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March 20, 1961

MEMORANDUM FOR THE ATTORNEY GENERAL

Attached herewith are two copies of the memorandum on constitutionality of assistance to sectarian schools. HEW is preparing three forms of a summary for your consideration tomorrow afternoon. I have no particular preference among them on legal grounds. Some minor changes may have to be made in this memorandum to adjust to the decision you take in that connection tomorrow.

Secretary Ribicoff has suggested the deletion of references to higher education in this memorandum. I strongly oppose wholesale deletion because I do not believe it is possible to present the argument without reference to the distinction between higher and lower education. It would immediately raise questions as to the constitutionality of the loan proposals in the bill on higher education and suggest that this memorandum was a less than adequate job. Some change in form and emphasis could be made, and perhaps these would satisfy Secretary Ribicoff. I do not know exactly why he wishes to consider this deletion; I understand his own staff is equally opposed to it.

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Attachments

4 MEMORANDUM

The extent to which Government, whether federal, state, or local, may, consistently with the United States Constitution, aid religious schools is a problem which, surprisingly enough, is a relatively new one.

Prior to 1947 federal judicial concern with this field was limited. The only case presented to the Supreme Court involving the expenditure of federally-controlled funds to religious schools was Quick Bear v. Leupp, 210 U.S. 50 (1908), which held merely that provisions in certain Indian appropriation acts prohibiting the use of public funds for the education of Indians in sectarian schools did not prevent trust funds belonging to the Indians and administered by the Federal Government from being used for such schools at their request and such action did not involve the prohibitions of the First Amendment.

It was only recently that State action in this field was held subject to First Amendment limitations.[1] In terms the

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[1] For this reason the limited number of earlier cases touching upon State action affecting religious schools came up in the context of the question whether property rights were impaired without due process of law in violation of the Fourteenth Amendment. See Pierce v. Society of Sisters, 268 U.S. 510 (1925), upholding as a constitutional right the maintenance of private, including parochial, schools; Cochran v. Board of Education, 281 U.S. 370 (1930), holding that the use of State moneys to provide textbooks for school children, including those attending private schools, whether sectarian or nonsectarian, is not a taking of property for private purposes.

First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." (Emphasis added.) By itself this language is not a limitation on State action, though similar provisions exist in many State constitutions. In 1934, however, freedom of religion as guaranteed by the First Amendment was construed to be among the liberties protected by the due process clause of the Fourteenth Amendment limiting State action. Hamilton v. Regents of the University of California, 293 U.S. 245. Later, in 1947, the now leading case of Everson v. Board of Education, 330 U.S. 1, made it clear that the due process clause forbids State action which would effectuate "an establishment of religion" prohibited by the First Amendment. The impact of that case is that State and federal action affecting religion must now satisfy the standards of the Amendment. Under those standards what is forbidden to a State is also forbidden to the federal government, and what is forbidden to the federal government is also forbidden to a State. It is possible, however, that what the federal government and the States may properly do without offending the First Amendment may nevertheless be prohibited to a particular State because of its own constitutional prohibitions.

In Everson, the Supreme Court in a 5-4 decision, held that where a local school district, as authorized by state law, reimbursed parents for the bus fare paid by them for public transportation of their children to parochial schools, such aid did not violate the 'establishment of religion clause' of the First Amendment. It was followed in 1948 by McCollum v. Board of Education, 333 U.S. 203. With only Mr. Justice Reed dissenting, the Court there held that the First Amendment (as made applicable by the Fourteenth Amendment to the state) forbade a public school program of "released time" under which religious teachers provided by various denominations were permitted by the Board of Education to hold classes in public school buildings for students who had volunteered for religious instruction. The children not desiring such instruction continued their regular studies in other rooms. In 1952, Zorach v. Clauson, 343 U.S. 306, was decided. By a six to three vote, a voluntary 'released time' program, basically differing from that involved in the McCollum case only in that the religious instruction was provided off the school premises, was held constitutional. These three cases constitute the most important judicial precedents in the field. The paucity of Supreme Court

precedent is due to two factors: First, it was only in 1934 that the Court read the Fourteenth Amendment as embodying the pertinent provisions of the First Amendment; second, despite the existence of a number of federal educational programs in recent years, judicial review in federal courts at the instance of a taxpayer of the lawfulness of federal expenditures has not been available since Massachusetts v. Mellon, 262 U.S. 447, decided in 1923.[2] It should therefore be emphasized that the questions discussed in this memorandum are probably not open for judicial determination, unless adequate special statutory provisions are enacted for this purpose.

The rule of the Mellon case imposes a particular responsibility both upon Congress and the Executive to stay within the Constitution as expounded by the Supreme Court. While the Court has laid to rest some significant questions, it has left significant ones undecided.

I.

At the outset it is evident that resolution of the constitutional problems of present concern requires us to deal with the interrelation of three constitutional limitations. Two are contained in the provisions of the First Amendment;

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[2] In Doremus v. Board of Education, 342 U.S. 429 (1952), the Supreme Court dismissed an appeal for want of jurisdiction in a suit filed by a State and local taxpayer who had not, on the facts alleged, shown a requisite financial interest.

neither Congress nor the States may pass any law "respecting an establishment of religion"; neither may they pass any law "prohibiting the free exercise thereof." The third constitutional limitation is found with respect to the Federal Government in the due process clause of the Fifth Amendment, and, for the States, in the due process and equal protection clauses of the Fourteenth Amendment. These limitations prohibit the Federal Government or a State from unreasonable discrimination in governmental programs. See Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education, 347 U.S. 483 (1954).

In many instances these three constitutional limitations overlap in one regard or another to prohibit federal or state action. For example, a government program of compulsory education exclusively at state-operated schools which taught religion would violate all three. In other factual circumstances, however, a program which satisfied one or more of the limitations might violate another. For example, a program of educational grants to returning war veterans for their rehabilitation into civilian life perhaps could not have constitutionally excluded from its benefits applicants who

wished to attend sectarian institutions. This would probably be regarded a classification so unrelated to the expressed public purpose of readjustment of soldiers to civilian life as to offend due process requirements.

