

The Board of Editors of the California Law Review are pleased to have the opportunity to reproduce an address of Mr. Warren Olney III given before the Conference of Barristers of the State Bar of California.

The essential timelessness of this address—apparently directed to a problem of only contemporaneous significance—is well illustrated by the remarks of Governors Collins and Hodges on December 15th that the use of “armed force” in Little Rock was a “mistake.” In the belief that the decision to enforce with federal troops the decree of the district court for the Western District of Arkansas was one of vital importance, and that the facts leading to this decision are of interest to every student of the law, Mr. Olney’s remarks are offered as a valuable contribution to the background of knowledge against which one must decide the efficacy of the government’s decision.

Comment

A GOVERNMENT LAWYER LOOKS AT LITTLE ROCK

*Warren Olney III**

When I accepted your invitation—only last June—I was rather hard put to think of the subject that I should talk to you about. Now I have no choice. So quickly has the crisis in our Government arisen in Little Rock.

Torrents of vitriolic oratory have already begun to flow on this subject and will, I have no doubt, continue to spew forth for a long time. I do not seek to swell this cresting flood.

What I shall try to do this morning is to tell you as dispassionately as I can how the legal developments in this matter looked at the time to the Government lawyers most concerned.

The fateful developments of September 1957 were preceded by litigation in which the government took no part but which nonetheless is an essential part of the story.

After “a great civil war, testing whether this nation or any nation . . . conceived in liberty and dedicated to the proposition that all men are created equal . . . can long endure,” the Constitution of the United States was amended to provide that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

On May 17, 1954 the Supreme Court of the United States by unanimous decision held that “separate educational facilities [on a racial basis] are essentially unequal” and that those against whom such restrictions are enforced are thereby deprived “of the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹

At this point I want to inject parenthetically some observations on the position of the government lawyer—all government lawyers. Other persons can and have questioned the wisdom, reasoning and even the validity of this decision of the Supreme Court in the school segregation cases. Some persons, even members of the Senate of the United States, have urged “massive resistance” to putting the principle of this decision into practice. The government lawyer cannot indulge in any

* Formerly, Assistant Attorney General of the United States.

¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

such questioning. Whatever his personal views, or his likes and dislikes, it is unthinkable that in his official actions he would fail to accept as controlling a unanimous decision of the Supreme Court as to the scope and meaning of the Constitution of the United States. Every government lawyer has taken an oath "to support the Constitution of the United States" and to him that means the Constitution as interpreted and declared by the Supreme Court of the United States. The government lawyer is as much bound by his oath to support the Constitution as is the President himself; the position of the government lawyer on *Brown v. Bd. of Educ.* is not, therefore, open to conjecture.

Only three days after the decision of the Supreme Court of the school segregation cases in May of 1954, the Board of Education of the City of Little Rock publicly announced that it intended to comply with the Constitutional requirements and that it would proceed to develop a plan for eliminating the racial restrictions upon attendance in the Little Rock schools. In May of the following year the Little Rock School Board approved and published its plan for the gradual elimination of racial segregation from the schools. The action taken by the School Board up to this point was voluntary and local. The federal government played no part in the adoption of this plan.

Subsequent to the adoption of the plan, the Superintendent of Schools not only made it public but read and explained it to approximately 200 local groups and organizations in an effort to obtain public acceptance of its provisions. The School Board which had approved the plan was re-elected with the plan's adoption as an issue. At this point the most serious opposition to the plan came from those who regarded its program of integration as too slow.

The plan proposed was indeed deliberate. It was to be accomplished over a period of not less than eight years from its announcement. It was to begin in September of 1957 with the admission into the Little Rock Central High School, having a student body of approximately 2,000 students, of only 10 Negro students. The plan was promptly challenged in the courts as being too gradual. A suit was filed in the United States District Court by a group of Negro students seeking admission to the school, challenging the School Board's program on the ground that it was so gradual that it did not comply with the requirements that racial segregation be eliminated from the schools "with all deliberate speed." This challenge failed in the District Court which held that the School Board's plan was consistent with the law and should be approved.

In view of the repeated references of Governor Orval Faubus to "imported" Federal Judges, it is worth noting that this first decision made on August 28, 1956 approving the School Board's plan was rendered by Judge John E. Miller, regularly assigned to the Western District of Arkansas, a resident of Arkansas and a former Congressman and United States Senator for that State.

