Document 158

Papers as President: President's Secretary's Files

PSF Justice

Office of the Attorney General
Washington, D.C.

February 11, 1937.

The President,
The White House.

My dear Mr. President:

Assistant Attorney General Brien McMahon and his staff have been giving careful consideration to the anti-lynching bill proposed by Mr. Spingarn and his associates. Distinct progress is being made and the prospect of formulating a bill that will meet constitutional tests is encouraging. I am today writing to Mr. Charles H. Houston, Special Counsel for the proponents of this measure, suggesting that he get in touch with Mr. McMahon and arrange for an interview at which Mr. Spingarn can be present. At that time, and of course informally, Mr. McMahon will be able to make some suggestions which are calculated to strengthen the proposed bill.

Knowing of your deep interest in this matter, I enclose herewith the report of the studies thus far made in this matter, with appendices attached thereto. It is quite an interesting discussion and parts of it at least you will find well worthy of consideration.

I would suggest that these papers be regarded as strictly confidential. It would seem to me altogether best that we should limit our approach to this matter to oral discussions. We can give all the necessary help in this way without putting the Department in the position of having given advice to any private group. No doubt, after the bill is introduced and referred to some appropriate committee, the Department will be asked by that Committee to express some sort of an opinion and it would be best if we were not in the position of having prejudged the matter. I shall, of course, keep you advised as to the progress in the matter.

Sincerely yours,

Attorney General.

PSF Justice

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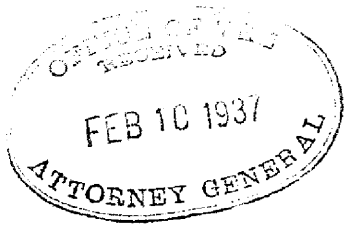
WASHINGTON, D. C.



February 8, 1937.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Anti-Lynching Bill

Reference is made to your memorandum of January 29, 1937, stating that the President is very much interested in the anti-lynching bill drafted by the National Association for the Advancement of Colored People, and requesting that I study the bill with a view to determining whether it will survive the constitutional test. This I have done, and this memorandum points out in brief the objects of the bill, the extent to which it differs from the Dyer Act of 1922 and the Costigan-Wagner Bill of 1935, and considers the constitutional objections that may possibly be raised.

I.

The bill provides for:

(A). A criminal prosecution in the federal courts against an officer of a state or sub-division of a state who, having a duty, fails to (1) prevent the lynching, (2) protect a prisoner in his custody from a lynch mob, or (3) use due diligence in apprehending the members of the lynch mob. (Sec. 3)

(B). A civil liability enforceable in the federal courts against a sub-division of a state having police functions in which a lynching occurs or in which a person is seized who is subsequently lynched. If the lynching results in death, the suit is brought for the benefit of the next of kin. (Sec. 5)

(C). An extension of the Federal Kidnapping Statute to include the transportation in interstate commerce by the lynch mob. (Sec. 6)

(D). The investigation and prosecution of cases arising under A, B, and C, above, is to be conducted by the Attorney General of the United States upon a complaint to him.

II.

Chief Distinctions between the present Bill and Previous Anti-Lynching Bills

(A). The term "lynching" is here defined, and the term "mob" more clearly defined.

(B). Violence occurring during the course of labor disputes and violence occurring between law-breakers (gangster and racketeer situations) are excluded.

(C). Actions against private citizens (such as the members of the lynch mob) are excluded, excepting of course such liability as may arise under the proposed amendment to the Lindbergh Law.

(D). The crime of conspiracy included in the Costigan-Wagner Bill is eliminated entirely.

(E). The civil action may be instituted by private counsel at the option of the person in whose behalf the action is brought.

(F). The Costigan-Wagner Bill made no provision for investigation of lynchings. This bill provides for investigation under the direction of the Attorney General.

(G). Previous bills have not covered the interstate transportation of the lynch victim .

(H). The elborate provisions for execution of the judgments provided in the previous bills and which, because of their "nuisance" character raised much protest in the Congress, have been simplified considerably in the present bill. (See the comparative table)

(I). The Costigan-Wagner Bill had attempted to give to the federal court jurisdiction upon a prima facie showing of a certain type that an unprejudiced jury would not be available in the state courts. This basis of federal jurisdiction is eliminated entirely in the present bill.