There is agreement that education serves a fundamental public purpose (see Brown v. Board of Education, supra at 493) and accordingly that the Federal Government or a State may use public funds for that purpose. In addition, to that end States with respect to education under their control may also compel children, within reasonable limits of age and maturity, to attend schools. Moreover, they may set reasonable standards for education. At the same time, there seems little doubt that Government may not use its authority in the field of education in order to instruct children in religion generally or in any specific religion. This would violate the Establishment of Religion Clause of the First Amendment. Nor may Government, without interfering with the religious freedom guaranteed by the First Amendment and the due process clause, reserve educational functions to public schools and forbid education by private institutions meeting the standards prescribed by law for the public school. See Pierce v. Society of Sisters, supra. And in any educational program in which public funds are expended there must be equal treatment for

all children; that is, a State may not classify children on the basis of their religion, race, or similar irrelevant considerations, without violating equal protection and due process requirements.

It is also evident that these constitutional limitations must be interpreted in the light of specific factual situations. It is the difficulty of attempting to interpret and apply them under contemporary conditions that brings about a potential conflict among them. The most significant of these conditions is that to a substantial extent education at the lower levels, which a State requires and compels, is being carried out by schools which teach according to particular religious tenets, although at the same time satisfying secular educational standards established by the State. This is a form of education which the State cannot constitutionally prohibit. It is settled that individuals have a constitutional right to a religious education. At the same time sectarian schools are ones which the State cannot constitutionally require a student to attend: There is a constitutional right to freedom of religion or no religion.

The difficult problem is posed by the dual constitutional mandate, that the State must recognize these schools as part of its educational system for purposes of compulsory attendance laws, but that it cannot support them in ways that would constitute an "establishment of religion."

The problem is accentuated by the fact that American society is one in which religion touches much of everyday life. It is a society in which customs, practices, morals, and ceremonies have been importantly influenced by religion. Granting the importance of the principles contained in the First Amendment, it is clear that they cannot always be absolutes. The problem is to draw a line between what is permitted and what is prohibited in accordance with applicable constitutional principles. Since this must be done in the society in which we actually live--a society in which aspects of religion are inextricably entwined with knowledge and culture--history and experience may be sounder guides to locating Jefferson's "wall of separation between Church and State" than abstract logic.

Even the general agreement that the State cannot constitutionally permit teaching of religion in public schools illustrates some of the difficulties. Examples of efforts

to draw the line between constitutionally permissible and impermissible State action have extended to such matters as readings from the Bible, prayers, and celebrations of religious holidays. Pushing the separation doctrine to its logical extreme would make education virtually impossible. History is replete with religious ideas, principles, and experience. Furthermore, it is readily apparent that what one person would classify as simply secular knowledge another would regard as religious instruction. The content of religious belief is largely the prerogative of religious groups to define, though they differ among themselves as to what is included. The content of education is for public authorities to define. Where definitions overlap difficulties arise.

It would be fruitless to deny that drawing the line between the permissible and impermissible is a hard task. In the Everson case itself, although the Court was unanimously of the view that the Establishment of Religion Clause forbade a State from using public funds for sectarian education, it nevertheless divided by the closest margin (5-4) on whether State reimbursement of parents for fares paid for public transportation to a sectarian school constituted a prohibited

use. But, however difficult it may be to find the line in marginal situations, this cannot properly be used to avoid constitutional proscriptions. There are clear cases as well as difficult ones.

To summarize, the broad principles are clear enough in the light of recent decisions. The First Amendment does not require Government to be hostile to religion, nor does it permit governmental discrimination against religious activities. The objective is neutrality, however difficult it may be to be neutral or to determine what neutrality requires in relation to particular factual situations. Zorach reaffirms that the State may not actively support a religious organization. On the other hand, it may, and perhaps under some circumstances must, temper its secular requirements if religious observances conflict with them.[3] There is the consistent emphasis in the cases that public funds may not be used to finance religion and that public property may not be used to assist it. Yet, the decisions warn that a person may not be denied general public benefits on religious grounds, without violating the First Amendment and the due process and equal protection clauses of the Fifth and Fourteenth.

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3/ See, for example, the flag salute case, Board of Education v. Barnette, 319 U.S. 624 (1943).

II

As earlier noted, prior to the decision in Everson, the Supreme Court had little occasion to consider the problem of governmental aid to religious schools. The right to attend such schools was clearly established in the 1920's. See Pierce v. Society of Sisters, supra; see also Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927). The Quick Bear case, supra, had dealt with the unique problem of the use of Indian trust funds. The Cochran case, supra, had been decided before it had been determined that the Establishment of Religion Clause of the First Amendment operated upon the states by virtue of the Due Process Clause of the Fourteenth Amendment. 4/

As indicated above, the controversy in the Everson case concerned a local school-board resolution adopted pursuant to a New Jersey statute. This resolution authorized reimbursement to parents of expenditures for transportation of their children to public and Catholic schools on regular

4/ For this reason the Cochran case is dubious authority for the proposition that textbooks may be provided by a state to parochial school students. The crucial question today is the Establishment Clause neither raised nor discussed in that case.

buses operated by the public transportation system. A taxpayer filed suit challenging this action of the school board. The Court unanimously agreed that the Due Process Clause of the Fourteenth Amendment embodied the "establishment of religion" prohibition contained in the First Amendment. Five Justices found that the statute involved did not constitute a "law respecting an establishment of religion." It should be emphasized that all nine Justices agreed that the clause prohibited governmental aid to religion. The disagreement turned, rather, upon whether the benefit was conferred upon the children or upon the parochial schools.

The most extensive discussion appears in the dissenting opinion of Mr. Justice Rutledge. On the basis of his evaluation of the historical materials and his view of the objectives of Madison and Jefferson, leading proponents of the Amendment, he stated that--

> "The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively

forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question." 330 U.S. at 31-32.

He concluded, therefore, that the taxing power may not be used to give support to religious training or belief and that "transportation, where it is needed, is as essential to education as any other element"; and that it "is impossible to select as indispensable an item from the composite of the total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about" (330 U.S., at 47, 48).

Justice Black, writing for the majority, adopted a similar view of the purpose of the First Amendment. He stated:

10 "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in

> any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government, can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" 330 U.S. at 15-16.

