IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BOSSIER PARISH SCHOOL BOARD; PAT ROWE, Member and President, and STROUD M. WISE, HATLEY L. PARKER, S. HOLMAN BOGGS, JOHN W. BASS, J. MURRAY DURHAM, BRYAND W. SWINT, LEONARD H. BUTLER, BLACKSHEAR H. SYNDER, GROVER C. ADKINS and JAMES ROBERSON, Members of the Bossier Parish School Board; and EMMITT COPE, Superintendent of Education of the Bossier Parish Schools, Defendants	)	CIVIL ACTION NO. 9282

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

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 the Bossier Parish School Board, each of its members, and Emmitt Cope, Superintendent of Education of the Bossier Parish Schools, were named as defendants. Jurisdiction was

was invoked pursuant to 28 U.S.C. §§1343[1] and 1345[2]

After noting that the State of Louisiana maintains a state-wide system of free public schools (paragraph 3), and that the Bossier Parish School Board "is vested under Louisiana law with the general

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1 / 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:
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> (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 futherance of any conspiracy mentioned in section 1985 of Title 42;
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> (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;
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> (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;
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> (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.

2 / 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.

administration and supervision of the public schools of Bossier Parish[3] "(paragraph 4), the complaint alleges in paragraph 7 that the plaintiff maintains, within the bounds of Bossier Parish, Barksdale and Bossier Air Force Bases "as a part of its national defense establishment," and that (paragraph 9) 7,100 military personnel and 700 civilians are stationed or employed at Barksdale Base, and 900 military personnel and 90 civilians are stationed or employed at Bossier Base.[4]

In paragraph 14 the complaint states that:

> Under the provisions of Chapter 19 of Title 20, United States Code, the United States Commissioner of Education has approved and the plaintiff has paid or agreed to pay grants in the total amount of $3,173,347.43 during the period from 1950 to the present time for the construction and improvement of the schools under the operating jurisdiction of the Board. * * * *

The complaint goes on to state that (paragraph 24):

> In connection with each of its applications for a grant under Chapter 19 of Title 20, United States Code, as referred to in paragraphs 14 through 23, the Board gave written assurance, as required by 20 U.S.C. 636, that the school facilities of the Board 'will be available to the children for whose education contributions are provided . . . on the same terms, in accordance

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[3] The complaint alleges (paragraph 12), that the school board maintains and operates twenty public schools for the education of the children of Bossier Parish "including dependents of members and civilian employees of the plaintiff's Armed Forces."

[4] In paragraph 11, the complaint states that "[t]here are no educational facilities" available on either base "to the school-age dependents of members and civilian employees of the plaintiff's Armed Forces."

> with the laws of the state in which applicant is situated, as they are available to other children in applicant's school district.' 5 /

After noting that approximately 4,400 white and Negro children of military personnel and civilian employees of the plaintiff attend public schools operated by defendants (paragraph 25), of which 740 are children residing with their parents on Barksdale or Bossier Bases (paragraph 26), the complaint alleges (paragraph 27) that "[i]t 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," and, therefore, that (paragraph 29):

> By reason of the policy and practice of the defendants to assign students to schools according to their race, all Negro school-age dependents of military personnel and civilian employees of the plaintiff residing in Bossier Parish are

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5 / In paragraph 15 through 23 (pp. 5-11), the complaint enumerates various school construction projects financed in whole or in part by federal funds supplied pursuant to Chapter 19 of 20 U.S.C.

And in paragraph 13 the complaint states 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 Board during the period from 1951 through June 30, 1962, a total of $2,623,213.71 for the maintenance and operation of its schools. These grants were approved and the payments made on account of the Board providing public education for the dependents of the military personnel and civilian employees of the plaintiff, and the proceeds have been used by the Board to defray the general cost of maintaining and operating its public schools.

