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Constitutional Law -- Little Rock School Litigation -- Re-examination of North Carolina Laws

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The impact of the decision in *Kent* on the practical problem of regulating passports is unfortunate. It leaves the Secretary powerless to deny passports save on the limited grounds approved in that decision. There is a real and pressing necessity for such regulation.[27] The problem admits of no uncertainty in its solution, for it is vital to the interests of the nation as a whole.

The Communist party openly seeks as its ultimate goal world revolution; to attribute to it any lesser aim is to ignore the essence of its existence. We need cite no authority that its machinations are the greatest concern of our government today. Statements to the effect that denial of a passport on the basis of membership in the Communist party or adherence to its cause is denial merely on the basis of "political beliefs and associations" are open to serious question. It is hoped that the use of such language by the majority in *Kent* was inadvertent.

That the exigencies of the moment should be used as grounds for denial of constitutional rights is contrary to the basic principles of free government.[28] But, on the other hand, it must be recognized that there is a problem that touches on the well-being of the nation, and that there are citizens whose purposes in going abroad justify their being forced to forfeit their rights. The problem must be to find some way to determine, using substantive criteria established by congressional authority and standard procedures that protect the individual from arbitrary action, whether the individual in question deserves to forfeit his right to travel.

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Constitutional Law—Little Rock School Litigation—Re-examination of North Carolina Laws

> [T]he Constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."[1]

With these words, the Supreme Court in *Cooper v. Aaron*[2] emphati-

[27] This necessity is evidenced by the fact that several days after this decision was handed down the President sent a message to Congress urging legislation delegating the power to regulate to the Secretary. It read in part: "I wish to emphasize the urgency of the legislation I have recommended. Each day and week that passes without it exposes us to great danger." 104 CONG. REC. 11849 (1958). The Eighty-fifth Congress adjourned without having acted on this problem.

[28] *Ex parte* Endo, 393 U.S. 283 (1944).

[1] Cooper v. Aaron, 358 U.S. 1, 17 (1958) quoting from Smith v. Texas, 311 U.S. 128, 132 (1940).

[2] 358 U.S. 1 (1958).

cally rejected the application of the Little Rock School Board for a two and one-half year suspension of its court-approved[3] desegregation program. In order to fully appreciate the import of this decision, a brief review of its background is necessary.

On May 17, 1954, the Supreme Court, in the *Brown* case,[4] held that enforced racial segregation in the public schools of a state denied the equal protection of the laws guaranteed by the fourteenth amendment. The Court expressly overruled the "separate but equal" doctrine of *Plessy v. Ferguson*[5] which had been relied on by the southern states for almost fifty years. However, the Court delayed formulation of a decree to effectuate this decision pending further argument. This decree was rendered May 31, 1955,[6] and called for the district courts concerned to require "a prompt and reasonable start toward full compliance"[7] with the *Brown* ruling and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed."[8]

The Court pointed out that once such a start had been made, the courts might find that additional time was necessary to carry out the ruling in an effective manner, but that the burden was on the defendants to establish that such time was necessary.

Following these decisions, the Little Rock District School Board formulated a plan for desegregation. This plan was approved by the district court[9] and in pursuance thereof, nine Negroes were scheduled to be admitted in September 1957 to Central High School which had over 2,000 students. This plan failed, however, when the Governor of the state dispatched units of the Arkansas National Guard to the school grounds and placed the school "off limits" to colored students.[10] Upon investigation, the district court found that the Governor was obstructing the court-approved plan of desegregation and entered a preliminary injunction against him and officers of the National Guard enjoining prevention of the attendance of Negro children at Central High School, and other obstruction or interference with the orders of the court in connection with the desegregation plan.[11] The National Guard was removed and on Monday, September 23, 1957, the nine Negro children entered the high school under the protection of the

[3] Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1957), *aff'd*, 243 F.2d 361 (8th Cir. 1957).
[4] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[5] 163 U.S. 537 (1896).
[6] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
[7] *Id.* at 300. [8] *Id.* at 301.
[9] Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1957), *aff'd*, 243 F.2d 361 (8th Cir. 1957).
[10] Cooper v. Aaron, 358 U.S. 1 (1958).
[11] Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd*, Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

Little Rock Police Department. They were removed, however, because of difficulties in controlling a large and demonstrating crowd which had gathered.