An appeal was taken from the decision of the District Court but the judgment was affirmed, the Court of Appeals for the 8th Circuit also holding that the School Board's plan was in conformity with the law.² The Federal Government had no occasion to take any part in the litigation I have just described.

The very first action taken by the Department of Justice with respect to the situation in Little Rock was taken on request from Governor Orval Faubus himself. At his personal instance, Mr. A. B. Caldwell, my assistant for civil rights in the Criminal Division and himself a native and former resident of Arkansas, was

² *Aaron v. Cooper*, 243 F.2d 361 (8th Cir. 1957).

sent to Little Rock on August 28, 1957 to confer privately with the Governor. At the time this request for a conference seemed curious to us. The Governor's subsequent action has given it a significance which was not appreciated by us at the time.

The Governor informed Mr. Caldwell that he had reason to apprehend there might be some disturbance at the Central High School when school opened on September 3 if the Negro children who were eligible for admission under the School Board's plan should present themselves. No statement was ever made by him as to the basis for these apprehensions. The conference consisted in largest part of questions addressed to Mr. Caldwell as to what action would or could be taken by the Department of Justice in the event that disturbances over the School Board's plan did develop.

In response, and of necessity, the Governor was informed that the development of a disturbance at the school would not of itself provide any basis for action by federal authorities. It was pointed out that the United States had had nothing to do with the School Board's plan and was not a party to the litigation in which the plan had been approved. The Governor inquired about the action taken by the Department last year in connection with the disturbances that arose over the schools at Clinton, Tennessee. It was pointed out to him that in that case the Federal District Court had issued an injunction at the request of the school board against certain named persons from interfering with the efforts of the school board to put its plan into effect and that when this order was violated, and the obstruction continued, that the Court had requested the assistance of the United States Attorney and of the Department of Justice in making its order and process effectual.

At this conference Governor Faubus informed Mr. Caldwell that at the suggestion of the Governor himself a suit had been filed in the Arkansas Chancery Court by a group of mothers having children in the Central High School seeking an injunction to restrain the School Board from admitting the Negro children in accordance with its plan. The Governor stated he hoped this suit would be successful as the granting of such an injunction would continue the school on a segregated status and thus prevent trouble from arising. The very next day the suit in the Arkansas Chancery Court which the Governor had mentioned came on for a hearing and the Governor himself appeared as a witness in support of the prayer for an injunction. Here again the Governor failed to give any specific information as to the basis for his apprehensions of trouble if the Negro students were admitted to school.

Notwithstanding the inadequate nature of this showing, the injunction was granted by the Chancery Court. This was followed immediately by application being made by the School Board to the Federal District Court for an order prohibiting the State Court from interfering with the efforts of the School Board to carry its plan for the admission of the Negro students into effect.

It was at this point that United States District Judge Ronald N. Davies of North Dakota, who has been referred to by Governor Faubus as an "imported" Judge, as though he were a foreigner, first entered these proceedings. The reason for his participation is entirely normal and is as follows: Judge Thomas C. Trimble of Little Rock, retired from the bench in January, 1957, leaving no Federal Judge permanently assigned to sit in Little Rock. For this reason the case involving the School Board's plan had been assigned to Judge John E. Miller, who had issued the order of August 28, 1956, approving the Board's plan, and who is regularly assigned to sit at Fort Smith, Arkansas, 160 miles away from Little Rock. Quite

aside from this litigation and because of the accumulating cases on the Court's calendar in Little Rock, Chief Judge Archibald K. Gardner of the 8th Circuit assigned Judge Davies of North Dakota, whose calendar was light, to sit in Little Rock for the purpose of clearing the calendar there. Judge Davies was actually sitting in Little Rock hearing cases when the Arkansas Chancery Court issued its injunction to restrain the School Board.

With the prospect of suddenly expanding litigation in Little Rock, the attorneys for the School Board complained to Judge Miller in Fort Smith about the time, distance and expense involved in his trying to continue to handle the case from a distance of 160 miles. As a result Judge Miller requested Chief Judge Gardner of the 8th Circuit to transfer the School Board litigation to Judge Davies who was then holding court on the scene in Little Rock, and this request was granted. This is the reason and the manner in which Judge Davies was assigned to the case. This is the assignment Governor Faubus represents as sinister.