> 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. 6 /

The complaint further contends that "the Board has failed and is now failing and refusing to perform each of its assurances referred to and described in paragraph 24," in that the defendants are failing (and have failed) to "make the public school facilities * * * available to Negro defendants of military personnel and civilian employees of the plaintiff upon the same terms as such facilities are available to white children," and that, moreover, "the acts and conduct of the defendants *** violate the Fourteenth Amendment to the Constitution" (paragraphs 31-33). 7 /

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6 / In paragraph 30 of the complaint it is also alleged that:

> Pursuant to their policy and practice of assigning students to schools according to their race, the defendants assign Negro school-age dependents of military personnel and civilian employees of the plaintiff * * * to schools further from their residences than other schools operated by the defendants for the education of white children exclusively.

7 / Finally in paragraph 34 of the complaint, the plaintiffs contend that defendants, unless restrained by the Court, will continue to segregate federal children, "thereby violating the written assurances described in paragraph 24 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 the servicement send their children to schools outside the area of Bossier Parish in order to avoid subjecting the children to racial discrimination in the children's education." And in paragraph 35 the complaint states that "the plaintiff has no adequate remedy at law."

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 military personnel or civilian employees of the plaintiff in the operation of the public schools of Bossier Parish, together with such additional relief as may be appropriate."

(b) The Motions to Dismiss. On February 5, 1962, the defendants filed a motion to dismiss for lack of jurisdiction of the subject matter, and a separate motion to dismiss for failure to state a claim upon which relief can be granted. The jurisdictional objection was that:

> This suit has been instituted on behalf of the United States of America under 28 U.S.C. 1343 and 1345. That neither of these statutes, cited as conferring jurisdiction, are applicable since the suit is neither brought by an individual, nor pursuant to specific statutory authority.

The memorandum in support of the motion to dismiss for lack of jurisdiction, after asserting that the suit "is brought by the United States * * * on behalf of dependants of certain military personnel living in and attending schools within the Parish of Bossier * * *," contends that "substitution of the United States on behalf of certain citizens, whom it is alleged are being deprived of their constitutional rights is not authorized either by statutory law or jurisprudence." The memorandum then adverts to a Bill pending in Congress which would empower the Attorney General to bring suit to redress generally violations of the civil rights of private citizens, suggesting thereby that, absent such legislation, the Government

has no authority to bring such a suit. The memorandum cites at length from the legislative history of the Civil Rights Act of 1957, 42 U.S.C. 1971, which reveals that a similar provision (Part III of the Bill which became 42 U.S.C. 1971), intended to grant the Attorney General the authority to bring such suits, was defeated during the course of the enactment of the 1957 Act. Similarly, legislative history of the 1960 Civil Rights Act was referred to as demonstrating a Congressional refusal to empower the Government to bring such suits.

In conclusion, the motion urges that "the Attorney General is attempting to exercise a power expressly denied him by the Congress of the United States."

In their motion to dismiss for failure to state a claim upon which relief can be granted, defendants state that "the only relief plaintiff herein is entitled to is the relief set forth by law; that is the operation of its own schools, if it finds that the education afforded is not suitable." The accompanying memorandum argues that the only remedy available, assuming that the facts set forth in the complaint are true, is that set forth in 20 U.S.C. 241, which provides that under some circumstances, if the United States Commissioner of Education finds that there are no "suitable" school facilities available for dependents of federal employees and servicemen living on military bases, he may elect to make other arrangements for the education of such children.

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 the defendants have refused to allow children of military and civilian personnel at Barksdale and Bossier Air Force Bases to attend the Parish public schools on a racially non-discriminatory basis. In consequence, we contend, the defendants have violated (1) the "assurance" given by them on each of ten occasions in which they filed applications for federal funds to aid in local school construction projects, (2) the statutory provision which requires the aforesaid "assurance", (3) and the equal protection clause of the Fourteenth Amendment to the Constitution 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.[8/]

8/ As the complaint states, Bossier Parish has also obtained federal funds 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. 51. It is also relevant because the motion to dismiss for failure to state a claim is grounded upon one of its provisions, 20 U.S.C. §241, discussed infra, pp. 33-42.

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. 9/

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 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

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

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 * * * *. 10/

Section 636(b)(2) then provides that, after the Commissioner of Education reviews the application and satisfies himself as to certain other matters, 11/

10/ "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.

11/ 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 overall 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)).

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. 12/

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."

12/ 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."

