No. 15 Orig.

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ALABAMA, by and through George C. Wallace as its Governor, and GEORGE C. WALLACE in his capacity as Governor of the State of Alabama, PLAINTIFFS

v.

UNITED STATES OF AMERICA and ROBERT S. McNAMARA, individually and as Secretary of Defense of the United States of America

BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

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BRIEF IN RESPONSE TO MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

The defendants oppose the motion for leave to file an original bill of complaint upon two grounds:

1. The complaint in seeking to restrain future action by the President of the United States by a proceeding against the defendant Secretary fails to state a claim upon which relief can be granted because the President has ample constitutional and statutory authority for any action taken or contemplated.

2. The complaint cannot be entertained against

the United States because there has been no consent to the suit.

Since the latter ground is not dispositive as to both defendants, leave to file should be denied upon the express ground that the complaint is without substantive merit.

STATUTE INVOLVED

Section 333 of Title 10, United States Code, provides:

> 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—
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> > (1) so hinders the execution of 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.

STATEMENT

Invoking the original jurisdiction of this Court, plaintiffs seek injunctive and declaratory relief against defendants. Specifically, the Court is asked to restrain the defendants and their agents "from deploying troops of the Armed Forces in the State of Alabama to suppress domestic violence unless and until the Legislature of the State of Alabama or the Executive (if the Legislature cannot be convened) makes application for such Armed Forces," and to declare Section 333, as well as the Fourteenth Amendment to the United States Constitution, null and void.

The complaint alleges in substance that the President has directed the Secretary of Defense to send federal soldiers into the State; that, prior to the issuance of this directive, there had been parades, demonstrations and acts of violence in the City of Birmingham; that State officials have taken measures necessary to suppress violence and are willing and able to do so in the future; that State authorities have not sought aid from the Armed Forces of the United States; that in these circumstances the President and the Secretary are without constitutional and statutory authority "to deploy members of the Armed Forces in the State of Alabama for the alleged purpose of using them to suppress domestic violence"; and that irreparable harm will result unless the defendants are restrained as requested.

In summary, then, the complaint challenges the constitutional and statutory powers of the President to invoke and act under Section 333, although, it should be noted, it cites no order of the President in-

voking that Section and alleges no action by the President or the Secretary beyond the deployment of troops.

We submit that this bare challenge to the President's constitutional and statutory powers should be rejected as without legal foundation. The portions of this Statement which follow are designed solely to set forth in brief outline the background against which the present controversy has emerged. The facts to which we allude for this purpose are matters of common knowledge.

On or about April 3, 1963, Negroes in the City of Birmingham instituted a series of steps designed to reduce the practice of racial segregation in that city. Various demonstrations followed, and large numbers of arrests were made by local police authorities for alleged violation of a city ordinance prohibiting parades without a permit. On April 10, a State court injunction was issued forbidding racial demonstrations. The demonstrations continued, and by May 8, 1963, more than 2,200 demonstrators had been arrested. On that date, a moratorium on further demonstrations was announced by leaders of the Negro community pending the outcome of discussions with various members of the Birmingham business community. On May 10, the parties to these discussions were reported to have agreed on various voluntary measures designed to ease racial controversy within the city.

On the night of May 11-12, however, two bombings took place. One of these partially destroyed the home of the Reverend A. D. King, a Negro minister, and

another damaged the A. G. Gaston Motel, the headquarters of the Negro campaign, injuring four persons. A serious riot thereupon ensued, during the course of which numerous persons were injured and substantial property damage occurred.

On the evening of May 12, 1963, President Kennedy issued a statement reading in pertinent part as follows:

> * * * This Government will do whatever must be done to preserve order, to protect the lives of its citizens and to uphold the law of the land.
>
> * * * *
>
> * * * I have instructed Secretary of Defense McNamara to alert units of the Armed Forces trained in riot control and to dispatch selected units to military bases in the vicinity of Birmingham. * * * Finally I have directed that the necessary preliminary steps to calling the Alabama National Guard into Federal service be taken now so that units of the Guard will be promptly available should their services be required.
>
> It is my hope, however, that the citizens of Birmingham themselves maintain standards of responsible conduct that will make outside intervention unnecessary and permit the city, the State and the country to move ahead in protecting the lives and the interests of those citizens and the welfare of our country.