As a result of these proceedings Judge Davies, on August 30, acting on petition of the School Board, enjoined plaintiffs in the Arkansas Chancery Court and all other persons from interfering with the effort of the School Board from carrying into effect its plan to admit the Negro students to Central High School.

With this order in effect, and without any effort having been made to appeal, review or supersede it, and having full knowledge of its terms, Governor Faubus called to active duty certain units of the Arkansas National Guard which he directed to surround Central High School. He stated he took this action to prevent any disturbance of the public peace and good order, although here again he failed to particularize as to his reasons for believing that the peace might be disturbed.

At this time the Governor informed the press that he had not ordered the Guard to exclude the Negro children but had left it to the discretion of the Guard as to how they should undertake to preserve the peace. But he did state that it was his belief that peace and good order could not be maintained if the Negro children were admitted.

In view of this, the School Board addressed a public request to the Negro children not to attempt to enter the school until the dilemma was resolved.

School opened September 3 with Governor Faubus' Guardsmen at their stations, prepared to bar entry to all Negro students although none attempted to enter on that day.

With these developments the School Board on September 3 petitioned the Federal Court for instructions as to whether the Board should recall its request to Negro students not to appear. In response the Court directed the Board to withdraw the request and to proceed with the acceptance of the Negro students forthwith. The Court stated that he would accept at face value the Governor's statement that he had no purpose excepting to preserve order. The next day nine Negro students appeared at the High School and tried to enter, but the Guardsmen stood shoulder to shoulder and they were repulsed. The effort was not immediately renewed.

The School Board now applied to the Federal Court for a temporary suspension of its plan because of the effect of the presence of the Guardsmen on the school children. Judge Davies held that this was not legal justification for the abandonment of the plan and of the Board's attempt to comply with the Constitution and the law. Up to this point the Department of Justice had taken no part in these proceedings for the very good reason that there is no provision of law under which the Attorney General could have taken action.

Judge Davies now appealed to the United States Attorney and the Attorney General to assist the Court in determining why and by whom the order of the Court was being obstructed and the plans of the School Board thwarted. This inquiry was undertaken by the Federal Bureau of Investigation and a report on the subject was submitted to the Court on September 9. The most significant development in this investigation was the production of documentary proof that in his original instructions to the National Guard Governor Faubus had failed to order the Guard to protect the Negro students who were applying for admission to the School, but on the contrary, had order the Guard expressly to exclude them all from the school premises. This was a deliberate nullification of the Constitution and laws of the United States perpetrated by Governor Faubus with the force of his troops. It was at the same time a frustration of the orders of the District Court.

After learning of the order given to his Guardsmen by Governor Faubus, the Court entered a formal order reciting that in the opinion of the Court "the public interest in the administration of justice should be represented in these proceedings." He requested the Attorney General and the United States Attorney to enter the case and assist as *amicus curiae*. Judge Davies specifically empowered the government to submit pleadings, evidence, arguments and briefs in the litigation, as well as to initiate such further proceedings as might be appropriate. In addition, the Court directed the government to serve on the Governor and the Commanders of the National Guard detachment an order to show cause why an injunction should not be granted against their further interference with and obstruction of the previous order of the Court that the School Board's plan of integration should be carried into immediate effect.

The appropriate pleadings were filed and on September 10 Governor Faubus emerged from his self-imposed siege in his mansion at Little Rock and accepted service without difficulty. The hearing on petition for an injunction was set down for September 20.

As lawyers you will readily perceive that these proceedings are unusual. They are, however, not without precedent.

It would be strange, indeed, if the judiciary lacked the power to appeal to the executive branch of the government for assistance where the orders and processes of the Court are being deliberately and forcibly thwarted and obstructed.

In the case of *Universal Oil Company v. Root Refining Company*,³ the Supreme Court held that for the purpose of vindicating its honor and making its process effective as a means of administering justice, a Federal Court can always call on the law officers of the United States to serve as *amici*.

The power of a federal court to review the action of a Governor of a State in using military force to achieve ends which are unconstitutional has also been settled by precedent. I shall not attempt to give you a brief of the law or even to mention the holdings on the varied aspects of this question. As illustrative, however, I call the attention of those of you who are interested, to the cases of *Sterling v. Constantin*,⁴ *United States v. Phillips*,⁵ and *Strutwear Knitting Co. v. Olson*.⁶

In the last named case the National Guard was used by a Governor to close a factory to prevent probable loss of life and property from the acts of a mob

³ 328 U.S. 575, 581 (1946).

