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Supreme Court of the United States

OCTOBER TERM, 1962

No. 15 Original

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, *Defendants.*

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

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CITATIONS

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I

JURISDICTION

This is an original action for injunctive and declaratory relief brought by the State of Alabama and by George C. Wallace as its Governor against the United States and Robert S. McNamara pursuant to Art. III, sec. 2, cl. 2, of the Constitution of the United States and to the implementing statutes giving this Court original non-exclusive jurisdiction over "controversies between the United States and a State" (28 U.S.C. § 1251(b)(2)). Plaintiffs filed this complaint on May 18, 1963, together with a motion for leave to

file pursuant to Rule 9 of this Court's Rules. The present brief is submitted in support of that motion and in support of plaintiffs' prayer for an advanced date of hearing and interim relief restoring the status quo pending final decision of this Court.

II

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant injunctive relief as prayed in the Complaint against the defendants?

2. Does the Secretary of Defense of the United States, acting pursuant to a directive from the President of the United States, have authority to send federal troops into the State of Alabama to suppress civil domestic violence wholly within the State of Alabama unless and until the Legislature of the State, or the Executive (when the Legislature cannot be convened), makes application to the United States for such assistance?

3. Is Title 10, Section 333 of the United States Code, 70A Stat. 15, constitutional as applied?

4. Was the Fourteenth Amendment to the Constitution of the United States validly adopted?

III

IMPORTANCE

For the first time since the era of Reconstruction an American President has ordered federal troops sent into a State, not in enforcement of a federal court order as in Little Rock or at the University of Mississippi, but as an exercise of personal power based on an assertion that he intended to suppress civil violence which was openly and unquestionably within the exclusive powers of the law enforcement officials of the State to control. Coincidentally the President made public announcements which had the effect of inciting the rioters by convincing them that the

federal army would support and protect the very persons advocating the riots and would block the efforts of the law enforcement authorities of the State.

This is the very situation that the framers of the Constitution had in mind when they forbade the sending of federal troops into a State to suppress domestic violence except upon the request of the State legislature or governor. Nothing could more greatly endanger the continuance of the federal system described in our Constitution than judicial sanction of self-authorized use of federal troops against lawful State authority by the Commander in Chief of our Armed Forces. Such action, if tolerated by this Court, would in effect create a military dictatorship.

Not only was the President's action unjustified in law, it was unsupportable in fact. The riots had been quelled before the troops were sent in. The State, county and city authorities were fully in control of the situation, all courts within Alabama were functioning, the civil governments of Alabama, Jefferson County and the City of Birmingham were functioning, and there was no insurrection or rebellion in existence.

IV

FACTS

Negro leaders in the City of Birmingham have for some time campaigned for compulsory percentage employment of negroes in various commercial establishments of the City and have made other demands for broader acceptance of negroes by the business community.

This situation changed radically following the coming to Birmingham of certain professional racial agitators and provocateers named in the complaint. Immediately thereafter, and continuing through the early days of this month, a large number of the negroes in the City changed their campaign to one of active civil disobedience, filling the streets and blocking sidewalks and other public places,

obstructing traffic by holding unauthorized parades and disturbing the peace and frightening other citizens by group shouting and threats.

As tension mounted in the City, the standby assistance of the State of Alabama was requested by local officials. During the time the demonstrations were being staged, the City of Birmingham secured a State court injunction against further demonstrations. Martin Luther King publicly defied this injunction and encouraged others to do the same.

While the law enforcement officers of the City were restoring order, many of the police were violently attacked and several seriously wounded. Nevertheless the law enforcement officials of the City and of the State had brought the situation under control by May 11th without serious injury to any of the rioters. Many of the highway patrolmen had left Birmingham because everything appeared to be relatively quiet.

However, on May 11th two bombing incidents took place in the City at locations openly indicative of either a real or purported racial hostility. No one was injured and no arrests have yet been made, even though State, local and federal officers are conducting an investigation.

Immediately after the bombings between 2,000 and 3,000 Negroes rioted. They burned several store buildings, destroyed numerous automobiles, committed acts of violence against police and law enforcement officials and refused to allow fire-fighting equipment to come into the area where they had set fire to buildings, which in some instances included their own property. A number of white citizens were attacked by negroes and some seriously injured. After members of the State of Alabama Highway Patrol arrived back at the scene, the riots were brought under control.

Within a day the streets were again cleared of the demonstrators and the City was returned to approximately its normal order. At no time during these riots was more than a small portion of the available law enforcement officers of the State needed or in use. The existing civil violence was openly confined to a small section of one city in the whole state and its suppression was unmistakably within the power of the immediately available police.

Notwithstanding this situation the President of the United States on May 12, after the city had been returned to approximately its normal order, announced that he would send federal riot trained troops to the vicinity of Birmingham for the stated purpose of suppressing such civil violence as is referred to in 10 U.S.C. § 333. Not only had the Alabama Legislature not requested the assistance of such troops but the sending of this military force into the State of Alabama was done over the repeated objection of the State's Chief Executive.

Moreover, in taking this action, the President chose to make a public announcement that he was sending such specially trained troops for the purpose of operating against the State authorities if they acted to quell any further rioting, sent a telegram to the plaintiff, Governor George C. Wallace, to that effect and released the same to the newspapers (Exhibit A). At the time the President made such announcement, he had reason to believe that he lacked the power to take the action which he was threatening (Exhibit B).

