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4 MEMORANDUM FOR THE ATTORNEY GENERAL

4 Re: Elimination of Racial Segregation in Interstate Transportation

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You have asked what might be done, apart from the enactment of legislation, to accomplish the elimination of racial segregation in interstate transportation.

Segregation in travel, as such, has not been declared unlawful. The past view of the Interstate Commerce Commission has been that segregation is neither required nor prohibited by the Interstate Commerce Act, that only substantial equality of treatment is required. Under that view, a railway carrier may therefore by its regulations require separation of white and negro passengers. Chiles v. Chesapeake and Ohio Ry., 218 U.S. 71 (1910); Henderson v. Southern Railway Co., 258 I.C.C. 413, 418-419 (1944); Henderson v. United States, 63 F. Supp. 906, 911 (D.C. Md., 1945) reversed in 339 U.S. 816 (1950); May v. Southern Railway Co., 268 I.C.C. 352 (1947); Henderson v. Southern Railway Co., 269 I.C.C. 73 (1947). The liberalizing Supreme Court decisions have rested on the ground either that the questioned segregation practice was an unreasonable discrimination under the Interstate Commerce Act, Mitchell v. United States, 313 U.S. 80 (1941) (denial to a Negro of Pullman car space); Henderson v. United States, 339 U.S. 816 (1950) (dining car segregation), or a burden on interstate commerce, Morgan v. Virginia, 328 U.S. 373 (1946) (holding Virginia's segregation law a burden on interstate bus transportation). As a result, various forms of segregation practices have been and are being tested on a case basis, as burdens on interstate commerce or unreasonable discriminations where the Interstate Commerce Act and similar legislation is controlling. In the latter category, unless the practice is clearly invalid under such provisions of law as 49 U.S.C. 3 (1) or 316 (d) so as to be stricken down directly by the courts, Lyons v. Illinois Greyhound Lines, 192 F. 2d 533 (C.A. 7, 1951), it may require preliminary administrative inquiry and action before final adjudication of the validity or invalidity of the practices can be had. Mitchell v. United States, 313 U.S. 80, 93 (1941); Greene v. Atlantic Coast Line R. Co., 95 F. Supp. 761 (D.C., E.D. N.Y., 1951); but cf Solomon v. Pennsylvania R. Co., 96 F. Supp. 709 (D.C., E.D. N.Y., 1951). In still other situations, there are issues of reasonable or unreasonable application of the segregation rule of the carrier by the carrier's agents. Carolina Coach Co. v. Williams, 207 F. 2d 408 (C.A. 4, 1953).

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Of course, there is good ground for believing that the legal basis for segregated travel, founded upon Plessy v. Ferguson, 163 U.S. 537 (1896), and Chiles v. Chesapeake & Ohio Ry., 218 U.S. 71 (1910), may one day disappear. The recent decision of the Supreme Court, which struck down as unconstitutional the segregation of races in the public schools, Brown v. Board of Education, ____ U.S. ____ (May 17, 1954); Bolling v. Sharpe, ____ U.S. ____ (May 17, 1954), rejected as inapplicable in the field of public education the "separate but equal" doctrine of Plessy v. Ferguson. Plessy v. Ferguson was a transportation case which in turn relied heavily on earlier state cases approving segregated schools, 163 U.S. at 544-545, 550-551. The action of the Supreme Court in the school segregation cases was almost immediately followed on May 24, 1954, by orders of the Court vacating three judgments below which had upheld segregation in the private operation of a municipal amphitheater, No. 85, Muir v. Louisville Park Theatrical Association, and segregation in two state colleges, No. 595, Tureaud v. Board of Supervisors of Louisiana State University, No. 9, Hawkins, State of Florida ex rel v. Board of Control (see 22 Law Week 3305), remanding the three cases for further consideration "in the light of the Segregation Cases decided May 17, 1954, Brown v. Board of Education, etc."; and by orders denying review of three judgments below striking down segregation in public housing, No. 583 Housing Authority of San Francisco, v. Banks, exclusion of negroes from a municipal golf course, No. 3, Holcombe v. Beal, and exclusion of negroes from a state junior college, No. 156, Wichita Falls Junior College District v. Battle (see 22 Law Week 3306).

There is thus ample reason to believe that the legal basis for segregation in transportation is crumbling. The Government has once before urged disavowal of the "separate but equal" doctrine in transportation, see brief of the United States in Henderson v. United States (339 U.S. 816). It has every encouragement now to press with renewed vigor for the elimination of the doctrine.

