

MEMORANDUM

Re: University of Alabama

The University of Alabama will be required to admit at least two Negroes the week of June 10, one to the Graduate Center at Huntsville and one to the undergraduate campus at Tuscaloosa. The student at Huntsville is a mathematician employed by NASA; the student at Tuscaloosa is a girl.

Unless he changes direction, Governor Wallace intends to create a major incident. His plan has been to go personally to the campus with the entire State Highway Patrol, plus special deputies, and personally to prevent entry of a Negro student into the University. He apparently intends to require the federal government to use troops to enforce the court order.

If this is done, there is a severe problem in avoiding violence of the sort that occurred at Oxford. The incident will unquestionably adversely affect the reputation and economy of the state. It will also hurt the University; in Mississippi there has been serious loss of faculty and a loss of tuition-paying students of at least 50% for next year.

The choice in this matter is completely up to the Governor. He is not supported by most of the newspapers on this point, and is opposed by his own Lieutenant Governor and Attorney General. Although it is very late, it would still be possible for Alabama to deal with this matter in the way that a similar situation was dealt with in South Carolina in January. In both Tuscaloosa and Huntsville, moderation and compliance with the court orders would have the full support of the newspapers, the city governments, the business community, and the large majority of the people.

Attached is a book containing a list of companies having major installations in Alabama, together with the names of their chief executives. It is essential that as many of these as possible be fully informed on the situation develop-

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ing regarding the University of Alabama and the position of Governor Wallace, which he publicly reaffirmed today.

It would be extremely helpful if you would look through the book and indicate the companies whose principal executives are known to you personally or have dealings with your Department. If you will then assign someone from your Department to coordinate calls to these people and others with us, we will arrange for a meeting to avoid duplication and the like before any calls are made. Accordingly, it would be appreciated if as soon as possible you would give the name of the person to work with on this to my office or to Burke Marshall.

ROBERT F. KENNEDY  
Attorney General

~~Chambers~~  
U. of A.

**MEMORANDUM TO THE MEMBERS OF THE CABINET**

**Re: University of Alabama**

Attached is a list of the companies and their chief executives having major installations in Alabama.

It would be desirable for as many of these as possible to be fully informed on the situation developing regarding the University of Alabama and the position of Governor Wallace.

The University will in all probability be required to admit at least two Negroes the week of June 10, one to the Graduate Center at Huntsville and one to the undergraduate campus at Tuscaloosa. The student at Huntsville is a mathematician employed by NASA; the student at Tuscaloosa is a girl.

Unless he changes direction, Governor Wallace intends to create a major incident. His plan has been to go personally to the campus with the entire State Highway Patrol, plus special deputies, and personally to prevent the entry of a Negro student into the University. He has intended to require his own arrest or removal by force, and to require the federal government to use troops to enforce the court order.

If this is done, there is a severe problem in avoiding violence of the sort that occurred at Oxford. The incident will unquestionably adversely affect the reputation and economy of the state. It will also hurt the University; in Mississippi there has been serious loss of faculty and a loss of tuition-paying students of at least 50% for next year.

The choice on this matter is completely up to the Governor. He is not supported by most of the newspapers on this point, and is opposed by his own Lieutenant Governor and Attorney General. Although it is very late,

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it would still be possible for Alabama to deal with this matter in the way that a similar situation was dealt with in South Carolina in January. In both Tuscaloosa and Huntsville, moderation and compliance with the court orders would have the full support of the newspapers, the city governments, the business community, and the large majority of the people.

1. It would be appreciated if you would look through the book and mark the men personally known to you, indicating whether or not each is well-enough known so that it would be appropriate for you to call him and inform him on this matter.

2. This undertaking will be coordinated by William Orrick. It would also be appreciated if you could assign someone who could report to Mr. Orrick the men you have selected as known to you or whom you would be willing to call.

B.M.

21 May 1963

U. of A.  
file

LOCATION OF UNITED STATES ATTORNEYS

Virginia

Claude V. Spratley, Jr.  
Richmond, Va.

Thomas B. Mason  
Roanoke, Va.

North Carolina

Robert H. Cowen  
Raleigh, North Carolina

William H. Murdock  
Greensboro, North Carolina

William Medford  
Asheville, North Carolina

South Carolina

Terrell L. Glenn  
Columbia, South Carolina

John C. Williams  
Greenville, South Carolina

Georgia

Floyd M. Buford  
Macon, Georgia

Donald H. Fraser  
Savannah, Georgia

Charles L. Goodson  
Atlanta, Georgia

Alabama

Nason L. Weaver  
Birmingham, Alabama

Ben Hardeman  
Montgomery, Alabama

Vernol R. Jansen, Jr.  
Mobile, Alabama

Mississippi

Hosea M. Ray  
Oxford, Mississippi

Robert E. Hauberg  
Jackson, Mississippi

Louisiana

Louis C. LaCour  
New Orleans, Louisiana

Edward L. Shaheen  
Shreveport, Louisiana

Arkansas

Robert D. Smith, Jr.  
Little Rock, Arkansas

Charles M. Conway  
Fort Smith, Arkansas

Tennessee

John H. Reddy  
Chattanooga, Tenn.

Kenneth Harwell  
Nashville, Tenn.

Thomas L. Robinson  
Memphis, Tenn.

Florida

Clinton M. Ashmore  
Tallahassee, Florida

Edward F. Beardman  
Tampa, Florida

Edith House  
Miami, Florida

UNITED STATES GOVERNMENT

# Memorandum

Burke Marshall

TO : Assistant Attorney General  
Civil Rights Division

DATE: MAY 7 1963

FROM : Norbert A. Schlei  
Assistant Attorney General  
Office of Legal Counsel

SUBJECT: Henry H. Mize - Tuscaloosa, Alabama

Mr. Herman Marcuse of my Office has suggested to me the name of Mr. Henry H. Mize, an attorney in Tuscaloosa, Alabama, as a possible moderate person who could be contacted in that city. While Mr. Mize served in the Alabama Senate from 1947-1951, he sponsored legislation which outlawed the wearing of the Klan uniform. Toward the end of World War II, he served with the War Crimes Branch of the U. S. Forces.

Mr. Marcuse has not met Mr. Mize for several years, but feels that he is basically a man of good will and that he might serve as a contact in Tuscaloosa if some need for a friendly observer there should arise.

*U. of A. file*

*Alabama file*

March 19, 1963

MEMORANDUM TO THE FILE

Re: University of Alabama

On March 19th, Jeff Bennett called with the following information:

1. The University arranged for a SCAT examination to be given yesterday to McGlathery. McGlathery was informed about this on Saturday and agreed to take it. Yesterday, however, he showed up with a letter that stated he did not want to take an examination, but asked enrollment as a Special Student, on a non-credit basis. His letter said that he was not refusing to take the examination, but would take it later if necessary.

Mr. Bennett said that the Special Student category was for students who had no high school degree; that it was not available to students with a college degree.