On September 25, 1957, the President dispatched federal troops to the school and the Negro students were admitted.[12] Later the federal troops were replaced by federalized National Guardsmen who stayed at the school for the remainder of the school year.

In February 1958, the School Board filed a petition in the district court seeking a postponement of its program of desegregation.[13] It was contended that because of the extreme public hostility, attributed by the Supreme Court to the attitudes of the Governor and the legislature, a sound education system could not be maintained with the attendance of the Negro students at Central High School.

The district court granted the relief requested by the board.[14] This was reversed by the court of appeals[15] and the reversal was affirmed by the Supreme Court in the present litigation.[16]

Although the Court was called upon to decide only one narrow point, *viz.*, whether or not open hostility by the people of a state toward a School Board's plan for desegregation is sufficient reason to warrant a delay of such plan, it very painstakingly stated its position regarding the whole school desegregation problem. With its assertion that no evasive scheme to avoid desegregation would be tolerated whether it be attempted "ingeniously or ingenuously"[17] it indicated that no plan would be allowed to circumvent the order of the Court.

Is North Carolina affected by this decision? This state has a three-fold plan for dealing with the problems posed by the *Brown* decision.[18] It consists of (1) a pupil assignment law vesting authority in the local school boards to assign students residing within their administrative

[12] See Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117 (1957).

[13] Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958).

[14] Aaron v. Cooper, *supra* note 13. The 1955 *Brown* case language to the effect that additional time might be necessary to carry out the ruling in an effective manner once a start had been made was construed to mean that such time would be allowed when necessary to preserve the public peace. The Supreme Court, however, rejected this view and quoted from Buchanan v. Warley, 245 U.S. 60, 81 (1917), as follows: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

[15] Aaron v. Cooper, 257 F.2d 33 (8th Cir. 1958).

[16] The Court rendered the decision September 12, 1958, but the opinion was not given until September 29, 1958.

[17] *Ingenious* means talented, clever, shrewd, or inventive while *ingenuous* implies high-mindedness or candor. Webster's New International Dictionary.

[18] For an excellent discussion of North Carolina's new legislative enactments and constitutional amendments on education, see Wettach, *North Carolina School Legislation*, 35 N.C.L. Rev. 1 (1956).

units to a public school,[19] (2) an amendment to the state constitution which provides for education expense grants to be given to students to enable them to attend private schools under certain conditions, and[20] (3) an amendment to the constitution known as the local option plan whereby the people of a local unit may close their schools when a majority of its electorate so desires.[21]

This plan originated in the report of a committee[22] appointed by Governor William B. Umstead and headed by the Honorable Thomas J. Pearsall, "to study the difficult and far reaching problems"[23] presented by the *Brown* decision. Under the heading of "Recommendations and Conclusions," the committee reported *inter alia,* the following:

> The mixing of the races forthwith in the public schools throughout the State cannot be accomplished and should not be attempted. The schools of our State are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. The Committee feels that the compulsory mixing of the races in our schools, on a State-wide basis and without regard to local conditions and assignment factors other than race, would alienate public support of the schools to such an extent that they could not be operated successfully.[24]

This report, along with the brief that the state had filed in the *Brown* case,[25] was "approved as a declaration of the policy of the state"[26] by the North Carolina General Assembly.