Following this statement, a number of military units were dispatched to federal bases or installations in Alabama. In all, approximately 3,000 soldiers were sent to Fort McClellan, 60 miles east of Birmingham, and to Maxwell Air Force Base 90 miles south of the

city. In addition, a few (presently three) army personnel are using office space leased to a federal agency in Birmingham, Alabama.

ARGUMENT

THE COMPLAINT AGAINST THE SECRETARY FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Introduction and Summary

We believe that the complaint against the defendant McNamara, insofar as it is justiciable, is within the original jurisdiction of this Court.[1] Article III, Section 2 of the United States Constitution and 28 U.S.C. 1251 confer upon the Court original jurisdiction of all actions by a State against a citizen of another State.[2] The allegation that this defendant's action is in excess of constitutional or statutory authority is apparently sufficient to make the suit one against him as an individual rather than a suit against the United States without its consent. Compare *Youngstown Co.* v. *Sawyer*, 343 U.S. 579; see,

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[1] The action cannot be maintained against the United States for want of its consent to suit. The decisions of this Court have firmly established the applicability of the doctrine of sovereign immunity to a suit by a State against the federal government. Ever since *Kansas* v. *United States*, 204 U.S. 331, this principle has been accepted without qualification. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 387 ("The exemption of the United States from being sued without its consent extends to a suit by a State", Brandeis, J.), and *Arizona* v. *California*, 298 U.S. 588. It has only recently been confirmed in *Hawaii* v. *Bell*, October Term, 1962, No. 12 Original, decided April 29, 1963.

[2] The defendant McNamara is a citizen of Michigan.

also, *Ex parte Young*, 209 U.S. 123; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643.

We also believe it appropriate, even though this Court's original jurisdiction in the matter is not exclusive, to have questions raised by a State as to the scope of the President's power and duty, under the Constitution and acts of Congress, to use federal troops in the preservation of order and for the protection of constitutional rights decided directly by the highest tribunal. A prompt decision authoritatively determining the powers of the President may reduce the danger of domestic violence and of unlawful combinations and conspiracies depriving citizens of constitutional rights that a State may be unable or unwilling to protect. We accordingly urge the Court, in its disposition of the plaintiffs' motion, to make it clear that the President is not without power, should future eventualities require it, to take upon his own initiative those steps authorized by Section 333 in order to safeguard the constitutional rights of citizens of the United States.

While agreeing, for the reasons just stated, that this Court should decide the legal issues presented, we nevertheless believe that the motion for leave to file the complaint should be forthwith denied, because the case tendered by the State is without merit. There is, of course, ample precedent for rejecting a motion to file a complaint upon that ground. See, *e.g.*, *Alabama* v. *Texas*, 347 U.S. 272; *California* v. *Washington*, 358 U.S. 64.

Our argument on the merits may be summarized as follows:

a. Section 333 places upon the President the explicit duty to use federal troops, under stated conditions, in order to quell domestic violence or unlawful combinations. There is, and could be, no allegation that the President has acted or intends to act in any manner not authorized by 10 U.S.C. 333 and related statutes. The allegation that Alabama officials have not requested the President to send federal troops and have requested their removal from Alabama is irrelevant because Section 333 requires the President to act upon his own appraisal of conditions even though State officials have not requested federal intervention.

