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cc: Files
Mr. Kramer
Mr. Ulman
Mrs. Copeland ✓

4 MAY 10 1960

4 MEMORANDUM FOR THE ATTORNEY GENERAL

4 Re: Federal authority to cope with possible armed clash between local police forces and Negro demonstrators.

This is in response to your oral request for the views of this Office on the above subject. The question is occasioned by recent newspaper reports suggesting a tense racial situation in Birmingham, Alabama. It is conceivable that this may give rise to an armed clash between the police forces of that city and its Negro population in the event of large-scale demonstrations by Negroes against claimed racial inequality of treatment in public places. The past few months have witnessed widespread demonstrations in various parts of the South, particularly aimed at racial segregation in public restaurants. As a result, already difficult racial feelings have been aggravated. In Biloxi, Mississippi, an attempt by Negroes to utilize white bathing facilities resulted in violence between the races. Washington Daily News, April 25, 1960.

In an article appearing in the New York Times on April 12, 1960, pp. 1, 28, one of its correspondents, Mr. Harrison E. Salisbury, describes the Birmingham situation as threatening. Mr. Salisbury reports the view of Negro residents of Birmingham that the situation in the city is not unlike that which existed in South Africa, prior to the recent police action against Negroes in that country. A local reporter advised Mr. Salisbury that Birmingham "is going to blow one of these days." According to Mr. Salisbury, the problem in Birmingham is worsened by the fact that its Commissioner of Police, Mr. Eugene Connor, is an avowed racist whose philosophy is expressed by such aphorisms as, "Damn the law--down here we make our own law", and "white and Negro are not to segregate together." It is also reported that Ku Klux Klan groups are openly active against Negroes and that members of the city police as individuals have participated in terroristic acts against the Negro population. It is said that the Federal Bureau of Investigation has

been asked to investigate whether the police have violated the civil rights statutes. On the other side, the Birmingham governing body, including Mr. Connor, has denounced the New York Times article as an untruthful slander and has retained counsel to bring suit against it. See Daily Cong. Rec., April 19, 1960, App., 3362-3363.

Assuming the possibility that the Birmingham police will resort to the use of armed force against Negro demonstrators, whether justifiably or not, the question is whether the Federal Government has the necessary authority to forestall such an incident or, if violence has broken out, to suppress it. Even if federal military force is eventually required, it is obvious that this method should be adopted only as a last resort. It has been said (Rich The Presidents and Civil Disorder (1941), p. 219):

> "Unless there is some special reason which seems to make imperative the immediate use of the troops, or until all efforts to effect a peaceful settlement have failed and violence threatens of a nature beyond the ability of the local and state governments to control, the president is wise to avoid recourse to force. To use the troops only

> when no other solution seems possible has been the most frequent presidential practice--a practice the value of which is attested by the fact that it has met with complete success."

Accordingly we shall proceed first to consider the availability of judicial remedies, both civil and criminal. We then discuss, on the assumption that a civil remedy is available, namely injunctive relief, the civil processes which may be utilized for coping with resistance to the injunction, including the employment of federal marshals. Finally, we deal with the authority of the President to employ military force should all other methods fail. In this connection we also consider the President's authority to use federal marshals.

I. AVAILABILITY OF JUDICIAL REMEDIES

A. CIVIL REMEDIES

1. In an appropriate situation the United States is empowered to apply to its courts for their aid in dealing with domestic disturbances. Specific statutory authority is not a prerequisite. The leading case is Debs v. United States, 158 U.S. 564 (1895), involving the Pullman strike

of 1894. In that case, the United States Attorney, acting upon direction of the Attorney General, obtained an order from the federal circuit court enjoining the officers of the union and all persons in combination with them from hindering, obstructing, or stopping the business of the railroads involved. The basis of federal jurisdiction was the fact that the railroads were engaged in the interstate transportation of freight and passengers and the carriage of the mail. Certain of the persons covered by the injunction were convicted of contempt of the injunction and their petition to the Supreme Court for a writ of habeas corpus was denied. Because the case is the important precedent in the field, it warrants detailed discussion.

As the Court put it, the case presented two questions of importance (158 U.S., at 577):

> "First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty."

As to the first question, the Court held that while the government of the United States is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers, among which are the power over interstate commerce and the power over the transportation of the mails; that the powers thus conferred were not dormant but had been assumed and exercised by Congress in appropriate legislation; and that, accordingly, the United States could remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. See 158 U.S., at 578-581. The Court then proceeded to consider the means available for removing these obstructions; it said that while the obstructions might be punished as criminal offenses against the United States, that was not the only remedy: "If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in

advance to failure." 158 U.S., at 581-582. But in these circumstances, the national government was not powerless: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. 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." 158 U.S., at 582.

Nevertheless, said the Court, the army was not "the only instrument by which rights of the public can be enforced and the peace of the nation preserved." (158 U.S., at 582); "the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention." Ibid. The argument that equity only intervenes

for the protection of property was held by the Court to be inapplicable where the Government seeks judicial assistance in the exercise of its powers and the discharge of its duties: " * * * while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." 158 U.S., at 586.

As to the contention that the courts seldom assumed jurisdiction to restrain, at the suit of the government, obstructions to highways, the Court said (158 U.S., at 592):

10 "That the bill filed in this case alleged special facts calling for the exercise of all the powers of the court is not open to question. The picture drawn in it of the vast interests involved, not merely of the city of Chicago and the State of Illinois, but of all the States, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts. If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations."