The Director of Admissions is writing to the Director at the Huntsville Center that the Special Student category is not applicable to graduate students, and that McGlathery cannot be admitted to the Spring Quarter because of a failure to have any SCAT examination. His letter says also that he is holding the file.

2. With respect to Carroll's application, the University has received no transcript from Morehouse or Marquette, as is required by the University regulations. Hence, his application is incomplete. He will be informed of this on Friday.



After the meeting of the Executive Committee last week, and of the Board of Trustees yesterday, Mr. Bennett states that they have unanimous opinion that the University should desegregate by having these two students admitted to graduate school in Huntsville in June. They will not admit the students, however, without a court order. The students will be rejected on the ground that the duty of the Board is to provide for the education process in the University as a whole in the best way that they can, and that the admission of these students would disrupt the educational process. They hope that the students will then obtain court orders for their admission.

The Governor attended the Board of Trustees' meeting. He states that after a court order is issued and the University says that it will comply with the order, he will take over. He will go to Huntsville personally with the State Highway Patrol, a group of sheriffs, and citizens serving as sheriffs' posses. He will preserve law and order but will turn away the students. He will force the federal government to come back with troops in order that he can announce that he has yielded only to force. He will then also say that it is up to the federal government to protect the students.

*B.N.*

cc: The Attorney General  
The Deputy Attorney General

U. of Ala. file

April 9, 1963

MEMORANDUM TO THE ATTORNEY GENERAL

Re: University of Alabama

Yesterday (April 8) the Board of Trustees of the University held a meeting at which they were informed by the President of the University of the details of the applications by McGlathery and Carroll to attend the Graduate Center at Huntsville in June.

Governor Wallace was at the meeting.

The Governor's statements as to his intentions were just as strong as on previous occasions. In addition, he said that he intended to call Senators Hill and Sparkman to ask them to ask that McGlathery and Carroll be transferred away from Huntsville. My information is that he did make those calls.

I am informed that it is to be expected that the Governor will initiate investigations into the backgrounds of McGlathery and Carroll.

The Governor also said that he intended to call Werner Von Braun and tell him that an incident in Huntsville would be bad for the space program.

Burke Marshall  
Assistant Attorney General  
Civil Rights Division

Burke:

showdown in  
Tuscaloosa instead  
of Huntsville?

Jack

NEW YORK TIMES

5/17/63

## SHOWDOWN NEAR AT U. OF ALABAMA

U. S. Judge Upholds Ruling  
on Admission of Negroes

By HEDRICK SMITH

BIRMINGHAM, Ala., May 16

Alabama moved a step closer today to a showdown next month over renewed desegregation of the University of Alabama.

A Federal district judge ruled that the university's new director of admissions was bound by the desegregation order he issued nearly eight years ago in the Autherine Lucy case. Miss Lucy, a Negro, won admission to the university at that time.

Judge H. Hobart Grooms also directed the dean of admissions, Herbert H. Mate, to show cause why three Negro applicants should not be admitted to the university and why he should not be held in contempt of the previous court injunction.

Judge Grooms set a hearing in the case for next Tuesday. His action today in consolidating the new cases with the Lucy case not only speeded up legal proceedings, but also put the burden of proof on the university.

### Dean Has Resigned

Judge Grooms issued the original injunction desegregating the University of Alabama on July 1, 1955. His injunction was directed against Williams F. Adams, the former dean of admissions, who has resigned.

Under that court order Miss Lucy, now Mrs. Autherine Lucy Foster, attended the University of Alabama for three days—Feb. 26-29, 1956.

She was expelled for "false, defamatory, impudent and scandalous charges against school officials" for comments made to the press. Her expulsion was later upheld by Judge Grooms.

Alabama is now the only state in the South with no desegregation in any of its public educational institutions. Gov. George C. Wallace has vowed to "stand in the school house door" and go to jail, if necessary, to preserve segregated schools.

Two separate suits were filed recently on behalf of Negroes seeking to attend the universi-

### U.S. Employees Apply

One was filed last week on behalf of two Negroes, both employees of the Federal Government at the Redstone Arsenal missile complex in Huntsville. They have applied to enter the university's Huntsville Center as graduate students during the summer semester, starting June 10.

The second suit was filed April 15 on behalf of the three students who want to transfer to the university's main campus in Tuscaloosa from the Negro colleges they are now attending.

Two of them, Vivian J. Malone, 20 years old, of Mobile, Ala., and Sandy English, 21, of Birmingham seek to enter the university as undergraduates next September.

The third, Jimmy A. Hood, 20, of East Gadsden, has applied to enter the university during the summer semester beginning June 10. He is now a sophomore at Clarke College in Atlanta.

The university, represented by three Birmingham lawyers, Andrew J. Thomas, Frontis H. Moore and Samuel H. Burr, contended that the court order in the Lucy case did not apply to the new dean of admissions.

Attorneys for the Negro students took the position that the court order had been issued against the office of the dean of admissions rather than against the dean as an individual.

U. of Ala

Library

## PRESIDENTIAL USE OF TROOPS TO EXECUTE THE LAWS: A BRIEF HISTORY

DANIEL H. POLLITT\*

\* On September 23, 1957, President Dwight D. Eisenhower issued a Proclamation reciting that "certain persons in . . . Arkansas . . . have wilfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas with respect to matters relating to enrollment and attendance" at Central High School in Little Rock. The President stated in the proclamation that "such wilful obstruction of justice . . . makes it impracticable to enforce such laws by the ordinary course of judicial proceedings" and he commanded "all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith."<sup>1</sup>

The following day the President issued an order directing the Secretary of Defense to take all appropriate steps to enforce any district court orders of the type covered by the Proclamation and authorized the Secretary of Defense to use the Arkansas National Guard or such parts of "the armed forces of the United States as he may deem necessary."<sup>2</sup> The Proclamation and the Executive Order recited as authority "the Constitution of the United States" and title 10, *United State Code*, sections 332, 333, and 334.<sup>3</sup> The purpose of this Article is to discuss

\* Associate Professor of Law, University of North Carolina.

<sup>1</sup> Proclamation No. 3294, 22 Fed. Reg. 7628 (1957).

<sup>2</sup> Exec. Order No. 10730, 22 Fed. Reg. 7628 (1957).

<sup>3</sup> § 332. Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

§ 333. The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

§ 334. Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." 1 STAT. 425 (1795), as amended, 10 U.S.C. §§ 332-34 (Supp. IV, 1957).

the legality of President Eisenhower's action in light of the above cited authorities.<sup>4</sup>

#### THE CONSTITUTIONAL PROVISIONS

The Constitution provides that "The Congress shall have Power To . . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ." It additionally provides that the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . ." and that "he . . . shall take Care that the Laws be faithfully executed . . . ." The genesis of these provisions is an event that took place just prior to the Constitutional Convention of 1788, a farmers' revolt in Massachusetts under the leadership of Daniel Shays.

