions and unfortunate results. Since "an officer of the law undoubtedly knows that a person arrested by him for an offense has the constitutional right to a trial under the law,"³³ the principal issue before the jury is whether the officer acted in defiance of such right (in which case he is guilty),³⁴ or solely because of malice (in which case he is innocent),³⁵ or for both reasons (in which case he is guilty).³⁶ In one significant case the jury felt compelled by the judge's instructions on specific intent to acquit the defendant officer even though in the opinion of its members he was guilty of murder or manslaughter.³⁷

As the mere statement of the issue indicates, whether specific intent exists is an elusive question which requires the jury to manipulate subtle distinctions concerning motive. Moreover, since there is usually no direct evidence of intent, the jury must draw inferences from surrounding circumstances, which are usually equivocal with respect to the distinction between general bad pur-

³² *Id.* at 105.

³³ *Crews v. United States*, 160 F. 2d 746, 750 (5th Cir. 1947).

³⁴ *Ibid.*

³⁵ Charge to the jury in *United States v. Screws*, Crim. No. 1300, M.D. Ga., Nov. 1, 1945.

³⁶ *Crews v. United States*, *supra* note 33, at 749-50.

³⁷ *United States v. Minnick*, Crim. No. 8466-M, S.D. Fla., June 23-26, 1953. See Shapiro, *Limitations in Prosecuting Civil Rights Violations*, 46 Cornell L.Q. 532 (1961).

pose and specific intent. The conceptual difficulty of the question, and the usual absence of compelling evidence, combine to produce an issue on which the jury can do little more than speculate. At best, this issue creates difficulties for the conscientious jury, and it is particularly undesirable in civil rights cases because the freedom it gives the jury may encourage its members to express personal prejudices against conviction.

The problem of connecting the violent and unlawful act with the Federal right arises in a different context in prosecutions under section 241. The lower Federal courts have held that section 241 punishes conspiracies to interfere with only a limited class of Federal rights—those which arise from the relationship of the individual and the Federal Government, rather than those rights only secured against State infringement.³⁸ Some of these special Federal rights which have been defined by the Supreme Court are the right to pass freely from State to State,³⁹ the right to petition Congress for a redress of grievances,⁴⁰ the right to vote for national officers,⁴¹ the right to be protected against violence while in lawful custody of a United States marshal,⁴² and the right to inform United States authorities of violations of its laws.⁴³ But section 241 has not yet been held to encompass protection for those constitutional rights to due process of law and equal protection of the laws which are protected from State interference by the 14th amendment.⁴⁴

The last time this issue arose the Supreme Court divided evenly, thus confirming the narrow interpretation of the lower courts.⁴⁵

³⁸ *United States v. Williams*, 179 F. 2d 644, 648 (5th Cir. 1950), *aff'd*, 341 U.S. 70 (1951).

³⁹ See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

⁴⁰ *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁴¹ *Ex parte Yarbrough*, 110 U.S. 651 (1884).

⁴² *Logan v. United States*, 144 U.S. 263 (1892).

⁴³ *In re Quarles*, 158 U.S. 532 (1895).

⁴⁴ *But see, United States v. Morris*, 125 Fed. 322 (E.D. Ark. 1903) ("the right to lease land and to accept employment for hire"); *Smith v. United States*, 157 Fed. 721 (8th Cir., 1907), *cert. denied*, 208 U.S. 618 (1907) (the right to be free from involuntary servitude); *Ex parte Riggins*, 134 Fed. 404 (C.C.N.D. Ala. 1904) *writ quashed sub nom.*, *Riggins v. United States*, 199 U.S. 547 (1905), not followed, *United States v. Powell*, 151 Fed. 648 (C.C.N.D. Ala. 1907) (right to due process of law).

⁴⁵ *United States v. Williams*, 341 U.S. 70 (1951).

The issue is now again before the Court in a case which illustrates the practical consequences of the narrow reading. In June 1964 three civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—were murdered near Philadelphia, Mississippi. A Federal grand jury indicted 18 men, including three law enforcement officers, in connection with this offense. The principal charge against the private citizens was that they had conspired with the officers to deprive the victims of the right secured by the Constitution “not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi.”⁴⁶ Holding that the right to due process of law from State officials is not a right arising from the relationship of the citizen and the Federal Government, the United States District Court dismissed this count of the indictment for failure to state an offense under section 241.⁴⁷ The Government appealed and the issue is now before the Supreme Court.⁴⁸

The holding of the lower court in this case illustrates that a narrow reading of section 241 would put many acts of racial violence by private persons beyond the reach of Federal law. But even if the Supreme Court adopts a broader reading, these remain significant barriers to successful prosecution. The principal problem is that the Government must still prove that the purpose of the conspiracy was to interfere with the free exercise of some Federal constitutional or statutory right.

Proving this purpose may create even greater problems than proof of specific intent required under section 242. Since most conspiracies are proved from the overt acts of the conspirators in furtherance of their plans, the purpose of the conspiracy must be inferred from the character of these acts. Even where the conspirators have committed an act of racial violence, this alone may be insufficient to permit the jury to conclude that the purpose of the conspiracy was to deny constitutional rights, and additional evidence bearing on the motives of the defendants may be required.

This problem is illustrated by two recent cases. On July 11, 1964,

⁴⁶ *United States v. Price*, Crim. No. 5215, S.D. Miss., returned Jan. 15, 1965.

⁴⁷ *United States v. Price*, *supra*, Feb. 24, 1965.

⁴⁸ *Prob. juris. noted, United States v. Price*, 380 U.S. 970 (1965).

Lemuel A. Penn, a Negro resident of Washington, D.C., was shot and killed near Athens, Georgia, as he was returning in his car from a tour of duty with his Army Reserve unit. Two men were tried and acquitted of this murder in the superior court of Madison County, Georgia. Subsequently, a Federal grand jury indicted these and four other men under section 241, charging that the group had conspired to interfere with the free exercise by Negroes in the vicinity of Athens, Georgia, of the right to use public accommodations and public facilities, and the right to travel freely on the public streets and highways.⁴⁹ Although no specific incidents were mentioned, the indictment charged that the defendants intended to carry out their conspiracy by, among other things, shooting, beating, and killing Negroes.⁵⁰

The murder of Penn was the moving force behind the indictment, and if the case is tried, the Government undoubtedly will introduce evidence of his killing to prove the conspiracy. But standing alone, proof that the defendants shot Penn would probably be legally insufficient to permit a jury to find defendants guilty of a conspiracy to deter Negroes from using the highways. To meet its burden of proof, the Government must introduce other evidence of the defendants' purposes.

Similar problems appear in the case arising from the murder of Mrs. Viola Liuzzo near Montgomery, Alabama, on March 25, 1965. As a result of an identification supplied by FBI agents, three men were indicted by Alabama on murder charges and one was tried. His first trial resulted in a hung jury and his second in an acquittal.⁵¹ A Federal grand jury had already indicted the same men for conspiracy under section 241. The grand jury charged that the purpose of the conspiracy was to interfere with the right to protest publicly unlawful deprivation of the right of Alabama Negroes to vote, the right to encourage Negroes to vote, the right

⁴⁹ *United States v. Guest*, Crim. No. 2232, M.D. Ga., Oct. 16, 1964, indictment dismissed Jan. 8, 1965, *prob. jur.* 381 U.S. 932 (June 1, 1965).

⁵⁰ *Ibid.*

⁵¹ N.Y. Times, May 8, 1965, § 1, p. 1, col. 2, Oct. 23, 1965, p. 1, col. 4. Both trials were before all-white juries, notwithstanding the fact that 81% of the population of the county in which the trials were held is Negro.

to petition the State government for a redress of grievances, the right to participate in a protest march under court order, and the right to travel to and from the State of Alabama.⁵² If the case is tried, the Government will introduce evidence that the defendants shot and killed Mrs. Liuzzo to prove the conspiracy. But, as in the Penn case, this evidence alone probably would not be legally sufficient to convict the defendants of the conspiracy to accomplish all or any of the purposes stated in the indictment.

As the Penn and Liuzzo cases indicate, when section 241 is invoked against private racial violence, the Government must prove that the defendants were involved in conduct which demonstrates their purpose to deny a Federal right. This requirement poses a difficult problem of proof, and in some cases an insuperable obstacle to successful prosecution. In the cases of assault in Adams and Pike Counties, discussed in Chapter 2 of this report, the reasons for the attack were not apparent either to the victims or to the Federal investigators. In those cases, as in the Penn and Liuzzo cases, the prosecution would have to show other acts by the persons responsible to prove their purposes. Even if the perpetrators of violence were apprehended, it may well be that sufficient additional evidence could not be found to provide an adequate basis for prosecution.

ENFORCEMENT OF THE STATUTES

In its 1961 *Justice Report* the Commission described the organization and administration of the Civil Rights Division of the Department of Justice, and criticized certain aspects of its operations and procedure.⁵³ In recent years the Division has expanded its staff and appears to have improved in certain respects its method of handling complaints and prosecutions.⁵⁴

⁵² *United States v. Eaton*, Crim. No. 11,736N, returned April 6, 1965 (M.D. Ala.).

⁵³ *Justice Report* 56-66.

⁵⁴ Conferences with Assistant Attorney General John Doar, Department of Justice, Washington, D.C., August 12 and October 5, 1965 [hereinafter cited as *Department of Justice Conferences*].

Organization

The Civil Rights Division was established in 1957. By 1961 it had a budget of \$627,000 and 35 attorneys.⁵⁵ Since that time the Division has acquired important new responsibilities: enforcement of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. To meet its new duties, the Division is now authorized a staff of 105 attorneys of which 86 are currently employed⁵⁶ and a budget of more than \$2 million.⁵⁷ In the opinion of John Doar, Assistant Attorney General in charge of the Division, this appears for the present to be a sufficient number of attorneys to carry on its day-to-day functions. But Mr. Doar also points out that racial crises—such as the violence in Bogalusa, Louisiana, in July 1965—have frequently involved most of the attorneys in the Division, with a resulting disruption of normal functions.⁵⁸

In the fall of 1964 the Division was reorganized along geographic lines, and the separate General Litigation Section, which had handled criminal cases, was abolished. At the present time Division attorneys in each geographic section handle all matters arising in their area. The Southwestern Section (Mississippi and Louisiana) and the Southeastern Section (Alabama, Florida, Georgia, and

⁵⁵ Information obtained from the Department of Justice.

⁵⁶ *Department of Justice Conferences.*

⁵⁷ Information obtained from the Department of Justice. The following table shows the breakdown for the entire Department in fiscal year 1965:

	Number of Attorneys	Budget
Solicitor General	12	\$569, 000
Antitrust	281	7, 072, 000
Tax Division	220	4, 630, 000
Criminal Division	134	3, 335, 000
Civil Division	195	4, 568, 000
Lands Division	104	3, 678, 000
Office of Legal Counsel	21	587, 000
Internal Security Division	48	1, 192, 000
Civil Rights Division	72	2, 034, 000
Total	1, 087	\$27, 665, 000
Field Attorneys	790	\$19, 115, 000

⁵⁸ *Department of Justice Conferences.*

South Carolina) each is authorized 32 attorneys; the Eastern and Western Sections, which comprise the remaining States, each is authorized 8 attorneys. In addition, there are 15 attorneys for an Appeals and Research Section. This reorganization was intended to improve the handling of criminal cases by giving responsibility for all Division activities in an area to attorneys who were familiar with local conditions.⁵⁹

Operations

In the 1961 *Justice Report* the Commission examined and commented on the Division's procedures for obtaining notice of possible violations of Federal law, its criteria for deciding whether to investigate complaints, its requirement that section 242 cases be commenced by indictment instead of by information, its relations with the Federal Bureau of Investigation and with United States Attorneys, and what appeared to be an overall lack of emphasis and vigor in criminal prosecutions.⁶⁰

Since 1961 the Division has deployed more of its personnel in the field and this has improved its sources of information of possible civil rights violations. Further improvement has resulted from the Division's recent increase in staff and geographic reorganization, and civil rights groups operating in the South have furnished more information.⁶¹

In 1961 the Commission noted that the initiative for ordering preliminary investigations into civil rights complaints was largely left with the Civil Rights Division, a practice which the Commission found led to unnecessary delays because of time-consuming administrative procedures.⁶² This situation has improved, at least with respect to complaints of official violence involving possible violation of section 242. When such complaints are made directly to the FBI, the agents are under standing instructions to make pre-

⁵⁹ *Ibid.*

⁶⁰ *Justice Report* 56-66.

⁶¹ *Department of Justice Conferences.*

⁶² *Justice Report* 60-61.

liminary investigations without referring the complaint to the Division.⁶³ A complaint of private violence, however, involving a possible violation of section 241, must still be transmitted to the Division for evaluation, although authorization for a preliminary investigation may be given by telephone.⁶⁴

Upon completion of the investigation, the first step in a felony prosecution must be an indictment by a grand jury; a misdemeanor prosecution may be commenced either by indictment or by the filing of an information—a sworn statement setting out the charges against the defendant. Since violation of section 242 is only a misdemeanor, the Department of Justice may choose either method. Nevertheless, in the past the Department has not proceeded without an indictment in most section 242 cases.⁶⁵ From January 1, 1962, to August 15, 1965, the Division attempted to prosecute 17 cases involving police or prison brutality in Mississippi. In accordance with its indictment policy, 14 of them were presented to Federal grand juries. In seven of these the grand juries refused to return indictments.⁶⁶

The Department has justified this policy principally on the grounds that an indictment by a grand jury provides support for the prosecution at the trial (since the charges in an indictment stem from the deliberations of local citizens), and that the grand jury procedure provides a useful, if not indispensable, forum for testing the credibility of witnesses.⁶⁷ Although these are important considerations, it is also true that a public trial may have significant educational value to the community—even if the defendant is acquitted. The community learns nothing of the significance of

⁶³ *Department of Justice Conferences.*

⁶⁴ *Ibid.*

⁶⁵ *Justice Report 65.*

⁶⁶ Letter from former Assistant Attorney General Burke Marshall to John de J. Pمبرتون, Jr., Executive Director of the American Civil Liberties Union, March 13, 1963, appearing in *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., sec. 4, pt. 2 at 1230 (1963). Information on cases after February 28, 1963, obtained from Department of Justice. It is possible to file an information when a grand jury fails to return an indictment.

⁶⁷ *Ibid.*

Federal law if the only proceedings are before grand juries, whose sessions are closed to the public. Moreover, since few indictments are returned, there is little use in proceeding by indictment in order to strengthen the case for trial, if the grand jury's failure to indict terminates the case without trial.

In 1961 the Commission concluded that although the use of informations presented a thorny problem, "the Division could profitably devote more consideration to the use of informations in appropriate cases."⁶⁸ During the past five years, out of a national total of 74 prosecutions for violations of section 242, only three have been commenced by information.⁶⁹ Assistant Attorney General Doar has indicated to the Commission, however, that in the future the Division intends to proceed by information with greater frequency.⁷⁰

Prosecution Policy and Record

In the *Justice Report*, the Commission criticized the Civil Rights Division for attaching undue weight to the likelihood of convictions in determining whether or not to prosecute.⁷¹ The Division's policy also was affected by its limited staff and the probability of securing more positive and far reaching results in civil voting cases.⁷² At present, the Division states that it follows a policy of prosecuting every case where the available evidence is sufficient to sustain a conviction without regard to the probability of failure due to jury hostility or bias.⁷³ In recent times the Division has been vigorous in bringing prosecutions in prominent racial murder cases, and the prosecutions brought in the Penn case and the cases involving the three civil rights workers in Mississippi

⁶⁸ *Justice Report* 66.

⁶⁹ See note 66, *supra*.

⁷⁰ *Department of Justice Conferences*.

⁷¹ *Justice Report* 63.

⁷² *Department of Justice Conferences*.

⁷³ *Ibid.* See also Note, 74 *Yale L. J.* 1297, 1300 n. 13 (1965).

may result in Supreme Court decisions giving broader scope to the criminal civil rights statutes. Except for well publicized murder cases, however, relatively few prosecutions have been brought, apparently because of the legal problems previously discussed and the inadequate machinery for enforcement. In earlier days, the Department was more active in bringing criminal prosecutions in civil rights matters. From 1870 to 1897 the Department brought an average of 191 criminal prosecutions per year in the South.⁷⁴ Convictions were obtained in approximately 20 percent of the cases, most of the remainder being either nolle prossed or dismissed.⁷⁵ During fiscal 1961, 1962, and 1963, the Department presented to grand juries a national total of 69 cases under sections 241 and 242, a rate of 23 per year. Indictments were returned in 16 cases, of which only three resulted in convictions.⁷⁶

During the fiscal years 1964 and 1965 the Department received and investigated a large number of complaints, most of which were classified as involving possible violations of section 242. Of these, the number presented to grand juries increased to an average of 40 per year and convictions were still infrequent. The following table tells the story.⁷⁷

⁷⁴ See Att'y. Gen. Ann. Repts. 1871-1897. These included prosecutions brought under the precursors of sections 241 and 242, as well as other statutes. For a description of these prosecutions from a southern point of view, see Davis, *The Federal Enforcement Acts*, Studies in Southern History and Politics, ch. IX (1914).