The Court next addressed itself to the argument that since the bill of complaint alleged facts against the defendants constituting criminal offenses ("derailing and wrecking engines and trains, assaulting and disabling employes of the railroad companies"), equity had no jurisdiction because it could not enjoin the commission of crimes. But this principle did not apply, said the Court, where there was an interference with property rights: "In such cases the jurisdiction of the civil

court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction." In the instant case, the complaint was "of disobedience to an order of a civil court, made for the protection of property and the security of rights." 158 U.S., at 593-594.[1]

Summing up its conclusions, the Court stated (158 U.S., at 599-600):

> " * * * the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty;

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[1] The Court's response to this argument is open to question. Presumably, "the injured party" referred to by the Court would be the plaintiff in the equity proceeding. This was the United States. But the United States did not have to show property damage in order to maintain the proceeding, as the Court had previously pointed out. Accordingly, it would seem that the actual holding of the Court was that equity might enjoin the commission of criminal acts at the instance of the Government even if no damage to its property interests were involved.

that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail--an obstruction not only

temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; * * * ."2/

On the authority of the Debs case, it was held in Robbins v. United States, 284 Fed. 39 (C.A. 8, 1922), that the United States was entitled to an injunction restraining the defendant from transporting passengers for hire in a national park in violation of regulations promulgated by the Secretary of the Interior. As to the contentions that the complaint was without equity because no property right was involved and the object of the suit was to enjoin a threatened offense, the court said (p. 46):

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2/ The Court pointed to testimony by one of the defendants that the injunction broke the strike. See 158 U.S., at 597. The fact of the matter is that federal troops were also used. Following an action between the troops and a mob, President Cleveland issued a proclamation on July 8, 1894, justifying the use of troops on the following grounds (see S. Doc. No. 263, 67th Cong., 2d Sess., p. 197, "Federal Aid in Domestic Disturbances"):

> "Whereas, by reason of unlawful obstruction, combinations, and assemblages of persons it has become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings, the laws of the United States within the State of Illinois, and especially in the city of Chicago within said State;
>
> "And whereas, for the purpose of enforcing the faithful execution of the laws of the United States and protecting its property and (cont'd)

Foot note 2 Cont'd on next Page

10 " * * * it is clear the government has important property rights in this park, but in any event its national policy is involved of protecting the public in traveling within the park, and in such a case, injunction is the proper remedy. In re Debs, 158 U.S. 564."

Further support for the Debs principle is to be found in United States v. Petersen, 91 F. Supp. 209, 213 (D.C.S.D. Cal., 1950). There the court stated that the United States is entitled to injunctive relief if necessary "to prevent irreparable injury to federal property rights, to protect

[redacted] removing obstructions to the United States mails in the State and city aforesaid, the President has employed a part of the military forces of the United States;".

Foot note 2 cont'd

The President had earlier advised Governor Altgeld of Illinois as follows (Rich, op. cit., p. 99):

> "Federal troops were sent to Chicago in strict accordance with the Constitution and laws of the United States, upon the demand of the post office department that obstruction of the mails should be removed, and upon the representations of the judicial officers of the United States that the process of the Federal courts could not be executed through the ordinary means, and upon competent proof that conspiracies existed against commerce between the States. To meet these conditions, which were clearly within the province of Federal authority, the presence of troops in the city of Chicago was deemed not only proper, but necessary, and there has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city."

the general welfare, or to abate a general nuisance."[3]

2. The Debs case demonstrates that in a proper case a federal court of equity will, at the suit of the United States, issue an injunction to assist it in dealing with domestic disturbances. The question here is whether such a case can be made out for the Birmingham and similar situations. In such cases the equity jurisdiction of the court will depend upon a showing of an unlawful interference with national interests of a character justifying injunctive relief. There are, of course, significant differences between the interests found to be sufficient in Debs and those which can be asserted here. In Debs the courts utilized the equity power in order to remove illegal obstructions to the flow of interstate commerce and to the carriage of the mails. Each was plainly subject to the plenary power of the Federal Government. No

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3/ The court declined to issue an injunction on the particular facts. It regarded the criminal remedy at law as adequate since all that was involved was the sale of liquor in a national park in violation of regulations issued by the Secretary of the Interior. The court did, however, grant the Government's prayer for a declaratory judgment. This was affirmed on appeal. 191 F. 2d 154 (1951), certiorari denied, 342 U.S. 885 (1951).

federal concern is involved if all that appears is the use of municipal police in a reasonable manner for the legitimate purpose of maintaining law and order in the community. For example, we doubt that the United States could enjoin the police from taking reasonable measures against Negroes who refuse to leave segregated restaurants. Under existing decisions they have no right under the Constitution or laws of the United States to be served at such restaurants. Accordingly, there would seem to be no legitimate ground for federal intervention. A different case would be presented, however, by an armed police assault against a peaceable public demonstration by Negro citizens. It could be forcefully argued that in such circumstances the United States had the right and the duty to apply to its courts for injunctive relief against the police. A tenable ground for such relief would be that the national government is entitled to protect its citizens in the exercise of the right of assembly guaranteed by the First and Fourteenth Amendments

from infringement by either private or official action. See Collins v. Hardyman, 341 U.S. 651, 660, 663 (1951); Board of Education v. Barnette, 319 U.S. 624 (1943). A further ground is that the national authority should be exercised to prevent a class of its citizens from being deprived under color of law of life or liberty without due process. This is a right guaranteed by the Fourteenth Amendment. Its violation is an offense against the laws of the United States. 18 U.S.C. § 242, and see Screws v. United States, 325 U.S. 91 (1945). Such conduct on the part of the police might well be within the ambit of the dictum of the Debs opinion that "[t]he entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." 158 U.S., at 582 (Underscoring added.).

