CR 13.6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

G. C. SIMKINS, JR., ET AL., Plaintiffs,	)	
v.	)	NO. C-57-G-62
MOSES H. CONE MEMORIAL HOSPITAL, ET AL., Defendants.	)	

MEMORANDUM OF THE UNITED STATES

I

Statement of the Case

Plaintiffs, Negro citizens suing on behalf of themselves and other Negro physicians, dentists and patients similarly situated filed a complaint seeking injunctive and declaratory relief in the United States District Court for the Middle District of North Carolina alleging that the defendants had discriminated against them because of their race in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The relief sought is (1) an injunction restraining the defendants from continuing to enforce the policy, practice, custom, and usage of denying plaintiff physicians and dentists the use of staff facilities at the Moses H. Cone and Wesley Long Community Hospitals in Greensboro, North Carolina, on the ground of race; (2) an injunction restraining defendants from continuning to enforce the policy, practice, custom and usage of denying and abridging admission of patients on the basis of race and refusing to permit patients to be treated by their own physicians and dentists on the basis of race, at the Moses H. Cone Memorial Hospital

and the Wesley Long Community Hospital in Greensboro, North Carolina, (3) a declaratory judgment declaring 42 U.S.C. 291e(f) (Title VI of the Public Health Service Act) and Regulation 53.112 of the Public Health Service Regulations, 42 C. F. R. 53-112, 21 F. R. 9841 unconstitutional invalid and void as violative of the Fifth and Fourteenth Amendments to the United States Constitution.

Since the lawsuit is one in which "the constitutionality of . . . [an] Act of Congress affecting the public interest . . . [has been] drawn in question", the United States, pursuant to 28 U.S.C. 2403 and Rule 24(a) of the Federal Rules of Civil Procedure, has moved to file herein a pleading in intervention.[1/] This memorandum will set forth the views of the United States on the questions presented by this proceeding.

A. The Act of Congress Under Attack

Plaintiffs seek a declaratory judgment that 42 U.S.C. 291e(f) (Title VI of the Public Health Service Act) and Regulation 53.112 of the Public Health Service Regulations, 42 C.F.R. 53- 112, 21 F. R. 9841 are unconstitutional. Plaintiffs' attack is grounded on the contention that the statute and regulation authorize a federal-state program that results in American citizens being discriminated against because of their race.

1/ The right of the United States to intervene in cases of this type is well established. See Garment Workers v. Donnelly Co., 304 U.S. 243 (1938); Smolowe v. Delendo Corporation, 36 F. Supp. 790 (S.D. N.Y. 1940); affirmed, 136 F. 2d 231 (C.A. 2, 1943); cert. denied, 320 U.S. 751 (1943); Commentary, 4 F. R. Serv. 911. Cf. S.E.C. v. United States Realty & Improvement Co., 310 U.S. 434 (1940); Walker v. Reynolds Metals, Co., 87 F. Supp. 283 (D. Ore. 1949).

The Hospital Survey and Construction Act of 1946, Act of August 13, 1946, 60 Stat. 1041 (hereinafter referred to as the Hill-Burton Act), as amended, 42 U.S.C. 291, et seq., is one of the statutes comprising Title VI of the Public Health Service Act, 42 U.S.C. Ch. 6 A., subch. IV. This act established a program of federal grants to the states for the construction of public and other non-profit hospitals.[2/]

The grants are made available upon approval by the Surgeon General of plans submitted by the states. The key provision -- the one here in question -- provides that the Surgeon General shall by general regulation prescribe:

> (f) That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color, and shall provide for adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination

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2/ The program was originally limited to a period of five years. As amended by the Act of August 14, 1958, 72 Stat. 616, 42 U.S.C. 291 (d), the program has been extended to June 30, 1964 and annual appropriations of $150 million have been authorized. The statute also has been amended in other respects, the major changes being in 1954 when special grant categories were added for diagnostic and treatment centers, chronic disease hospitals, rehabilitation facilities and nursing homes (section 641, et seq.; 42 U.S.C 291, et seq.).

> on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint.

Pursuant to the provision, the Surgeon General adopted the following pertinent regulations (42 C.F.R. §§53.111, 53.112):

> §53.111 General. The State plan shall provide for adequate hospital, diagnostic or treatment center, rehabilitation facility, and nursing home service for the people residing in a State without discrimination on account of race, creed, or color, and shall provide for adequate facilities of these types for persons unable to pay therefor.
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> §53.112 Nondiscrimination. Before a construction application is recommended by a State agency for approval, the State agency shall obtain assurance from the applicant that the facilities to be built with aid under the Act will be made available without discrimination on account of race, creed, or color, to all persons residing in the area to be served by that facility. However, in any area where separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities, are provided for separate population groups, the State agency may waive the requirement of assurance from the construction applicant if (a) it finds that the plan otherwise makes equitable provision on the basis of need for facilities and services of like quality for each such population group in the area, and (b) such finding is subsequently approved by the Surgeon General. Facilities provided under the Federal Act will be considered as making equitable provision for separate population groups when the facilities to be built for the group less well provided for heretofore are equal to the proportion of such group in the total population of the area, except that the State plan shall not program facilities for a separate population group for construction beyond the level of adequacy for such group.

A State, to participate in the program, is required to submit for approval by the Surgeon General a state plan setting forth a "hospital construction program" which,

among other things, "meets the requirements as to lack of discrimination on account of race, creed,or color, . . . required by the regulations prescribed under section 291e(f). . . ." (42 U.S.C. 291f(a)(4). The state may meet this non-discrimination requirement "in any area where separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities, are provided for separate population groups . . . if . . . the plan otherwise makes equitable provision on the basis of need for facilities and services of like quality for each such population group in the area, and. . . such finding is subsequently approved by the Surgeon General." (Regulation 52.112, 42 C, F. R., 53.112). Where a separate-but-equal plan is in operation, the individual applicant for aid need not give any assurance that it will not discriminate and, in fact, expressly indicates on its application form that "certain persons in this area will be denied admission to the proposed facilities as patients because of race, creed, or color."[3/] The arrangement to extend aid is formally concluded by a memorandum of agreement signed by representatives of the applicant, the state agency and the Surgeon General.

