

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
 )  
v. )  
 )  
 )  
MADISON COUNTY BOARD OF )  
EDUCATION, et al., )  
 )  
Defendants )  
 )  
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CIVIL ACTION NO. 63-23

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MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION TO DEFENDANTS' MOTIONS  
TO DISMISS

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THE PROCEDURAL BACKGROUND

(a) The Complaint. On January 18, 1963, the United States of America, plaintiff herein, filed in this Court a complaint, in which two separate claims are stated. In the first claim the Madison County Board of Education, each of its members, and Nathaniel Almon, Superintendent of Education of Madison County, are named as defendants. In the second claim the City of Huntsville Board of Education, each of its members, and Raymond Christian, Superintendent of Education of the City of Huntsville, are named as

defendants. Each of the two claims alleges substantially similar facts with respect to each of the two groups of defendants.<sup>1/</sup> As to each claim the jurisdiction of this Court is invoked under 28 U.S.C. §§1343<sup>2/</sup> and 1345.<sup>3/</sup>

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<sup>1/</sup> As stated in paragraph 30 of the complaint, paragraphs 1, 2, 3, 7, 8, 9, 10, 11, 17, 20, 22, 25, 27, 28, and 29 of the "first claim" are incorporated verbatim into the "second claim." Moreover, other paragraphs of the two claims are substantially identical. Wherever in the following description of the complaint identical or substantially identical paragraphs are described or quoted, a single description or quote will be used where clarity is achieved by so doing, with variations as to one or the other groups of defendants noted in brackets in brackets ( [       ] ). When this is done the relevant paragraphs will be cited by the numbers appearing in both the first and second claims.

<sup>2/</sup> 28 U.S.C. 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
- (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

<sup>3/</sup> 28 U.S.C. 1345 provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

After noting that the State of Alabama maintains a state-wide system of free public schools (paragraphs 3, 30), and that both the Madison County Board of Education<sup>4/</sup> and the City of Huntsville Board of Education<sup>5/</sup> are "vested under Alabama law with the general administration and supervision of the public schools" within their respective domains<sup>6/</sup> (paragraphs 4, 7/<sup>7/</sup> 31), the complaint alleges that the plaintiff maintains, in Madison County, Alabama, the Redstone Arsenal "as a part of its national defense establishment," (paragraph 7, 30) and that approximately 3730 military personnel and 18,890 civilian employees are stationed or employed at Redstone Arsenal<sup>8/</sup> (paragraphs 10, 30).

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<sup>4/</sup> Hereinafter referred to as the "County Board."

<sup>5/</sup> Hereinafter referred to as the "City Board."

<sup>6/</sup> The County Board administers and supervises all of the public schools of Madison County "other than those schools within cities having a city board of education" (paragraph 4). The City Board administers and supervises "the public schools of the City of Huntsville and such adjacent territory as has been annexed as a part of the city school district" (paragraph 31).

<sup>7/</sup> The complaint alleges that the County Board and the City Board maintain and operate, respectively 29 and 28 public schools "for the education of children residing" within the jurisdiction of each Board, "including dependents of members and civilian employees of the plaintiff's Armed Services (paragraphs 12, 34).

<sup>8/</sup> Specifically, the complaint alleges in paragraph 10 that 1,375 military personnel and 8,515 civilian employees are stationed and employed at the Army Ordnance Missile Support Agency; that 2,340 military personnel and 950 civilians are stationed and employed at the Army Guided Missile School; that 15 military personnel and 7,575 civilians are employed at the George C. Marshall Space Flight Center; and that there are 1,850 civilian contractor employees at Redstone Arsenal.

In paragraphs 14 and 36 the complaint states that "under the provisions of Chapter 19 of Title 20, the United States Commissioner of Education has approved and the plaintiff," in the case of the County Board, "has paid," and, in the case of the City Board, "has paid or agreed to pay," for the "construction and improvement of the schools" operated by each Board, grants from 1950 to the present time in the amount of \$527,933.92 to the County Board, and \$4,404,861.47 to the City Board.

The complaint goes on to state (paragraphs 19, 53) that "in connection with each of its applications for a grant under Chapter 19 of Title 20, United States Code," each Board:

\*\*\*gave written assurance, as required by 20 U.S.C. 636, that the school facilities of [The County Board and The City Board] "will be available to the children for whose education contributions are provided ... on the same terms, in accordance with the laws of the state in which applicant is situated, as they are available to other children in applicant's school district."9/

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9/ With respect to the County Board, the complaint enumerates (paragraphs 15 through 18) various school construction projects financed in whole or in part by federal funds supplied pursuant to Chapter 19 of 20 U.S.C. Similarly, in paragraphs 37 through 52 of the complaint, various school construction projects undertaken by the City Board with federal funds are enumerated.

In paragraphs 13 and 35 the complaint states, with respect to each Board, that:

Under the provisions of Chapter 13 of Title 20 of the United States Code, the Commissioner of Education has approved and the plaintiff has paid to the [respective Boards] during the period from 1951 to the present time a total of [\$980,213.00 to the County Board, and \$3,622,666 to the City Board] for the maintenance and operation of its schools. These grants were approved and the payments made on account of the [respective Boards] providing public education for the

(Continued on following page

After noting that approximately 2000 white and Negro children of military and civilian personnel stationed or employed at Redstone Arsenal (of whom 250 are Negro children) attend the public schools operated by the County Board (paragraph 21), and that approximately 9,000 children of military and civilian personnel stationed or employed at Redstone Arsenal (of whom 500 are Negro children) attend the public schools operated by the City Board (paragraph <sup>10/</sup>55) the complaint alleges that "it is the policy and practice of the defendants in operating the public schools under their jurisdiction, to segregate Negro students in separate schools maintained and operated solely for students who are of the Negro race" (paragraphs 22, 30) and, therefore, that:

By reason of the policy and practice [of each group of defendants] to assign students to schools according to their race, all Negro school-age dependents of the members and employees of the plaintiff's Armed Services stationed or employed at Redstone Arsenal and ["residing within Madison County" (paragraph 24); "attending the schools operated by the City Board" (paragraph 57)] are compelled to attend schools operated exclusively for members of the Negro race and are not permitted to attend schools available to white children similarly situated (paragraphs 24, 57).

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9/ (Continued from preceding page)

dependents of members and civilian employees of the plaintiff's Armed Services, and the proceeds ["were used by the County Board" and "were used and are being used by the City Board"] to defray the general cost of maintaining and operating its public schools.

10/ Of the 9,000 children attending city schools, 700 are children of military personnel living within Redstone Arsenal. Of these 700, 17 are Negroes (paragraph 56).

The complaint further contends that (paragraphs 26, 58) each Board "has failed and is now failing and refusing to perform each of its assurances referred to and described in" paragraphs 19 and 53 of the complaint, in that (paragraphs 25, 30) the defendants are now failing (and have failed) to "make the public school facilities \* \* \* available to Negro dependents of the members and employees of the Armed Services of the plaintiff upon the same terms as such facilities are available to white children," and that, moreover (paragraph 27, 30), "the acts and conduct of the defendants \* \* \* violate the Fourteenth Amendment to the Constitution."<sup>11/</sup>

The prayer seeks an injunction restraining the defendants from "segregating or discriminating against, among, or between, upon the basis of their race or color, any dependents of the members or employees of the Armed Services of the plaintiff in the operation of public schools under their jurisdiction, together with such additional relief as may be appropriate."

<sup>11/</sup> In paragraphs 28 and 30 of the complaint, the plaintiffs contend that defendants, unless restrained by the Court, will continue to discriminate against federal children on the basis of race, "thereby violating the written assurances described in paragraph 19 [and 53] and causing irreparable injury to the plaintiff, consisting of impairment of the service and morale of its military and civilian personnel and the separation of servicemen from their families when Negro servicemen send their children to schools outside the area of the military installation at which they are stationed in order to avoid subjecting the children to racial discrimination in the children's education." And in paragraphs 29 and 30 the complaint states that "the plaintiff has no adequate remedy at law."