The defendant McNamara carried out the instructions of the President and sent approximately 3,000 troops to the Birmingham area. Even though the planning of the troop movement was veiled in secrecy, it soon became publicly known that these were specially trained riot control groups, some of which were sent to Birmingham itself, both officers and men, with military vehicles. The Army force in the City of Birmingham immediately began to

map the city and set up a command post believed to be at 2121 Eighth Avenue North. This post is believed to have been under Major General Charles Billingslea, assisted by Brigadier General John T. Corley and a number of aides.

The sending of these troops, the establishing of their commander in Birmingham, in conjunction with the public statements of the President and others in the federal government that they would be used in Birmingham in the event of further riot, have caused and are causing continuing unrest in the City and have been and were intended to be interpreted as indicating that the federal government will support the activities and demonstrations of the rioters and will use troops to protect them from the police and other law enforcement agencies of the City and State. This has created an explosive situation which has forced the State to continue to maintain State patrolmen in Birmingham on a standby basis.

Until these troops are removed such civil unrest and sporadic outbreaks of crime and violence will continue and will prevent any complete restoration of peace and order in the City of Birmingham.

V

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

Constitution

1. Art. I, § 8, cl. 15

> "The Congress shall have power . . .
>
> "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;"

2. Art. III, § 2, cl. 1

> "The judicial power shall extend to all cases . . . arising under this Constitution . . . to controversies to which the United States shall be a party."

3. Art. III, § 2, cl. 2

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. . . ."

4. Art. IV, § 4

"The United States shall guarantee to every State in this Union a republican form of government, and shall potect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

5. Art. XIV, § 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

5. Tit. 10, sec. 333

"*Interference with State and Federal law.*

"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."

6. Tit. 18, sec. 1385

"*Use of Army and Air Force as posse comitatus.*

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

7. Tit. 28, sec. 1251(b)(2)

"*Original Jurisdiction.*

* * * *

"(b) The Supreme Court shall have original but not exclusive jurisdiction of:

* * * *

"(2) All controversies between the United States and a State; . . ."

VI

SUMMARY OF ARGUMENT

1. The Court has jurisdiction of the subject matter and the parties, and an appropriate case is presented for the granting of injunctive relief.

2. The action of the defendants in sending members of the Armed Forces into the State of Alabama on May 14, 1963, and keeping them within the State, for the confessed purpose of suppressing domestic violence which may in the future occur within the State, constitutes a repudiation of the guaranty of the republican form of government which Art. IV, § 4, of the Constitution of the United States makes the obligation of the federal government.

3. The sending of troops into Alabama under the circumstances of this case is not authorized by the plain language of 10 U.S.C. § 333; or if 10 U.S.C. § 333 could be so interpreted it would be clearly unconstitutional.

4. The ratification of the Fourteenth Amendment by the Southern States was compelled under the same conditions of military duress as is exemplified by the current action of the President in this case and is voidable.

VII

ARGUMENT

1. The Court has jurisdiction of the subject matter and the parties, and an appropriate case is presented for the granting of injunctive relief

1. This Court has jurisdiction of the subject matter and the parties to this action. Art. III, § 2, cl. 1, provides:

> "The judicial power shall extend to all cases . . . arising under this Constitution . . . to controversies to which the United States shall be a party."

Art. III, § 2, cl. 2, provides:

> "In all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction."

The Congress has specifically reconfirmed and expanded such jurisdiction in 28 U.S.C. § 1251(b)(2), which provides:

> "(b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> * * * *
>
> "(2) all controversies between the United States and a State; . . ."

2. This jurisdiction is possibly the most important grant of power which has been made to this Court. It makes this Court the ultimate force to preserve and maintain the federal-state relationship created by the Founding Fathers.

When the thirteen original colonies made a unanimous declaration on July 4, 1776, the framers of the Declaration of Independence stated that:

> "The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world. . . . He has kept among us, in times of peace, standing armies, without the consent of our legislatures. He has affected to render the military independent of, and superior to the civil power. . . . For quartering large bodies of Armed Forces among us. . . . For taking away our charters, abolishing our most valuable laws, and altering fundamentally our forms of Government."
>
> Declaration of Independence

This historic document ended civic "tyranny over the human mind."

And Mr. Madison, Father of the Constitution, in an essay, said (4 *Writings of Madison,* pp. 472-3):

> "The political system of the United States claims still higher praise. The power delegated by the people is first divided between the General Government and the State governments, each of which is then subdivided into legislative, executive, and judiciary departments. And as in a single government these departments are to be kept separate and safe by a defensive armour for each so, it is to be hoped, do the two governments possess each the means of preventing or correcting the unconstitutional encroachments of the other. Should this improvement in the theory of free government not be marred in the execution, it may prove the best legacy ever left by lawgivers in their country, and the best lesson ever given to the world by its benefactors. If a security against power lies in the division of it into parts mutually controlling each other, the security must increase with the increase of the parts into which the whole can be conveniently formed."