There is another important factor which a federal court might well consider. There is little doubt that a "Johannesburg incident" in the United States would

severely hamper the President in the conduct of our foreign relations. Thereby the defense of the United States would be impaired. A substantially similar reason was advanced by the United States to support its Supreme Court appearance in The School Segregation Cases as amicus curiae. As the Government stated in those cases (Initial brief, p. 6, Nos. 8, 101, 191, 413, 448, O.T. 1952):

> "The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."

This statement was supported by a letter to the Attorney General from the Secretary of State. A like letter would be in order should the Government find it necessary to apply for injunctive relief in the instant situation.

That a forceful argument against equitable relief can be made should be recognized. Such an argument would be based on the Civil Rights Act of 1957. There the Government asked and obtained from Congress the right to sue for

preventive relief with respect to racial discrimination in the exercise of voting rights. 42 U.S.C. § 1971(c). It requested but did not obtain from Congress the right to sue for preventive relief with respect to other civil rights. This was covered by Part III of the bill. That part was deleted by Congress. A fair statement of the position of the Government, as made known to Congress, was that it was quite doubtful whether under existing law it could sue for preventive relief against a violation of the civil rights statutes and that it was limited in that area to criminal prosecutions. Thus, Attorney General Brownell advised the House Judiciary Committee on February 4, 1957:

> "I cannot overemphasize the importance of providing the Department with civil powers and remedies in voting and also in other civil rights cases. * * * criminal sanctions are the only remedies specifically authorized by the Congress. * * * we have no alternative but to proceed, if we are authorized to proceed at all, under the criminal statutes when a violation is found to have been committed and remedial action is indicated."

Similarly, he advised the Senate Judiciary Committee on February 14, 1957, that the proposed legislation, if enacted, "would permit us to take civil remedial action instead of having to depend solely on criminal proceedings."

B. CRIMINAL REMEDIES

There are two criminal statutes of possible relevance: 18 U.S.C. § 241 and 18 U.S.C. § 242:

1. 18 U.S.C. § 241--This section makes it an offense for two or more persons (1) to conspire to injure, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or (2) to go in disguise on the highway or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured. The second portion of the section is obviously inapplicable. The police will be acting openly as a uniformed body. The first portion appears to be limited to conduct which interferes with rights "which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States." United States v. Williams, 341 U.S. 70, 82 (1951). The only distinct federal right involved here is the right of assembly

guaranteed by the First Amendment. Conceivably, a prosecution might lie against members of the police force for violation of the first clause of 18 U.S.C. § 241.

2. 18 U.S.C. § 242--This section makes it an offense for any person under color of law willfully to deprive another of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States. This section was enacted to enforce the Fourteenth Amendment and "its great purpose" is "the protection of the individual in his civil liberties." Screws v. United States, 325 U.S. 91, 98 (1945). It affords protection against officers "who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States." 325 U.S., at 112. And, as stated in that case, acts of police officers "who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." 325 U.S., at 111.

It may be possible to prosecute members of the police for violation of § 242. The theory of the prosecution

would be that the police used their official authority as a pretense and that their real purpose was to deprive Negro demonstrators of their Fourteenth Amendment rights to freedom of assembly (Collins v. Hardyman, Board of Education v. Barnette, supra) and to due process of law. Screws v. United States, supra.

As a practical matter, however, it is questionable whether criminal proceedings would be effective in the circumstances. There is good reason to doubt that a grand jury would return an indictment against members of the police force. Compare The Charles Mack Parker case. Of course, the United States could proceed by way of information, thus permitting the defendants to be arrested. This might be enough even if the defendants should be subsequently acquitted. Removal of the defendants from the scene even for a short time might have the necessary deterring effect. A civil injunction is, however, likely to do more good. As shown below, a violation can be punished by contempt proceedings. As

observed by the Supreme Court in Debs, where the emergency is great and the national interest is gravely imperilled, the United States should not be confined to the doubtful remedy of a criminal prosecution. 158 U.S., at 581-582.

II. CIVIL REMEDIES IN THE EVENT OF NON-COMPLIANCE WITH AN INJUNCTION.

Assuming that a federal court issues an injunction restraining the police from forcible interference with the legal rights of Negro demonstrators, it is conceivable that the police would refuse to comply. Should such an eventuality occur, an effective civil remedy is available to the Federal Government. The Government would be entitled to institute contempt proceedings against the defendants and all persons acting in concert with them. Rule 65(d) of the Federal Rules of Civil Procedure. In Debs the United States successfully prosecuted the defendants for violating the injunction issued by the federal court in that case. A like example in the civil rights field is the case of John Kasper and his associates who were convicted of criminal contempt for acts designed to

frustrate a restraining order in a school segregation case. Kasper v. Brittain, 245 F. 2d 92 (C.A. 6, 1957), certiorari denied, 355 U.S. 834 (1957). And a state official who refused to comply with a federal court decree has been punished for contempt. See the discussion concerning the Bank of the United States litigation in Warren, The Supreme Court in United States History (Rev. ed. 1937), Vol. I, pp. 533-534; 1 Harv. Law Rev. 223 (1887).