He concluded, however, that the State cannot deny any of its citizens the benefits of public welfare legislation because of their religion. He emphasized that much of such legislation (for example, that providing fire and police protection, etc.) incidentally benefits religious institutions, and that such benefits do not constitute proscribed support of the institutions. In this light he viewed the New Jersey statute merely as providing a program to get children, "regardless of their religion, safely and expeditiously to and from accredited schools." He therefore interpreted the purpose of the statute as a general, nondiscriminating one, designed to protect the health and safety of all school children. On this basis he was led to the conclusion that, while the New Jersey statute "approaches the verge" of impermissible action under the

First Amendment, it did not actually breach the "wall of separation between Church and State."

The specific holding in the Everson case permitted the use of public funds to confer a limited benefit upon children attending religious schools. Nevertheless, the language and reasoning of both the majority and minority gives scant comfort to those who feel that, as a matter of fairness, State support ought to be provided to these schools. Proponents of this view point out that religious schools meet the educational standards imposed by the States and relieve the State of the burden of educating large numbers of children. The parents of children attending religious schools are taxed to support the public schools, yet receive no reciprocal benefits from the State.

The majority opinion states that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (Emphasis supplied.) If one assumes that a principal reason for the existence of a religious school is to provide religious teaching and the practice of religion (not available in public

schools), and that religious considerations are interwoven in the entire fabric of sectarian education, moneys raised by taxation cannot be used to support such education. Obviously then, direct grants to sectarian schools are prohibited. The only question remaining open is whether the use of funds for general welfare purposes in a manner which benefits religious schools also constitutes prohibited support.

Because the clear import of the Everson opinion was that neither the Federal Government nor the States can directly support religious schools, a concentrated attack was made upon its rationale. The focus of this attack was on the Court's reading of history; that in fact the purpose of the First Amendment was merely to strike at the official establishment of a single sect, creed or a religion, as exists in England, and that the amendment was not intended to prohibit non-preferential aid to all religions.[5] This view has been vigorously argued by some scholars. For present purposes it is sufficient to note that it was presented to and

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5/ See J. M. O'Neill, Religion and Education Under the Constitution: The use of the O'Neill thesis by counsel in the McCollum case is referred to in Pfeffer, Church and State: Something Less than Separation, 19 U. of Chi. L. Rev. 1, 2 (1951).

considered by the Supreme Court in McCollum v. Board of Education, supra. While it might be argued that Justice Reed adopted this view in his dissent, it is plain that the eight other members of the Court rejected it. The question is not open today.

The McCollum case involved the constitutionality of the system of "released time" adopted in Champaign, Illinois. Under an arrangement made with various religious faiths, representatives of those faiths were permitted to offer classes in religious instruction in the public schools. The classes were held once a week for thirty minutes in the lower grades and forty-five in the higher grades. The teachers were not paid by the public school authorities and the classes were attended only by students whose parents had requested it. Students who did not choose the program continued their secular studies in other classrooms. Justice Black, writing the opinion of the Court, stated that the arrangement was clearly prohibited by the holding in Everson:

10 "The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the

state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson v. Board of Education, * * * ." 333 U.S. at 209-210.

He went on to state--

10 "Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the Everson case, counsel for the respondents challenge these views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the Everson case that the Fourteenth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions." Id., at 211. 6/

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6/ In his concurring opinion, Justice Frankfurter also made it clear that "the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" Id., at 213. Justice Jackson who, in a separate concurrence expressed doubts as to the standing of the complainant and the scope of the relief granted, concurred in this opinion.

Zorach v. Clauson, supra, is the last case in which the Supreme Court has considered the "establishment of religion" prohibition. It also involved "released time." There the plan permitted students actually to be released from the public schools at their parents' request in order to obtain religious instruction elsewhere. The churches participating reported to the schools the names of children released from school who did not appear for religious instruction. In a six to three decision, the Court concluded that there was no element of coercion in the plan and that the only issue involved was whether public schools may excuse those who wish to worship or obtain religious instruction. The principles of the earlier cases were, however, carefully preserved. The Court stated:

10 "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not throw any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church,

to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here." 343 U.S., at 314.

In separate dissents, Justices Black, Frankfurter and Jackson said that since in effect the machinery of the State was being used to provide pupils to religious groups, the plan was constitutionally indistinguishable from that held invalid in McCollum.

The majority opinion, while emphasizing that ours is a religious nation, with profound religious traditions affecting, and intermingling with, secular activities (id., at 313-314), does not abandon the basic view of the First Amendment adopted in Everson and McCollum. The most that can be said is that the opinion evidenced a somewhat more flexible attitude towards problems of separation.

The State court cases which have been decided since Everson have interpreted that case and McCollum and Zorach as precluding use of public funds to pay tuition at sectarian schools. Almond v. Day, 197 Va. 419, 89 S.E. 2d 851 (1955), held that State payments to sectarian elementary and secondary schools for the education of war orphans violated the First Amendment because such payments utilize--

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> ". . . public funds to support religious institutions contrary to the principles laid down in Everson . . . It affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery . . . . It compels taxpayers to contribute money for the propagation of religious opinions which they may not believe." (69 S.E. 2d, at 858)

Swart v. South Burlington Town School District, 167 A. 2d 514 (Vt., 1961), involved a school district which did not maintain a high school. Pursuant to statute the parents were permitted to choose schools and the district paid the tuition. Under this plan it made tuition payments to Catholic high schools. The court read the Everson, McCollum and Zorach cases as raising the following question, which it answered affirmatively:

> "Does the payment of tuition to a religious denominational school by a public entity finance religious instruction, to work a fusion of secular and sectarian education?" (167 A. 2d, at 520)

The court, although noting that the district did not maintain a public high school, that the Catholic schools involved had been approved by the State Board of Education, and that non-Catholic students were not required to attend religious instruction, concluded, nevertheless, that the First Amendment had been violated.

