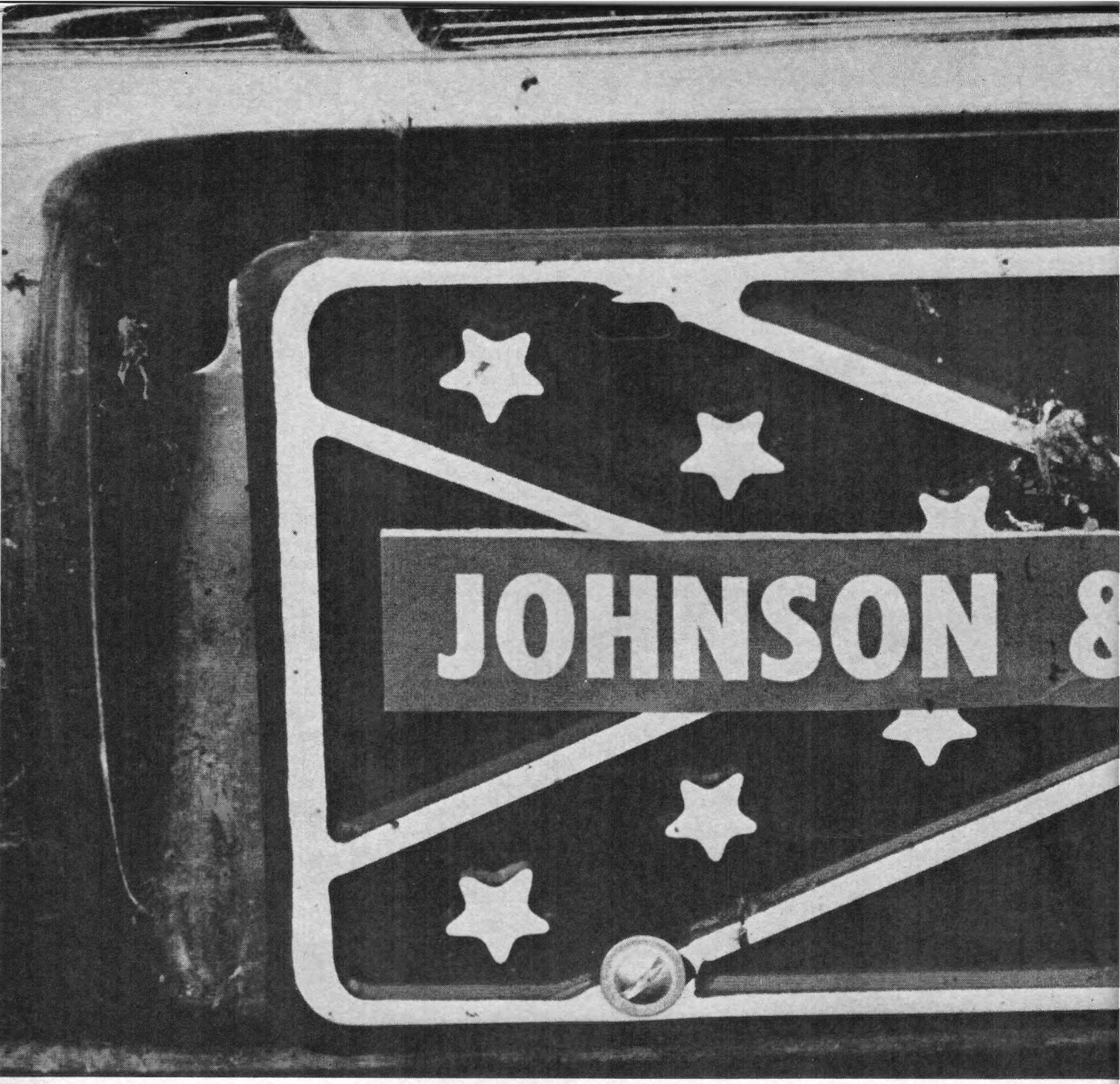
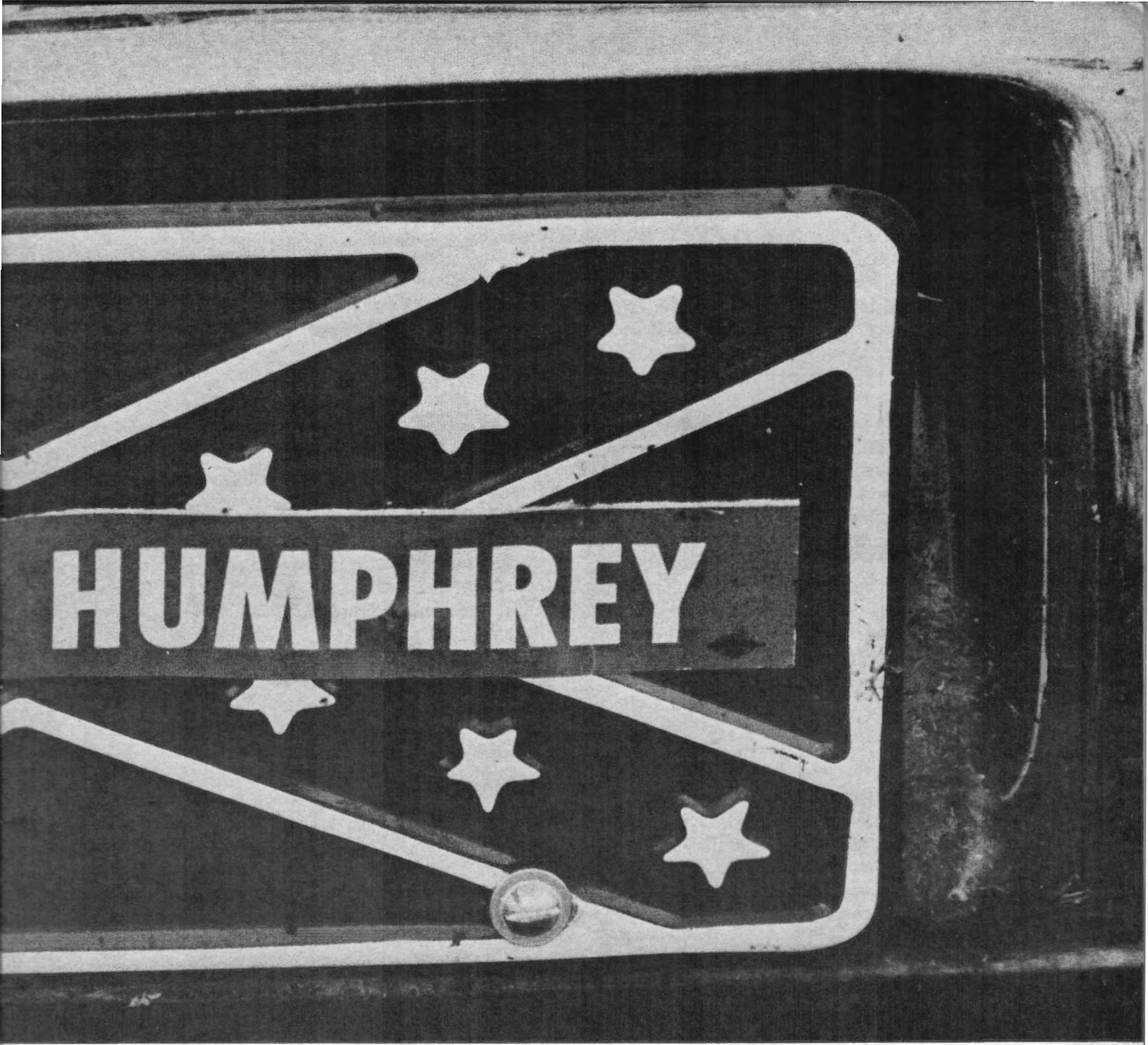