The New England states at the close of the Revolutionary War were in a depression. The fishing industry had been virtually destroyed. The shipping trade was in a languishing condition because of the war-time loss of many ships and because those remaining were prohibited by laws of England from pursuing their previous trade with the British colonies in the West Indies. The whaling industry which employed 150 vessels at the outbreak of the Revolutionary War was, at the opening of the peace, "reduced to the object of nineteen sails only."<sup>5</sup> Coinciding with the depressed economic conditions was an astronomical increase in debt, both public and private. The public debt of Massachusetts increased from approximately 100,000 pounds at the outbreak of the war to over 1,300,000 pounds by 1786. Private debts had accumulated in approximately the same ratio during the inflationary Revolutionary War period when the seldom paid soldier was forced to borrow for the support of his family. At the close of the Revolutionary War the state of Massachusetts levied high taxes to discharge the public debt; and the private creditor made demands upon the returned soldiers.<sup>6</sup> The

\* Objections have been made to the legality of the President's action. These objections have taken four major forms. (1) The President is prohibited by the Constitution from sending troops into a state against the objections of the governor of that state (the situation presented in Arkansas); (2) Constitutional authority vested in the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 2, is limited to enactments of Congress and does not include decrees of a federal court; (3) The Posse Comitatus Act of 1878, 20 STAT. 152, 18 U.S.C. § 1385 (Supp. IV, 1957), makes it unlawful to employ any part of the Army for the purpose of executing the laws except as such employment may be expressly authorized by the Constitution or by act of Congress and there existed no express authorization to send the federal troops to Little Rock; and (4) the provision of the Civil Rights Act authorizing the President to employ the Armed Forces "to aid in the execution of judicial process" issued in Civil Rights cases, 17 STAT. 16 (1871), 42 U.S.C. § 1993 (1952), was expressly repealed in the 1957 Civil Rights Act Amendment, 71 STAT. 634, 42 U.S.C.A. § 1975a (Supp. 1957). These objections are discussed and supported in the 1957 September and November issues of *U.S. News & World Report*.

\* U.S. CONST. art. II, §§ 2, 3.

\* U.S. CONST. art. I, § 8.

\* MINOT, HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS 13 (1810).

\* CURTIS, HISTORY OF THE CONSTITUTION OF THE UNITED STATES 266-69 (1854).

years 1785-1786 saw homesteads sold for the payment of debts, farm animals sold for the payment of lawyer's fees, and the farmer, his debts not yet satisfied, cast into debtors' prison.<sup>9</sup>

In 1786 some of the New England states passed legislation designed to aid the distressed debtor. Rhode Island issued half a million dollars in script for the payment of farm mortgages.<sup>10</sup> Vermont made farm produce, "at the value of their appraisal of men under oath," legal tender for purposes of paying farm mortgages. New Hampshire abolished imprisonment for debt.<sup>11</sup> The Massachusetts legislature, however, adjourned on the 8th of July, 1786, without enacting any legislation favoring the debtor. Remedial measures had passed the General Court, as the lower chamber was designated, but had failed in the Senate where qualifications of property ownership excluded all but the creditor class.<sup>12</sup>

The Massachusetts debtors were disappointed at the failure of the legislature to emulate the action taken in Rhode Island, Vermont, and New Hampshire. Conventions of delegates from townships were held in the western part of Massachusetts and petitions sent Governor Bowdoin requesting an emergency session of the legislature and the enactment of legislation to create "a bank of paper money . . . making it a tender in all payments, equal to silver and gold."<sup>13</sup> The conventions also requested Governor Bowdoin to halt the forthcoming sessions of the Court of Common Pleas, the court with jurisdiction over civil actions to collect tax and private debts, until the requested legislative session had opportunity to act on the grievances set forth in the petitions.<sup>14</sup>

The farmers decided to prevent the Court of Common Pleas from sitting until the Governor had opportunity to act on their petitions; so when the judges of the court arrived in Northampton on August 29th to begin the fall session, they were met with a line of bayonets barring their access to the court house, and presented with a petition requesting them to adjourn until "the resolves of the convention of this county can have an opportunity of having their grievances redressed by" the legislature. The court adjourned "without day"<sup>15</sup> and proceeded to Worcester County to hold its scheduled session on September 5th. Upon arrival the judges again found the court house filled with armed farmers who refused to let them in. The judges retired to a nearby tavern and opened court there; but access to all litigants was barred by the farmers, so the court adjourned to Athol, only to meet another band of armed

<sup>9</sup> TAYLOR, *THE FARMERS' MOVEMENT 1620-1920*, at 24 (1953).

<sup>10</sup> Note the provision in the Constitution authorizing the Congress to regulate the value of money. U.S. CONST. art. 1, § 8.

<sup>11</sup> TAYLOR, *op. cit. supra* note 9, at 26-29.

<sup>12</sup> STARKEY, *A LITTLE REBELLION* 7-8 (1955).

<sup>13</sup> MINOT, *op. cit. supra* note 7, at 36-37.

<sup>14</sup> STARKEY, *op. cit. supra* note 12, at 8.

<sup>15</sup> *Id.* at 20-21.

farmers who presented a petition requesting the judges to hear no cases "except by consent of both parties."<sup>16</sup> The court then moved to Great Barrington where the armed farmers "not only prevented the sitting of the courts which were so obnoxious to them, but broke open the gaol, and liberated the prisoners. They also compelled three of the Judges of the Court of Common Pleas to sign an obligation that they would not act under their commissions until grievances were redressed."<sup>17</sup>

When Governor Bowdoin learned of these events, he called an emergency session of the legislature to meet on the 18th of October. Both chambers of the legislature shared an "abhorrence of the proceedings against the Judicial Courts"; but the lower chamber thought the best way to meet the situation was to eliminate the causes of the distress, while the upper chamber favored punitive action.<sup>18</sup> The legislature adjourned in the last days of November without enacting any conclusive legislation.

Throughout December county-wide conventions were held where petitions were addressed to Governor Bowdoin requesting a new legislative session; and the farmers continued to prevent the Court of Common Pleas from holding its scheduled sessions. Finally, in January, the Governor called forth the militia from the eastern counties and ordered the Commanding General "to protect the Judicial Court . . . if the justices of the said courts should request your aid; to assist the circuit magistrates in executing the laws . . ." and to put down the insurrection.<sup>19</sup> The militia, amounting to 4,400 rank and file, marched off and routed the insurrectionists. Daniel Shays and other leaders of the rebellion fled the state, and a general pardon was issued for all others with but two exceptions.<sup>20</sup> That spring Governor Bowdoin was swept out of office in an election which saw many of those who had actively participated in the rebellion elected to the legislature.<sup>21</sup> The rebellion was over. However, the repercussions of the rebellion played a vital role in the formation of our national government.

