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Whether the supplemental brief in Wilkins v. United States should argue that §241 reaches private conspiracies to interfere with Fourteenth Amendment rights

I thought it would be useful to set down some of the factors we should consider in deciding whether to argue, in the supplemental brief we must soon file in this case, that §241 makes it a crime for private persons to conspire to interfere with a right derived from the Fourteenth Amendment -- here the Due Process right to conduct a protest march. Lou Kauder's draft, in Part II, makes the argument that the statute covers the case. I think the argument is very doubtful, as set forth below, but I also believe there are reasons to make the argument, and perhaps another alternative.

A. Why the argument is doubtful

The argument, as all agree, turns upon the proper interpretation of the cryptic concurring opinion of Justice Clark in Guest (subscribed to by Justices Fortas and Black), read in conjunction with the opinion of the "Court" (Stewart, Harlan, and White).

Justice Stewart's opinion for the Court plainly implied that §241 reached conspiracies to interfere with Fourteenth Amendment rights only when some state action was involved, but construed the indictment as alleging state action. Justice Clark stated that "I join the opinion of the Court" because a "study of the language in the indictment clearly shows that the Court's construction is not a capricious one . . . ." The only reason for Justice Clark to characterize the Court's construction as not capricious is that he was attempting to fend off the charge that the Court had strained to save that count of the indictment. And the only reason it could be necessary to strain to save

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that count is if, absent the construction of official complicity, this count would be totally defective. In other words, Justice Clark must have meant: "I believe that this count is good only if it can be read to change official complicity in the conspiracy, but I believe it can reasonably be so read."

As against this plain implication there is only a confusing sentence ending in "as to §241," 1/ which could conceivably be read to mean that Justice Clark was not reaching the question whether Congress in §241 had covered this case -- while, at the same time, he expressed the view that Congress had the power to do so. I do not know what this elusive language means, but the idea that it reflected an intention to avoid the question of §241's scope seems to me to be unacceptable because this was not a question which logically could be avoided -- at least without absurd consequences.

1/ The full paragraph in which this sentence occurs reads as follows:

> The Court carves out of its opinion the question of the power of Congress, under §5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to §241. Some of his language further suggests that the Court indicates sub silentio that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects

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The result of a holding like Justice Stewart's must be (as it was) to restrict the prosecution to proving "state action" or taking a dismissal of the public facilities count of the indictment. But if the court avoids the question whether §241 reaches private conspiracies in the absence of state action, what happens below? There are two possibilities, both anomalous. First, we may go to trial on this count but risk dismissal at the close of our case on the ground that no state action was proved. Should the trial judge be told at the close of the government's case that the question was left open by the court, but rejects that argument, we can never appeal his ruling -- so the effect of the Court's leaving the question open is really to foreclose it.

Unless, that is, the issue is raised before jeopardy attaches. In that case we argue to Judge Boetle that, although we are not going to try to prove state action, this count is still good because the Supreme Court left open the question. But Judge Boetle has already ruled ~~against us~~ -- so of course he rules the same way again. At which point we take another direct appeal to the Supreme Court on the very same issue we took up the first time around. If that is what Justice Clark intended, he has a peculiar sense of judicial efficiency. I therefore think that Justices Clark, Black, and Fortas did not intend to leave the question open -- indeed, that it would have been irrational to do so. The question was before the court and had to be decided, and it seems to me it was.

Against us on this very question

1/ (continued from preceding page)

> any such connotation, ante, p. 755, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of §5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights.

B. Alternatives to abandoning the argument

We could, of course, advise the Court of Appeals that we are unable to decipher the Guest opinions, but we think that because of their ambiguity the Court ~~of Appeals~~ is free to re-examine the question de novo. I would avoid saying, as the draft does, that "it is difficult to impute to Mr. Justice Clark the view that §241 does not cover private conspiracies against Fourteenth Amendment rights in the absence of the clearest expression in his opinion to that effect." We could suggest the opinion's unclarity and reargue the merits, not so much in the hope of persuading the court of appeals, but to preserve the point for ultimate Supreme Court review -- i.e., to get the high Court to reconsider what (I think) it did in Guest. Since our new anti-violence legislation failed in the last Congress and may fail in this one too, perhaps we ought to try to overrule Guest.

In the alternative, we could suggest that (if the court rejects our court order contention) it should certify to the Supreme Court the question whether §241 covers private conspiracies to interfere with Fourteenth Amendment rights. See 28 U.S.C. 1254(3); 2/ United States v. Barnett, 376 U.S. 681. The basis for the certification could be that the court of appeals is in doubt about the meaning of Guest. Indeed, this would seem to be the most appropriate course for the court to take if it is in real doubt about that. (If we suggest a certification, however, we should try to ensure that the court order question is also reviewed by the Supreme Court at the same time, either on certification, certiorari, or, if the court below has not yet decided that question, on certiorari before judgment, see 28 U.S.C. 1254(1)).

2/ 28 U.S.C. 1254(3) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
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> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

We could, of course, advise the Court that the answer to its question is "No," and reargue the court order point, with the idea of petitioning for certiorari on that question alone if we lose. (I would reargue the court order point in any event.)

C. The "federal election" argument

I have not made up my mind what I think about Lou Kauder's argument that wholly apart from the Fourteenth Amendment there is a distinctly "federal" right to protest denial of the right to vote in federal elections which, like the right to occupy a homestead or be secure in the custody of a federal marshal, is protected by §241. The argument must be that any assembly to discuss such a distinctly federal right is within §241, regardless of the persons to whom the protest is directed, since here the protest was not made to officialsof the federal government. There is some support for this in Hague v. C.I.O. But we must also argue that the mere fact that discrimination in the state registration process necessarily discriminates against registration for federal elections and is thus within §241, even though the protesters were not thinking in terms of the type of elections. Perhaps that argument is sound. Even if it is, however, I have some doubt -- notwithstanding Hague -- that there is such a right independent of the Fourteenth Amendment. If there is, then we have the odd result that a Negro protest is protected from private interference if it is directed at discrimination in federal elections, but not at discrimination in state elections or most other types of official discrimination. A broader argument -- that a protest against denial of any federal right, including a Fourteenth Amendment right, is within the Hague-Cruikshank principle -- would of course swallow up the distinction between "federal" and "Fourteenth Amendment" rights.

which would remove Thus anomaly