Mississippi Violence And Federal Power



ON FRIDAY EVENING, June 19, 1964, Mickey Schwerner walked me to where I had parked my rented car on the spacious campus of Western College for Women in Oxford, Ohio. The college was the site of a two-week orientation period for some five hundred volunteers who had agreed to spend their summer in Mississippi in connection with the voter registration, freedom school and community center programs of the Council of Federated Organizations (COFO). Since Mickey and his wife, Rita, had run a community center

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in Meridian for many months, he was a key figure at many of the orientation sessions.

I had come to Oxford to announce the filing for COFO of a federal lawsuit challenging the method of selecting Mississippi's delegates to the forthcoming Democratic National Convention. When some of the reporters who were assigned to the summer project heard of the suit they were interested in learning more about it. I agreed to meet them in the lounge of the administration building and I asked Mickey, who knew a great deal about the intricacies of Mississippi politics, to join me. As usual, he was knowledgeable and articulate.

Later, as we walked to the car, I told him that I hoped that I would get a chance to visit him and Rita in Meridian. He replied that I would always be welcome and he was sure that with all the volunteers flocking to Mississippi for the summer his community center would be a regular port of call. A little more than forty-eight hours later, he was lying dead on a dark road in Neshoba County with a .38-caliber bullet through his body.

It is true that Mickey was shot to death by a southern index finger curled around the trigger of a police special. It is equally true that almost everyone in Neshoba County knows who murdered him and his ill-fated companions. But what is not clear at all is that the ultimate responsibility for the lives of these three blameless young men—and of so many others—must rest squarely and directly with the federal government.