(b) The Motions to Dismiss. On February 5, 1963, each of the two groups of defendants filed identical motions to dismiss, assigning in each instance eight grounds therefore. The grounds stated are that (1) the complaint fails to state a claim upon which relief can be granted; (2) the Court lacks jurisdiction of the subject matter; (3) the complaint is founded upon an alleged violation of the Equal Protection Clause of the Fourteenth Amendment "and such rights as may exist thereunder are assertable only by those individuals adversely affected by such violation and not by the United States of America"; (4) the suit is a "civil rights action" and "this Court lacks jurisdiction thereof in that the action has not been commenced by a person as required by Section 1343 of Title 28, United States Code;" (5) the four attorneys who "presume to execute the complaint on behalf of the United States of America,<sup>12/</sup> have not shown their authority by Congressional action or otherwise to bring this suit, and, absent such authority, it cannot be maintained as a matter of law;" (6) the Attorney General, Assistant Attorney General, the United States Attorney, the Department of Justice, and "other departments, agencies, officers and employees of the United States have been expressly forbidden, prohibited and denied authority to bring an action" of this type by 20 U.S.C. §242 (a); (7) the United States has not been granted authority to "enforce a civil right of an individual or individuals to attend nonsegregated

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<sup>12/</sup> Assistant Attorney General Burke Marshall, United States Attorney Macon L. Weaver, St. John Barrett, and David H. Marlin.

schools, the factor asserted in the complaint concerning the contribution by the federal government to state schools affording no right to the relief sought \* \* \* and there being no other factor shown by the complaint conferring such authority"; and (8) "it appears from the facts averred in the complaint that these defendants have complied with and performed each of the assurances referred to and described in paragraph[s] 19 [and 53]."

ARGUMENT

I

Introduction

The complaint filed in this action by the United States is grounded upon three independent propositions. Fundamental to each of them is the claim that both the county and the city defendants have refused to allow children of military and civilian personnel at Redstone Arsenal to attend the Madison County and City of Huntsville public schools on a racially non-discriminatory basis. In consequence, we contend, the defendants have violated (1) the "assurances" given by them in obtaining each grant of federal funds for school construction;<sup>13/</sup> (2) the statutory provision which requires the aforesaid "assurance", and (3) the Fourteenth Amendment to the Constitution of the United States, inasmuch as violating the amendment interferes with an interest of the United States. Before proceeding to a discussion of defendants' objections, in the course of which each of our three propositions will be explained, we shall describe, as general background information, the School Construction Act of 1950, which is relevant to most of the questions raised by the motions to dismiss.<sup>14/</sup>

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<sup>13/</sup> The County Board gave the required assurance on each of four occasions in which it applied for federal funds, and the City Board did so on each of twenty such occasions.

<sup>14/</sup> As the complaint states, Madison County and the City of Huntsville have also obtained federal funds

In 1950 the Congress of the United States enacted chapter 19 of Title 20, United States Code (20 U.S.C. §§631 et seq.), The Congressional objectives are set forth, inter alia, in section 631 of the Act, which declares that:

The purpose of this chapter is to provide assistance for the construction of urgently needed minimum school facilities in school districts which have had substantial increases in school membership as a result of new or increased federal activities. 15/

The Act sets forth how the "federal share" of any school construction project is to be computed, depending upon the number and percentage of children of federal employees or servicemen who attend local schools (§§634-635).

Section 636 of Title 20 sets forth in detail the procedures by which local school authorities may apply for federal funds for school construction. Section 636(b)(1) provides that "Each application by a local educational agency shall set forth the project for the construction of school facilities for such agency with respect to which it is filed, and shall contain or be supported by" a number of specifications and "assurances." The

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14/ (Cont. from preceding page)

under chapter 13 of Title 20, 20 U.S.C. §236 et seq. This chapter provides for the payment of general operating and maintenance funds for local school districts. This chapter, however, does not require that the local agency give an assurance comparable to that contained in 20 U.S.C. 636(b)(1)(F). The contributions under chapter 13 are, however, relevant to the question of the standing of the United States to bring suit to enforce the Fourteenth Amendment. See infra, p.

15/ For this purpose funds were authorized to be appropriated. 20 U.S.C. §631.

application must contain a description of the project and site, preliminary drawings of the proposed construction, and other information the Commissioner of Education might require (§636(b)(1)(A)). It must also contain or be supported by an "assurance" that the agency has or will have title to the site or the right to build schools thereon and to operate them for 20 years (§636(b)(1)(B)); an assurance that the agency has legal authority to undertake the construction and to finance its share of the cost (§636(b)(1)(C)); an assurance that the agency will build the school facility within a reasonable time (§636(b)(1)(D)); an assurance that certain minimum wage scales will be adhered to in the construction work (§636(b)(1)(E)); and an assurance that the agency will submit such reports on the project as the Commissioner of Education may require (§636(b)(1)(G))

In addition, section 636(b)(1)(F) requires the school authorities to give an "assurance" that:

\* \* \* the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district \* \* \* \*. 16/

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16/ "School facilities" is defined in section 645(9) to include "classrooms and related facilities", and "initial equipment, machinery, and utilities necessary or appropriate for school purposes." Certain facilities are excluded from the definition.

Section 636(b)(2) then provides that, after the Commissioner of Education reviews the application and satisfies himself as to certain <sup>17/</sup> other matters, he "shall approve" the application. And section 636(c) provides that "No application \* \* \* shall be disapproved in whole or in part until the Commissioner of Education has afforded the local educational agency reasonable notice and opportunity for hearing."

Section 637(a) of the Act then provides that:

Upon approving the application of any local educational agency under section 636 of this title, the Commissioner of Education shall pay to such agency an amount equal to 10 per centum of the federal share of the cost of the project. After final drawings and specifications have been approved by the Commissioner of Education and the construction contract has been entered into, the Commissioner shall, in accordance with regulations prescribed by him and at such times and in such installments as may be reasonable, pay to such agency the remainder of the Federal share of the cost of the project. 18/

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17/ The Commissioner must find that (a) the requirements of section 636(b)(1)(A to G) have been met; (b) the project is "not inconsistent with over-all State plans for" school construction, about which the Commissioner must consult with State and local educational agencies; and (c) that there are sufficient federal funds to pay the "Federal share" of the cost of the project and of other projects having a higher priority. The priority requirement may be waived (§636(b)(2)).

18/ Section 637(b) provides that "Any funds paid to a local educational agency under this chapter and not expended for the purposes for which paid shall be repaid to the Treasury of the United States."

Section 640 of the Act deals with the situation which might arise, with respect to "children who \* \* \* reside on Federal property", in the event that "no tax revenue of the State or any political subdivision thereof may be expended for the free public education of [federal] children", or if, in the "judgment of the Commissioner", after consultation with State officials, "no local educational agency is able to provide suitable free public education for [federal] children." In such cases, section 640 states that the Commissioner of Education "shall make arrangements for constructing or otherwise providing the minimum school facilities necessary for the education of such children."

Moreover, section 640 also deals with situations in which, with respect to children of members of the Armed forces on active duty, "the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner", after consulting the state educational agency, "that no local educational agency is able to provide free suitable public education for such children." In such cases the Commissioner "may", as in the cases of children who reside on federal property, make arrangements to construct or provide school facilities for these children as well, on a temporary basis.