(J). There are other minor differences in the statute, all of which will appear in a comparative table which has been prepared and which is attached hereto, marked Exhibit "A".

III.

The Constitutional Basis for the Statute

The present bill rests for its authority on the due process and equal protection provisions of the 14th Amendment. That Amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is thus apparent that the 14th Amendment is a prohibition upon action by the state denying the above-named rights. Section 5 of Article 14, however, provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The 14th Amendment is therefore more than a prohibition upon state action. It is a grant of power to the Federal Government to take affirmative action to prevent a denial of these rights by the states.

> "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."
>
> Ex parte Virginia, 100 U. S. 339, at 344.

See also to the same effect Strauder v. West Virginia, 100 U. S. 303, and United States v. Reese, 92 U. S. 214. In the former case the court said, at page 309:

> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms and those are as comprehensive as possible. This language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, whether for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution. "

Congress took affirmative action in the enactment of Section 19 of the Criminal Code, punishing conspiracies to injure persons in the exercise of civil rights (18 U.S.C.A., Sec. 51). This statute has been upheld in numerous cases as an appropriate exercise of the power given by the 14th Amendment to the Congress. See the cases collected in Annotations to Section 51 of Title 18.

Another example of affirmative Congressional action pursuant to Section 5 of the 14th Amendment is found in Section 31 of the Judicial Code (Title 28 U.S.C., Sec. 74), which provides for the removal to the federal courts of causes commenced in the state courts in cases where persons have been denied civil rights. The validity of this section was upheld in Va. v. Rives, 100, U.S.339, and Strauder v. West Virginia, supra.

Another illustration of action on the part of Congress of the type mentioned is found in Section 453 of Title 28, which, although written in negative terms, impliedly authorizes the federal courts to issue writs of habeas corpus where a person "is in custody in violation of the Constitution or of a law or treaty of the United States". This section was involved in the case of Moore V. Dempsey, 261 U. S. 86.

Another example of affirmative action by the Congress is found in the enactment of certain of the Civil Rights Statutes, notably Section 44 of Title 8, U.S.C., which punishes the exclusion of jurors on account of race or color from service in a state court. This was the statute involved in Ex parte Virginia, supra.

The Act Constituting a Denial of Equal Protection of the Law or Due Process of the Law By the State May Be An Unauthorized Act of a Subdivision or Officer

In the case of Home Telephone and Telegraph Co. v. United States, 227 U. S. 278, the United States Supreme Court held that the Federal District Court had jurisdiction of an injunction suit brought by a California corporation against the City of Los Angeles to prevent the putting into effect of a city ordinance establishing telephone rates, which rates the plaintiff alleged deprived him of his property without due process of the law. It was argued in the case that the 14th Amendment is directed against action by the states themselves, and that since the State of California had taken no action and since the City of Los Angeles was an agent of the state with but limited powers and that its powers did not include authority to pass a confiscatory rate ordinance, the action taken by the City of Los Angeles was not state action; in other words, that an unauthorized act by a subdivision of the state was not state action within the meaning of the 14th Amendment. The court said (page 288):

> "... In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. ... A state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done prima facie would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority."

In Yick Wo v. Hopkins, 118 U. S. 356, the plaintiff petitioned the Supreme Court of California for a writ of habeas corpus alleging that he was illegally confined following his conviction for violation of an ordinance relating to the licensing of laundries in the City of San Francisco, which ordinance, while fair on its face, was administered by the local officials in a discriminatory fashion. The case came to the Supreme Court of the United States upon writ of error to the Supreme Court of the State of California. It became necessary to determine whether the plaintiff had been deprived of his right of equal protection of the laws under the 14th Amendment by the action of the local officials in the enforcement of the statute. The court said (page 373):

> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by the court in Henderson v. Mayor of New York, 92 U. S. 275; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703."