3/ There are, however, a multitude of requirements that an applicant must meet to be approved by the state agency. For example, in approving any application the state agency is required by regulation (42 C.F.R. 53.127(d)) to certify that the application contains reasonable assurances as to title, payment of prevailing rates of wages, and financial support for the construction and operation of the project; that the plans and specifications for construction of the project are in accord with the minimum construction standards in the Federal regulations; that the application is in conformity with the State plan; that the application contains an assurance that the applicant will conform to the requirements of sections 53.111, 53.112, and 53.113 of the Regulations regarding the provision of facilities for persons unable to pay therefore; that the application contains an assurance that the applicant will conform to state standards for operation and maintenance and to all applicable state laws and state and local regulations; that the application is entitled to priority over other projects within the state; and that the state agency has approved the application.

B. The Allegations of the Pleadings

The allegations of the complaint and of the pleading in intervention may be summarized as follows:

In September 1946, the State of North Carolina, acting through the North Carolina Medical Care Commission, filed with the Public Health Service an application, pursuant to the Act, for federal funds to conduct a survey of existing hospital and related facilities in North Carolina. The application was approved and, following an allotment of funds to the State, the North Carolina Medical Care Commission filed a state plan with the Public Health Service. This plan was approved by the Surgeon General on July 8, 1947, and, with periodic revisions, has remained in effect to the time of the filing of the pleading in intervention.

The State plan provides for the division of Guilford County, North Carolina into two Hospital service areas, the Greensboro Hospital Service area and the High Point Hospital service area. Greensboro is one of several hospital service areas where, pursuant to the State plan as approved by the Surgeon General, separate hospital facilities are provided for separate population groups.

Plaintiffs are Negro citizens of the United States and the State of North Carolina residing in the City of Greensboro. Certain of the plaintiffs are qualified medical doctors and certain others are qualified dentists, all practicing in Greensboro. This group of plaintiffs seeks admission to the staff facilities of Moses H. Cone Memorial Hospital and Wesley Long Community Hospital.

Plaintiffs A. J. Taylor and Donald R. Lyons are in need of medical treatment and desire to enter either the

Wesley Long Community Hospital or the Moses H. Cone Memorial Hospital where complete medical equipment and the best facilities for treatment in the Greensboro area are available. Plaintiffs also desire treatment from their personal physicians. Plaintiffs, however, cannot be admitted to the Long Hospital since it follows a policy, practice, custom and usage of refusing to admit Negroes to the use of its facilities. Plaintiffs cannot enter the Cone Hospital on the same basis as whites nor can they enter the Cone Hospital and be treated by their personal physicians because the Cone Hospital will not admit Negro doctors or dentists to staff facilities.

Defendants, Moses H. Cone Memorial Hospital, Inc., and Wesley Long Community Hospital Inc., are North Carolina corporations that have established and now maintain in Greensboro, North Carolina, the Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital, respectively, which are tax exempt and state licensed. Defendant Harold Bettis is the Director of the Moses H. Cone Memorial Hospital Inc. and defendant A. O. Smith is the Administrator of the Wesley Long Community Hospital.

The complaint and the pleading in intervention make these allegations with respect to the functioning and operation of defendant hospitals:

1. Of the fifteen members of the Board of Trustees of Cone Hospital, six are appointed by agents or subdivisions of the State of North Carolina.[4/]

4/ Three members are appointed by the Governor of North Carolina; one member is named by the Board of Commissioners of the City of Greensboro; one member is named by the Board of Guilford County; one member is named by the Board of Commissioners of Watanga County.

2. One member of the Board of Trustees of Cone Hospital is appointed by the Guilford County Medical Society -- a component of the Medical Society of North Carolina. The latter body appoints the Board of Medical Examiners of North Carolina and elects four members of the State Board of Health.

3. Cone Hospital conducts training and is regularly used as a place of training for student nurses from the Women's College of the University of North Carolina and the Agricultural and Training College of North Carolina, both of which are tax supported, public institutions.

4. The Cone and Long Hospitals have received the following amounts of federal funds under the Hill-Burton Act:

Cone Hospital:

(a) $462,000.00 for new construction the estimated total cost of which is $5,277,023.00;

(b) $697,950.00 for an addition and remodeling of the General Hospital, the estimated total cost of which was $1,850,000.00;

(c) $110,000.00 for the construction of a diagnostic and treatment center the estimated total cost of which was $240,000.00 5/

5/ The funds described in paragraph (a) above were requested in project application NC-86, dated June 17, 1950 and the funds described in paragraphs (b) and (c) above were requested in project applications NC-330, dated October 28, 1959. These applications were approved by the North Carolina Medical Care Commission and submitted to the Surgeon General who approved the projects on July 11, 1950 and March 17, 1960, respectively.

Long Hospital:

(a) $1,617,150.00 for new hospital construction the total estimated cost of which is $3,240,722.00;

(b) $66,000.00 for an adjunct service facility addition the total cost of which is $120,000.00;

(c) $265,650.00 for a nursing home addition, the estimated total cost of which is $492,636.00.[6/] These funds have been allocated to defendant Cone and Long Hospitals by the North Carolina Medical Care Commission, an agency of the State of North Carolina charged with the sole responsibility for administering the program of federal grants in aid of hospital construction in the State of North Carolina, including allocation of the federal funds received to the various state hospitals.[7/]

5. In Cone Hospital projects NC-86 and NC-330 as originally submitted to the Surgeon General by the Commission and as approved by him, the Commission stated that the applicant had given adequate assurances that the hospital facilities would be operated without discrimination because of race, creed,or color. On April 15, 1960, William F. Henderson, Executive Secretary of the Commission, wrote to the Public Health Service stating that project application NC-330 had incorrectly stated the intention

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6/ The funds described in paragraphs (a), (b), and (c) above were requested in project applications NC-311, dated November 18, 1958, NC-353, dated sometime prior to January 12, 1961, NC-358, dated February 1, 1961. These applications were approved by the North Carlina Medical Care Commission and submitted to the Surgeon General who approved the projects on June 30, 1959, May 15, 1961 and December 15, 1961, respectively.

7/ As of the date of the filing of the pleading in intervention, the United States has paid to the Treasurer of the State of North Carolina the sum of $1,229,552.50 on projects NC-86 and NC-330 for the Cone Hospital and $1,596,301.60 on projects NC-311 and NC-353 for the Long Hospital.

of the Cone Hospital with respect to the assurances that the hospital facilities would be operated without discrimination because of race, creed, or color. By amendment submitted to the Surgeon General and approved by him on April 19, 1960, the Commission and Cone Hospital withdrew the non-discrimination assurance previously given.

6. The Long Hospital has not given assurances that it will operate its facilities without discrimination because of race, creed, or color.