Two cases offer an opportunity for intervention in that direction. There is now pending before the Interstate Commerce Commission a complaint of the National Association for the Advancement of Colored People and several individuals against St. Louis-San Francisco Ry. Co. and 11 other rail carriers, No. 31423, charging acts of segregation and discrimination in the furnishing of interstate transportation facilities. Complainants seek a cease and desist order from segregating, discriminating, or making any distinction based upon race or color among passengers using the carriers' services and facilities. The suit apparently has been filed on the theory that segregation per se is violative of the Interstate Commerce Act and the Constitution. The answer of at least one of the carriers, Gulf, Mobile and Ohio R.R. Co., admits that with respect to certain interstate passenger train operations it maintains a policy or rule segregating and separating its negro and white passengers, but denies that such segregation results in unlawful discrimination within the meaning of the Interstate Commerce Act. Others of the answers, without making a similar admission, indicate a technical reliance upon the theory that separation of the races

as such is not violative of the Interstate Commerce Act. A few of the answers appear to be denials of any segregation practices. Complainants filed an amended complaint on April 9, 1954 to which the defendants have answered, and the matter has been scheduled for hearing on July 27, 1954 in Washington.

The second case involves a motor carrier in interstate commerce, Sarah Keyes v. Carolina Trailways, Inc., No. MC-C 1564. In this case, a hearing was held May 12, 1954. It appears that the defendant carrier maintains a regulation for seating whites from the front and Negroes from the rear of its buses. Complainant traveling from New Jersey to North Carolina, on a through ticket, was subjected in North Carolina to an application of these rules when she refused to comply with a request of the bus driver to change from a front to a rear seat on one of the company's buses. When she refused to make the change, the driver had all of the passengers transferred to another bus but excluded the complainant from the second bus. The testimony of both the complainant and the defendant's employees appear to agree on this point. (Complainant was also arrested by local police, but the parties differ on whether this was caused by defendant's employees or by alleged abusive language of complainant.) The complaint asks for a cease and desist order directing the defendant to cease discrimination against members of the Negro race, and asks for damages as well. The brief of the complainant appears to adopt the theory that segregation per se is unlawful, and defendant's brief relies upon Chiles v. Chesapeake and Ohio Ry., supra, as authority for the carrier to segregate. The examiner has not as yet filed any determination or recommendation with the Commission.

It would seem to me that either or both cases now before the Interstate Commerce Commission offer appropriate opportunity for the Government to intervene and urge the adoption of orders which will remove the cloak of legality which has surrounded the segregation practices of the interstate carriers. Of course, the Government could await a decision in either or both cases by the Interstate Commerce Commission and, if the decision continues the support of segregated practices, could intervene on any appeal to the courts. However, it seems to me that if the Government were to throw its weight into the controversy at this point, it might persuade the Commission that the time has come to abandon an insupportable rule without waiting for further direction from the courts. As far back as 1947, one of the present commissioners, together with a former colleague, urged that race no longer constituted a basis for segregation in interstate travel. See dissent of Commissioner Mahaffie and former Commissioner Aitchison in Henderson v. Southern Railway Co., 269 I.C.C. 73 (1947). Many of the present members have come to the Commission since that time, including four appointed under the present administration. The impact of the recent cases, and a strong position by the Attorney General intervening as the chief legal officer of the Government in support of the constitutional prohibition and national policy against racial segregation, could be persuasive and decisive. For your further information I attach the copies of documents we have been able to obtain in the two pending cases.

In the course of examining into our subject, we have looked briefly at the possibility of challenge of segregation in intrastate travel, bearing in mind that Plessy v. Ferguson involved just that, and is the cornerstone of the legal structure of segregation in travel. The Supreme Court has not yet disavowed Plessy, but in the light of Brown v. Board of Education, supra, the chances are that it will when the occasion arises. We have no recommendation, at the present time, for lack of information regarding a suitable case for federal action or intervention. It seems to us that an appeal on an appropriate set of facts from a criminal conviction under a state segregation law would probably offer the better of several avenues of challenge. We have made some informal inquiries as to any current situations which might involve servicemen or federal employees being subjected to state segregation laws in intrastate travel, but are not prepared to report anything concrete as yet.

4/ J. Lee Rankin
/ Assistant Attorney General
/ Office of Legal Counsel

Enclosures