The administration of the licensing provisions in the ordinance was admittedly discriminatory. The court said (page 474):

> "No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except

> hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

Under the proposed bill (excepting, of course, the amendments to the Lindbergh Law), the civil liability of the subdivision and the criminal liability of the official does not arise until there has been a showing that the state, through its subdivision or official, has actually denied equal protection or due process by failure to perform a duty imposed upon the subdivision or official by state law. It would seem clear that one may be deprived of rights of equal protection and due process by non-action or neglect, as well as by affirmative acts of misfeasance resulting in such deprivation. In Home Telephone and Telegraph Co. v. Los Angeles, supra, the court said (page 286):

> ".... The provisions of the Amendment ... are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."

And at page 287, the court continues:

> "The proposition (propounded by the District Court) is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer ... ... inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer...".

The case of Tarrance v. Florida, 188 U. S. 519, is an illustration of an act by a state administrative officer resulting in denial of equal protection. In this case no state statute justified such denial. The defendant was prosecuted in the state court for murder. A motion to quash was entered on the ground that the county commissioners, in making up the jury panel, discriminated against colored men and allowed no

colored men on the panel. No complaint was made of the Florida law. The complaint was that the county commissioners, in executing the state laws, denied equal protection. The conviction was sustained in the state court and affirmed by the Supreme Court, but on the ground that the motion to quash did not lie by Florida authority and that the denial could be reached only by a plea in abatement. In discussing the acts of the state agents, the court said:

> "The law of the state is not challenged, but its administration is the complaint. Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law."

See also to the same effect Neal v. Delaware, 103 U. S. 370. This point is even made clear in the Slaughterhouse Cases (frequently cited in the Senate debates on the Costigan-Wagner Bill as indicating the unconstitutionality of the bill), 83 U. S. at 346:

> "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision (14th Amendment) therefore must mean that no agency of the state or of the officers or agents by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of position under a state government deprives another of property, life, or liberty without due process of the law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and if he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state."

Cases Which were Relied upon in the Debates on Previous Anti-Lynching Bills to Show the Unconstitutionality of Such Proposals

The four cases principally relied upon to show the Anti-Lynching measures unconstitutional were:

The Slaughterhouse Cases, 16 Wall. 36
The Civil Rights Cases, 109 U. S. 3
Barbier v. Connolly, 113 U. S. 27
United States v. Cruikshank, 92 U. S. 542.

The Slaughterhouse and Barbier cases involved alleged violations of the 14th Amendment on the part of the states. The Civil Rights cases and the Cruikshank case involved federal statutes.

It is submitted that none of the four cases which were cited as showing the unconstitutionality of the Costigan-Wagner Bill are applicable to the bill now under discussion. The distinction between the present bill and the Costigan-Wagner Bill which renders these cases inapplicable is that, where the Costigan-Wagner Bill imposed a criminal liability upon individual members of the mob, the present bill imposes no liability upon such private citizens but reaches only officials of the state and governmental subdivisions—agencies of the state.

(A). Civil Rights Case.

These cases involved Sections 1 and 2 of the Civil Rights Act of 1875, which made it a federal offense to deny equal accommodations in public conveyances, inns, theaters, etc., to persons on account of their race or color. The court held that the 13th and 14th Amendments did not give to Congress the power to substitute its acts for the laws of the states acting directly on individual citizens. The court said (page 11):

> "It is State action of a particular character that is prohibited /by the Amendment/. Individual invasion of individual rights is not the subject matter. ... It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."

At page 14, the court continues:

> "Inspection of the law (Sections 1 and 2 of the Civil Rights Act) shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. ... In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities."

The case, therefore, is no authority for the invalidity of the present bill. In fact, the language of the court indicates that the present bill would be upheld.

(b). United States v. Cruikshank

This case involved an indictment under Section 51, Title 18, U.S.C., which created the offense of conspiring to prevent the exercise of rights guaranteed by the constitution. The court treated the section as an implement of the clause of Section 1 of the 14th Amendment which provides that no state may abridge the rights and immunities of any citizen of the United States. It held that common protection of life and property against acts of private individuals remains within the rights of state citizenship, and was not included in the rights of United States citizenship.