3. The subject matter of this case presents an appropriate occasion for injunctive relief. As indicated in the statement of facts, the injury caused by the presence of the Armed Forces in the State of Alabama is presently occurring; so that cases concerning the impropriety of deciding future constitutional questions are not here relevant. The facts present a case of irreparable injury in which the ordinary legal remedies are entirely inadequate. The threat to domestic law and order within Alabama posed by the continuing presence of the Armed Forces is immediate, and can only be removed by the granting of the restraining order against the defendants which is requested in the Bill of Complaint.

2. The action of the defendants in sending members of the Armed Forces into the State of Alabama on May 14, 1963, and keeping them within the State, for the confessed purpose of suppressing domestic violence which may in the future occur within the State, constitutes a repudiation of the guaranty of the republican form of government which Art. IV, § 4, of the Constitution of the United States makes the obligation of the Federal Government

Based upon the facts of this individual case, it is submitted that the President was without constitutional authority to send members of the Armed Forces into the State of Alabama for the alleged purpose of suppressing domestic violence when the State and local law enforcement officials were able and had not refused or failed to suppress the domestic violence which had occurred within the City of Birmingham.

The deployment of members of the Armed Forces in the City of Birmingham, Alabama, and at two federal reservations within Alabama (Fort McClellan and Maxwell Air Force Base), for the confessed purpose of suppressing domestic violence, abrogates the guaranty of a republican form of government provided by Art. IV, § 4, of the Constitution, which provides:

> "The United States shall guarantee to every State in the Union a republican form of Government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the Legislature cannot be convened), against domestic violence."

This provision of the Constitution has been applied by the Executive and interpreted by this Court numerous times in the past, but never under circumstances at all similar to those in the present case. This guaranty is so basic and so specific that it is not subject to interpretative overriding or supplanting by generalized provisions of the Constitution—such as the Fourteenth Amendment—or, *a fortiori*, by general statutory language authorizing the use of troops—such as 10 U.S.C. § 333.

The words

> "and on application of the legislature, or of the executive (when the legislature cannot be convened)"

state an inflexible prerequisite to action which may be taken by the United States for the purpose of protecting a State "against domestic violence."

The framers of the Constitution were explicit in providing that the United States should guarantee to every State a republican form of government and protect each against domestic violence upon application of the legislature or of the executive when the legislature could not be convened. The duty rest upon the United States, including the executive, legislative and judicial branches thereof. A breach of this duty entitles the party against whom the injury flows to a cause of action if we are still a government of laws. This Court has the obligation to see that this most basic constitutional guaranty is not usurped. For to remain silent would but encourage arbitrary power.

The Founding Fathers, still cognizant of the awesome power of a central government, were explicit in providing

that the legislature of a State must act, when possible, in order to bring in troops of the United States to deal with domestic violence. As indicated in the previous excerpt from the Declaration of Independence, the sound of the Red Coats marching in their streets was still remembered in the Constitutional Convention. The constitutional provision is too specific to be misunderstood. This constitutional obligation rests upon the United States, of which this Court is a part.

This section of the Constitution was carefully analyzed by the Court in *Luther* v. *Borden*, 7 How. 1, 12 L. Ed. 581 (1849), where it was held that State militia, called out by the governor, did not commit trespass by breaking into the house of a person who was engaged in insurrection against the State.

Discussing Art. IV, § 4, of the Constitution and the second clause of § 1 of the Act of February 28, 1795 (enacted pursuant to this provision of the Constitution), the Court said (7 How. 1, 42-3, 12 L. Ed. 581, 599):

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; *and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence.* . . .
>
> "So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested upon Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, 'in case of an insurrection in any

> State against the government thereof it shall be lawful for the President of the United States, *on application of the Legislature of such State or of the executive (when the Legislature cannot be convened),* to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.'
>
> "By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. *He is to act upon the application of the Legislature or of the executive,* and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act." (Emphasis added)

In the same case, distinguishing between the President's power to call out the militia to repel invasion (provided in the first clause of § 1 of the Act of February 28, 1795) and the authorization for a call to suppress an insurrection against a State government (provided in the second clause of the same section), the Court remarked (7 How. 1, 44-5, 12 L. Ed. 581, 600):

> "A question very similar to this arose in the case of *Martin* v. *Mott,* 12 Wheat. 29-31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. *The power given to the President in each case is the same, with this difference only: that it cannot be exercised by him in the latter case, except upon the application of the Legislature or executive of the State.*" (Emphasis added)

Martin v. *Mott,* 12 Wheat. 19, 6 L. Ed. 537 (1827) (cited in *Luther* v. *Borden, supra*), upheld the punishment by court-martial of a militiaman who refused to obey the orders of the President calling him into the public service under the Act of 1795. The power exercised by the President in this case was the authority granted by the Congress

to call forth the militia in cases of actual or imminent invasion. As pointed out later by the Court in *Luther* v. *Borden,* such power could be exercised by the President without the necessity of an application from the legislature or executive of a State. Yet, even in this case involving the power to repel threatened invasion—which is certainly a higher power than the authority given to the United States by the Constitution to protect the States against "domestic violence"—the Court cautioned (12 Wheat. 19, 29, 32, 6 L. Ed. 537, 540-1):

> "The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. . . .
>
> "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself."

