

~~Noted: 3/28~~

4 March 28, 1961

4 MEMORANDUM FOR THE ATTORNEY GENERAL

4 Re: Judicial review of constitutional problems raised by the federal aid to education.

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3/28

You have asked whether or not there are any alternative schemes to the ones suggested by the Solicitor General, and contained in the Government memorandum to Senator Clark, by which a court review of loans to sectarian institutions could be achieved.

The problem stems from the fact that the Supreme Court held in Massachusetts v. Mellon that a taxpayer did not have a sufficiently substantial interest to challenge in court the expenditure of federal monies. The Supreme Court related this prohibition to Article III of the Constitution which gives to the courts jurisdiction to determine a "case or controversy" arising under the constitution and laws of the United States. Some interest, in addition to that of being a taxpayer, must be established by a private party.

In view of this decision it is extremely doubtful whether a simple authorization by the Congress to any taxpayer to challenge the constitutionality of federal aid to education would accomplish the desired result. Some observers do not believe that Massachusetts v. Mellon is decided on the basis of an interpretation of the Constitution, and believe, therefore, that the simple authorization would achieve judicial review. But I believe all scholars would agree that the question is not free from doubt and no one could be certain that judicial review could be achieved in this way. Furthermore, other questions of policy are raised since such an authorization could justify literally hundreds of suits all around the country. In fact, this possibility is discussed in Massachusetts v. Mellon and suggested as one of the grounds for decision.

One further possibility for private litigation of the constitutional question has occurred to me, and it is possible that it may be included in Senator Clark's proposal since it has occurred to other people as well.

In order to get around Massachusetts v. Mellon it would be necessary to create a special interest, more substantial than that of any taxpayer, in certain private persons. This might be accomplished in the following way: Congress would create a fund from which non-profit schools could borrow for various purposes specified in the Act; the fund would be allocated by states, so that each state received a share related to some objective factor such as the private school population; it would then provide that if any borrowers were ineligible on constitutional grounds the amount available would be shared among other non-profit schools who would have the right to demand that the fund be allocated to them. The mandatory language contained in the last sentence would be to establish beyond any doubt the interest in such institutions in the fund. What is important is to give them "a good faith pocketbook" interest. See Doremus v. Board of Education, 342 U.S. 429 at 434.

I am not wholly convinced that the scheme outlined above would satisfy the Supreme Court, although I think there is a probability that it would. It may also be unfeasible and perhaps undesirable as an administrative scheme, since 80% of the private school population is in parochial schools who might be declared ineligible for participation in the fund. This would be a tremendous windfall to a relatively few schools which nobody particularly wants to aid anyway.

As I understand it, Senator Clark's bill will contain Mr. Cox's proposal, plus a general authorization for taxpayers' suits, and perhaps the proposal indicated above or some variation thereof. If the bill contains language forbidding the Commissioner to make loans to schools where the effect would be to violate the First Amendment as he



interprets it, I see no harm in including other provisions for judicial review in the event the Commissioner permits the loans. The important provision in the bill would be the one which limited loans to those permissible under the First Amendment, therefore maintaining the President's constitutional position. For reasons that I do not wholly understand, the bill may be more acceptable to Catholics if it contains provisions which suggest that the Commissioner might interpret the Constitution differently from the interpretation indicated by the President in his press conferences.

I have not been able to go over these suggestions in detail with the Solicitor General, but he shares my skepticism as to the taxpayer's suit and is perhaps more skeptical than I of the feasibility of the third proposal indicated above.

4/ Nicholas deB. Katzenbach  
/ Assistant Attorney General  
/ Office of Legal Counsel