In order to implement this policy, the North Carolina General Assembly, on the Pearsall committee's recommendation, enacted the Pupil

[19] N.C. GEN. STAT. §§ 115-176 through -179 (1955).
[20] N.C. CONST. art. IX, § 12.
[21] *Ibid.*
[22] This committee was first entitled the Special Advisory Committee on Education and was later denominated the North Carolina Advisory Committee on Education. It is commonly referred to as the Pearsall Committee.
[23] N.C. Sess. Laws (1955), Resolution 29, at 1692.
[24] *Id.* at 1693.
[25] Although North Carolina was not a party to the litigation in the *Brown* case, it was invited to file a brief amicus curiae. This brief, the purpose of which was to aid the Supreme Court in formulating a plan to effectuate its 1954 desegregation decision, stated: "The people of North Carolina know the value of the public school. They also know the value of a social structure in which two distinct races can live together as separate groups, each proud of its own contribution to that society and recognizing its dependence upon the other group. They are determined, if possible, to educate all of the children of the State. They are also determined to maintain their society as it now exists with separate and distinct racial groups in the North Carolina community.
"The people of North Carolina firmly believe that the record of North Carolina in the field of education demonstrates the practicability of education of separate races in separate schools. They also believe that the achievements of the Negro people of North Carolina demonstrate that such educational system has not instilled in them any sense of inferiority which handicaps them in their efforts to make lasting and substantial contributions to their State." Quoted in N.C. Sess. Laws (1955), Resolution 29, at 1693.
[26] N.C. Sess. Laws (1955), Resolution 29, at 1693.

Assignment Act[27] as the first part of the three-fold plan. Without mentioning race, the act merely directs each local school board[28] to assign the children within the school district "so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils."[29] Pursuant to this plan, the local school boards have to date assigned thirteen Negro children to what were formerly white schools. This is in accord with the declared policy of the state[30] to allow each local unit to decide whether or not it desires to desegregate.

Assuming that it is constitutional on its face,[31] is the plan constitutional in its context and application? Resolution 29 recites that "the mixing of the races in the public schools within the State cannot be accomplished and if attempted would alienate public support of the schools to such an extent that they could not be operated successfully."[32] But this very reason for postponing integration was asserted by the Little Rock School Board and rejected by the Supreme Court in the *Cooper* decision. Reading this state "policy" into the Pupil Assignment Act as it now functions, it is believed that the Supreme Court would find it either an "ingenious" or an "ingenuous" scheme by the state to deprive Negro rights of the equal protection of the laws.[33] It is not to be doubted that the courts will be quick to strike down any action by

[27] N.C. GEN. STAT. §§ 115-176 through -179 (1955).

[28] Prior to these amendments, N.C. GEN. STAT. § 115-352 (1952) provided that school children attend school within the district in which they resided unless assigned elsewhere by the State Board of Education. The only criteria for making an assignment outside the district in which the student resided was when it was more economical for the efficient operation of the schools.

[29] N.C. GEN. STAT. § 115-176 (1955). This new legislation authorizes each local board of education to assign students residing within its administrative unit to a public school whether such school is within its administrative unit or not.

[30] N.C. GEN. STAT. § 115-176 (1955).

[31] In Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), it was contended that the North Carolina Pupil Enrollment Act (denominated Pupil Assignment Act by 1956 amendment) was unconstitutional on its face because it vested discretion in an administrative body without adequate standards for the exercise of this discretion. The court held that, as to this contention, it was not unconstitutional on its face. Alabama's school placement law, which like North Carolina's makes no mention of race, was declared constitutional on its face in Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd*, 27 U.S.L. WEEK 3159 (U.S. Nov. 25, 1958), in spite of legislative resolutions adopted before passage of the placement law which indicated an intention not to follow the *Brown* case. However, it must be noted that the School Board denied the petitioners' allegations that they were denied the right to attend the white public schools solely on the basis of race and the court found no evidence to indicate that this was the sole reason for such denial. *But see* Adkins v. School Board of Newport News, 148 F. Supp. 430 (E.D. Va. 1957), *aff'd*, 246 F.2d 325 (4th Cir. 1957), where Virginia's school placement plan, when considered in the light of its legislative history, was held to be so patently bad as to be unconstitutional on its face.

[32] N.C. Sess. Laws (1955), Resolution 29, 1692-93.