In the year preceding the rebellion all the states had been invited to send delegates to a convention where the Articles of Confederation could be examined in light of the changing times. Only five states agreed to send delegates, and George Washington refused to leave his retirement although requested by the Virginia legislature to lead its delegation to the proposed convention. Immediately after the Massachusetts rebellion, another invitation was sent to the states, and this time all except Rhode Island (whose legislature had sympathized with the side of the Massachusetts rebels) agreed to send delegates to what is now known as the

<sup>16</sup> *Id.* at 40.

<sup>17</sup> *Id.* at 52-53.

<sup>18</sup> STARKEY, *op. cit. supra* note 14, at 216.

<sup>19</sup> *Id.* at 190.

<sup>20</sup> MINOT, *op. cit. supra* note 13, at 45.

<sup>21</sup> *Id.* at 99.

Constitutional Convention. This time George Washington agreed to preside as chairman.<sup>22</sup> Additionally, and more appropriate for purposes of this Article, the Shays Rebellion in Massachusetts was referred to constantly throughout the drafting of the Constitution and throughout the debate on its ratification as demonstrating the need for congressional and presidential authority to call forth the armed forces to execute the laws.<sup>23</sup>

The procedure adopted by the Constitutional Convention that met in Philadelphia in 1787 was to consider the proposals submitted by the delegates and to send the approved proposals to a Committee on Style for rewriting. Several delegates proposed that Congress have power "to call forth the aid of the militia in order to execute the laws of the Union" and these proposals were approved and sent to the Committee on Style without dissent or debate. The proposal that the President be given power "to execute the national laws" was debated and adopted over protest. Mr. Madison of Virginia introduced an amendment providing that the words "not legislative nor judiciary in their nature" be added to the phrase giving the President authority "to execute the laws." This amendment was defeated by a vote of seven states to three.<sup>24</sup> Thus, the framers of the Constitution expressly rejected a proposal that the President's power to execute the law not be extended to the "judiciary laws."

The Constitution was completed on September 17, 1787, and presented to the states for ratification. During the ratification debate "the inordinate pride of State importance" prompted an argument against the proposed Constitution on the grounds that it would authorize the use of force "against delinquent members." Those favoring the Constitution admitted that the proposed national government would be granted this power, but said that without it, the United States would "afford the extraordinary spectacle of a Government destitute even of . . . power to enforce the execution of its own laws."<sup>25</sup> Additionally, those who opposed the Constitution sought "to cast an odium upon the power of calling forth the militia to execute the laws of the Union" by stating that the militia would be used as a matter of course, as "there is nowhere any provision in the proposed Constitution for calling out the posse comitatus to assist the magistrate in the execution of his duty." Those who supported the Constitution admitted that the militia could be called forth to assist the magistrate but argued that this power would not be exercised often as the congressional right "to pass all laws necessary and proper to execute its declared powers" included the right to re-

<sup>22</sup> CURTIS, *op. cit. supra* note 8, at 273-74, 401-02.

<sup>23</sup> STARKY, *op. cit. supra* note 20, at 242.

<sup>24</sup> 5 ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 141-42 (1845).

<sup>25</sup> THE FEDERALIST No. 21, at 133 (University ed. 1893) (Hamilton).



quire "the assistance of the citizens to the officers who have been entrusted with the execution of those laws."<sup>28</sup> Thus it appears that those who ratified the Constitution, as well as those who signed it, did so with full knowledge that the power to "execute the laws" authorized the federal government to call forth the militia to assist the magistrate in the execution of his duty against "delinquent" states.

#### CONGRESSIONAL USE OF ITS CONSTITUTIONAL POWER TO PROVIDE FOR CALLING FORTH THE MILITIA

In addition to the Constitution, President Eisenhower based his action on a statute initially requested by George Washington, amended at the request of Thomas Jefferson, again amended at the request of Abraham Lincoln, and most recently re-enacted without material alteration in 1956.

#### THE GEORGE WASHINGTON STATUTES OF 1792 AND 1795<sup>29</sup>

The Constitution<sup>30</sup> authorizes the Congress to "provide for calling forth the Militia to execute the Laws of the Union." Congress first exercised this authority in 1792 with a law authorizing the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed."<sup>31</sup> This act of 1792 expired by its terms at the end of three years, and upon its expiration in 1795, Congress enacted a substantially identical permanent law.<sup>32</sup> The motivating factor behind these two George Washington statutes was the Whiskey Rebellion in the four western counties of Pennsylvania.

In March of 1791 Congress passed a law levying a tax on the dis-

<sup>28</sup> THE FEDERALIST No. 35, at 232-33 (University ed. 1893) (Hamilton). The *potte comitatus*, a term which is often used in this Article, is the entire population of a county above the age of fifteen which a sheriff may summon to his assistance in executing judicial decrees, keeping the peace, arresting felons, etc. BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>29</sup> This term is used for the purpose of clarity in the subsequent discussion.

<sup>30</sup> U.S. CONST. art. I, § 8.

<sup>31</sup> "§ 2. And be it further enacted, That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary courts of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President . . . to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session." Act of May 2, 1792, c. 28, 1 STAT. 264.

<sup>32</sup> 1 STAT. 424 (1795), as amended, 10 U.S.C. §§ 332-34 (Supp. IV, 1957). Some changes were made, the effect of which was to give the President a freer hand. Thus, the requirement of the 1792 act requiring notice by the judiciary to the President was eliminated, and the President was given authority to call the militia of any state without having to call first the militia of the state involved.

tillation of grain into whiskey.<sup>21</sup> This tax, for all practical purposes, was a direct tax on the income of the western farmer who, for lack of a local market or adequate transport across the Allegheny mountains, was required to reduce his bulky grain to portable form and send the resulting whiskey across the mountains for sale. As no other group or class was saddled with an "income tax," the western farmer believed that this act violated at least the spirit of the constitutional provision that all taxes be uniform.<sup>22</sup> The western farmer also objected to existing provisions that violation of this law be tried in the nearest federal court (located in Philadelphia). This, it was believed, violated the spirit of the sixth amendment, which guaranteed trial by a jury of the district wherein the alleged crimes had been committed.<sup>23</sup> The Pennsylvania assembly had enacted laws taxing whiskey in 1694, 1728, 1744, and 1772, and each of them was repealed because of popular protest.<sup>24</sup> The farmer decided to oppose this newest taxing authority.