⁴ 287 U.S. 378 (1932).

⁵ 33 F. Supp. 261 (N.D. Okla. 1940), further proceedings, 312 U.S. 246 (1941).

⁶ 13 F. Supp. 384 (D. Minn. 1936).

objecting to its operation. The Court held that this was not a permissible use of force, saying:⁷

It is certain that while the state government is functioning, it cannot suppress disorders the object of which is to deprive citizens of their lawful rights, by using its forces to assist in carrying out the unlawful purposes of those who create the disorders, or by suppressing rights which it is the duty of the state to defend. The use of troops or police for such purposes would breed violence. It would constitute an assurance to those who resort to violence to attain their ends that, if they gathered in sufficient numbers to constitute a menace to life, the forces of law would not only not oppose them, but would actually assist them in accomplishing their objective. There could be but one final result, namely, a complete breakdown of government and a resort to force both by the law-abiding and the lawless.

It will undoubtedly occur to some of you that if the law is this clear the matter might have been brought to a head more quickly by the government seeking an immediate temporary restraining order instead of petitioning for a preliminary injunction with a ten-day delay prior to hearing. This course and the date of the hearing were set by Judge Davies. Perhaps he wanted to give the Governor an opportunity to conform to the requirements of the Federal Constitution and law as he had promised to do when he met with President Eisenhower in Newport. Possibly Judge Davies was reluctant to believe that a Governor of a State would deliberately and intentionally use his troops to obstruct the orders of a federal court and attempt to nullify the Constitution and laws of the United States. In any event the Court was definitely of the view that the Governor should be served with notice and afforded an opportunity to be heard before any injunction issued against him or his officers.

You will readily recall the next developments. Governor Faubus made his dramatic flight to Rhode Island to confer with President Eisenhower about the situation. While the official statements that followed this meeting were noncommittal about details, Governor Faubus did state publicly that he recognized integration as the "law of the land." It seemed possible that the meeting might have achieved its purpose of solving the impasse without force or ultimatum. It even seemed possible that the Governor might either withdraw the Guardsmen from the High School or revise his order so as to admit the Negro students under the protection of the Guard, taking such action without the necessity of a hearing and order from the United States court. But Governor Faubus did not follow any such course.

On September 20 he entered an appearance in the District Court by counsel though not in person. After a series of dilatory motions and challenges to the jurisdiction of the Court had been denied, the Governor's counsel walked out of Court without waiting for the taking of any testimony, refusing in the name of the Governor to recognize the Court's authority or jurisdiction.

Judge Davies then proceeded without further delay to take testimony and enter appropriate findings of fact and conclusions of law. The principal finding was that since September 2, and up to the time of the hearing on September 20, the units of the Arkansas National Guard had remained at Central High School and had continued to prevent eligible Negro students from attending the school, pursuant to the order issued to the Guard by the Governor of Arkansas. The Court found that these acts directly obstructed and interfered with the carrying out and effectuation of the Court's orders of August 28, 1956 and September 3, 1957, con-

⁷ *Id.* at 391.

trary to the due and proper administration of justice. On this basis the Court then issued the appropriate injunction.

It is important to note that the Court did not order the Governor to remove the National Guard from the High School or its vicinity. The Court continued to leave it within the discretion of the Governor to determine whether the presence of the Guardsmen at the School was needed in order to preserve the public peace and order. All that the Court required was that the Governor and the Guardsmen desist from preventing the eligible Negro students from attending school and from preventing the School Board from putting into execution its plan of integration as approved by the Court.

That evening Governor Faubus told a radio-television audience he would "exhaust every legal remedy to appeal this order. However, . . . I will comply . . ." The troops were withdrawn but to date no steps have been taken to appeal.

The events that followed the opening of school the next Monday are not likely to be forgotten by any of us. You will recall that an unruly mob quickly began to gather. You have seen for yourselves the pictures of white men, their faces flushed with hate, striking and kicking the colored news photographers who happened to be present, and chasing other Negroes who ventured into the vicinity. You will recall that the Negro students were received into the school, but that the uproar caused by the mob outside was so great that the school authorities, the Mayor and the City Police requested the Negro children to retire from the School until better protection could be provided.