The foregoing two cases are the only State court decisions since Everson that have dealt with the payment of tuition to sectarian schools. Both held such payments unconstitutional on the basis of that authority. Other State cases, however, have sustained payments to other types of sectarian institutions in specialized circumstances. Thus, payments for the support and maintenance of neglected and dependent children in denominational homes and institutions were upheld because they were considered as reimbursement rather than a use of appropriated funds prohibited by the State constitution. Schade v. Allegheny County Institution District, 386 Pa. 507, 126 A. 2d 911 (1956). Payments to sectarian institutions have also been justified where the funds were used exclusively for public purposes and the institution merely operated as a conduit for those purposes. In Opinion of the Justices, 99 N.H. 519, 113 A. 2d 114, (1955), there was involved a proposed New Hampshire law which would have provided annual grants in aid to hospitals in the State offering nurses' training. This aid

would have gone only to charitable hospitals, including sectarian ones which did not discriminate on the basis of the religion of either students or patients. Holding that the grant program would not violate either the First Amendment or its New Hampshire equivalent, the court stated:

> "The purpose of the grant . . . is neither to aid any particular sect or denomination nor all denominations, but to further the teaching of the science of nursing . . . . The aid is available to all hospitals offering training in nursing without regard to the auspices under which they are conducted or to the religious beliefs of their management, so long as the aid is used for nurses' training 'and for no other instruction or purpose' . . . . If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial . . . . A hospital operated under the auspices of a religious denomination which receives funds under the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes.
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> "The fundamental proposition that public moneys shall be used for a public purpose only has not prevented the use of private institutions as a conduit to accomplish the public objectives." (113 A. 2d, at 116)[9]

[9] A similar early holding by the Supreme Court is Bradfield v. Roberts, 175 U.S. 291 (1899). There the Court held that the First Amendment did not preclude the Commissioners of the District of Columbia from entering into a contract with an eleemosynary corporation organized by Catholic sisters for the construction of buildings to be operated as part of the hospital.

The Everson, McCollum, and Zorach cases have also inspired a large body of scholarly comment. Appendix A is a representative bibliography of such comment. In Appendix B we shall briefly describe some of the representative views contained in such comment.

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III

The foregoing review suggests the relevancy of several considerations in determining the constitutional reach of the First Amendment. First and foremost, the Supreme Court has made it absolutely clear that public funds and public property may not be used for the purpose of assisting any or all religions. In the Everson and McCollum cases it has unequivocally rejected the historical argument, whatever its merits, that the Establishment Clause merely forbids State favoritism among religions.

The initial inquiry therefore must be whether a given legislative proposal is honestly designed to serve an otherwise legitimate public purpose, and is not a mere subterfuge for religious support. Application of the test is not always easy. In the Everson case the majority characterized the

New Jersey law as related to the health and safety of children--a legitimate public concern. It was likened to police and fire protection services, ostensibly legitimate "benefits" to religious institutions, "incidental" to the larger public interest (330 U.S. at 16-18). The dissenters viewed the statute differently. They pointed out that, contrary to the Court's interpretation, it discriminated against other private schools. And all four dissenting justices characterized the statute as having the purpose of getting the child to school--an indispensable part of his education--rather than protecting his health and safety. Indeed, the characterization largely decided the case for both majority and minority. Justice Black for the majority suggested that once the characterization is made in his fashion, it might well be a violation of the Fourteenth Amendment and the second clause of the First to discriminate on religious grounds.

This analysis is confirmed by McCollum where the Court forbade the use of public school facilities for religious instruction during "released time." Here there could be no

possible public purpose except to assist and support religious education--a purpose the Court found proscribed by the First Amendment.[8]

The existence of a bona fide legislative purpose does not, however, validate a measure irrespective of any collateral benefit that might be rendered to a religious institution. Assume a legitimate public purpose not explicitly or implicitly related to religious support, as in the commonly constitutional examples cited in Everson--police, fire, sewage and (on Everson's assumptions) transportation. Could it properly be contended, for example, that since improving educational standards generally is a legitimate public purpose, any program which has that for an objective is constitutional irrespective of the Establishment

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[8] In the Lemon case, the Court stated:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." (233 U.S. at 212)

Clause of the First Amendment? If the objective is legitimate, are the benefits bestowed on religious schools always and necessarily "incidental?" We think not. The end cannot always justify the means. And where the means employed result in fact in measurable support of religious institutions, the constitutional judgment cannot be avoided.

The problem area, then, is with regard to legislation which has a constitutionally legitimate public purpose but which at the same time has the additional side effect of benefitting a religious institution. This was the problem raised by Everson, and the difficulty of its resolution is evidenced both by the 5-4 division of the Court itself and the widespread comment it engendered. How is the line to be drawn between what is proscribed and what is permissible? Once a benefit to a religious institution is conceded, what are the relevant criteria for determining that it is merely "incidental?" What factors are to be taken into account and evaluated?

As Justice Douglas acknowledged in Everson, we live in a culture and society in which religion has played and continues to play a vital role. It is not possible to separate

religion completely from other aspects of life; and the Constitution does not require the impossible. Yet the impossibility of complete and absolute separation of Church and State, as well as the logical absurdity of applying absolutes to contemporary American facts, does not relieve either Congress, the President, or the Supreme Court of the responsibility of making an honest interpretation compatible with the essential precepts of the Constitution. There may be no distinction based on pure logic between tax exemption of religious property and governmental grants to construct religious edifices. Yet the whole history of Church and State and the constitutional policy embodied in the First Amendment put tax exemption and grants at opposite poles.[50] Neither the majority nor dissenters in Everson could suggest an easy, workable rule of thumb against which to measure all governmental aid. But history, the language of the Constitution, the judicial decisions and past practices do furnish an understanding of the criteria that are relevant to a judgment.

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[50] See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation, 14 Law & Contemp. Prob. 144, 147-152 (1949); Van Alstyne, Tax Exemption of Church Property, 20 Ohio St. L. J. 461 (1959); Note, 49 Colum. L. Rev. 968 (1948).

