No. 20,668

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

MADISON COUNTY BOARD OF EDUCATION; L. B. HEREFORD, CHAIRMAN, AND HERMAN B. SANDERS, WILLIAM L. VAUGHN, DONALD SPENCER AND ATLAS CARRIGER, MEMBERS OF THE MADISON COUNTY BOARD OF EDUCATION; NATHANIEL ALMON, SUPERINTENDENT OF EDUCATION OF MADISON COUNTY; CITY OF HUNTSVILLE BOARD OF EDUCATION; A. V. SNEED, PRESIDENT, AND L. A. DAVIS, MARVIN DRAKE, J. C. McKINNEY, JR., AND MILTON FRANK, MEMBERS OF THE CITY OF HUNTSVILLE BOARD OF EDUCATION; AND RAYMOND CHRISTIAN, SUPERINTENDENT OF EDUCATION OF THE CITY OF HUNTSVILLE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLANT

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I.

Introduction

This appeal concerns racial segregation of several hundred children of Negro military and civilian personnel stationed or employed at Redstone Arsenal, a United States defense installation of

major importance located in Madison County, Alabama. The complaint alleged that the appellee school boards assign these children to certain schools on account of their race or color. The court below granted the appellees' motions to dismiss, which are the subject of this appeal. At least for purposes of the present appeal, then, it is admitted that appellees are segregating these children on account of race or color in violation of the Fourteenth Amendment.

Broadly stated, the question here is whether the United States has authority, or "standing", to seek to enjoin this unconstitutional practice. It is our position that such standing exists, derived from the facts that (1) appellees have contracted not to segregate the Redstone children, and (2) the segregation complained of burdens the exercise of the war power of the United States.

II.

The complaint, the motion to dismiss, and the decision below

A. The Complaint

On January 18, 1963, the United States filed in the District Court for the Northern District of Alabama a complaint in which two separate, although substantially identical, claims were stated. The first claim was against the Madison County Board of Education, each of its members, and the county Superintendent of Education (R. 10). The second claim was against the City of Huntsville Board of Education, each of its members, and the city Superintendent of Education (R. 18).

Jurisdiction of the subject matter as to each claim was invoked under 28 U.S.C. 1345 and 1343.

The complaint alleges the following facts.

First. The Redstone Arsenal is a defense installation of the United States. Functioning within the Arsenal are the United States Army Ordnance Missile Command[1/], the Army Ordnance Missile Support Agency[2/], the Army Guided Missile School[3/], the George C. Marshall Space Flight Center[4/], and private contractors conducting rocket and missile research for the United States. These agencies and contractors

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1/ The Missile Command, the complaint states, "has the national mission for Army rocket and guided missile programs and is responsible for the entire field of weapon systems management, covering research, design, development, production, maintenance and supply of all Army missiles and rockets." (R. 12).

2/ The Ordnance Missile Support Agency provides logistical and administrative support to all units at Redstone Arsenal (R. 12).

3/ The Guided Missile School conducts courses for military and civilian personnel in the inspection, repair, supply and maintenance of guided missile systems. It also organizes and trains ordnance missile support units (R. 12).

4/ The Marshall Space Flight Center, "the largest field installation of the National Aeronautics and Space Administration," is charged with the "design, development and testing of large rocket vehicles used in space flight" (R. 12).

conducting rocket and missile research for the United States utilize the services and skills of more than twenty thousand military and civilian workers (R. 12-13)[5/], some of whom are Negro citizens of the United States (R. 16).

Second. Two thousand children of Redstone personnel attend the public schools operated by the County Board, and 9000 such children attend the schools operated by the City Board (R. 16, 28). Of the 2000 children attending county schools, 250 are Negro, and of the 9000 children attending city schools, 500 are Negro. Of the city school Negro children, seventeen live within Redstone Arsenal proper (R. 16, 28).

Third. "It is the policy and practice of the defendants in operating the public schools under their jurisdiction, to segregate Negro students in separate schools maintained and operated solely for students who are of the Negro race" (R. 16). In

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5/ The following table reveals the breakdown of employees by agency at Redstone Arsenal:

AGENCY	MILITARY PERSONNEL	CIVILIANS
Army Missile Command and Missile Support Agency	1,375	8,515
Guided Missile School	2,340	950
Marshall Space Fligh Center	15	7,575
Private Contractors		1,850
TOTALS	3,730	18,890

consequence of this policy of maintaining dual schools, Negro children of Redstone personnel "are compelled to attend schools operated exclusively for members of the Negro race and are not permitted to attend schools available to white children similarly situated" (R. 17, 28).

Fourth. Pursuant to chapter 19 of Title 20, United States Code (20 U.S.C. §631, et seq., hereinafter referred to as the School Construction Act), the United States has paid to the County Board the sum of $527,933.92, from 1950 to the present, for the "construction and improvement of the schools" operated by the County Board.[6/] The City Board received from the same source, and for the same purpose, the sum of $4,404,861.47 (R. 14, 20).[7/] The various school

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6/ Section 631 of the School Construction Act 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."

7/ In Appendices B and D to the complaint (R. 31, 33-34), the funds received by each Board are set forth by year. Payments were approved for the County Board as follows: 1952, $120,554.33; 1954 (November 15), $188,680; 1958, $77,312.59; and also 1958, $141,387.

For the City Board, the figures are: 1952, $625,859; 1954 (September), $55,971; 1954, (October), $78,070; 1955, $207,450; 1956 (March), $51,300; 1956 (October), $138,700; 1957 (April 3), $668,570; 1957 (April 8), $81,580; 1958 (June 2, four separate applications), $143,000; $208,750; $85,332; and $103,083; 1958 (March), $473,144.96; 1959 (November), $81,511; 1959 (April), $370,500; 1959 (May), $114,898.82; 1959, (July 2), $137,800; 1959 (July 14), $166,322; 1961 (March), $538,588.96; 1961 (November), $74,430.

construction or improvement projects for which these federal funds were expended are set forth in detail in the complaint (R. 14-16, 20-27).[8/]

Fifth. In connection with each of its applications for a grant of federal school construction funds pursuant to 20 U.S.C. 631 et seq., the County and City Boards:

> . . . gave written assurance, as required by 20 U.S.C. 636, that their school facilities . . . will be available to the children for whose education contributions are provided . . . on the same terms, in accordance with the laws of the state in which applicant is situated, as they are available to other children in applicant's school district.'

Sixth. Each Board "has failed and is now failing and refusing to perform each of its assurances" (R. 17, 29) in that the defendants have failed and are failing to "make the public school facilities . . . available to Negro dependents of members and employees of the Armed Forces of the

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8/ The complaint also states that, pursuant to chapter 13, of Title 20, United States Code, 20 U.S.C. 231 et seq., (hereinafter called the Operating Expenses Act), the United States has paid for the maintenance and operation (as distinguished from construction and improvement) of Madison County and Huntsville schools, the sums of $980,213 to the County Board, and $3,622,666 to the City Board.

The complaint alleges further that these operating funds "were approved and the payments made on account of the [respective Boards] providing public education for the dependents of members and civilian employees of the plaintiff's Armed Services, and the proceeds ["were used by the County Board" and "were used and are being used by the City Board"] to defray the general cost of maintaining and operating its public schools.

plaintiff upon the same terms as such facilities are available to white children . . . ." (R. 17, 18).

Seventh: The conduct of the defendants violates the Fourteenth Amendment (R. 17-18), with resultant irreparable injury to the plaintiff, "consisting of impairment of the service and morale of its military and civilian personnel . . . ." (R. 18).

The prayer seeks an order enjoining the defendants from "segregating or discriminating against, among, or between, upon the basis of their race or color, any dependents of the members or employees of the Armed Forces of the plaintiff in the operation of public schools under their jurisdiction, together with such additional relief as may be appropriate" (R. 29).

B. The Motions to Dismiss

On February 5, 1963, the City Board and the County Board filed identical motions to dismiss (R. 41-48). The principal defenses asserted were failure to state a claim, lack of jurisdiction, lack of authority in the United States to sue, and, as to the alleged violation of the statutory assurance, full performance[9/] (R. 41-48).

9/ More specifically, the motions to dismiss urged that the complaint is founded upon an alleged violation of the equal protection clause "and such rights as may exist thereunder are assertable only by those individuals adversely affected by such violation and not by the United States of America"; that the suit

(Cont. on following page)

C. The Decision Below

On May 29, 1963, the District Court granted the defendants' motion to dismiss, and dismissed the complaint (R. 49-52). The court referred with approval to the decision by the District Court for the Southern District of Mississippi in a similar case, United States v. Gulfport Municipal Separate School District, C.A. No. 2678, now on appeal to this Court as No. 20,772 and stated that "to extend this brief order to encompass the scope of [Judge Mize's] opinion would be to do more than is required or is needful" (R. 50).

