Excerpts From the Opinions of Judge Haynsworth

Special to The New York Times

WASHINGTON, Aug. 18—Following are excerpts from opinions written by Judge Clement F. Haynsworth Jr. of the Federal Court of Appeals for the Fourth Circuit, who was nominated by President Nixon today as Associate Justice of the Supreme Court:

Hospital Segregation

In Simpkins v. Moses H. Cone Memorial Hospital, 1963, the Appeals Court ruled that hospitals receiving Federal funds through a state plan under the Hill-Burton Act could not exclude Negro doctors or patients. Judge Haynsworth dissented, contending that the State of North Carolina was not sufficiently involved to bring the Fourteenth Amendment's bar against state discrimination into play and that Congress had not intended the Hill-Burton Act to be an antidiscrimination measure. The Supreme Court let the majority decision stand.

The plaintiffs contend that state action should be found to have arisen out of the "totality" of the circumstances—that a minority of the members of the board of trustees of the Cone Hospital are appointed by designated public officials, that Cone voluntarily cooperates with two state supported colleges in a program for the training of student nurses, and, with respect to both hospitals, that they are licensed by the state as doctors, lawyers and restaurants are, that they enjoy a tax exemption, as every eleemosynary corporation in North Carolina does, and that they received Hill-Burton funds.

Since the majority rests its opinion solely upon the receipt of Hill-Burton funds, we may dismiss the other suggested governmental contacts upon which the plaintiffs would rely, being unwilling to rely upon the Hill-Burton contention alone.

The United States, as intervenor, readily concedes that the receipt of governmental subsidy alone would not make the subsequent operation of a hospital state action, but it finds in the Hill-Burton Act and the North Carolina statutes passed in compliance with it such regulation and power of control as to convert the operation of the hospitals into state action in a constitutional sense. This theory, adopted by the majority, distorts the Hill-Burton Act, its purposes and its operation in practice.

Recent measures in the Congress may bear upon governmental understanding of what was undertaken by the Hill-Burton Act and the state statutes enacted in order to qualify hospitals within the states for the grants in aid. The Senate rejected a proposal that henceforth grants in aid to hospitals under the Hill-Burton Act be restricted to hospitals which are desegregated and which practice no discrimination on account of race.

Other broader proposals for the elimination of racial discrimination in broad categories of institutions and business, to be applied prospectively, are now pending before the Congress. These proposals lend some emphasis to what is so clearly apparent from the original Hill-Burton Act—that the Congress had no idea that grants in aid authorized through cooperative state agencies would convert the subseqent operation of recipient private hospitals into state action so as to bring them under the Fourteenth Amendment.

The Congress may properly reconsider this matter, and undoubtedly, it has the power, if it chooses to exercise it, to condition future grants of Hill-Burton funds to the execution of nondiscrimination agreements.

Under these circumstances, it seems to me particularly inappropriate for us to now hold that the Congress, unbeknownst to itself, in 1944 had done what it now has under consideration for prospective operation only.

School Desegregation

In Bowman v. County School Board, 1967, Judge Haynsworth upheld a freedom-of-choice school, desegregation plan, on the ground that as long as the Negro students' choice of schools was truly free the Constitution is not violated by the continued existence of all-black schools. The Supreme Curt later reversed this position, holding that freedom-of-choice plans are unconstitutional unless they succeed in eliminating dual school systems:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes.

They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

"Freedom of choice" is a phrase of many connotations.

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both voluntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible.

Long since, this court has condemned it. The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holding.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find its existence no denial of any constitutional right not to be subjected to racial discrimination.

Habeas Corpus

In Rowe v. Peyton, 1967, Judge Haynsworth held in a majority opinion that state prisoners may bring habeas corpus actions in Federal court to attack the constitutionality of state prison terms that are yet to be served after the prisoners' current terms are served. The Supreme Court affirmed his decision, thereby extending the right of habeas corpus beyond its former limits.

The writ of habeas corpus is not the creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction.

In the seventeenth century it developed into the "great writ" so prized in colonial America. In the process, it was assisted by the petition of right, enacted by the Parliament in 1728 to extend the writ to bring into question commitments under orders of the crown, and it received procedural assistance in its codification in the Habeas Corpus Act of 1697, but the writ was essentially the product of judicial innovation.

In this country, in Article I Section 9 of the Constitution, it was provided that the privilege of the writ shall not be suspended except when required by the public safety in times of rebellion or invasion. The Judiciary Act of 1789 authorized the Federal courts to grant such writs, but the nature and scope of the writ was to be found neither in Article I of the Constitution nor in the Judiciary Act of 1789.

When the writ, as it is known today, therefore, is almost entirely the product of judicial innovation and adaption to fit it to new situations and newly felt needs, judges should not hesitate to take a further step to adapt it to meet yet another need which is present, urgent, and recognized, even by the state.

Taking our direction from Jones v. Cunningham's declaration of the potentiality for growth of the writ of habeas corpus to achieve its purpose, and from Fay v. Noia's assurance of "the fullest opportunity for plenary Federal judicial review" and the necessity for "swift and imperative justice on habeas corpus," we conclude that we are not bound in the circumstances of these cases by the historic requirement for availability of the writ that the court's order may procure the immediate release of the prisoner.

Nor does that historic requirement limit us to the Artin and Williams situations in which the sentence under attack prevents the proner's being considered for parole. So far as the historic limitation is concerned, we conclude that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner.

NYT 8/19/69