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 a 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).[13/]

Sections 642 and 643 of the Act deal with its administration and the general powers of the Commissioner of Education and other federal agencies.[14/]

13/ 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).

14/ 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).

II

This Court Has Jurisdiction

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, 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 (1895); United States v. Conti, 27 F. Supp. 756, 759 (S.D. N.Y. 1939).

Defendants, however, in their motion to dismiss, appear to suggest that jurisdiction exists only where the United States has been expressly authorized to sue by act of Congress. This view depends upon a gross misreading of the statute, which 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 in any other manner would be to render nonsensical the Congressional language, for (if defendants are right) 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 * * *." Defendants' suggestion then, is linguistically impossible. In short, to read the statute as if "expressly authorized" modified "United States" as well as "agency or officer thereof" would require a major reconstruction of the language of the statute. 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 strongly supports our position. 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, 78.[15/] 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.[16/] In 1875 (18 Stat. 470) the circuit courts were granted jurisdiction of suits at common law and equity "in which the United States are plaintiffs or petitioners." No

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15/ This and some subsequent statutes contained a jurisdictional amount requirement.

16/ 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 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.

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 revision of The Judicial Code[17/]) 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 * * *."

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).]
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> 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.]

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

> The grant to Federal trial courts of "original jurisdiction of all civil action * * * commenced by the United States" has never been displaced. . . .18/

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 law to sue. The effort of defendants to tack onto the former the qualifying language which has always accompanied the jurisdictional grant over suits by federal officers is in the teeth of 174 years of history.

This objection, then, is frivolous. It cannot be denied that under 28 U.S.C. 1345 this Court has jurisdiction in the sense of power to hear the case, by the mere fact that the United States is the plaintiff. The real objection of defendants, as their memorandum obliquely suggests, is that the United States lacks standing to bring this suit. By intermingling jurisdictional and standing arguments defendants (like the defendants in United States v. Silliman, supra) merely confuse the issue; the two concepts are not interchangeable. The former involves the power of this Court to hear the case at all; the latter, the legal interest of the United States in the subject matter of the suit. We shall consider the "standing" question separately.19/

18/ Last deletion, noted by . . ., added.

19/ 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 United States Has Standing To Maintain This Suit

1. As the complaint states, each time the defendant board filed an application for federal school construction grants, it 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 --
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> 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"[20/] and to the

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20/ See, however, pp.24-27, 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.

phrase of the House report referring to segregation "established in accordance with the laws of the State * * *." Of course, Louisiana law no longer requires racial segregation in public schools, (1) because it cannot, Brown v. Board of Education, 347 U.S. 483 (1954), (2) because the state laws which once required such segregation have been repealed. Const. La., Art. XII §1, (as amended 1958), and (3) because the existing state law, by enumerating seventeen factors which local boards may consider in assigning pupils, [21/]

[illegible]

21/ The criteria by which local school board in Louisiana decide upon school assignment are set forth in 17 LSA - RS, section 104, (1958, as amended 1960) which provides:

> Authority and responsibility of local boards; factors to be considered. Subject to appeal in the limited respect herein provided, each local board 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 shall 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, in accordance with such rules and regulations, 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 of admission of the pupil upon the academic progress of other students

(Continued on following page)

excludes by clear implication racial criteria.[22]

21/ (Continued from preceding page)

> 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.
>
> Local school boards may require the assignments 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. Acts 1958, No. 259, §4, as amended Acts 1960, No. 492, §1.

22/ Moreover, since Louisiana operates a statewide school system, Hall v. St. Helena Parish School Board, 197 F. Supp 649 (E.D. La. 1961), aff'd, 368 U.S. 515, it may not, in the language of the Brown case, "permit" local boards to segregate. And since the Constitution of the United States is as much the law of the state as anything appearing on the statute books thereof, Neal v. Delaware, 103 U.S. 370, 389-390 (1881), this means that Louisiana law does not permit segregation, even apart from the obvious meaning of LSA - RS 17 §104. Thus there can be no argument made that existing state law is merely "neutral" on the question of racial segregation, or that it authorizes but does not require segregation.

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 statute means 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 Louisiana and cannot, therefore, be used as the basis for measuring the treatment due federal Negro children. 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 laws; ergo, they are violating the assurances which they gave the plaintiff.