In January of 1963, the Mississippi Advisory Committee of the United States Commission on Civil Rights suddenly woke up to the sobering fact that, as far as Negroes' rights were concerned, Washington had been dragging its feet for generations. "The Federal Government, although acting in good faith," it reported, "has not done enough to protect the American citizenship rights of Mississippi Negroes." In the same breath, the Committee stated that widespread police brutality was the most urgent civil rights problem in the state.

When confronted with the unmistakable evidence of both official and unofficial violence, Attorney General Robert F. Kennedy consistently maintained that the Justice Department did not have the power to do any more in Mississippi than it was doing—which was very little. During my trip to Oxford I heard John Doar, the second-in-command of the Department's Civil Rights Division, reiterate this refrain at one of the orientation sessions in Peabody Hall. "We simply do not have the necessary tools," he explained to his frankly incredulous audience, "to cope with the problem."

Yet, as he and his chief well knew, there is an imposing body of existing law which gives the President ample authority to do what is necessary to make the Magnolia Jungle, as writer P. D. East calls it, safe for non-racist human habitation. If the Reconstruction Congress, which was acutely aware of the need for federal supervision in this area, was willing to supply the "necessary tools," then there can be no excuse for those who are required to use them to fail to do so.

IN 1866 A SIGNIFICANT BILL was reported out of the Senate Judiciary Committee. It provided that United States attorneys and other specified federal officers "are authorized and required . . . to institute prosecutions against all persons violating any of the provisions" of certain specified civil rights criminal statutes. Senator Lyman Trumbull, the committee's chairman, informed his colleagues that "we have the right to enact such legislation as will make them [the ex-slaves] free . . . and that can only be done by punishing those who undertake to deny them their freedom."

In the debate in Congress, Trumbull steadfastly maintained that the new statute was designed to make it mandatory for federal officers to act. "The various provisions of this bill," he explained on the floor of the Senate, "make it the duty of the marshals and deputy marshals, the commissioners of the United States Courts, the officers and agents of the Freedman's Bureau, the district attorneys, and others, to be vigilant in the enforcement of the act."

In the House, Iowa's James Wilson, in opposing an amendment which would have stripped the statute of its penal provisions, reminded his fellow representatives that "the highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights."

On January 4, 1866, one day before Senator Trumbull introduced his bill, an Associated Press dispatch noted that "it makes it the duty of the judicial authorities of the United States . . . to execute the law and provide all the machinery for making the bill effective." There is not the slightest shadow of a doubt that the Thirty-Ninth Congress expected the most vigorous action by the national government to protect imperiled Negroes in the southern states, and that the words "authorized and required" in the bill were intended to mean exactly what they said.

Congress underscored its intent in 1875 when it reenacted the statute in virtually identical language. In addition, it provided that "any district attorney who shall wilfully fail to so institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby . . . and shall, on conviction thereof, be deemed guilty of a misdemeanor. . . ."

Even if there could still be any lingering doubt as to what Congress had in mind, it was dispelled in the House debates. "We make it the duty . . . of the district attorneys," stated Congressman Benjamin Butler who reported the bill out of the Judiciary Committee, "to see that the penalties provided for in this statute are enforced." Today, the act, which is known as Sec. 1987 of Title 42, is part and parcel of our federal law.

BUT SEC. 1987 IS NOT THE ONLY statute giving the United States the power to intervene in Mississippi. On June 24, 1964, Robert Kennedy told an outraged NAACP delegation that the situation in Mississippi was "a local matter for law enforcement" and that federal authority in that state was "very limited." He was immediately contradicted by twenty-nine of the country's foremost law professors who, in a public statement, referred him to Sec. 332 of Title 10.

That statute, they pointed out, gave the President the power to use the state militia and the armed forces of the nation "whenever [he] considers that unlawful obstructions, combinations of assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States . . . by the ordinary course of judicial proceedings." Presidents Kennedy and Eisenhower had already used this section in enforcing court orders in cases involving the desegregation of the Little Rock School District (1957), the University of Mississippi (1962) and the University of Alabama (1963).

Both Chief Executives had also called into play the provisions of Sec. 333 which authorized them to use troops 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."*

Although there are few recent court decisions interpreting either section, no one would seriously contend that they are unconstitutional. In 1879, an attempt was made to convince the Supreme Court that the conduct of federal marshals who were seeking to enforce the electoral laws of the United States in South Carolina violated the Constitution. "It is argued," the court said, "that the preservation of peace and good order 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 upon 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. . . ."