The District Court then held that "the United States is without authority to maintain this action," and that the complaint does not state a claim upon which relief can be granted (R. 50).[10] The

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9/ (Cont. from preceding page.)

is a "civil rights action" and the district court "lacks jurisdiction thereof in that the action has not been commenced by a person as required by Section 1343 of Title 28, United States Code;" that the United States has been "expressly forbidden, prohibited and denied authority to bring an action" by 20 U.S.C. 242; that receipt of federal school construction funds does not entitle the United States to sue; and that "it appears from the facts averred in the complaint that these defendants have complied with and performed each of the assurances referred to . . . ." The motions also contended that the individual Government attorneys who "presume to execute the complaint" had no authority to do so (R. 41-48).

10/ Concluding that the United States has no standing to enforce the Fourteenth Amendment, the Court held that "the United States is not a 'person' under the Fourteenth Amendment nor under the Civil Rights Act. Title 28, U.S.C.A. #1343" (R. 50).

court reasoned that "Except in the field of voting rights, the Congress has granted the Government no authority to bring such a suit as this. In fact, it has refused to grant such permission" (R. 51). And he held, moreover, that "The remedy and relief provided in the Act under consideration are vested in the Commissioner of Education and not in the Courts" (R. 52).

Turning to the allegation of the complaint that appellees have breached a contract with the United States, the District Judge said that: (R. 51)

> The quoted language of subsection (f) [of 20 U.S.C. 636(b)] would certainly encompass the Alabama School Placement Law. By this complaint the plaintiff would simply sidestep the Placement Law which has been held "upon its face" to be constitutional. Under the theory of this complaint, a colored dependent child of federal personnel would have preferred status over all other school children simply because of his color. Of course, it is well established that the law does not require integration but only abolishes discrimination, and until the individual colored children of federal personnel show that they have been discriminated against because of their race or color, the Placement Act would be applicable.

Accordingly, the complaint was dismissed (R. 52).[11/]

11/ At the end of his opinion the District Judge chided the Government for overreaching. He said:

> Although not necessary to this decision, it may not be amiss to remark that this case illustrates the rule that the hand that extends the benefaction may also attempt to control its use. Our cries to Washington for help have been so loud that they have muted the claims to local control and states' rights.

SPECIFICATION OF ERROR

The District Court erred in granting the motions of the appellees to dismiss the complaint filed by the United States.

STATUTORY PROVISIONS INVOLVED

Chapter 19 of Title 20, United States Code, "School Construction In Areas Affected by Federal Activities," is involved. It is described in detail infra pp. 16-21.

The Alabama Pupil Placement Law, Title 52 §§61(4), (7), and (9), Code of Alabama, Recomp. 1958, provides:

> § 61(4). Authority and responsibility of local boards for assignment, transfer and continuance of pupils; factors to be considered.--Subject to appeal in the limited respect herein provided, each local board of education shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the board as provided herein, the board may exercise this responsibility directly or may delegate its authority to the superintendent of education or other person or persons employed by the board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular 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 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 boards of education may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth. (1955, pp. 493, 494, §4; 1957, pp. 484, 485, §4.)

§ 61(7). Objection to assignment of pupils; request for transfer; action by board; hearings; investigations.--A parent or guardian of a pupil may file in writing with the local board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the board. Unless a hearing is requested, the board shall act upon the same within the 30 days, stating its conclusion. If a hearing is requested the same shall be held beginning within 30 days from receipt by the board of the objection or petition at a time and place within the school district designated by the board.

The board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the board. The board of education is authorized to designate one or more of its members or

one or more competent examiners to conduct any such hearings, and to take testimony, and to make a report of the hearings to the entire board for its determination. No final order shall be entered in such case until each member of the board of education has personally considered the entire record.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

For the purpose of conducting hearings or investigations hereunder, the board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the state of Alabama to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the county to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as are allowed for the service of subpoenas from a circuit court. In the event any person fails or refuses to obey a subpoena issued hereunder, any circuit court of this state within the jurisdiction of which the hearing is held or within the jurisdiction of which said person is found or resides, upon application by the board or its representatives, shall have the power to compel such person to appear before the board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof. Witnesses at hearings conducted under this chapter shall be entitled to the same fees as provided by law for witnesses in the circuit courts, which fees shall be paid as a part of the costs of the proceeding. (1955, pp. 494, 495, §7; 1957, pp. 485, 486, §7.)

§ 61(9). When action of board final; appeals.--The findings of fact and action of the board shall be final except that in the event that the pupil or guardian,

if any, of any minor or, if none, of the custodian of any such minor shall, as next friend, file exception before such board to the final action of the board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, or any right under the laws of Alabama, and the board shall not, within fifteen days reconsider its final action, an appeal may be taken from the final action of the board, on such ground alone, to the circuit court in equity of the judicial circuit in which the school board is located, by filing with the register within thirty (30) days from the date of the board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the federal Constitution, or state law, accompanied by bond with sureties approved by the register, conditioned to pay all costs of appeal if the same shall not be sustained. A copy of such petition and bond shall be filed with the president of the board. The filing of such a petition for appeal shall not suspend or supercede an order of the board of education; nor shall the court have any power or jurisdiction to suspend or supercede an order of the board issued under this chapter before the entry of a final decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for appeal, after a preliminary hearing, and upon a prima facie showing by the petitioner that the board has acted unlawfully to the manifest detriment of the child who is the subject of the proceeding.

On such appeal the circuit court may, as in other equity cases, summon a jury for the determination of any issues of fact presented. Appeal to the supreme court of Alabama may be taken from the decision of the circuit court in the same manner as appeals may be taken in other suits in equity, either by the appellant or by such board of education. (1955, p. 495, §9; 1957, pp. 486, 487, §9.)

Article I, §8 of the Constitutinn of the United States provides in pertinent part that:

The Congress shall have Power . . .

> To raise and support Armies . . .
> To provide and maintain a Navy . . .
> To make Rules for the Government and Regulation of the land and naval forces . . .

Article II, §2 of the Constitution of the United States provides in pertinent part that:

> The President shall be Commander in Chief of the Army and Navy of the United States . . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

We shall demonstrate herein that the United States is entitled to maintain this action to enjoin the unconstitutional segregation of Redstone children alleged in the complaint.

In Argument I we shall show that the complaint sufficiently states a claim for breach of contract. The argument is as follows: the complaint alleges that appellees gave written assurance to the United States, as explicitly required by the School Construction Act, that they would make their schools available to Redstone children "on the same terms, in accordance with the laws of the State . . . as

they are available" to local children. Since Alabama state law prohibits the racial segregation of local children, the assurance prohibits the racial segregation of Redstone children. Since concededly on this record, Redstone children are treated in a racially-discriminatory manner, the assurance was violated. It follows that the complaint states a cause of action for breach of contract.

Alternatively, we shall show that the result must be the same even if Alabama law were silent on the racial question. When the assurance refers to the "terms" imposed upon local children as the measure of how appellees may treat federal children, it means constitutional terms. Any unconstitutional terms imposed upon local Negro children are therefore irrelevant in determining how appellees must treat Redstone children. The fact that appellees are segregating local children in violation of the Constitution is therefore irrelevant, because these schools are "available" to local Negro children without regard to race, i.e., they are available on constitutional "terms." Therefore, Redstone children, too, are entitled to attend them.

We shall also show that the assurance is a contractual obligation enforceable in equity; that nothing in the school construction act prohibits this suit; and that Redstone children are not compelled to exhaust the administrative remedies which may be afforded under the Alabama Pupil Placement law.

Argument II, which proceeds on a separate basis, leads to the same result. We there show that violation of the Fourteenth Amendment rights of Redstone children may be redressed by the United States if it is also injured by the violation; that the complaint alleges that the unconstitutional segregation of Redstone children interferes with the exercise of the war power by the United States by impairing the morale and efficiency of its defense personnel; that such interference is a legal injury to the United States; and, therefore, that the United States may redress the violation of the Fourteenth Amendment rights of the Redstone children.[12/]

I

The defendants are under an enforceable contractual obligation, running to the United States, not to assign Redstone children to local schools on the basis of race or color.

A. The statutory scheme

In 1950 Congress enacted P.L. 815 (Chapter 19 of Title 20, United States Code, 20 U.S.C. §§631 et seq.). The congressional objectives are set forth inter alia, in 20 U.S.C. 631, which declares that:

12/ It should be understood that we do not urge here that the United States has standing to enforce the Fourteenth Amendment on behalf of any and every Negro citizen or other person who may be victimized by unconstitutional practices. It may be that in certain circumstances the United States does have such general authority. Cf. United States v. City of Jackson, 318 F.2d 1 (C.A. 5, 1963) (opinion of Wisdom, J.). But this broad question is not ripe for decision in this case. In this case the United States seeks only to enjoin segregation of children of federal personnel employed at Redstone Arsenal because of the special injury caused by that segregation to the war power of the United States. We do not seek general desegregation of defendants' school systems.

> 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.

