March 1, 1968

To: Mr. Pollak

Re: Maxwell v. The Good Samaritan Hospital Association -- possible amicus participation in the Supreme Court

In the middle of January, Gerry Choppin brought to your attention the above-captioned case with the view of our participating on behalf of the appellant in the Supreme Court. This case arises from a refusal of a local tax assessor in Florida to grant a state tax exemption to a private hospital because the hospital discriminated against Negroes in admission and staff privileges. His theory is that the granting of a tax exemption privilege to a hospital would be unconstitutional state action. The hospital then brought an action in state court to declare the action of the tax assessor null and void and to enjoin him from cancelling the tax exemption that had been previously granted to the hospital. The trial court held: (1) That the tax assessor did not have the capacity to deny the tax exemption because of the alleged discriminatory policies of the hospital, and (2) That the granting of the tax exemption to the hospital was not an unconstitutional form of state action. On these grounds a motion to strike the defenses of the tax assessor was granted. The order of the trial court also contained the following statement (which is not elaborated upon in the jurisdictional statement that we have been furnished) "By way of dicta it might be pointed out that the question sought to be raised in said affirmative defense may be moot by reason of the plaintiff's recent public declaration on the subject." An interlocutory appeal was taken. The appellate courts affirmed on the sole ground that the tax assessor

cc: Mr. Choppin
Mr. Marblestone

OMF

did not have the power to raise the affirmative defense that he did, i.e., that granting the tax exemption would be an unconstitutional form of state action. The Supreme Court of Florida said "Denial of the exemption for any reason other than noncompliance with the [state] statute would be an exercise of power in excess of that granted such office."

A jurisdictional statement was filed in the Supreme Court on February 23, 1968. I see the appeal raising the following issues:

(1) Is the question as to the power of the tax assessor to deny the exemption on the grounds that granting such an exemption would be in conflict with the federal constitution a question of state law or federal law? The Supreme Court of Florida treated it solely as a question of state law but I think an argument could be made that it is a question of federal law.

(2) As a matter of federal law does the tax assessor have the power (or even the responsibility) to deny the tax exemption because of alleged conflict with the federal constitution? The argument that was made by one of the courts below was that this issue of racial discrimination could only be raised by Negroes, i.e., the ones that are now being discriminated against. However, I would think that federal policy would encourage local state officials into taking courageous acts such as those that were taken in this case and traditional doctrines of standing would so accommodate that policy. For example, I think the Negroes could have commenced a suit in the federal district court to restrain the tax assessor from granting such an exemption and his action is this regard could be taken as reflecting his unwillingness to subject himself to such litigation.

(3) Does it violate the Equal Protection Clause to grant a tax exemption to a racially discriminatory institution. I am inclined to answer that question in the affirmative, and I think the whole thrust about private school litigation is in that direction. The practice of the Internal Revenue Service of granting tax exemptions to private segregated schools is an embarrassment to that judgment; but this Division and the Department always fought that practice and the Internal Revenue Service in part defended on the ground that that pertinent tax statute did not give them any flexibility in this matter.

The immediate question facing us is whether we should participate at this stage of the litigation in the Supreme Court. My initial reaction was against such participation. The Department of Justice only participates at the certiorari or jurisdictional stage only in the most extraordinary circumstances and the pragmatic significance and ruling in this case (as compared to the pragmatic significance in the St. Louis housing case) appeared somewhat marginal. The Title VI program of HEW provides the strongest monetary or financial incentive for private institutions to relinquish their discriminatory policies and if a hospital persists in its discriminatory policy at the cost of losing federal funds I have some doubts as to whether the denial of tax exemption would produce any meaningful change in their racial policy. However, on further reflection, I have some reservations with that position. (This reservation primarily stems from the fact that what is before the Court is not an application for a writ of certiorari but rather an appeal from the state court which inevitably produces some ruling on the merits. Unless the Department of Justice participates

at this stage there is a fairly good chance the appeal will be dismissed for want of a substantial federal question, and although that decision might be later explained in terms of the standing issues it might also have the effect of insulating the granting of tax exemptions from Equal Protection attack. In light of these reservations, my recommendation would be for you, or one of us, to get some informal reading from the Solicitor General's office. I am not sure that they are aware of this case.

Owen Fiss

March 8, 1968

To: Mr. Pollak

Re: Maxwell v. The Good Samaritan Hospital Association, Inc., No. 1147

I gather from Mr. Claiborne's memorandum that he would be inclined to participate at this preliminary stage if this matter was properly before the Supreme Court as an appeal. However, he states, "I think it is rather clear that this is not properly an appeal" and assumes that the Supreme Court will treat these papers as an application for a writ of certiorari.

I am sure some argument can be mustered for the view that this case is not proper for appeal. However, there also seems to me to be argument on the other side and I am not prepared to say that it is "rather clear" that this is not a proper appeal. 28 U.S.C. §1257(2) provides for an appeal "where is drawn in question the validity of a treaty or statute of any state" on the grounds of being unconstitutional, and a decision is in favor of its validity. It seems to me that in this case the argument could be made by appellant that a state statute is being drawn in question here -- namely the state statute that would require him to granting tax exemptions to the hospital notwithstanding the hospital's racial discriminatory policy.

Mr. Claiborne might well have the quick answer to that argument and it might be useful to raise it with him before we start on research.

ONF

March 12, 1968

To: Mr. Pollak

From: Owen Fiss

Re: Maxwell v. The Good Samaritan Hospital Association, Inc., No. 1147

Following your second transmission of papers to Mr. Claiborne, he called me yesterday afternoon. His answer to my question was to refer to Bergen v. Wilmington Parking Authority where Justice Clark cryptically stated that this matter was not properly there on appeal but instead was cognizable as a writ for certiorari. He admitted that there was some doubt as to the meaning of that case and that perhaps an argument could be made that this matter was properly before the Court on appeal. However, he generally concluded that the Court would be very anxious to avoid a decision on the merits of the substantive questions tendered, and therefore the Court would be inclined to treat this within the certiorari jurisdiction rather than appellate jurisdiction. I am not entirely persuaded by the legal analysis in light of the traditional doctrine that an attack upon a state statute as being unconstitutional as applied is within the appellate jurisdiction as well as an attack upon the statute on its face; but I think Mr. Claiborne's general conclusion that the Court would be anxious to treat this as a certiorari matter would properly be sufficient justification for us to wait and see what the Court does before filing something.

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