7. Defendant Cone and Long Hospitals are pursuing a policy, grounded on race, of barring physicians and dentists -- such as plaintiffs -- from staff privileges.[8/] In addition, defendant Cone Hospital refuses to admit Negro patients on the same terms and conditions as white persons,[9/] and defendant Long Hospital refuses entirely to admit Negro patients to the use of its facilities. Plaintiffs allege that this policy, practice, custom and usage violates their rights to the equal protection of the laws and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The plaintiff physicians and dentists allege that they are now suffering and will continue to suffer irreparable injury by the maintenance of defendants' policy, practice, custom and usage as described in the

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8/ All physsicians and dentist plaintiffs have applied for admission to the staff of defendant Cone Hospital and have been rejected. All physician and dentist plaintiffs have requested staff application forms from defendant Long Hospital but these requests have not yet been honored.

9/ The complaint also alleges that when Negro patients are admitted, they are not permitted to be treated by their own physicians or dentists.

complaint, including loss of earnings and deprivation of the opportunity to further develop the skills necessary for continued proficiency of their chosen profession.

The plaintiff patients allege that they are now suffering and will continue to suffer irreparable injury by the maintenance of defendants' policy, practice, and usage, as described in the complaint, including deprivation of the opportunity of receiving medical care in the most complete medical facilities available in their locality and the use of said facilities with the treatment of their own pyysicians and dentists.

Plaintiffs pray for declaratory and injunctive relief which would:

1. Declare 42 U.S.C. 291c(f) and Regulation 58.112 unconstitutional.

2. Enjoin defendants from continuing to enforce their policy of denying admission to their medical staffs on the grounds of race.

3. Enjoin defendants from continuing to enforce their policy of denying admission to patients on the basis of race and in any way conditioning or abridging the admission to, and use of, the facilities of Cone and Long Hospitals on the basis of race.

The United States joins with the plaintiffs in requesting this Court to declare unconstitutional so much of section 291e(f) of Title 42 U.S.C. as authorizes the Surgeon General to prescribe regulations concerning separate hospital facilities for separate population groups. In addition, the United States asserts that the conduct of defendant hospitals attacked in this proceeding violates the Fourteenth Amendment to the Constitution.

II

ARGUMENT

A. Introduction

Since this case draws in question the constitutionality of an Act of Congress, the United States believes it is required, under 28 U.S.C. 2403, to state its position as to the constitutionality of the statute under attack. We recognize, of course, the self-imposed judicial inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S 283, 295 (1905).[10/] However, we believe that if the Court concludes that the conduct of the defendants is subject to constitutional limitations, it will, of necessity, be required to pass on the constitutionality of the separate-but-equal provisions of the Hill-Burton Act. It is that Act which expressly sanctions the defendants' conduct, and it is that Act which expressly authorized the State of North Carolina to devise a hospital construction plan that discriminates on the basis of race, in violation of the Fourteenth Amendment. Where unlawful conduct appears to be expressly authorized by a statutory provision, we do not believe that, when the conduct is attacked, the Court can avoid adjudicating the constitutionality of the provision involved.

10/ Cases are collected in the opinion of Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345 et seq. (1936). See also United States v. Auto Workers, 352 U.S. 567, 589-593 (1957).

B. The Provision of the Hill-Burton Act Sanctioning the Construction of Separate-But-Equal Hospital Facilities is Unconstitutional

This case raises the question of whether the Constitution permits Congress to authorize expressly the "separate-but-equal" treatment of different racial groups in federal-state programs. The United States takes the position that the Constitution does not condone such treatment and that the "separate-but-equal" provisions of the Hill-Burton Act are violative of the Fifth Amendment, and the action of a state in administering a "separate-but-equal" hospital construction program is impermissible under the equal protection clause of the Fourteenth Amendment.

In the Hill-Burton Act, Congress has authorized federal-state cooperation in a federally financed, state administered program of hospital construction for the benefit of all the people (42 U.S.C. 291(a)). Although the Act specifically provides that state hospital construction programs shall not discriminate "on account of race, creed or color", Congress has further prescribed that this non-discrimination standard may be met if the state program provides for the construction of "separate-but-equal" facilities. Thus, the Hill-Burton Act is not merely neutral or silent on the question of racial discrimination. Rather, Congress incorporated into the statute a standard based on race and has authorized and sanctioned racial discrimination by state-connected institutions -- racial discrimination that clearly violates the Fourteenth Amendment. Congress has no power, under the Fifth Amendment, to do this.

First, section 291e(f) of Title 42 is, on its face, violative of the Constitution. That our Constitution prohibits the utilization of race as a yardstick in any

type of governmental activity is now too well established to be questioned. Racial classifications are "obviously irrelevant and invidious."[11] This principle was succinctly stated by Mr. Justice Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 537, 559 (1896):

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. * * * The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. * * *

Second, the Hill-Burton Act expressly sanctions racial discrimination by state-connected institutions. It is now beyond question that racial discrimination by a state runs afoul of the Constitution since, "for a state to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."[12/] Nevertheless, despite this clear principle, under the Act, the states are expressly authorized to devise hospital construction programs that provide separate facilities for the races. The state program must be approved by the Surgeon General and he must determine whether the state properly has applied the separate-but-equal formula. In effect, therefore, the federal government takes a very direct part in cooperating with the states in the effectuation of a separate-but-equal hospital program. This is state sponsored racial discrimination with a federal imprimatur.

11/ Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 203 (1944).

12/ Mr. Justice Frankfurter, dissenting on other grounds in Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961).

For Congress expressly to authorize such a scheme necessarily violates the due process clause of the Fifth Amendment.[13/] Certainly, Congress has power to promote hospital construction, but it cannot use that power "to attain an unconstitutional result." Western Union Telegraph Co. v. Foster, 247 U.S. 105, 114 (1918). Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). With respect to a related field of federal activity, the Supreme Court has said (United States v. Butler, 297 U.S. 1, 74 (1936)):

> ". . . it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended.

13/ In Bolling v. Sharpe, 347 U.S. 497 (1954) the Court indicated that, with respect to racial discrimination, the reach of the due process clause of the Fifth Amendment was coextensive with that of the equal protection clause of the Fourteenth Amendment. The Court said (347 U.S. at 500):

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." See also Steele v. Louisville & Nashville R.R. Co., 323 U.S 192 (1944) where Justice Murphy, in a concurring opinion, stated (323 U.S. at 208):

"The Act [the Railway Labor Act] contains no language which directs the manner in which the bargaining representative shall perform his duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." Cf. Hurd v. Hodge, 334 U.S. 24 (1948).