The Act sets forth how the "federal share" of the cost 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."[13/]

13/ The application must contain a description of the project and site, preliminary drawings of the proposed construction, and such other information as the Commissioner of Education might require (§636(b)(1)(A)). It must also contain or be supported by an "assurance" that the agency has or will have title to the site or the right to build schools thereon and to operate them for 20 years (§636(b)(1)(B)); an assurance that the agency has legal authority to undertake the construction and to finance its share of the cost (§636(b)(1)(c)); an assurance that the agency will build the school facility within a reasonable time (§636(b)(1)(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)).

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 * * * 14/

Section 636(b)(2) then provides that, after the Commissioner of Education reviews the application and satisfies himself as to certain other matters,[15/] he "shall approve" the application. Section 636(c) declares 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." And Section 637(a) of the Act then provides for the mode of payment.[16/]

14/ "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.

15/ The Commissioner must find that (1) the requirements of section 636(b)(1) (A to G) have been met; (2) the project is "not inconsistent with over-all State plans for" school construction, about which the Commissioner must consult with State and local educational agencies; and (3) 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)).

16/ Section 637(a) states:

> 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

(Cont on following page.)

Section 640 of the Act empowers the Commissioner of Education to operate schools for federal children in certain circumstances.[17]

16/ (Cont. from preceding page.)

> 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.

17/ Section 630 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." Section 640 states that in such cases the Commissioner of Education "shall make arrangements for constructing or otherwise providing the minimum school facilities necessary for the education of such children."

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 Commission "may" make temporary arrangements to construct or provide school facilities for these children as well, on a temporary basis.

Section 641(a) of the Act authorizes the Commissioner to take certain action upon violations by the grantee of the assurances and requirements laid down in preceding sections.[18/]

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).[19/]

18/ This section provides:

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

19/ 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.

(Cont. on following page.)

Section 642(a) provides that:

> In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency. 20/

19/ (Cont. from preceding page.)

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

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

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

B. Under existing law the statutory Assurance forbids the exclusion of Redstone children from any school because of race

Each time the Huntsville and Madison County boards filed an application for a school construction grant they included therein the assurance required by 20 U.S.C. §636(b)(1)(F). To repeat, this section provides:

> Each application * * * shall contain or be supported by --
>
> assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the state in which the school district of such agency is situated, as they are available to other children in such school district * * *.

We submit that the statute and the assurance given pursuant thereto prohibit the assignment of Redstone children to local schools on the basis of race.

1. Segregation violates the assurance because it violates Alabama law

(a) The minimal standard for treating federal children is that established by state law

1. The assurance explicitly states that the "terms" by which Redstone children are to be treated are those which are "in accordance with" state law. This language seems to us to be quite straightforward. Congress did not say that any "terms" imposed upon local children could be imposed upon Redstone children.[21/] It said that

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21/ But see the opinion of Judge Mize in United States v. Gulfport Municipal Separate School District, C.A. No. 2678 (S.D. Miss. 1963), pending on appeal in this Court as No. 20,772 (C.A. 5). It is not clear whether the court below agreed with Judge Mize or not, for at one point in Judge Grooms' opinion that of Judge Mize appears to be

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schools are to be made available to federal children on terms that are in accordance with the laws of the State in which the school district is situated. This limitation upon the power of local school authorities may be disregarded only by violating what the Supreme Court has described as a "cardinal rule" of statutory construction -- that "if possible, effect shall be given to every clause and part of a statute." D. Ginsberg and Sons, Inc., v. Popkin, 285 U.S. 204, 209 (1932).

In our view, the "accordance with" limitation upon the power of local Boards must have been designed to establish minimal treatment to which federal children are entitled, irrespective of law local children are treated in fact. If local boards violate state law with respect to local children, they are nonetheless bound to treat federal children as state law requires.

2. This common sense view of the meaning of the "in accordance with" clause is directly confirmed by the legislative history.

The assurance contained in Section 636(b)(1)(F) is explained by the report of the Committee on Education and Labor of the House of Representatives, No. 2810, 81st Cong., 2d Sess., p. 15 (1950), as follows:

> This provision is intended as a safeguard against discrimination against categories of

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21/ (Contd. from preceding page)

adopted en toto (R. 50), while at another the court below held that the administrative remedies of the Alabama Pupil Placement Law must be exhausted by Redstone children because the laws of Alabama are controlling. The exhaustion problem is discussed infra pp. 57-59.

> 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).

The House Committee did not say that any "patterns of racial segregation" would satisfy the assurance. What it said was that racial segregation "established in accordance with the laws of the State" would satisfy the assurance. And it wrote that understanding into the statute itself.[22/]

22/ Another chapter in the history of the education of federal children adds further confirmation.

In 1951, the House of Representatives passed H.R. 5411, 82nd Cong., 1st Sess., providing certain amendments to P.L. 815 and P.L. 874. It was reported to the Senate with an additional amendment to section 6 of P.L. 874. This amendment would have permitted the Commissioner to make temporary arrangements for educating off-base children in on-base facilities where he had made arrangements for education of on-base children in such facilities, pursuant to "suitability" requirement and other standards which permit him to make education arrangements for on-base children. In addition, the Senate amendment read:

> To the maximum extent practicable, education provided under this section shall be comparable to free public education provided for children in comparable communities in the State, and education provided under this section shall be available to the children for whom it is being provided on the same terms, in accordance with laws of the State in which the Federal property is situated, as free public education is available to other children in such State. Sen. Rep. No. 1022, 82d Cong., 1st Sess., p. 11 (1951). (Emphasis added)

The Senate Report stated:

> Your committee has amended this section of the bill so as to require that, to the maximum extent practicable, the education provided pursuant to the amended section 6 of Public Law 874 will be available to the children for whom it is being provided on the same terms, in accordance with the laws of the State in which the Federal property is located, as free public education is available to other children in the State.

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22/ (Contd. from preceding page)

> This amendment is patterned after the provision now in Public Law 815 which requires applicants seeking assistance under that law for the construction of schools to give assurance that the school facilities of the applicant will be available to the federally-connected children on the same terms, in accordance with State law, as they are available to other children in the same area. Sen. Rep. No. 1022, 82d Cong., 1st Sess., p. 5 (1951). (Emphasis added)

President Truman refused to sign H.R. 5411 into law. His "Memorandum of Disapproval" was dated November 2, 1951. In the course of his veto message, the President said (97 Cong. Rec. 13787, 82nd Cong., 1st Sess.):

> Unfortunately, however, the Congress has included one provision in this bill which I cannot approve. This provision would require a group of schools on Federal property which are now operating successfully on an integrated basis to be segregated. It would do so by requiring Federal schools on military bases and other Federal property to conform to the laws of the States in which such installations are located. This is a departure from the provisions of Public Laws 815 and 874, which required only that the education provided under these circumstances should be comparable to that available to other children in the State. The purpose of the proposed change is clearly to require that schools operated solely by the Federal Government on Federally-owned land, if located in any of seventeen States, shall be operated on a segregated basis 'to the maximum extent practicable.' (Emphasis added)

Both the Congress and President Truman clearly considered that the phrase "in accordance with the laws of the State" required operation of the on-base schools on a racially segregated basis if the law of the state in which the base was located required racial segregation.

3. That the obligation owed by local school authorities to federal children is to be governed by State law was the holding of the district court for the Eastern District of Virginia in an identical case, United States v. Prince George County, Virginia, School Board, C.A. No. 3536 (decided June 24, 1963), from which no appeal was taken.[23/] There, Judge Butzner said:

> The statute and the assurance refer to state laws without excepting any of these laws. The Court can not exclude state laws pertaining to race in the assignment of children to school. To make this exclusion, despite the clear language of the statute and assurance, would violate the well established principle [that clear and unambiguous statutory and contractual language must be given its plain meaning].
>
> This conclusion is in harmony with the explanation of the statute given in H.R. 2810, 81st Congress, 2nd Session, page 15 (1950), ... [quoting the House Report, supra].
>
> Thus, it is plain that the statute does deal with racial segregation. Pursuant to the terms of the statute, the question of racial segregation is to be determined by state law. . . . . Both Congress and the School Board . . . . clearly stated that state laws were to be the criteria by which the obligation of the assurance was to be discharged. This Court is bound to adhere to the plain language of the statute and assurance 'as the authentic expression of the intention of the parties.' . . . .
>
> Since 1950, the statute has not been changed. The intent of Congress and of the School Board has not changed. They both stated they would be guided by state law. (emphasis added)

23/ In the Prince George case the district court entered judgment for the United States, after a trial on the merits, on the ground that the school board there involved had violated the Assurance here relied upon.

Judge Butzner then concluded that ". . . the law of Virginia is the measure of the School Board's obligation."