Moreover, the fact is that local children, indeed the majority of local children,[23/] are attending schools which federal Negro children are not permitted to attend. 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 some of the federal children is that they are Negro and that the Board is entitled to bar access to these schools to the federal Negro children because they are treating the local Negro children on the same basis.

23/ See generally State Dept. of Educ., Louisiana School Directory, Session 1962-1963, Bulletin No. 975 (1962), pp. 51, 112.

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. 20-23) 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, by necessary implication, incorporates 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 unlawful, 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) (" * * * 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);[24/] Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-104 (1940);[25/] United States v. Unzenta, 281 U.S. 138, 143-144 (1930). At the time of the Air Terminal

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24/ 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.

25/ 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):

> 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 provisons of the

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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 is in violation of the Constitution of the United States itself.

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

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25/ 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.

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.

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. 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.

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 Bossier Parish 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 manner and in violation of state law.[26/]

26/ 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).

2. Since that is so, it must follow that the United States has standing -- that is, a sufficient legal interest in the subject matter -- to maintain this suit.

(a) The "assurance" given by the Board in each of its six applications is an obligation arising out of a contractual arrangement entered into between the United States and the Bossier Parish School 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 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)[27]; 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

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27 / 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

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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, 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).[28] 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 exdcuted on its part. It follows that the defendants continue to be bound by the assurance contained in Section 636(b) (1) (F).

27/ (Continued from preceding page)

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 * * *".

28/ See also H. Rept. No. 2810, quoted supra, p. 20 .

(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.

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.

(c). Defendants contend, however, in their motion to dismiss for failure to state a claim upon which relief may be granted, that "the only relief plaintiff herein is entitled to is the relief set forth by law; that is the operation of its own schools, if it finds that the education afforded is not suitable", citing 20 U.S.C. 241(a) and (b).

20 U.S.C. 241 appears in Chapter 13 of Title 20, dealing with federal monetary contributions for the operation and maintenance of public schools. If, in the judgment of the Commissioner of Education, "no local educational agency is able to provide suitable free public education for [children who reside on federal property]," he "shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children." It further provides that, with respect to children of members of the Armed Forces on active duty, the Commissioner may also make "such arrangements" if he finds that "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 * * * no local educational agency is able to provide suitable free public education for such children."

While Section 241 is not a part of the school construction act, but of the operating expense act, the school construction act, 20 U.S.C. 631 et seq., contains a provision similar to Section 241. By 20 U.S.C. 640 the Commissioner of Education "shall make arrangements for constructing or otherwise providing" school facilities for children residing on federal property if schools are unavailable for the same reasons described in the parallel statute relied upon by the defendants, and he may do so, on a temporary basis, for children of members of the Armed Forces on active duty. Defendants' contention, therefore, is more properly based upon Section 640, appearing in the same act containing the assurance, than upon Section 241, appearing in the operating funds statute.[29/] But we submit

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29/ About Section 241 it may be said that, inasmuch as it does not appear within the school construction act, but within the operating funds act, it can hardly be thought to provide an exclusive remedy for violations of the assurance contained in the construction act. The rule evidently relied upon by defendants is that where "a statute creates a right and provides a particular remedy by which that right may be enforced, no other remedy than that afforded by the statute can be used." Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 238 (1873); see also United States v. Stevenson, 215 U.S. 190, 197 (1909). But the very statement of the rule presupposes that the right and the remedy are contained in the same statute. Since Section 241 of Title 20 is contained in the operating funds act and the assurance we seek to enforce has to do solely with the school construction act, we doubt that this exclusive remedy argument, based on 20 U.S.C. 241, has any relevance here.

that, which ever of these provisions is relied upon by defendants, the rule they invoke has no application to this case, for two reasons.