[33] In the Virginia case, *supra* note 31, the court held that inasmuch as the criteria for assignment was based partly on the race of the applicant, that it was a violation of the constitutional provision guaranteeing equal protection of the laws.

the local school boards pursuant to the plan which appears to be motivated by race.

The second part of the plan recommended by the committee is found in a 1956 amendment to the constitution and in legislative statutes of the same year.[34] These provisions authorize "payment of education expense grants from any State or local public funds for the private education of . . . a child who is assigned against the wishes of his parents . . . to a public school attended by a child of another race."[35] However, no child shall be eligible for such a grant unless he attends a private school "recognized and approved under"[36] and "found to be in compliance with"[37] article 32 of the North Carolina General Statutes on Education.[38] Since this is an integral part of the state's program designed to cope with the *Brown* decision, these grants, like the Pupil Assignment Act, may be viewed in the light of the legislature's declared policy, and if so viewed, their authorization would be constitutionally suspect.[39] Furthermore, in *Rice v. Elmore*,[40] the court held that the

[34] N.C. CONST. art. IX, § 12; N.C. GEN. STAT. §§ 115-274 through -295 (1955).
[35] N.C. CONST. art. IX, § 12.
[36] N.C. GEN. STAT. § 115-282 (1955).
[37] N.C. GEN. STAT. § 115-285 (1955).
[38] N.C. GEN. STAT. §§ 115-255 through -257 (1955). Private schools in North Carolina cannot operate lawfully at any time unless they are regulated and supervised by the State Board of Education and meet the standards required of the public schools with respect to the following: (a) grading of instruction (b) promotion of pupils (c) the courses of study for each grade (d) the manner in which these courses are conducted (e) the qualifications and certification of teachers.

The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is state action which is prohibited by the Constitution and not purely private action. As the Court said in *Ex parte* Virginia, 100 U.S. 339, 347 (1879): "The constitutional provision, therefore, must mean that no agency of the State . . . shall deny to any person within its jurisdicton the equal protection of the laws." It is submitted that the amount of private regulation embodied in N.C. GEN. STAT. §§ 115-255 through -257 (1955) might induce a holding that such schools are agencies of the state so that denial of admission to Negroes by them because of race would be unconstitutional. Certainly it has taken far less state regulation to class as state action what is in form private action. See Terry v. Adams, 345 U.S. 461 (1953), where a private Texas organization held pre-primary elections to determine their candidates for the state primaries and restricted its membership to white persons. The Court found this discrimination to be state action although the Court split as to the reasons for its conclusion.

[39] That the purpose for these grants is to avoid the desegregation order of the *Brown* decisions cannot fairly be denied. Section 115-274 of the North Carolina General Statutes states in part that "Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of North Carolina to make available, under the conditions and qualifications set out in this article, education expense grants for the private education of any child of any race residing in this State." The courts have already struck down two evasive schemes which were designed to avoid the desegregation order. See Aaron v. Cooper, 27 U.S.L. WEEK 2236 (8th Cir. Nov. 18, 1958), where private corporations leased state buildings to conduct schools on a segregated basis and Allen v. Charlottesville School Board, 27 U.S.L. WEEK 2173 (D.C. Va. Oct. 14, 1958), where the State of Virginia paid teachers to teach in private, segregated schools.

[40] 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

Democratic party must allow Negroes to vote in its primary elections even though the state had repealed all laws which related to the Democratic party and it was functioning as a club. The court reasoned that since primaries had become a part of the machinery for choosing public officials, they should be subject to the same tests of discrimination as those applied to general elections. If North Carolina private schools admitted pupils who had availed themselves of state tuition grants, might not the Court hold that these institutions thus became agencies of the state, fulfilling the functions of the public schools, and require that admission to these private schools be granted to Negroes on a non-discriminatory basis?[41]