(b) Under existing Alabama law racial school assignments are prohibited

The laws of Alabama were amended, subsequent to the decision in Brown v. Board of Education, 347 U.S. 483 (1954), to preclude the assignment of children to public schools on racial grounds.[24/]

24/ It is clear that under the Assurance the obligation of the appellees changes as state law changes. See United States v. Prince George County School Board, supra, where the district court held:

> In 1950 Congress intended that segregated facilities should be used for the education of federally-connected children in those states whose laws provided for the separation of the races. In 1951 the School Board, when it gave the assurance, intended to use segre-- gated facilities in compliance with state laws. Both Congress and the School Board, however, clearly stated that state laws were to be the criteria by which the obligation of the assurance was to be discharged . . . .
>
> Since 1950, the statute has not been changed. The intent of Congress and of the School Board has not changed. They have stated they would be guided by state law. The only thing that was changed is the state law to which the statute and the assurance refer.
>
> The fact that the state law pertaining to racial segregation has changed affords no justification for disregarding the plain language of the statute or the assurance. Obviously the Congress and the School Board realized State laws would change. They can not be held to have intended that all state laws pertaining to education were frozen in the mold of 1950. The statute places no such limitation on the application of State laws.

Moreover, racial segregation is but one aspect of the educational process to which the assurance speaks. Suppose, for example, that in 1950 Alabama law did not require any public school to provide a biology laboratory

24/ (Contd. from preceding page)

for its students. And then suppose that in 1960 Alabama law was amended to require such facilities. It could hardly be seriously argued that access to a new laboratory could be withheld from Redstone children while it was at the same time made available to local children. The same principle governs this case.

It is also clear that, "if in exact obedience to the law," as here, "the specified provision is integrated into a written contract, in exact terms, the provision must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it." 3 Corbin, Contracts §551 pp. 200-201. See also Personal Industrial Bankers, Inc. v. Citizens Budget Co., 80 F. 2d 327, 328 (C.A. 6, 1935), cert. denied, 293 U.S. 674. It is therefore irrelevant that appellees may have believed that the assurances they gave subsequent to the revision of Alabama law would be satisfied by separate-but-equal treatment. It is also irrelevant that appellees may have believed that assurances antedating the revision of Alabama law would be satisfied by segregated schooling after the date of Alabama law revision.

Irrelevant, too, since the meaning of a statute is involved, is the fact that the Commissioner of Education has in recent years approved grant applications despite the fact that appellees were known to be segregating Redstone children. Administrative rulings -- much less administrative acquiescense, which is the most that can be charged to the Commissioner here -- can not vary the meaning of a federal statute or give rise to any sort of estoppel. United States v. Prince George County School Board, supra; United States v. San Francisco, 310 U.S. 16, 31 (1940) (federal grant); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); United States v. California, 332 U.S. 19 (1947); Loftus v. Mason, 240 F. 2d 428 (C.A. 4, 1957), cert. denied, 353 U.S. 949.

First. The Alabama Constitutional provisions and statutes which once required racial segregation have been repealed. See Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, 379-380 (N.D. Ala. 1958), affirmed per curiam, 358 U.S. 101.

Second. The previous segregation laws, which antedated Brown, were replaced by the present Alabama Pupil Placement Act, Title 52, §61(4), Recomp. Code of Alabama (1958), first enacted in 1955 and subsequently amended in 1957.[25/]

25/ The Alabama Pupil Placement Law, Title 52 §61(4), Recompiled Code of Alabama (1958) provides in pertinent part:

> Authority and responsibility of local boards for assignment, transfer and continuance of pupils; factors to be considered. - Subject to appeal in the limited respect herein provided, each local board of education shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the board as provided herein the board may exercise this responsibility directly or may delegate its authority to the superintendent of education or other person or persons employed by the board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and association involved; the effect or admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission

The Pupil Placement Act expressly applies to " . . . the assignment, transfer or continuance of pupils among and within the schools . . ." It vests the power over these matters in local school boards, subject to limited review. And it declares that "in the assignment, transfer or continuance of pupils . . .," certain "factors and the effect or results thereof shall be considered, with respect to the individual pupil . . . ." The Act then ennumerates seventeen factors to be considered in making pupil assignments. Among these factors are (1) available space and "teaching capacity"; (2) suitability of curricula for particular pupils; (3) the adequacy of a pupil's academic preparation; (4) intelligence, aptitude and "mental energy or ability"; and (5) the morals, conduct,

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25/ (Contd. from preceding page)

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

health and personal standards of the pupil. There are other, more vague and ambiguous criteria as well. But not mention is made of race as a factor which the local school authorities "shall" consider in making assignments. The fact that the Alabama statute enumerates seventeen factors which are to govern pupil assignments, without mentioning race, clearly means that race cannot be considered. Indeed, there can be no doubt that this interpretation is the sine qua non of the legal validity of the Pupil Placement Law.

The Alabama Pupil Placement Act has been so construed. In Shuttlesworth v. Birmingham Board of Education, supra, a three-judge District Court held the Act constitutional on its face. In so doing the court said, at page 384:

> The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color (emphasis added).

Citing the page of the District Court's opinion upon which the above language appears, the Supreme Court affirmed Shuttlesworth in a per curiam opinion, stating, "the motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision. 162 F. Supp. 372, 384." (Emphasis added). The Alabama Pupil Placement Act has, therefore, been authoritatively construed to prohibit racial assignments.[26/]

26/ Other Pupil Placement laws which have come before the courts have received an identical interpretation. See Jeffers v. Whitley, 309 F. 2d 621, 627 (C.A. 4, 1962), where the Court of Appeals for the Fourth Circuit said of the North Carolina law that "assignments on a racial basis are neither authorized nor contemplated by that permissive act." Similarly, in Bradley v. School Board of Richmond,

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Since (1) defendants gave an assurance that they would treat the Redstone children in accordance with State law, and (2) Alabama law prohibits assignments on the basis of race, it follows that (3) in assigning Negro Redstone children to local schools on account of their race the defendants are violating Alabama law, and (4) they are therefore also violating the assurance.

26/ (Contd. from preceding page)

317 F. 2d 429 (C.A. 4, 1963), the same Court said that "assignments on a racial basis are neither authorized nor contemplated by Virginia's Pupil Placement Act

2. Segregation also violates the assurance because the local "white" schools are "available" to local Negro children

Our principal contention is, as explained above, that Redstone children cannot be assigned to schools for racial reasons because (1) Alabama law forbids racial assignments, and (2) Alabama law governs the meaning of the Assurance. Even if, however, Alabama law were silent on the racial question[27/], we would reach the same conclusion.

(a) Basically, our argument in this respect is as follows. In requiring that the obligation to the federal children was to be measured by state law, Congress, of course, meant valid -- i.e., constitutional -- state law[28/]. On the other hand, it can hardly be argued that, while Congress intended that unconstitutional state law could not define the obligation of the assurance, it also intended that, if state law is silent, the obligation could be defined by unconstitutional local practice. If "laws" means constitutional laws -- and there can be no doubt about that -- then "terms," in the absence of laws, must mean constitutional terms. Constitutional terms, of course, are terms which do not include racial segregation.

27/ It has not been suggested, of course, that Alabama law requires racial assignments.

28/ An unconstitutional "law," the Supreme Court has many times noted, "is no law." Ex parte Royall, 117 U.S. 241, 248 (1886). It is viewed "the same as if there were no act." United States v. Realty Co., 163 U.S. 427, 439 (1896). See also Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Chicago, I. & Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913); Norton v. Shelby County, 118 U.S. 425 (1886). Hence, when Congress in a statute refers to the "laws" of a State, it means constitutional laws. If, therefore, Alabama law required racial segregation, that requirement would not be part of the "laws" of Alabama within the meaning of the Assurance, and it could not be interpreted as a defense to this lawsuit.

(b) These conclusions are supported by several considerations. First, the Constitution of the United States is a part of the "laws" of every state. See, e.g., Neal v. Delaware, 103 U.S. 370, 389-391 (1881). It therefore follows that the local practice of segregation is prohibited by the "laws" of Alabama because such segregation is prohibited by the Fourteenth Amendment. In short, the phrase "in accordance with the laws of the State" is comprehensive, i.e., it governs both state laws and local practice and refers, as we have said, only to constitutional local practice. Second, the legislative history suggests that unless state law requires segregation, the assurance would not be satisfied by segregation practices. The committee report, quoted supra, p.23-24 notes that the assurance was not "intended to disturb ... patterns of racial segregation established in accordance with the laws of the State." The inference is that segregation not required by state law was to be "disturbed" by the assurance. Third, the peculiar -- indeed, bizarre -- nature of the real defense of appellees on this aspect of the case is that the federal children may be treated unconstitutionally because appellees treat their own children unconstitutionally. The propriety of a federal court accepting this defense is surely open to question. Cf. Hurd v. Hodge, 334 U.S. 24 (1948). This defense is nothing more nor less that the "indiscriminate imposition of inequalities" condemned in Shelley v. Kraemer, 334 U.S. 1 (1948).

(c) These conclusions are foreshadowed by several decisions of the federal courts. Air Terminal Services, Inc., v. Rentzel, 81 F. Supp. 611 (E.D. Va.