> But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enteres into a contract to teach doctrines subversive to the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power."

Thus, Congress may not enact legislation which expressly sanctions state violations of the Fourteenth Amendment, for to do so is "to attain an unconstitutional result."[14/]

Moreover, it is without significance that the Hill-Burton Act does not compel the states to devise separate-but-equal hospital construction programs. It is enough that racial discrimination is permitted or sanctioned. Thus, the Kansas statute involved in Brown v. Board of Education, 347 U.S. 483 (1954) permitted, but did not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students.[15/]

14/ In Ming v. Horgan, 3 R2R.L. Rep. 693, 699 (Cal. Super. Ct. 1958) the court held that private persons who accepted federal mortgage guarantees were bound by the Fifth Amendment. With regard to the absence of an explicit non-discrimination provision in the act of Congress in issue, the court said:

> If it be objected that Congress refused to so so ordain, it must be replied that Congress could not ordain otherwise -- the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not . . . .

15/ Cf. McCabe v. Atchison, T. & S.F. Ry. Co., 235 U.S. 151 (1914) where the Supreme Court said that a statute was invalid which affirmatively permitted, though it did not require, a railroad to provide unequal transportation facilities for whites and Negroes.

Nor is it significant that the state plan involved in this case does not compel individual hospitals to discriminate. The actions of the State of North Carolina in this case are sufficient to meet the tests of unconstitutional state action as set forth in Cooper v. Aaron, 358 U.S. 1, 19 (1958) where the Court said:

> " State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process 16/ of law. Bolling v. Sharpe, 347." (Emphasis added)

16/ See Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961) where the Court held that a State cannot avoid its responsibilities under the Fourteenth Amendment by entering into leasing arrangements and said:

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige, behind the admitted discrimination, (Emphasis added).

See also Catlette v. United States, 132 F. 2d 902 (C.A. 4, 1943); Picking v. Pennsylvania R. Co., 151 F. 2d 240 (C.A. 3, 1945); Lynch v. United States, 189 F. 2d 476 (C.A. 5, 1951).

Nor can the constitutionality of the separate-but-equal provisions of 42 U.S.C. 291e(f) and Regulation 53.112 and the hospital construction plan of the State of North Carolina be sustained on the ground that they do not discriminate against any race but expressly provide for separate but equal treatment. While no case has been found which specifically holds that state aided hospitals may not be operated on a separate but equal basis,[17/] it is clear that the separate but equal doctrine has been thoroughly repudiated and may no longer be applied. That doctrine had its birth prior to the adoption of the Fourteenth Amendment in the decision of a Massachusetts State Court relating to public schools. Robert v. City of Boston, 59 Mass. 198 (1849). The doctrine of that case was followed in Plessy v. Ferguson, 163 U.S. 537 (1896) where the Supreme Court held as to intrastate commerce that a Louisiana statute, requiring railway companies to provide equal but separate accommodations for the white and colored races was not in conflict with the provisions of the Fourteenth Amendment.

However, in Morgan v. Virginia, 328 U.S. 373 (1946) the Court held that a state statute requiring segregated seats for Negro passengers on interstate buses was an unconstitutional burden on interstate commerce. In Henderson v. United States, 339 U.S. 816 (1950), the Court held that interstate railroad regulations and

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17/ Greenberg, Race Relations and American Law 90 offers this explanation for the few cases dealing with hospital segregation: "But a paucity of cases on the duty of hospitals with respect to race probably stems from the fact that persons requiring hospitalization usually are in no position to litigate. They have to care for their illnesses where and as soon as they can; potential litigation then becomes moot."

practices assigning a separate table in a dining car to Negroes contravened the Interstate Commerce Act, 49 U.S.C. 81 et seq. The Court referred to the statutory right as "a fundamental right of equality of treatment," and cited cases construing the Fourteenth Amendment, id at 825, though the Court did not reach the constitutional question. The reasoning applied was similar to that employed in Shelley v. Kraemer, 334 U.S. 1, 22 (1948) where the Court recognized that the underlying philosophy of the Fourteenth Amendment is the equality before the law of each individual. See also Bailey v. Patterson, 369 U.S. 31 (1962); Gayle v. Browder, 352 U.S. 903 (1956); Fleming v. South Carolina Electric & Gas Co., 224 F.2d 752 (C.A. 4, 1955), appeal dismissed, 351 U.S. 901 (1956).

In the field of college education, beginning in 1938 and continuing to the present time, the Court has first weakened the vitality of, and has then destroyed, the separate but equal concept.[18/] In the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954), the separate but equal doctrine was repudiated in the area where it first developed, i.e., in the field of public education. On the same day the Supreme Court made clear that its ruling was not limited to that field when it

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18/ See State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); State of Florida ex rel. Hawkins v. Board of Control of Florida, 347 U.S. 971 (1954); Tureaud v. Board of Supervisors of Louisiana University, 347 U.S. 971 (1954); Lucy v. Adams, 350 U.S. 1 (1955); State of Florida ex rel. Hawkins v. Board of Control 350 U.S. 413 (1956); Board of Trustees of University of North Carolina v. Fraiser, 350 U.S. 979 (1956).

remanded "for consideration in the light of the Segregation Cases . . . and conditions that now prevail" a case involving the rights of Negroes to use the recreational facilities of city parks. Muir v. Louisville Parks Theatrical Association, 347 U.S. 971 (1954).

Later the Fourth Circuit expressly repudiated the separate but equal doctrine as applied to recreational centers. Dawson v. Mayor and City Council of Baltimore, 220 F.2d 386, 387 (C.A. 4, 1955), affirmed, 350 U.S. 877 (1955). The doctrine also has been rejected in holdings that the cities of Atlanta and of Miami cannot meet the test by furnishing the facilities of their municipal golf courses to Negroes on a segregated basis. Rice v. Arnold, 340 U.S. 848 (1950), Holmes v. City of Atlanta, 350 U.S. 879 (1955).[19/] And, in Browder v. Gayle, 142 F.Supp. 707, 717 (M.D. Ala. 1956), affirmed, 352 U.S. 903 (1956) the court explicitly said:

> ". . . the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that Plessy v. Ferguson has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to a public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power."

