Segregation
Personal file

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
RALEIGH

HARRY McMULLAN
ATTORNEY GENERAL

25 May 1954

RECEIVED
MAY 25 1954
GOVERNOR'S
OFFICE

Honorable William B. Umstead
Governor of North Carolina
Raleigh, North Carolina

Dear Governor Umstead:

In the memorandum which I sent you yesterday mentioning some of the questions which may arise in connection with the decision of the United States Supreme Court in the segregation cases, I mentioned the possible questions which might arise of civil or criminal penalties under the Federal Civil Rights Act. I requested Mr. Cogburn of my staff to make a study of this question and I am enclosing you copy of the memorandum which he furnished me. I am inclined to believe that the conclusions which he states, beginning on page 9, are correct but, as in all other cases involving civil rights in our Supreme Court, the results are unpredictable. Some of the judges now composing this august tribunal have voted sustaining practically every civil right which has been asserted in cases reaching that court. With the trend of decisions now apparent, it is difficult if not impossible to say what they may decide in any case of this character.

You will observe that Mr. Cogburn reaches the conclusion that until the Supreme Court has finally issued the decrees in the cases of BROWN v. BOARD OF EDUCATION and other cases, after the reargument for which the cases have been docketed, he does not think that the so-called Civil Rights provisions could be enforced by civil or criminal sanctions.

I thought that this was a very interesting angle to our problem.

With highest regards, I am

Sincerely yours,

Harry McMullan

Attorney General

HMcM:la
Enclosure

Cc: Honorable M. V. Barnhill
Chief Justice of the Supreme Court
Raleigh, North Carolina

24 May 1954

MEMORANDUM

TO: MR. McMULLAN

FROM: MAX COGBURN

You have requested that I read the segregation opinion recently handed down by the Supreme Court of the United States in the cases involving the public schools. You pointed out that there may be some difficulty arising as to what action officials of the State of North Carolina are to take in view of the decision. You asked that I look into possible violations of the so-called Civil Rights Act by officials who find it necessary to take action with relation to the matter of segregation in the public schools of this state.

I have read the opinion in the case of BROWN V. BOARD OF EDUCATION OF TOPEKA COUNTY and the other cases which were consolidated with it by the Supreme Court for the purposes of decision. In the Brown case, the Kansas statute involved permitted but did not require segregation in the public schools. The other three cases involved statutes and constitutional provisions which require segregation of the races in public schools. It would appear that the opinion of the Court holds that segregation in the public schools because of race is a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment whether the State law requires such segregation or simply permits it.

I shall first direct my attention to the appropriate Federal civil rights statutes for violation of which criminal penalties are provided. U. S. C. A. Title 78 Section 42 provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District, to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution

or laws of the United States. . . shall be fined not more than $1000 or imprisoned not more than one year, or both." It will be noted that this statute covers any inhabitant of any state, territory, or district. In U. S. VS. CLASSIC, 313 U. S. 299, the Supreme Court held that this provision is violated by the deprivation of any constitutional right without regard to whether the deprivation was on account of the injured person's color or race. The constitutionality of this statute was questioned in SCREWS V. U. S., 325 U. S. 91, which was decided in 1945. The facts in the Screws case may be summarized briefly as follows: Screws was sheriff of Baker County in Georgia. Assisted by a policeman and a deputy sheriff he arrested a Negro for the theft of a tire. When the officers arrived at the court house with the Negro in custody they began beating him with their fists and a blackjack and continued this for about 30 minutes until he was unconscious. He was then dragged into the jail and then later taken to the hospital where he died within an hour without regaining consciousness. Screws was indicted for violation of this civil rights statute, was found guilty, and this judgment was affirmed by the Court of Appeals of the United States. When this case came on for argument before the Supreme Court of the United States Screws' attorney argued that this statute was unconstitutional. His theory was roughly this: this statute seeks to make criminal a violation of the due process clause of the Fourteenth Amendment. The due process clause has been broadly defined by the Supreme Court. This vagueness of the due process clause is imported into the statute with the result that the statute sets no ascertainable standard of guilt. Since our system of government requires that criminal statutes be specific,

this statute must fail for the reason that it establishes no ascertainable standard of guilt. The Supreme Court held the statute is constitutional but in order to do so it held that in a prosecution under this statute the trial court must instruct the jury and the jury must find that the defendant not only had a generally bad purpose motivating his action but that in addition he was motivated by the purpose and a specific intent to deprive a person of a federal right made definite by decision or other rule of law. The Court further pointed out that "in determing whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances". (325 U. S. 91, 107) It may be worthwhile to point out how the members of the Court split in this case. Justices Douglas, Stone, Black, Reed, Rutledge, and Murphy agreed that the statute was constitutional. Justices Roberts, Frankfurter and Jackson dissented on two grounds. In the first place, they felt that the Act is unconstitutional because of its indefiniteness and vagueness. In the second place, they contended that even if the Act be treated as constitutional that it was intended by Congress to apply only to that unconstitutional conduct of state officers which has been authorized by state law but not to such conduct which is opposed to state law. The majority of the Court held that Screws could be convicted even though his actions were in violation of the law of Georgia. Screws had contended that he was acting in violation of law and therefore not "under color of law" but the majority of the Court rejected this argument.