1949) (Bryan, J.), was a civil action to set aside a regulation of the federal Civil Aeronautics Administrator which prohibited racial segregation at Washington National Airport, located in Virginia. The plaintiff contended that a Virginia statute requiring racial segregation in restaurants was applicable to the Airport under the "Assimilative Crimes Act," 18 U.S.C. §13, which makes a federal crime of any act on a government reservation which is a crime under the laws of the state in which the reservation is located. But Judge Bryan rejected this argument. He held (81 F. Supp. at 612):

> ...the assimilative crimes act ... 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., 29/ 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

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29 / In Johnson the Supreme Court suggested quite clearly the principle later followed by the Rentzel decision. Considering whether a shipment of liquor to Fort Sill, Oklahoma, which had been seized by state officials, should be ordered returned to the shipper, the Court said:

> Petitioners' argument as to the applicability of the assimilative crimes statute raise at least three distinct questions, no oneof 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. Steward & Co. v. Sadrakula, 309 U.S. 94, 99-104 (emphasis added).

> regulation of the Administrator, who was authorized by statute 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 (emphasis added).

Judge Bryan squarely held, then, that a federal statute incorporating state law as the federal standard did not incorporate state laws in conflict with federal public policy. This ruling was followed in United States v. Warne, 190 F. Supp. 645, 658-659 (N.D. Calif., 1960) (three-judge court), affirmed in part and reversed in part on other grounds sub. nom. Paul v. United States, 371 U.S. 245 (1963, in which the court said that "... the Assimilative Crimes Act does not operate to adopt any State penal statutes which are in conflict with federal policy. . . ."

These cases say that when Congress declares that state law (or state conduct, if state law is silent) is to define obligations or duties under federal law, Congress means state law or conduct consistent with federal policy. A fortiori, when, as in section 636(b)(1)(F), Congress refers to "terms" upon which schools are available to local children, it means "terms" consistent with the federal Constitution.

(d) Finally, we think that this interpretation of the Assurance is required by the federal Constitution. Many years ago, in Gunn v. Barry, 82 U.S. (15 Wall.) 610, 623 (1872), the Supreme Court squarely held that:

> Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States

If 20 U.S.C. §636 makes unconstitutional state conduct the statutory measure of treatment due federal children, it will be at once apparent that the statute itself is in grave constitutional difficulties. Consider, for example, the problem presented if a Negro

Redstone child sued under 42 U.S.C. 1983 and 28 U.S.C. 1343 to gain admittance to "white" schools in Huntsville or Madison County, and the appellees justified their segregation practices by pointing to the Assurance and observing that it allowed them -- perhaps even compelled them -- to segregate the plaintiff because they segregated local children. Obviously a federal court would have to either (1) reject their contention, or

(2) hold section 636(b)(1)(F) unconstitutional under the Fifth Amendment, which, like the Fourteenth, prohibits racial segregation, Bolling v. Sharpe, 347 U.S. 498 (1954), whether the federal government's involvement in that segregation is direct or "nonobvious," cf. Burton v. Wilmington Pkg. Authority, 365 U.S. 715 (1961).

In light of the constitutional difficulties which arise if section 636(b)(1)(F) is construed to authorize unconstitutional segregation of federal children, we submit that the statute must be interpreted to preclude such segregation. In short, the "terms" which the Assurance requires appellees to apply to Redstone children are terms consistent with the Fourteenth Amendment.

C. The Assurance is enforceable in equity

The only remaining question about the Assurance is whether the United States can do anything about its violation. The appellees contended below that it cannot be enforced in federal court. We say that it can be.

1. The Assurance is a contractual obligation

The Assurances given by the defendants in each of their applications are obligations arising out of a contractual arrangement entered into between the United States and the particular Board. Pursuant to the statute (20 U.S.C. §631 et seq.) the parties entered into an agreement by which the United States would provide school construction funds in 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 Supreme 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 Pac. Ry., 256 U.S. 51, 63 (1921)[30]; 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).

30/ The same principle is expressed in United States v. Northern Pacific Ry. Co., 256 U.S. 51, 63 (1921), where the Court said:

> The purpose of the granting act and resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions and public stores to and from the Pacific coast, with all the resultant advantages to the Government and the public. To that end the act and resolution embodied a proposal to the company to the effect that if it would undertake and perform that vast work it should receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus, the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government .... (emphasis added).

These cases indicate that when the government grants money upon certain conditions or obtains certain promises in exchange therefore, a contract arises, enforceable as such at the suit of either party.

Thus, in United States v. Prince George County School Board, supra, Judge Butzner held, with respect to school construction grants to county school authorities in Virginia, that, "There is no essential difference between the grants to the railroads and the grants to the School Board." Continuing, he said:

> The Court concludes that the arrangement by which the School Board obtained money from the United States for assistance in construction of schools constituted a contract. The United States agreed to make certain payments to the School Board in exchange for certain assurances. The School Board, in order to receive the funds, gave the assurance required by the statute. The United States made the payments, and the contract is executed on its part. 31/

The court below, by approving Judge Mize's opinion in the Gulfport school case, appears to have agreed that the appellees here entered into a contract with the United States, for Judge Mize's opinion refers to the assurance as a "contract" on several occasions. United States v. Gulfport Municipal Separate School District, supra.

31/ Indeed, even if the contracts were not now fully executed on the Government's part, the statute makes it clear that once the statutory conditions are met the Government is obliged to approve (i.e., "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

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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).

2. The United States has standing to enforce its contractual rights in court without statutory authority to sue

It has long been settled that the United States may institute a lawsuit to enforce any contract right it may have, notwithstanding the absence of statutory authority to sue, unless such a suit has been expressly prohibited by Congress.[32/] As the district court held in United States v. Prince George County School Board, supra, in an identical case, "This is a well established right of the United States."

As early as 1818, in Dugan v. United States, 16 U.S. (3 Wheat.) 172, 181, Mr. Justice Livingston said:

> An intimation was thrown out, that the United States had no right to sue in any case, without an act of congress for the purpose. On this point, the court entertains no doubt. In all cases of contract with the United States, they 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 to them a right which is secured to every citizen of the United States.

Similarly, in Cotton v. United States, 52 U.S. (11 How.) 229, 231 (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

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32/ The contention that the School Construction Act expressly prohibits this suit is considered infra pp. 53-57.

> 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 33/

The absence of express statutory authority to sue to enforce these contracts is, therefore, no obstacle to maintenance of this suit, for the assurance is enforceable like any other contract to which the Government is a party. 34/

33/ See also Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956); Jessup v. United States, 106 U.S. (16 Otto) 147, 152 (1882); United States v. Tingey, 5 Pet. 115, 127-128 (1831); Hart & Wechsler, The Federal Courts and the Federal System, 1114-1115 (1953); Corwin, ed., Annotated Constitution of the United States of America, 584 (1953).

34/ Even if enforceable contractual obligations were not created when the appellees gave the assurances required by section 636, we submit that the statute is directly enforceable. While section 636(b)(1)(F) is not cast in terms of a direct command to the appellees, this phraseology is immaterial when a federal grant is to be construed. Cf. Ervein v. United States, 251 U.S. 41 (1919); Searight v. Stokes, 44 U.S. (3 How.) 150, 166-167 (1845). And federal grants have the force of law as well as of contractual obligations. See Oregon & California Ry. Co. v. United States, 238 U.S. 393, 415 (1915)(". . . railroad grants have the command and necessarily, therefore, the effect of law . . ."); Helvering v. Northwest Steel Mills, 311 U.S. 46, 51 (1940); United States v. 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).

Since the statute itself commands the performance sought here, the authority to enforce it (assuming arguendo that no contractual obligation is created) is inferable from the statute itself. United States v. Republic Steel Corp., 362 U.S. 482 (1960).

(Cont. on following page.)

3. Nothing in the School Construction Act precludes enforcement of the Assurance in the courts.

(a) The administrative remedies provided by sections 640 and 641 are not exclusive.

Section 640 authorizes the Commissioner of Education, in the event that no local educational agency is able to provide "suitable free public

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34/ (Cont. from preceding page.)

In Republic Steel, section 10 of a statute prohibited the creation of any "obstruction . . . to the navigable capacity of any of the waters of the United States . . ." Suing for an injunction to enforce section 10, the United States was faced with the objection that, although another provision of the Act authorized suits to remove "structures," no authority had been given to remove "obstructions." But the Supreme Court held that "no statute is necessary to authorize this suit." 362 U.S. at 492. The Court said (ibid.):

> 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).

Similarly, assuming no contractual obligation, section 636 must be construed as enforceable by inference if the purpose of Congress is not to be frustrated. See also United States v. Powers, 307 U.S. 214, 217 (1939); Bird v. United States, 187 U.S. 118, 124 (1902) (presumption against a "construction which would cause grave public injury or even inconvenience" if statute not enforceable); cf. Gemsco, Inc. v. Walling, 324 U.S. 244, 266-267 (1945)(dictum that terms and conditions of wage order may be enforced in court because "Congress did not include authority to prescribe 'terms and conditions' merely as a preachment").

education" for children who reside on federal property, to make arrangements for "constructing or otherwise providing the minimum school facilities necessary for the education of such children."[35/]

Section 641(a) provides that if the Commissioner of Education finds that "any assurance given in an application is not being or cannot be carried out," he may notify the local board that "no further payment wil be made . . . until there is no longer any failure to comply . . ."