⁷⁵ Att'y. Gen. Ann. Repts. 1871-1897.

⁷⁶ U.S. Commission on Civil Rights computations from statistical tables of Civil Rights Division, Department of Justice, submitted to the Commission. These figures are Department estimates. It is important to note, however, that at least one difficulty in enforcement of section 242 which did not face Federal prosecutors in the period of 1870 to 1897 stems from the fact that the word "willfully" was added to the statute in 1909. Act of March 4, 1909, ch. 321 § 20, 35 Stat. 1092. See opinion of Mr. Justice Douglas in *Screws v. United States*, 325 U.S. 91, at 103 (1945). However, Mr. Justice Rutledge, concurring, contended that the addition was "a change of no materiality, for the statute implied it beforehand." *Id.* at 120.

⁷⁷ U.S. Commission on Civil Rights computations from statistical tables of Civil Rights Division, Department of Justice, submitted to the Commission. These figures are Department estimates. The chart shows only those matters received which have been terminated. At the end of fiscal year 1965, there were 54 matters pending under section 241 and 569 matters pending under section 242.

Fiscal Years 1964-1965

	Matters Rec'd ^a	Cases Presented to Grand Jury	Disposition by Grand Jury		Disposition at Trial	
			No True Bill	Indictment	Acquittals	Convictions
Section 241.....	60	6	1	2	0	0
Section 242.....	4,478	73 ^b	37	26	15 ^c	6

^a Matters Received are "complaints which the Federal Bureau of Investigation, by particular request, or by previous standing arrangement with [the Civil Rights] Division, has investigated, or any other matter which has been docketed on the request of an attorney." This division between sections 241 and 242 reflects the Department's classification. Under section 242 are included the following categories of complaint: summary punishment, coerced confession, denial of police protection, unlawful search, unlawful arrest, unlawful detention, due process miscellaneous, and equal protection miscellaneous. Section 241 includes only "conspiracy against rights."

^b Three of these cases were commenced by the filing of informations.

^c In addition, one case was declared a mistrial, and in three others the indictments were dismissed.

SUMMARY

The criminal remedies available to the Federal Government in civil rights cases are inadequate. Section 242, which is directed at deprivations of constitutional rights by public officials, has been limited by a requirement that the official act with "specific intent" to deny Federal rights. Section 241, which is directed at conspiracies by private citizens, has not yet been held to encompass protection for the broad range of constitutional rights protected by the 14th amendment and requires proof that the conspiracy was aimed at Federal rights. The requirement that the prosecution show specific intent under section 242 or a conspiracy to deny rights under section 241 presents a difficult problem of proof for the Government and a confusing and difficult issue for the jury. The usual absence of clear evidence on these questions tends to encourage jury speculation, which may reduce even further the chances for convictions in appropriate cases.

Due primarily to the difficulties of prosecution which these statutes present and an inadequate staff, the Civil Rights Division of

the Department of Justice has brought only a few prosecutions under these acts. An expanded staff and administrative reorganization promise a more aggressive handling of these cases, but the problems cannot be fully met without a revision of the statutes to eliminate existing deficiencies.

CHAPTER 7.

FEDERAL CIVIL REMEDIES

Federal criminal remedies, discussed in the preceding chapter, have been utilized primarily in cases involving alleged violence by private persons or officials. In other cases, where officials have failed to carry out their duty to protect Negroes or civil rights workers (as described in Chapter 3), or where they have refused to respect constitutional rights to demonstrate (as described in Chapter 4), the Federal Government or the affected individuals have brought special civil proceedings in Federal court to vindicate Federal rights.

The purpose of these special proceedings has been to bring the case to the attention of a Federal court at an early stage without the delays involved in waiting for the termination of appeals in the State courts and final appeal to the United States Supreme Court. Although these proceedings have been generally more successful in securing protection than Federal criminal prosecutions, their effectiveness has been limited by various legal doctrines designed to minimize friction between State and Federal courts. The problem has been to secure Federal rights with minimum interference with the administration of State criminal law.

EQUITABLE REMEDIES

The power of a Federal court to grant equitable relief, such as an injunction, is the broadest and the most flexible Federal civil remedy available for preventing or halting local interference with the exercise of federally protected rights. If a court finds that local officials have failed to prevent interference by private citizens with civil rights activity, it may order local police to protect civil rights demonstrators or it may instruct private individuals or public officials not to obstruct, harass, intimidate, or arrest per-

sons engaged in the protected activity.¹ The court may also enjoin the enforcement of unconstitutional State statutes.² These court orders may be enforced by civil or criminal contempt proceedings. Thus, a person who violates a court order may be cited for civil contempt and imprisoned until he complies or he may be cited for criminal contempt and sentenced to pay a fine or to imprisonment for a fixed term. In view of the potential effectiveness of this remedy, it is thus not surprising that there have been a large number of suits requesting equitable relief in civil rights cases, both by the Federal Government and by private citizens.³

Federal Government

The Attorney General has broad authority to seek equitable relief in Federal court in civil rights cases. The Civil Rights Act of 1957 authorizes the Attorney General to seek equitable relief to combat discriminatory denials of the right to vote;⁴ his powers were broadened further in this area by the Voting Rights Act of 1965.⁵ The Civil Rights Act of 1964 authorizes the Attorney General to institute proceedings to compel nondiscriminatory treatment in places of public accommodation,⁶ public facilities,⁷ education,⁸ and employment.⁹ In addition, it has been held that the Government has general powers—absent any statutory authorization—to sue to prevent discrimination in interstate commerce.¹⁰

The Civil Rights Act of 1964 also authorized the Attorney General to intervene in privately instituted civil rights cases.

¹ See e.g., *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Kelly v. Page*, 335 F. 2d 114 (5th Cir. 1964); *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961).

² See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

³ See Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. Rev. 839 (1964).

⁴ 42 U.S.C. § 1971 (1964). Prior to the 1957 statute, only private individuals could bring suit in cases of voting denials. See also note 22 *infra*, and accompanying text.

⁵ 79 Stat. 437 (1965).

⁶ 42 U.S.C. § 2000a-5 (1964).

⁷ 42 U.S.C. § 2000b (1964).

⁸ 42 U.S.C. § 2000c-6 (1964).

⁹ 42 U.S.C. § 2000e-6 (1964).

¹⁰ *United States v. U.S. Klans*, *supra* note 1.

Title IX of the Act,¹¹ provides that the Attorney General may intervene in any case of general public importance brought in Federal court where relief is sought “from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin. . . .” When the Government intervenes, it is entitled to the same relief from the court “as if it had instituted the action.”¹²

Pursuant to the provisions of Title IX, the Government intervened in private suits to uphold the right of hundreds of persons to march from Selma to Montgomery, Alabama, to protest voting denials,¹³ and to compel officials of Bogalusa, Louisiana, to protect from attack persons attempting to picket, assemble peaceably and advocate civil rights for Negroes.¹⁴ The Government has also intervened in several private school desegregation suits.¹⁵ It should be noted, however, that the Government’s statutory power to intervene is limited to cases involving denials of equal protection based on race, color, religion, or national origin, and does not extend to cases involving denials of due process. Thus, the Government may not intervene in many demonstration cases where only denials of 1st amendment rights—a due process claim—are involved.¹⁶

When the Civil Rights Act of 1964 was first proposed, it contained a provision under which the Attorney General would have been authorized to institute suit, not only to remedy denials of

¹¹ 42 U.S.C. § 2000h-2 (1964).

¹² *Ibid.*

¹³ *Williams v. Wallace*, *supra* note 1.

¹⁴ *Hicks v. Knight*, Civil No. 15,727, E.D. La., July 10, 1965.

¹⁵ See *e.g.*, *Singleton v. Jackson Municipal Separate School District*, Civil No. 22,527, 5th Cir., June 22, 1965.

¹⁶ See *e.g.*, *Guyot v. Pierce*, Civil No. 22,676, 5th Cir., June 15, 1965 (injunction granted pending appeal), involving arrests of civil rights demonstrators in Jackson, Mississippi, for failure to obey the city parade ordinance. Demonstration cases may in some instances raise equal protection problems. A clear showing of discriminatory enforcement of a valid parade ordinance would, for example, constitute a denial of equal protection as well as infringement upon freedom of speech and assembly. See *e.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965).

equal protection, but also denials of due process.¹⁷ While this provision was still being considered by the House Judiciary Committee, the Attorney General appeared before the Committee and requested that the Government not be given the broad injunctive authority proposed.¹⁸ He stated that the proposed statute would inject the Government “into some areas which are not its legitimate concern and vests the Attorney General with broad discretion in matters of great political and social concern.” He added:

To illustrate: Which types of disputes should the Attorney General make a matter of Federal concern? Should he exempt disputes involving reading of the Bible in classrooms? If so, on what basis? What criteria should he adopt to determine whether to intervene in a particular case of an arrest for investigation, for example, or the banning of a movie as obscene, or a claim that the rate set by a State public utility commission is unreasonably low?¹⁹

As a result of the Attorney General’s opposition, the proposal was dropped from the legislation. Although intervention was authorized by Title IX, this provision is quite limited—the Attorney General may not institute suits and may only intervene in cases involving denials of equal protection.

Private Individuals

The primary source of Federal equity jurisdiction in private civil rights cases is section 1983 of title 42 of the United States Code.²⁰ That section authorizes Federal courts to grant legal or

¹⁷ In 1963 the United States Commission on Civil Rights recommended that Congress empower the Attorney General “to initiate civil proceedings to prevent denials to persons of any rights, privileges or immunities secured to them by the Constitution or laws of the United States.” *1963 Report of the U.S. Commission on Civil Rights* 124.

¹⁸ *Hearings Before the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 4, at 2659 (1963).

¹⁹ *Id.* at 2658.

²⁰ This provision originated in the Civil Rights Act of 1871, and is the civil counterpart of 18 U.S.C. § 242, discussed *supra*, pp. 107–09. The two sections have been read consistently as coextensive in their reach of acts “under color” of State authority; to that extent they have been construed *in pari materia*. *Geach v. Moynahan*, 207 F. 2d 714, 717 (7th Cir. 1953); *McShane v. Moldovan*, 172 F. 2d 1016, 1020 (6th Cir. 1949); *Burt v. City of New York*, 156 F. 2d 791, 792 (2d Cir. 1946); *Picking v. Pennsylvania R.R.*, 151 F. 2d 240, 48 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947). See also *Monroe v. Pape*, 365 U.S. 107, 183–85, (1961).

equitable relief to any person deprived under color of law of any right, privilege, or immunity secured by the Constitution.²¹ This statute has been relied upon, for example, in all private school desegregation suits and private voting suits²² and has been used to protect the right to demonstrate.²³

Concern with possible conflict between State and Federal courts has led to the imposition of certain judicial and statutory limitations on the use of the broad equitable powers such as those conferred under section 1983. These limitations derive from the Federal Anti-Injunction statute²⁴ and the rule of comity. The Anti-Injunction statute prevents, in most cases, injunctions by the Federal court of State court proceedings. Under the rule of comity, Federal courts generally will not interfere with State criminal proceedings unless authorized by Congress or unless clearly necessary to prevent "danger of irreparable injury 'both great and immediate'."²⁵

The Federal Anti-Injunction statute provides that Federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."²⁶ The effect of the statute in most private civil rights cases is to bar Federal courts from halting criminal prosecutions

²¹ 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity, or other proper proceeding for redress.*" (Emphasis added.) The Civil Rights Act of 1964 also authorizes individuals to institute proceedings to obtain nondiscriminatory treatment in places of public accommodations and in employment. 42 U.S.C. §§ 2000a-3, 2000e-5 (1964).

²² See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (education); *Evers v. Jackson Municipal Separate School Dist.*, 328 F. 2d 408 (5th Cir. 1964) (education); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) *aff'd*, 336 U.S. 933 (1949) (voting).

²³ See e.g., *Williams v. Wallace*, *supra* note 1.

²⁴ 28 U.S.C. § 2283 (1964). The statute does not apply when the United States is a party to the suit. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

²⁵ *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943).

²⁶ 28 U.S.C. § 2283 (1964). For purposes of this section, a criminal proceeding is considered commenced when the State obtains an indictment; merely arresting a person is insufficient to commence a proceeding. See *Dombrowski v. Pfister*, *supra* note 2.

pending in State courts. A civil rights worker, for example, who has been charged with violations of a State law, although his action was constitutionally protected, is prevented from obtaining a Federal court order to halt his prosecution unless an act of Congress expressly authorizes such an injunction. It has been held that the Civil Rights Act of 1957 and the public accommodations title of the Civil Rights Act of 1964 are such authorizations.²⁷ Thus a Negro arrested while attempting to obtain service at a previously segregated restaurant may obtain, because of the public accommodations law, a Federal court injunction barring his prosecution.²⁸

It has also been argued that the Anti-Injunction statute is inapplicable to suits brought under section 1983, since that section constitutes an express authorization for equitable relief (including enjoining State criminal prosecutions) in civil rights cases.²⁹ Some Federal courts have accepted this argument,³⁰ but the majority have held that section 1983 is not an express authorization under the terms of the Anti-Injunction statute.³¹

Section 2283 has been held only to prohibit enjoining pending criminal proceedings. A Federal court still may enjoin the institution of prosecutions.³² Thus, the application of section 2283

²⁷ See *Dilworth v. Riner*, 343 F.2d 266 (5th Cir. 1965) (public accommodations); *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961) (voting) (alternate holding) cert. denied 369 U.S. 850 (1962). See also *United States v. Clark*, 10 Race Rel. L. Rep. 568 (S.D. Ala. 1965) (voting and public accommodations).

²⁸ *Dilworth v. Riner*, *supra* note 27.

²⁹ 1A Moore, *Federal Practice*, par. 0.213(1) (2d ed. 1960).

³⁰ See, e.g., *Cooper v. Hutchinson*, 184 F. 2d 119 (3d Cir. 1950) where the court stated that section 1983 constitutes an express authorization in the terms of the Anti-Injunction statute, but declined to stay a State court prosecution on grounds of judicial restraint and comity. See also *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 468, 490 (W.D. Pa. 1957).

³¹ See *Chaffee v. Johnson*, 229 F. Supp. 445 (S.D. Miss. 1964); *Goss v. Illinois*, 312 F. 2d 257 (7th Cir. 1963); *Island Steamship Lines, Inc. v. Glennon*, 178 F. Supp. 292 (D. Mass. 1959) (alternate holding); *Smith v. Village of Lansing*, 241 F. 2d 856 (7th Cir. 1957); *Sexton v. Barry*, 233 F. 2d 220 (6th Cir. 1956); *Alesna v. Rice*, 172 F. 2d 176 (9th Cir. 1949) (dictum); *Aultman & Taylor Co. v. Brumfield*, 102 Fed. 7 (N.D. Ohio 1900); *Hemsley v. Myers*, 45 Fed. 283 (C.C. Kan. 1891).

³² "This statute [Anti-Injunction statute] and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted." *Dombrowski v. Pfister*, *supra* note 2, at 484, n. 2. In the *Dombrowski* case,

depends on a technicality which makes it necessary for individuals, who fear that they will be improperly arrested or prosecuted, to seek relief in Federal court before a State criminal indictment has been returned.³³ Since it is not always possible to anticipate prosecutions of civil rights participants, intervention by the Federal court is foreclosed in many cases.³⁴ For example, in the Jackson Freedom Rider cases a Federal court ruled that city officials should be enjoined from arresting individuals attempting to utilize Jackson transportation facilities on a non-discriminatory basis.³⁵ Approximately 300 other Freedom Riders who had already been convicted, however, were compelled to appeal their cases through the State courts.³⁶

Apart from applying the limitations of the Anti-Injunction statute, a Federal court may apply general judicial principles of comity and refuse to enjoin State court proceedings. The rule of comity was designed by the Federal courts in order to avoid, as a matter of deference and respect, undue conflicts with State courts and the State administration of criminal justice.³⁷ An underlying premise of the rule is that State courts will apply the law as set forth by the Supreme Court; in the event State courts err, the Federal courts may amend the erroneous decision on review.³⁸

§ 2283 did not apply because the petitioners sought relief after they were arrested by State authorities but before they were indicted by a grand jury. Thus, no criminal proceedings had been "instituted" against them.

³³ *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1048 (1965).

³⁴ Other Federal civil remedies such as habeas corpus and removal may be utilized. See discussion at pp. 130-39, *infra*.

³⁵ *Bailey v. Patterson*, 323 F. 2d 201 (5th Cir. 1963).

³⁶ These cases were not resolved until 1965 when the defendants prevailed before the Supreme Court after four years of litigation. *Thomas v. Mississippi*, 380 U.S. 524 (1965) (per curiam).

³⁷ See *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Douglas v. City of Jeannette*, *supra* note 25.