There is no room for judicial review of a Presidential determination that the conditions stated in Section 333 have arisen and require him to take "such measures as he considers necessary." Cf. *Martin* v. *Mott*, 12 Wheat. 19, 28-33. *A fortiori*, a court will not interfere with the entirely preliminary assignment of segments of the Armed Forces to points from which they can be conveniently deployed in the unhappy event that the conditions stated in Section 333 should be found to have arisen. Even more obviously, a court will not interfere in advance, by injunction or declaratory judgment, with the President's performance of his duty to determine whether federal intervention is required and, if so, what measures are appropriate.

b. The attack upon the constitutionality of Section 333 is also unfounded. The United States, although

composed of sovereign States, is one nation. Its people have rights, privileges and immunities under the Constitution and laws of the United States which the federal government has an independent power and duty to protect. As the Court said in *In re Debs*, 158 U.S. 564, 582, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." See also *Ex parte Siebold*, 100 U.S. 371, 395. Section 333 does not purport to confer, and the President does not claim, power to use troops to deal with ordinary domestic violence. The power and duty is to put down any "insurrection, domestic violence, unlawful combination, or conspiracy" which either (1) hinders the execution of State or federal laws with the effect of depriving a part of the people of constitutional rights that the State authorities fail or are unable to protect or (2) obstructs the execution of the laws of the United States. In each event the President's action is tied to the enforcement of federal rights or duties. If a State fails, for whatever reason, to safeguard the fundamental rights of a portion of its people (including the rights to life and the security of person and property), it deprives them, by such action or inaction, of the Fourteenth Amendment's guarantee of equal protection of the laws; and it then becomes the duty of the federal government to act. Section 333 thus implements the Fourteenth Amendment and is plainly a valid execution of the power, conferred in Section 5, to "enforce, by appropriate legislation, the provisions of this Article."

c. Although a rejection of the constitutional claims of the State would make it unnecessary to consider other obstacles to the plaintiffs' claim to relief, we point out additionally that traditional grounds for equitable intervention are lacking. The bare allegation of threatened irreparable harm to the State is unsupported by any averments of fact. And there would be no justification, particularly in the present posture of affairs, for taking the extraordinary step of issuing an injunction or declaration designed to limit the President's choice of a course of action in some future emergency the full nature of which cannot now be foreseen.

A.

The Preparations Made by the Executive and the Action Apprehended by the Plaintiffs in the Event of an Emergency Are Authorized by United States Code, Title 10, Section 333.

Section 333 of Title 10 of the United States Code confers upon the President the power and duty of using federal troops where necessary to suppress domestic violence (or unlawful combinations or conspiracies) that either obstructs the execution of the laws of the United States or deprives any part of the people of a State of constitutional rights that the State is unwilling or unable to protect. It is not, and cannot be, alleged that the Executive contemplates any action not authorized by Section 333; and we assume, therefore, that the gist of the complaint is an attack upon the constitutionality of that Section—an issue considered in Point B. Out of an abundance

of caution we emphasize here (1) that all of the federal action challenged or apprehended by the complainant is within the express authority granted by law and (2) that neither a President's determination concerning the existence of conditions requiring his intervention under Section 333 nor the measures he might adopt would be subject to judicial review.

1. Alabama complains that the President, citing Section 333, directed the Secretary to post troops at federal installations in Alabama in readiness to be employed by the President in Birmingham if violence should break out anew. But that is precisely the duty placed upon the President by Section 333 in the unhappy event that either of two stated conditions appears, *viz.*—

(a) the violence (or an unlawful combination or conspiracy) obstructs the execution of federal law; or

(b) the violence (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 to equal protection of the laws, which the State authorities are unable, fail or refuse to protect.

The President, in short, has made no claim to authority in the premises other than that conferred by Section 333,[3] and he has repeatedly expressed the

[3] The President, of course, has other related powers and duties, not here involved, that future events might require him to exercise; for example, the responsibility of dealing

hope that it will prove unnecessary for him to draw upon these statutory powers. Certainly no court can state in advance that the conditions described in the statute cannot arise.