Section 641(a) of the Act allows the Commissioner to take certain action upon violations of the assurances and requirements laid down in

preceding sections for the use of the federal funds once granted. This section provides:

Whenever the Commissioner of Education, after reasonable notice and opportunity for hearing to a local educational agency, finds (1) that there is a substantial failure to comply with the drawings and specifications for the project, (2) that any funds paid to the local educational agency \* \* \* have been diverted from the purposes for which paid, or (3) that any assurance given in an application is not being or cannot be carried out, the Commissioner may forthwith notify such agency that no further payment will be made under this chapter with respect to such agency until there is no longer any failure to comply or the diversion or default has been corrected or, if compliance or correction is impossible, until such agency repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.

Judicial review of any refusal to approve any application for funds, and of any action taken by the Commissioner in cases of deviation from the statutory requirements or assurances, is provided for by section 641(b).<sup>19/</sup>

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<sup>19/</sup> Section 641(b) provides:

The final refusal of the Commissioner to approve part or all of any application \* \* \*, and the Commissioner's final action under subsection (a) of [section 641], shall be subject to judicial review on the record, in the United States court of appeals for the circuit in which the local educational agency is located, in accordance with the provisions of the Administrative Procedure Act.

One such refusal has been reviewed in the courts. School City of Gary v. Derthick, 273 F. 2d 319 (C.A. 7, 1959).

Section 642(a) provides that:

In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency.

Other aspects of the administration of the Act and the general powers of the Commissioner of Education and other federal agencies are dealt with in sections 642 and 643 of the Act. <sup>20/</sup>

## II

### This Court Has Jurisdiction

Both motions to dismiss contend that "it appears upon the face of the complaint that the Court lacks jurisdiction of the subject matter. There is no merit whatever to this argument.

28 U.S.C. 1345 provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

This statute means that whenever suit is brought by the United States, the district court has jurisdiction by virtue of the fact that the United States has brought the suit. United States v. Silliman, 167 U.S. 607 (C.A. 3, 1948), cert. denied, 335 U.S. 825; United States v. Colvard, 89 F. 2d 312, 313 (C.A. 4,

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<sup>20/</sup> Section 644 of the Act authorizes payments to local agencies which cannot meet the requirements of the preceding sections but which need federal funds (except that the assurances and requirements of section 636 (b)(1) apply to these grants as well).

1937); United States v. United States Klans, 194 F. Supp. 897, 899 (M.D. Ala. 1961); United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 854 (S.D. Calif. 1958); United States v. City of Philadelphia, 56 F. Supp. 862, 866 (E.D. Pa. 1944), affirmed, 147 F. 2d 291 (C.A. 3), cert. denied, 325 U.S. 70; cf. United States v. Sayward, 160 U.S. 493 (185); United States v. Conti, 27 F. Supp. 756, 759 (S.D. N.Y. 1939).

As these cases indicate, only agencies or officers of the United States--not the United States itself--need express authority to sue in order to vest jurisdiction in the District courts. The statute itself makes this very clear. It grants jurisdiction "of all \* \* \* suits \* \* \* commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

(Emphasis added). The italicized language obviously refers only to suits brought by agencies and officers, and is immaterial with respect to suits brought by the United States itself. It will be noted that the statutory language is expressed in the disjunctive -- "the United States, or by any agency or officer thereof" -- and that, while there is a comma before the "or", no comma appears after "thereof." This clearly reveals an intention to specify two separate classes, with the language following "thereof," without a grammatical pause, pertaining exclusively to the second class.

To read the statute otherwise would be to render nonsensical the Congressional language, for if "expressly authorized" does not pertain only to

officers and agencies the statute must be read to say that this Court has jurisdiction "of all \* \* \* suits \* \* \* commenced by the United States \* \* \* expressly authorized to sue by Act of Congress." But surely Congress did not grant jurisdiction of "\* \* \* suits \* \* \* expressly authorized to sue \* \* \*." In short, a major reconstruction of the statutory language would be required in order to read "expressly authorized" to modify "United States" as well as "agency or officer thereof". This is surely the place for application of the normal rule that "qualifying words, where no contrary intention appears, be ordinarily applied solely to the words or phrase immediately preceding." Buscaglia v. Bowie, 139 F. 2d 294, 296 (C.A. 1 1943); see also United States v. Hughes, 116 F. 2d 613, 616 (C.A. 1940).

United States v. Silliman, *supra*, would seem to dispose of this issue. In Silliman the Government asserted a common law cause of action in tort, which was sustained by the Court of Appeals for the Third Circuit although no statute authorized the United States to sue to recover tort damages for the particular injury alleged. One of the objections to the maintenance of this suit was that the district court lacked "jurisdiction." But the Court of Appeals for the Third Circuit held (167 F. 2d at 610):

The argument for the defense on this question is phrased in terms of jurisdiction of the United States courts. We do not think this method of approach is convincing nor does it make the point which the defendant really has in mind. If the United States has a cause of action the general

statute [citing 28 U.S.C. 41(1), the similarly-phrased predecessor to 28 U.S.C. 1345] giving jurisdiction to District Courts of the United States is amply clear to show that the forum chosen is an appropriate one.

The Silliman case, then, held that the United States need not be expressly authorized to sue in order to give jurisdiction to the District Courts. See also United States v. Colvard, supra.

The historical development of what is now 28 U.S.C. 1345 is equally persuasive. Article III, section 2 of the Constitution extends the judicial power of the United States "to controversies to which the United States shall be a Party." The Judiciary Act of 1789 gave the district courts jurisdiction "of all suits at common law where the United States shall sue," and gave the circuit courts jurisdiction "of all suits of a civil nature at common law or in equity where "\* \* \* the United States are plaintiffs, or petitioners." 1 Stat. 77, <sup>21/</sup>78. It was not until 1815 that Congress dealt with suits by officers of the Government. By 3 Stat. 244, 245, district and circuit courts were granted jurisdiction of "all suits at common law, where the United States, or any officer thereof, under the authority of any act of Congress, shall sue", thus adding to the original grant. <sup>22/</sup>In 1875 (18 Stat. 470) the

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<sup>21/</sup> This and some subsequent statutes contained a jurisdictional amount requirement.

<sup>22/</sup> It would have been possible to read the act of 1815 to require express statutory authority even where the United States sued, because of the comma appearing after "thereof" and the general structure

circuit courts were granted jurisdiction of suits at common law and equity "in which the United States are plaintiffs or petitioners." No mention was made of suits by federal officers, which presumably could still be brought under the 1815 statute. See Hart & Wechsler, The Federal Courts & The Federal System 1107, note 4 (1953). The final product (except for minor changes in phraseology added by the 1948<sup>23/</sup> revision of The Judicial Code was created by the act of 1911 (36 Stat. 1087, 1091) described by Hart & Wechsler, supra, at 1107-1108, as follows:

When the circuit courts were abolished in 1911, their jurisdiction in suits by the United States was transferred to the district courts. To it was added cognizance of all civil actions, equitable as well as legal, brought by federal officers "authorized by law to sue \* \* \*."

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22/ (Cont. from preceding page)

of the language of the Act. Yet it is perfectly clear that such an idea was not entertained by the Supreme Court, as Cotton v. United States, 11 How. 229 (1850), makes clear. Cotton was a suit by the United States for trespass quare clausum fregit. No statute authorized the Government to maintain such a suit. Defendants challenged the Government's standing, and the Supreme Court held that the United States, as a body politic, could maintain an action for tort, just as a private person or corporation could. Had the 1815 Act meant what defendants say section 1345 (the language of which is much less favorable to their contention than was the language of the 1815 Act) means, the Supreme Court would not have reached the standing question, for the suit would have had to be dismissed for lack of jurisdiction of the subject matter. But no one disputed the court's jurisdiction. This decision plainly indicates that the Court believed the United States courts had jurisdiction whenever the United States brought suit, even without statutory authority. Accord: United States v. Silliman, supra.

23/ And the addition of the word "agencies."