First, the nature of defendants' objection is, in brief, that, although they promised to treat federal children equally and without regard to race, the United States has no judicial or other remedy for violation of the assurance because the United States has the power to operate its own schools or to make other arrangements for the education of federal children. This alternative, available to the United States by statute, is, according to the defendants, a remedy. But surely this argument cannot be taken seriously. "A remedy is a means employed to enforce a right or redress an injury." Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 384 (1918). It is not a means of doing for oneself what the promisor has agreed to do. The United States cannot enforce its right to have federal children treated equally by operating its own schools. What the defendants have really said is, they have violated the assurance but that is just too bad; nothing can be done about it; their promise is worthless, a mere scrap of paper. As the Supreme Court said in United States v. San Francisco, 310 U.S. 16 (1940), where it rejected a similar argument made by the City to the effect that a requirement of a federal grant could not be enforced:

> 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.

Moreover, this suggested remedy -- that the United States can operate its own schools -- is limited to providing education for children who reside on federal property (so-called "on base" children), when the local public schools are not able to provide a "suitable" free public education for these children. The Commissioner has no authority to provide an education for "off base" children. In Bossier Parish there are 740 "on base" children and 3,660 "off base" children attending the local public schools. Defendants' suggestion is that authorization to provide an education for 740 children is a "remedy" for defendants' breach of the assurance with respect to the other 3,660 children. To state this proposition is to refute it.

Since no "remedy" whatever for violation of the assurance is provided by sections 241 or 640, these provisions cannot in any sense be considered to abrogate the ordinary common law remedy for breach of contract which has historically been available to the United States.

To say the least, then, the "remedy" allegedly provided by sections 241 and 640 of Title 20 is inadequate. And the courts have held that the inadequacy of the remedy provided by the statute which creates the right strongly demonstrates that the statutory remedy was not intended to be the exclusive means of enforcing the right involved. In Territory of Alaska v. American Can Co., 269 F. 2d 471, 477 (C.A. 9, 1959), the court of appeals held that " * * * the statutory method provided for the collection of personal property taxes being inadequate, a personal action for the collection of such taxes under the Alaska statute in question may be brought." And in Shriver v. Woodbine Savings Bank, 285 U.S. 467, 477 - 479 (1932), the Supreme Court, per Stone, J., said:

> In the face of the sweeping language of the statute, the mere fact that it gave a remedy by sale of the stock cannot be taken as necessarily precluding resort to the common law remedy, which would otherwise be available and by which alone the liability declared could in many cases be successfully enforced. * * * In those instances where the impairment is more than 50% of the capital, the remedy by sale would be insufficient to enforce the liability declared. No reason is suggested why such a remedy should, by mere implication, be deemed exclusive or why the statute should be so construed by reference as to defeat its obvious purpose, or limit or destroy the liability which, in plain terms, it has created. (emphasis added).

Continuing, the court noted the usual common law rule about exclusive remedies, and then said (Id. at 478-479):

> Here, the remedy provided is a summary and only partially effective supplement or alternative to that which the common law affords for enforcing the obligation * * *. The very fact that the remedy is on its face inadequate to compel full performance of the obligation declared, is persuasive that it was not intended to be exclusive of applicable common law remedies, by which complete performance might be secured (emphasis added).

Here, where the administrative remedies for breach of contract are inadequate to compel any -- much less "full" -- performance of the assurance, the principle of the Shriver case applies a fortiori.

Secondly, an even more fundamental principle governs this case. The rule suggested by defendants -- that a statute creating a right and specifying a remedy for its enforcement makes that remedy exclusive -- does not operate so as to divest The United States of a pre-existing remedy at common law, such as the power, invoked here, to sue to enforce a contractual obligation.

In The Dollar Savings Bank v. United States, (86 U.S. (19 Wall.) 227 (1873), the United States brought an action of debt against the bank to recover internal revenue taxes. The Bank urged that "the act of Congress which imposes the tax on savings banks provides a special remedy for its assessment and collection, and * * * that when a statute creates a right and provides a particular remedy by which that right may be enforced, no other remedy than that afforded by the statute can be used." 86 U.S. at 238. Hence, it was argued, an action of debt would not lie on behalf of the government, but the latter was confined to the express statutory remedy. Rejecting this contention, the Supreme Court said (86 U.S. at 238-239):

> But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and is enforced when any one to whom the statute is a rule of conduct seeks redress of a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not the government. They may be obligations upon tax collectors. They may present any suit at law by such officers or agents. But they are not rules for the conduct of the State. It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised * * * affect him not in the least, if they may tend to restrain or diminish any of his rights and interests.
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> * * * *
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> It must, then, be concluded that the government is not prohibited by anything contained in the Act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason. (emphasis added).

