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4 Expense of enforcing the desegregation order at the University of Mississippi

Opponents of the action taken by the Administration at the University of Mississippi frequently have pointed to the expense of maintaining troops and marshals for the protection of a single person. In connection with this issue, the opinion of Attorney General Cushing, in 6 Op. A.G. 466, 472-473, 474, is highly pertinent, especially because the shoe now is on the other foot.

In 1851, a marshal arrested a fugitive slave in Chicago. When a mob threatened to free the latter, the marshal called to his assistance a police force of twelve men and a party of the militia, who were in continuous attendance for five days. The question arose whether this expense was to be borne by the United States or to be taxed to the owner of the slave, who had instituted the proceedings. The Attorney General decided that the costs were to be paid by the United States under the act of August 31, 1852, section 11, 10 Stat. 99, now 28 U.S.C. 1929, originally designed to implement the Fugitive Slave law. He supported this ruling by the following consideration:

> "I repeat, the posse comitatus to aid the officer of the law in the execution of his duty is in the service of the Government, not in the service of the individual who sues out the process of the law to have the justice of the nation administered to him, which administration is of the duty of the Government. To guard against violence by wrongheaded, misguided, disloyal citizens, or by foreign force, is an important obligation of every Government,--the grand purpose and consideration, indeed, for which it is instituted.

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Hence, when the officer of the law deems it necessary and proper to raise the posse comitatus, to aid and assist him in executing the process of the law, the extraordinary expense thereby incurred is properly payable by the Government. Expenses to be paid by the parties litigant are ordinary fees, certainly fixed and taxable, as costs against the party at whose particular instance the ordinary services, in the usual calm and peaceful administration of justice, have been performed, and which the successful litigant recovers of his adversary, as taxed costs for his personal wrong and injury. But it would be contrary to all reason, and wholly unjust, to burden either party with the extraordinary expenses incurred by the officer of the law in raising the posse comitatus, and keeping them in his employment for five days, or more, in aiding him to perform his duty in obedience to the precept of the law, and in defending its process against the threatened tumults and riotous conduct of lawless men." (pp. 472-473)

The opinion concludes:

"This statute of 1850 is enacted to execute a provision of the Constitution, the due and complete execution of which intimately concerns the fate of the Government of the United States and the integrity of the Union. Such a statute deserves, and will receive, a beneficial construction, so that the mischiefs intended to be guarded against may be suppressed by the full use of all the remedies provided by Congress." (p. 474)

If these considerations applied to a statute such as the fugitive slave law, they are all the more pertinent to a Constitutional provision such as the Fourteenth Amendment, which gives legal form to the self-evident truth that all men are created equal, the motto under which we claimed our independence.