The court below, relying upon the opinion of Judge Mize in the Gulfport case, appears to have held that the "remedies" provided in sections 640 and 641 are exclusive, and that no other recourse for violation of the assurance is available to the United States. This conclusion is erroneous.

First. Simply stated, the district court has ruled that the United States has no judicial remedy for violation of the assurance because the United States has the power to build and operate its own schools. This alternative, according to the

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35/ The Commissioner may also make arrangements "to provide, on a temporary basis, minimum school facilities for children of members of the Armed Forces on active duty, if 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 . . . that no local educational agency is able to provide suitable free public education for such children."

This provision applies only to children of military, not civilian, employees. Moreover, it authorizes only "temporary" action.

court below, is a remedy. But this contention is singularly unpersuasive. "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 contract right to have the defendants treat Redstone children without discrimination by operating its own schools. What the court has really said is, even if defendants have violated the assurance, 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. 36/

36/ 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. There are 700 "on base" children and 8300 "off base" children attending the public schools of the City of Huntsville. And of the 500 Negro children involved, only 17 live within the Redstone Arsenal. To suggest that authorization to provide an education for seventeen Negro children is a "remedy" for defendants' breach of the assurance with respect to the other 483 Negro children is surely dubious. As to Madison County, all of the federal children attending its schools live off-base.

Precisely the same argument refutes the contention that the Commissioner's power (under section 641(a)) to withhold further construction payments if the Assurance is violated provides an exclusive remedy. As to this contention, Judge Butzner held in the Prince George County suit that:

> Provisions of this section are not applicable to the facts proved in this case. Here, the bulk of the funds can not be withheld because they have already been paid and the schools have been built.

This ruling is equally applicable to the present case. If the recourse authorized by section 641(a) were the sole means of enforcing the assurance, the latter would be ineffective beyond the date that any given project was completed. This certainly could not have been the intention of Congress, which drafted the assurance as "a safeguard against discrimination against [federal children] . . . ." H. Rept. No. 2810, 81st Cong., 2d Sess., p. 15 (1950), quoted in full supra p. 23. A "safeguard" remaining vital only during the construction process would be illusory indeed.

Since no "remedy" whatever for violation of the assurance is provided by sections 640 or 641(a), these provisions cannot in any sense be held to abrogate the Government's common-law remedy for breach of contract.

Second. We have demonstrated that the "remedies" allegedly provided by sections 640 and 641(a) are not, in truth, "remedies" at all. A fortiori, then, these "remedies" are 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, 284 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.

Third. An even more fundamental principle governs this case. The rule relied upon by Judge Mize and evidently adopted by the court below--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.[37/]

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

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37/ None of the cases cited by Judge Mize in the Gulfport case for his holding that the administrative remedies provided in sections 640 and 641(a) are exclusive involved suits by the United States, or by any governmental entity, state or federal. See Pollard v. Bailey, 87 U.S. 520 (1874); Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284 (C.A. 7, 1954); Globe Newspaper Co. v. Walker, 210 U.S. 356 (1908); Louisville v. Dixon, 150 So. 811 (Miss. 1933); Price v. Price, 32 So. 2d 124 (Miss. 1947); Coleman v. Lucas, 39 So. 2d 879; G. & S.I.R. Co. v. Laurel Oil Co., 160 So. 564 (Miss. 1935).

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 anyone 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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> 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). 38/

38/ 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 and 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 39/ (emphasis added).

Nothing in the school construction act suggests that the remedies upon which the defendants would have the government rely -- if, indeed, they are remedies at all -- were intended to exclude resort to the common-law remedy for breach of contract. On the contrary, as the Shriver and American Can cases show, the very inadequacy of these remedies suggests quite strongly that they were not intended to be exclusive.

(b) Section 642(a) does not prohibit this suit.

Section 642(a) provides:

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

39/ Similarly, in United States v. Republic Steel Corp., 362 U.S. 482 (1960), the Supreme Court dealt with section 10 of a federal statute which prohibited "the creation of any obstruction . . . to the navigable capacity of any of the waters of the United . . ." Another provision of the same statute expressly authorized suits to remove "structures," but the statute was silent as to suits to remove "obstructions" referred to in section 10. Notwithstanding the argument that the specific remedy provided for removing structures excluded that remedy for removing obstructions, the Supreme Court held that the Government could sue to remove obstructions. See also United States v. Silliman, 167 F. 2d 607, 611 (C.A. 3, 1948).

This provision does not bar the United States from instituting suit to enforce the Assurance required by section 636(b)(1)(F).

1. This section has been construed by the district court for the Eastern District of Virginia as inapplicable to suits brought to enforce the Assurance. In United States v. Prince George County School Board, supra, the court said:

> . . . the Court must determine whether this section bars relief in this case. The Court concludes that it does not. The section cannot be construed to annul those assurances for which Congress expressly provided in the statute.
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> Undoubtedly no official of the federal government could exercise any supervision, direction or control over the selection of a school superintendent by the school board. No assurance was required by the Congress in this regard.
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> On the other hand, Congress did require an assurance that the school facilities be available to federally-connected children on the same terms, in accordance with the laws of the state, as they are available to other children. This can give rise to many personnel problems, but the Court does not construe the act ot mean that all such problems shall be uncorrected. For example, the purpose of the statute would be impaired and the assurance violated if the school board were to rule that local children could start to school at age 6 and federally-connected children only at age 10. This also would pertain to personnel. Certainly, however, the statute contemplates that such a situation should be corrected by federal intervention. The Court is of the opinion that 20 U.S.C. 642(a) pertains to matters for which no provision is made in other parts of the statute. It was not intended to defeat safeguards erected by the Congress. 40/

40/ We also think that section 642(a) is inapplicable to the question of the treatment accorded federal children because its language does not in terms deal with this problem. This provision does not refer to suits of any kind, but to "direction, supervision, or control." If Congress had intended to divest the United States of its common-law remedy for breach of the assurance contract, it would have chosen more apt language to express this intention,

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Judge Butzner's holding is but an application of a more general rule of statutory construction. Section 636 specifically declares that, however "local" the question of the treatment of federal children might otherwise be, the federal government has an interest in their treatment and has expressly determined to assure a particular standard of treatment. The specific and express requirement contained in section 636 must then prevail over the general language of section 642(a). In Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957), the Supreme Court held that:

> However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specified terms prevail over the general in the same or another statute which otherwise might be controlling.' 41/

40/ (Continued from preceding page)

for there is a strong presumption against construction of a federal statute that would deprive the United States of a common-law remedy (i.e., suit for breach of contract) to enforce a right created by the same statute (see supra pp. 49-53), and an equally compelling 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).

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

If, therefore, the Assurance requires certain conduct and section 642(a) in general terms appears to be inconsistent with the explicit terms of the Assurance, section 642(a) must give way.

Moreover, the construction urged below by appellees conflicts with yet another rule of statutory construction. Their view would render section 636 meaningless. But so to construe the statute would run afoul of the earlier noted "cardinal rule," that, "if possible effect shall be given to every clause and part of a statute." D. Ginsberg & Sons v. Popkin, supra. Put another way, the appellees are saying that the assurance required by section 636, even if it squarely prohibits the defendants' conduct, simply cannot be enforced. Similar arguments have not enjoyed a favorable reception in the Supreme Court. See, e.g., United States v. San Francisco, 310 U.S. 16 (1940), quoted supra p. 46 ; Gemsco, Inc., v. Walling, supra.

2. The legislative history makes it clear that section 624(a) was intended to prohibit federal intervention only where the federal government has no legitimate interest declared elsewhere in the statute, and not otherwise. Section 636(b)(1)(F), of course, declares that providing education to the federal children is a matter of interest to the federal government.

The House Report on section 242(a) of Title 20, an identical provision appearing in the School Operating Expenses Act, 20 U.S.C. 231 et. seq., enacted contemporaneously with the School Construction Act, reveals that the restrictions contained therein were enacted because of the Committee's view that "the personnel, curriculum, or program of instruction * * * will be of no concern to

the Federal Government" (emphasis added).[42/] Since that is so, it is plain that the general language of sections 242(a) and 642(a) was not intended to govern the problem of the availability of school facilities to federal children, since that availability is expressly, by statute, made the concern of the federal government.

4. Redstone children are not obliged to exhaust the administrative remedies of the Alabama Pupil Placement Law

The court below held that "until the individual colored children of federal personnel show that they have been discriminated against because of their race or color, the [Alabama Pupil] Placement Act would be applicable."

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

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

This suit, he said, "would simply sidestep the Placement Law . . . ." (R. 51). Accepting the premise of the district court reasoning, its conclusion is erroneous as a matter of law.