1. How closely is the benefit related to the religious aspects of the institution aided?

We are here concerned, as previously, with the underlying problem of distinguishing aid to the public generally, or general classes thereof, from aid to religion in particular. As the fire, police, and sewage examples indicate, churches and other religious institutions may receive benefits in their capacities as members of the general public and as property owners. The Constitution does not require that they be discriminated against, or be excluded from a general class conceptually and factually unconnected with religion, i.e., property owners.[10] The connection between the Church as a religious organization and as a corporate entity is remote, as is the benefit derived from incorporation and the religious function or ceremony. So, too, a church or church school may receive tax exemption when classified with others as "non-profit" organizations. Again it meets the group criteria, and there is no constitutional obligation to exclude it from benefits common to the class. Similarly, it may be said validly that children, as such, constitute a class which is a proper object of general welfare legislation. The State has a legitimate concern with their health, their safety, and, indeed, their education. It may extend

[10] The same could be said of according the benefits of State incorporation laws to churches.

financial assistance in various ways to achieve these ends. But where this assistance is also assistance to a religious institution the means become crucial. One side of the constitutional equation says: the State may aid this child to achieve a sound body and a sound mind. The other side says: the State may not aid the religious instruction of this child.

To adopt without qualification the theory that whatever benefits the child is ipso facto constitutional is to ignore the obverse prohibition. It either proves too much or proves nothing at all. The crucial question then becomes separating the permissible from the prohibited, the educational function from the religious one.

Milk, school lunch, medical inspection and services, and such like do not raise substantial problems because they do not closely tie in with the religious function served. [12] The Supreme Court has put transportation in the same category. True, all such programs make the sectarian school more attractive educationally than it would otherwise be. But the Constitution does not require the State to handicap religious

[12] Sam Pfeffer, Church, State and Freedom (1953), at 474-475.

institutions, or force parents to prejudice their children's health in exercising their constitutionally protected right to a sectarian education.

The same principle may, perhaps, be extended to textbooks for the use of individual students where the books in question are common to the secular and sectarian educational systems. It may, perhaps, also be extended to some equipment or facilities designed for special purposes totally unconnected with the religious function of the schools.

How far this type of assistance, unquestionably of benefit to the sectarian school, can go cannot be conclusively stated. Unavoidably we are dealing here with matters of degree. State court cases indicate that it may be possible to make a tenable distinction between aid to sectarian hospitals and aid to sectarian schools.[12/] The Supreme Court put transportation at the outer limits of the constitutionally permissible. Those who see no distinction between transportation and any assistance whatsoever should keep in mind that, apparently, the Court did.

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12/ See, for example, Opinion of the Justices, supra; cf. Schade v. Allegheny County Institution District, supra.

The clearest case is "across the board" aid, which necessarily includes items of aid that are closely related to the religious function. No separation is even attempted, and therefore general State grants to sectarian education would seem to be plainly prohibited. Public schools have already been constitutionally prohibited from providing classrooms for religious instruction during released time at no measurable cost to the public purse. A fortiori the government is prohibited from granting funds to sectarian schools which would, directly or indirectly, serve the same prohibited use.

2. Of what economic significance is the benefit?

The spectrum of monetary benefits begins with an outright grant and moves through various loan arrangements to the most limited form of assistance, the contract for specified services.

Admittedly, the case for the constitutionality of a general loan program is stronger than that for a program of general grants. For example, it has been argued that if the interest rate is as high as, or higher than the Governmental borrowing rate no expenditure of tax monies in support of a religious institution has been made. However, viewed from a different standpoint a loan is not different in kind from a grant. To the extent that loans are made at long term with interest rates below the private market, it can be argued that in fact a grant of the

difference is being made to the sectarian institution. Whatever the interest rate, the lending of credit can be analogized to the lending of a classroom proscribed in the McCollum case. While the Everson case did talk about the expenditure of tax monies as constituting the proscribed conduct, McCollum did not involve any expenditure, and, therefore, is closer to the loan situation. The lending of public property and the lending of public credit seem indistinguishable as forms of Governmental assistance. And in the Zorach case, Justice Douglas, speaking for the majority, expressly stated "Government may not finance religious groups * * *," (343 U.S. at 314). It is our view that the statement, admittedly dictum, was not confined to grant assistance.

It is also important to recognize that the measurement of economic value is not necessarily the same from the standpoint of the governmental donor and the private recipient. While a loan may involve no economic loss from the standpoint of taxpayers, it may, nonetheless, be of measurable economic assistance to a private institution unable to secure reasonable credit from non-government sources.

Also relevant is whether the assistance provided enables a private institution to free its own funds for unrestricted purposes. To the extent that this occurs, the economic benefit

becomes the type of "across the board" assistance which inevitably assists religious purposes. Unless a grant is earmarked for a specific purpose which would not otherwise be undertaken by the recipient, a grant program is more likely than a loan program to have the effect of releasing funds for constitutionally impermissible purposes.

When the government makes contracts for initiation of particular studies, or grants for undertaking particular research, any benefit to a religious institution seems too remote to be constitutionally proscribed. Unlike an "across the board" grant for "education," or an unrestricted grant for classroom construction and teacher salaries, such programs are primarily to serve a special governmental interest, and the size of the fee or grant is closely related to the cost of the program. In such cases the religious benefits seem remote and incidental. Alternatives would require a preference to secular institutions which in many instances might be less well-equipped to carry out the required research.

3. At what level of education is the benefit provided?

The constitutional principles involved are obviously the same whether the subject is elementary and secondary school education or higher education, but the factual circumstances surrounding the application of the principles are dramatically different. The reasons are largely historical.

The history of education in the United States at the grammar and high school level is largely one of free public schools. While private institutions exist, and cannot be constitutionally prohibited, the fact of the matter is that some 85 percent of children in the United States are educated in public schools. The reasons for this historically lies both in the public policy perceived in educating children and in the implementation of that policy by making education at the lower levels compulsory. In order to compel the education of children, States were constitutionally obligated to provide a system of education which was open to all on equal terms. In addition, it was prohibited to the States to teach religion, or to give a religious education in such schools. Whatever other courses might have, in theory or even in fact, been possible, the States chose to implement their policy by a system of free public schools.

The history of college and university education is almost precisely the opposite. While from a relatively early date the Federal and some State governments subsidized State universities and colleges, the bulk of advanced education has until recently been carried on by private institutions, the majority of which have a religious origin.