It should also be noted that a criminal remedy would be available against resisters who were not covered by the injunction. The civil rights bill recently passed by Congress (H. R. 8601, Title I) adds a new section to the Criminal Code, 18 U.S.C. § 1509, making it an offense by any person to obstruct any court order by force or threat of force, whether the person involved is named in the order or not. While in terms the statute is not restricted to persons not named in the order, it was stated by you in testifying on the Administration bill that it was "not intended to apply to a person who is named in

an outstanding court order"; such a person being answerable in contempt "if he violates or resists the order directed to him." Statement on Proposed Civil Rights Legislation before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 86th Congress, 1st sess., March 20, 1959. It should also be noted that in United States v. Bright, Fed. Cas. No. 14,647 (C.C.D.Pa. 1809), Justice Washington, sitting on circuit, held that a state militia officer who, under the orders of the Governor, employs force to resist and prevent a United States marshal from executing federal court process is subject to criminal prosecution. See Warren, op. cit., I, 385-387.[4/]

In both cases (contempt or violation of a criminal statute) a United States marshal or deputy marshal would be empowered to arrest offenders. He would, of course,

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4/ In connection with this incident (the Olmstead case), President Madison wrote to Governor Snyder of Pennsylvania (21 Ann. Cong. 2269 (1809)):

> " * * * the Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it."

have such authority where he was in possession of a judicial warrant of arrest or attachment covering named persons.[5] He would also have that authority without a warrant or attachment where a federal offense was committed in his presence. See, generally, memoranda of this Office addressed to the Deputy Attorney General, August 25, 1958, August 27, 1958, "U. S. Marshals."[6]

III. AUTHORITY TO USE THE ARMED FORCES OF THE UNITED STATES.

In this section of the memorandum we consider the authority of the Federal Government to employ its military power in a situation like that which may arise in Birmingham. The question is examined from a dual standpoint: (a) where a federal court order is outstanding; (b) where there is no such order. It is also assumed that all other methods for dealing with the problem have failed.

5/ 28 U.S.C. § 547(b) provides that the marshal "shall execute all lawful writs, process and orders issued under the authority of the United States * * * ."

6/ 18 U.S.C. § 3053 provides that marshals may carry firearms and "may make arrests without warrant for any offense against the United States committed in their presence * * * ." It has been uniformly held that criminal contempts are offenses against the United States.

10A. USE OF THE ARMED FORCES WHERE A COURT ORDER IS OUTSTANDING.

There are three federal statutes authorizing the President to use the armed forces of the United States in a domestic disturbance, viz., 10 U.S.C. §§ 331, 332, and 333:

1. Section 331--This section, based on R. S. § 5297, provides that "whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection." It is plain that the authority conferred by this section, even if otherwise applicable, would be of no value here. It may be taken for granted that a request for federal assistance will not be forthcoming from the State.

2. Section 332--This section, based on R. S. 5298, provides that "whenever the President considers that unlawful obstructions, combinations, or assemblages, or

rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion." Its application does not depend upon a prior call by the State for federal aid. The statute was most recently used in connection with the Little Rock incident of 1957, involving forcible mob obstruction of federal court decrees in a school segregation case. See 41 Op. A. G. No. 67 (November 7, 1957). As stated by the Attorney General (Op., 16-17):

> "As applied to the Little Rock events, I advised you that unlawful obstructions, combinations, or assemblages made it impracticable to enforce the laws of the United States in Little Rock by the ordinary course of judicial proceedings (10 U.S.C. 332). The facts upon which these conclusions were based were reported to you as they occurred, and included an account of the determined group of hundreds of men and women bent upon overpowering the local peace officers, the several incidents of violence with their very real and discernible trend toward a larger-scale inflammatory assault,

the action of the Mayor and local authorities in ordering the withdrawal of the Negro students so as to appease the unruly mob, the admission of local authorities that such peace officers as they could command were unable to cope with the disorderly assemblage, and the indifference or refusal of the Governor of the State to supply a sufficient force to quell the lawless movement.

"I also advised you that the local strength of the United States Marshal was insufficient to achieve enforcement of the order of the United States District Court, and that, because of the local situation and the need for timely action, it would not have been reasonable, or effective in the circumstances, to attempt to have the Marshal enlist the support of the citizenry to carry out the court order. In accordance with the salutary policy that the agents of the Federal Bureau of Investigation shall not be used as a national police, you rejected suggestions originating outside the Federal Government that such agents be called upon to enforce the court's orders."

Section 332 has been invoked on a number of previous occasions of mob resistance to federal court decrees. See the compilation in the Government's brief in Jackson v. Kuhn, 254 F. 2d 555 (C.A. 5, 1958), pp. 79-89.[1] Also,

[1] This case, arising out of the use of federal troops in Little Rock, sought to have 10 U.S.C. §§ 332 and 333 declared unconstitutional as applied in the Little Rock situation. The Court of Appeals did not reach the constitutional issues, holding that the district court had properly ruled that in the circumstances of the case the federal courts had no jurisdiction to review the President's decision to invoke these statutes. As to § 333, see infra.

as shown in that brief (pp. 44-58), the phrase "laws of the United States" as used in § 332 covers not merely acts of Congress but federal law in its broadest sense, including orders of a federal court. Accordingly, there can be little doubt as to the President's authority to invoke § 332 should this become necessary to enforce any decree issued by a federal court in the Birmingham situation.