The complaint alleges very explicitly that (R. 16):

> It is the policy and practice of the defendants in operating the public schools under their jurisdiction, to segregate Negro students in separate schools maintained and operated solely for students who are of the Negro race.

The complaint also alleges that, in consequence of this policy, Negro children of Redstone personnel "are compelled to attend schools operated exclusively for members of the Negro race and are not permitted to attend schools available to white children similarly situated" (R. 17, 28).

The district court's ruling was made upon a motion to dismiss. The above allegations of the complaint are, of course, admitted to be true for purposes of such a motion. Thus the court below should have viewed the case as if, in its own words, "individual colored children of federal personnel . . . have been discriminated against because of their race or color . . . ." And it should therefore have proceeded to apply the rule -- which it recognized to be applicable to such a state of facts -- that the remedies afforded by the Pupil Placement law[43/] need not be exhausted prior to the institution of suit. See Potts v. Flax, 313 F. 2d

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43/ See Title 52, Code of Alabama, Recomp. 1958, §§61(7), 61(9), quoted supra pp. 11-13.

284, 290 (C.A. 5, 1963); Mannings v. Board of Public Instruction, 277 F. 2d 370 (C.A. 5, 1960); Gibson v. Board of Public Instruction, 272 F. 2d 763 (C.A. 5, 1959); Bush v. Orleans Parish School Board, 308 F. 2d 491, 498-501 (C.A. 5, 1962).

II

The United States may sue to enjoin violations of the Fourteenth Amendment rights of Redstone children because the violations burden the exercise of the war power

The complaint alleges that appellees are assigning Redstone children to their schools in violation of the Fourteenth Amendment. As we shall demonstrate, the allegations of the complaint entitle the United States to sue to enjoin this unconstitutional conduct notwithstanding the absence of specific statutory authority.[44/]

A. Violation of the Fourteenth Amendment rights of Redstone children may be redressed by the United States if it suffers a legal injury as a result of that violation

While Fourteenth Amendment rights are personal, it does not follow that only persons directly within the scope of the Amendment may sue to enforce it.[45/] In Pierce v. Society of Sisters,

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44/ This argument is entire independent of the contractual obligation urged in Argument I, supra.

45/ The court below dismissed the claim for relief grounded upon violation of the Fourteenth Amendment on the ground that only "persons" are entitled to enforce the Amendment and the United States is not a "person" within the meaning of 28 U.S.C. 1343, the civil rights statute. But that holding entirely misconceives the nature of the problem. Section 1343 is a jurisdictional statute: it tells the courts what kinds of lawsuits they may entertain, not who may bring any particular kind of suit. We do not find it necessary to rely upon section 1343(3) to give the district court subject matter jurisdiction, because under 28 U.S.C. 1345 the district courts are granted jurisdiction of the subject matter of any suit brought by the United States. Under §1345 the sole question is whether the United States has a cause of action, not whether the district court has jurisdiction. United States v. Bossier Parish School Board, No. 9282 (W.D. La. 1963); United States

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268 U.S. 510 (1925), the State of Oregon had enacted a statute requiring children within the state to attend state-operated schools. The Plaintiffs, who owned and operated certain private schools within the state, complained that enforcement of the law offended the Fourteenth Amendment by denying parents liberty of choice in the education of their children, and that the result was to injure the plaintiffs in the conduct of their business of operating private schools. The defendants objected that the plaintiffs had no legal standing to obtain relief for Fourteenth Amendment violations being suffered by others. The Court rejected this contention, stating (pp. 535-536):

> Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255; Western Turf Association

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45/ (Cont. from preceding page)

v. Silliman, 167 F.2d 607 (C.A. 3, 1948), cert. denied, 335 U.S. 825; United States v. Colvard, 89 F.2d 312, 313 (C.A. 4, 1937). The predecessors to section 1345, beginning with 1 Stat. 78 (1789), reviewed in United States v. California, 208 F. Supp. 861, 864 (S.D. Calif. 1962) and Hart & Wechsler, The Federal Courts and the Federal System, 1107-1108 (1953), make this abundantly clear. See also 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, 654 (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.

The court below has, in our view, confused the question of subject-matter jurisdiction, which the court clearly has under §1345, and the question of the "standing" (or authority) of the United States to bring suit, which we shall demonstrate also exists.

> v. Greenberg, 204 U.S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax v. Raich, 239 U.S. 33; Truax v. Corrigan, 257 U.S. 312; Terrace v. Thompson, 263 U.S. 197.
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> Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clean and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229; Duplex Printing Press Co. v. Deering, 254 U.S. 443; American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184; Nebraska District v. McKelvie, 262 U.S. 404; Truax v. Corrigan, supra, and cases there cited (emphasis added.)

The Supreme Court considered a somewhat similar situation in Barrows v. Jackson, 346 U.S. 249, 97 L. Ed. 1586, 73 C. St. 1031 (1953). There the plaintiff had sued in state court for damages,

alleging that the defendant had breached a racially-restrictive covenant contained in a deed to real estate. The defendant, in disregard of the covenant, had conveyed the property to a person falling within the racial ban of the covenant's terms. In countering a defense that imposition of damages by a state court would violate the Fourteenth Amendment guarantee of equal protection, the plaintiff urged that the defendant, not being a member of the race discriminated against, had no standing to raise the issue. The Court, in rejecting the contention, said (pp. 259-260):

> Petitioners argue that the right to equal protection of the laws is a "personal" right, guaranteed to the individual rather than to groups or classes. For instance, discriminatory denial of sleeping-car and dining-car facilities to an individual Negro cannot be justified on the ground that there is little demand for such facilities by Negroes as a group. McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 161-162. See Sweatt v. Painter, 339 U.S. 629, 635. This description of the right as "personal," when considered in the context in which it has been used, obviously has no bearing on the question of standing. Nor do we violate this principle by protecting the rights of persons not identified in this record. For instance, in the Pierce case, the persons whose rights were invoked were identified only as "present and prospective patrons" of the two schools. Pierce v. Society of Sisters, supra, at 535. In the present case, it is not non-Caucasians as a group whose rights are asserted by respondent, but the rights of particular non-caucasian would-be users of restricted land.

Accord: N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-460 (1958).

In light of these cases, the question is whether the complaint sufficiently alleges a legal injury to the United States entitling it to sue to enjoin violations of the Fourteenth Amendment rights of Redstone children.

B. Appellees' violations of the Fourteenth Amendment burden the exercise of the war power by the United States

1. The war power of the United States is grounded upon constitutional provisions authorizing Congress to "raise and support Armies," Article I §8 cl. 12, to "provide and maintain a Navy," Art. I, §8 cl. 13, and to "make rules for the government and regulation of the land and naval forces," Art. 1, §8 cl. 14.[46/] This power is executed by the President, who is "Commander in chief of the Army and Navy of the United States," Article II, §2.

2. The complaint alleges that the unconstitutional state action of the appellees interferes with the exercise of the war power by adversely affecting and impairing the "service and morale" of military personnel and civilian employees of the United States stationed at Redstone Arsenal. This allegation, of course, is admitted as true for purposes of this appeal. Aside from that, however, there is much support for this conclusion in various studies undertaken in recent years and in directives of the Executive Branch of the Government, all of which may be judicially noted.

46/ See also Article I §8 cl. 11 (the power to "declare war") and clauses 15 and 16 of Article I, §8, concerning the militia.

The most recent comprehensive study of the subject is contained in the June 13, 1963 Initial Report of the President's Committee on Equality of Opportunity in the Armed Forces,[47/] "Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States." The Committee concluded, inter alia, that "Community segregation and discrimination adversely affects service morale." Initial Report, p. 46. This conslusion was noted by the President when, in transmitting the Initial Report to Secretary McNamara on June 21, 1963, he said that "[a]s the report emphasizes, a serious morale problem is created for Negro military personnel when various forms of segregation and discrimination exist in communities neighboring military bases" (emphasis added).

Dealing specifically with the problem of school segregation, the Committee said, referring to the serviceman transferred to a community where segregation exists (Initial Report, p. 47):

47/ On June 22, 1962, the President, in his letter establishing the Committee, stressed the importance of a "thorough review of the current situation both within the services and in the communities where military installations are located." He charged the Committee with answering the following question:

> What measures should be employed to improve equality of opportunity for members of the Armed Forces and their dependents in the civilian community, particularly with respect to housing, education, transportation, recreational facilities, community events, programs?

> Schools are his next concern . . . . Although he wears the uniform of his country, his dependents may be forced into segregated schools. In some communities near bases these schools are well below standards, overcrowded, distant from the base and otherwise undesirable. Whatever the quality of the schools, and school conditions do of course vary, his children, like himself, are again set apart, contrary to their wishes.

