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Draft Pleadings - Lee v. Macon
County Board of Education

Mr. Loper and I are working on draft pleadings for possible use in case the Governor of Alabama does what the newspapers predict she will do. The preparation assumes that, through legislation or executive order, the Governor will attempt to interpose herself between the federal court on the one hand and the state and local school superintendents on the other. It is further assumed that the Governor will seek to legitimate this action by invoking the state police power as superior to the power of the federal courts.

Our basic position must be that such an act or order is unconstitutionally designed to interfere with a valid court order for the desegregation of schools, in violation of the Supremacy Clause and the Fourteenth Amendment's equal protection clause. The act or order is therefore invalid, and the Governor is not interposed between the court and the superintendents. Subsidiary points may be that Governors cannot defy the Federal Constitution or federal courts and that the state police power is subordinate to the supremacy clause and equal protection clause. We are also looking into Alabama law to ascertain whether it allows such act or order.

We think it best to prepare several alternative sets of pleadings. Each set would consist of a supplemental complaint, a motion for preliminary injunction, and a memorandum in support of the motion for preliminary injunction. If we wish to file instead a motion for further relief, an application for an order to show cause

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or some other type paper, it should be easy to adapt them from the complaint and motion for preliminary injunction. The sets of pleadings we have thus far thought of are set out below. I would appreciate having your views on them and on what other type of pleadings might be helpful.

In each draft supplemental complaint we will allege the history of the Lee litigation and of state resistance to desegregation, the entry of the Court's order of March 22, 1967, the passage of the state interposition law or resolution or the promulgation of an executive order or proclamation, and our information and belief that the defendants and local school systems plan to follow the state directive. Depending on the content of tonight's speech, we may be able to allege statements showing the discriminatory purpose of the directive.

The first set of pleadings we draft will be directed at the Governor, State Superintendent, and State Board of Education. It will seek a declaration of the unconstitutionality of the directive, a declaration that the obligation of the parties under the March 22, 1967 order have not changed, and an injunction forbidding the Governor from assuming the duties of the State and local superintendents. The problem with such a pleading is that it may set the Court and Governor on a collision course. The other pleadings attempt to avoid this problem.

The second set of pleadings would be directed only at the State Superintendent and Board of Education. We could seek a declaration of the invalidity of the directive and an injunction forbidding them to hand their powers over to the Governor or to fail to carry out their obligations under the March 22, 1967 order.

The third set of pleadings would resemble the second, except that we would seek to add as defendants the superintendents and boards of the 99 school systems covered by the Court's order. We would then seek an order requiring

them to follow the Court's model decree and forbidding them to turn their powers over the Governor. The problem with this is how one Court could enforce the day-to-day questions arising under such a decree as to 99 school systems. Such a decree would probably eventually necessitate the appointment of a master.