A similar issue arose in United States v. Chamberlin, 219 U.S. 250 (1911). There, the United States brought an action to recover the amount of Stamp taxes due under a war revenue act. Mr. Justice Hughes, relying heavily upon The Dollar Savings Bank v. United States, supra, laid down the rule that "If the statute creates an obligation to pay, and does not

provide an exclusive remedy, the action must be regarded as well brought" (emphasis added). 219 U.S. at 258.

Conversely, in United States v. Stevenson, 215 U.S. 190 (1909), the Court held that specification of a civil penalty in a federal statute did not preclude the government from proceeding by way of a criminal prosecution for violation of the statute's command. For assisting or encouraging the importation of contract laborers the statute provided a penalty of $1000 for each offense, and the penalty was made recoverable as a debt in the federal courts. The Court said (215 U.S. at 197):

> The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that where a statute creates a right and prescribes a particular remedy that remedy, and none other, can be resorted to.
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> * * * * *
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> The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect. Dollar Savings Bank v. United States, 19 Wall. 227, 238, 239 (emphasis added).

Examining the statutory provision there in question, the Court said (215 U.S. at 198):

> It is to be noted that this statute does not in terms undertake to make an action for the penalty an exclusive means for enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the government to this method of enforcing the law. It is not to be presumed, in the absence

> of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the government the well-recognized method of enforcing such a statute by indictment and criminal proceedings (emphasis added).

See also United States v. Republic Steel Corp., 362 U.S. 482 (1960), discussed infra, pp. 44-45; Cf. United States v. Silliman, 167 F. 2d 607, 611 (C.A. 3, 1948).

Nothing in the school construction act or the operating expenses act suggests that the remedy upon which the defendants would have the government rely - if, indeed, it is a "remedy," - was intended to be exclusive. On the contrary, as the Shriver and American Can cases show, the very inadequacy of the "remedy" suggests quite strongly that it was not intended to be exclusive.[30/]

30/ Nor are any other "remedies" provided by the statute any more exclusive. It is true that the statute provides in 20 U.S.C. 641(a) that:

> Whenever the Commissioner of Education * * * finds (1) that there is a substantial failure to comply with the drawings and specifications for the project, (2) that any funds paid to a local educational agency under this chapter 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 of correction is impossible, until such agency repays or arranges for the repayment of federal moneys which have been diverted or improperly expended (emphasis added).

Section 641(a) simply enumerates various conditions precedent the failure of which will excuse the Commissioner of Education from making further payments for school construction projects already approved. Among these conditions is the assurance we rely upon in its

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character as a promise. But the right to cease performance upon failure of condition precedent surely is not a "remedy" -- much less an exclusive remedy -- for breach of the assurance. And if the recourse authorized by section 641(a) were the sole means of enforcing the equal treatment assurance, the latter would be ineffective beyond the date that any given school was completed. This certainly could not have been the purpose of Congress, which drafted section 636(b)(1)(F) as "a safeguard against discrimination mentioned in the bill as such * * *. H. Rept. No. 2810, 81st Cong., 2d Sess., p. 15 (1950). A "safeguard" remaining vital only during the construction process would be illusory indeed.

We have referred above to the equal treatment assurance as both an enforceable promise and a condition precedent. It is plainly both, and may be called, in Professor Corbin's terms, a "promissory condition." Its character as a condition does not render it any the less enforceable as a contractual promise. See 3A Corbin, Contracts §§ 633-635; International Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F. 2d 137 (C.A. 2, 1958), cert. denied, 359 U.S. 946; cf. Restatement, Contracts § 261; Greene County v. Quilan, 211 U.S. 582, 594 (1908). Nor can the assurance be viewed as a "condition subsequent," authorizing the Government to sue only for recission and recoup its funds if violated, for this type of forfeiture is in extreme judicial disfavor, especially where federal grants are concerned. Oregon & California Ry. Co. v. United States, 238 U.S. 393, 420 et seq. (1915); compare United States v. San Francisco, 310 U.S. 16 (1940).