Primary schooling has long been accepted as essential for every American child, and secondary education is rapidly becoming

recognized as almost equally a necessity. Attendance at a university or college, on the other hand, has always been a matter of individual decision, dictated or influenced by the circumstances and preferences of the individual child and his family. Even today fewer than half of the high school graduates enter college on a full-time basis and of these 41 percent are students in non-public institutions.[18]

Reflecting these differences in history and practice, State laws everywhere require school attendance of all children for a substantial period of years; whereas, needless to say, there is no corresponding requirement at the college level. These children whose parents so elect may satisfy the compulsory attendance laws by attendance at private schools, but they are still subject to compulsion once that election has been made. The election can be reversed if the parents wish to do so--if not immediately, then at the start of the next school term or year--but while the election stands, the child is not shielded from enforced attendance at classes, secular or sectarian as the case may be.

The position of the college student is very different. His attendance is wholly voluntary, not merely a choice between alternative commands of the State. He is mature enough, moreover, to

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[18] The U.S. Department of Health, Education, and Welfare, Office of Education, estimates that of those who graduate from high school 43% enter college on a full-time basis and 16% on a part-time basis. Of those who do enter, approximately 60% eventually graduate.

have made the decision to attend college and to select the institution, or at least to have participated intelligently in those decisions. He can better understand the significance of sectarian as compared to secular teaching. At some sectarian institutions he is not required to study religion, but if he chooses to do so, or chooses an institution where religious instruction is mandatory, he is merely asserting his constitutional right to the "free exercise thereof."

There are thus important differences between school and college, not only in terms of history and tradition, but also in terms of the compulsory nature of attendance. There are differences, too, from the standpoint of the national interest involved. At the college and graduate levels the public institutions alone could not begin to cope with the number of young men and women already in pursuit of higher education, and expansion of these institutions or the creation of new ones sufficient to meet the expected increase of enrollment is out of the question. The effort which it is agreed must now be made in the field of higher education would, if confined to public institutions, force an ever more intensive selection of students and ever more concentrated effort to direct them into fields of study deemed important to the national defense and welfare. It would likely induce these institutions to over emphasize particular fields of study to the detriment of a balanced curriculum. Such warping of our educational

policies is not to be contemplated lightly, and to the extent that Congress finds it appropriate to encourage expansion of our university and college facilities, Congress must be free to build upon what we have, the private as well as the public institutions.

All these considerations indicate that aid to higher education is less likely to encounter constitutional difficulty than aid to primary and secondary schools. The same considerations apply even more forcefully to graduate and specialized education.

4. To what extent is the selection of the institutions receiving benefits determined by Government?

There is an important difference between governmental programs that aid institutions as such (including sectarian institutions) or aid them on behalf of all their students, and, on the other hand, programs that aid a small number of selected students whose choice of institution alone results in benefit to a sectarian school. In the former case the aid to sectarian institutions is an automatic consequence of government action; in the latter, it is a matter of chance so far as government is concerned.

Under the original G. I. Bill, each individual selected the institution he wished to attend, although the government made the

tuition payment directly to the institution. If the Government had selected the institution, however, it would obviously have presented a very different situation, and the mode of selection would have been more relevant than the identity of the payee of the government check.

A program of financial aid to qualified students attending institutions of their choice to carry out a public policy of assisting mentally able students to develop their full potentialities, or to encourage study in subjects where there is a shortage of adequately trained persons to serve national needs, does not seem to raise a serious question. The support which a particular religious institution might receive would depend upon the student's choice, and would seem therefore both indirect and incidental. From the governmental viewpoint it would depend upon chance, not governmental decision. There would seem to be no constitutional significance to the fact that, like other problems of probability, some statistical prediction might be possible of how much aid particular religious institutions might receive. Only if selective standards of eligibility of recipients were to be virtually abandoned so that all college students were eligible would the program appear a disguised method of assisting all colleges, including sectarian ones. Under such a system there would be no functional difference between the award

of scholarships and direct payments to colleges on a per capita basis. A program so equivalent to direct subsidy would transcend, we believe, the constitutional prohibition.

Everson put some emphasis on who received the assistance, student or institution. From this it has been argued that while assistance to the institution itself is prohibited, assistance to the student is more likely permissible, even though, functionally viewed, a similar purpose is served. This view overstates the significance of form alone. We believe that who receives the benefit is important only where form serves a substantive end. The examples above illustrate that it is not simply the identity of the payee which is the determinant of constitutionality.

5. What alternative means are available to accomplish the legislative objective without resulting in the religious benefits ordinarily proscribed? Could these benefits be avoided or minimized without defeating the legislative purpose or without running afoul other constitutional objections?

Within this category, where the constitutional significance of incidental religious assistance is discounted in part by necessity, one could include many of the traditional "benefits" received by church organizations; for example, police protection, fire protection, and sewage disposal, although these could also

be justified by other criteria suggested above. The point is that protection of health and safety within the community cannot reasonably be accomplished without including religious institutions within the class of beneficiaries. Furthermore, to exclude religious institutions from the class benefitted would probably be violative of the First Amendment as tending to prohibit freedom of worship and of the Due Process clause as an unreasonable classification.

Another illustration of the criterion here applied lies in the employment of chaplains and the construction of churches and places of worship by the Armed Forces. The purpose of employing chaplains is related to the morale and discipline of the forces, and it is difficult to see how an army could effectively perform its military functions without making provision for the moral welfare of the troops. In the context of military operations this purpose can be effectuated only by active assistance on the part of the Government.

Conversely, to refuse to facilitate religious activities would be to throw the power of the Government against religion, not to maintain neutrality. To make it legally or factually impossible for a soldier to worship freely and, to fail to adjust military necessity to religious freedom, within reasonable limitations, would itself be unconstitutional. Here, it seems, history

and constitutional theory require cooperation of church and State not to breach, but rather to preserve, the "wall of seperation." Soldiers may not be coerced into church attendance but making church attendance possible cannot, under the facts of military organization, be constitutionally proscribed. And the difference between using public facilities within the armed services and permitting the use of public facilities in the released time school cases is found in the different demands of military life and the life of school children in a typical American community.