This historical development was recently reviewed in United States v. California, 208 F. Supp. 861, 864 (S.D. Calif. 1962), as follows (all deletions, noted by \* \* \*, are the court's):

Moreover, the First Congress, while declaring in §13 that the Supreme Court generally had exclusive jurisdiction of all cases wherein a State was a party, at the same time expressly conferred upon the circuit (trial) courts of the United States original jurisdiction of "all suits of a civil nature \* \* \* where \* \* \* the United States are plaintiffs \* \* \*." [Judiciary Act of 1789, §11, 1 Stat. 78 (1789).]

Throughout their long history, the trial courts of the United States have retained this same "original jurisdiction" of all civil cases wherein "the United States are plaintiffs". [See: Act of March 3, 1875, §1, 18 Stat. 470, as amended, 24 Stat. 552 (1887) and 25 Stat. 434 (1888); Judicial Code of 1911, §24, 36 Stat. 1091 (1911); 28 U.S.C. 41(1), as amended, id. §1345 (1948).] So it is that 1345 of Title 28 of the United States Code now stipulates that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States \* \* \*." [ibid.]

The grant to Federal trial courts of "original jurisdiction of all civil action \* \* \* commenced by the United States" has never been displaced. . . .<sup>24/</sup>

In short, the antecedents of 28 U.S.C. 1345 reveal two separate bases of jurisdiction, which have at times been combined in a single statute (as now) while always retaining their independent character: suits by the United States, and suits by federal officers (and, since 1948, agencies) authorized by

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<sup>24/</sup> Last deletion, noted by . . ., added.

law to sue. It cannot, therefore, be denied that under 28 U.S.C. 1345 this Court has jurisdiction of this case, by the mere fact that the United States is the plaintiff.<sup>25/</sup>

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<sup>25/</sup> Since it is so clear that the District Court has jurisdiction under section 1345, it is not necessary for this Court to decide whether jurisdiction also exists under the Civil Rights Act, 28 U.S.C. 1343.

III

The Complaint States A Claim For Relief Enforceable at The Suit of The United States

As earlier stated, the Complaint in this case is grounded upon ~~three~~ independent propositions, each of which, in our view, would support an independent claim upon which relief could be granted. And, we submit, the United States has "standing" -- i.e., authority -- to assert each of these legal bases for relief. Defendants, however, dispute both the existence of a cause of action (Motions to Dismiss, paragraphs I, VII & VIII) and the standing of the United States to sue to enforce any cause of action which may exist (Id. at III, V, VI, & VII). For purposes of clarity we shall consider seriatim each legal basis for relief and the standing of the United States to assert it.

A. Breach of Assurance

1. As the complaint states, each time the defendant boards filed an application for a federal school construction grant, they included therein the "assurance" required by 20 U.S.C. §636 (b) (1) (F).

This section provides:

Each application \* \* \* shall contain or be supported by --

assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the state in which the school district of such agency is situated, as they are available to other children in such school district \* \* \*.

This assurance is explained by House Report No. 2810, 81st Cong., 2d Sess., p. 15 (1950), as follows:

This provision is intended as a safeguard against discrimination against categories of children mentioned in the bill as such, but it is not intended to disturb classification on jurisdictional or similar grounds or patterns of racial segregation established in accordance with the laws of the State in which the school district is situated (emphasis added).

Both the statute itself and the legislative history reveal that the assurance would not affect or require any change in racial segregation practices if those practices were established by state law. No other meaning can be given to the statutory phrase "in accordance with the laws of the state"<sup>26/</sup> and to the phrase of the House report referring to segregation "established in accordance with the laws of the State \* \* \*." Of course, Alabama law no longer requires racial segregation in public schools, (1) because it cannot, Brown v. Board of Education, 347 U.S. 483<sup>27/</sup> (1954), (2) because the state constitutional provision and laws which once required such segregation have been repealed, see Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, 379-380 (N.D. Ala. 1958), affirmed per curiam, 358 U.S. 101, and (3) because the existing state pupil placement law, by enumerating seventeen factors which local boards "shall consider in assigning pupils, excludes

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<sup>26/</sup> See, however, pp. , infra, in which we explain that implicit in the statute is the requirement that the "terms" imposed upon local children, by which the rights of federal children are measured, are only those terms which are not inconsistent with the Constitution of the United States.

<sup>27/</sup> The Constitution of the United States is as much the law of the state as anything appearing in the state statutes or Constitution. Neal v. Delaware, 103 U.S. 370, 389-390 (1881).

race as a factor which may be considered in the assignment of pupils to public schools in Alabama.<sup>28/</sup>

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<sup>28/</sup> The Alabama Pupil Placement law, Title 52 §61(4), Recompiled code of Alabama (1958) provides in pertinent part:

Authority and responsibility of local boards for assignment, transfer and continuance of pupils; factors to be considered. - Subject to appeal in the limited respect herein provided, each local board of education shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the board as provided herein, the board may exercise this responsibility directly or may delegate its authority to the superintendent of education or other person or persons employed by the board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect or admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

(Continued on following page)

As the three-judge district court said of the Alabama Pupil Placement Act in Shuttlesworth v. Birmingham Board of Education, supra at 384, "The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color" (emphasis added).<sup>29/</sup>

Since state law not only does not require but forecloses pupil assignment on the basis of race, it is clear that the assurance has been violated by the defendants. The assurance requires that, irrespective of how local students are treated in fact, federal children must be treated according to the laws of the state. Thus, while perhaps in fact the defendants do not permit local Negro children to attend "white" schools, their action in so doing violates the law of Alabama and cannot, therefore, be used as the basis for measuring the treatment due federal Negro children.

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28/ (Continued from preceding page)

Local boards of education may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth. (1955, pp. 493, 494, §4; 1957, pp. 484, 485, §4.)

29/ In affirming per curiam, the Supreme Court said that "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision. 162 F. Supp. 372, 384." 358 U.S. 101.

The standard to be used in measuring the treatment due federal children is the standard contained in state law. Since the defendants are assigning federal children on a racial basis, they are violating state law; ergo, they are violating the assurances which they gave the plaintiff.

Moreover, the fact is that federal Negro children are being excluded from the majority of schools attended by local children. Inasmuch as the statute requires that school facilities must be made available to the federal children on the same basis as they are available to local children, it follows that, without more, all of the federal children are entitled to attend these same schools -- unless the local school authorities can point to some reason for not permitting such attendance. The only reason the Board has for excluding these federal children is that they are Negro and that the Board is entitled to bar their access to these schools because local Negro children are being similarly treated.

This defense, however, must be rejected by this Court, for two reasons. First, the segregation of local children is unconstitutional. The Constitution is "color blind," as Mr. Justice Harlan noted long ago in Plessy v. Ferguson, 163 U.S. 537 (1896), and the "indiscriminate imposition of inequalities" can never justify discrimination which violates the Constitution, Shelley v. Kraemer, 334 U.S. 1 (1948). Thus defendants simply may not be heard to say that their treatment of federal children is lawful because their treatment of local children is unconstitutional. It would be absurd for a federal court to entertain such a defense. Cf. Hurd v. Hodge, 334 U.S. 24 (1948).

Secondly, defendants may not be heard to say this because this defense is not available under the statute here in question. While we think it clear (see supra pp. 22-26) that one standard by which the treatment accorded federal children must be measured is the standard imposed by state law, we also submit that section 636, and the assurances given pursuant thereto, necessarily incorporate as well the standards imposed by the Constitution of the United States. When the statute requires federal children to be treated on "the same terms" as local children are treated, the "terms" to which it refers must be understood to include only constitutional terms. Thus, what the assurance means is that federal children must be treated as local children are required to be treated under state law, but in any event federal children may be treated no worse than the Constitution of the United States requires local children to be treated.