The third and final part of the Pearsall plan is found in article IX[42] of the constitution and supplementing legislation of 1956. It permits any board of education to "call for an election on the question of closing the public schools"[43] and directs the board of education to suspend the operation of such public schools "when a majority of the votes cast in such election are in favor"[44] of suspending the schools. This plan has not yet been put into operation and consequently has not been tested. However, suits testing the constitutionality of the Arkansas and Virginia school closing plans are now pending. In Virginia, the litigants contend among other things that closing the schools in Norfolk while leaving Richmond schools open denies Norfolk children equal protection of the laws. Another possible argument is that legislation by the state authorizing the closing of a previously segregated *white* school if a Negro exercises his constitutional right to attend it is the use of a governmental power to enforce segregation, and, hence is unlawful.[45]

In conclusion, it must be noted that the Supreme Court in the *Cooper* decision not only announced a decision, it also expressed a mood. It went out of its way to point out that state officials take an oath of office to support the Constitution of the United States and hence are obligated to comply with the spirit as well as the terms of the desegregation decisions. One suspects that all plans aimed at continued segregation of

[41] The authorization of such grants by the state might be subject to attack from still another angle. Any taxpayer who had not availed himself of such grants could seek to enjoin this expenditure of state funds on the grounds that this would be a non-public use of public funds in violation of the due process clause of the fourteenth amendment. Teer v. Jordan, 232 N.C. 48, 59 S.E.2d 359 (1950), states that a taxpayer has the legal right to bring an action against the state or any agency which is using public funds for an unlawful purpose.

[42] N.C. CONST. art. IX, § 12.

[43] N.C. GEN. STAT. § 115-265 (1955).

[44] *Ibid.*

[45] Professor Douglas B. Maggs of the Duke University Law School included this argument in a prepared statement to a Joint Meeting of the Special Session of the North Carolina General Assembly on the Legislation Proposed by the North Carolina Advisory Committee on Education. (unpublished in University of North Carolina Law School Library, 1956).

school children will be nullified as either "ingenious" or "ingenuous" attempts to evade the Constitution, a document which, as has been said, is "colorblind."[46]

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Constitutional Law—Military Jurisdiction Over Civilians

In the last two decades the United States has been confronted with a major world war and a police action in Korea. These have necessitated wholesale conscription of millions of American citizens to supply the armies needed, and the additional use of citizens in civilian capacities to complement these armies. In such situations the military requires prompt and efficient means of dealing with personnel who commit acts threatening the discipline and morale of the armed forces. Resort was made to the age-old military tribunal, the court-martial.[1] Thus during war time courts-martial have long exercised jurisdiction over uniformed military personnel and civilians accompanying the armed forces in the field.[2]

However, upon cessation of hostilities, there arises the question of continued military jurisdiction over persons who committed crimes while on active duty but were separated prior to being charged with such crimes. The general rule was that a discharge or separation divested the military of jurisdiction.[3] In *United States ex rel. Hirshberg v. Cooke*,[4] the Supreme Court held this rule applicable to one who was discharged and immediately re-enlisted, reasoning that courts-martial could not assume jurisdiction without a grant of congressional authority.

This case motivated Congress,[5] in enacting the new Uniform Code of Military Justice[6] (hereafter referred to as UCMJ), to include article 3(a),[7] a provision retaining military jurisdiction over serious offenders

[46] Mr. Justice Harlan dissenting in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[1] For a concise historical development of courts-martial, see WINTHROP, MILITARY LAW AND PRECEDENTS 45-51 (2d ed. reprint 1920).

[2] See, *e.g.*, Caldwell v. Parker, 252 U.S. 376 (1920); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945); *Ex parte* Campo, 71 F. Supp. 543 (S.D.N.Y.), *aff'd sub. nom.* United States *ex rel.* Campo v. Swenson, 165 F.2d 213 (2d Cir. 1947); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 14 (1951); MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 9 (1949).

[4] 336 U.S. 210 (1949).

[5] H.R. REP. No. 491, 81st Cong., 1st Sess. 5, 11 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 8 (1949).

[6] 10 U.S.C. §§ 801-940 (Supp. V, 1958).

[7] "[N]o person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States . . . may be relieved from amenability to trial by court-martial by reason of the termination of that status." 10 U.S.C. § 803(a) (Supp. V, 1958).