19/ See also New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958), affirming, 252 F.2d 122 (C.A. 5, 1958); City of St. Petersburg v. Alsup, 238 F.2d 830 (C.A. 5, 1956), cert. denied, 353 U.S. 922 (1957); Tate v. Department of Conservation, 133 F.Supp. 53 (E.D. Va., 1955), affirmed, 231 F.2d 615 (C.A. 4, 1956), cert. denied, 352 U.S. 838 (1956); Henry v. Greenville Airport Commission, 279 F.2d 751 (C.A. 4, 1960); Turner v. Memphis, U.S. , 7 L.ed. 2d 762 (1962).

What the Constitution forbids, Congress may not sanction. It is clear, therefore, that Congress may not enact a statute authorizing a hospital construction program based on a separate-but-equal formula, and a state may not administer such a program. In view of this, the United States is compelled to concede the unconstitutionality of the separate-but-equal provision of the Hill-Burton Act and the regulation enacted pursuant thereto.[20/] We believe the proper Constitutional standard was enunciated in Hirabayashi v. United States, 320 U.S. 81, 100 (1943) where the Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

20/ We believe that that part of 42 U.S.C. 291e(f) beginning with the words "but an exception" and ending with the words "each such group" and that part of 42 C.F.R. 53.112 which follows the words "However, in any areas" are unconstitutional.

C. Defendant Hospitals, By Discriminating Against Negro Patients And By Denying Staff Privileges To Negro Physicians And Dentists, Have Violated The Fourteenth Amendment.

From the declaration in the Civil Rights Cases, 109 U.S. 3, 11 (1883), that the Fourteenth Amendment "nullifies and makes void . . . State action of every kind, which . . . denies . . . the equal protection of the laws" (emphasis added) to the Court's recent pronouncement in Cooper v. Aaron, 358 U.S. 1, 4 (1958), that "state participation through any arrangement, management, funds or property" is sufficient to make racial discrimination in such circumstances violative of the Fourteenth Amendment, it has been clear that the mere outward trappings of private activity are not sufficient to insulate an activity from the commands of the Fourteenth Amendment. Racially discriminatory acts of individuals are so insulated only insofar as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings", or are "not sanctioned in some way by the State." Civil Rights Cases, supra at 17.[21] Where racial discrimination is accompanied by some form of state support, the applicability of the Fourteenth Amendment is clear.[22]

21/ The assumption that individual action is insulated from the commands of the Fourteenth Amendment is rooted in the Civil Rights Cases, 109 U.S. 3 (1883). The correctness of that ruling in so restricting the scope of the Fourteenth Amendment has long been questioned by competent scholars. See, e.g., Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Col. L. Rev. 131, 162, 163 (1950); Flack, Adoption of the Fourteenth Amendment.

22/ The interrelationship between governmental and private activity was aptly described by Chief Justice Vinson in American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1950) where he wrote: ". . . when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."

Here the racially discriminatory conduct occurred in hospitals heavily supported by public monies.[23/] These hospitals are licensed by the State of North Carolina and receive the substantial benefit of being exempt from city and county taxes. Both hospitals received their financial aid pursuant to a hospital construction plan prepared by the North Carolina Medical Care Commission which specifically authorized the expenditure of public monies on a separate but equal basis. Each hospital applied directly to the Medical Care Commission for financial aid; each hospital had its application reviewed and approved by the Commission; each hospital entered into a memorandum of understanding with the Commission and the Surgeon General of the United States. Of the fifteen members of the Board of Trustees of Cone Hospital, six are appointed by agents or subdivisions of the State and one is appointed by a quasi-governmental body. In addition, Cone Hospital cooperates with tax supported public colleges and universities of North Carolina in a nurses training program.

The Fourteenth Amendment's applicability to this case does not depend upon whether each of the varied aspects of state involvement are alone sufficient to satisfy the "state action" requirements of that Amendment. Rather, state involvement must be viewed as a totality -- as the sum of various related activities. Here, we believe, the state "has so far insinuated itself into a position

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23/ Long Hospital has been authorized to receive almost two million dollars in public monies -- fifty percent of its construction requirements. Cone Hospital has been authorized to receive over a million dollars in public monies -- fifteen percent of its construction requirements.

of interdependence with"[24] the defendant hospitals that access to the hospitals -- both as staff members and patients -- must be accorded without racial discrimination. Indeed, we think it plain that the prohibitions of the Fourteenth Amendment have been held binding in situations where state participation might be deemed less direct and substantial than it is here.

Only recently, the Supreme Court had before it the problem of determining whether the state had become so involved in private conduct as to make the action of private individuals subject to the Fourteenth Amendment. In holding that a private restaurant operating in a public building under a lease from a public authority could not engage in racial discrimination, the Court noted (Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961):

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. 25/

24/ Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1962).

25/ Even before Burton there was a large body of case law which proscribed discrimination by a lessee of public property or facilities. See Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954), vacating and remanding, 202 F. 2d 275 (C.A. 6, 1953) (leased open air theater); Aaron v. Cooper, 261 F. 2d 97 (C.A. 8, 1958) (leased school); City of Greensboro v. Simkins, 246 F. 2d 425 (C.A. 4, 1957), affirming, 149 F. Supp. 562 (M.D. N.C. 1957) (leased golf course); Derrington v. Plummer, 240 F. 2d 922 (C.A. 5, 1956), cert. denied, 353 U.S. 924 (1957) (leased cafeteria); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960) (leased airport restaurant); Jones v. Marva Theatres, 180 F. Supp. 49 (D. Md. 1960) (leased motion picture theatre); Tate v. Department of Conservation, 133 F. Supp. 53 (E.D. Va. 1955), affirmed, 231 F. 2d 615 (C.A. 4, 1956), cert. denied, 352 U.S. 838 (1956) (leased beach); Nash v. Air Terminal Services, 85 F. Supp. 545 (E.D. Va. 1949) (leased airport restaurant); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948) (leased swimming pool). Although these decisions are rested on various grounds -- in some, that the lease was a technique of evading state responsibility; in others, that the property, though privately operated, was being used for a public purpose -- they have been uniform in reaching the conclusion that the discrimination effectuated by the private lessee was constitutionally forbidden.

In many other areas the courts have also sifted facts and weighed circumstances so as not to permit conduct to escape the fall-out of the Fourteenth Amendment merely by sheltering under the cloak of "private action." Thus, in the Girard College Case, Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957), the discrimination (in that case, against Negro applicants for admission to Girard College) stemmed from the fact that an individual had placed limitations upon the use of monies which he had placed in a private trust. A state agency was involved in the matter as trustee, i.e., it was engaged in carrying out the trust in accordance with its terms. The Supreme Court nevertheless concluded that the action of the trustee was "discrimination by the State" (353 U.S. at 231). This case thus illustrates the general principle that what is material and decisive, for purposes of the Fourteenth Amendment, is that the state has chosen to place its power behind the discrimination.[26/] If a state cannot participate in the administration of a private trust which draws racial distinctions, as the Girard case holds, it follows, we believe, that it cannot participate in a vast hospital program which involves discrimination on the basis of race.