The allegation that the Alabama authorities have not requested Presidential action is irrelevant. Section 333 shows upon its face that no such request is required to give the President the authority. It is the President who is directed, in the circumstances specified, to use the militia or Armed Forces or to take such other measures "as he considers necessary;" and it is the President alone who has the responsibility of appraising the prevailing conditions and determining whether federal constitutional rights are being impaired by a breakdown of local law enforcement or by a failure to apply the law evenhandedly in suppressing violence. It would have stultified the legislation to make Presidential action contingent upon the concurrence of State officials. The statute, enacted in its original form in 1871 (see discussion in Point B, *infra*), was aimed not only at situations in which State authorities might be unable to cope with an assault upon the rights of a group or class of the people but also, as its language attests, at cases in which State officials might "refuse" to act. Congress must have been fully aware that it

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with "unlawful obstructions, combinations or assemblages" that make it impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings. See 10 U.S.C. 332. It is also unnecessary, in view of the specific statutory basis for Presidential action in the present context, to consider the scope of the President's inherent powers. Cf. *In re Debs*, 158 U.S. 564.

would be futile indeed to expect State officials who had refused to accord the protection of the laws to a particular class of citizens to invite the federal government to intervene to protect them.

The argument also ignores historic principles. The people of the United States, while citizens of the States, are also citizens of the United States. All of them are entitled to the protection of the United States in the rights, privileges and immunities secured by the Constitution. It is the obligation of the federal government to all classes of people, in the event of a breakdown of local authority, to take the action necessary to preserve order and safeguard them in the exercise of their federal constitutional rights. Section 333 was enacted pursuant to this obligation. See Point B, *infra*. The power and duty of the national government could not be left dependent upon the wishes of State officials.

It is equally irrelevant to any issue before the Court that the complaint alleges the ability of the State and local authorities to suppress domestic violence. If the local authorities prove able and willing to follow that course and to preserve order in a way that secures for all the people of Alabama the rights, privileges, immunities and protection accorded by the Constitution, then there will be no occasion for Presidential intervention. But the allegations of intent cannot relieve the President of the right and duty to prepare for all contingencies and to make the independent determination required by Section 333.

2. There is no room for judicial review of Presidential action under Section 333. In *Martin* v. *Mott*,

12 Wheat. 19, involving a parallel statute (1 Stat. 424) authorizing the President to call forth the militia to execute the laws of the United States, suppress insurrections and repel invasions, the Court unanimously held (pp. 28-31):

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. * * *
> * * * He is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law. * * * *[4]

Similarly, Section 333 puts upon the President the duty of deciding when there is an exigency requiring his intervention in order to suppress insurrection or domestic violence obstructing the execution of the federal laws or depriving any class of persons of constitutional rights that the State is unable or unwilling to protect. The express mandate is that the President shall take "such measures as *he* considers necessary" (emphasis supplied).

The natural meaning of the words is confirmed by the nature of the power and the exigencies in which it is to be exercised. The power is confided to the Chief Executive and Commander-in-Chief.

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[4] See, also, *Luther* v. *Borden*, 7 How. 1, 42, 45; *Mississippi* v. *Johnson*, 4 Wall. 475, 498-499; *Consolidated Coal & Coke Co.* v. *Beale*, 282 Fed. 934 (S.D. Ohio).

This alone would be a strong indication of the absence of judicial review.[5]

Furthermore, as in *Martin* v. *Mott*, *supra*, 12 Wheat. at 30, "The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." Upon such occasions there are neither opportunities for judicial review nor criteria for judicial determination.[6] It needs no argument to demonstrate that decisions to call upon the Armed Forces to repel invasion, to curb insurrection or to suppress domestic violence which destroys the constitutional rights and threatens the lives and safety of a large class of citizens of the United States are of a kind which require an awareness and assessment of facts and information ordinarily available only to the executive branch of the government. It is equally apparent that situations of such danger and delicacy may change from hour to hour and that the existence of the power to judge and to act immediately is of the essence. One can conceive of no category of cases which would more surely defy the processes

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[5] See *Prize Cases*, 2 Black 635; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U.S. 163; *Orloff* v. *Willoughby*, 345 U.S. 83; cf. *Moyer* v. *Peabody*, 212 U.S. 78; Administrative Procedure Act, Sec. 10, 5 U.S.C. 1009.