³⁸ An aspect of the rule of comity is the doctrine of abstention. Under the abstention rule, Federal courts defer to State courts for the adjudication of issues which may involve Federal constitutional rights. The Federal courts will abstain from or postpone exercising jurisdiction in order to permit State courts to act and thereby prevent premature consideration of constitutional issues and to minimize Federal interference with State policies. See *Bailey v. Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961), *vacated*

In the case of *Douglas v. City of Jeannette*,³⁹ the Supreme Court fashioned a broad rule of comity—Federal courts were directed not to interfere in the administration of State criminal laws unless exceptional circumstances are shown evidencing “irreparable injury which is clear and imminent.”⁴⁰ Thus, a strict application of the principle of comity would prevent Federal court intervention in State proceedings and would constitute an obstacle to enjoining enforcement of unconstitutional State laws.⁴¹

In its 1964 term, however, the Supreme Court modified the comity rule so that equitable remedies may now be available if State officials interfere with first amendment rights. In *Dombrowski v. Pfister*, the Court held that application of the rule of comity was inappropriate in cases where State statutes are “applied for the purpose of discouraging protected activities.”⁴² *Dombrowski* and two others, all of whom had been members of an organization dedicated to promoting civil rights in the South, were arrested and charged with violation of the Louisiana Subversive Activities and Communist Control Law and the Louisiana Communist Propaganda Control Act. They sued to enjoin the prosecution, alleging that the statutes were invalid on their face and that the threats to enforce them in this case were made only to discourage

and *remanded*, 369 U.S. 31 (1962) (three-judge court improvidently convened since State laws and policies requiring segregation in facilities of interstate transportation are clearly unconstitutional). Abstention calls for the postponement of Federal court determinations in order to facilitate decision of the case on nonfederal grounds. Federal courts may decide constitutional issues only where such decisions are clearly necessary. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951). Thus, in a suit which raises a Federal question, abstention may be appropriate if a resolution of the question of State law could possibly eliminate the Federal constitutional question. See *Railroad Comm'n v. Pullman Co.*, *supra*.

³⁹ 319 U.S. 157 (1943).

⁴⁰ *Id.* at 163.

⁴¹ *Douglas v. City of Jeannette*, *supra* note 39; *Dombrowski v. Pfister*, *supra* note 2. Where Congress has granted specific authority to obtain equitable relief, such as in the areas of voting and public accommodations, the irreparable injury requirement set forth in *Douglas* need not be established in order to obtain injunctive relief. *United States v. Wood*, *supra* note 27 (voting); *Dilworth v. Riner*, *supra* note 27 (public accommodations).

⁴² *Supra* note 2 at 490.

Dombrowski and the others from continuing their civil rights activity. The Court, in ruling that their complaint was valid and that they should not be barred from obtaining equitable relief in Federal court, stated that "the chilling effect upon the exercise of First amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."⁴³

The scope of the *Dombrowski* decision has not as yet been fully defined. It seems clear, however, that in civil rights cases, when State authorities are interfering with 1st amendment rights, the rule of comity is no longer an obstacle to Federal court intervention.⁴⁴ The implications of the *Dombrowski* decision were seen when the Fifth Circuit Court of Appeals, during recent demonstrations in Jackson, Mississippi, enjoined city officials from arresting civil rights demonstrators under the city's parading ordinance.⁴⁵

The Court in *Dombrowski* has thus taken a major step toward the establishment of effective Federal civil remedies for State interferences with civil rights activity. It should be noted, however, that the *Dombrowski* case involved a prospective prosecution and was therefore not affected by the Anti-Injunction Statute. Unlike the rule of comity, which is judicially created and thus could be modified by the Court, the Anti-Injunction Statute is created by Congress and an act of Congress would be required to alter its effects in civil rights cases.⁴⁶

⁴³ *Id.* at 488. The Court specifically stated that the abstention doctrine (see note 38, *supra*) is inappropriate in first amendment cases. "We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas v. City of Jeannette*, statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." 380 U.S. 479, 489-90 (1965).

⁴⁴ In *Cameron v. Johnson*, 381 U.S. 741 (1965) (per curiam), the Supreme Court vacated and remanded a three-judge district court decision refusing to enjoin enforcement of a Mississippi anti-picketing statute. The Court directed the lower court to reconsider the case in light of the *Dombrowski* decision. Four justices dissented on the grounds that the Mississippi statute was not void on its face and thus *Dombrowski* was inapplicable.

⁴⁵ *Guyot v. Pierce*, Civil No. 22, 676, 5th Cir. June 15, 1965 (injunction granted pending appeal).

⁴⁶ Congressional action might not be required if section 1983 were construed as an express authorization under section 2283. See notes 30 and 31 *supra* and accompanying text. See also *Developments in the Law—Injunctions*, *op. cit. supra* note 33, at 1051.

REMOVAL

Removal is a procedure by which a State court criminal defendant may take his case into a Federal court, where it may continue as if originally brought there.⁴⁷ All proceedings in the State court are stayed and the prisoner is transferred from State to Federal custody.⁴⁸ In Federal court he has the advantages of liberal rules of criminal procedure, a jury drawn without racial discrimination and from a wider area of the State, and a court potentially less prejudiced against him and more responsive to constitutional rights. Consequently, the procedure can be of great importance to persons engaged in civil rights activities who face prosecutions in State courts.

Numerous examples have been given where local authorities have abused State criminal process for the purpose of punishing civil rights workers and Negroes by prosecuting them under statutes unconstitutional on their face or discriminatory in their application.⁴⁹ Defendants in such cases carry a heavy burden of expensive and extended litigation to vindicate their rights.⁵⁰ One notorious example is that of Reverend Fred L. Shuttlesworth, convicted of disturbing the peace for sitting in the white section of a Birmingham, Alabama, city bus. He made 19 appearances in court over a five-year span, including two in the United States Supreme Court, before he was freed on a writ of habeas corpus.⁵¹

⁴⁷ See 28 U.S.C. §§ 1441-47 (1964).

⁴⁸ 28 U.S.C. § 1446(e) (1964). The stay procedure is a statutory exception to 28 U.S.C. § 2283. See note 26, *supra*. To remove a case from State court a defendant must file a petition with the United States District Court any time before trial. 28 U.S.C. § 1446(c) (1964). This petition must state facts which entitle the defendant to removal. Copies of the petition are filed with the State court and a notice of removal is served upon the State prosecutor; whereupon, the State court loses jurisdiction of the case and any further proceedings in State court are null. 28 U.S.C. § 1446(e) (1964). The district court then determines the merits of the removal petition. If the petition fails to state facts which entitle the defendant to removal, the district judge denies the petition by remanding the case to State court. 28 U.S.C. § 1447 (1964).

⁴⁹ See Chapter 2 *supra* (discriminatory and harassing prosecutions) and Chapter 4 *supra* (practices of authorities in using prosecutions to suppress demonstration movements).

⁵⁰ See Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 Colum. L. Rev. 1163 (1963).

⁵¹ The Shuttlesworth litigation is discussed in detail at pp. 137-38, *infra*.

The Jackson Freedom Rider cases involved a similar history of delay in the State courts.⁵²

It was to protect against such discriminatory prosecutions that Congress in 1866 enacted a civil rights removal statute as part of a broad grant of jurisdiction to Federal courts in all criminal and civil cases "affecting persons who are denied or cannot enforce in the courts . . . of the states . . . any of the rights secured to them by [the thirteenth amendment and the Civil Rights Act of 1866]. . . ." ⁵³

The removal statute as amended and limited now reads:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the

⁵² *Thomas v. Mississippi*, 380 U.S. 524 (1965) (per curiam); Lusky, *op. cit.*, *supra* note 50.

⁵³ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. The first case to reach the Supreme Court under this statute did not involve a suit first brought in State court. Rather, in *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872), the United States attempted to use the statute as the jurisdictional basis for prosecuting two white men in Federal court for the murder of an aged Negro woman in Kentucky. There had been no State prosecution because the law of Kentucky prohibited Negroes from testifying against whites. The case was brought on the theory that the Act authorized a Federal prosecution for a State offense whenever a State by discriminatory laws rendered its tribunals ineffective to protect Negroes' rights. The defendants were convicted, but on appeal the Supreme Court reversed and held that there was no Federal jurisdiction since neither the dead woman nor the disqualified prospective witnesses were persons "affected" within the terms of the statute. This significant decision, which eliminated the possibility of direct Federal prosecutions when State law prevented prosecutions of whites for crimes against Negroes, was not modified by Congress when the 1866 civil rights legislation was codified as section 641 of the Revised Statutes of 1875. But the power of Congress to confer removal jurisdiction on Federal courts has never been doubted by the Supreme Court. See *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1867). The constitutionality of the civil rights removal statute was upheld in 1880 in *Strauder v. West Virginia*, 100 U.S. 303 (1880) and in *Virginia v. Rives*, 100 U.S. 313 (1880).

United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or refusing to do any act on the ground that it would be inconsistent with such law.

Prior to 1964, the statute was rendered practically useless by restrictive interpretations by the Supreme Court. With respect to subsection (1), which grants removal to persons who cannot enforce equal rights in State courts, the Supreme Court early held that this subsection would not permit removal unless the defendant established that a State constitutional or statutory provision, on its face, deprived him of equal rights.⁵⁴ These and other early restrictive interpretations became frozen into the law because a statutory rule of procedure prevented appeal from the remand of a removal case.⁵⁵ As a result, higher Federal courts had no opportunity to review these early cases.⁵⁶ But in 1964, Congress, sensitive to repeated denials of Federal rights in State courts, amended the procedural statute to allow appeals of remand orders in civil rights removal cases.⁵⁷

Since enactment of this amendment, judicial interpretations of the removal statute have extended its reach. Thus, in *Rachel v. Georgia*⁵⁸ the Fifth Circuit permitted removal on a finding that a State prosecution under the Georgia anti-trespass statute denied petitioners equal rights secured to them by the public accommodations title of the Civil Rights Act of 1964. In *Peacock v. City of Greenwood*,⁵⁹ the court extended this principle and held that a State prosecution based on a discriminatory application of an otherwise valid criminal statute could be removed on the ground

⁵⁴ *Virginia v. Rives, supra; Kentucky v. Powers*, 201 U.S. 1 (1906).

⁵⁵ Ch. 646, 62 Stat. 939 (1948), amended by ch. 139, § 84, 63 Stat. 102 (1949) (now 28 U.S.C. § 1447(d) (1964).)

⁵⁶ See Lusk, *op. cit. supra* note 50 at 1189.

⁵⁷ Civil Rights Act of 1964, § 901, 78 Stat. 266, 28 U.S.C. § 1447(d) (1964).

⁵⁸ 342 F. 2d 336 (5th Cir. 1965), *cert. granted*, 34 U.S.L. Week 3014 (U.S. Oct. 5, 1965).

⁵⁹ 347 F. 2d 679 (5th Cir. 1965).

that it denied petitioners' constitutional right to equal protection of the laws.⁶⁰

In *Cox v. Louisiana*, the Court of Appeals held that removal could properly be granted when allegations in the petition show a "planned prosecutorial abuse of a [state criminal] statute."⁶¹ The court stated that in the case before it, as in *Rachel* and *Peacock*:

The defendants, as a result of their actions in advocating civil rights, are being prosecuted under statutes, valid on their face, for conduct protected by federal constitutional guarantees or by federal statutes or by both constitutional and statutory guarantees.⁶²

More recently, in *McMeans v. City of Fort Deposit*,⁶³ a district court relied on the *Cox* principle to sustain the removal of prosecutions of demonstrators arrested for violating a local picketing ordinance in Lowndes County, Alabama. The court found that the arrests and prosecutions stemmed directly from the petitioners' efforts to protest discriminatory practices by several stores in the community. The court stated:

The manner in which the petitioners were protesting the alleged discrimination against members of their race was an allowable and constitutionally recognized exercise of their right of free speech and assembly. . . . If the ordinance . . . that these petitioners . . . were charged with violating makes their conduct punishable . . . then the ordinance is unconstitutional as applied to the petitioners.⁶⁴

⁶⁰ Cf. *Johnson v. City of Montgomery*, Crim. No. 11,740-N, M.D. Ala., Aug. 3, 1965; *Forman v. City of Montgomery*, Crim. No. 11,727-N, M.D. Ala., Aug. 3, 1965, which held that demonstrators arrested for lying down in the streets or sitting on sidewalks after fair warning may not remove their cases under subsection (1) because the arrests under the circumstances fail to show an unfair application of the statute. It appears that future problems of removal may concern many of the same issues raised in Chapter 4 on the limits of lawful protest activities.

⁶¹ 348 F. 2d 750, 751 (5th Cir. 1965.)

⁶² *Id.* at 754-55.

⁶³ Crim. No. 11,759-N, M.D. Ala., Sept. 30, 1965.

⁶⁴ *Ibid.*

Two of the petitioners were also arrested for reckless driving and leaving the scene of an accident. As to them, the court held that the charges were subterfuges and that the arrests stemmed directly from their protest activities. Consequently, the court held that the statutes, as applied, denied them equal protection of the laws. The *McMeans* decision is significant because it is the first to grant removal on the ground that arrests directly stemming from protest activities may constitute a denial of equal protection of the laws.⁶⁵

Subsection (2), which permits, in part, removal of cases involving "any act under color of authority derived from any law providing for equal rights," has been held to apply only to Federal officers and those assisting them.⁶⁶ In *People of New York v. Galamison*,⁶⁷ however, the Court of Appeals avoided that issue and remanded the case after finding that petitioners' acts were not related to any law providing for equal rights.⁶⁸

These decisions indicate that the Federal courts have begun the process of reconsidering the earlier restrictive interpretations of section 1443, a step forward that Congress anticipated in 1964.⁶⁹

⁶⁵ See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793 (1965).

⁶⁶ *Peacock v. City of Greenwood*, 347 F. 2d 679, 686 (5th Cir. 1965) (removal under subsection (2) refused to persons claiming they were arrested for acts done under color of authority of laws providing for equal rights); *City of Chester, Pennsylvania v. Anderson*, 347 F. 2d 823 (3d Cir. 1965) (same); *Johnson v. City of Montgomery, Ala.*, *supra* note 60 (same); *Forman v. City of Montgomery*, *supra* note 60 (same); *City of Clarksdale, Mississippi v. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964) (same).

⁶⁷ 342 F. 2d 255 (2d Cir. 1965).

⁶⁸ See also *People of State of Michigan v. Barnard*, 239 F. Supp., 306 (E.D. Mich. 1965). But New York City election officials have successfully used the alternative clause of subsection (2), permitting removal of cases involving a refusal "to do any act on the ground that it would be inconsistent" with a law providing for equal rights, to remove a civil action brought to enjoin them from enforcing a provision of the Voting Rights Act of 1965. *O'Keefe v. New York City Board of Elections*, 34 U.S.L. Week 2172 (S.D.N.Y. Sept. 14, 1965).

⁶⁹ See remarks of Senator Dodd, floor manager for Title IX, 110 Cong. Rec. at 6956. The Fifth Circuit had already begun the process of reconsidering the civil rights removal statute by staying remand orders in a number of cases. See *CORE v. Town of Clinton, Louisiana*, 346 F. 2d 911 (5th Cir. 1964), *stay order entered Oct. 14, 1963*, 346 F. 2d 912.

In the light of this trend, it may not be necessary for Congress to amend the statute.⁷⁰

HABEAS CORPUS

In a Federal habeas corpus proceeding involving a State prisoner, the question at issue is the legality of an individual's continued incarceration by the State. A petition for habeas corpus must allege that an individual's arrest or conviction by the State is "in violation of the Constitution or laws or treaties of the United States."⁷¹ The State is compelled to justify its detention of the petitioner; if it cannot, the petitioner is released. In cases involving arrest and detention of civil rights workers, the filing of a habeas corpus petition permits a Federal court to examine the case to determine whether or not the petitioner's incarceration violates his constitutionally protected rights.

If the Federal court finds that these rights are violated,⁷² the petition will be granted, the jurisdiction of the Federal court over the prisoner will supersede that of the State courts, the prisoner will be released, and the proceedings against him in the State court will be terminated.⁷³

The usefulness of habeas corpus in civil rights cases, however, has been severely limited by the judicially developed requirement that remedies in State court be exhausted before a Federal court will intervene.⁷⁴ The rationale behind this doctrine is that

⁷⁰ Following the *Rachel* decision, removal under subsection (1) was granted in a number of cases *sub. nom.*, *Robinson v. Florida*, 345 F. 2d 133 (5th Cir. 1965).

⁷¹ 28 U.S.C. § 2241(c)(3) (1964).

⁷² If the allegations made by the petitioner leave the court in doubt as to whether or not the petitioner is entitled to habeas corpus, the court will order petitioner's custodian to "show cause" why the writ should not be issued. A return or answer must be filed by the custodian within three days. The petitioner may then reply. A hearing will be held within five days to determine the justification for detention of the prisoner. On the basis of this hearing the court will either grant or deny the petition. 28 U.S.C. § 2241-54 (1964).

⁷³ 28 U.S.C. § 2283 (1964) does not apply to stays granted pursuant to a habeas corpus petition. See note 26, *supra*.