The limits imposed by the Constitution upon the power of the United States over the internal affairs of a State were clearly indicated, in terms of Art. IV, § 4, in *South Carolina* v. *United States,* 199 U.S. 437 (1905), where it was held that license taxes charged by the Federal Government upon persons selling liquor were not invalidated by the fact that they were agents of a State engaging in that business. There the Court remarked (*id.* 451):

> "Each State is subject only to the limitations prescribed by the Constitution, and within its own territory is otherwise supreme. *Its internal affairs are matters of its own discretion.* The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of government.' Art. IV, sec. 4. *That expresses the full limit of national control over the internal affairs of a State.*" (Emphasis added)

In *United States* v. *Cruikshank,* 92 U.S. 542 (1876), indictments under the Enforcement Act of May 31, 1870, were dismissed essentially for the reason that they charged no more than a conspiracy to commit a breach of peace within a State. The factual situation was closely similar to that presented in the present case, and the Court's statements regarding the guaranty of Art. IV, § 4, are particularly apposite (*id.,* 593):

> "The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted. . . . There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. *Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the Executive, when the Legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution, art. IV, sec. 4; but it applies to no case like this.*" (Emphasis added)

That the United States, in enforcing the equal protection guaranteed by the Fourteenth Amendment, is limited strictly by the Constitutional mandate to guarantee to the States a republican form of government, was stated clearly by the Court in *Cruikshank* (92 U.S. 542, 554-5):

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not . . . add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the

> States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

The difference between "mere police duty in the States" (cf. *United States* v. *Cruikshank, supra*), which is not a necessary or proper function of the Federal Government, and the protection of the national interest in a stable form of government, which is an appropriate task for the United States to undertake, is graphically illustrated by *Commonwealth* v. *Nelson*, 350 U.S. 497 (1956). The Court held that the Smith Act of 1940, as amended in 1948, which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.

This Court noted in *Nelson* that its decision did not "limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds" (350 U.S. 497, 500, n. 8), quoting the following language from the opinion of the Supreme Court of Pennsylvania in the same case (377 Pa. 58, 70, 104 A. 2d 133, 139 (1954)):

> "Nor is a State stripped of its means of self-defense by the suspension of its sedition statute through the entry of the Federal Government upon the field. *There are many valid laws on Pennsylvania's statute books adequate for coping effectively with actual or threatened internal civil disturbances.* As to the nationwide threat to all citizens, imbedded in the type of conduct interdicted by a sedition act, we are—all of us—protected by the Smith Act and in a manner more efficient and more consistent with the service of our national welfare in all respects." (Emphasis added)

Both this Court and the Supreme Court of Pennsylvania recognized that the duty of suppressing sedition within a state—unlike the function of local law enforcement—is

placed directly upon the Federal Government by virtue of the constitutional provision charging the United States with the duty of guaranteeing to every state a republican form of government. Quoting from the Congressional finding of necessity in the Subversive Activities Control Act of 1950, this Court said (350 U.S. 497, 504-5):

> "Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. . . . It accordingly proscribed sedition against all government in the nation—national, state and local. Congress declared that these steps were taken 'to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government * * *' [50 U.S.C. § 781 (15)]. Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem. As was said in the court below:
>
> > " 'Sedition against the United States is not a *local* offense. It is a crime against the *Nation* * * *'." [377 Pa., at page 76, 104 A. 2d, at page 142.] (Emphasis in original)

Nor may the determination of these delicate and difficult issues be avoided as involving no more than a political question.

In our more enlightened era, an objection that a suit seeks protection of a political right "is little more than a play on words." *Nixon* v. *Herndon,* 273 U.S. 536, 540 (1927); *Baker* v. *Carr,* 369 U.S. 186, 209 (1962).

In *Luther* v. *Borden,* 7 How. 1 (1849), this Court implied that the "political barrier" question was not an absolute. In *Baker* v. *Carr,* this Court commented on the *Luther* case, thusly (369 U.S. 186, 222, n. 48):

> "Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the

> Court plainly implied that the political question barrier was no absolute: 'Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.' 7 How., at 45. Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of 'republican form', and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented."

Mr. Justice Douglas, concurring in the same case, approved the determination of this question by the judicial branch, saying:

> ". . . that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable."

He further said (369 U.S. 186, 242, n. 2):

> "What he [Justice Woodbury in *Luther* v. *Borden*] wrote was later to become the tradition, as expressed by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U.S. 378, 401: 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are *judicial questions.*" (Emphasis supplied)

Georgia v. *Stanton*, 6 Wall. 50, 18 L. Ed. 721 (1867), was no more "political" than a host of others this Court has entertained. See e.g. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Alabama* v. *Texas*, 347 U.S. 272 (1954); *Baker* v. *Carr*, *supra*.

Today, would this Court hold non-justiciable or "political" this suit to enjoin the Secretary of Defense from acting under an order which would allow him to use mili-

tary force and take over the law enforcement machinery of a sovereign State? As Mr. Justice Douglas said in *Baker* v. *Carr,* 369 U.S. 186, 246, n. 3 (1962):

> "Georgia v. Stanton (U.S.) 6 Wall. 50, 18 L. Ed. 721, involved the application of the Reconstruction Acts to Georgia—laws which destroyed by force the internal regime of that State. Yet the Court refused to take jurisdiction. That question was no more 'political' than a host of others we have entertained. See, e.g. Pennsylvania v. West Virginia, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658, 32 ALR 300; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 26 ALR 2d 1378; Alabama v. Texas, 347 U.S. 272, 98 L. Ed. 689, 74 S. Ct. 481.
>
> "Today would this Court hold non-justiciable or 'political' a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?
>
> "Georgia v. Stanton (U.S.) 6 Wall. 50, 18 L. Ed. 721, supra, expresses a philosophy at war with Ex parte Milligan, 4 Wall. 2, and Duncan v. Kahanamoku, 327 U.S. 304, 90 L. Ed. 688, 66 S. Ct. 606. The dominance of the civilian authority has been expressed from the beginning. See Wise v. Withers (U.S.) 3 Cranch 331, 337, 2 L. Ed. 457; Sterling v. Constantin, 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190, supra, note 2."