The Everson case itself provides an example, for once it has been determined that the legislative purpose relates to the safety and health of children, it is difficult to see how it could be accomplished without including all children.

One final example where the practicalities are relevant is the G.I. Bill. The purpose of the bill was to rehabilitate veterans into civilian life by making it possible for them to continue or commence their education. To have conditioned their benefits on attendance at a secular institution would have been impractical in view of the number of veterans and the limited educational resources available. In view of the short-range duration and urgency of the program, the construction of adequate

additional facilities would have been impractical if not impossible.[14] Thus, the legitimate legislative purpose could not have been achieved by other reasonable means.

One cannot blink the difficulties of applying this criterion, nor do we suggest it is by any means conclusive. In some instances the support of religious institutions incident to a legitimate public policy may well be so direct and substantial that the policy itself may be legislatively unattainable despite the absence of practical alternatives.

One final argument made by proponents of governmental aid to non-profit private schools should be mentioned. It has been suggested that the only criterion is whether or not the religious institution benefits *qua* religious institution or as a member of a more general class. It may be suggested that the general classification "non-profit schools" would be a reasonable classification, and that aid to all such schools, including sectarian ones, would not violate the First Amendment.

This argument seems to be directly counter to Everson and meets none of the criteria which we believe is determinative of constitutionality. Particularly is this true with regard to

[14] To have excluded from its benefits those veterans who, by conscience or preference, wished to attend sectarian institutions might conceivably have violated due process.

elementary and secondary school education where over 90% of the general class would be composed of sectarian schools to whom direct assistance would be forbidden under Everson. Here the special class swallows up the general one in such a way as to make assistance an obvious evasion of the Establishment provision. If the argument has any validity, it can only have it in the realm of higher education, where the proportion of sectarian colleges to the general class of non-profit educational institutions would be relatively minor. But in neither situation do we find this approach helpful. It seeks to avoid the Constitution rather than apply its terms as judicially interpreted. The general classifications earlier suggested--property owners, corporations, and non-profit organizations--are very different from non-profit schools, and are supported as well by other considerations discussed herein.

13 IV

Against the authority and criteria already discussed, we consider in this section legislative proposals which have been introduced or which may possibly be seriously urged. These are (1) the addition of private nonprofit schools to the Administration bill which provides grants for elementary and secondary school education; (2) long-term loans to private elementary and secondary schools; (3) the Administration bill to assist higher education and (4) Special Purpose Programs.

A. Inclusion of private nonprofit schools within the Administration bill for elementary and secondary school education.

The inclusion of sectarian schools as beneficiaries of federal moneys expended under provisions of the Administration bill would squarely run into the prohibitions of the First Amendment as interpreted in the Everson, McCollum and Zorach cases. Grants for assistance in the construction of general school facilities and for increasing teachers' salaries, to be administered by governmental agencies and made available directly to sectarian schools, are the clear case of what is proscribed by the Constitution. They meet none of the criteria suggested in the foregoing section. Indeed, if the inclusion of such schools in the Administration program would not violate the Establishment provision of the First Amendment as

judicially interpreted, it is difficult to think of a situation of aid to education which would. Aid by way of grants to sectarian schools could only be justified by a reversal of the Supreme Court's interpretation of the Establishment Clause and a new interpretation which would regard it as merely prohibiting discrimination among religions. Whatever its historical justification, this latter interpretation of the clause has been urged upon the Court in the cases cited and rejected by nine Justices in Everson and by eight in McCollum. While the tone of the Zorach opinion may imply a slight modification of the rigid separation doctrine espoused in McCollum, it is clear that it did not modify the Court's earlier interpretation of the establishment provision in any substantial way. Rather, the opinion reiterates the principle that Government may not finance religious institutions.

Since the Supreme Court has spoken, the only serious argument put forward against this conclusion rests more on considerations of fairness than of law. The argument is that because sectarian schools meet all prescribed standards of education, and because they contribute significantly to the education of American children, they should be entitled to Governmental assistance. This argument is bolstered by

stating that, in effect, the refusal to grant assistance to children attending such schools constitutes a discrimination against them incompatible with the spirit of the Fifth Amendment, and, viewed realistically, violates the mandate of the First Amendment against prohibiting the free exercise of religion.

The difficulty with this viewpoint, apart from the fact that it has been consistently rejected by the courts, lies in the fact that students attending such schools do so as a matter of free choice. If the choice is not "free" it is because of the religious beliefs of the individuals making the choice, not because of Governmental edict. Since the public schools are open to all children without exception, it cannot be argued that constitutionally prescribed discrimination exists.

16/ In Swart v. South Burlington Town School District, 167 A. 2d 514, supra, the Supreme Court of Vermont forbade the payment of tuition by the School District for students attending a parochial school. In meeting the argument stated above, the Court said (at pages 520-21):

> "Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental (cont'd)

The prohibition embodied in the second phase of the First Amendment is only a prohibition against Government action which interferes with the free exercise of religion. The Constitution does not require the Government to create conditions which make the free exercise of religion less burdensome financially.

B. Long-term loans to private elementary and secondary schools for construction of educational facilities.

It has been suggested that even if grants to sectarian elementary and secondary schools are unconstitutional, long-term low interest loans would not be. While we believe that loans constitute a less substantial assistance to religion than outright grants, we do not believe that this difference, without more, is sufficient to justify the distinction urged. Loans are also prohibited by the rationale of the Everson decision. This conclusion is reinforced by McCollum, where the Supreme Court declared unconstitutional the provision of classrooms

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15/ (con't)

Law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. See Pierce v. Society of the Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468.

"Equitable considerations, however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law."

in a public school for religious instruction during "released time." No measurable cost to the government was involved in the use of such facilities, yet the Court held that the use nonetheless constituted assistance to religion by a governmental entity in violation of the Establishment provision.

Only 15.2 per cent of American school children are presently educated in private schools. But more than 80 per cent of these are educated in sectarian schools. It would seem, therefore, that loans to private schools would, in fact, be almost exclusively loans to sectarian schools, and that the principal purpose of such a bill would be to provide governmental assistance to religious education. Unlike the collegiate situation, the purpose here would be so predominately connected with religion as to breach the constitutional wall.