Very few cases have been brought under this statute. It may perhaps be said that federal officials have been and will be somewhat reluctant to proceed against state officials under this statute. It is true that federal judges are appointed by the President for life (or during good behavior) but it is

the United States Attorney for a particular District who would play the central role in a prosecution under this statute and the United States Attorney is generally a local lawyer who is appointed by the President, chiefly for political reasons, and who serves for a term of four years "unless sooner removed by the President". (28 U.S.C.A. 482) The United States Attorney is the person who has discretion to initiate criminal proceedings and there is no review of his decisions unless the Department of Justice should see fit to look into the conduct of his office. Furthermore, a jury in such a case would be drawn from citizens of North Carolina and these citizens would be reluctant to indict or convict local officers in doubtful cases. I

In the case of WILLIAMS V. U. S., 341 U. S. 97, the Supreme Court held that there had been a violation of this statute where the operator of a detective agency who held a special police officers'car issued by a municipality, had taken the oath as a police officer, and had conducted an investigation of a theft during the course of which he used brutal methods to obtain a confession from certain suspects.

As pointed out earlier, it is clear that an officer acts under color of law whether or not he is acting pursuant to state law or in violation of that law.

Title 18 U.S.C.A., Section 241, provides in part as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . they shall be fined not more than $5000 or imprisoned not more than 10 years, or both". There are three obvious limitations to the

application of this Act: (1) In the first place since it is a conspiracy statute it cannot be violated by a single person acting alone. (2) The intended object of the conspiracy must be a citizen of the United States. (3) The purpose of the conspiracy must be an invasion of rights or privileges secured by the Constitution or laws of the United States. BALDWIN V. FRANKS, 120 U. S. 678. This statute was before the Court in the case of U.S. V. WILLIAMS, 341 U. S. 70, which was decided in 1951. In that case a Florida corporation employed a detective agency to investigate thefts of its property. The inquiry was conducted by the head of the agency, two employees of the agency, and a member of the police force of the city of Miami, Florida. Some suspects were picked up but not arrested by these people and were forced to confess to the crime by blows, kicks, threats, and other "third degree" methods. Williams, the head of the detective agency, and the other three persons involved were indicted for violating this conspiracy statute. They were convicted in the District Court but this conviction was reversed by the Court of Appeals and the case came to the United States Supreme Court on certiorari. The Supreme Court held that the conviction was properly reversed by the Court of Appeals. The reasoning of the majority opinion was that this statute applies only to interference with rights which arise from the relation of a person to the federal government and not to interference by state officials with rights which the federal government guarantees from abridgment by the statute. The majority further reasoned that the right to be immune from a forced confession is not a right which arises from the relationship between the federal government and a private person but is simply one against the abridgment of which by the states the federal government furnishes protection and that therefore the

action for conspiracy would not lie. Just what these rights are which exist because of the relationship between a person and the federal government is not too clear but in the case of POWE V. U.S., 109 Fed. 2d, 147 (1940), Cert. Den. 309 U.S. 679 (1940) they were defined as including the following: (1) The right to assemble peaceably for the purpose of petitioning the federal government for redress of grievances. (2) The freedom of speaking and printing on subjects relating to the federal government, federal elections, federal laws, federal operations and officers. (3) Protection of persons from violence while in federal custody. (4) Protection of federal elections by Congress.

FEDERAL STATUTES PROVIDING FOR CIVIL ACTIONS IN CIVIL RIGHTS MATTERS.

The statutes to be considered in this connection are 8 U.S.C.A., Sections 41, 43 and 47(3). Hereafter, I will simply refer to these statutes by the appropriate section number. Section 41 provides as follows: "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, fines, penalties, taxes, licenses, and exactions of every kind, and to no other". This section carries with it no sanctions, civil or criminal. It is a general statement of constitutional policy which, as was stated in STRAUDER V. VIRGINIA, 100 U.S. 303, merely puts in the form of a statute substantially what had been provided by the Fourteenth Amendment. That is, this statute simply provides a partial enumeration of rights and immunities intended to be guaranteed by the Constitution.