If this were not true it would be necessary to impute to Congress the intention to subject federal children to whatever lawful, arbitrary, and unconstitutional conduct happened to prevail in any given school district. But we think it plain that whenever Congress in general terms incorporates state conduct into a federal statute, the statute incorporates only constitutional state conduct. In Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611 (E.D. Va. 1949) (Bryan, J.), it was argued that a Virginia criminal statute requiring racial segregation in restaurants was applicable to restaurants in the Washington National Airport (located in Virginia). Under 18 U.S.C. §13 (the "Assimilative crimes Act")

any act on a government reservation which is a crime under the laws of the state in which the reservation is located is also a federal crime. The Federal Civil Aeronautics Administrator, however, had issued a regulation prohibiting such segregation at National Airport. Judge Bryan held (81 F. Supp. at 612):

The fundamental purpose of the assimilative crimes act was to provide each Federal reservation a criminal code for its local government; it was intended "to use local statutes to fill in gaps in the Federal Criminal Code." It is not to be allowed to override other "federal policies as expressed by Acts of Congress" or by valid administrative orders, Johnson v. Yellow Cab Co., 321 U.S. 383, 389, 64 S. Ct. 622, 626, 88 L. ED. 814, and one of those "federal policies" has been the avoidance of race distinction in Federal matters, Hurd v. Hodge, 334 U.S. 24, 68 S. Ct. 847. The regulation of the Administrator, who was authorized by statute, Act June 29, 1940, 54 Stat. 686, to promulgate rules for the Airport, is but an additional declaration and effectuation of that policy, and therefore its issuance is not barred by the assimilative crimes statute.

In short, Judge Bryan held that a federal statute incorporating state law as the federal standard did not incorporate state laws which are in conflict with federal public policy. See also United States v. Warne, 190 F. Supp. 645, 658-659 (N.D. Calif., 1960) (three-judge court), affirmed in part and reversed in part on other grounds sub. nom., Paul v. United States, 371 U.S. 245 (1963) (" \* \* \* the Assimilative Crimes Act does not operate to adopt any State penal statutes which are in conflict with federal policy \* \* \*"); Johnson v. Yellow Cab Co., 321 U.S. 389, 389-390 (1944);<sup>30/</sup> Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-104 (1940);<sup>31/</sup> United States v. Unzenta, 281 U.S. 138, 143-144 (1930). At the

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30/ In Johnson v. Yellow Cab Co., supra, the Supreme Court, considering whether a shipment of liquor to Fort Sill, Oklahoma, seized by state officials, should be ordered returned to the shipper by a lower federal court, said (321 U.S. at 389-390):

Petitioners' argument as to the applicability of the assimilative crimes statute raise at least three distinct questions, no one of which is easily resolved: \* \* \* (2) If there are Oklahoma statutes which could be so adopted, are all or any of them in conflict with federal policies as expressed by Acts of Congress other than the assimilative crimes statute or by valid Army regulations which have the force of law? Cf. Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-104.

The Court found it unnecessary to reach the question stated.

31/ In Stewart & Co. v. Sadrakula, supra, the Supreme Court considered the question of whether a state statute concerning the protection of employees in places of work remained effective as a statute of the United States applicable to land after the federal government acquired exclusive jurisdiction thereof. The court held that the New York law continued as a part of the laws of the federal enclave. The court said, however (309 U.S. at 99-104):

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time of the Air Terminal decision racial segregation had not been held to violate the Constitution; it was merely in conflict with federal "policy" and an administrative order. If the Air Terminal decision was correct, then, we submit, it follows a fortiori that section 636 does not incorporate state laws or conduct which violate the Constitution of the United States itself.

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31/ (Cont. from preceding page.)

The Constitution \* \* \* has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of [state] sovereignty which govern the rights of the occupants of the territory transferred. \* \* \* It is urged that the provisions of the Labor Law contain numerous administrative and other provisions which cannot be relevant to the federal territory. \* \* \* With the domestication in the excised area of the entire applicable body of state municipal law much of the state law must necessarily be inappropriate. Some sections authorize quasi-judicial proceedings or administrative action and may well have no validity in the federal area. \* \* \* We do not agree, however, that because the Labor Law is not applicable as a whole, it follows that none of its sections are. We have held in Collins v. Yosemite Park Co. [304 U.S. 518, 532] that the sections of a California statute which levied excises on sales of liquor in Yosemite National Park were enforceable in the Park, while sections of the same statute providing regulation of the Park liquor traffic through licenses were unenforceable.

(Cont. on following page.)

Finally, we think that this construction of the statute is required by the Fifth Amendment to the Constitution of the United States. If the statute makes unconstitutional state action the statutory standard, the statute is itself unconstitutional under the Fifth Amendment, which prohibits governmentally imposed segregation just as the Fourteenth Amendment does. Bolling v. Sharp, 347 U. S. 497 (1954). For example, if a federal child sued under 42 U. S. C. 1983 to gain admittance to the "white" schools in Bossier Parish, the defendants could not justify their action on the ground that it was authorized by 20 U.S.C. 636. If the court held that the statute did authorize their action, it would have to declare the statute unconstitutional. As the Supreme Court held in Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623, "Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States." We think it wholly inadmissible to impute to the Congress of the United States an intention to violate the Fifth Amendment to the Constitution of the United States. And surely a federal statute which is susceptible of two constructions, one constitutional and the other valid, must be construed to sustain its validity.

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31/ (Cont. from preceding page.)

But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the State enactment must, of course, give way.

For all of these reasons we submit that the only "terms" applied to local children by local school authorities which may be considered in measuring the treatment due federal children are constitutional terms. It follows, therefore, that in determining whether the Madison County and City of Huntsville schools are available to federal children "on the same terms" as they are available to local children, it is irrelevant that in fact defendants are treating local Negro children in an unconstitutional <sup>32/</sup> manner.

2. Since the defendants have breached the assurances they gave, it must follow that the United States has standing to maintain this suit.

(a) The "assurance" given by the two Boards in each of their applications is an obligation arising out of a contractual arrangement entered into between the United States and the particular Board. Pursuant to the statute (20 U.S.C. §631 et seq.) the parties entered into an agreement by which the United States would provide school construction funds in

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32/ The meaning of the assurance is clearly a question of statutory interpretation, since the statute requires that the specific terms of the statutory language be incorporated into the application. See Personal Industrial Bankers, Inc. v. Citizens Budget Co., 80 F. 2d 327, 328 (C.A. 6, 1935), cert. denied, 293 U.S. 674; cf. United States v. Lewin, 29 F. Supp. 512 (N.D. Calif. 1939). And the statute obviously refers to the law of the state as it exists at the time of performance. See generally United States v. Sharpnack, 355 U.S. 286, 294-296 (1958); Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 326 (1917); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825). Similarly, the time of performance is also the relevant time with respect to the requirements imposed by the federal constitution. See Neal v. Delaware, 103 U.S. 370 (1881).

exchange for certain "assurances" on the part of the Board. An "assurance" is a promise, Caband v. Federal Insurance Co., 37 F. 2d 23 (C.A. 2, 1930), and the entire arrangement, as prescribed by the statute, has all the characteristics of an ordinary contractual transaction. When the United States makes a grant with the expectation of obtaining benefits in return therefore, and extracts promises in exchange, the grant is not a mere "gift", unaccompanied by any obligation on the part of the grantee, but is, on the contrary, a part of a binding contractual arrangement. In Burke v. Southern Pacific Ry. Co., 234 U.S. 669 (1914), the Court said, with reference to a federal grant of land to a railroad (234 U.S. at 679):

We first notice a contention on the part of the mineral claimants to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company \* \* \*. The purpose was to bring about the construction of the road, with the resulting advantage to the government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. And when, by constructing the road and putting it in operation, the company performed its part of the

contract, it became entitled to performance by the government \* \* \* the grant should not be treated as a mere gift.