[6] Compare, *Coleman* v. *Miller*, 307 U.S. 433, 454-455, and *Baker* v. *Carr*, 369 U.S. 186, 210, where the Court has stated: "In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

and standards of determination by litigation.[7]

It is even plainer that the Executive alone must decide whether to assign troops to particular federal installations in the interest of preparedness. No intervention in Birmingham has yet taken place and it is greatly to be hoped that the people of that city will solve the difficulties, without disorder, at the local level. Nonetheless, the responsibility for deciding whether to take precautions (as well as the choice of precautionary measures) against a breakdown of local responsibility remains. That power exists entirely apart from Section 333; it is an attribute of the President's constitutional duties as Chief Executive and Commander-in-Chief of the Armed Forces.

Still more obvious, no court will undertake to conjure up in advance the conditions which the President might face on some unborn day and attempt to define for him, by prescient declaration or injunction, the circumstances in which it might become imperative for him to act or the means he should choose.

B.

Section 333 Is Constitutional

Preliminarily, it will be helpful to correct the fundamental misconception underlying the entire

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[7] Comparable, though less obvious, cases are presented when a party seeks adjudication of a delicate question affecting the conduct of foreign relations (See *Doe* v. *Braden,* 16 How. 635; *Terlinden* v. *Ames,* 184 U.S. 270; *Oetjen* v. *Central Leather Co.,* 246 U.S. 297) or one relating to the duration of hostilities (*Commercial Trust Co.* v. *Miller,* 262 U.S. 51).

complaint by describing the several statutory sources of Presidential authority to use troops in exigencies created by domestic disorder, and also the quite different constitutional bases upon which the statutes rest. For, contrary to the plaintiffs' mistaken assumption, the constitutional authority for Section 333 is not Article IV, Section 4; it is Article I, Section 8, and Section 5 of the Fourteenth Amendment.

Congressional authority for Presidential use of federal troops in certain cases of domestic violence and related unlawful combinations or assemblages is found in the three substantive provisions of Chapter 15 of Title 10 of the United States Code. Section 331 provides—

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Here, clearly, is authorization to come to the aid of a beleaguered State, in the event of insurrection *against the State government.* This provision implements Article IV, Section 4, which promises the several States that the federal government stands ready to "protect each of them * * * on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Quite reasonably, Presidential action in this instance depends upon a local request, both by statute and

under the Constitution. The national government has no occasion to interfere, short of an invitation, if the problem is local, the federal laws are being enforced, and no federal rights are in jeopardy.

The second provision is Section 332:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make 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.

The contrast between Section 331 and Section 332 is at once apparent. In the situation envisaged by Section 332 there is no question of protecting the State from internal difficulties; the occasion for action is rebellion directed *against the United States* and the purpose of intervention is to vindicate *federal* authority and assure enforcement of *federal* law. The statute accordingly makes no provision for an invitation by State officials. Nor is the State's consent constitutionally requisite.

The reasons are obvious. In the first place, State officers may themselves be parties to the conspiracy against federal authority. See *Cooper* v. *Aaron*, 358 U.S. 1. More fundamentally, the President's duty to preserve federal law cannot be dependent on the wishes of any State administration, for his constitutional mandate to "take Care that the Laws be

faithfully executed," Art. II, Sec. 3, is not conditioned upon State approval. See *Ex parte Siebold*, 100 U.S. 371, 395-396. Probably, as Commander-in-Chief, he had the implied authority to use the Armed Forces of the Nation, including the State militia, to execute the laws of the United States (Art. 2, Sec. 2; *In re Debs*, 158 U.S. 564, 582), but in any event, Congress in 1792 put his power on a statutory footing and beyond question. Act of May 2, 1792, Sec. 2, 1 Stat. 264; Act of February 28, 1795, Sec. 2, 1 Stat. 424.