Opposition at first was peaceful. Throughout the summer months of 1791 conventions were called where the delegates drafted petitions to Congress asking for repeal of the law. Local associations of farmers were formed who pledged mutual non-compliance with the law until Congress had opportunity to act on their petitions. Placards were posted, signed by "Tom the Tinker," urging contempt and boycott of those who paid the tax. When it was perceived that mere negative modes of opposition might prove ineffectual, local groups, known as "Whiskey Boys," began to threaten those who were likely to comply. The next step was physical interference with those whose duty it was to collect the tax. On the 6th of September, 1791, a party of armed and disguised men waylaid one Robert Johnson, collector of revenue for the counties of Allegheny and Washington, "seized, tarred and feathered him, cut off his hair, and deprived him of his horse, obliging him to travel on foot a considerable distance in that mortifying and painful situation."<sup>25</sup>

Complaint was made to the United States court sitting in Philadelphia, and warrants issued for the arrest of three persons who were thought to have participated in the offense. Deputy Marshal Joseph Fox was chosen to execute them. He went to Pittsburgh (the center of the western counties), where he found so much popular sentiment against the tax laws that, fearing for his own safety, he employed a private messenger to serve the warrants. This person "was seized, whipped, tarred, and feathered; and after having his money, and horse

<sup>21</sup> Act of Mar. 3, 1791, c. 15, 1 STAT. 199, 203.

<sup>22</sup> U.S. CONST. art. I, § 8.

<sup>23</sup> 1796-1797: 6 ANNALS OF CONG. 2803 (1849) (report of the commissioners appointed to confer with the citizens in the western counties of Pennsylvania).

<sup>24</sup> TAYLOR, *op. cit. supra* note 9, at 46.

<sup>25</sup> 1796-1797: 6 ANNALS OF CONG. 2852 (1849) (report of Secretary-Treasurer Alexander Hamilton on opposition to the excise law).

taken from him, was blindfolded and tied in the woods, in which condition he remained for five hours."<sup>38</sup>

The Congress that next convened in the winter of 1791-1792 turned its attention to ways and means of enforcing the tax on whiskey. To reduce the opposition and make the law more palatable to the farmer, Congress reduced the amount of the tax<sup>39</sup> and remitted the penalties previously accrued.<sup>40</sup> To ensure that the amended tax would be collected, Congress increased the compensation and number of the tax officials,<sup>41</sup> regulated the serving of process issued by the United States courts,<sup>42</sup> and, more important for purposes of this Article, authorized the President to call forth the militia to aid in the execution of the laws.<sup>43</sup> Alexander Hamilton pointed out that at the time of the attack on the federal marshal in September of 1791 "the Legislature of the United States had not yet organized the means by which the Executive could come in aid of the Judiciary, when found incompetent in the execution of the laws."<sup>44</sup> None of these statutes had the desired effect.

In the summer of 1792 the tax officials went to the four western counties, but were unable to secure office space from which to carry on their business. An army captain named William Faulkner rented his house to a tax official, but shortly thereafter was encountered by a number of people "who reproached him with letting his house for an office of inspection, drew a knife upon him, threatened to scalp him, tar and feather him, and reduce his house and property to ashes, if he did not solemnly promise to prevent the further use of his house for an office. Captain Faulkner was induced to make the promise exacted; and, in consequence of the circumstances, wrote a letter to the inspector countermanding the permission for using his house . . ."<sup>45</sup>

Throughout the summer of 1792 another series of farmer's meetings was held, committees of correspondence appointed, petitions sent to Congress requesting the total repeal of the tax law, and all citizens urged to refrain from paying the tax or having social intercourse or dealings with those who did. Bands of "Whiskey Boys" visited those who were inclined to observe the law, smashed their stills, and burned their barns. Few, if any, farmers paid their taxes.

The Administration met this rebellion with both stick and carrot. President Washington issued a proclamation on September 15, 1792, warning "all persons whom it may concern to refrain and desist from

<sup>38</sup> *Id.* at 2853.

<sup>39</sup> Act of May 8, 1792, c. 32, 1 STAT. 267.

<sup>40</sup> Act of May 8, 1792, c. 35, 1 STAT. 275.

<sup>41</sup> Act of May 8, 1792, c. 34, 1 STAT. 274.

<sup>42</sup> Act of May 8, 1792, c. 36, 1 STAT. 276.

<sup>43</sup> Act of May 2, 1792, c. 28, 1 STAT. 264. See note 29 *supra*.

<sup>44</sup> 1790-1797: 6 ANNALS OF CONG. 2852, 2853 (1849).

<sup>45</sup> *Id.* at 2856.

all unlawful combinations and proceedings whatsoever . . . .<sup>44</sup> The Administration also attempted to enforce compliance by prosecuting delinquents and by seizing the illegal whiskey on its way to the eastern markets where the people did not object to the law. To induce the farmers to pay their taxes, the Government entered into a purchasing program whereby all the whiskey used by the Army was to be purchased with immediate cash payment from the western Pennsylvania farmers who complied with the law.

All these measures were without avail. Inspectors and collectors of revenue were prevented by force from carrying out their tasks; and the "Whiskey Boys" who were indicted for interfering with the revenue officials were acquitted after neighbors provided alibis. The untaxed whiskey was diverted from its ordinary markets in eastern Pennsylvania and sent westward for sale in Kentucky and the Northwest Territory, whose inhabitants shared the western Pennsylvania farmers' aversion to the whiskey tax. The "Whiskey Boys" continued to threaten those who might otherwise have paid the tax.<sup>45</sup>

The Congress that met in 1792-1793 was unable to agree on any of the many proposals submitted on the Whiskey Tax and adjourned without taking any action on this problem.<sup>46</sup>

During the spring and summer of 1793 the western Pennsylvania farmers continued to obstruct the revenue laws, hoping thereby to cause their repeal. In April of 1793 a party of armed men in disguise attacked the house of the revenue collector in Fayette County. The judges of the county court thereupon issued warrants for the arrest of the rioters, but the sheriff refused to execute them and the judges were shortly thereafter voted out of office. In November of that year another attack was made on the home of the revenue collector, and he was forced at pistol point to surrender his office.<sup>47</sup>

The Congress that met in the winter of 1793-1794 again failed to take any definitive action, and upon its adjournment the Administration took matters into its own hands. Warrants for the arrest of those who had participated in the attack on the revenue collector were secured from

<sup>44</sup> 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 124 (1896).

<sup>45</sup> "A breath in favour of the law, was sufficient to ruin any man. It was considered as a badge of toryism. A clergyman was not thought orthodox in the pulpit, unless against the law; a physician was not capable of administering medicine, unless his principles were right in this respect; a lawyer could have got no practice without at least concealing his sentiments, if for the law; a merchant, at a country store, could not get custom. On the contrary, to talk against the law was the way to office and emolument. . . . To go to the Assembly, you must make a noise against it; and in order to go to Congress, or to keep in it, you must contrive, by some means, to be thought staunch in this respect. It was the *shibboleth* of safety, and the ladder of ambition." TAYLOR, *op. cit. supra* note 9, at 49, quoting from J. BRACKENRIDGE, INCIDENTS OF THE INSURRECTION 22 (1795).

<sup>46</sup> 1796-1797: 6 ANNALS OF CONG. 2852, 2858-59 (1849).