⁷⁴ This doctrine originated in the case of *Ex parte Royall*, 117 U.S. 241 (1886). The requirement did not exist when Federal habeas corpus was first extended to State court prisoners in 1867. See Judiciary Act of Feb. 5, 1861, ch. 28, § 81, 14 Stat. 385-86.

“it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation. . . .”⁷⁵ This exhaustion requirement is now codified in 28 U.S.C. Section 2254, which bars a petitioner from the Federal courts so long as “he has the right under the law of the State to raise, by any available procedure, the question presented.”

This language has been interpreted by the Supreme Court to mean that a habeas corpus petitioner who wishes to attack his incarceration on Federal grounds need present his Federal questions to the highest State court only once. If the State judiciary decides the merits of his claim, petitioner may go into Federal court even though under other State procedures he could “raise . . . the question presented.”⁷⁶ But, if the State’s highest court decides the case on procedural grounds and does not reach the merits, State collateral remedies, *i.e.*, procedures prescribed by State law for testing the legality of imprisonment, would have to be pursued before Federal habeas corpus would be available.⁷⁷

The statute appears to demand the exhaustion of State remedies no matter what the nature or source of the Federal right which the petitioner is seeking to vindicate. In the case of *Brown v. Rayfield*,⁷⁸ for example, the defendants, who were protesting racial discrimination, were summarily convicted under a Jackson, Mississippi, parading-without-a-license ordinance. Prior to filing an appeal for a new trial, they sought Federal habeas corpus alleging that the conduct for which they were being prosecuted was protected by the 1st and 14th amendments to the Constitution and that the prosecutions were intended to further the State policy

⁷⁵ *Darr v. Buford*, 339 U.S. 200, 204 (1950). The exhaustion requirement permits “full play [to] be allowed to the States in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings.” *Fay v. Noia*, 372 U.S. 391, 419 (1963).

⁷⁶ *Brown v. Allen*, 344 U.S. 443 (1953).

⁷⁷ *Ibid.* The requirement of exhaustion has been further limited to apply only to the failure to exhaust those State remedies *still open* to the petitioner at the time he files his petition in the Federal court. *Fay v. Noia*, *supra* note 75.

⁷⁸ 320 F.2d 96 (5th Cir. 1963), *cert. denied*, 375 U.S. 902 (1963).

of racial discrimination. The Court of Appeals for the Fifth Circuit sustained the refusal of a Mississippi Federal district court to entertain the petition on the grounds that the petitioner had failed to exhaust State remedies.⁷⁹ The court also found that even extended court delays and inability to obtain a speedy trial because of the congestion of civil rights prosecutions in the Mississippi courts would not excuse "exhaustion" where a habeas petitioner is able to make bond and, thus, obtain his release.⁸⁰

Most civil rights prosecutions, however, are for offenses in which the sentence involved is usually a few weeks or months. If a petitioner is unable to obtain bail and, thus, must remain incarcerated while exhausting State remedies, he may serve his entire sentence before Federal relief can be obtained.

The recent case of *In re Shuttlesworth*⁸¹ indicates that in such a situation relief may be available. In 1958 Reverend Shuttlesworth was arrested and convicted of disorderly conduct when he led an attempt to desegregate the bus system in Birmingham, Alabama. He was sentenced to 82 days in jail at hard labor. His conviction was affirmed by the Alabama Court of Appeals without a decision on the merits, and both the Alabama Supreme Court and the United States Supreme Court refused to review this decision. Shuttlesworth then sought habeas corpus in a Federal district court. His petition was denied, and he sought permission to appeal this denial in both Federal district and circuit courts. Fear-

⁷⁹ See also *Application of Wyckoff*, 196 F. Supp. 515 (S.D. Miss., 1961). In this case a Supreme Court Justice refused to entertain an original petition for habeas corpus, also on the grounds that petitioner had failed to exhaust State remedies. See 6 Race Rel. L. Rep. 794 (Black, Circuit Justice, 1961).

⁸⁰ By the time the habeas corpus proceeding in the *Brown* case reached the Fifth Circuit, the petitioners had made bond in the State court. In view of this, the Court of Appeals found no sufficient reason to excuse petitioners from the requirement of exhaustion.

⁸¹ The history of this litigation leading up to the granting of the habeas corpus petition can be traced through the following cases: *White v. City of Birmingham*, 41 Ala. App. 81, 130 So. 2d 231 (1960), *cert. denied*, 272 Ala. 301, 130 So. 2d 234 (1961), *cert. denied sub nom.*, *Shuttlesworth v. City of Birmingham*, 368 U.S. 959 (1962); *Shuttlesworth v. Moore*, 7 Race Rel. L. Rep. 114 (N.D. Ala. 1962), *rev'd*, 369 U.S. 35 (1962) (per curiam), *on remand petitioner released on bail*, 7 Race Rel. L. Rep. 121 (N.D. Ala. 1962), *on merits writ granted*, 9 Race Rel. L. Rep. 107 (N.D. Ala. 1963).

ing that before a court decision was rendered he would serve his entire 82-day sentence and, thus, moot his case, he sought an original habeas corpus petition in the United States Supreme Court.⁸² While his petition was pending in the Supreme Court, the Federal Court of Appeals refused to consider his appeal on the ground that, although he had failed to obtain a State determination of his contentions by direct review, he might be able to obtain a decision on the merits of his case by means of various other State remedies which should be pursued before Federal habeas corpus would be granted.

In February 1962 the Supreme Court reviewed the case and remanded it to the Federal district court with directions to hold the matter while Shuttlesworth pursued State collateral remedies. The Court held, however, that:

In the event of failure to secure . . . [State] relief, or to secure admission to bail pending such relief within five (5) days from the date of application for bail, petitioner may . . . proceed on this application [for a writ of habeas corpus] in the United States District Court which may then consider all State remedies exhausted and proceed to hear and determine the cause.⁸³

Shuttlesworth went back to the State courts but was again denied relief. The Federal district court then ordered Shuttlesworth discharged from custody on habeas corpus without even holding an evidentiary hearing, finding that the State trial court record clearly indicated that the conviction was unconstitutional.⁸⁴

By the time Shuttlesworth was released by the district court, he had served 34 days of an 82-day sentence and spent more than five years in and out of various State and Federal courts.

There have been indications that the Federal courts may follow the decision in *Shuttlesworth* in civil rights cases in which bail is denied by the State courts and, if so, habeas corpus may yet be

⁸² See 28 U.S.C. § 2241(a) (1964).

⁸³ 369 U.S. at 35.

⁸⁴ *Shuttlesworth v. Moore*, 9 Race Rel. L. Rep. 107 (N.D. Ala. 1963).

come a viable remedy.⁸⁵ In a case in which a habeas petitioner is able to gain his release by posting bond, however, the doctrine of the *Brown and Wyckoff* cases indicates that "exhaustion" of State remedies will be required.⁸⁶

SUMMARY

This chapter has considered various remedies that are available from Federal courts to restrain quickly denials of or interferences with constitutional rights. One such remedy is the injunction—a Federal court order issued in a civil proceeding which can restrain or compel action by private individuals or public officials. Federal courts have issued injunctions to halt interferences with civil rights activities, such as lawful demonstrations, and to compel officials to protect persons exercising constitutional rights. In addition, injunctions have been granted to prohibit arrests under unconstitutional statutes.

The civil jurisdiction of Federal courts also can be invoked to remove cases from State court to Federal court. Under this procedure, it is possible for a person who is being prosecuted illegally in State court to deprive the State court of its jurisdiction and to bring his case before a Federal court. If the Federal court agrees

⁸⁵ See *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), a case growing out of the prosecution of Freedom Riders (questions of law certified to Florida Supreme Court), *cert. dismissed* 378 U.S. 539 (1964). When the district court denied habeas corpus petitions on grounds of failure to exhaust State remedies, the Court of Appeals for the Fifth Circuit modified the judgment to allow hearing on the claims raised by this petition unless the State court discharged petitioners or released them on nominal bail within three days. *Dresner v. Stoutamire*, No. 21,802, 5th Cir., Aug. 5, 1964. The Municipal Court *sta sponte* reconsidered the sentences imposed and reduced them to the time already served and discharged the prisoners. Habeas corpus proceedings were thus mooted. Cf. also *Johnson v. Davis*, 9 Race Rel. L. Rep. 814 (M.D. Fla. 1963).

⁸⁶ See e.g., *Hillegas v. Sams*, 349 F.2d 859 (5th Cir. 1965). The Federal district court denied the habeas corpus petition of a COFO worker arrested for vagrancy on the grounds of failure to exhaust available State remedies. The Court of Appeals for the Fifth Circuit affirmed this denial, holding that: "No effort was made to obtain relief in the courts of Mississippi. Nothing is here shown to call for the application of a different rule than was announced and applied in *Brown v. Rayfield* . . . and *In re Wyckoff*."

that further proceedings would amount to a denial of constitutional rights, the State court action must be discontinued.

Finally, the ancient writ of habeas corpus is available to a person illegally held in State custody. This remedy permits a Federal court to review the facts of a case and determine whether a denial of constitutional rights exists requiring the person held in State custody to be released.

Various legal doctrines have developed which place limitations on the use of each of the Federal civil remedies discussed in this chapter. These doctrines are designed to minimize Federal interference with State court proceedings. In recent years, however, the restraints on Federal civil remedies have been relaxed in order to meet the challenge posed by the widespread use of State court proceedings to interfere with Federal rights. Some further modification of the limiting doctrines may be necessary to protect fully Federal rights.

CHAPTER 8.

EXECUTIVE ACTION TO PROTECT THE EXERCISE OF FEDERAL RIGHTS

INTRODUCTION

The incidents of racial violence described in this report fall largely into two categories. First, there have been situations, such as in Greenwood, Mississippi, and in St. Augustine, Florida, where private violence was directed against individuals as they attempted to exercise specific Federal rights and where law enforcement officers were unwilling or unable to furnish protection. Thus, persons seeking to exercise the right to vote, the right to utilize public accommodations and facilities covered by the Civil Rights Act of 1964, the right to picket peacefully, and the right to travel in interstate commerce have been attacked, sometimes in the presence of law enforcement officers.¹

The second category is exemplified by the situations in Natchez and McComb, Mississippi. In these communities there have been repeated incidents of violence directed against individuals, not to prevent them from exercising specific Federal rights, but apparently to create a climate of fear and intimidation which would deter Negroes generally from exercising their rights. In these situations as well, law enforcement officers demonstrated unwillingness or inability to prevent or punish violence.

¹ Other examples of this kind were the Freedom Riders in Montgomery, Alabama, in 1961, *1961 Report of the U.S. Commission on Civil Rights, Justice* 29-33 [hereinafter cited as *Justice Report*]; the attempted voter registration marches in Selma, Alabama, in March 1965, *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); and the demonstrations, picketing, and attempts to use public accommodations in Bogalusa, Louisiana, in June and July, 1965, *Hicks v. Knight*, Civil No. 15,727, E.D. La., July 10, 1965.

Demands for Federal Action

The failure of local law enforcement officials to curb racial violence has resulted in demands for direct Federal action. The most far-reaching demand has been that the National Government utilize the Armed Forces or United States marshals to supplant local authority. It has also been proposed that the Federal Government intervene in a more limited way by stationing Federal agents in communities to protect persons in the exercise of Federal rights. Protection would be provided by the presence of Federal agents at the scene of probable violence with the authority to prevent violations of law and to make arrests for violations committed in their presence, by furnishing security to persons know to be in jeopardy, and by surveillance of suspected groups and persons.

The Response of the Federal Government

Federal intervention has been varied but limited. In five notable instances—at Little Rock,² Montgomery,³ Oxford,⁴ Tuscaloosa,⁵ and Selma⁶—Federal force has been used on a significant scale to avert racial violence by preventive police action.⁷ In Montgomery,⁸ Selma,⁹ Greenwood,¹⁰ and Bogalusa,¹¹ the Federal Government has brought or intervened in private suits seeking injunctive orders against police or against extremist groups after

² See Brief of United States, pp. 6–8, *Jackson v. Kuhn*, 254 F. 2d 555 (8th Cir. 1958) [hereinafter cited as *Jackson Brief*].

³ See *Justice Report* 29–33; Marshall, *Federalism and Civil Rights* 64–67 (1964).

⁴ For the history of the admission of James Meredith to the University of Mississippi, see 7 Race Rel. L. Rep. 739–65 (1962) and Barrett, *Integration at Ole Miss* (1965).

⁵ For cases and proclamations involved in the admission of Vivian Malone to the University of Alabama, see 8 Race Rel. L. Rep. 448–58 (1963).

⁶ For cases, proclamations, and accounts of other action relating to the Selma-Montgomery march, see 10 Race Rel. L. Rep. 218–34 (1965).

⁷ Small numbers of U.S. marshals also have been used on approximately 30 occasions since 1958, primarily in connection with school or university integration. Interview with Chief Marshal James McShane, August 16, 1965 [hereinafter cited as *McShane Interview*].

⁸ *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961).

⁹ *Williams v. Wallace*, 240 F. Supp. 100 (N.D. Ala. 1965).

¹⁰ *United States v. Sampson*, Civil No. GC 6449, N.D. Miss., Sept. 2, 1964.

¹¹ *Hicks v. Knight*, *supra* note 1; *United States v. Original Knights of the K.K.K.*, Civil No. 15,793, E.D. La., July 19, 1965.

violence had occurred and local law enforcement officials failed to prevent or contain it.¹² The Federal Government also took direct action in some areas where there was substantial violence, such as Mississippi, Alabama, and Georgia, by increasing the "Federal presence," usually by dispatching large numbers of FBI agents.¹³

But severe self-limitations have been imposed on the scope of Federal protective action. Except where court orders have been previously obtained, the Department of Justice will not directly protect persons exercising Federal rights.¹⁴ Nor will FBI agents or United States marshals arrest persons for offenses committed in their presence or perform patrolling or other preventive duties in communities where there has been substantial racial violence.¹⁵

The reluctance to provide more extensive Federal protection has been justified on a number of grounds. The Department of Justice has claimed that providing a protective Federal force in the absence of a court order would raise the deepest constitutional issues; that the use of such force would represent an unwarranted departure from the principles of Federalism leading to the creation of a national police force operating in situations not limited in time or place; that local authorities would be discouraged from assuming their responsibilities; and that at present there are not enough properly trained personnel (marshals and FBI agents) for such duties.¹⁶

This chapter will first analyze the legal and historical precedents which define the scope of the President's authority to use Federal

¹² The legal authority that formed the basis of these actions is discussed in Chapter 7, *supra*.

¹³ *FBI Appropriation 1966*, 23 (FBI reprint of testimony of J. Edgar Hoover, Director, Federal Bureau of Investigation, before the House Subcommittee on Appropriations, March 4, 1965).

¹⁴ Conferences with Assistant Attorney General John Doar, Department of Justice, Washington, D.C., August 12 and October 5, 1965 [hereinafter cited as *Department of Justice Conferences*].

¹⁵ Memorandum, "Handling of Civil Rights Investigations by the FBI," August 18, 1965, and Supplement, October 7, 1965, from the Federal Bureau of Investigation to the U.S. Commission on Civil Rights. [Hereinafter cited as *FBI Memo*.] For a full discussion of this policy, see pp. 160-62, *infra*.

¹⁶ *Department of Justice Conferences*. See generally Marshall, *op. cit. supra* note 3.

officers to protect persons exercising constitutional rights in situations where local officials are unwilling or unable to provide protection. This analysis will consider the extent to which the limitations on Federal action expressed by the Department of Justice are limitations of policy and not legal power. The chapter will conclude with an analysis of the policy considerations relating to the use of Federal officers in particular situations.¹⁷

LEGAL AUTHORITY

The Constitution directs the President to "take care that the laws be faithfully executed."¹⁸ One constituent of this mandate is the power to use force to carry out the laws and to prevent their violation. Presidents have exercised this authority since the first days of our Nation. Although the Supreme Court has held that in certain situations a President has exceeded his authority,¹⁹ it has never done so with respect to Presidential use of force to execute the laws.²⁰ In the only cases in which that issue has been faced by the Court, it has stated that the only limitation on the President in this area is that he act with "honest devotion to the public interests"²¹ and out of a sense of "high responsibility."²²

In 1879 it was argued in the Supreme Court of the United States that when Federal marshals sought to enforce Federal election laws, their conduct infringed upon the prerogatives of the States. In rejecting the argument, Justice Bradley, writing for the Court, expressed what has become a definitive statement of Federal authority:

It is argued that the preservation of peace and good order

¹⁷ The chapter does not consider the use of Federal force to quell domestic disorder pursuant to the request of a State. See U.S. Const. art. iv, § 4, 10 U.S.C. § 331 (1964).

¹⁸ U.S. Const. art II, § 2.

¹⁹ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) and *Duncan v. Kahanamaku*, 327 U.S. 304 (1946), holding that the Constitution prohibited the suspension of habeas corpus during the Civil War and the Second World War; and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), holding that the emergency strike procedures of the Taft-Hartley Act barred Presidential seizure of certain steel mills during the Korean War.