Section 43 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the parties injured in an action at law, issued in equity, or other proper proceeding for redress". This section was considered by the Supreme Court in 1944 in the case of SNOWDEN V. HUGHES, 321 U. S. 1. In that case, the Supreme Court decided that suit under this statute would lie only where there was a deprivation of rights, privileges or immunities which are incident to citizenship of the United States, that is rights which a person has because of his relationship to the federal government. This section is not available for redress of a violation of rights which are simply protected by the Constitution of the United States from deprivation by the states. The precise holding of the Snowden case was that the right to become a candidate for state office, like the right to vote for the election of state officers, is a right or privilege of state citizenship and not one of national citizenship. Hence, no action would lie under this section for the abridgment of this right or privilege.

Section 47 (3) provides: "If two or more persons in any state or territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving directly or indirectly, any person or class or persons of the equal protection of the laws, or equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from

giving or securing to all persons within such state or territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injuries or deprivations, against any one or more of the conspirators". The constitutionality of this section is doubtful. In the case of U.S. V. HARRIS, 106 U.S. 629, (1882) the Supreme Court had before it for consideration and indictment under a statute which was substantially identical to Section 47(3) except that that statute provided a criminal instead of a civil sanction. In that case, the Supreme Court held that statute unconstitutional on the theory that the statute was broader than either the Thirteenth or Fourteenth Amendments and hence beyond the authority of Congress to enact. However, this section was relied on in the case of O'SULLIVAN V. FELIX, 233 U. S. 318 (1914) which involved the right to vote. Furthermore, this section was before a court of appeals in 1943 in the case of VILES V. SYMES, 129 Fed. 2d 828, and that Court did not question the constitutionality of this section. However, the suit which was before the court in that case was dismissed.

There have been some cases in which certain governmental officials have been held immune from suit under the civil rights acts. BRANDHOVE V. TENNEY, 341 U. S. 376, held that a legislator was immune from suit under the Civil Rights Act for action taken by him in his official capacity even where

that action was taken in bad faith. Cases involving judges which have reached a similar conclusion are SOUTHER V. REID, 101 Fed. Supp. 806 (1951) and U.S. V. CHAPLIN, 54 Fed. Supp. 926 (1944). However, in the case of McSHANE v. MOLDOVAN, 172 Fed. 2d, 1016 (1949) it was held that immunity from suit was not available to the judge.

CONCLUSION

I have the feeling that at the present time a criminal action for violation of civil rights would not lie against a school official who excludes a Negro from a white school. My conclusion is based upon this reasoning: In the opinion just handed down in BROWN V. BOARD OF EDUCATION IN TOPEKA COUNTY and the three cases consolidated with that case the Supreme Court stated that the cases would be held open for re-argument next Fall on questions 4 and 5 which it propounded to counsel before the decision was handed down. Those questions relate to the time when and the manner in which this decision is to be implemented. Question 4 in particular raises the question for argument of whether Negro students should be admitted immediately to white schools or whether this should be done over a period of time. Question 5 is allied to this same issue. As we noted, in the Screws case the Supreme Court of the United States held that a criminal conviction could be had only upon instructions to the jury and a finding by the jury that the defendant in such a case has not only a generally bad purpose underlying his action but also was motivated by a specific intent to deprive a person of a federal right made definite by a decision or other rule of law. It seems to me that the recent Supreme Court

segregation decisions fairly clearly imply that Negroes have no present right to be admitted to white schools. Certainly there is considerable doubt whether they have such a present right and I feel that if a school official excluded a Negro from a white school and had an indictment brought against him under the criminal statute he could have the court instruct the jury that this implication and ambiguity in the opinion in the segregation cases is a circumstance which they should consider in passing upon whether that school official had a specific intent to deprive that Negro person of a federal right.

I am of the opinion that if a school official were to now exclude a Negro from a white school that he would not be liable for suit under civil rights acts. As we noted in the discussion of these civil acts, such an act does not lie unless there is a deprivation of rights, privileges or immunities incident to United States citizenship as distinguished from state citizenship. And, we further pointed out that the Supreme Court has held that the right to become a candidate for a state office and the right to vote for the election of state officials is a right or privilege of state citizenship and not one of national citizenship. In the case of US V BUNTIN, 10 Fed. 730 (1882) a federal judge in charging a jury in a civil rights case took this view. There is no decision in that case upon which we can rely because that reported case deals solely with the instruction of a judge to a jury and the ultimate result was that the jury disagreed. Education, being a matter of local concern, would seem to me to fall in the same general category. Furthermore, I think that here, as in the criminal cases, there is some doubt whether the Negro has a present right to be admitted to white schools.