It will be noted that the authority provided by the statute has been utilized on at least two occasions as against the constituted authorities of a state. The first instance occurred in 1832 in connection with the South Carolina Ordinance of Nullification. See Rich, The Presidents and Civil Disorder, pp. 38-50, Sen. Doc. No. 263, 67th Cong., 2d sess., pp. 46-48. The second instance occurred upon the outbreak of the Civil War. After the southern states declared themselves absolved from allegiance to the Union and seized federal forts and arsenals, President Lincoln in 1861 issued a proclamation calling upon the militia of the several states to aid in suppressing

combinations in the seceding states too powerful to be suppressed by the ordinary course of judicial proceedings. S. Doc. No. 263, supra, pp. 85-89.

Moreover, it has been held that the Governor of a State cannot use his military power to prevent the enforcement of a federal court decree. Sterling v. Constantin, 287 U.S. 378 (1932). It would seem therefore that when local authorities undertake to resist such a decree by force they are subject to the overriding authority of the Federal Government which is entitled, if necessary, to use its own military power to overcome the resistance.

3. Section 333.--This section, based on R. S. § 5299 and derived from § 3 of the Act of April 20, 1871, 17 Stat. 13, 14, reads as follows:

> "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."

It would appear that the authority provided by this section is available to cope with mob resistance to a federal court order dealing with constitutional rights. It was so employed in the Little Rock case. In his opinion in that case, the Attorney General stated (41 Op. A. G. No. 67, supra, p. 18):

" * * * 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 * * * the appropriate State authorities were unable, unwilling, or failed to protect that right, privilege, immunity, or to give that protection." /8/

/8/ Presumably the deprivation involved was the equal protection of the laws guaranteed by the Fourteenth Amendment, more precisely, the right to attend a public school without discrimination on account of race or color.

As with § 332, the phrase "laws of the United States" includes orders issued by a federal court. See the Kuhn brief, supra.

It is doubtful, however, whether this section, in contrast to § 332, applies to interference with a federal court order by the constituted authorities of a state or a political subdivision thereof. So far as we know, it has never been so employed (see the compilation in the Kuhn brief, pp. 79-89). Its legislative history (discussed in more detail below), shows that its purpose was to cope with the widespread lawless activities of the Ku Klux Klan in various parts of the South which were aimed at the newly-freed Negroes and their so-called "carpet bag" supporters. See 98 Cong. Globe 317, 321, 366, 428, 448, 459, 461, 483-484; 99 Cong. Globe 606-608, 650, 660.

10 B. USE OF THE ARMED FORCES WHERE THERE IS NO COURT ORDER OUTSTANDING.

1. Section 331 would be of no assistance since its application is dependent upon a prior call for federal aid by the appropriate State authorities. We assume that no such request will be made.

2. We also doubt the applicability of § 332 to state authorities where there is not involved resistance to a decree of a federal court. As pointed out above, § 332 was invoked in Little Rock to deal with resistance to a federal court decree. It is therefore not a precedent here. The section has also been resorted to on a number of previous occasions. See the compilation in the Government's brief in the Kuhn case, supra, pp. 79-89. We do not believe that any of these instances is a valid precedent here. The use of § 332 in railroad strikes of 1877 and the Pullman strike of 1894 was justified on the ground that military force was required to overcome resistance to decrees issued by a federal court. Other cases of the use of the armed forces under the authority of § 332 involved resistance to the enforcement of federal statutes: The Whiskey Rebellion, 1794 (excise tax laws); Fries Insurrection, 1799 (tax statutes); the Embargo Troubles, 1808 (the embargo laws); the South Carolina Ordinance of Nullification, 1832 (the Fugitive Slave Act).

The only instances in which the statute was invoked as against the constituted authorities of a State were in connection with South Carolina's nullification ordinance, supra, and the secession of the Southern states in 1861, when their initial steps were to seize federal property within their boundaries. The Birmingham situation, as we know it, is dissimilar. It does not appear to involve any direct resistance to the enforcement of federal statutes, or the unlawful seizure of federal property.

3. There remains for consideration the application of 10 U.S.C. § 333, the text of which is given supra. In our opinion, it would appear proper to invoke paragraph (1) of this section as a means of coping with violence in Birmingham, even if there is no federal court order involved, provided the circumstances outlined below are found to exist.[2/] We shall proceed first

4/ ##FN9

2/ Paragraph (1) supra, authorizes the use of military force where domestic violence, etc., involves the deprivation of federal rights with respect to a class of the people of a State and the constituted authorities of the State either are unable or refuse to furnish the necessary protection. In such a case the State is considered to have denied the equal protection of the laws secured by the Constitution of the United States.

to an examination of the background of the statute, its legislative history, and previous occasions for its exercise.

(a) As pointed out above, § 333 is derived from § 3 of the Act of April 20, 1871, 17 Stat. 13, 14, "To enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." That Act, as we have shown, was designed to cope with the widespread lawless activities of the Ku Klux Klan in various areas of the South directed against the newly-freed Negroes and their so-called "carpetbag" supporters. It had its origin in the following message to Congress from President Grant dated March 23, 1871 (7 Richardson,

Messages and Papers of the Presidents, 127; House Exec. Doc. No. 14, 42d Cong., 1st Sess.):

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
>
> "Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States.
>
> "It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress.
>
> "There is no other subject upon which I would recommend legislation during the present session."