²⁰ See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1857), where the Supreme Court suggested that it was without power to challenge any Presidential action because of the unenforceability of any order it might issue.

²¹ *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32 (1827).

²² *Luther v. Borden*, 48 U.S. (7 How.) 1, 44 (1849).

in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.²³

The view of Executive power expressed in *Siebold* was applied a decade later by the Supreme Court when it held that even in the absence of congressional enactment, the President was authorized to direct United States marshals to protect a threatened Federal judge. The Court based its decision on the President's implied power in executing the laws to enforce the "rights, duties, and obligations growing out of the constitution itself," and to provide "all of the protection implied by the nature of the government under the constitution."²⁴

The issue of Executive power to compel obedience to Federal law was again raised in the famous Pullman Railway dispute when the Pullman workers struck and the American Railway Union supported them by refusing to handle Pullman cars.²⁵ A Federal court in Chicago issued a sweeping injunction against the strike and troops were used to enforce the order. In upholding the authority of the President to seek the injunction, without statutory authority, the Court again applied *Siebold*:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all

²³ *Ex parte Siebold*, 100 U.S. 371, 394-95 (1880).

²⁴ *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890).

²⁵ See Rich, *The President and Civil Disorder*, 91-109 (Brookings Institution, 1941) [hereinafter cited as *Rich*].

national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.²⁶

Although the President's authority to use force is phrased in the broadest terms, it is not unlimited. In enforcing the Constitution and statutes, the President must interpret their meaning and scope, as well as the breadth of his own powers. Thus, his decisions will inevitably take cognizance of congressional action and judicial interpretations, as well as the precedents of Presidential action. These interpretations by each branch of the Federal Government help define the scope of the President's authority, and, as a practical matter, establish the boundaries within which he is likely to exercise his power, even if he is not so limited by law.

Congressional Definition of the President's Power to Use Federal Force

Congress, as well as the courts, has repeatedly sustained in broad terms the use of force by Presidents to execute Federal law.²⁷ Beginning in 1792 a series of congressional enactments

²⁶ *In re Debs*, 158 U.S. 564, 582 (1894).

²⁷ Although Congress did limit the power of the President in suppressing domestic violence by restricting his discretion to call out the militia of a State other than that where the violence was threatened, Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, this limitation was repealed in 1795. See Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424. There are several other enactments which might be understood to constitute such a limitation but which in fact do not. (1) By the Act of Feb. 8, 1894, ch. 25, 28 Stat. 36, the election laws of 1871 (Act of Feb. 28, 1871, ch. 99, 16 Stat. 433) were repealed. The repeal of the entire law naturally included a repeal of the specific authorization (§ 8) for the use of marshals to enforce it. (2) By the Act of March 4, 1909, ch. 321, § 22, 35 Stat. 1092, 18 U.S.C. § 592, the use of "troops or armed men" at elections was prohibited. The House managers of the bill said that this "does not in any sense diminish the force of existing law." H.R. Rep. 2319 to accompany S. 2982, 60th Cong., 2d Sess. (1909). (3) By the Act of Sept. 9, 1957, § 122, 71 Stat. 637, the Act of May 31, 1870, ch. 114, § 13, 16 Stat. 143, was repealed. The Act had permitted the President to use

have expressly authorized the President to use force in domestic disturbances and particularly in circumstances similar to those described in this report. These statutes have added weight to the President's authority, for, as Mr. Justice Jackson has said:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty.²⁸

Congressional efforts to define the situations in which the President may directly use Federal force to execute the laws without a request from a State are codified as sections 332 and 333 of title 10 of the United States Code.

10 U.S.C. Section 332

In 1792 Congress enacted a statute authorizing the President to use States' militia when the execution of the laws of the United States was opposed by combinations too powerful to be suppressed either by the ordinary course of judicial proceedings or by marshals.²⁹ The circumstances of its passage and its development into the present 10 U.S.C. section 332 suggest how broadly Congress conceived the President's power, and the situations in which it has been used establish its practical scope.³⁰

military force under certain circumstances. The repeal was justified by Senator Humphrey, who introduced it, on the ground that, "There is plenty of other appropriate law, besides Reconstruction law, available for the President's use." 103 Cong. Rec. 11979 (1957). (4) By the Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152, 18 U.S.C. § 1385 (1964), the use of the army as a *posse comitatus* was prohibited. This provision has been consistently interpreted simply as a limitation on the ability of United States marshals to use Federal troops as a posse without prior Presidential or congressional authorization. See 7 Cong. Rec. 3846-49, 4240-48 (1878); 16 Ops. Att'y. Gen. 162-64; 17 Ops. Att'y. Gen. 242-44, 333-35; 19 Ops. Att'y. Gen. 293-96, 570-71; 41 Ops. Att'y. Gen. 313, 329-30.

²⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* at 635-36.

²⁹ Act of May 2, 1792, 1 Stat. 264.

³⁰ Cf. Frankfurter, J., *concurring*, in *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* at 610-11 (1952).

The Act of 1792 was aimed at domestic disorder which interfered with the execution of Federal law.³¹ There was little opposition to the essential principle of the bill.³² Several years later, following a rebellion against the collection of whiskey excise taxes in western Pennsylvania,³³ Congress broadened the Act to give the President greater flexibility and discretion with respect to calling the militia to suppress domestic disorder.³⁴ The Act was again broadened in 1807 by authorizing the President to use Federal troops whenever he could use the militia.³⁵ In 1861 the Act was amended once more to provide that the determination of the need for Federal force depended only upon "the judgment of the President of the United States."³⁶ The purpose of this amendment was to make clear that the President was the sole judge of the exigency requiring the use of troops.³⁷

Thus, the 1861 Act represents the culmination of an expanding concept of Presidential discretion in the deployment of Federal force for domestic purposes.³⁸ It confirmed in the President all the powers he might lawfully exercise under the Constitution with respect to the use of "the militia" or the "land and naval forces" of the United States.

The statute reads as follows:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against

³¹ One of the moving forces behind passage of the Act was Shay's Rebellion, which had ended five years before. See Wilson, *Federal Aid in Domestic Disturbances, 1903-1922*, S. Doc. No. 263, 69th Cong., 2d Sess. 9-24 (1922) [hereinafter cited as *Federal Aid*].

³² *Annals of Congress, 1791-1793*, at 574-79.

³³ *Federal Aid* 27-33; Cummings & McFarland, *Federal Justice*, 41-45 (1937).

³⁴ Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424. The Act authorized the President to call the militia from any State and also to make the determination of the need for action without a recommendation from a judge.

³⁵ Act of March 3, 1807, ch. 39, 2 Stat. 443.

³⁶ Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281.

³⁷ 31 Cong. Globe 146, 37th Cong., 1st Sess. (1861) (remarks of Rep. Bingham).

³⁸ *Id.* at 145. Representative Bingham, the principal sponsor of the amendment, cited several acts which had contributed to this development: Act of March 3, 1803, ch. 32, § 1, 2 Stat. 241; Act of April 18, 1806, ch. 32, § 1, 2 Stat. 383; Act of March 30, 1808, ch. 39, §§ 1, 5, 2 Stat. 478-79; Act of April 10, 1812, ch. 55, §§ 1, 4, 2 Stat. 705-06.

the authority of the United States, makes it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.³⁹

From 1792 to 1860, on at least 10 occasions, Presidents, without being requested by a State, exercised their authority to suppress violent opposition to the laws of the United States.⁴⁰ Most of these instances involved violent interference with Federal officials in their efforts to execute Federal laws. Several, however, such as the Slave Insurrections of 1831⁴¹ and the disturbances in Kansas in 1856,⁴² involved general violence which was suppressed by Federal troops. On each occasion the President issued a proclamation declaring that violence prevented the enforcement of Federal law by the normal course of judicial proceedings and sent militia or troops to restore order.⁴³ Significantly, court orders were not involved in any of these cases, nor was any special finding made with respect to the willingness or ability of local officials to carry out Federal law or to protect Federal officials.⁴⁴

Even after the Civil War and the enactment of 10 U.S.C. section 333, which is discussed below, Presidents continued to invoke section 332 to suppress violence.⁴⁵ But the pattern of the use of Federal force is different in the latter period. Before the Civil War, force was used most often in situations which threatened the supremacy of Federal law, and, in some instances, the existence of the Union. Following the War, however, the principal use was to suppress general violence unrelated to interference with specific Federal laws. Since 1957, the necessity of enforcing

³⁹ 10 U.S.C. § 332 (1964).

⁴⁰ *Jackson Brief* 79-88. See generally, *Federal Aid*.

⁴¹ *Rich* 50; *Federal Aid* 45-46.

⁴² *Federal Aid* 66-71.

⁴³ *Federal Aid* 25-85.

⁴⁴ *Ibid.*

⁴⁵ *Jackson Brief* 83-89; *Rich* 72-204; *Federal Aid* 94-204.

Federal court orders has been the basis for invoking this section—in connection with section 333—to justify the use of Federal force.⁴⁶

10 U.S.C. Section 333

Following the Civil War, the activities of the Ku Klux Klan and the restrictive view that President Andrew Johnson took of his authority to use Federal force under 10 U.S.C. section 332 led to a demand for additional legislation.

Military commanders expressed concern to their superiors in Washington about increasing Klan activities. In 1868, for example, one commander in Tennessee wrote that the State was being disturbed “by the strange operations of a mysterious organization known as the Ku Klux Klan . . . whose acts were shown to be of a lawless and diabolical nature.”⁴⁷ He relayed a request of a member of the Tennessee legislature who asked if the Federal Government could not do something to “protect the community,” and warned that if nothing were done, “there was danger of a bloody collision.”⁴⁸

This request for Federal protection was denied. President Andrew Johnson determined that since the State itself had not asked for Federal aid, intervention by the United States was not “within the province of the Executive.”⁴⁹

From Tennessee, Klan activity and vigilante violence spread to Georgia, North Carolina, Mississippi, Alabama, and South Carolina. In January 1871 the violence finally compelled Federal action, leading President Grant to send a special message to Congress asking for legislation to “effectively secure life, liberty, and property, and the enforcement of law. . . .”⁵⁰

⁴⁶ See notes 1–6, *supra*.

⁴⁷ *Federal Aid* 98.

⁴⁸ *Id.* at 99.

⁴⁹ *Ibid.* Cf. 10 U.S.C. § 331 (1964).

⁵⁰ House Exec. Doc. No. 14, 42d Cong., 1st Sess. (1871). See 7 Richardson, *Messages and Papers of the Presidents* 127. See also the resolution introduced by Senator Sherman, 44 Cong. Globe, 42d Cong., 1st Sess. (1871).

After prolonged debate, Congress enacted what is now section 333 of title 10 of the United States Code.

The President, by using the militia or the Armed Forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Although section 333 has never been interpreted by the courts, the problems confronting Congress at the time of its passage shed light on the intended scope of the statute.

The primary evil sought to be corrected by section 333 was widespread violence by private citizens which went unchecked by local law enforcement officials. The belief that this kind of situation did not present an occasion for Presidential intervention, and that a supplementary statute to section 332 was required, was based on the then current interpretation of the rights protected by the Constitution. The President was authorized by section 332 to enforce “the laws” of the United States, which included the Constitution. The Constitution, however, only secured the right to personal security against action by the Federal and State governments, and not against action by private individuals.⁵¹ And

⁵¹ U.S. Const. amend. V, XIV.

although a Supreme Court Justice, sitting on circuit in 1823, had suggested that the right to personal security was so fundamental that it belonged "of right, to the citizens of all free governments,"⁵² this view had not gained widespread acceptance.

The sponsors of this legislation accepted the view that the Federal Government could not in any and all circumstances guarantee by force the right to personal security—a right which traditionally had been thought to derive from the individual's relationship to the State rather than his relationship to the Federal Government.⁵³ It was necessary, therefore, to attempt to delimit the circumstances under which violations of personal security could be considered a deprivation of Federal rights. The result was 10 U.S.C. section 333, which is bottomed on the right to equal protection of the laws secured by the 14th amendment. That section defines as a denial of the equal protection of the laws, acts of violence in violation of State law, which are widespread and which are unchecked by local authorities.⁵⁴

Representative Shellabarger, who guided the measure through the House, stated:

Now, note, the provisions of the section are, first, that there must be a condition of public violence . . . such as to deprive, not one individual merely, but a "portion or a

⁵² *Corfield v. Coryell*, 4 Wash. C.C. 371 (D. Pa. 1823). But cf. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 76 (1873).

⁵³ 44 Cong. Globe 376-97, 42d Cong., 1st Sess. (1871).

⁵⁴ Apparently, the framers of section 333 considered State "inaction" to be no less a violation of the 14th amendment than direct State action. This construction of the 14th amendment is, today, well established. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961); *Lynch v. United States*, 189 F. 2d 476 (5th Cir. 1951); cf. *Collins v. Hardyman*, 341 U.S. 651 (1951). It is also clear that invocation of section 333 does not require a finding that the conduct of State officials has been "willful." This has been the standard applied to section 242 of title 18—the Federal criminal statute directed at 14th amendment violations by State officers. See *Screws v. United States*, 325 U.S. 91 (1945). But such a test has been required only to meet the standards of due process necessary to sustain criminal convictions. Willful conduct has not been required when civil actions based on the 14th amendment (under 42 U.S.C. § 1983) have been brought against State officers. In those situations the officer's conduct is viewed against the background of "tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 65 U.S. 167, 187 (1961).

class of the people," of their rights, privileges or immunities. They must also be deprived of the privileges and immunities of American citizens. *And more than that*, the constituted authorities must also have been unable to protect the people or have failed or refused to protect them. . . . Until all these things have occurred there is no authority under this bill (but existing law gives it in other cases) to send to the State the military aid of the United States.⁵⁵

Section 333 was put into effect in South Carolina almost immediately after its passage when the President issued a proclamation in October 1871, applying the Act to nine counties of the State and then sending troops who arrested a large number of persons connected with the Ku Klux Klan.⁵⁶ The Act was subsequently cited by President Cleveland in support of his action in in the Pullman Railway Strike of 1894,⁵⁷ and by Presidents Eisenhower, Kennedy, and Johnson in the racial disturbances since 1957.⁵⁸

Section 333, like section 332, grants the President broad discretion to decide when the circumstances justify the use of force to prevent or suppress violence. President Kennedy, during the Birmingham crisis of May 1963, gave forceful expression to this principle in a telegram he sent to Alabama's Governor Wallace:

Under this section, [title 10, section 333] which has been invoked by my immediate predecessor and other Presidents as well as myself on previous occasions, the Congress entrusts to the President all determinations as to (1) the necessity for action; (2) the means to be employed;

⁵⁵ 44 Cong. Globe App. 71, 42d Cong., 1st Sess. (1871) (emphasis added). Shellabarger also suggested that the failure of a State to request Federal assistance under the guaranty clause, U.S. Const., art. IV, § 4, may itself be evidence that this State is denying equal protection. *Ibid.*

⁵⁶ *Federal Aid* 103.

⁵⁷ *Rich* at 99-103.

⁵⁸ See *Jackson Brief; Justice Report* 29-33; see also, note 60, *infra*.

and (3) the adequacy or inadequacy of the protection afforded by State authorities to the citizens of that state.⁵⁹

The Department of Justice in its brief supporting President Kennedy's action in Birmingham at that time stated to the Supreme Court that section 333 authorizes Presidential intervention whenever:

[V]iolence (or unlawful combination or conspiracy) so hinders the ordinary processes of law enforcement that a part or class of people are deprived of federal constitutional rights, including the right of equal protection of the laws, which the State authorities are unable, fail or refuse to protect.⁶⁰

MEANS AVAILABLE TO THE PRESIDENT TO ENFORCE LAW

As discussed above, Federal troops frequently have been utilized by Presidents to enforce Federal law.⁶¹ Section 333 provides that, in addition to the militia and Armed Forces, the President also may use "any other means" to execute the laws. These additional means available to the President include the force of United States marshals, as well as other Federal law enforcement officers.

⁵⁹ 8 Race Rel. L. Rep. 442 (1963).

⁶⁰ Brief of the United States at 11, *Alabama v. United States*, 373 U.S. 545 (1963). See also the interpretation given to the Governor of Nevada by Secretary of State Elihu Root at the time of the Goldfield disorders: "Action under sec. 5299 of the Revised Statutes [now section 333] is to be taken . . . upon the judgment of the President of the United States that some portion or class of the people of a State are denied the equal protection of the laws to which they are entitled under the Constitution of the United States." See *Rich* 200, n. 42. It should be noted that this interpretation does not involve or require a violation of Federal statutes to permit Presidential action although section 333 speaks of interference with State laws and laws "of the United States." The legislative history suggests that the requirement of interference with "laws of the United States" would be satisfied by interference with rights protected under the 14th amendment. See 44 Cong. Globe App. 71; 44 Cong. Globe 478 (remarks of Representative Shellabarger), 567, 703 (remarks of Senator Edmunds); 42d Cong., 1st Sess. (1871).