The requests of the School and City authorities for assistance against this violence went unheeded by Governor Faubus. It became all too plain that the public agencies of the City of Little Rock and the State of Arkansas either could not or would not provide the Negro students with the equal protection of the laws guaranteed to them by the Constitution of the United States. The mob, having been inflamed against the Negroes, was on the verge of breaking into extremes of violence because of the lack of any real effort by State authorities to curb it.

Consequently, before the day was over President Eisenhower issued his Proclamation calling on the mob to cease and desist from its obstruction at the School and to disperse forthwith. The President was acting under authority of Chapter 15 of Title 10 of the United States Code which I shall discuss in a moment.

On the following morning the mob again gathered in front of the Central High School, notwithstanding the President's Proclamation, obviously bent on again preventing the Court's order relating to the admission of Negro children to the School from being carried out. Thereupon the President issued an Executive Order "Providing Assistance for the Removal of the Obstruction of Justice Within the State of Arkansas." This order authorized and directed the Secretary of Defense to order into the active military service of the United States as he may deem appropriate any or all units of the National Guard to serve for an indefinite period and until relieved by appropriate orders, to utilize the armed forces of the United States and to take all appropriate steps to enforce any orders for the removal of obstruction of justice in the State of Arkansas with respect to enrollment and attendance in the Little Rock School District.

The Secretary acted without delay. A unit of the armed forces was sent to Little Rock at once, while the Arkansas National Guard was federalized at the same time. The mob was dispersed efficiently and with a minimum of incident. The Negro students returned to school under protection of the soldiers.

Now we are confronted with the extraordinary spectacle of a public school

operating with soldiers present to afford physical protection for some of its students from an incipient mob and from the violence of outsiders.

It is too bad that the Federal Government had to intervene, but no other course was possible. When the Governor of Arkansas determined to use the National Guard for the unlawful purpose of preventing integration in Little Rock, as planned by its School Board and ordered by the Federal Court, federal intervention became inevitable. The necessity arose from this open defiance of the law and of the courts. While the normal agencies for law enforcement were adequate to keep the peace, they had been ordered to nullify the law.

Now it is being claimed that the course followed by the President was illegal.

The President in his inaugural oath swears and affirms that he will to the best of his ability "protect and preserve the Constitution of the United States." So long as the Constitution stands; so long as the Supreme Court's interpretation stands; so long as the President maintains his oath, the federal government must step in if state and local authorities deny to citizens the equal protection of the laws guaranteed by the Fourteenth Amendment.

The President's duty rests in the Constitution, but the manner of carrying it out has been spelled out in detail by the Congress. Section 332 of Title 10 of the United States Code provides that "Whenever the President considers that unlawful obstructions, combinations, or assemblages, . . . against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws . . ." And the next section provides additional authority. Section 334 authorizes the proclamation to the mob to disperse as a preliminary step to calling upon military authority. In this instance the President issued his proclamation on September 23.

There is nothing old about these statutes and nothing new about their principle. The statutes to which I have just referred were revised and reenacted as recently as 1956. It is not without interest to note that the Subcommittee of the Senate that approved this language was headed by Senator John L. McClellan of Arkansas, while the Chairman of the full Committee which unanimously approved its passage was presided over by Senator James O. Eastland of Mississippi. They passed both houses without objection.

The principle of this law long antedates the Civil War. It was originally enacted in 1792. It was utilized two years later by President George Washington in suppressing the Whiskey Rebellion and has been utilized by later Presidents on at least thirteen occasions. The legality of the action taken by the President will never be successfully challenged.

This is as far as it seems proper for me to go in my recital of events. Obviously there are matters of interest pending and under investigation at the present time, but it is not in order for me to discuss them.

By way of conclusion, however, I can state that no one should have been in any doubt in the past and none can be in any doubt in the future as to the course that the President—any President—must follow when the troops of a state are used to nullify the Constitution and laws of the United States, as interpreted by the Supreme Court, and to defy the orders of the Courts of the United States. No President can abandon the positions taken and sustained by Abraham Lincoln through four years of bitter Civil War. A wider understanding and acceptance of this fact in the South would be in the interest of national peace and tranquillity.