The Attorney General, for reasons which he has not disclosed, chose to disregard both statutes and the clear judicial invitation to use them. "It is at once disappointing and ironic," the professors conclude, "that the Department of Justice, which has been bold beyond precedent in successfully urging the Supreme Court that the judiciary possesses the broadest powers to enforce the constitutional assurances of equality, should now discover nonexistent barriers to executive action."

But there was even a more dramatic rebuttal to Mr. Kennedy's untenable view of the law. Two days after his statement to the NAACP delegation, FBI agents arrested three white Mississippians for threatening to injure COFO personnel who were distributing voter registration literature in Itta Bena. The defendants were charged with violating Sec. 241 of Title 18 which prohibits conspiracies "to injure, oppress, threaten or intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States. . . ."

Sec. 241 is one of the very civil rights criminal statutes which the federal government was "authorized and required" by the Reconstruction Congress to enforce. It is a consummate tragedy that the first recent use of this appropriate law in Mississippi had to be generated by three highly publicized murders. As one writer has just put it,

"implementation of this Federal law at an earlier stage might well have averted tragedies and saved lives now bitterly mourned."

THERE ARE, OF COURSE, a number of other statutes which require marshals, FBI agents and other federal officials to enforce the various civil rights acts. The Reconstruction Congress, however, was careful not to put all of its eggs into one basket. It also provided that the Judicial Branch should share in the responsibility for protecting the lives and property of southern Negroes.

In 1866, it enacted a statute which is now known as Sec. 1989 of Title 42. This law provided for the appointment by federal judges of as many special United States Commissioners as were necessary "for the arrest and examinations of persons charged with [civil rights] crimes." The commissioners were given extremely broad powers. "The persons so appointed shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged. . . ."

Senator Trumbull, who was the bill's floor manager, explained its purpose in unequivocal language. "With a view to affording reasonable protection to all persons in their constitutional rights of equality before the law," he said on January 12, 1866, "it is to be the duty of the . . . courts, from time to time, to increase the number of commissioners so as to afford a speedy and convenient means for the arrest and examination of persons charged with violation of the act." Although President Andrew Johnson condemned the bill as being beyond the authority of Congress to enact, it was passed over his veto. The statute remains in the code.

Indiana's Senator Lane clearly saw why such a statute was absolutely necessary. "Here is a justice of the peace in South Carolina or Georgia," he said. "They appoint their own marshal, their deputy marshal, or their constable, and he calls upon the posse comitatus. Neither the judge, nor the jury, nor the officer as we believe is willing to execute the law. We should not legislate at all if we believed the State courts could or would honestly carry out [the law], but because we believe they will not do that, or give the federal officers jurisdiction."

Sec. 1989, which has never been repealed, was originally part of a legislative package entitled "An act to protect all persons in the United States in their civil rights, and furnish means for their vindication." In addition to providing for the appointment of special commissioners, it can also furnish the supportive basis for an anti-violence injunction. Since the Justice Department often takes the position, untenable as it may be, that it cannot act in Mississippi unless it is seeking to enforce a court order, the latter can be obtained in a suit brought under this statute.

IT IS ABUNDANTLY CLEAR that there are a great many federal statutes and procedures available to cope with the situation in Mississippi. The Justice Department is just as aware of this fact of life as are the twenty-nine professors who took such sharp issue with Robert Kennedy's demurrer of federal authority. As they put it, "The Attorney General's position would be less misleading and therefore less perilous if he would acknowledge that the President today has power to act but believes that 'the police action' under Section 333 of Title 10 is inadvisable."

On June 25, 1964, one Justice Department spokesman told the *New York Herald Tribune* that his office could do nothing to protect the members of the Mississippi Summer Project. "This may sound cold-blooded," he admitted, "but it is not meant to be. But I don't see how they can make a case for us to provide bodyguards in Mississippi any more than we should protect people on the subways in New York City."

Despite such pious disclaimers of available power, it is beyond cavil that, where conspiracies to violate civil rights exist, or where violence has occurred or can be reasonably anticipated, there is ample authority for federal intervention. Ranging from the dispatch of state and federal troops to suits for protective injunctions, there is a whole range of legal remedies which belie every Washington claim of "nonexistent barriers." The power is there, it has only to be effectuated.

"It seems inescapable," Professor James W. Silver writes in *Mississippi: The Closed Society,* "that Mississippians will one day shed their fantasy of past and present, and will resume their obligations as Americans. In the year 1964, there is small reason to believe that they will somehow develop the capacity to do it themselves. . . . It cannot be long before the country, seeing that persuasion alone must fail, and perhaps acting through the power and authority of the Federal Government, will, with whatever reluctance and sadness, put an end to the closed society in Mississippi."