See also United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921); <sup>33/</sup> Helvering v. Northwest Steel Mills, 311 U.S. 45 (1940); Oregon & California Ry. Co. v. United States, 238 U.S. 393 (1915); United States v. Northern Pacific Railway, 311 U.S. 317 (1940); United States v. San Francisco, 23 F. Supp. 40, 45 (N.D. Calif. 1938), rev'd 106 F. 2d 569 (C.A. 9), rev'd, aff'g District Court, 310 U.S. 16 (1940).

These cases indicate that in general, when the government grants money upon certain conditions or obtains certain promises in exchange therefore, the grant is to be considered a contract, enforceable as such at the suit of either party. The grants made pursuant to the federal school construction act are no different. Here the United States agreed, by approving the applications, to make certain payments in exchange for certain promises; and it did make such payments. Indeed, even if the contracts were not now fully executed on the government's part, the statute makes it clear that once the statutory conditions are met the government is obliged to approve (or "accept") and to pay. The statute declares that,

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<sup>33/</sup> In the Northern Pacific case the Court said: \* \* \* the Act and resolution [of Congress] embodied a proposal to the company to the effect that if it would undertake and perform that vast work, it would receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract \* \* \*".

if the conditions specified are met, the Commissioner "shall approve" the application, 20 U.S.C. 636(b)(2), and he "shall pay" to the local school agency the funds agreed upon according to the statutory scheme. 20 U.S.C. 637(a), 637(b). Any doubt whether the Commissioner is bound to approve and to pay is dispelled by the provisions for a hearing and for judicial review of an adverse decision. 20 U.S.C. 636(c), 641(b).

In return for payment, the Board has agreed to do certain things, specified in Section 636(b)(1), among them to treat federal and non federal children alike. Indeed, this assurance is one of the main inducements for the government to grant the funds, as the assurance itself makes clear by referring to "the [federal] children for whose education contributions are provided in this chapter \* \* \*"., 20 U.S.C. 636(b)(F).<sup>34/</sup> Compare United States v. Northern Pacific Railway, 256 U.S. 51, 58-59 (1921). At this stage the government has paid and the contracts are therefore fully executed on its part. It follows that the defendants continue to be bound by the assurance required by Section 636(b)(1)(F).

(b) Since the defendants are bound by contract not to discriminate racially against federal children in school assignments, it is clear that the United States -- the promisee of the assurance required by Section 636(b)(1)(F) and given in the applications -- has standing to enforce that contractual obligation.

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<sup>34/</sup> See also H. Rept. No. 2810, quoted supra, p. 20.

It has long been settled that, notwithstanding the absence of express statutory authority, the United States has standing to sue to enforce contracts to which it is a party. As early as 1818 in Dugan v. United States, 3 Wheat. 172, 177, the Supreme Court said that "in all cases of contract with the United States, [the United States] must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law \* \* \*. It would be strange to deny them [the United States] a right which is secured to every citizen of the United States." See also Jessup v. United States, 106 U.S. (16 Otto) 147, 152 (1882); United States v. Tingey, 5 Pet. 115, 127-128 (1831).

Similarly, in Cotton v. United States, 11 How. 229 (1850), the Supreme Court said:

\* \* \* the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. \* \* \* Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property.

See also Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956); Hart & Wechsler, The Federal Courts and The Federal System, 1114-1115 (1953); Corwin, ed., Annotated Constitution of the United States of America, 584 (1953).

The absence of express statutory authority to sue to enforce these contracts is, therefore, no obstacle to the maintenance of this suit, for the assurance is enforceable. like any other contract to which the Government is a party.

(c) Defendants contend, however, that  
(Motions to Dismiss, paragraph VI):

The Attorney General, Assistant Attorneys General, United States Attorneys, the Department of Justice, other departments, agencies, officers and employees of the United States have been expressly forbidden, prohibited and denied authority to bring an action on the subject matter which is the basis of this complaint by the provisions of Section 242(a) of Title 20, United States Code.

20 U.S.C. 242(a) provides:

In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency.

While section 242(a) is not a part of the School Construction Act, an identical provision is included in the latter Act. See 20 U.S.C. 642 (a). We submit, however, that neither of these provisions has any application to questions arising out of the assurance required by section 636(b)(1)(F).

First, sections 242(a) and 642(a) say nothing about suits of any kind. These provisions refer only to "direction, supervision, or control." Surely if Congress intended to divest the United States of its common-law remedy for breach of the assurance, it would have chosen more apt language to express this intention. Moreover, it is over the "personnel, curriculum, or program of instruction" that federal officers are forbidden to exercise "direction, supervision, or control." But this suit -- even assuming that "direction, supervision, or control" might conceivably refer to lawsuits -- will not affect local control over the personnel, the curriculum, or the program of instruction in any local school. That language appears to be

limited to control over (1) teachers, (2) what is taught, and (3) how it is taught. This suit, on the other hand, affects only the enrollment of federal children in the local schools. It is only by a strained and artificial interpretation of "personnel" (or perhaps "program of instruction") that the language of 242(a) and 642(a) can be thought to include the question of school assignments for federal children. Considering that the language of the two limitations upon federal power does not in terms refer to suits or to questions concerning the enrollment of federal children, they must be construed in accordance with the strong presumption against a construction of a federal statute that would deprive the United States of a common-law remedy to enforce a right created by that statute (compare The Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227 (1873); United States v. Chamberlin, 219 U.S. 250 (1911); United States v. Stevenson, 215 U.S. 190 (1909); cf. Shriver v. Woodbine Savings Bank, 285 U.S. 467, 477-479 (1932); Territory of Alaska v. American Can Co., 269 F. 2d 471, 477 (C.A. 9, 1959), and the equally compelling presumption applicable to questions of the enforceability of statutes, "against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience," United States v. Powers, 307 U.S. 214, 217 (1939); Bird v. United States, 187 U.S. 118, 124 (1902). If section 642(a) is construed as defendants would have it, the assurance provision of the Act, section 636, would be rendered wholly ineffective and nugatory.

The legislative history of section 242(a) (which was enacted contemporaneously with section 642(a)) demonstrates quite clearly that its language was not intended to be applicable to questions arising out of the assurance requirement of section 636. The House Report reveals that the restrictions contained therein were enacted because of the Committee's view that "the personnel, curriculum, or program of instruction \* \* \* will be of no concern to the Federal Government"

<sup>35/</sup>  
(emphasis added). Since that is so, it is plain that the general language of sections 242(a) and 642(a) has no application to the problem of the availability of school facilities to the federal children, since that availability is expressly, by statute, made the concern of the federal government.

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<sup>35/</sup> The full comment of the Committee on section 242(a) is as follows (H. Rept. No. 2287, 81st Cong., 2d Sess., p. 23 (1950)):

Section 7 provides that the bill shall be administered by the Commissioner of Education, and specifically forbids him, or any department, agency, or employee of the United States from exercising any direction, supervision, or control over the personnel, curriculum or program of instruction of any school or school system of any local or State educational agency. Apart from the rare occasions when the Commissioner of Education himself will have to arrange for the education of certain children (see sec. 6), the personnel, curriculum, or program of instruction of any State or local school system will be of no concern to the Federal Government. It will, of course, be necessary for the Commissioner to require school officials, as a condition to receipt of federal payments, to comply with reasonable Federal requirements concerning the making of applications and the furnishing of information necessary for the determination of eligibility and the amount of payment. But these requirements can be met without any Federal interference with the traditional prerogatives of State and local educational agencies in educational matters.