While this Court is possessed of neither the purse nor the sword, it should not abdicate its jurisdiction behind any guise of non-justiciability or "political" question, where the facts specifically show that the executive branch of government is exercising an arbitrary power which can only lead to ultimate despotism.

The State of Alabama has standing, as *parens patriae,* to protect its citizens against the breach of the duty on the part of the United States to guarantee to it a republican form of government. This Court has held that a state has standing to sue to protect its sovereign right to take

game. *Missouri* v. *Holland,* 252 U.S. 416 (1919). Is not the right to local self-government and the handling of domestic affairs of more importance than the right to shoot and take wild ducks? The people of each State compose a State, having its own government, and endowed with all the functions essential to *separate and independent existence.* Without the States in the Union, there could be no such political body as the United States. *Texas* v. *White,* 7 Wall. 700, 725 (1868). As this Court further stated in *Texas* v. *White* (*ibid.*):

> ". . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

On its face it might seem that this Court's cases of *Georgia* v. *Stanton,* 6 Wall. 50 (1867), and *Mississippi* v. *Johnson,* 4 Wall. 475 (1867), are contrary to the argument here made. But a close look at these cases shows that the issues are different. In *Georgia* v. *Stanton, supra,* the Congress had clearly refused to recognize the existence of a valid State government in Georgia. The case of *Mississippi* v. *Johnson, supra,* only stands for the elementary proposition that this Court will not accept a bill requiring it to direct the President in the personal performance of his discretionary powers.

Under this set of facts, therefore, we submit that there is a justiciable controversy, and there are presented to this Court for review serious questions touching the continuance of constitutional law in this Nation under our federal system. We further submit that the Constitution of the United States also provides, in the Ninth and Tenth Amendments thereto, that all powers not expressly delegated in the Constitution are reserved to the People or to the States. The enforcement of its laws and the suppression of domestic violence have, since time immemorial, been a function of

State government. The continued presence of the troops of the Armed Forces within the State of Alabama under the threat that they will be used can only mean that we are on the threshold of a military dictatorship unless this Court restrains the use of said troops in accordance with our prayer for relief in this case.

3. The sending of troops into Alabama under the circumstances of this case is not authorized by the plain language of 10 U.S.C. § 333; or if 10 U.S.C. § 333 could be so interpreted it would be clearly unconstitutional

The President's telegram to Governor Wallace, dated May 13, 1963, states in pertinent part (Exhibit A):

> "In response to the question raised in your telegram of last night, Federal troops will be sent into Birmingham, if necessary, under the authority of Title 10, § 333, Paragraph 1 of the United States Code relating to the suppression of domestic violence."

About 3,000 troops were in fact sent to Alabama and a command post was set up in Birmingham.

10 U.S.C. § 333, cl. 1, authorizes the President to use the militia or the armed forces "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy," but specifically limits any action thereunder to situations where

> "the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection."

Such was not the case in the State of Alabama on May 13, 1963, and is not the case now. The constituted authorities of that State have at all times been able, and have not failed or refused, to protect any and all rights, privileges, and immunities, and to afford the protection named in the Constitution.

That the military powers of the President acting under constitutional provisions are limited, and can be questioned by the courts in their exercise, is clearly shown by *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). An Executive Order directing the Secretary of Commerce to seize steel mills was held to be unauthorized by Constitutional provisions granting powers to the President, particularly Article II,* even though the order was made on findings of the President that his action was necessary as a war measure to avert a national catastrophe which would inevitably result from a stoppage of steel production during the Korean conflict. *A fortiori,* the exercise of military powers by the President under statutory provisions should be carefully scrutinized by this Court, and permitted only when clearly authorized by the statute.

The concurring opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co., supra,* contains statements which are pertinent to the case at bar. This opinion points out (343 U.S. 579, 644-5):

> "There are indications that the Constitution did not contemplate that the title Commander-in-Chief *of the Army and Navy* will constitute him also Commander-in-Chief of the country, its industries and its inhabitants . . . .
>
> "That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history . . . .
>
> "It also was expressly left to Congress to 'provide for calling forth the Militia to execute the laws of the

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* "The executive Power shall be vested in a President . . ." "he shall take care that the Laws be faithfully executed" "shall be Commander in Chief of the Army and Navy of the United States."

> Union, suppress Insurrections and repel Invasions. . . .'[11] Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights.[12] On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when *expressly* authorized by the Constitution or by Act of Congress.[13]

"[11] U.S. Const., Art. I, § 8, cl. 15.

[12] 14 Stat. 29, 16 Stat. 143, 8 U.S.C. § 55 [later transferred to 42 U.S.C. § 1993, and repealed, 71 Stat. 637 (1957)].