(c). The Slaughterhouse Cases

These cases also involved violation of Clause 1 of Article 14, relating to the privileges or immunities of citizens. The court held that a monopoly in slaughtering which had been granted by the State and the City of New Orleans was within the police power of the state and did not violate any privilege or immunity of federal citizenship. The case is devoted to a distinction between the rights involved in state citizenship and the rights involved in federal citizenship. The proposed bill does not depend upon any theory of United States citizenship as distinguished from state citizenship. The Slaughterhouse cases are, therefore, not in point and in this connection it should be pointed out that the language of Section 1 of the 14th Amendment relating to privileges and immunities is worded quite differently than the language in the other sections of the 14th Amendment. Where Section 1 provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens", Clauses 2 and 3 of Section 1 provide "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Whereas the word "abridge" connotes action, the word "deny" connotes inaction. Whereas the first clause says "No state shall make or enforce any law...", the second clause says "No state shall deprive ... or deny". The difference in phraseology of the three clauses of Section 1 is significant.

(d). Barbier v. Connolly

The familiar rule is announced that the 14th Amendment does not prohibit states from the exercise of their police functions and the imposing of special restrictions, (In this case an ordinance relating to the hours during which laundries shall operate) when such exercise is not discriminatory. This familiar rule has no bearing on the constitutionality of the proposed Anti-Lynching bill.

Hodges v. United States, 203 U. S. 1, involved an indictment against a private citizen under Section 51 of Title 18 for conspiring to prevent negroes from working. The court held that an indictment against a private individual for private wrong could not stand in a federal court where the constitutional basis of the statute was the 13th Amendment. The court said, in referring to the 13th, 14th, and 15th Amendments:

> "They are restrictions upon state actions, and no action on the part of the state is complained of."

Powell v. United States, 151 F. 648, cited by opponents of the Costigan-Wagner Bill, and United States v. Wheeler, 254 U. S. 281, both were indictments against private individuals.

The Bill is not Objectionable as Infringing on the Powers of the States Reserved by the 10th Amendment

Granting the power of the Federal Government to enact the bill as a measure designed to enforce the provisions of the 14th Amendment, it follows that no objection could be made to the measure upon the ground that the statute deals with a matter customarily reserved to state sovereignty prior to the adoption of the 14th Amendment. The 14th Amendment, like other provisions of the Constitution, was a delegation to the Federal Government of powers. To the extent that powers were delegated by that amendment, sovereignty was to an extent surrendered by the states. As is said in Hamilton v. Kent Distilleries Co., 251 U. S. 146, at page 156:

> "That the United States lacks the police power and this was reserved to the states by the Tenth Amendment is true, but it is none the less true that when the United

> States exerts any of the powers conferred upon it by the Constitution a valid objection cannot be based on the fact that such exercise may be attended by the same methods which attend the exercise by a state of its police powers or that it may attend a similar purpose."

Likewise, in Ex parte Virginia, 100 U. S. 339, at 346, the same doctrine is announced:

> "Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. ... Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them."

There Is No Constitutional Objection to a Provision That The U. S. May Sue in the Federal Courts

In United States v. Texas, 143 U. S. 621, the State of Texas challenged the right of the United States to sue it in a United States Court. The entire subject is there discussed fully by the court, and the right of the United States to sue in its own court is vindicated. Other instances of suits by the United States in Federal courts against States are United States v. North Carolina, 136 U. S. 211; United States v. Michigan, 190 U. S. 379.

A subdivision of a State may be sued in the Federal Courts. See Lincoln County v. Luning, 133 U. S. 529. And the 11th Amendment, which divests Federal Courts of jurisdiction over the suits of citizens of one state against another state, does not apply to a subdivision of a state. See Lincoln County v. Luning, supra; Port of Seattle v. Oregon and W.R.R., 255 U. S. 56; Chicot v. Sherwood, 148 U. S. 529; Pearl River County v. Wyatt Lumber Co., 270 F. 26; and Mercer County v. Cowles, 74 U. S. (7Wall) 118.