Section 332, therefore, is unrelated to Article IV, Section 4. Congress was here invoking its own constitutional power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, Sec. 8. The United States is not a mere confederation operating by and through the States. "The government of the Union * * * is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch* v. *Maryland*, 4 Wheat. 316, 404-405. While under our dual system of sovereignty the powers of government are distributed between the State and the Nation, and while the latter is a government of limited powers, nevertheless within its constitutional sphere the national government has all the attributes of sovereignty and in the exercise of its enumerated powers acts directly upon the citizen and not through the intermediate agency of the States. It has the power to command obedience to its

laws, and hence the power to keep the peace to that extent. *In re Debs,* 158 U.S. 564, 578-579; *Lane County* v. *Oregon,* 7 Wall. 71, 76; *Ex parte Siebold,* 100 U.S. 371, 395. Section 332 is plainly constitutional.

We turn to Section 333, which provides:

> 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
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> (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.

The second paragraph of Section 333 is of a piece with Section 332, and rests upon the same constitutional footing. The first paragraph differs in that the emphasis is upon the protection of constitutional rights, privileges and immunities under the federal

union as distinguished from the second paragraph's emphasis upon enforcement of federal legislation. The principle, however, is identical. Both provisions are wholly independent of Article IV, Section 4, for they are concerned not simply with domestic violence and unlawful combinations or conspiracies but with the relationship—the rights and duties—between the national government and the people. Neither makes the President's authority dependent upon the invitation or consent of State authorities. Both are tied to the federal laws and Constitution. As the Court held in *In re Debs*, 158 U.S. 564, 582, the power of the national government to enforce its laws and protect the rights of its citizens are not at the mercy of a State. "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers *and the security of all rights entrusted by the Constitution to its care*" (emphasis added).

Specifically, the first paragraph of Section 333 has its foundation in Section 5 of the Fourteenth Amendment which expressly authorizes the Congress to enforce the Amendment "by appropriate legislation." [8] Cf. *Strauder* v. *West Virginia*, 100 U.S. 303, 311; *Virginia* v. *Rives*, 100 U.S. 313, 317-318; *Ex parte*

[8] The challenge to the validity of the Fourteenth Amendment presents nothing of substance. The vitality of the Amendment is sufficiently attested by the hundreds of cases decided under it for the greater part of a century. In any event, as this Court held in *Coleman* v. *Miller*, 307 U.S. 433, and recently reiterated in *Baker* v. *Carr*, 369 U.S. 186, 214, the ratification process does not present a justiciable issue. See, also, *Leser* v. *Garnett*, 258 U.S. 130, 137.

Virginia, 100 U.S. 339, 344-346; *Monroe* v. *Pape*, 365 U.S. 167, 171-172. Indeed, Section 333 is derived from Section 3 of the Act of April 20, 1871, 17 Stat. 13, 14, which was an act "To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes." President Grant, in proposing the measure, explained—

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
>
> Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States. [7 Richardson, *Messages and Papers of the Presidents*, p. 127; House Exec. Doc. No. 14, 42d Cong., 1st Sess.]

As the text itself reflects, the prime object of the provision was to secure equal protection of the laws to those—largely former slaves—to whom the State was unable or unwilling to accord it. See H.R. No. 320, 42d Cong., 1st Sess.;: 98 Cong. Globe 317, 322, 335, 339-341, 366-370, 374-376, 384, 390-392, 412-415, 425-429, 436-440, 442-451, 456-461; 99 Cong. Globe App. 71.

Since Alabama challenges Section 333 even before its implementation (which may never occur), it is impossible to foretell exactly what constitutional rights might be put in jeopardy by the failure or inability of the State to suppress domestic violence or unlawful combinations and conspiracies. But the basic right, which might be threatened in various ways, is the Fourteenth Amendment's guarantee of the equal protection of the laws.