Finally, even if it be thought that the general language of sections 242(a) and 642(a) might conceivably be so distorted as to cover the same subject matter included in section 636(b)(1)(F), a fundamental canon of statutory construction forbids the interpretation for which defendants contend. Section 636 specifically declares that, however "local" the question of the treatment of federal children might otherwise be thought to be, the federal government has an interest in their treatment and has expressly determined to assure a particular standard of treatment. The specific and express statement contained in section 636 must then prevail over the general language of sections 242(a) and 642(a). In Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957), the Supreme Court held that:

However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment ... Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

See also D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204 (1932); MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944).

Defendants apparently suggest, however, that while it is clear that under section 636 the question of the treatment of federal children is a matter of federal interest, sections 242(a) and 642(a) mean that no suit may be brought to enforce that undoubted federal interest. This, however, is but another way of saying that the assurance required by section 636 is meaningless, a mere scrap of paper, an illusory promise which may be violated by the defendants with absolute impunity.

Analogous contentions made in other cases to the effect that for one reason or another conditions attached to federal grants cannot be enforced by the United States have not enjoyed a favorable reception in the Supreme Court. See, e.g., United States v. San Francisco, 310 U.S. 16 (1940), where the Court, rejecting such an argument, said that "the City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted."

That is exactly what defendants are arguing here. And this argument is spun out of a statutory provision which, on its face, does not appear to be applicable to the question of the enforceability of the assurance. To so construe the statute would violate yet another canon of construction, described by the Supreme Court as a "cardinal rule," that, "if possible, effect shall be given to every clause and part of a statute." D. Ginsberg & Sons, Inc., v. Popkin, 285 U.S. 204, 209 (1932). And, as we have said, to construe 242(a) or 642(a) as defendants suggest would nullify the equal treatment assurance.

For all of these reasons we think it plain that the United States is not barred from suit by the language of 20 U.S.C. 242(a) or 642(a).

B. Breach of The Assurance As a Violation of the Statute

Even if an enforceable contractual obligation was not created when the defendants gave the several assurances required by 20 U.S.C. 636(b)(1)(F), we submit that the statute itself implies that the

assurance is enforceable in a court of law. While §636(b)(1)(F) is cast in terms of a requirement that each applicant assure the Commissioner that equal treatment will be afforded, its substance is that no entity which has given the assurance shall treat federal children other than as required therein. Whatever the particular phraseology of section 636(b)(1)(F), nice technical distinctions as to form or language are inapplicable in the interpretation of federal grants made under an act of Congress. Ervein v. United States, 251 U.S. 41 (1919); cf. Searight v. Stokes, 44 U.S. (3 How.), 150, 166-167 (1845)<sup>36/</sup>. And federal grants have always been considered as having the force of law as well as creating contractual relationships. Oregon & California Ry. Co. v. United States, 238 U.S. 393, 415 (1915), held that "\* \* \* there may be a difference in rigor between public and private

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<sup>36/</sup> In Searight v. Stokes, *supra*, the Court said (44 U.S. (3 How.) at 166-167):

But in interpreting these contracts the parties, the relation in which they stand to one another, and the objects they evidently had in view, must all be considered. And we should hardly carry out their true meaning and intention if we treated the contract as one between individuals, bargaining with each other with adverse interests, and should apply to it the same strict and technical rules of construction that are appropriate to cases of that description. This, on the contrary, is a contract between two governments deeply concerned in the welfare of each other \*\*\*\*."

grants and \* \* \* this court has said that railroad grants have the command and necessarily, therefore, the effect of law \* \* \*." See also Helvering v. Northwest Steel Mills, 311 U.S. 46, 51 (1940); United States v. City & County of San Francisco, 23 F. Supp. 40, 45 (N.D. Calif. 1938), rev'd., 106 F. 2d 16 (1940), rev'd., aff'g., district court, 310 U.S. 16 (1940). Thus we think the authorities demonstrate that section 636 itself requires -- even apart from contract -- that the defendants must do what the statute prescribes.

2. If section 636 requires compliance with its terms, we submit that it must be enforceable. Otherwise, once the schools have been constructed and final payment has been made, there would be no means of enforcing compliance with this assurance, surely a result not intended by the Congress.

The authority to enforce section 636 by injunction is, therefore, inferable from the statute itself. The same considerations which led the Supreme Court to hold a provision of a federal statute governing navigable waters enforceable in United States v. Republic Steel Corp., 362 U.S. 482 (1960), are applicable here. In that case the United States sued to enjoin the defendants from depositing industrial waste in the Calumet River without a permit. Section 10 of the statute said:

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited.

The court of appeals held that this provision was not enforceable by injunction at the suit of the United States, but the Supreme Court reversed. Although another provision of the Act expressly authorized suits to remove "structures," the statute was silent as to suits to remove "obstructions" under section 10, and the defendants' action amounted to an obstruction.

Notwithstanding the possibility that the specific remedy provided for one violation excluded that remedy for other violations, the Supreme Court, quoting Sanitary District of Chicago v. United States, 224 U.S. 413 (1912), held that "no statute is necessary to authorize this suit." 362 U.S. at 492. The Court said (Ibid.):

The Court [in Sanitary District] held that the Attorney General could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend. Section 10 of the present Act defines the interest of the United States which the injunction serves.

\* \* \* \*

Congress has legislated and made its purpose clear; it has provided enough federal law in §10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation (emphasis added).

The authority to institute suit, then, was inferred from the fact that otherwise an important provision of law would be nugatory and that the existence of the statutory provision evidenced a sufficient interest of the United States to imply a remedy in the statute. That is precisely what we urge here. And this proposition is consistent with the principle, applicable, inter alia, to questions of the enforceability of statutes, that "there is a presumption against a construction which would cause grave public injury or even inconvenience", United States v. Powers, 307 U.S. 214, 217 (1939); Bird v. United States, 187 U.S. 118, 124 (1902), and the equally compelling dictum of the Court in Gemsco, Inc. v. Walling, 324 U.S. 244, 266-267 (1945), where a similar question arose as to authority to institute

suit to enforce the terms and conditions of a wage order, that "Congress did not include authority to prescribe 'terms and conditions' merely as a preachment."

Here, there is every reason to infer a power to enforce the assurance in the courts. There is every reason to avoid a result that would render the assurance ineffective or relagate it to the status of a mere "preachment." It follows, then, that section 636(b)(1)(F) is enforceable in the courts because the power to do so is implied in the very nature of the statute.

C. Violation of the Constitution

We have heretofore demonstrated that the United States has (1) an enforceable cause of action in contract, even in the absence of statutory authority, and (2) an enforceable cause of action arising by implication from the requirement of section 636, even disregarding the contractual obligation. There is yet another basis upon which the standing of the United States may be independently grounded.

It is important here to clear away some of the underbrush growing out of defendant's motions to dismiss for lack of jurisdiction. The motion argues that the United States seeks to assert here the general power to sue to enforce the equal protection of the laws when denied to any citizen. Whatever the scope of the Attorney General's authority to do that, no such question is involved in this case. Rather, we assert here a more circumscribed interest of the United States.

We submit that the United States has independent standing to enforce the Fourteenth Amendment when its violation interferes with an interest of the United States and burdens the exercise of a constitutional function entrusted by the Constitution to the Federal Government. We wish to emphasize that it is the interest of the United States, and not the individual interest of federal children, which we assert here. This suit is not brought on behalf of anyone else; it is brought by and on behalf of the United States itself, to enforce its interest that the

federally-connected children not be discriminated against on account of race or color. This distinction is well illustrated by Heckman v. United States, 224 U.S. 413 (1912), a suit by the United States to set aside conveyances of Indian lands which had been made in violation of Congressional restrictions. Objection was made to the standing of the United States. The Supreme Court, holding that the United States could sue, said that enforcing the restrictions on alienation, "while relating to the welfare of the Indians, \* \* \* is distinctly an interest of the United States." So here, while enforcement of the Fourteenth Amendment relates to the welfare and rights of the federal children, the United States has its own, separate, independent interest in the guarantee of the equal protection clause as it applies to those children.