[13] 20 Stat. 152, 10 U.S.C. § 15 [now 18 U.S.C. § 1385, the so-called 'posse comitatus' statute]." (Emphasis in original)

The principles expressed by the Court in *Youngstown Sheet & Tube Co.* are equally applicable to Art. IV, § 4, in the present case and the statute invoked by the President must be read in the light of these provisions. As an analogy, we can take the interpretation of militia statutes under Art. I, § 8, cl. 15, which conferred upon the Congress the power:

> "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

In addition to the lack of any application by the State of Alabama for the protection of the State against "domestic violence," the significant fact is that there did not exist in the State at any pertinent time the kind of "domestic violence" which statutes empowering the domestic use of the Armed Forces have long been interpreted to encompass. All of the situations to which such statutes have been historically applied presented cases of "domestic violence" similar to, or closely approaching, "insurrection." The

commonly accepted definition of the latter term—which certainly does not apply to the facts of the present case—is (Webster's New International Dictionary, 2d ed., 1959):

> "Act or instance of revolting against civil or political authority, or the established government."

The type of situation to which the constitutional power to suppress insurrection by military means was, nearly a century ago, held to be inapplicable is aptly illustrated by *Raymond* v. *Thomas*, 91 U.S. 712 (1875). The Court voided an order of a military commander in South Carolina, during the Reconstruction Period, which wholly annulled a decree in equity made by a competent judicial officer of South Carolina. Even though the statutes under which the officer acted gave "very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction" (*id.*, 715), the Court refused to tolerate this kind of interference in the internal affairs of a State.

Borrowing from the opinion in *Raymond* v. *Thomas,* it is respectfully submitted that "the clearest language would be necessary" to justify a finding that the Congress intended 10 U.S.C. § 333 to be applied merely for internal police purposes, as is being attempted in the present case (91 U.S. 712, 715). Such use of the Armed Forces is, indeed, "an arbitrary stretch of authority, needful to no good end that can be imagined" (*id.*, 716).

This Court has been reluctant to interpret statutes as extending the military power to supplant civilian authority except where absolutely essential for protection against invasion or similar strictly military purposes. Not even the existence of a major war was thought to be sufficient justification for the imposition of complete martial law, in *Duncan* v. *Kahanamoku,* 327 U.S. 304 (1946). There the essential question was whether the Hawaiian Organic Act during the period of martial law during World War II

gave the armed forces power to override civilian authority and to substitute military decisions for judicial trials under the emergency conditions existing in Hawaii at that time.

Section 67 of the Organic Act (31 Stat. 141, 48 U.S.C. § 532) authorized the governor to place the Territory under martial law "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it."

Failing to find an answer to the question of the scope of "martial law" in either the language or the legislative history of the Organic Act, the Court looked to other sources in order to interpret that term. The Court said (327 U.S. 304, 319):

> "We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act . . . .
>
> "People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which according to the government Congress has authorized here. In this country that fear has become part of our cultural and political institutions."

The Court concluded (*id.*, 324):

> "We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of 'martial law' it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase 'martial law' as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."

Similarly, 10 U.S.C. § 333 is taken from the old Ku Klux Act passed on April 20, 1871, 17 Stat. 14. As background for the Reconstruction Statute, this Court said in *United States* v. *Williams,* 341 U.S. 70, 74 (1951):

> "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate."

The same theme was followed in *Collins* v. *Hardyman,* 341 U.S. 651, 656-7 (1951), where this Court, speaking of another of the Reconstruction Acts, said:

> "This statutory provision has long been dormant. It was introduced into the federal statutes by the Act of April 20, 1871, entitled, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes'. The Act was among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liability with which we are here concerned as well as other civil liabilities, together with parallel criminal liabilities. It also provided that unlawful combinations and conspiracies named in the Act might be deemed rebellions, and authorized the President to employ the militia to suppress them. The President was also authorized to suspend the privilege of the writ of habeas corpus. It prohibited any person from being a federal grand or petit juror in any case arising under the Act unless he took and subscribed an oath in open court 'that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy'. Heavy penalties and liabilities were laid upon any person who, with knowledge of such conspiracies, aided them or failed to do what he could to suppress them.

> "The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."

This Court said in *Collins* v. *Hardyman, supra,* that the Civil Rights Acts were not to be used to *centralize power so as to upset the federal system.* If this Court validates the actions taken by the President in this case, then there is no limit to his power to use Armed Forces in any State at any time to suppress any type of violence including street fights. Executive power will then have become absolute.

10 U.S.C. § 333 has never before been invoked except for the specific enforcement of federal court orders where State authorities were directly obstructing the court's mandate.