There are also other instances in which ostensibly private actions have been found to have sufficient nexus with governmental action to justify use of the

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26/ ". . . Under some circumstances state contact, control and encouragement may be so intimately fused with the activities of a private group or individual in the performance of a public function that it seems fair to call the activity 'state action' . . . ." Shanks, "State Action" and the Girard Estate Case, 105 U. of Pa. L. Rev. 213, 227 (1956).

Constitution as an instrument of control. This has been true with respect to the right to vote, see e.g., Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Perry v. Cyphers, 186 F. 2d 608 (C.A. 5, 1951); Rice v. Elmore, 165 F. 2d 387 (C.A. 4, 1947), cert. denied, 333 U.S. 875 (1948); Chapman v. King, 154 F. 2d 460 (C.A. 5, 1946), cert. denied, 327 U.S. 800 (1946); Brown v. Baskin, 78 F. Supp. 933 (E.D. S.C. 1948); United States v. Wilson, 72 F. Supp. 812 (W.D. Mo. 1947), the right of free speech, see e.g., Marsh v. Alabama, 326 U.S. 501 (1946)[27]; Tucker v. Texas, 326 U.S. 517 (1946), employment, see e.g., Black v. Cutter Laboratories, 351 U.S. 292 (1956); Tucker v. Texas, supra; Steele v. Louisville & Nashville R.R., supra; Betts v. Easley, 161 Kan. 459, 169 P. 2d 831 (1946); education, see e.g., Pennsylvania v. Board of Directors of City Trust, supra; housing, see e.g., Shelley v. Kraemer, 334 U.S. 1 (1948)[28]; Barrows v. Jackson, 346 U.S. 249 (1953)[29]; Hurd v. Hodge, 334 U.S. 24 (1948); libraries, see e.g., Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C.A. 4, 1945), cert. denied, 326 U.S. 721 (1945).

27/ In Marsh, the Court ruled that criminal courts could not be used to convict of trespass persons exercising their rights of free speech in a privately-owned company town. See also Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449, 463 (1958).

28/ In Shelley, the Court held that judicial enforcement of private racially restrictive covenants by injunction violated the Fourteenth Amendment.

29/ In Barrows, the Court held that restrictive covenants could not be enforced, consistently with the Fourteenth Amendment, by the assessment of damages for their breach.

The status of the hospitals in this case is not unlike that of a labor organization designated, under the Railway Labor Act or the National Labor Relations Act, as the exclusive bargaining agent of the employees in a particular bargaining unit. A labor organization that attains this privileged position may not make "discriminations based on race alone [which] are obviously irrelevant and invidious." Steele v. Louisville & Nashville R.R. Co., supra at 203. Similarly, in Railroad Trainmen v. Howard, 343 U.S. 768, 774 (1952) the Supreme Court said:

> Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. 30/

And in Railway Employers' Dept. v. Hanson, 351 U.S. 225 (1956), the Court emphasized the consequences of conduct undertaken pursuant to federal law. There the respondents contended, inter alia, that union shop agreements, specifically permitted by the Railway Labor Act, operated to deprive them of rights secured by the First and Fifth Amendments. In the course of its opinion holding that no rights were infringed upon, the Court said (351 U.S. at 232):

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

30/ See also Syres v. Oil Workers International Union, 223 F. 2d 739 (C.A. 5, 1955), reversed per curiam, 350 U.S. 892 (1955); Betts v. Easley, supra. Cf. Oliphant v. Brotherhood of Locomotive Firemen and Engineers, 262 F. 2d 359 (C.A. 6, 1958), cert. denied, 359 U.S. 935 (1959).

We do not believe that Eaton v. Board of Managers of James Walker Memorial Hospital, 261 F. 2d 251 (C.A. 4, 1958), cert. denied, 359 U.S. 984 (1959) requires a conclusion in this case contrary to that suggested by the cases discussed above. The elements of state contact in the Eaton case were far less pervasive than they are here. For example:

1. In Eaton, none of the members of the Board of Managers of James Walker Memorial Hospital were appointed by governmental agencies;[31] here, seven of the fifteen members of the Board of Trustees of Cone Hospital are appointed by governmental or quasi-governmental bodies, a factor especially significant in the light of the Supreme Court's decision in Pennsylvania v. Board of Directors of City Trusts, supra.

2. Walker Hospital did not participate in an arrangement with tax supported public colleges and universities of the State of North Carolina for the training of nurses, as does Cone Hospital.

3. In Eaton, all governmental aid and assistance in the construction of facilities and the acquisition of property ended in 1901; here substantial assistance continues to this day.

31/ This factor was expressly noted by the district court which said (164 F. Supp. 191, 193 (E.D. N.C. 1958)): ". . . no member of the City or County government is now a member of the Board or in any way in charge of the affairs of James Walker Memorial Hospital."

4. In Eaton, the revenues derived from governmental sources in the six years preceeding the law suit amounted to 4.5 per cent of the hospitals total income; here, the Long Hospital has been authorized to receive almost $2,000,000.00 in public monies-about 50% of its construction requirements, while Cone Hospital has been authorized to receive over $1,000,000.00 in public monies - about 15% of its construction requirements.

5. But the most significant distinction between the Eaton case and the present case is the total absence in the former of any discussion or analysis of the relationship between Walker Hospital and the Hill-Burton hospital program.[32] In this respect, the present case presents an entirely different picture. The Cone and Long hospitals have been involved in a state plan designed to develop programs of hospital construction to make possible adequate services to all people. These hospitals affirmatively chose to participate in this state program. They applied for

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[32] In fact, James Walker Memorial Hospital has not received financial assistance under the Hill-Burton Act. See Hospital and Medical Facilities Project Register, (December 31, 1961) published by the Public Health Service Division of Health and Medical Facilities.

financial assistance and, as a condition for receiving such assistance, gave numerous assurances to the State and to the Surgeon General.[33/] These assurances, and the concomitant obligations arising from the receipt of large amounts of federal aid, removed the almost unlimited freedom of management that was present in the Eaton case. Here also the discriminatory policy attacked is one expressly sanctioned by federal law and abetted by state planning. Certainly, through the Hill-Burton Act, governmental power and authority has sufficiently insinuated itself into the affairs of the defendant hospitals as to provide a decisive distinction from the Eaton case.[34/]

33/ For example, the defendant hospitals have given assurances that they will accept indigent patients, thus carrying out a public obligation. In Eaton, indigent patients were treated merely on a contract basis.