<sup>47</sup> *Id.* at 2859-60.

the United States court in Philadelphia and the marshal went personally to execute them. On July 15, 1794, he arrived in Allegheny County and joined forces with the inspector of revenue, one Colonel John Neville. Thereafter he was "beset on the road by a party of from thirty to forty armed men, who, after much previous irregularity of conduct, finally fired upon him, but, as it happened, without injury either to him or to the inspector."<sup>48</sup> The marshal made application to the "judges, generals of militia, and sheriffs of the county" for protection, but he was informed that "should the *posse comitatus* of the county be ordered out in support of the civil authority, very few could be gotten who were not of the party of the rioters."<sup>49</sup> The marshal then went to the home of Revenue Inspector John Neville, who took the precaution of calling a small detachment of regulars from the garrison of Fort Pitt to his aid. This precaution was justified, for on the night of July 17th, an armed band of approximately 500 men attacked the house of the inspector, and after some casualties on both sides, burned it to the ground. The marshal and inspector were captured, and released only after the marshal had agreed to serve no process on the west side of the Allegheny Mountains. Thereafter "the marshal and inspector returned to Philadelphia by a circuitous route, fearing personal injury from the farmers who beset all the usual routes to Philadelphia."<sup>50</sup>

Upon hearing of the marshal's misadventures, James Wilson, an Associate Justice of the Supreme Court of the United States, wrote the President that "in the counties of Washington and Allegheny, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district."<sup>51</sup>

The receipt of this information caused President Washington much concern. "On the one hand . . . to yield to the treasonable fury of so small a portion of the United States, would be to violate the fundamental principle of our Constitution, which enjoins that the will of the majority shall prevail. On the other, to array citizen against citizen . . . were steps too delicate, too closely interwoven with many affecting considerations, to be lightly adopted."<sup>52</sup> He postponed the immediate summoning of the militia into the field, but called for a standby ready reserve of 15,000 men in the event that the Governor of Pennsylvania would not or could not cope with the situation.

The President then conferred with Governor Mifflin of Pennsylvania, who not only refused to call forth the Pennsylvania militia, but advised

<sup>48</sup> *Id.* at 2863.

<sup>49</sup> *Id.* at 2865.

<sup>50</sup> 1796-1797: 6 ANNALS OF CONG. 2793 (1849) (message of President Washington to Congress).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Id.* at 2796.

the President not to send any militia into the western Pennsylvania counties.<sup>22</sup> The President advised Governor Mifflin that he had a constitutional obligation to "execute the laws," both those "laying duties upon spirits distilled within the United States" and those "which uphold the judiciary functions";<sup>23</sup> and on August 7, 1794, President Washington issued a proclamation warning all insurgents "to dispers and retire peaceably to their respective abodes" by the first day of September. In this proclamation he recited that David Lennox, marshal of the district of Pennsylvania, "had been fired upon while in the execution of his duty" and that he, President Washington, was determined "to cause the laws to be duly executed."<sup>24</sup> On the same day President Washington made requisition upon the Governors of Pennsylvania, Maryland, New Jersey, and Virginia for 15,000 men, to be immediately organized and prepared to move at a moment's warning.<sup>25</sup>

In the hope that the use of the militia might be averted, President Washington appointed three commissioners "to proceed to the scene of the insurrection, and to confer with any bodies of men or individuals with whom you shall think proper to confer, in order to quiet and extinguish it." These commissioners were authorized to tell the insurgents that the President was willing "to grant an amnesty and perpetual oblivion for everything which has passed" and to waive enforcement "concerning the duties of former years if they will fairly comply for the present year."<sup>26</sup>

The three United States commissioners met with three commissioners given like powers and duties by the Governor of Pennsylvania, and all proceeded to Pittsburgh to meet with the insurgents. The insurgents appointed a committee to meet with the commissioners, and after several days of discussion, it was agreed on both sides that prosecutions would be suspended and pardon granted if the majority of the people voted by referendum to henceforth pay their taxes. A referendum was conducted, and the people voted against compliance with the Whiskey Tax.<sup>27</sup>

Upon receipt of this information President Washington issued a proclamation "in obedience to that high and irresistible duty consigned to me by the Constitution 'to take care that the laws be faithfully executed'" in which he recited that he was sending the militia from

<sup>22</sup> 1796-1797: 6 ANNALS OF CONG. 2826-30 (1849) (letter of Aug. 5, 1794, from Governor Mifflin to President Washington).

<sup>23</sup> 1796-1797: 6 ANNALS OF CONG. 2848 (1849) (letter from President Washington to Governor Mifflin).

<sup>24</sup> 1 RICHARDSON, *op. cit.* *supra* note 44, at 159-60.

<sup>25</sup> S. Doc. No. 209, 57th Cong., 2d Sess. 37 (1903).

<sup>26</sup> 1796-1797: 6 ANNALS OF CONG. 2799-2800 (1849) (letter of Secretary of State Randolph to Commissioners James Ross, Jasper Yeates, and William Bradford).

<sup>27</sup> *Report of the Commissioners, 1796-1797*: 6 ANNALS OF CONG. 2803-12 (1849).

New Jersey, Pennsylvania, Maryland, and Virginia to "the scene of disaffection."<sup>80</sup>

Governor "Lighthorse" Harry Lee of Virginia, a Revolutionary War hero, was put in command of the militia and he was directed to accompany United States District Judge Richard Peters and United States Attorney William Rawle to the area of conflict and there "cause the laws to be executed . . . by judiciary process" by giving "countenance and support to the civil officers in the means of executing the laws."<sup>81</sup>

In the meantime meetings had been held in the rural districts and strong resolutions passed expressing willingness to "submit to the laws of the United States." On October 2nd a general meeting was held and two men delegated the task of meeting the President to assure him that order could be restored without the aid of military force. The President's reply was that the army was already on its way.<sup>82</sup>

When the militia arrived it was met with complete submission. A meeting was held on October 24th and resolutions adopted promising submission to authority and the payment of all excise taxes. Secretary of Treasury Alexander Hamilton caused the arrest of eighteen leaders who were sent to Philadelphia and marched through the streets with the word "Insurgent" on their hats, but a general pardon was issued to all but a few, and those who were tried and found guilty of treason were specially pardoned by Washington.<sup>83</sup>

President Washington devoted much of his 1794 annual message to Congress to the recent events in western Pennsylvania. He defended his conduct by pointing out that the "vengeance of armed men" prevented the marshal from delivering legal process; but pointed out that "there are not wanting real and substantial consolations for the misfortune," namely, the demonstration that his fellow-citizens "are now as ready to maintain the authority of the laws against licentious invasions as they were to defend their rights against usurpation." Then pointing out "the possibility of a similar contingency" he urged the Congress to enact laws reorganizing the militia and "providing, in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrection, and repel invasions."<sup>84</sup>

Ten days after the annual message of the President, the Congress enacted a temporary measure authorizing the President to cope with the situation then existing in western Pennsylvania.<sup>85</sup> The Congress then

<sup>80</sup> 1 RICHARDSON, *op. cit. supra* note 44, at 161-62.