If anarchy runs riot, life itself is in serious peril, and all the most fundamental rights of liberty and property are threatened. Under normal conditions the attack of one private citizen upon another, or the attack of one group upon another, raises no question of constitutional safeguards. The Constitution secures life, liberty and property and other civil liberties, such as freedom of speech, assembly and association, only against deprivation by government. But when the law and order ordinarily preserved by a State break down in one of its communities, its inhabitants, of whatever race or color, are deprived of the protection of the laws because of the State's unwillingness or inability to perform the sovereign's first and fundamental duty—to provide its people, their property and activities with the protection of the law.

The lack of the *equal* protection that would offend the Fourteenth Amendment may result in several ways. There is the possibility of some of the cruder forms of discrimination resulting when a State fails to protect a class or part of its people, because of their race or color, against aggression by rioters or unlawful combinations. There is the subtler danger

that the conspirators may be permitted to win peace, or order may be preserved, upon terms that deny some part of the people important constitutional freedoms guaranteed by the Bill of Rights through the Fourteenth Amendment. Again, the inequality may affect all the people of a particular locality without regard to race or color. Manifestly, there is a lack of equal protection if the State is unable or unwilling to preserve order in one community in a way that safeguards federal constitutional rights, while it maintains the customary peace and order in others.

We need not explore all the possibilities. At this juncture it is enough that the provision is valid on its face. We cannot know whether the occasion for invoking the statute will actually arise. Nor need we examine the precise circumstances which might justify the contemplated intervention. It is sufficiently clear, however, that the prevailing situation in Birmingham may deteriorate in such a way as to require action under Section 333. Without pretending to foretell the course of events, we must note the danger that the equal protection of the laws will not be secured to all the residents of the beleaguered city without federal assistance. We need conclude only that such an eventuality would authorize the action contemplated by Section 333, and that the constitutionality of such intervention would be beyond doubt.

C.

The Complaint Fails to Satisfy Traditional Requirements for the Grant of Equitable Relief.

If, as argued immediately above, the basic attack upon the constitutionality of Section 333 must be rejected as insubstantial, the case is at an end. Nonetheless, we point out additionally that the complaint in this case would in no event warrant the relief sought.

Plaintiffs make a bare allegation of threatened irreparable harm but fail to specify at all, much less with particularity, what injury would be suffered.[9] As already emphasized, the President is authorized to act under Section 333 only to secure federal rights which would otherwise go unprotected. And it cannot be presumed that he would act for any purpose other than that authorized, *Martin* v. *Mott, supra,* 12 Wheat. at 32-33. It is difficult to see by what process of reasoning an act of Presidential intervention occasioned by necessity and designed to secure the fundamental rights of citizens of the United States could be deemed a threat of irreparable harm cognizable by a court of equity. Certainly, the State does not suggest that it has any interest contrary to the maintenance of order and the protection of constitutional rights.

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[9] A demonstration of irreparable harm has always been a prerequisite to the grant of equitable relief in the federal courts. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500. Moreover, the burden of establishing entitlement to injunctive relief is a particularly heavy one where the suit is against public authority. *Yakus* v. *United States,* 321 U.S. 414, 440.

The unavailability of injunctive relief is further emphasized by the consideration that the President has not invoked his authority under Section 333 or taken any action other than those preparatory measures which would enable him to act with dispatch should future contingencies require it. Whether there will be any future movement of federal troops from federal installations to the City of Birmingham is entirely speculative. Thus, plaintiffs are necessarily forced to the extremity of contending that in no event and in no circumstances would the President be authorized to act upon his own initiative in order to fulfill the duty which Congress has directly imposed upon him. At best, such a contention would be tenable only if the statute were plainly unconstitutional on its face. Since, for the reasons already indicated, this is palpably untrue, certainly the courts will not intervene upon the hypothetical and unwarranted assumption that the President might act in disregard of statutory limitations. No more will the courts attempt to predict the conditions which the Chief Executive may encounter or hamper the exercise of his discretion in deciding upon the appropriate measures of response.

CONCLUSION

The motion for leave to file the complaint should be denied because the challenge to the constitutionality of Section 333 is unfounded and the complaint states no cause of action.

Respectfully submitted.

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MAY 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1963 688025 1209