Thus, in 1957 President Eisenhower employed federal troops to enforce federal court orders in connection with integration of the public schools in Little Rock, Arkansas. The legal basis for such action is to be found in the Opinion of the Attorney General, entitled "President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas," which states (41 Op. A.G., November 7, 1957):

> "Congress declared in this statute [10 U.S.C. § 333] when the execution of the laws is so hindered, *without State protection,* the State shall be considered to have denied the equal protection of the laws secured by the Constitution.
>
> "I also advised you that the execution of the laws of Arkansas and of the United States within the State of Arkansas was being hindered by unlawful combinations so as to deprive people in that State of a right, privilege, immunity, or protection named in the Constitution and secured by law, *and that the appropriate*

> *State authorities were unable, unwilling, or failed to protect that right, privilege, immunity, or to give that protection.* The requisites of law were met (10 U.S.C. 333)." (Emphasis added)

A further objection to interpreting 10 U.S.C. § 333 as authorizing troops in the present case is that this would directed conflict with 18 U.S.C. § 1385, the so-called posse comitatus statute. This Act provides:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Construing this statute, a federal district court recently held that even the use of an Air Force helicopter and its personnel to aid in a State's search for a nonmilitary prison escapee was forbidden, and that such personnel were so acting beyond their authority that the United States could not be held liable for their alleged negligence (*Wrynn* v. *United States,* 200 F. Supp. 457 (E.D.N.Y. 1961)). Concerning 18 U.S.C. § 1385, the Court said (*id.,* 464-5):

> "*The legislative history leaves little doubt that the statute is indeed meant 'to preclude the Army* [*or Air Force*] *from assisting local law enforcement officers in carrying out their duties'* (Gillars v. United States, 1950, 87 U.S. App. D.C. 16, 182 F. 2d 962, 972. Compare Chandler v. United States, 1st Cir., 1949, 171 F. 2d 921, 936) . . . .
>
> "The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing '*the inherited antipathy of the American to the use of troops for civil purposes.*' (Sparks, National Development 1877-1885, p. 127, in Vol. 23, The American Nation, A History.)

> Its relevancy to this age is sadly clear (1957, 41 Op. A.G. No. 67) . . . .
>
> "Given the statute and its continuing vitality, *the use of the helicopter and its personnel here to aid in executing the laws of New York was a forbidden use.* It could not have been authorized on behalf of the United States by any action short of a Congressional enactment." (Emphasis added)

Further detailing the legislative history of 18 U.S.C. § 1385, the Court stated (*id.*, 464):

> "Mr. Knott, who introduced the Section as an amendment to the Appropriation Bill, assumed only the existence and not the legitimacy of the practice (7 Cong. Rec. 3849) and argued the importance of stopping such uses of the military, under adequate punitive sanctions except where the Congress had expressly authorized the use (7 Cong. Rec. 3846-3847). He envisaged the penalty he proposed as applying to everyone, from the Commander in Chief to the lowest officer, who presumed to take upon himself to decide when he would use the military force in violation of the law of the land (7 Cong. Rec. 3847-3851) and visualized the statute as forbidding every employment of the Army or any part of it in aid of civil law enforcement unless under explicit statutory authorization (7 Cong. Rec. 3849). See, e.g. 10 U.S.C.A. § 331-334 (Presidential powers) . . . . The Senate debate indicated a sense that the section was not limited by the expression 'as a posse comitatus or otherwise' but was to operate as if the prohibition ran—simpliciter—against the use of the Army to execute the laws, without reference to whether employed as a posse comitatus or as a portion of the Army (7 Cong. Rec. 4241, 4245)."

Essentially the only decision of this Court approving the civil use of troops is *In re Debs,* 158 U.S. 564 (1894). There the use of federal troops, as well as the injunctive powers of the federal courts, was approved in quelling the train wrecking and employee attacks in Chicago, Illinois, which accompanied the Pullman strike of 1894. This case is clearly distinguishable from the instant case in that the

Federal Government was there acting to protect interstate commerce and the transmission of the mail, which are clearly national—not local—interests.

Of the two questions presented to the Court, the first question was (*id.*, 577):

> "Are the relations of the general government to interstate commerce and the transportation of the mails such to authorize a direct interference to prevent a forcible obstruction thereof?"

The Court answered this question in the affirmative, stating (*id.*, 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 intrusted 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."

In summary, there is no precedent in the history of the United States for the use of federal troops under the circumstances presented by the instant case. There is no authority for interpreting 10 U.S.C. § 333 so broadly as to permit the present disposition of the Armed Forces within the State of Alabama for the reasons alleged by the President.

Needless to say, Congress cannot enact legislation which is contrary to the Constitution. *Marbury* v. *Madison,* 1 Cranch. 137 (1803). This court has also invalidated executive action where such action was taken pursuant to invalid Congressional delegation. *Cole* v. *Young,* 351 U.S. 536 (1956); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Cf: Peters* v. *Hobby,* 349 U.S. 331 (1955); and *Service* v. *Dulles,* 354 U.S. 363 (1957).

If 10 U.S.C. § 333 were to be interpreted as authorizing such use of the Armed Forces, it would be unconstitutional. We submit that under Art. IV, § 4, of the Constitution, the United States must guarantee to each State a republican form of government and this guarantee must be enforced by the executive, legislative and judicial branches of the Government.

Furthermore, 10 U.S.C. § 333 would be unconstitutional as here applied on the ground of being an invalid delegation of an unlimited discretion to the Executive. Such delegations of power violate the separation of powers structure and should be struck down. *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935). See also *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935).

Finally, an interpretation of 10 U.S.C. § 333 which would authorize the use of federal forces in the instant case would go far beyond any authority which this Court has ever recognized to be vested in the Congress under its power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions (Art. I, § 8, cl. 15), and would contradict the terms of 18 U.S.C. § 1385, the posse comitatus limitation.