34/ Even in Eaton, the district court recognized that every case must be evaluated on its own terms. Thus, the court said (164 F. Supp. at 196): "when considering the ability to control, it must be noted that it is a composite of elements, for there are as many elements of control as there are qualities and quanties in the controlled subject. The elements must be viewed in their relationship to each other and as part of a sum total, and for this reason each case must be viewed on its merits."

Finally, while we believe that the involvement of governmental power and authority in the defendants' activities is sufficient to require the defendant hospitals to conform to the commands of the Fourteenth Amendment, we are also persuaded that where, as here, an institution is of a public nature, affecting the community at large, such an institution is "a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." (Mr. Justice Douglas concurring in Garner v. Louisiana, 368 U.S. 157, 183 (1961)). Courts have long recognized that restrictions properly could be placed on activities affected with a public interest. See Munn v. Illinois, 94 U.S. 113 (1876); Nebbia v. New York, 291 U.S. 502 (1934); Marsh v. Alabama, supra; Boman v. Birmingham Transit Co., 280 F. 2d 531 (C.A. 5, 1960).[35/] In the Garner case, supra, Mr. Justice Douglas, in a concurring opinion, concluded that such restrictions should be extended to a retail establishment under permit from a municipality.[36/]

35/ Lord Chief Justice Hale stated in De Portibus Maris, 1 Harg. Law Tracts 78, ". . . if a man set out a street in new building on his land, it is now no longer bare private interest, but is affected with a public interest."

36/ Mr. Justice Douglas relied heavily on the fact that the retail establishments were licensed by the state (as are the hospitals in this case). He wrote (Garner v. Louisiana, supra at 184-85):

> I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The
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> (continued)

It is particularly appropriate to view a non-profit hospital as an institution affected with a public interest. As the memorandum of the General Counsel of the Department of Health, Education and Welfare (attached hereto as an appendix) reveals, non-profit hospitals have a decidedly public character. This memorandum

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36/ (continued)

> authority to license a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public. I see no way whereby licenses issued by a State to serve the public can be distinguished from leases of public facilities (Burton v. Wilmington Parking Authority, supra) for that end.
>
> One can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. Whether retail stores, not licensed by the municipality, stand on a different footing is not presented here. But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. As the first Mr. Justice Harlan stated in dissent in Plessy v. Ferguson, supra, at 559, ". . .in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind . . . ."

indicates that while there are 2,276 accredited private non-profit hospitals in the United States, there are only 524 governmental and 154 proprietary (profit-making) accredited hospitals. The governmental hospitals "differ little from private non-profit hospitals except in the manner of selection of the governing boards, and sometimes in having a call upon tax funds to meet deficits." Both governmental and non-profit hospitals serve as general community hospitals. Such "community hospitals have become essential, both to provide hospital service to the people of the community and to enable its physicians to practice good medicine." Hence non-profit hospitals perform a vital function which would otherwise have to be performed by the state. It is not, therefore, inappropriate to include such hospitals within the reach of the Fourteenth Amendment.[37] Only recently a court suggested that schools and colleges, "no matter how 'private' they may claim to be," are so affected with the public interest as to be bound by the Fourteenth Amendment. Thus, in Guillory v. Administrators of Tulane University, 30 L.W. 2469 (E.D. La., 1962), the court said:

37/ Here the State of North Carolina has chosen to make adequate hospital service available to all of its people by designating, throughout the State, public and private non-profit hospitals as recipients of federal aid. The defendant hospitals are among those designated, and are thus among the instrumentalities selected by the State for the effectuation of its purpose -- a purpose that includes, and must include, Negroes on the same terms as whites. Before the Brown decision, North Carolina was free to achieve its purpose through separate institutions for the two races; today, plainly it is not. Under no circumstances, however, do we believe that the Fourteenth Amendment permits a state, through the device of using private institutions to discharge a public function, to relieve itself or the institutions of such responsibility as is cast upon a state by the Equal Protection Clause. Today, that responsibility is incompatible with racial segregation.

> At the outset, one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only 'sure foundation * * *of freedom,' 'without which no republic can maintain itself in strength,' institutions of learning are not things of purely private concern. * * *
>
> No one any longer doubts that education is a matter affected with the public interest. And this is true whether it is offered by a public or private institution. . . . Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, to the same extent as private persons who govern a company town, Marsh v. Alabama, 326 U.S. 501, or control a political party, Terry v. Adams, 345 U.S. 461, or run a city street car and bus service, Public Utilities Comm'n. v. Pollak, 343 U.S. 451; Boman v. Birmingham Transit Company, 5 Cir., 280 F. 2d 531, 29 L.W. 2028, or operate a train terminal, Baldwin v. Morgan, 5 Cir., 287 F. 2d 750, 29 L.W. 2389?
>
> Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how 'private' they may claim to be.

Similarly, we believe that the Constitution forbids non-profit hospitals, serving such essential and far reaching community needs, to be infected with the virus of racial discrimination.

Respectfully submitted,

BURKE MARSHALL,
Assistant Attorney General.

William H. Murdock,
United States Attorney,

St. John Barrett,
Howard A. Glickstein,
Theodore R. Newman, Jr.,
Attorneys.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

G. C. SIMKINS, JR., ET AL.,
Plaintiffs,
v. NO. C-57-G-62
MOSES H. CONE MEMORIAL HOSPITAL, ET AL.,
Defendants.

AFFIDAVIT

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Alanson W. Willcox, being duly sworn, deposes and says:

I am the General Counsel of the Department of Health, Education, and Welfare, and have prepared the attached "Note on the Public Character of Nonprofit Hospitals" for purposes of the above-entitled case. The attached note has been reviewed and approved by Dr. Jack C. Haldeman, Chief, Division of Hospital and Medical Facilities, United States Public Health Service.

My present position, which I have held since January 1961, entails responsibility for all legal service to the Department. Day-to-day legal advice to the Public Health Service is rendered by a division of this office, but I keep in personal touch with and participate in advice on major issues.