⁶¹ The power to use troops also includes the power to federalize the State National Guard. 10 U.S.C. § 3500 (1964). See notes 2, 4, 5, and 6, *supra*.

United States Marshals

United States marshals are appointed by the President, and presently act under the supervision of the Attorney General.⁶² They have been described as the “national peace-officers”⁶³ and as the “first line of Federal defense on occasion of domestic disturbances.”⁶⁴ In considering the scope of their powers, the Supreme Court has held that the use of force by marshals is an essential attribute of Federal power:

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? . . .

The argument is based on a strained and impracticable view of the nature and powers of the National Government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons. And, to do this, it must, necessarily, have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.⁶⁵

The Office of the United States Marshal and the court system of the United States were established by the Judiciary Act of 1789, which created judicial districts and a marshal's office for each district. For over a century, marshals had a variety of administrative

⁶² 28 U.S.C. § 541 (a), (c) (1964).

⁶³ *In re Neagle*, 39 Fed. 833, 860 (C.C. Cal. 1889).

⁶⁴ *Cummings & McFarland*, *op. cit. supra* note 33, at 544.

⁶⁵ *Ex parte Siebold*, 100 U.S. 371, 395-96 (1880).

duties ranging from census taking and executing courts-martial, to carrying out orders issued by the President under the Alien Act of 1798.⁶⁶ Hostility to the administration of justice was at times so great that, as one Attorney General wrote, "in certain localities no operation is so dangerous as a faithful performance of duty by United States marshals."⁶⁷

In discharging his duties, the present-day marshal acts concurrently as an officer of the Federal Judiciary and as an executive officer responsible for the "general enforcement, maintenance and administration of Federal authority."⁶⁸ In either position he acts in obedience to the orders of the Attorney General, and thus is vested with all the authority necessary to carry out these orders.⁶⁹ "In such a case the Marshal acts as an arm of the Attorney General who is in turn an arm of the President."⁷⁰

Congressional definition has clarified the authority of marshals in certain specific situations. As a law enforcement officer, the marshal is authorized by a statute enacted in 1792 to exercise the same powers in executing the laws of the United States as sheriffs and their deputies in the several States may exercise in executing the laws thereof.⁷¹ Under this statute a Federal marshal is entitled to exercise all of the peace keeping powers of a State sheriff.⁷² As

⁶⁶ *Outline of the Office of United States Marshal*, at 7 (Publication of the Executive Office for United States Marshals, rev. 1963).

⁶⁷ *Id.* at 7.

⁶⁸ *United States v. Krapf*, 285 F.2d 647, 649 (3d Cir. 1961).

⁶⁹ *Id.* at 650.

⁷⁰ *Ibid.*

⁷¹ Act of May 2, 1792, ch. 27, § 9, 1 Stat. 265, 28 U.S.C. § 549 (1964). Marshals also have been empowered to execute "all lawful writs, process and orders" of the United States since the First Judiciary Act of 1789. 28 U.S.C. § 547(b) (1964). Although each marshal is appointed for a particular district, 28 U.S.C. § 547(a), his authority to execute "all lawful writs, process and orders" is nationwide. *Billeci v. United States*, 184 F.2d 394, 396 (D.C. Cir. 1950); *MacNeil v. Gray*, 158 F. Supp. 16, 18 (D.Mass. 1957). The marshal's powers are not limited to the precise terms of judicial and executive orders, but include those acts which are necessary and proper to their effectuation. *Cunningham v. Neagle*, 135 U.S. 1, 58-61 (1890); *United States v. Krapf*, 285 F. 2d 647, 649-50 (3d Cir. 1961).

⁷² *In re Acker*, 66 Fed. 290 (C.C. Mont. 1894); *Carico v. Wilmore*, 51 Fed. 196 (D.C. Va. 1892).

a result, throughout the 19th century marshals exercised broad law enforcement duties. A former Attorney General has written:

The United States marshals in each judicial district . . . first created to execute judicial and executive orders, were soon given the powers of local sheriffs. They, through their powers to appoint deputies and to summon the able-bodied men of the community to their aid as a *posse comitatus*, prevented serious breaches of the peace in open and organized form. In cases of importance they were also expected to spare no effort to detect and apprehend violators of the law. When reports reached Washington that local lawlessness went unchecked, the marshals were called upon to explain and were reminded that their failure to act was a reflection upon the Department of Justice.⁷³

Thus, during a long and important part of American history, "U.S. marshals [who] were charged with enforcing only federal laws, . . . also frequently assisted in local problems."⁷⁴

[The marshal's] duty was to prevent serious breaches of the peace in open and organized form. . . . [N]ot only did he have authority under the Judiciary Act to command all necessary assistance and appoint deputies, but he inherited in the federal sphere the powers of the sheriff at common law.⁷⁵

To supplement the sheriff's statute, in 1935 Congress enacted a statute to assure marshals uniform powers of arrest throughout the country.⁷⁶ The sheriff's statute and the arrest statute, along with

⁷³ Cummings & McFarland, *op. cit. supra* note 33, at 367-68.

⁷⁴ Penfield, *Western Sheriffs and Marshals* 7 (1955).

⁷⁵ Cooley, *The Office of United States Marshal*, 12 *Western Political Quarterly* 123, 126-27 (March 1959).

⁷⁶ 18 U.S.C. § 3053 (1964). This statute was enacted at the request of Attorney General Cummings to avoid difficulties arising from variations in State law. H.R. Rep. No. 283, 74th Cong., 1st Sess. (1935). See also 42 U.S.C. § 1987 (1964), which on its face appears to provide extensive arrest powers in civil rights cases but which has been held to be no broader than the marshals' arrest power under 18 U.S.C. § 3053. *Moses v. Kennedy*, 219 F. Supp. 762 (D.C. 1963).

the continued exercise of law enforcement authority by United States marshals under the direction of the Attorney General, strongly suggests that Congress viewed marshals as the appropriate instrument for the exercise by the President of his power to execute the laws.

Since 1957 marshals have been used on a number of occasions to prevent racial violence. In Montgomery in 1961, marshals were used both to enforce a Federal court order⁷⁷ enjoining the Ku Klux Klan from further interference with interstate travel and requiring the Montgomery police to provide protection for interstate travelers, and to protect a Negro mass meeting which was held in Montgomery during the Freedom Rides.⁷⁸ Marshals were used in Oxford, Mississippi, in September 1962, to suppress and prevent violence attendant upon the entry of James Meredith to the University of Mississippi.⁷⁹ In March 1965 marshals were again used to prevent violence against persons conducting a march from Selma to Montgomery.⁸⁰ In addition, marshals have been sent on numerous occasions to places where civil rights problems had occurred or were anticipated to assist local authorities and to stand by in the event these authorities were unable to cope with breakdowns in law enforcement. Most of these occasions were in connection with school and university integration and the Freedom Rides.⁸¹

More frequent use of United States marshals and deputy marshals has been limited by their numbers. There are presently 92 marshal's offices, one in each judicial district. In most offices there is a marshal, a chief deputy, and additional deputies varying in number from one in Delaware to 92 in the District of Columbia. Thus, in addition to the 92 marshals and 89 chief deputies, there are 644 deputy marshals in the United States.⁸²

⁷⁷ *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961).

⁷⁸ See note 3, *supra*.

⁷⁹ See note 4, *supra*.

⁸⁰ See note 6, *supra*.

⁸¹ *McShane Interview*.

⁸² *Ibid.*

Considerable experience and training is required as a prerequisite to the appointment of the deputy marshals, and the training they receive on the job compares favorably with that of most other law enforcement officers.⁸³ Applicants must have two years' specialized experience of a law enforcement nature involving normal police duties, such as criminal investigation, police protection, or making arrests.⁸⁴ In addition,

all deputies are required to undergo an annual physical examination after entry on duty, since they are required to perform arduous and hazardous duties and must remain physically qualified to do so.⁸⁵

Deputy marshals receive extensive on-the-job training, including techniques of arrests, and the proper handling and use of "firearms and restraining equipment."⁸⁶ Some of this training takes place in the district to which the marshal has been appointed. Much of it, however, is conducted in a one-to-two-week training session held annually for all new deputies and for deputies who need additional training. These sessions may include intensive training in firearms, riot control, and legal problems.⁸⁷ The training sessions in riot control were begun after marshals were used at Little Rock and their lack of training became apparent.

Other Federal Officers

There are many Federal officers whose primary function is law enforcement. Although the most prominent of these are the agents of the Federal Bureau of Investigation, there are others, operating in areas which normally do not involve civil rights, who may be used when the need arises.⁸⁸ The Federal Bureau of

⁸³ The marshal normally does not have this background, nor does he receive subsequent training. *Ibid.*

⁸⁴ One exception to this requirement is completion of law school or admission to a State bar. Department of Justice, Job Description of United States Marshal, Form No. USM-19 (Rev. 12-11-63), pp. 3-5.

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 1.

⁸⁷ *McShane Interview.*

⁸⁸ See, e.g., Marshall, *op. cit. supra* note 3, at 66 (use of Treasury Agents, Bureau of Prison and Border Patrol personnel in Montgomery).

Investigation is part of the Department of Justice, authorized specifically by statute.⁸⁹ Following the establishment of the Bureau, Congress specified its power to make arrests by a statute which presently authorizes agents to:

[C]arry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.⁹⁰

On its face, this statute gives FBI agents the power to arrest without a warrant for any Federal felony or misdemeanor committed in their presence. In addition, they may also arrest without a warrant when they have probable cause to believe that a person has committed or is about to commit a felony.⁹¹ This authority is the same as that granted United States marshals.⁹² Pursuant to this power, FBI agents repeatedly make arrests without warrants for violations of most Federal laws,⁹³ but have not done so for violations of the civil rights statutes—18 U.S.C. sections 241 and 242.⁹⁴

The critical legal issue in determining when an arrest made

⁸⁹ 5 U.S.C. §§ 299, 300 (1964).

⁹⁰ 18 U.S.C. § 3052 (1964). The statute originally did not authorize arrests without a warrant for offenses committed in the presence of an agent, but this power was attributed to FBI agents in *Coplon v. United States*, 191 F. 2d 749 (D.C. Cir. 1951), *cert. den.* 342 U.S. 920 (1952). Specific authorization for such arrests was granted by the Act of Jan. 10, 1951, ch. 1221, § 1, 64 Stat. 1239.

⁹¹ *Henry v. United States*, 361 U.S. 98, 100 (1959).

⁹² 18 U.S.C. § 3053 (1964).

⁹³ See, e.g., Whitehead, *The FBI Story* (1956), which recounts numerous instances of arrests by FBI agents without warrants. A justification for requiring prior legal training of agents is to assist them "in determining [their] power of arrest . . . whether it be with or without warrant." Hoover, *The Value of Legal Training for FBI Agents*, 36 Fla. B.J. 413, 415 (1962). The exercise of this power has been upheld by Federal courts on numerous occasions. See, e.g., *United States v. Bianco*, 189 F.2d 716 (3d Cir. 1951) where the court stated that "the principal function [of section 3052] was to facilitate the ability of agents 'to make arrests in emergency situations,' that is, where quick action was essential." *Id.* at 719.

⁹⁴ *FBI Memo.*

without a warrant was lawful is whether there was “probable cause” for the arrest. “Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”⁹⁵ As the definition suggests, the issue is a factual one and depends on the information available to the arresting officer—not on whether an offense has, in fact, been committed, or whether the officer was correct in his belief. Thus, for example, the agent need not know for a fact that an assailant was motivated by the illegal purposes required for violation of 18 U.S.C. section 241 or 242.⁹⁶ All that is necessary is that he have probable cause derived from all the surrounding circumstances of the assault to believe that such is the case. Accordingly, the prohibition against on-the-scene arrests involves only departmental policy, not the authority of Bureau agents or marshals, nor the law of arrest.⁹⁷

Nonetheless, the Bureau takes the position that on-the-scene arrests raise legal problems because “the courts have placed increasingly stringent demands on law enforcement officers to obtain warrants prior to making arrests.” This and the “legal technicalities relating to civil rights charges” present issues, such as the issue of specific intent or the use of unnecessary force, requiring determination “which should be made by a prosecutor removed from the scene rather than on the spur of the moment by a representative of an investigative agency.”⁹⁸

The FBI itself has suggested that, like any law enforcement agency, its activities are not limited strictly to investigations of the commission of specific crimes:

As an investigative organization, the FBI does gather intelligence information concerning civil rights and re-

⁹⁵ *Henry v. United States*, 361 U.S. 98, 102 (1959).

⁹⁶ *Ibid.* See Chapter 6, *supra*, pp. 107–12.

⁹⁷ Significantly, the contrary view of the law of arrest would prohibit any arrests at all under sections 241 and 242, since the standard of probable cause is the same for obtaining a warrant for an arrest as it is for making an arrest without a warrant for an offense committed in the presence of the officer. *Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963).

⁹⁸ *FBI Memo.*

lated matters on a daily basis. Extremist groups and known troublemakers are investigated when any Federal violation within the FBI's jurisdiction is indicated. Such groups and individuals are also followed from an intelligence standpoint and our coverage utilizes a variety of investigative techniques including surveillance where appropriate.⁹⁹

These activities may also have desirable side effects. For example, following the murder of the three civil rights workers in Mississippi in the summer of 1964, the Bureau sent more than 100 special agents from offices outside Mississippi to assist in the investigation. The Director of the Bureau testified before the House Subcommittee on Appropriations:

I believe our investigations have had a very salutary effect in the State of Mississippi in that there has been no similar action of violence since June of 1964.¹⁰⁰

In addition to the nearly 6,500 FBI agents throughout the country, there are approximately 10,000 other Federal officers engaged full time in law enforcement. The Treasury Department has nearly 5,000 agents divided among seven offices within the Department, including 800 Secret Service agents, 300 narcotics agents, 800 customs agents, nearly 100 members of the Coast Guard, Intelligence, and Law Enforcement Unit, 1,000 men in the Alcohol and Tax Service, 1,900 officers investigating tax fraud and gambling, and 250 general investigators.¹⁰¹ The Immigration and Naturalization Service has 700 investigators and 1,400 members of the Border Patrol in addition to immigration inspectors.¹⁰² There are 1,058 postal inspectors in the Post Office Department who work

⁹⁹ *Ibid.* See also, e.g., the description of FBI surveillance preceding the arrest of Judith Coplon, in *Coplon v. United States*, *supra* note 90.

¹⁰⁰ *FBI Appropriation 1966*, 23 (FBI reprint, 1965).

¹⁰¹ Information obtained from Arnold Sagalyn, Chief of Law Enforcement Coordination, Department of the Treasury, August 1965.

¹⁰² Information obtained from James F. Green, Dep. Assoc. Commissioner, Domestic Control, Immigration and Naturalization Service, August, 1965.

half time on law enforcement.¹⁰³ The National Park Police has nearly 300 men¹⁰⁴ and 2,900 officers of the Bureau of Prisons¹⁰⁵ are engaged in correctional functions.

The President in the past has used these officers in a preventive capacity in civil rights situations. In 1961, Border Patrolmen, Bureau of Prison personnel, and Treasury agents, were sent to Montgomery to supplement the forces of United States marshals in preventing further violations of Federal law.¹⁰⁶ In March 1965, approximately 70 deputy Federal marshals and deputized Border Patrolmen were assigned to maintain surveillance over and to protect the personal security of the marchers from Selma to Montgomery, in cooperation with Alabama National Guardsmen and military police trained in riot control.¹⁰⁷ In addition, a large number of FBI agents were assigned to the area to observe and to be present in the event any violation occurred within their jurisdiction.¹⁰⁸

In summary, the President has broad discretion to use force "to execute the laws." Congress, in enacting sections 332 and 333, has supported this power, not only where the execution of a specific Federal law is being interfered with, but also where private violence interferes with the enjoyment of life and property and the State fails to control it. In section 333 Congress has said that State inaction in such a situation may amount to a denial of equal protection as much as if the State acted affirmatively to discriminate, and has vested in the President sole discretion to determine whether particular situations justify the use of force. The President may exercise his authority without regard to the existence of a court order. Congress has established agencies which have been

¹⁰³ Information obtained from Harry Montague, Chief Postal Inspector, Post Office Department, September 1965.

¹⁰⁴ Information obtained from Capt. Roland A. Fallin, Services Division, United States Park Police, September 1965.

¹⁰⁵ Information obtained from Marvin R. Hogan, Asst. Administrator for Correctional Services, Bureau of Prisons, September 1965.

¹⁰⁶ Marshall, *op cit. supra* note 3, at 66-67.

¹⁰⁷ *McShane Interview*.

¹⁰⁸ Information obtained from a representative of FBI.

used to prevent and suppress violence. Personnel of these agencies have the authority to make arrests and to carry out other law enforcement functions where violence is threatened. Under sections 332 and 333 the President can lawfully delegate to these Federal officers all the power necessary to prevent violence and to enforce Federal law.¹⁰⁹

Presidents have used this authority to protect the exercise of Federal rights and to suppress violence general enough to endanger the lives of a class of persons. They have used troops, marshals, and other Federal law enforcement personnel for police purposes in the execution of the laws.