(d) 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); see generally Searight v. Stokes, 44 U.S. (3 How.), 169, 187-188 (1845). 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 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.

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 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), 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 relegate 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.

(e) We have heretofore demonstrated that the United States has standing to maintain this suit becuase (1) it may sue to enforce a contract to which it is a party, even in the absence of statutory authority, and (2) in any event the power to sue to enforce the equal treatment assurance is inferrable from the statute itself. 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 motion to dismiss for lack of jurisdiction. The motion argues that the United States seeks to assert here the power which Congress failed to grant to the Attorney General in the Civil Rights Acts of 1957 and 1960, that is the power to sue to enforce the equal protection of the laws when denied to any citizen, which had been incorporated in Part III of the bill which became the 1957 Act. Whatever the scope of the Attorney General's authority to do that,[31] 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 violation of the Amendment interferes with an interest of the

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31/ The mere fact that Part III was deleted from the bill which became the Civil Rights Act of 1957 does not, of itself, militate against the conclusion that the Attorney General has the power therein sought to be granted. See, e.g., United States v. California, 332 U.S. 19, 28 (1947): "That Congress has twice failed to grant the Attorney General specific authority to file suit against California, is not a sufficient basis upon which to rest a restriction of the Attorney General's statutory authority [to "Protect the Government's interests through the courts"]".

United States[32]. 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 federal children should not be discriminated against on account of race or color.[33] 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 the 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.

32/ As earlier noted, we assert the power to enforce a contract and a power to sue derived from the school construction act by implication, and these claims for relief are wholly independent of the Fourteenth Amendment claim.

33/ The claim for relief upon which we rely here is created by the Fourteenth Amendment. It is not necessary that a claim for relief be created by statute; it may arise from the Constitution itself. Bell v. Hood, 327 U.S. 678 (1945).

This interest 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. 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 Louisiana. True, their families so elected, but it can hardly be

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. And when a Negro serviceman finds that his children must attend segregated schools in Louisiana, it is inevitable that this will affect his outlook, morale, and attitude. In turn, his reaction affects the United States which, of course, must maintain an efficient fighting force.

Surely it cannot be said that this interest of the United States is insignificant. Indeed, since the very existence of the Republic depends upon the preservation of an efficient military establishment, this interest would seem to be greater than other interests which have been held over the years to be sufficiently important to support the standing of the United States to seek injunctive relief in the absence of statutory authority.

Thus, 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 restrain interference with the flow of interstate commerce (In Re Debs, 158 U.S. 564 (1895), 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). The Robbins case supra held that the United States could sue to enjoin the unauthorized operation of a passenger transport business in Rocky Mountain National Park because of the "national policy * * * of protecting the public in traveling within the park * * *." Surely if protecting the public in parks sustains the Government's standing, a suit to defend the efficiency of the armed forces and thereby protect the Republic, will also lie. Indeed, in United States v. California, 332 U.S. 19, 29 (1947), the Supreme Court sustained the standing of the United States on the ground, inter alia, that the government had the responsibility to "exercise whatever power and dominion are necessary to protect this country against dangers to the security" of its people which might arise because of the fact that the United States was bounded by two oceans. (emphasis added).

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 geneal interest, so hotly controverted by defendants,

in ensuring to every citizen the guarantees of the Fourteenth Amendment.[34/]

Finally, the United States has a pecuniary interest in the subject matter. The United States has granted to Bossier Parish a total of $1,737,486.61 in federal funds for school construction purposes,[35/] and the valid and lawful utilization of these funds is a proper concern of the Government.

In sum, aside from the contractual obligation owing to the United States by the defendants, and the implied statutory authority to sue, the United States has standing because (1) its interest in the matter is declared by section 636(b)(1)(F), (2) it has an interest in preserving an efficient military establishment, and (3) it has a financial interest in the operation of these schools.[36/]

34/ 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.

35/ And $2,623,213.17 for operating expenses.

36/ Of course, we have here demonstrated more than that the United States has "standing." We have demonstrated that the complaint states a claim upon which relief may be granted (in the sense of "cause of action") as well.

CONCLUSION

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

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