<sup>81</sup> 1796-1797: 6 ANNALS OF CONG. 266-67 (1849) (instructions from President Washington to Governor Lee). The defined objects of the "judiciary process" were "(1) to bring offenders to justice, and (2) to enforce penalties on delinquent distillers by suit."

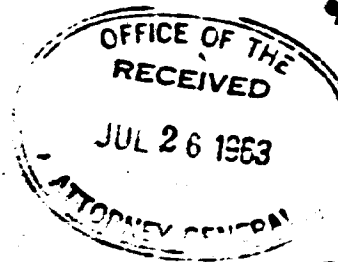
<sup>82</sup> TAYLOR, *op. cit. supra* note 34, at 52-53.

<sup>83</sup> BASSETT, *THE FEDERALIST SYSTEM 1789-1801*, at 112 (1906).

<sup>84</sup> 1 RICHARDSON, *op. cit. supra* note 44, at 162-67.

<sup>85</sup> Act of November 29, 1794, c. 1, 1 STAT. 403.

Department of Justice  
Washington



26 July 1963

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: University of Alabama

*File with  
University of  
Alabama*

The Administration of the University of Alabama would like to get additional financial help out of one of three programs, although they also kindly supplied me with the attached sheet showing their commitments, and means of meeting them, and emergency possibilities:

1. A NASA grant for aerospace and physical sciences research. This is an existing grant for \$300,000 this fiscal year, \$200,000 the next fiscal year, and \$100,000 the following year. It would normally be supplemented up to \$300,000 each year. The grant could be broadened in scope to strengthen the University generally, and the limitation to research only removed. This would justify expenditures for faculty commitments in Tuscaloosa within the general area of study covered by the grant.

2. An Army grant starting next year for \$300,000 per year. This is also, under the present application, limited to research. It has not been approved but its approval is in process. It would have to be broadened in the same way as the NASA grant in Paragraph 1, but this could be done by cutting down the research funds request before approval of the grant to \$200,000 a year and then using the \$100,000, plus additional funds, to strengthen the University generally within the field covered by the grant.

3. A training grant from the Army in the amount of \$360,000 a year. This has already been approved and already applies to faculty,



but is defined in terms of specific items. Dr. Pow says that he could justify a modification of this grant to provide for the general development of the University of Tuscaloosa in the areas of the University's work which are of interest to the Marshall Space Center.

\*\*\*\*\*

Is there anything I should do about this? I was noncommittal.

BM

cc: Deputy Attorney General

50,300

total of 100,000 for equipment and furnishing  
for the new office building, 100,000

100,000

10,000

10,000

100,000

100,000

100,000

100,000

U. of Ala. file

April 9, 1963

MEMORANDUM TO THE ATTORNEY GENERAL

Re: University of Alabama

Yesterday (April 8) the Board of Trustees of the University held a meeting at which they were informed by the President of the University of the details of the applications by McGlathery and Carroll to attend the Graduate Center at Huntsville in June.

Governor Wallace was at the meeting.

The Governor's statements as to his intentions were just as strong as on previous occasions. In addition, he said that he intended to call Senators Hill and Sparkman to ask them to ask that McGlathery and Carroll be transferred away from Huntsville. My information is that he did make those calls.

I am informed that it is to be expected that the Governor will initiate investigations into the backgrounds of McGlathery and Carroll.

The Governor also said that he intended to call Werner Von Braun and tell him that an incident in Huntsville would be bad for the space program.

Burke Marshall  
Assistant Attorney General  
Civil Rights Division

March 19, 1963

MEMORANDUM TO THE FILE

Re: University of Alabama

On March 19th, Jeff Bennett called with the following information:

1. The University arranged for a SCAT examination to be given yesterday to McGlathery. McGlathery was informed about this on Saturday and agreed to take it. Yesterday, however, he showed up with a letter that stated he did not want to take an examination, but asked enrollment as a Special Student, on a non-credit basis. His letter said that he was not refusing to take the examination, but would take it later if necessary.

Mr. Bennett said that the Special Student category was for students who had no high school degree; that it was not available to students with a college degree.

The Director of Admissions is writing to the Director at the Huntsville Center that the Special Student category is not applicable to graduate students, and that McGlathery cannot be admitted to the Spring Quarter because of a failure to have any SCAT examination. His letter says also that he is holding the file.

2. With respect to Carroll's application, the University has received no transcript from Morehouse or Marquette, as is required by the University regulations. Hence, his application is incomplete. He will be informed of this on Friday.

After the meeting of the Executive Committee last week, and of the Board of Trustees yesterday, Mr. Bennett states that they have unanimous opinion that the University should desegregate by having these two students admitted to graduate school in Huntsville in June. They will not admit the students, however, without a court order. The students will be rejected on the ground that the duty of the Board is to provide for the education process in the University as a whole in the best way that they can, and that the admission of these students would disrupt the educational process. They hope that the students will then obtain court orders for their admission.

The Governor attended the Board of Trustees' meeting. He states that after a court order is issued and the University says that it will comply with the order, he will take over. He will go to Huntsville personally with the State Highway Patrol, a group of sheriffs, and citizens serving as sheriffs' posses. He will preserve law and order but will turn away the students. He will force the federal government to come back with troops in order that he can announce that he has yielded only to force. He will then also say that it is up to the federal government to protect the students.

*B.N.*  
B.N.

cc: The Attorney General  
The Deputy Attorney General

Two other applicants to the undergraduate school at Tuscaloosa are Sandy English (at Stillman College) and Vivian Malone.

Dr. Rose suggested that the possibility of use of the Northington Air Force Base for any marshals be investigated. This is covered by a contract between the University and either GSA or the Air Force. It can accommodate from one to two thousand people.

The commanding officer of the National Guard Unit in Tuscaloosa is a Colonel Collins. Col. Collins accepts the fact that he might be used to enforce a court order. Col. Collins is friendly to the University and to Dr. Rose.

BM

~~Ch...~~  
U. of A.

MEMORANDUM TO THE MEMBERS OF THE CABINET

Re: University of Alabama

Attached is a list of the companies and their chief executives having major installations in Alabama.

It would be desirable for as many of these as possible to be fully informed on the situation developing regarding the University of Alabama and the position of Governor Wallace.

The University will in all probability be required to admit at least two Negroes the week of June 10, one to the Graduate Center at Huntsville and one to the undergraduate campus at Tuscaloosa. The student at Huntsville is a mathematician employed by NASA; the student at Tuscaloosa is a girl.

Unless he changes direction, Governor Wallace intends to create a major incident. His plan has been to go personally to the campus with the entire State Highway Patrol, plus special deputies, and personally to prevent the entry of a Negro student into the University. He has intended to require his own arrest or removal by force, and to require the federal government to use troops to enforce the court order.