The theory of § 3 of the Act was that a state, which either lacked the power or the desire to protect a class of its citizens from the terroristic acts of the Ku Klux Klan, was in effect denying to those citizens the equal protection of the laws guaranteed by the Fourteenth Amendment. Representative Stoughton said (98 Cong. Globe 322):

10 "When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to section five, which declares that 'Congress shall have power to enforce by appropriate legislation the provisions of this article' (98 Cong. Globe 322)."

According to Representative Coburn of Indiana (98 Cong. Globe 459):

10 " * * * there is a preconcerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. * * * The States cannot or do not act. Some other power must be invoked. * * * That Power resides in the General Government. * * * Where there is domestic violence and aid is asked by the State, the nation must exercise its authority. Can it do so without invitation? Before the fourteenth amendment it could not unless that violence amounted to an overthrow of republican institutions; then it could; then the invitation is needless, the guaranty must be fulfilled. But now, where the equal protection of the law * * * is denied by domestic violence or any other cause, the nation may interpose to afford it, by legislation, directing the use of military power

> and the interposition of the courts of the United States; and this effort may be aimed at the particular case or State where the difficulty exists, or at all cases of that character whenever and wherever arising. The failure to afford protection equally to all is a denial of it.
>
> * * *
>
> " * * * the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the condition of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government."

And, addressing himself to § 3, Representative Coburn said (id., 461):

> " * * * When the civil power fails, why should these outlaws not be arrested by military power as well as by any other?"

Representative Shellabarger, in charge of the bill, declared that when there was a state of violence in a State which deprived people of their constitutional rights and the State authorities refused to call on the Federal Government for aid, "then they have denied the equal protection of the laws * * * [a]nd it is in the light of a proposition so plain as that we provide this third section * * * ." 99 Cong. Globe App. 71. Representative Beatty said (98 Cong. Globe 428):

" * * * men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons. It is to remedy this evil and cover these proscribed and outraged citizens with the shield of the Constitution that we propose to authorize the President to send military aid to the local authorities in these lawless sections."

According to Mr. Butler, "Nothing but the strong arm of military power will put down military organizations such as the evidence discloses now exists in the South." Id., 448. Representative Blair described the need for § 3 as follows (99 Cong. Globe App. 72):

"The Klans are powerful enough to defy the State authorities. In many instances they are the State authorities. And if you deny to the General Government the authority to interfere, then there is no remedy anywhere. To wait until the State calls for assistance to suppress disorders is to wait, in many instances, for a voice from the grave. The States are prostrate before a power they cannot control."

According to Representative Berry (id., 79), --

" * * * if the violence be unlawful, and not hostile to the State government; if the State authorities be in complicity with it; if it be directed against rights secured by the Constitution and laws of the United States, it is,

of course, not merely domestic to the State, but hostile to the power of the Federal Government, and in the nature of insurrection or rebellion."

Senator Edmunds, the floor manager of the bill in the Senate, explained § 3 as follows (98 Cong. Globe 567-568):

" * * * the President and his forces really act as a posse comitatus, although they are entitled to act under this bill just as police officers are entitled to act as a posse comitatus, so to speak, without a warrant; that is, the President may go in with his forces and seize the conspirators and turbulent and wicked men who are engaged in these acts of violence, without waiting for anyone to swear out a warrant against these people before a commissioner or judge. That is the effect of it. * * *.

* * *

"Then the third section is, as we think, one in entire conformity to precedents and in entire conformity to the principles of the Constitution and of the laws, authorizing the President when the lawful rights of citizens of the United States shall be interfered with and overthrown by unlawful conspiracies, combinations, and insurrections, and when the State shall fail to protect the people in those rights and put down these insurrections, to bring to bear the power of the nation for the purpose of repressing such tumults and disorders, and handing the violators of the law over to justice."

From these statements it is clear that the theory of § 3 was that in the South the state authorities were unable

or unwilling to enforce state laws against the Ku Klux Klan and others who were resorting to terror and violence to prevent the Negroes and their white supporters from exercising their rights to vote and participate in political affairs; that this failure of state law enforcement constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment; and that the section was "appropriate legislation" to enforce this constitutional guarantee./10/

44/ ##FN10

10/ Section 3, as introduced (H. R. 320, 42d Cong., 1st sess.), was the subject of several amendments during the course of its consideration by Congress. In the debate in the House, Congressman Shellabarger, the floor manager for the bill, offered an amendment which added, after the original provision that the domestic violence, etc., so far obstruct or hinder the execution of the laws of a state, the phrase "and of the United States and continued (as in the original bill)--as to deprive any portion or class of people of such state of their constitutional rights. 98 Cong. Globe 477. He said that this was merely "a verbal amendment" (id., 478), and the supporters of the bill continued to treat it as one to enforce the Fourteenth Amendment, without any indication that the change was significant. Id., 481-484, 485-486, 487-488, 508, 514, 516-518. The bill passed the House with this amendment. Id., 521-522.