Low-interest across-the-board construction loans do provide measurable economic benefit to religious institutions. Moreover, there is a total failure in this proposal to distinguish between those aspects of a school which are involved with religious teaching and those which may not be. This combination of factors when applied to elementary and secondary schools place the proposal beyond the limits of permissible assistance.

C. The Administration bill to assist higher education.

The Administration bill to assist higher education authorizes loans to institutions, without distinguishing between public and private ones, or between those under secular and sectarian sponsorship. It also provides for college scholarships awarded on a competitive basis. These scholarships may be used at any accredited college which the recipient selects. In addition, the bill provides for the payment to the college of a "cost of education" allowance to supplement the scholarship.

Governmental assistance directly to colleges for the construction and expansion of academic facilities admittedly raises, in the case of sectarian institutions, a closer constitutional question than scholarships. Fundamentally the distinction between assistance to sectarian colleges and assistance to sectarian elementary and high schools rests upon differences between the educational system which exists in the United States at the college and graduate school level and the predominantly free public educational system at the elementary and secondary school level. Largely of historical origin, they create importantly different factual circumstances against which to measure the constitutional question.

These differences make material several of the criteria discussed in Part IV of this memorandum. We are not, at the college level, dealing with a system of universal, free, compulsory education for all students. The process is more selective, the education more specialized, and the role of private institutions vastly more important. There are obvious limitations upon what the government can hope to accomplish by way of expanding public or secular educational facilities. If the public purpose is to be achieved at all, it can only be achieved by a general expansion of private as well as public colleges, by sectarian as well as secular ones.

Loans for construction of facilities may be less constitutionally vulnerable than grants for the same purposes. But this distinction is not here the only one, or perhaps even the crucial one. More important are the distinctive factors present in American higher education: the fact that the connection between religion and education is less apparent and that religious indoctrination is less ubiquitous in a sectarian college curriculum; the fact that free public education is not available to all qualified college students; the desirability of maintaining the widest possible choice of colleges in terms of the student's educational needs in a

situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination against, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the collegiate enrollment does not have the power of state compulsion supporting it.

Weighing all of these factors, we conclude that the Administration's loan proposal for higher education is within constitutional limits. No feasible alternative to the accomplishment of the national purpose suggests itself.

All of the foregoing factors related to higher education are, of course, relevant to the scholarship grants. In addition, the decision as to which college is attended is entirely controlled by the student.

The additional cost-of-education grant paid to the institution is also, in effect, closer to a scholarship than a grant to support the institution chosen. Tuitions vary among colleges owing both to cost differentials and the size of endowment and annual private or public subsidy, but almost

invariably the cost of education exceeds the tuition charged. It is to take account of this fact that the scholarship grant is supplemented by a cost-of-education allowance. In essence, it too is subject to the student's, not the government's, educational choice.

The payment to the institution is in reality merely a supplement to the scholarship, no less valid constitutionally than the scholarship itself. To regard such payments as unconstitutional would make the question of who receives the payment the one decisive criterion and sacrifice substance to form.

D. Special Purpose Programs.

The Federal Government at present engages in a wide variety of statutory programs that have some impact on sectarian educational institutions. It is significant that the great bulk of government supported programs is in fields of higher education. Examples are aids for specialized training; or research connected with national defense, public health, or improving educational methods; or loans for college housing facilities or to permit needy students to attend college. In all such programs no direct connection with

religion[16] is present, and the funds in each case appear adequately separated from any religious function to stay within constitutional bounds.

Existing federal programs at the elementary and secondary level are less extensive in number and size. Typically such programs either bear a clear cut relationship to childrens' health; or promote a special purpose with a clear national defense implication. These programs are devoid of any substantial aid to the religious function, and such aid as might possibly occur is both remote and unavoidable.

[16] One seeming exception, more apparent than real, is the aid given under the Mental Health Act to divinity schools for an experimental program with regard to training clergymen in mental health aspects of their job. This program can be justified by the fact that it was not a part of the existing curriculum, and by the fact that the mental health training bore no close relationship to the religious training. It would, therefore, seem to fall within the special purpose doctrine. A more difficult case is the disposal of surplus government property to sectarian institutions. Certainly this program has approached, perhaps even transgressed, constitutional boundaries. At the same time, however, the general language and the legislative history of the surplus property disposal acts made quite clear the intention of Congress to include sectarian institutions. In most such cases, the property disposed of did not directly benefit the religious programs and training of sectarian schools. But one cannot say flatly that no such aid in any situation violated the criteria set forth in this memorandum.

To what extent a special purpose provides constitutional legitimacy to high school or elementary school loans, or possibly even grants, would depend on the extent to which the circumstances could be severed from religious aspects of sectarian education. The problem is complicated because assistance for one purpose may free funds which would otherwise be devoted to it for use to support the religious function, and thus, in effect, indirectly yet substantially support religion in violation of the Establishment Clause. At the present time, the National Defense Education Act permits the Commissioner of Education to make loans to private schools to acquire science, mathematics, or foreign language equipment. We believe such loans are constitutional because the connection between loans for such purposes and the religious functions of a sectarian school seems to be nonexistent or so minimal as to raise no substantial question. Furthermore, the money is loaned at 1/4 of 1 per cent above the current average yield on all outstanding marketable obligations of the United States, thus avoiding characterization as more than a grant of credit.

There may be some other special purposes for which loans would be equally defensible, but any specific proposal would have to be evaluated in the context of the criteria discussed above.

In considering whether a given proposal exceeds permissible limits of assistance to a religious institution, no single criterion is necessarily decisive. And none of these criteria afford precise units of measurement susceptible of easy application. Nevertheless, each criterion is an aid to judgment. What is least likely to be constitutional can readily be distinguished from what is most likely to be constitutional. In forming a judgment as to legislative proposals in the middle ground, all relevant criteria must be accorded due consideration. Ultimately a judgment is required--not a doctrinaire conclusion as to what should be done or should not be done, but a reasoned consideration of how an imprecise statement of fundamental constitutional principles is likely to be applied to each particular factual situation.