POLICY CONSIDERATIONS

The limitations on Federal action expressed by the Department of Justice, then, are limitations of policy. They represent an evaluation of the wisdom of the exercise of authority in particular situations. The policy of the Federal Government has been to intervene in racial crises with Federal force only in cases of direct affront to Federal authority and with the clear legal mandate of a judicial determination. It is argued that intervention without a court order would involve the United States in general police duties over a large area for which it lacks the forces or the authority.¹¹⁰

In lieu of more frequent use of Federal force, the Federal Government has sought to encourage the development of responsibility in local officials by negotiating with political leaders, warning of potentially dangerous situations, and attempting to secure commitments that law and order will be maintained.¹¹¹ At the same time, the Department of Justice has dispatched large numbers of Federal investigators to areas where violence has occurred,¹¹² but

¹⁰⁹ *Cf. United States v. Kraft*, 285 F. 2d 647 (3d Cir. 1961).

¹¹⁰ *Department of Justice Conferences*.

¹¹¹ *Ibid.*

¹¹² See *supra* p. 162.

has not permitted them to perform guard duty or make on-the-scene arrests.

This policy, often effective in preventing violence in communities where local authorities have been amenable to advice and persuasion, has not been successful in some areas where officials take a more defiant attitude toward their duties to uphold Federal law. In these latter communities the limitations on Federal policy have prevented effective action until repeated acts of racial violence have occurred.

Two types of situations where the Federal Government has not fully exercised authority emerged from the Commission's study: first, where persons seeking to exercise specific rights have been subjected to violent interference by mobs which were not controlled by local authorities, and second, where widespread violence was unconnected with the assertion of any particular right but deterred Negroes from attempting to exercise rights.

In the first situation, exemplified by Greenwood, Mississippi, and Bogalusa, Louisiana, the involvement of the Federal Government has been limited largely to efforts to obtain court orders directing local police authorities to carry out their responsibilities. In Bogalusa, Louisiana, violence erupted in the spring of 1965 and continued for several months when Negroes engaged in civil rights demonstrations in the downtown area of the city. The police failed to protect the demonstrators who were assaulted and beaten by white bystanders. On July 10, 1965, after repeated incidents of violence, the Federal court ordered the police to provide protection. Failure of the police to obey the court order led to the initiation of contempt proceedings in which the Attorney General intervened. Finally, after a judgment on July 30, holding the local officials in civil contempt, they provided protection and Negroes were able to exercise their rights.¹¹³

In Greenwood, the Federal Government intervened only after crowds, unchecked by the police, prevented Negroes from attend-

¹¹³ *Hicks v. Knight*, Civil No. 15,727, E.D. La. Telephone interview with Department of Justice attorney, August 26, 1965.

ing a theater for a period of three weeks. On September 2, 1964, the Department of Justice sought a court order compelling the police to protect the Negroes attempting to enter the theater. This case has not yet been decided nor are Negroes using the theater.¹¹⁴

An alternative to the Department's approach in these cases would be to provide sufficient Federal force to assure free exercise of Federal rights. The presence of sufficient Federal personnel at the Greenwood theater, and in downtown Bogalusa, might well have been sufficient to forestall a mob attack.

Where the presence of the Federal force does not act as a sufficient deterrent, Federal officials, as has been shown, have the legal authority to make arrests. The policy voiced by the Federal Bureau of Investigation is that making on-the-scene arrests would interfere with their functions to observe and report violations of Federal law.¹¹⁵ This problem could be solved by allocating resources so that the agents responsible for reporting would not also be responsible for making arrests.

Of more serious concern is the argument that the presence of Federal officers would lead local law enforcement officials to abdicate their responsibilities. This is, however, precisely what the local officers did in the Greenwood and Bogalusa situations in the absence of Federal officials. In fact, the Federal presence might well lead to the opposite result—the assumption of responsibility by local officials. This was what occurred when, following the murder of three civil rights workers in June 1964, the President ordered a substantial force of FBI agents into Mississippi to investigate¹¹⁶ and the Bureau opened an office in Jackson.¹¹⁷

¹¹⁴ See Chapter 3, *supra*.

¹¹⁵ "The agents are present for the specific purpose of observing and reporting the facts to the Department of Justice in order that the Department will have the benefit of objective observations. If the Agent should become personally involved in the action, he would be deserting his assigned task and would be unable to fulfill his primary responsibility of making objective observations." *FBI Memo*.

¹¹⁶ *FBI Appropriation 1966*, at 23.

¹¹⁷ Information obtained from a representative of the FBI.

This action spurred State officials to make an increased effort to prevent violence.

A second serious concern is that there would be a violent confrontation between local and Federal officials. The recent history of civil rights conflicts raises a question of whether this is likely to occur. Such confrontations are no less likely in cases where Federal force is called upon to enforce court orders. Yet in the cases where force was used to enforce court orders, such as Oxford, Mississippi, and Tuscaloosa, Alabama, officials stood aside.¹¹⁸ Assuming, however, that there is a danger of such a confrontation, the Federal Government would have to be prepared with sufficient forces to surmount it. The paramount issue is whether the protection of the constitutional rights of citizens and vindication of the supremacy of Federal law is worth the risk of conflict.

The second situation in which Federal force might be used is exemplified by Adams County. There was widespread violence in the county, which did not cease until State police officials appeared in numbers. Their presence, however, did not lead to solutions of the crimes or to the exercise of rights by Negro citizens.¹¹⁹ Violence erupted again after State authorities left, and they returned again only when Negroes threatened violence in retaliation.

Effective guarantee of the right to equal protection in such a situation would require a more substantial Federal presence. Federal officials would be required for long periods of time to place under surveillance persons and groups suspected of violence and to attempt to protect persons who are likely to be endangered. Their presence, moreover, would encourage citizens to exercise their rights. This would be an extension of the policy under which large numbers of FBI agents have been sent to Mississippi, but not deployed in specific areas. There is no guarantee that the Federal presence would be entirely effective, since victims of violence have often apparently been selected at random. Here, again,

¹¹⁸ See sources cited in notes 4, 5, *supra*.

¹¹⁹ See Chapter 2, *supra*.

the issue is whether assuring free exercise of Federal rights and vindicating Federal authority justify the assumption of risk.

A final consideration is the extent of the Federal commitment that such an extension of present Federal policy would entail. The events of the past year suggest that widespread supplanting of State authority would not be necessary. In recent months many southern political leaders have declared themselves opposed to racial violence, and some have made State authority available to suppress it. They have been supported in their denunciation of violence by statements of business groups, clergymen, and members of the bar,¹²⁰ and this has helped to restrain violent activities in many areas.

Thus, the area where Federal action would be required has been narrowed. It now seems confined largely to rural areas, such as southwest Mississippi and central Alabama, where racial hostility is so intense and local law enforcement officials are so biased or ineffectual that violence is still not contained by present Federal and State activities.¹²¹ These situations probably could be controlled by Federal law enforcement officers, such as marshals, and should not require resort to the Armed Forces—a policy which the Federal Government wisely has tried to avoid.

An extension of Federal policy might well require an increased force of well-trained Federal officers. At present, Bureau agents are not trained in riot control or in general law enforcement duties, such as patrolling, traffic control, and general policing.¹²² The United States marshals undergo rigorous training in these areas, and constitute a well-trained—although undermanned—force for the purpose considered here.¹²³ To the extent that these Federal officers are inadequate in number or in training, the Presi-

¹²⁰ See Chapter 5, *supra*.

¹²¹ The Voting Rights Act of 1965, Pub. L. 89-110, Aug. 6, 1965, 79 Stat. 437, may help further to reduce uncontrolled violence. Increased Negro registration, undoubtedly, will have an effect upon the quality of law enforcement officials elected in the future.

¹²² *FBI Memo*.

¹²³ The issue of training for marshals was faced by the Department of Justice after the use of troops at Little Rock was severely criticized. See p. 159, *supra*. Riot control training for deputy marshals dates from that time. *McShane Interview*.

dent clearly may request further funds to add personnel or to improve their preparation, for neither the number nor the training is compelled by statute and is only the practical result of the Executive's request for appropriations.

Whether Federal forces should be more extensively employed to suppress violent interferences with Federal rights is, therefore, a question of Executive policy. Few commands of the Constitution are more basic than Article VI which proclaims Federal law as the "supreme Law of the Land." Whatever Federal force is required, and under whatever circumstances, should be marshalled to make the command a reality.

PART III.

CONCLUSION

CHAPTER 9.

FINDINGS AND RECOMMENDATIONS

PRELIMINARY STATEMENT

In no country but our own is the discreditable fact true that where murder and cruel shocking outrages are perpetrated by a dominant party in a narrow region of country, there is no power of punishment, save through the impractical instrumentality of those who have either committed or sympathized with the crime. . . . Unless our statesmen, State or National, create some jurisdiction of wider scope and which will authorize indictments and trial beyond the narrow limits a majority of whose citizens abet the crime to be punished, the Nation must still submit to the disgrace of yearly additions of mean and courage-wanting murders of the innocent and the helpless, without the slightest infliction of any legal penalty upon the offenders. . . . It has been our painful duty in repeated instances to charge juries that the Federal court had no cognizance of offenses where crimes so cruel and shocking have been proved that the court, jury, and audience could scarcely refrain from tears of sympathy, and where the elegantly dressed, socially well connected, and shameless murderers, had, in the communities where they had shed innocent blood, not only confessed but boasted of their crime and who had either not been indicted at all, or, when tried, had been acquitted by juries, their coadjutors in crime, amid the acclamation of their co-conspirators. . . . It is believed by many of our best citizens that there should be here, as in every other government on earth, some power to bring such wicked men to justice, outside of, and uncontrolled by, the wills and hands which have united in their atrocities.¹

¹ Emmons, J., Charge to the Grand Jury, Case No. 18,260, 30 Fed. Cas. 1005, 1006-07 (C.C.W.D. Tenn. 1875).

The assurance of personal security is a right of citizens in our society fundamental to the exercise of all other rights. The Constitution secures this right by requiring public officials to extend the equal protection of the laws to all persons within their jurisdiction. In particular, all persons are entitled to receive equal protection from the police, and even-handed investigation and prosecution of offenses committed against them, including non-discriminatory selection of juries. They are also entitled to be free from harassing arrests or other discriminatory legal action. Officials who deny to any class of persons the protection of the laws or who use legal processes unjustifiably to harass or punish, violate the Federal Constitution and their oath to uphold it.

The Commission's investigation has disclosed that in some communities in the South, local officials have defied the Constitution and repudiated their oath by denying the protection of the laws to Negro citizens. In some instances, law enforcement officers have stood aside and permitted violence to be inflicted upon persons exercising rights guaranteed by Federal law. In others, prosecutors have failed to carry out their duties properly. In the few cases in which persons have been prosecuted for violence against Negroes, grand juries and petit juries—from which Negroes have been systematically excluded and which express deeply rooted community attitudes—have failed to indict or convict.

The purpose and effect of violence and abuse of legal process has been to maintain and reinforce the traditional subservient status of Negroes by discouraging the exercise of the rights of citizenship. The occurrence of even a single incident of unpunished racial violence often serves to deter Negroes in a community from asserting their rights. In these circumstances racial violence injures not only the victim but the entire community.

The right to free expression in all its aspects is also a fundamental right guaranteed by the Constitution. Peaceful and orderly demonstrations to protest segregation and the denial of equal opportunity are modes of expression which the courts have held are protected from governmental interference. Yet, the Com-

mission's investigation disclosed that local officials in a number of southern communities suppressed constitutionally protected public protests by arrests and prosecutions.

The Commission recognizes that law enforcement is primarily the responsibility of State and local officials. In some southern communities, where local citizens have insisted upon fair and effective law enforcement, violence has been averted and the integrity of the processes of law maintained. The number of these communities has increased as public officials and leading citizens have recognized the dangers that unchecked violence or corruption in the administration of justice pose to the community as a whole. In proposing remedies for communities where discrimination persists, the Commission has been guided by the principle that the best solution would be the assumption of responsibility by local officials. Accordingly, it has suggested reforms which would strengthen local law enforcement and has recommended Federal assistance to local law enforcement agencies.

But it is clear that in some communities wrongs have been committed with the active or passive support of local officials and will not readily yield to self-reform. That the number of such communities is diminishing does not make this less a matter of national concern. The Government of the United States has both the authority and the responsibility to protect the constitutional rights of all citizens and to uphold the rule of law. Accordingly, the Commission is recommending additional congressional and Executive action.

These recommendations do not entail major changes in the present distribution of Federal and State responsibility for local law enforcement. Our proposals, particularly those dealing with Executive action, are designed to utilize existing Federal instrumentalities of justice more fully in an effort to deter racial violence. Believing as we do that equal justice can ultimately be secured only by the actions of citizens in the communities where it is now being denied, the Commission has not accepted more far-reaching proposals that our judicial system be changed to permit cases to be

tried by jurors and judges far removed from the scene of the crime. We emphasize, however, the importance of recommendations for proceedings to eliminate discrimination in selecting juries which we made in our *1961 Justice Report*. The removal of all forms of racial discrimination from the courtroom is essential to the achievement of equal justice.

Whether it will be necessary to utilize fully the remedies proposed in this report or to adopt others more drastic depends on the conduct of local officials themselves. The Federal Government must act when the constitutional rights of some of its citizens are being denied. The need for action will abate when local officials assume their sworn obligation to support the Constitution of the United States.

FINDINGS

1. During 1963 and 1964 severe outbreaks of racial violence occurred in several communities in Mississippi. In many cases, law enforcement officials failed in their duty to prevent or punish acts of racial violence. Specifically, law enforcement officers:

- (a) failed to protect Negroes from preventable acts of violence;
- (b) failed to conduct adequate investigations of incidents of violence;
- (c) arrested or abused victims of violence who reported incidents to them;
- (d) allied themselves or publicly expressed sympathy with extremist racist groups; and
- (e) failed to prosecute adequately cases in which arrests were made.

2. These failures were primarily the result of hostility to the assertion of rights by Negroes or to the civil rights movement—a hostility which was also evidenced in the frequent arrest of civil rights workers, both white and Negro, for petty offenses or on unsubstantiated charges.

3. Mississippi's law enforcement institutions have structural weaknesses which have contributed to the failure to prevent, solve, or prosecute crimes of racial violence. The responsibility for the

enforcement of State law rests on elected county officials. There is virtually no State supervision over the conduct of these officials, with the result that there is, in effect, a local option on the enforcement of State law.

4. Local officials in communities studied by the Commission in Mississippi, Alabama, Florida, and Georgia did not permit persons to exercise the right to assemble peaceably to make known their grievances. Civil rights demonstrators were repeatedly arrested, dispersed, or left unprotected before angry crowds, without regard for the right to public protest assured by the Constitution.

5. When participants in civil rights activities were arrested, local officials often abused their discretion in the administration of criminal justice by:

- (a) imposing harsh and discriminatory bail requirements both as punishment and deterrent;
- (b) imposing harsh and discriminatory sentences and fines;
- (c) utilizing the latitude permitted in juvenile proceedings to curtail or penalize participation in constitutionally protected activities; and
- (d) subjecting demonstrators to intolerable jail conditions designed to inflict punishment.

6. The Federal Constitution requires local officials to be bound by oath or affirmation to support it, and State laws generally enforce this obligation by requiring such an oath. Nevertheless, many local officials in Mississippi and in the other communities studied by the Commission violated their duty to uphold the Constitution by failing to provide Negroes and civil rights workers protection from violence; by interfering with the exercise of Federal rights, including the right of public protest; and by abusing discretion in the administration of justice.

7. The present criminal remedies available to the Federal Government to punish racial violence are the remnants of broad Reconstruction legislation and are inadequate. The fundamental problem is that the principal statutes—sections 241 and 242 of title 18 of the United States Code—require, in one form or another,

proof that the defendant intended to deprive the victim of Federal constitutional or statutory rights. This requirement of purpose has limited the usefulness of these statutes as remedies for racial violence.

8. Because of the inadequacies of existing law, the Department of Justice has found considerable difficulty in prosecuting cases of racial violence. The result has been an unfortunate absence of prosecutions despite the seriousness and scope of the problem.

9. Under present law there are only limited situations under which the Attorney General is authorized to initiate proceedings to remedy denials of equal protection of the laws. The Civil Rights Act of 1964 empowers the Attorney General to intervene in any case where relief is sought "from the denial of equal protection of the laws under the 14th amendment to the Constitution on account of race, color, religion, or national origin, . . ." but he may not intervene in or initiate proceedings to remedy denials of due process.

10. Under recent decisions of the Supreme Court, the equitable powers of the Federal courts have been broadened to enable participants in civil rights activities to obtain Federal court orders enjoining unlawful arrest and enforcement of unconstitutional State statutes. The Federal Anti-Injunction statute, however, prevents a Federal court from enjoining State court proceedings against defendants who are being prosecuted for constitutionally protected activity.

