UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

TO : Mr. John Doar
Assistant Attorney General
Civil Rights Division

DATE: September 12, 1967

RSS:mch

FROM : Ralph S. Spritzer
Acting Solicitor General

SUBJECT: Intervention in Sobol v. Perez

As per your request, I have examined the papers pertaining to the above-captioned case. As stated in Mr. Norman's memorandum, you propose to argue that "the enforcement of a State rule which limits those eligible to practice in the State courts to a particular class of attorneys, in a factual context where the designated class of attorneys is unwilling to represent a class of defendants, is closely analogous to State practices of refusing to make counsel or other requisites for effective access to the courts, such as transcripts, available to indigent defendants and prisoners." I have no great difficulty with the proposition as stated but I am quite unconvinced by anything that I have read that that can be said to be the State rule in Louisiana. I am confirmed in this by our local expert in Louisiana law (Louis Claiborne), who has done some research in the matter.

As we read the complaint and the applicable Louisiana rules of practice, it would appear probable that the prosecution against Sobol will be ended--whether by injunction issuing from the federal court or even in the State courts--on the ground that he was merely a "visiting attorney" acting in association with local counsel. See ¶¶ 21-24, pp. 14-15, of the Amended Complaint. If that was indeed his status in the Duncan case (which I assume is the sole basis for the prosecution), Louisiana law condones his action.*

Arguably, Louisiana law requires local counsel to remain with the foreign attorney, in which event his absence here during the whole of the Duncan trial could be viewed as a breach of the rule. But I would suppose Sobol likely to prevail with the argument that such an application of a criminal statute would offend the constitutional requirement of due notice--especially when, as here, the trial judge himself apparently acquiesced in the actual procedure.

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* The statute itself (La. R.S. 37:214) so suggests by apparently authorizing an attorney who falls under the reciprocity rule to practice "without being required to associate with himself some [local attorney]"; but, at all events, the codifier's note (viewed as authoritative in Louisiana) makes this explicit, as do the rules of the Louisiana State Bar Association (Article 12, § 9, reprinted in 21A West's L.S.A.-R.S., p. 147), adopted and confirmed by the Louisiana Supreme Court. Rule XIV, reprinted in 8 West's L.S.A.-R.S., 1966 pocket part, p. 98.

Since there are very persuasive reasons for regarding this simply as a case of misguided or discriminatory or malicious prosecution, it seems to me very unlikely that the three-judge court will have any disposition to reach those questions which would be presented if it appeared (a) that the action taken by Sobol was dictated by Louisiana law and typical of law enforcement in the State, and (b) that the consequence was generally to deprive - or threaten to deprive - Negroes of needed legal assistance that out-of-State lawyers are prepared to make available to them. Aside from the point discussed above (which is presented in Sobol's fourth cause of action), there are other grounds upon which he might prevail that are narrower than the broad rule for which you would be contending. This further strengthens my belief that any reasonably cautious and deliberate court sympathetic to the position in which Sobol has been placed would feel obliged to explore relatively narrow grounds of decision and to refrain from assuming that the apparently isolated action of the prosecutor of Plaquemines parish reflects a correct interpretation of a statute which, on the face of it, is no more illiberal than similar statutes to be found throughout the country. To be sure, one could argue your point in a contingent vein: If the Plaquemines prosecutor's presumed interpretation is a correct interpretation of State law and if (as we would undertake to show) it would have the effect of cutting Negroes off from essential legal services, a violation of the Fourteenth Amendment results. But I suggest again that it is unrealistic to suppose that a court inclined to grant relief to Sobol would experience any difficulty in adopting, at least in the first instance, a narrower ground of decision. Accordingly, it seems to me that the heavy investment which would be required to lay the predicate for your theory is not at all apt to yield any dividends in the present litigation. So saying, I do not mean to imply a belief that we should refrain from any participation in the case.[*]

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* I note one other problem in the case. If (as the Civil Rights Division reports, contrary to the allegation of the complaint) the information was filed before the federal court suit, the bar against enjoining ongoing State court prosecutions becomes relevant. See 28 U.S.C. 2283. It remains an open question whether a suit under 42 U.S.C. 1983 (which this is) is excepted from that rule. See <u>Cameron</u> v. <u>Johnson</u>, 381 U.S. 741. The issue is now pending in the Supreme Court on a second appeal in the <u>Cameron</u> case. Arguably, the presence of the United States as a party obviates that problem. See <u>Leiter Minerals</u> v. <u>United States</u>, 352 U.S. 220; but whether a mere intervention can eliminate the barrier is not clear. Cf. <u>United States</u> v. <u>Barnett</u>, 376 U.S. 681, 692, n. 8, 736-739.