4. The ratification of the Fourteenth Amendment by the Southern States was compelled under the same conditions of military duress as is exemplified by the current action of the President in this case and is voidable

We further submit that 10 U.S.C. § 333 would be unconstitutional to the extent that it was passed in furtherance of the Fourteenth Amendment since this Amendment is itself void as lacking proper ratification by the States.

This Court, sitting as a court of equity and as the final arbiter in all controversies wherein constitutional questions are raised, may take judicial notice of what all historians know and have known, and that is, that the Fourteenth Amendment was first rejected by the Southern States but that the Southern States were compelled to ratify the Fourteenth Amendment under federal military authority

as the price of restoration to the Union. The truth surrounding the ratification of the Fourteenth Amendment as known to historians should be vivid to this Court, and for present purposes this Court should refuse to recognize the validity of this Amendment which was secured by means contrary to the processes provided for amending the Constitution which appear in the Constitution itself.

Especially in view of the comments made in *Baker* v. *Carr,* 369 U.S. 186 (1962), this Court has the power to inquire into the interpretive validity of an act of Congress passed in support of a constitutional amendment which was not ratified in accordance with express terms of the Constitution. Nor should this Court decide that the question of such validity is a political one and is therefore non-justiciable.

VIII

CONCLUSION

The sending of troops to Birmingham was unlawful as beyond the power of the President of the United States under the Constitution, outside the limitations of the statute he relied on for taking such action, and has caused and continues to cause irreparable damage to plaintiffs. The motion for leave to file a bill of complaint should be granted and a temporary injunction issued requiring restoration of the status quo by removal of the troops from the Birmingham area.

Failure to do this would in effect destroy our constitutional democracy. The long-continued struggle for liberty under law will have come to an end. For a dictatorship is a dictatorship regardless of its form.

Respectfully submitted,

/s/ JOHN P. KOHN
John P. Kohn,
Of Counsel for Plaintiffs

May 23, 1963

EXHIBIT A

May 13, 1963

To His Excellency George C. Wallace, Governor of Alabama

In response to the question raised in your telegram of last night, Federal troops will be sent into Birmingham, if necessary, under the authority of Title 10, Section 333, Paragraph 1 of the United States Code relating to the suppression of domestic violence. Under this Section, which has been invoked by my immediate predecessor and other Presidents as well as myself on previous occasions, the Congress entrusts to the President on determinations as to (1) the necessity for action (2) the means to be employed and (3) the adequacy or inadequacy of protection afforded by State authorities to the citizens of that State.

As stated, no final action has been taken under this Section with respect to Birmingham inasmuch as it continues to be my hope as I said last night, "that the citizens of Birmingham themselves will maintain standards of responsible conduct that will make outside intervention unnecessary." Also, as I said last Thursday, in the absence of any violations of Federal statutes or court orders or other grounds for Federal intervention, our efforts will continue to be focused on helping local citizens to achieve and maintain a peaceful reasonable settlement. The community leaders who worked out this agreement with a great sense of justice and foresight deserve to see it implemented in an atmosphere of law and order. I trust we can count on your constructive cooperation in maintaining such an atmosphere; but I would be derelict in my duty if I did not take the preliminary steps announced last night that will enable this government, if required, to meet its obligations without delay.

JFK

EXHIBIT B

Excerpt from The Washington Merry-Go-Round, THE WASHINGTON POST, Tuesday, May 21, 1963:

RACE RIOT LAWS

Attorney General Robert Kennedy, prodded by a bipartisan group of Senators, is studying whether he needs new laws to prevent future race riots.

He reported to the Senators in closed session in the Birmingham riots and listened to their suggestions for keeping the peace between Negroes and whites.

Kennedy claimed that the Birmingham police chief actually had done a good job of curbing the riots with a minimum of bloodshed. He blamed Safety Commissioner Eugene (Bull) Connor for what harsh methods were used.

The Attorney General pointed out that no Federal laws were violated in Birmingham, that the only authority the Justice Department had for intervening was an 1871 statute authorizing the Federal Government to suppress violence when it threatened citizens.

This led Sen. Phil Hart, Detroit Democrat, to express "grave concern" over the "legislative gap" in the civil rights laws. He suggested that there was a need for "clearer statutory authority."

Under the present laws, all the Federal Government can do is use its good offices to head off a race dispute or wait until the riot erupts to suppress it.

Sen. Hart suggested that the Attorney General should have authority to go to the courts and get an immediate order against threatened mob action.

This would bring the influence of the court to bear upon the mob leaders in advance and permit the Federal Government to move in with marshals or troops to enforce the court order immediately.

The idea was supported by most of the Senators at the conference, including Mansfield of Montana, Humphrey of Minnesota, Douglas of Illinois (Democrats), Javits of New York, Keating of New York, and Kuchel of California (Republicans).

Indeed, Javits earlier had wanted to offer this idea in the form of a civil rights amendment to the feed grain bill which passed the Senate last week.

But, Humphrey talked him out of it, warning that a public debate at this time would stir emotions and cause more trouble than it would cure.

Humphrey repeated the warning in closed meeting, suggesting that it would be better to discuss civil rights remedies quietly until southern tempers cooled. Sen. George Smathers (D-Fla.) echoed this warning, and the group agreed to keep their discussions behind closed doors.

Attorney General Kennedy agreed to ask his lawyers to study Hart's proposal. Later, the bipartisan group held another private session without the Attorney General and agreed to press him for a finding.