It has long been settled that violations of the Fourteenth Amendment may result in legal damage to persons other than those discriminated against, and that a suit to enforce the Amendment may be brought by such other persons. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 535-536 (1925); Barrows v. Jackson, 346 U.S. 249, 259-260 (1953). If, therefore, discrimination against federal children has invaded a legal interest of the United States, the United States has standing to sue to enjoin that discrimination.

The interest of the United States upon which we rely here may be briefly stated. It rests upon three separate foundations. First, it rests upon the

fact that Congress has by legislation declared the United States interested in and affected by the treatment afforded children of military personnel and dependants working upon military bases. This it has done by enacting 20 U.S.C. 636(b)(1)(F). As the Supreme Court said of a similar statute in the Republic Steel case, supra, the statute "\* \* \* defines the interest of the United States which the injunction serves." The assurance provision, in other words, is declarative that the United States has an official and direct interest in ensuring that federal children receive the treatment which the statute describes.

Secondly, the interest of the United States rests upon its obligation to ensure the efficient operation of its Armed Forces, upon which all of its other interests, and the interests of the States as well, ultimately depend. This interest is interfered with when a State or its subdivisions imposes upon children of its military personnel invidious distinctions based upon race or color.

The federal government has recognized, years before the Brown decision, that racial discrimination in its Armed Services impairs morale and interferes with efficiency. It therefore abolished discrimination in the ranks by executive order<sup>37/</sup>. Discrimination against the children of such personnel, although more indirect, surely works a hardship upon Negro servicemen. These servicemen have no choice about where they shall be stationed. They did not elect to come to Alabama. True, their families so elected, but it can hardly be

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37/ See Executive Order No. 9981 (July 26, 1948)

open to question that the efficient operation of the Armed Forces, these days, requires families to accompany servicemen from base to base at least within the continental United States. As the complaint states, the Armed Services and the Congress have long recognized the necessity and have carried out a program of constructing housing for Service families in order to enable military families to live together. But when a Negro serviceman finds that his children must attend segregated schools in Alabama, it is inevitable that will affect his outlook, morale, and attitude. In turn, his reaction affects the United States which, of course, must maintain an efficient fighting force.

Indeed, in this case the impact of segregation upon the common defense is aggravated by the fact that Redstone Arsenal is the center of important research and development in vital programs the success of which may well be essential to national survival. In carrying out these programs the Government cannot compel scientists and technical personnel to work in Alabama. It must rely upon the free choice of these highly skilled personnel, whose talents are hardly in oversupply, to come to Redstone Arsenal. But when Negro scientists and technicians do so, they meet racial discrimination against their children. The inevitable impact of such discrimination upon the defense of the nation is surely a matter of serious concern to the United States.

It has long been settled that interests of no greater magnitude will support a suit by the United States in the absence of statutory authority. Thus,

for example, the United States has been held to have power to seek injunctive relief to remove a burden imposed by private persons upon the constitutional function of carrying the mail and regulating interstate commerce. In Re Debs, 158 U.S. 564 (1895). And the Supreme Court has sanctioned suits by the United States to set aside a land patent obtained by fraud (United States v. San Jacinto Tin Co., 125 U.S. 273 (1888), to cancel invention patents obtained by fraud, (United States v. Bell Telephone Co., 128 U.S. 315 (1888) to cancel conveyances of Indian lands, (Heckman v. United States, 224 U.S. 413 (1912), to remove obstructions to interstate commerce in navigable waters, Sanitary District of Chicago v. United States, 266 U.S. 405, 425-426 (1925); United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960), and for the recovery of tideland property claimed by the states, United States v. California, 332 U.S. 19 (1947). Lower federal courts have also permitted suits by the Attorney General to enjoin the operation of a radio broadcasting station in interstate commerce without a federal license, United States v. American Bond & Mortgage Co., 31 F. 2d 448 (N.D. Ill. 1929), aff'd, 52 F. 2d 318 (C.A. 7, 1931), cert. denied, 285 U.S. 538 (1932), and to bar unlicensed commercial enterprises in national parks, Robbins v. United States, 284 Fed 39 (C.A. 8, 1922).

In Paul v. United States, 371 U.S. 245 (1963), the United States sued California on the ground that the state's price regulation scheme "was an unconstitutional burden on the United States in the exercise of its constitutional power to establish and maintain the Armed Forces."<sup>38/</sup> In affirming the issuance of an injunction, the Supreme Court held that "the issue as to whether or not the State regulatory scheme burdened the exercise by the United States of its constitutional power to maintain the Armed Services \* \* \* was a substantial federal question." Cf. United States v. Georgia Public Service Commission, 371 U.S. 285 (1963). In this case, as we have said, the imposition of racial discrimination upon federal children burdens the exercise of this constitutional power, and the Paul case establishes that such a burden may be removed by a suit brought by the United States without express statutory authority.

This, then, is a separate interest of the United States: the interest it has in maintaining an efficient armed forces. It should be quite evident that this interest is far different in kind from its general interest, so hotly controverted by defendants, in ensuring to every citizen the guarantees of the Fourteenth Amendment.<sup>39/</sup>

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<sup>38/</sup> See U.S. Const., Preamble; Art. I, §8, Cl. 1, 11, 12, 13, 14; Art. II §2, 3.

<sup>39/</sup> We also think that the United States may assert yet another independent interest -- its interest, arising from the near-absolute control which it exercises over servicemen, in ensuring that they are not denied the rights guaranteed them by the Fourteenth Amendment. Cf. Heckman v. United States, 224 U.S. 413 (1912), where the Supreme Court held the United States could sue to void conveyances of Indian lands because the Government had an independent interest in the suit arising out of the peculiar character of the relationship between the United States and the Indian tribes.

Finally, the United States has a pecuniary interest in the subject matter. The United States has granted to the County Board a total of \$527,933.92 in federal funds for school construction,<sup>40/</sup> and to the City Board a total of \$4,404,861.47 in federal funds<sup>41/</sup> for the same purpose. The valid and lawful utilization of these funds is a proper concern of the Government.

In sum, aside from the contractual obligation owing the United States by the defendants, and the implied statutory authority to sue, the United States has an independent interest in enforcing the Fourteenth Amendment because (a) 20 U.S.C. 636(b)(1)(F) declares the interest of the United States in the availability of schools to federal children, (b) discrimination against federal children interferes with and burdens the maintenance of the Armed Forces, and (c) the United States has a pecuniary interest in the subject matter.<sup>42/</sup>

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<sup>40/</sup> And \$980,213 for operating expenses.

<sup>41/</sup> And \$3,622,666 for operating expenses.

<sup>42/</sup> Moreover, we think that the federal government is sufficiently involved in the education of the federal children so that the strictures of the Fifth Amendment apply to this case. The federal government has arranged, by statute and by contract, for the education of federal children. It has provided several million dollars in federal funds to the local boards on the basis of the number of federal children attending local schools. It has, in short, paid for the education of federal children and arranged for that education. This involvement of the United States is analogous to situations in which the courts have held that a state has become sufficiently involved in private activity so that the Fourteenth Amendment applies thereto. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Allen v. County School Board, 198 F. Supp. 497 (E.D. Va. 1961). Under the circumstances, we believe the federal government has an obligation under the Fifth Amendment (which, like the Fourteenth, prohibits racial discrimination, Bolling v. Sharp, 347 U.S. 497 (1954)) to ensure that these federal children are treated without discrimination on the basis of race or color. And this obligation carries with it the power to sue to remove obstacles to the fulfillment of that obligation. Cf. Brewer v. Hoxie School Dist., 238 F.2d 91 (C.A. 8, 1956).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the motions to dismiss should be overruled.

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