Noting that "to all Negroes these community conditions are a constant affront," Id. at 48, the Committee went on to conclude that impairment of morale was not the only consequence of off-base segregation; the performance of servicemen was also affected. It said (Id. at 49):

> Complaints which the Committee received, some in interviews and some written, show that for some Negro families, the presence of community discrimination prove too great to bear. Homes are broken up by these conditions as Negro families coming from parts of the country which are relatively tolerant of color differences find themselves facing a situation which is both new and frightening. For them, the clock has turned back more than a generation. To protect their children and to maintain some degree of dignity they return home, and the husband is left to work out his service obligation alone. Other families never attempt to venture into these conditions in the first place. Under either of these circumstances the Negro serviceman becomes consumed with the frustration of separation and the desire for transfer. And whether his family is with him or not, the indignities suffered in the community place a load upon his service career affecting both his interest and his performance. (Emphasis added).

Again speaking generally about segregated communities, the Committee said (Id. at 51):

> It is not surprising but most discouraging, to have to report that there are bases where Negro personnel confront such intolerable conditions off base that almost any device will be employed to effect a change in duty assignment. Applications for transfer, infractions of rules and a general contempt for the "system" are apt to appear. The effect on Service morale and efficiency is apparent. The Committee's inquiries, including interviews with many base Commanders, made it clear that the accomplishment of the military mission of a base confronted with such conditions is measurably impaired (emphasis added). 48/

48/ In light of its findings, the Committee recommended, among other things, that the services should "make every effort to eliminate discriminatory practices as they affect Members of the Armed Forces and their dependents within the neighboring civilian communities." Id. at 61. "Should all other efforts fail," the Committee suggested that "the services must consider a curtailment or termination of activities at certain military installations near communities where discrimination is particularly prevalent." Id. at 70

3. Indeed, it is precisely because of the impairment of efficiency and morale that the Executive Branch has, since some years prior to the decision in Bolling v. Sharpe, 347 U.S. 498 (1954), holding racial segregation unconstitutional under the Fifth Amendment, taken steps to eliminate racial segregation and discrimination both within the Armed Services themselves, and in connection with public and private facilities in communities near military installations. These steps began in the main with President Truman's Executive Order 9981 of 1948, which prohibited racial discrimination in the Armed Services.[49/] The latest determination is embodied in a

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49/ Later examples of orders eliminating on-base discrimination include President Truman's pocket-veto of a bill which would have required segregation of on-post schools in states where state law required segregation. See 97 Cong. Rec. 13787, 82nd Cong., 1st Sess., "Memorandum of Disapproval," dated November 2, 1951, in which the President noted that some desegregation of on-base schools in such states had been achieved. On January 12, 1954, Secretary of Defense Wilson ordered that all on-base schools must be operated without racial discrimination. The order applied to the education of dependents of both military and civilian personnel. This policy directive, issued prior to Bolling v. Sharpe, 347 U.S. 498 (1954), was plainly based upon the war power and not the Fifth Amendment. In 1961 the Secretary of Defense forbade official sponsorship of any recreational organization which practiced racial discrimination, and prohibited the use of any Department of Defense facility by such organizations.

Memorandum from Secretary McNamara to the President, dated July 24, 1963, reviewing the Gesell Report, and a directive, dated July 26, 1963, No. 5120.36, implementing the general conclusion of that report.[90/]

90/ Earlier examples of Executive Branch determination that racial segregation off-base impairs the effectiveness of the defense establishment include (1) a directive of the Commissioner of Education, dated March 30, 1962, that segregated education is not "suitable" within the meaning of section 640 of the School Construction Act; (2) a directive, dated February 27, 1963, of the Acting Adjutant General of the Army, reminding commanders that the Army policy against discrimination "includes educational facilities utilized by the dependent children residing on military installations"; (3) a memorandum dated March 8, 1963, from Secretary McNamara on "Non-Discrimination in Family Housing," applicable to off-base housing not owned by the United States, and directing that when the Armed Services lease privately-owned housing in order to make it available for assignment to military personnel and their families, the owner must agree to accept military tenants without discrimination because of race, color, creed, or national origin. The Memorandum further provides that the base housing offices which list available private housing shall list only housing units which are available without discrimination; (4) a directive of the Deputy Secretary of Defense, dated June 19, 1961, noting that "the policy of equal treatment for all members of the Armed Forces without regard to race, creed, or color, is firmly established within the Department of Defense," and ordering local commanders to obtain desegregation of off-base facilities through the use of command-community relations committees whenever they could do so. Whenever desegregation could not be achieved by such means, the Department of Defense would provide such facilities on the military installations to the extent possible; (5) a directive of the Assistant Secretary of Defense for Manpower, dated December 7, 1961, ordering the under-secretaries of the Armed Services to ensure that civil defense training and education was conducted on a racially non-discriminatory basis, and requiring Commanders to provide on-base facilities for such training whenever non-segregated facilities are unavailable off the base; (6) a reminder issued in 1963 by the Assistant of Defense for Manpower that "facilities selected for use in field exercises should be open to use by all personnel without regard to race," which noted further that discrimination is not justified merely because a local organization volunteers a facility for use; (7) a directive, dated January 18, 1963, from the Assistant Secretary for Manpower, to the secretaries of the Services, to cooperate with the United Service Organizations, Inc. to desegregate USO facilities.

In his "Memorandum for the President" the Secretary of Defense stated that "Our military effectiveness is unquestionably reduced as a result of civilian racial discrimination against men in uniform." And his Directive issued July 26, 1963, declares that:

> Discriminatory practices directed against Armed Forces members, all of whom lack a civilian's freedom of choice in where to live, to work, to travel and to spend his off-duty hours, are harmful to military effectiveness. Therefore, all members of the Department of Defense should oppose such practices on every occasion, while fostering equal opportunity for servicemen and their families, on and off-base (emphasis added).

To eliminate discrimination and segregation the Secretary authorized the Assistant Secretary of Defense for Manpower to "establish the Office of Deputy Assistant Secretary of Defense (Civil Rights)." And "every military commander" was charged with the responsibility "to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours."

4. The Gesell Report, in which the President concurred, Secretary McNamara's findings, and the various directives and orders of the Department of Defense and the Executive Branch generally, issued over the past two decades, reflect a determination by the Government that military operations are adversely affected by racial discrimination, including school discrimination against children of servicemen and civilian employees of the government working in defense installations. Since a matter of military judgment committed to Executive authority is involved, the determination of the Commander-in-chief and lesser officials charged with responsibility

for carrying out the war power is at least entitled to great weight. In any event, we submit that the complaint sufficiently alleges that appellees conduct directly interferes with the maintenance by the appellant of an efficient military establishment. This, as we shall now show, alleges a legal injury.

C. An interference with the war power is a legal injury

It is settled that State action which burdens the exercise of the war power by the United States constitutes a legal injury to the United States. Thus, in Paul v. United States, 371 U.S. 245 (1963), the United States sued California on the ground that the state's price regulation scheme, as applied, "was an unconstitutional burden on the United States in the exercise of its constitutional power to establish and maintain the Armed Forces." After holding that "the issue as to whether or not the State regulatory scheme burdened the exercise by the United States of its constitutional power to maintain the Armed Services . . . was a substantial federal question" requiring the convocation of a three-judge court, the Supreme Court invalidated certain aspects of the California program found to conflict with the war power. Accord: Public Utilities Comm. v. United States, 355 U.S. 534 (1958).

The standing of the United States to remove a burden on the war power is but one facet of its standing to remove a burden upon the exercise of its "other constitutional functions," United States v. Georgia Public Service Comm., 371 U.S. 285 (1963), such as "its power to maintain a civilian service," United States v. Georgia Public Service Comm., supra, or its power to

"regulate commerce . . . among the several states," In re Debs, 158 U.S. 453 (1895); United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962), affirmed, 316 F. 2d 928 (1963); see also United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. U.S. Klans, 194 F. Supp. 36.[51/]

D. Conclusion

We have demonstrated that a violation of the Fourteenth Amendment rights of Redstone children may be remedied in a suit in equity brought by the United States if the latter is legally injured by that violation. We have then shown that the complaint alleges an actual injury to the United States because of the loss of morale and efficiency resulting from such segregation. And finally, we have demonstrated that this actual injury constitutes a legal injury as well. It follows that the Fourteenth Amendment rights of Redstone children may be redressed in this action by the United States. We do not assert, of course, that all state action burdening the exercise of the war power is actionable. But certainly state conduct which is not even otherwise constitutional may be such a burden on the war power that it is subject to removal. In this case the state conduct violates the Fourteenth Amendment. For this reason the

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51/ Thus, in another "impacted area" school suit brought in the Western District of Louisiana, United States v. Bossier Parish School Board, No.9282 (W.D. La. 1963), Judge Dawkins stated that the United States would ordinarily be entitled to a trial on the merits on the war power issue. Judge Dawkins, however, dismissed the complaint because, in his view, government counsel had conceded on oral argument that the United States had no evidence to offer on this matter.

United States is, in our view, entitled to a trial on the merits to determine whether in fact the appellees' conduct imposes a burden on the war power.

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be reversed.

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