11. The Civil Rights Act of 1964 enabled the Federal courts to re-evaluate restrictive interpretations of the Federal removal statute. As a result, recent Federal court decisions have broadened the scope of this remedy so that State prosecutions of civil rights workers, which constitute denials of equal protection of the laws under the 14th amendment, may be removed to Federal court.

12. The President has the authority in carrying out his constitutional duty to execute the laws to use force to prevent violations and secure the execution of Federal law. Under 10 U.S.C. section 333, the President has express statutory authority to use force to protect a class of citizens when local officials fail to protect

them from widespread violence. These sources of Presidential power are broad enough to permit the use of whatever Federal force may be required to protect Federal rights. The policy of the Federal Government, which has limited the use of force to situations involving a court order, has in many situations prevented the prompt use of Federal force to prevent racial violence. As a consequence, persons have been injured and the exercise of Federal rights deterred.

13. The need for the additional Federal action recommended in this report results from the failure of certain States to assume their responsibilities to assure their own citizens the rights guaranteed by the Federal Constitution. When and to the extent these States act to assume these responsibilities, action by the Federal Government will no longer be needed.

RECOMMENDATIONS

I. Criminal Remedies

Failures of State and local law enforcement officials to prevent or punish crimes of racial violence and the inadequacy of the current Federal criminal statutes urgently require additional legislation to protect persons exercising rights guaranteed by the Constitution and by Federal statute. The Commission *recommends*, therefore, that Congress consider enacting a criminal statute based on its powers to regulate interstate commerce and to enforce the 14th amendment by appropriate legislation.

Part I of the statute, based on congressional power over interstate commerce, would make criminal any act of violence, threat, intimidation, or punishment against a person engaging in certain protected activities if the perpetrator used or was using the mails or any facility of interstate commerce or if the victim was using a facility of interstate commerce. The protected activities would include the lawful exercise (or attempted exercise) of any right created or secured by a Federal statute relating to equal or civil rights, or any peaceful and orderly activity which is protected by

the 1st amendment, when undertaken for the purpose of obtaining equality for individuals of a particular race or color.

Violation of the statute would be a felony and the penalties for its violation graduated according to the seriousness of the unlawful act.

Part II, based on the equal protection clause of the 14th amendment, would permit the prosecution in Federal court of cases of racial violence that violate State law where the failure of local officials to act, or the nature of their action, constitute a denial of equal protection in the administration of justice or where it is determined that justice is administered in the community involved in a manner so as to deny equal protection of the laws. The statute could set forth various standards, such as the extent of racial discrimination in the selection of juries, to be evaluated in making the latter determination. Punishment should be the same as if the case had been prosecuted in State court. To minimize interferences with State criminal procedures, the determination of whether a Federal prosecution is justified could be made by a three-judge Federal court. If the three-judge court determines that a Federal trial is appropriate, the trial should proceed before a single judge sitting with a jury.²

II. Civil Remedies

1. To Increase the Authority of the Attorney General to Initiate and Intervene in Civil Rights Cases

Title IX of the Civil Rights Act of 1964 provides that the Attorney General may intervene in any case of general public importance brought in Federal court where relief is sought "from the denial of equal protection of the laws under the 14th amendment to the Constitution on account of race, color, religion, or national

² In *United States v. Guest*, pending on appeal, No. 65, Oct. Term, 1965, the Department of Justice is urging that section 241 of title 18 be construed to apply to private violence that interferes with rights protected by the equal protection clause of the 14th amendment. Because of the pendency of this case, the Commission deems it inappropriate to make any recommendation regarding amendment of section 241 at this time. For the Commission's previous recommendation regarding amendment of section 242, see *Justice Report* 112.

origin. . . .” The Commission *recommends* that Congress consider amending this statute to empower the Attorney General to initiate, as well as to intervene in, such proceedings³ and to initiate or intervene in proceedings to protect persons exercising 1st amendment rights directed at obtaining equal treatment for all citizens regardless of race, color, religion, or national origin.

2. *To Provide Relief to Private Persons Against Unlawful State Court Proceedings*

Although private persons may seek relief against *prospective* prosecutions under State statutes unconstitutional on their face which abridge 1st amendment rights or where State statutes are applied for the purpose of discouraging protected activity, such relief is not available once a prosecution is instituted. The Commission *recommends* that Congress consider amending section 1983 of title 42 to permit injunctive relief, notwithstanding the Anti-injunction statute, where State prosecutions are brought against persons for exercising 1st amendment rights directed at obtaining equal treatment for all citizens regardless of race, color, religion, or national origin.

3. *To Strengthen Civil Remedies Against Unlawful Official Conduct*

In 1961 the Commission recommended that section 1983 of title 42 of the United States Code be amended “to make any county government, city government, or other local governmental entity that employs officers who deprive persons of rights protected by that section, jointly liable with the officers to victims of such officers’ misconduct.” The Commission again *recommends* that Congress consider the need for this revision. The Commission also recommends that Congress consider amending

³ This would permit the Attorney General to bring civil proceedings to assure non-discriminatory jury selection. See the Commission’s recommendation to that effect in 1961. *Justice Report* 113.

section 1983 to provide that in all cases brought under this section—actions for injunctions, as well as for damages—the court, in its discretion, may allow the prevailing party reasonable attorney’s fees as part of the costs.

4. *To Extend The Equal Employment Law to Public Employment*

In order to help assure that justice is administered in a non-discriminatory manner, employment in law enforcement agencies should be available to all persons, regardless of race, color, religion, or national origin. Title VII of the Civil Rights Act of 1964, providing for equal employment opportunities, does not cover public employment. Although discrimination in public employment can be challenged in private law suits, administrative and judicial remedies also should be provided. The Commission *recommends* that Congress consider amending Title VII to extend its coverage to public employment.

III. Executive Action

1. *Methods of Federal Law Enforcement*

The employment of Federal force to curb racial violence should not be limited to situations involving a Federal court order. Federal protection should be accorded where local authorities fail to protect persons exercising constitutionally guaranteed rights or where general racial violence, unchecked by local law enforcement officials, deters individuals from exercising such rights. In affording Federal protection, the Armed Forces should be used only when all other means prove inadequate. The Commission *recommends* that the President direct that Federal law enforcement officers be stationed at the scene of likely violence, that increased numbers of Federal officials be assigned to communities where violence has occurred, that more extensive investigation and surveillance activities be undertaken by these officials, and that Federal law enforcement officers be authorized to make on-the-scene arrests for violations of Federal law. In addition, the Commission

recommends that the staffs of Federal law enforcement agencies, particularly the U.S. marshals, should be strengthened and that their training and organization be designed to carry out these functions.

2. *Assistance to Local Law Enforcement Agencies*

Congress has enacted the Law Enforcement Assistance Act of 1965 which provides Federal funds to assist in training State and local law enforcement officials and to improve techniques, capabilities, and practices in local law enforcement in order to prevent and control crime. The Attorney General administers this Act. The Commission *recommends* that in administering this Act particular attention should be paid to assisting communities with problems of law enforcement raised by crimes of racial violence. Efforts should be made to develop techniques for recruitment, selection, screening, and training procedures which will improve the quality of local law enforcement.

SEPARATE STATEMENT OF COMMISSIONER ERWIN N. GRISWOLD

As a lawyer who is proud of his profession, and as a legal educator who is concerned with the development of high professional standards in young lawyers, I have a deep concern in the administration of justice. It is clear that the administration of justice in the South today is one of the key elements in the most fundamental domestic problem of the United States. Too long and too often has this fact been overlooked by citizens and by lawyers throughout the country. It is my earnest hope that this report of the Commission on Civil Rights will focus the attention of thoughtful people everywhere on the realities of this problem, and that, especially, it will lead to an awakening of awareness and responsibility on the part of citizens and lawyers of the South.

As far as the ordinary Negro in the South is concerned, justice is not administered by the Supreme Court of the United States, or even by the supreme courts of the several States. The place where State power makes its impact on him is when he encounters sheriffs, and their deputies, and police officers, and court officers, and magistrates and justices of the peace. From experience he tends to look on these officers of the State not as protectors but as persons to be feared. He knows that many of them will exercise the discretion committed to them in such a way as to demean him and to deny him equality under the law. The Negro who knows his place ordinarily has little trouble—in his place. The Negro who is aware of the rights conferred on him by the Constitution and laws of the United States—and those who seek to help him—repeatedly encounters the long arm of the local law designed to intimidate him and to discourage him from any attempt to break out of the subservient place to which he has been assigned by the practices and the customs of the dominant elements of the community.

This injustice appears in mass arrests, such as those of the Freedom Riders who sought only to assert a simple citizen's right. It is

found in the decision to arrest, or not to arrest, when a small group of Negroes walking to register to vote becomes an illegal parade. When there is some offense, the white man receives a warning, or is ignored. The Negro is arrested with all the consequences of arrest. Discrimination is found in bail practices. White persons are released on their own recognizance, or with modest bail easily arranged; Negroes often have a higher bail and restrictions are imposed, such as a refusal to accept cash bail, or requiring bail supported only by unencumbered real estate—which is hard to find in a Negro community. Very often bail cannot be arranged from bonding companies in so-called civil rights cases because local agents will not sign the bonds.

The Negro's plight is found in police brutality—perhaps almost as important, in police discourtesy, in constant reminders in many ways, large and small, that he is a subordinate, lacking the full dignity of a man. It is found in decisions of the minor judiciary, where the Negro goes to jail and the white man is released on parole or pays a fine. It is found in social practices still tolerated in many courts, where seating is still segregated, and where Negroes are addressed only by their first names. It is found in juries, where, by one device or another, Negroes are rarely—often never—found seated on the jury which actually hears a case with racial aspects. It is found in the fact that a Negro convicted of rape is usually given a death sentence, while this is rarely the fate of a white man convicted of this offense.

Looming in the background of all this, is the fact, well known to Negroes, that a white man who harms them will rarely, if ever, be severely punished. The murderers of Mack Charles Parker, though known, have never been indicted. No one has ever been charged by the State of Mississippi with the murder of three civil rights workers in 1964. The trials of persons charged with the murder of Lemuel A. Penn and of Jonathan Daniels resulted in acquittals. The measure of progress in this area, and our present lamentable situation, is indicated by the fact that a person was actually charged with the murder of Medgar Evers, and was brought

to trial, resulting in a hung jury; he was retried, with the jury hung again. Here the prosecuting officers and the judge did their duty—all credit to them—but juries are a part of our system of administration of justice, too. The trial of one of the persons charged with the murder of Mrs. Viola G. Liuzzo likewise resulted in a hung jury. A re-trial led to an acquittal.

Jurymen take an oath to administer justice fairly and impartially, according to the evidence produced before them in open court. Until they do so, can it be surprising that Negroes have little confidence in the administration of justice in southern courts? More than a century ago, in recounting the situation in the distant past, Chief Justice Taney said that “The Negro has no rights which the white man is bound to respect.” In these crucial matters—the physical safety of the Negro in his life and body, and his human dignity—how much progress have we made in the last three centuries, or alas, in the last hundred years? ¹

So long as lawyers, public officials, and State courts in the South continue to distort the processes of public power so that Negro citizens may not enjoy the legal equality promised them or exercise the liberties assured them by the Constitution, Federal authority must continue to make itself felt. A central irony in the situation in which the South now finds itself is the fact that the refusal of its lawyers and its judges to fulfill their plain responsibilities has been the principal cause of the intervention from outside against which the South so vigorously protests. So long as disregard of national law rules the southern scene, national power must make itself directly felt. Sometimes its bite will affect the electoral processes that have been misused to preserve discriminations. Sometimes injunctions will be issued to prevent continued harassment of Negroes. Sometimes cases that have been initiated for

¹ Our sad lack of progress in the past 90 years is strikingly shown by the charge given by a Federal judge in Tennessee 90 years ago which is painfully applicable to our present situation. See *supra*, p. 171-72. This is quoted by Professor Mark DeW. Howe in his Foreword to *Southern Justice* (1965) v-vi.

abusive purposes will be removed from the State courts where they are pending. The sooner the bar and the officials of the South recognize that this is one country and that the Constitution of the United States is law everywhere in the United States, the sooner they will find themselves partners in the enterprise of American government.

On all these matters, progress can be made in the long run only in the South and through southerners. That is as it should be, but there should be progress—great and heartening progress which will really make the Negro an equal in all the aspects of the administration of justice—the little homely, personal aspects which are so important, and in the impartial actions of all officials concerned—police, sheriffs, magistrates, as well as judges and jurors. This must not only be the fact, but the Negro must know it to be the fact and have confidence in it. Perhaps this is the millenium. But America, the land of the Declaration of Independence and the Constitution, the land of liberty and the home of the free, cannot be content with less. Southern citizens, white and Negro, cannot wisely or in good conscience rest until these things are accomplished.

In all of this, lawyers have a special responsibility. They are persons trained in the law, with presumably a special interest in justice. They are officers of the courts. Through their training and background, they are often elected to our legislatures, hold executive and administrative offices, as well as sit on the benches in our courts. Yet, too many of the members of the bar—it is not too much to say most of the members of the bar in the South—have been complacent about these things. Some have been concerned, but have felt that they could not speak up, a sad commentary on the situation which so distorts the administration of justice where racial factors are involved.

In the hearings before the Commission, in which a number of lawyers of good will participated, it developed that there are only four Negro lawyers in Mississippi. Until just a few years ago, there was no place in Mississippi where a Negro could study law,

and it is well known that the admission of Negroes to the University of Mississippi was accomplished only with the aid of military force. There are still no Negro graduates of the University of Mississippi Law School. There are no white lawyers in Mississippi who will ordinarily handle a civil rights case. Much the same is true in other states in the South. For this situation, the dominant groups in these States are responsible. The lawyers, there and elsewhere, bear a special responsibility.

In his address as President of the American Bar Association in August 1965, an able and public-spirited lawyer, Lewis F. Powell, Jr., spoke of the importance of safeguarding fair trial and of the "diminishing minority which still uses violence and intimidation to frustrate the legal rights of Negro citizens." He went on to urge that "the courts and legislative halls, rather than the streets, must be the places where differences are reconciled and individual rights ultimately protected." Appealing as this is, does it really get to the bottom of the problem? Are there any basic legal questions in this area which have not already been settled in the legislative halls or in the courts? The difficulties arise not because of doubts about the law—about schools, about voting, about public accommodations, about facilities in transportation, about juries, about employment—but because of persistent failure to accept and follow and apply and be governed by the clearly applicable law, and to administer the law fairly and without discrimination.

The Negro, and his supporters, march in the streets not because the law is not clear, but because it has not been followed. He knows from long experience that a resort to the courts will far too often result, initially, in delay, frustration, injustice, and denial of clearly defined rights. It is small comfort to him that three years later he will get justice from the Supreme Court of the United States. Justice—true and real justice—should be dispensed by voting registrars, sheriffs, the police, school boards, district attorneys, justices of the peace, and the others close at hand who represent the authority of the State, and who use their au-

thority far too often to perpetuate a system of social control, which may represent what has been regarded as the southern way of life, but which is wholly inconsistent with rights established by valid Federal power as a part of "the supreme Law of the Land."

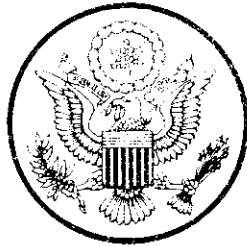
Thus the key to the greatest domestic problem of this country may well be found in the administration of justice by southern peace officers and in southern courts. The problem is by no means exclusively a southern problem, but it is more deep-seated and more pervading there. Not until justice can truly be found close at home, from officers of the law and local magistrates, can it be rationally expected that Negroes in the South, and their supporters, will present their cause in the courts rather than in the streets. The sad fact is that the streets have long been the only place where they could ordinarily get any sort of an effective hearing. Of course these matters should be gotten off the streets; but this can only be done when the administration of justice is not so deeply polluted at the source.

The lesson which these hearings drive home to me is the crucial importance of doing what we can to change the atmosphere in southern courts and the approach of southern law enforcement officers. As Daniel Webster said, in his funeral oration on Mr. Justice Story: "Justice, Sir, is the great interest of man on earth." And as Thomas Erskine said at the trial of Thomas Paine, "The choicest fruit that grows upon the tree of English liberty" is "security under the law; or, in other words, an impartial administration of justice."

When the ordinary southern Negro has confidence in his local peace officers and in his local courts, when the people of the whole country can have confidence in southern justice at the grass roots, then the Negro, and others interested in equal rights for all citizens, will surely present their grievances to the courts and stay off the streets.

This is the great challenge to the lawyers of this country, and particularly to the lawyers of the South. "The place of justice is a hallowed place," as Francis Bacon said long ago. There is no

justice without true equality, not only in court but in all law enforcement procedures. Too long have we too casually accepted a system in this area which too often, sometimes even unconsciously and unintentionally, has in fact been grossly discriminatory. When southerners, and particularly southern lawyers, can accept and face this deplorable fact, and begin to work, openly and assiduously, to correct it, we can have real hope that this situation will change to the great benefit of the South and of the Nation.



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