In the Senate, the Judiciary Committee added, without objection, the words "the Constitution", so as to make the bill cover domestic violence, etc., which deprived ~~(cont'd)~~

Foot note 10 cont'd on next Page

(b) President Grant invoked the provisions of § 3 on October 12, 1871, with respect to certain counties in South Carolina. On that date he issued a proclamation reading in part as follows (17 Stat., App. 950-951):

> "WHEREAS unlawful combinations and conspiracies have long existed and do still exist in the State of South Carolina, for the purpose of depriving certain portions and classes of the people of that State of the rights, privileges, immunities, and protection named in the Constitution of the United States, and secured by the act of Congress approved April the twentieth, one thousand eight hundred and seventy-one, entitled 'An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States;'

Foot note 10 Cont'd

~~for [illegible]~~ persons of rights, privileges, or immunities, or protection "named in the Constitution and secured by this act * * * ." 99 Cong. Globe 703. The Senate also adopted a committee amendment striking from the bill the requirement that the President could act only if the state authorities failed to apply to him for aid in protecting such rights. Ibid. The Senate then agreed to a committee amendment which authorized the President to take action not merely when the domestic violence, etc., obstructed the laws of the state and of the United States, but also "whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same * * * [paragraph (2) in substance of 10 U.S.C. § 333]." Ibid. The House accepted the Senate amendments. Journal of the House of Representatives, 42d Cong., 1st sess., 165.

"And whereas in certain parts of said State--to wit, in the counties of Spartansburgh, York, Marion, Chester, Laurens, Newberry, Fairfield, Lancaster, and Chesterfield--such combinations and conspiracies do so obstruct and hinder the execution of the laws of said State and of the United States as to deprive the people aforesaid of the rights, privileges, immunities, and protection aforesaid, and do oppose and obstruct the laws of the United States and their due execution, and impede and obstruct the due course of justice under the same;

"And whereas the constituted authorities of said State are unable to protect the people aforesaid in such rights within the said counties;

"And whereas the combinations and conspiracies aforesaid, within the counties aforesaid, are organized and armed, and are so numerous and powerful as to be able to defy the constituted authorities of said State and of the United States within the said State, and by reason of said causes the conviction of such offenders and the preservation of the public peace and safety have become impracticable in said counties;

"Now, therefore, I, ULYSSES S. GRANT, President of the United States of America, do hereby command all persons composing the unlawful combinations and conspiracies aforesaid to disperse and to retire peaceably to their homes within five days of the date hereof, and to deliver, either to the marshal of the United States for the district of South Carolina, or to any of his deputies, or to any military officer of the United States within said counties, all arms, ammunition, uniforms, disguises, and other means and implements, used, kept, possessed, or controlled by them, for carrying out the unlawful purposes for which the combinations and conspiracies are organized."

The five day period having expired without effect, the President suspended the writ of habeas corpus[11] and stationed federal troops at various points in the state. All persons known or suspected to be connected with the Ku Klux Klan were arrested. Up to January 1, 1872, more than 600 arrests were made. S. Doc. No. 263, 67th Cong., 2d Sess., p. 103.

(c) In considering the statue, note should be made of Collins v. Hardyman, 341 U.S. 651 (1951) supra, involving the scope of § 2 of the Act of April 20, 1871, now 42 U.S.C. § 1985 (3). That section provides a civil damage remedy for conspiracies, inter alia, "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws,

4/ ##FN11

11/ The suspension of the writ was authorized by § 4 of the Act of April 20, 1871, 17 Stat. 14-15. This section was temporary legislation expiring at "the end of the next regular session of Congress." Under it the unlawful combinations named in § 3 were to be deemed a rebellion against the Government of the United States when so armed and powerful as to be able to defy the local authorities and those of the United States or when the constituted state authorities "are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations * * * ."

or of equal privileges and immunities under the laws." The Court held that these provisions did not cover an alleged conspiracy to deprive plaintiffs of their rights as citizens of the United States peaceably to assemble and to equal privileges and immunities under the laws of the United States in that the defendants proceeded to plaintiffs' meeting place, and by threats and violence, broke up the meeting, thus interfering with the right of plaintiffs to petition the Government for redress of grievances. There was no averment that the defendants were state officers or acted under color of law. The Court stated that, even if it should be assumed that the facts alleged showed that the defendants deprived plaintiffs "of having and exercising a federal right (the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances),[12] the statute did not reach "private discrimination [which] is not inequality before the law unless

44/ ##FN12

12/ The court cited "the dictum" to that effect in United States v. Cruikshank, 92 U.S. 542, 552 (1875) (see 341 U.S., at 660). A minority of the court believed that a cause of action was stated. Justice Burton, speaking for the minority, stated that the right involved was expressly recognized by the First Amendment, and its source was not the Fourteenth Amendment. 341 U.S., at 663.

there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." 341 U.S., at 661. The Court continued, however, as follows (p. 662):

> 10 "We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. Indeed, the post-Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so. It is estimated to have had a membership of around 550,000, and thus to have included 'nearly the entire adult male white population of the South.' It may well be that a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the 'carpetbag' and 'scalawag' governments of the day, was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and those who made up the Ku Klux Klan. We do not know. But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens. California courts are open to plaintiffs and its laws offer redress for their injury and vindication for their rights."

It seems to us that § 333 (1) would authorize the President to use the armed forces if a lawless mob attacked

a peaceable demonstration by Negro citizens in order to intimidate or punish them because they were endeavoring to exercise their constitutional rights and the constituted local authorities failed to act against the mob. Under Collins v. Hardyman, supra, it could be argued that the constitutional right involved was the right of peaceable assembly. Where, however, the demonstration took the form of invading private facilities, such as restaurants, action (at least under existing decisions) beyond the protection of the Fourteenth Amendment, the case for federal intervention would be weak.

