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The Attorney General

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Constitutionality of Federal Allocation of Funds on the Basis of the Number of "Minority Group Children" within a State.

In your note to me of May 11, you asked whether I agree with the conclusion reached by St. John Barrett, Acting General Counsel of the Department of Health, Education and Welfare, that the allocation of federal education funds to states on the basis of the number of "minority group children" in the state is constitutional. I agree.

Brown v. Board of Education, 347 U.S. 483 (1954), held that state laws requiring separation of the races in public schools were unconstitutional. Bolling v. Sharpe, 347 U.S. 497 (1954) made this ruling applicable to the Federal Government in its administration of the schools of the District of Columbia. In those parts of the country where de jure segregation was once the rule, the application of the Brown mandate has been held by the Courts of Appeals for the Fourth and the Fifth Circuits to require, at least in some cases, that considerations of race be considered in drawing school district boundary lines in order to overcome the effects of past unlawful segregation. Wanner v. County School Board of Arlington County, Virginia, 357 F.2d 452 (1966); United States v. Jefferson County Board of Education, 372 F.2d 836 (1966).

On the other hand, in those parts of the country where de jure segregation has not been the rule, the weight of authority supports the conclusion that de facto is not unconstitutional, and that governmental bodies are not constitutionally compelled to take any steps to correct that type of situation. Deal v. Cincinnati Board of Education,

6 Circuit, 369 F.2d 55 (1966), cert. denied, 389 U.S. 847; Downs v. Board of Education of Kansas City, 10th Circuit, 336 F.2d 988 (1964), cert. denied, 380 U.S. 914; Bell v. School Board of Gary, Indiana, 7th Circuit, 324 F.2d 209 (1963), cert. denied, 377 U.S. 924.

The measure under consideration raises the question whether, even though no level of government is required under the Constitution to take steps to combat de facto segregation, it is violative of the Constitution for them to do so on their own initiative. So far as I can see, there is no reason why the constitutional question would be different in the case of a local school board, a state legislature, or the Federal Government. The great weight of case authority, cited in Mr. Barrett's memorandum, supports the conclusion that this sort of legislation is constitutionally permissible, even though not required.

The arguments contra, while they might make some sense logically, have not been adopted by the courts which have considered the question. Justice Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 537 (1896), made the statement that the Constitution is "color blind". This has been taken by some to mean that no racial classification is constitutionally permissible; but a majority of the Supreme Court has never expressly adopted this approach to the Fourteenth Amendment. It has simply noted that racial classifications "bear a far heavier burden of justification" than other classifications, McLaughlin v. Florida, 379 U.S. 184, 194 (1964). The lower courts which have decided cases dealing directly with the sort of question which you have asked have taken this to leave the door open for what is generally described as "benign" classification based on race--classification presumably motivated by a good faith desire to help minority groups, rather than to discriminate against them. Whether this will ultimately prove to be workable distinction, and whether it is entirely consistent with the logic of broad application of the equal protection clause when invoked by minority groups, admit of reasonable doubt as a matter of original inquiry. However, the courts which

have passed on the question in the last few years have resolved these doubts in favor of constitutionality, and the Cabinet Committee probably ought therefore to do the same in its consideration of the proposed legislation.