From late 1956 until January 1961 I was General Counsel of the American Hospital Association. In that capacity, I was in constant contact with officials of the Association who are hospital administrators, as well

as with other staff personnel thoroughly versed in hospital matters, and I made extensive study of certain legal aspects of hospital operation. I attended substantially all meetings of the Association's Board of Trustees during those years, and many meetings of Association councils. My work with the Association, and the contacts it involved with informed individuals and groups, gave me a fairly comprehensive familiarity with the structure and functioning of the hospital system of the country.

From 1947 to 1953 I was General Counsel of the Federal Security Agency, predecessor of the present Department of Health, Education, and Welfare, with duties similar to my present duties, including responsibility for legal advice to the Public Health Service. Prior to 1947 I was an Assistant General Counsel of the Federal Security Agency, and in that capacity participated actively in drafting the Public Health Service Act of July 1, 1944 (42 U.S.C., Chap. 6A), and was the principal technical draftsman of the Hospital Survey and Construction Act (commonly known as the Hill-Burton Act) of August 13, 1946, which became Title VI of the Public Health Service Act (42 U.S.C., Chap. 6A, Subchap. IV).

/s/ Alanson W. Willcox
General Counsel

Sworn to before me on this 10th day of May, 1962.

/s/ Albert C. Allen
Notary Public
My comm. exp. 10-31-66

(SEAL)

NOTE ON THE PUBLIC CHARACTER OF NONPROFIT HOSPITALS

The hospital system of the country is divided, in terms of ownership and control, into three segments: governmental, private nonprofit (the so-called "voluntary" hospitals), and proprietary. The American Hospital Association listing for 1960 shows nonfederal short-term general (and "other special"*) hospitals divided as follows:

		Institutions	Beds
Governmental	(Listed	1,260	156,000
	(Accredited**	524	121,000
Private nonprofit			
	(Listed	3,291	446,000
	(Accredited	2,276	403,000
Proprietary	(Listed	856	37,000
	(Accredited	154	14,000

Governmental hospitals are for the most part owned by counties, municipalities, or in some States hospital districts. Except for State university hospitals, State institutions are generally confined to mental, tuberculosis or other specialized hospitals. County and municipal hospitals include some, mostly in the larger cities, that are operated exclusively or primarily for indigents who are expected to pay little or nothing for their care. Most governmental general hospitals, however, operate in much the same fashion as private nonprofit institutions, described below. These governmental institutions serve as general community hospitals, accept paying patients, and grant staff privileges to local physicians who bill their patients as private practitioners. These hospitals differ little from private nonprofit hospitals except in the manner of selection of the governing boards, and sometimes in having

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*/ E.G., pediatric hospitals and maternity hospitals. Figures do not include psychiatric hospitals. See, Hospitals, Journal of the American Hospital Association (Aug. 1, 1961, part 2, page 428).

**/ By the Joint Commission on the Accreditation of Hospitals.

a call upon tax funds to meet deficits.

The nonprofit community hospital was originally, and still is in the older parts of the country, the backbone of our general hospital system. The older hospitals were organized, frequently under religious auspices, primarily as institutions for care of the sick poor. With the tremendous growth of curative medicine in the last forty years and its increasing concentration in the hospital, these older institutions, and their modern counterparts both public and nonprofit, have become centers for the care of the entire population, and thus centers for the practice of medicine in its treatment of the seriously ill. Not only does the hospital provide the attending physician with expert nursing care of his patient, but it supplies also a wide range of ancillary services and facilities. Operating and delivery rooms and at least minimal laboratory and X-ray services are found in all community general hospitals; the larger and better hospitals place a great and ever-growing complex of professional, subprofessional and technical services at the disposal of the clinician. Typically the hospital employs or contracts with medical specialists to head pathology, radiology, and sometimes other departments; but typically the care of the individual patient is the responsibility of a private practitioner who enjoys staff privileges but has no financial relationship with the hospital.

Staff privileges, classified and sometimes graduated in accordance with the qualifications of the individual physician, are granted by the governing board on recommendation of the medical staff or a staff committee. Membership on a hospital staff has become essential to the practice of many branches of medicine,

and the interchange it provides is also an important element in the continuing professional education of the practitioner. The organized medical staff of a hospital, and its committees that review the work of individual practitioners, constitute for most physicians the single exception to the individualistic pattern of practice which has been traditional in the medical profession.

The larger hospitals, both governmental and nonprofit, perform substantial educational functions, most notably in graduate medical education and in the training of professional nurses. These teaching hospitals are generally regarded as providing, by and large, the highest quality of care. A hospital internship has become an almost universal prerequisite to medical practice, and a residency is essential to qualification as a specialist. Eighty-five per cent of the registered nurses of the country are produced by hospital schools of nursing. Some hospitals also train practical nurses, laboratory technicians, and a number of other paramedical groups. Although student services are availed of by the hospitals in varying degree, these educational activities incur substantial net deficits which are generally recouped by charging paying patients somewhat more than the immediate cost of services to them.

Nonprofit hospitals are controlled by governing boards which usually either are self-perpetuating or are selected by religious bodies with which hospitals are affiliated. The hospitals and their property are widely exempted from taxation. For purposes of the Federal income tax, including deductibility of gifts to them, they are classified as charitable institutions. States and localities almost universally exempt these hospitals from

State. This requirement of Statewide plans was an important innovation, bringing a measure of order into what had

equaled in volume the construction aided by the program).

Although State construction programs were required to establish priorities in accordance with Federal standards based primarily on the relative shortage of facilities, in some other respects the States were left a free hand in selecting the projects to be aided. Specifically, as between a public and a nonprofit project in a given community, or as between competing nonprofit projects, the State was made the arbiter; in those States that provided racially separate facilities, the option to approve "separate but equal" hospitals for Federal aid was left to the State.

To summarize:

1. Community hospitals have become essential, both to provide hospital service to the people of the community and to enable its physicians to practice good medicine.

2. The functions of such hospitals can be, and are, performed equally well by governmental and by private nonprofit institutions. Not only do the two kinds of institutions perform the same community functions, but they do so in the same way and with the same relationships to their patients and to the practicing profession. They enjoy substantially the same freedom from taxation, and often the same or similar support from public funds. Such differences as there may be in the make-up of the governing boards or in the financial structure are usually all but invisible to patients or to physicians.

3. The Hill-Burton Act recognizes the interchangeability of public and nonprofit community hospitals and aids the two on the same terms, leaving the choice in each individual case to the community and the State.

The State plan must be addressed to the provision of adequate facilities for all of the people of the State, but effectuation of the plan may be through any combination of public and nonprofit institutions. Each institution must be open to all people of the community unless the State elects to approve "separate but equal" facilities for separate groups.