We think the same result should follow with respect to an attack by so-called state "special deputies", acting under the pretense of legal authority.[13] Similarly, we think that the President would be empowered to

##FN13

[13] According to a second article by Mr. Salisbury in the New York Times of April 13, 1960, p. 33, "volunteer horse patrols" have been sworn in as special deputies in several counties in Alabama, including Shelby County, adjacent to Birmingham. "They provide their own horses and guns. The Sheriff gives them badges. They are the rough equivalent of vigilantes of the Wild West. One Alabaman who has watched the development closely expressed concern that the posses might assume the character of legalized night-riders."

act under the statute if the attack should come from the police itself, provided there existed reasonable grounds to believe the police were proceeding not for the purpose of maintaining law and order in the community in a reasonable manner but because they were in fact acting in the circumstances as an arm of some such private organization as the Ku Klux Klan, and the Governor of the State refused to intervene./14/

In the absence of grounds for believing that the police are acting in complicity with a private terroristic group, the case for application of the statute presents substantial difficulties. It may be that the use by the police of excessive force would subject them to prosecution for violation of 18 U.S.C. § 242, penalizing acts which willfully deprive persons of any right secured to them by the Fourteenth Amendment. See Screws v. United States, 325 U.S. 91 (1945), supra. While it

44/ ##FN14

14/ In the same article, Mr. Salisbury reports that Ku Klux Klan groups are flourishing openly in Alabama, including Birmingham, and that Klan members "have called openly on Governor John Patterson in the Governor's mansion in Montgomery." It may be that Police Commissioner Connor has some affiliation with these groups.

would seem that where the normal judicial processes cannot be utilized to prevent unwarranted police action, and the State authorities remain passive, the President should have the power to restrain the police by military force, if need be, it is questionable whether the statute, reasonably construed, so provides./15/ It is doubtful that the mere exertion of force by the constituted

44 ##FN15

15/ In several familiar dicta the Supreme Court has stated, without reference to statute, that the Federal Government can employ its armed forces, if need be, to compel obedience to its laws and to protect the lives of its officers and its property. Ex parte Siebold, 100 U.S. 371, 395 (1879); In re Neagle, 135 U.S. 1, 65 (1890); In re Debs, 158 U.S. 564, 582 (1895). On the basis of such dicta, the Attorney General in his opinion in the Little Rock case referred to the constitutional power of the President to use the armed forces in that situation. 41 Op. No. 67, p. 15. However, in that instance, and apparently in all other instances, the Presidents have deemed it expedient to rely on the authority conferred by statute. If the case for the use of military force cannot be justified from a statutory standpoint, it is questionable that the President should proceed on the basis of his constitutional authority alone. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the steel seizure case). Even in the Neagle case in which it was said that the President might, without specific statutory authority, use the marshals of the United States to protect the life of a federal judge, the Court went on to justify such use on statutory grounds. See 134 U.S., supra, at 68-69.

authorities of a State, even if unwarranted in the circumstances, can be regarded as embraced by the language of § 333, which limits the President's authority to the suppression of "any insurrection, domestic violence, unlawful combination, or conspiracy." Apart from the use of the military against the rebellious Southern states in 1861, we are aware of no other instance in which the President has resorted to such measures in a domestic situation.

10 C. USE OF FEDERAL MARSHALS AS AN ALTERNATIVE TO THE USE OF MILITARY FORCE.

As has been shown above, the marshals of the United States are the appropriate federal officers for executing the process of the federal courts. Accordingly, should the Birmingham situation involve resistance to a decree of a federal court, the marshals may be employed without reference to the President's authority to use the armed forces of the United States. If there is no court decree involved, the authority to use marshals to deal with the situation would depend on the President's powers under the

statutes permitting him to employ the armed forces. We have already indicated the doubtful applicability to the Birmingham situation of the provisions of 10 U.S.C. § 332 in the absence of a court decree. If, however, as has been shown, a case can be made out for the application of 10 U.S.C. § 333, we are of the opinion that that section is broad enough in terms to justify the President in using federal marshals instead of the military, should this be deemed desirable. It will be noted that the statute authorizes the President to take such measures as he considers necessary to suppress the insurrection, etc., "by using the militia or the armed forces, or both, or by any other means." While the legislative history does not expressly refer to the use of marshals, it does show that the phrase "by any other means" was understood as not confining the President to the employment of the military. Senator Saulsbury, an opponent of the measure, stated that under this language the President "may do anything else he deems proper * * * . He may use 'any other means' he may deem necessary." 99 Cong. Globe 601.

Another opponent of the bill regarded the phrase as conferring upon the President "unparalleled powers." Id., App., 60. The fear was that the broad language of the phrase might be interpreted as permitting the President to employ means even more drastic than military measures, such as suspending state elections and removing the Governor from office. It can hardly be argued that a milder method of coping with the situation, such as the use of federal marshals, is beyond the authority conferred by the statute. As said by the Supreme Court in In re Debs, 158 U.S. 564, 582 (1895), while, if the emergency arises, the national government may compel obedience to its laws through the use of its armed forces, the army is not "the only instrument by which rights of the public can be enforced and the peace of the nation preserved." And in In re Neagle, 135 U.S. 1, 65 (1890), the Court stated that "if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region

of country, who can doubt the authority of the President or one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by * * * providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a posse comitatus properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?" We think that these cases amply support the authority of the President to use marshals in the circumstances here considered.