If this is done, there is a severe problem in avoiding violence of the sort that occurred at Oxford. The incident will unquestionably adversely affect the reputation and economy of the state. It will also hurt the University; in Mississippi there has been serious loss of faculty and a loss of tuition-paying students of at least 50% for next year.

The choice on this matter is completely up to the Governor. He is not supported by most of the newspapers on this point, and is opposed by his own Lieutenant Governor and Attorney General. Although it is very late,

-2-

it would still be possible for Alabama to deal with this matter in the way that a similar situation was dealt with in South Carolina in January. In both Tuscaloosa and Huntsville, moderation and compliance with the court orders would have the full support of the newspapers, the city governments, the business community, and the large majority of the people.

1. It would be appreciated if you would look through the book and mark the men personally known to you, indicating whether or not each is well-enough known so that it would be appropriate for you to call him and inform him on this matter.

2. This undertaking will be coordinated by William Orrick. It would also be appreciated if you could assign someone who could report to Mr. Orrick the men you have selected as known to you or whom you would be willing to call.

B.M.

21 May 1963

*Marshall  
Light Division*

OFFICIAL LETTER SENT TO:

JUN 17 1963

Mr. Thomas L. Evans  
Executive Assistant to  
the Secretary  
Department of Agriculture  
Washington, D. C.

Mr. Robert L. Evans  
Department of the Army  
Washington, D. C.

Mr. Frank L. Barton  
Deputy Under Secretary  
for Transportation  
Department of Commerce  
Washington, D. C.

Dear Mr. Barton:

I appreciate ever so much the time and trouble you took to make the telephone calls to the business leaders having interests in Alabama. These calls strengthened the determination of the individuals contacted to maintain a moderate position, in most instances, and their contacting Governor Wallace has unquestionably caused him to reevaluate his position. I think that these calls were very worthwhile and helpful.

Thank you again for your assistance.

Respectfully,  
Deputy Secretary of Defense  
Washington, D. C.

Respectfully,  
Assistant Secretary  
Federal Reserve Bank  
Washington, D. C.

Respectfully,  
Chairman  
Federal Communications Commission  
Washington, D. C.

Respectfully,  
Secretary of Health, Education,  
and Welfare  
Washington, D. C.

Respectfully,  
Secretary of Labor  
Washington, D. C.

Respectfully,  
Secretary of Defense  
Washington, D. C.

Respectfully,  
Secretary of the Interior  
Washington, D. C.

Respectfully,  
Assistant Secretary  
Washington, D. C.

Respectfully,  
Assistant Postmaster General  
Washington, D. C.

Respectfully,  
Attorney General  
Secretary of State  
Washington, D. C.

Respectfully,  
Deputy Secretary of State  
Washington, D. C.

(encl 4)



JUN 17 1963

Honorable Orville L. Freeman  
Secretary of Agriculture  
Washington, D.C.

Dear Orville:

I appreciate ever so much the time and trouble you and the members of your staff took to make the telephone calls to the business leaders having interests in Alabama. These calls strengthened the determination of the individuals contacted to maintain a moderate position, in most instances, and their contacting Governor Wallace has unquestionably caused him to reevaluate his position. I think that those calls were very worthwhile and helpful.

Thank you again for your assistance.

Sincerely,

Attorney General



U.S. v Alabama

## Department of Justice

### STATEMENT BY THE DEPARTMENT OF JUSTICE

Saturday, May 18, 1963

We believe that the action filed by Governor Wallace is utterly lacking in merit. If Governor Wallace, nevertheless, believes that there are important constitutional questions, we welcome his filing this suit. Such questions are properly to be decided in the courts.

The federal government will, of course, abide by the Court's disposition. We hope that the Governor's action means he will follow the same course in this and similar cases.

The suit ignores the national character of the United States. We are all citizens of a state, but all of us are also citizens of the United States and entitled to the protection of the United States in the rights, privileges and immunities secured by its Constitution and laws. It is the duty of the President, when an emergency arises, to take such action as may be necessary to preserve order and safeguard all citizens, both white and Negro, in the exercise of their constitutional rights.

Accordingly, Section 333 of Title 10 of the United States Code directs that the President "by using the militia or the armed forces . . . shall take such measures as he deems necessary to suppress in any State any insurrection, domestic violence, unlawful combination or conspiracy," if it obstructs the execution of the laws of the United States or results in depriving any part of the people of the State of a constitutionally guaranteed right which the State fails, refuses or is unable to protect.

The statute expressly makes it his duty and responsibility to determine whether federal intervention is required, and its operation does not depend upon a request for assistance from state officials.

This statute rests upon a specific provision of the 14th Amendment empowering Congress to enact laws necessary to secure the constitutional rights granted by the amendment.

No federal troops have been used in Birmingham. We sincerely hope that they will never be necessary. In view of the disturbances of May 11 and 12 and the events that preceded them, however, the President would have been derelict in his duty to protect the constitutional rights of all citizens if he had not dispatched trained units to federal bases near Birmingham where they would be available if the necessity should arise.

We feel strongly that these matters should be resolved at the local level. The people of this country can settle even these difficult issues peacefully through discussion and negotiation. We hope and expect that the problems of Birmingham will be resolved by the people of Birmingham and that no further steps will have to be taken by the Federal Government.

**The Attorney General**

Mr. Dear stated the Civil Rights Division will consider this matter and will discuss with U. S. Attorney Weaver his request for investigation by this Bureau. Promptly thereafter the Civil Rights Division will advise as to the course of action to be taken regarding the institution of investigation in this case. No investigation will be conducted by this Bureau in the absence of a specific request from the Department.

A copy of a letterhead memorandum dated May 7, 1963, prepared by our Birmingham Office, setting out the detailed information made available by the Security Officer, Redstone Arsenal, Alabama, is enclosed for Mr. Miller and for Mr. Marshall for information.

- 1 - The Deputy Attorney General
- 1 - Mr. Herbert J. Miller, Jr.  
Assistant Attorney General - Enclosure
- 1 - Mr. Burke Marshall  
Assistant Attorney General - Enclosure

*second  
memo*

**MEMORANDUM**

**Re: University of Alabama**

Attached to this memorandum is a list of persons to be called, based upon the list submitted by your office. The action contemplated by Governor Wallace in Alabama will undoubtedly damage the economy of the state and harm the University. In this connection, at least one-third of the faculty at the University of Mississippi is leaving as soon as possible and there has been a 50% decrease in tuition paying enrollment for next year. If the persons you are calling will contact Governor Wallace and urge him to follow a course of moderation in this matter, perhaps we can prevent a recurrence of the Mississippi situation.

Please have someone in your office contact our office, Code 187, Ext. 3300, and inform us of the results of your conversations and any important information obtained. If possible, please try to complete the calls over the weekend and contact our office by Monday, May 27, 1963.

Thank you for your assistance in this matter.

**ROBERT F. KENNEDY**  
**Attorney General**