The Provision for Civil Liability of a Governmental Subdivision for Mob Violence is not Unreasonable nor Arbitrary

The imposition of liability to the victims of mob violence on the subdivision of the state in which mob violence occurs is a type of remedy of long standing, and has been upheld by the Supreme Court of the United States and by the Supreme Courts of a number of the States. Such liability may be absolute, and there is nothing in the Constitution to require that it be dependent upon proof of negligence on the part of the officers of the subdivision. The leading case on the subject is City of Chicago v. Sturges, 222 U. S. 313. The following state cases have also upheld such legislation:

Dale County v. Gunter, 46 Ala. 111
DeKalb v. Smith, 47 Ala. 407
Cantey v. Clarendon County, 101 S. C. 141
Atchison v. Twine, 9 Kan. 350
Cherryvale v. Hawman, 80 Kan. 170
St. Louis Railway v. Chicago, 242 Ill. 178
Darlington v. Mayor of New York, 31 N. Y. 189
Commonwealth v. Church, 62 Ohio State 318
Allegheny County v. Gibson, 90 Pa. State 397.

See also on this general subject 44 L. R. A. 358, and Ann. Cas. 1913(b) page 1351.

Objections to the Costigan-Wagner Bill which are Inapplicable to the Proposed Bill

(1). It was objected that the bill was an infringement of the sovereignty of the states. This objection has been adequately dealt with in this memorandum. It has been shown that the bill is a proper exercise of the power granted to Congress to enact legislation to prevent denials of the rights guaranteed by the first Section of the 14th Amendment.

(2). Senator Black, of Alabama, and others, objected to the Costigan-Wagner Bill on the ground that it would be applicable to labor disputes. This objection is inapplicable to the present statute, which specifically exempts violence growing out of labor disputes.

(3). Senator Borah, and others, objected to the Costigan-Wagner Bill on the ground that if the Federal Government was to be given power to punish lynching, why should it not be given the power to prosecute all murders, whether by a mob or by a single individual. The answer to this objection is that the present bill does not punish members of the mob, and further, that there is a legitimate distinction between mob murder and individual crimes of violence. The argument is predicated upon the false assumption that the states have as effective laws against lynching as they have against other crimes.

Appendix "B", attached hereto, shows that only 9 states make lynching itself a crime. In a 30-year period only 8/10 of one per cent of the lynchings were followed by convictions, according to Chadbourn in his recent book entitled "Lynching and the Law". This figure may be contrasted with those compiled by Brearley in "Homicide in the United States", in which it is shown that homicide is punished in 44% of the cases where it occurs. In other words, there is a breakdown in the local law so far as the prosecutions of lynchers are concerned. In only 8 states have there been any convictions for lynching, and in these 8 states the percentage is as follows: Alabama 4%; Georgia 8%; Oklahoma 3%; Virginia 4%; Minnesota 33%; Texas 7%; Illinois 7%; and Missouri 3%. These figures are taken from Chadbourn's book, page 13, and were taken from the files of the Tuskegee Institute.

That there has been in practice a denial of equal protection in the case of lynching is clear from the figures of the Southern Commission on the Study of Lynching in its 1931 Report, page 14. A study was made of 254 lynchings covering a period from 1921 through 1929. Of these 74, or 29.1%, were taken from peace officers outside of jails. 68, or 26.8% were taken from the jail. This indicates the denial of equal protection. That officers can prevent lynchings when they are of a will to do so is indicated by the following table from Raper, "The Tragedy of Lynching", page 484, showing the number of lynchings prevented, by the year, from 1914 to 1932.

YEAR	NO. PERSONS LYNCHED	NO. LYNCHINGS PREVENTED
1914	52	16
1915	67	19
1916	54	18
1917	38	18
1918	64	13
1919	83	37
1920	61	56

YEAR	NO. PERSONS LYNCHED	NO. LYNCHINGS PREVENTED
1921	64	72
1922	57	58
1923	33	52
1924	16	45
1925	17	39
1926	30	33
1927	16	42
1928	11	24
1929	10	27
1930	21	40
1931	13	62
1932	8	33
TOTAL	715	704

(4). It was argued by some of the Southern Senators that the Costigan-Wagner Bill was directed against the Southern States. The answer to that is that the problem is national in character, as indicated by a list of the lynchings from 1900 to 1931, as reported by the Tuskegee Institute:

STATE	TOTAL	STATE	TOTAL
Alabama	132	Michigan	1
Arizona	4	Minnesota	3
Arkansas	127	Mississippi	285
California	12	Missouri	41
Colorado	7	Montana	9
Connecticut	-	Nebraska	3
Delaware	1	Nevada	3
D. C.	-	New Hampshire	-
Florida	170	New Jersey	-
Georgia	302	New Mexico	6
Idaho	2	New York	-
Illinois	15	North Carolina	35
Indiana	8	North Dakota	5
Iowa	5	Ohio	5
Kansas	8	Oklahoma	48
Kentucky	68	Oregon	4
Louisiana	172	Pennsylvania	1
Maine	-	Rhode Island	-
Maryland	6	South Carolina	71
Massachusetts	-	South Dakota	2

STATE	TOTAL	STATE	TOTAL
Tennessee	76	Washington	2
Texas	201	West Virginia	13
Utah	1	Wisconsin	1
Vermont	-	Wyoming	9
Virginia	26	TOTAL	1886

(5). Other minor objections were made to the act, virtually all of which are corrected in the present bill.

Suggested Changes in the Proposed Bill

(1). Section 6 of the proposed act makes reference to the Federal Kidnapping Statute (18 U.S.C.A., Sec. 408), and provides that the crime there defined shall include "the transportation in interstate or foreign commerce of any person unlawfully abducted and held for purposes of punishment, correction, or intimidation".

It is felt that this is an unfortunate method of amending the Kidnapping Statute—that is, by simply referring to it without indicating at what place in the Kidnapping Statute the suggested words are to be inserted. Furthermore, it is felt that the Kidnapping Statute should not be made so broad as to cover transportation for purposes of punishment, correction, or intimidation. For example, if the statute were worded in such manner, it would become a capital crime for a police officer to take a suspect across the state line for the purpose of bringing him to justice on a state charge. Other examples might readily be cited.

It is therefore suggested that, so far as the amendment to the Lindbergh Law is concerned, a separate bill be drafted, amendatory of the statute, inserting after the phrase "a parent thereof" the following:

> " ... and whoever shall knowingly transport or cause to be transported, or aid or abet in transporting in interstate or foreign commerce, any person or persons for the purpose of lynching ..."

The Kidnapping Statute with the suggested amendment inserted is set forth as Appendix "C" of this memorandum.

(2). The remaining suggestions are not of primary importance. They are merely suggested improvements in the wording of the bill.

(a). It is suggested that lines 6, 7, 8, and 9, of page 1, be amended to read as follows:

> "For the purpose of better assuring under said amendment equal protection to the lives and persons of citizens and due process of law to all persons charged with or suspected or convicted of any offense within the jurisdiction of the several states."

The reason for this suggested change is that any reference to the rights of "citizens of the United States" is unfortunate, in view of the decisions of the courts which have held those rights to be decidedly limited in character. The constitutionality of this statute does not rest upon the first phrase of Section 1 of the 14th Amendment, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(b). At line 19 of page 1, strike out the phrase "of the United States", for the reason above indicated.

(c). At line 21 of page 1, strike out the word "criminal", in view of the fact that persons are sometimes lynched without having committed any criminal offense against the state law or without having been charged with the commission of a criminal offense.

(d). On page 2, line 10, strike out the word "incidental" and insert the phrase "or any incident".

(e). At line 16, page 2, insert the word "wilfully" before the word "neglected", and at line 17 delete the word "wilfully", so as to make the word "wilfully" applicable to "neglected, refused, or failed".

(f). The same change should be made at lines 20 and 21 and at lines 24 and 25.

(g). At line 23, page 2, strike the phrase "in violation of his" and insert in place thereof the words "having the".

(h). At page 3, line 9, insert at the end thereof the word "wilfully", and strike the word "wilfully" from line 10.

(i). The same change should be made with reference to lines 13 and 14.

(j). Insert at line 17, after the word "United States" the phrase "or his duly appointed representative".

(k). On page 5, change the lines 11, 12, and 13 to read as follows:

> "Tried in any division of the District as he may designate in such order."

The proviso contained in lines 12 and 13 would be stricken. This change would permit the judge to direct that the trial be had in the division of the District in which the least prejudice prevailed.

(l). Change lines 20, 21, and 22, page 5, to read as follows:

> "Furtherance of protection of lives and persons of citizens and other persons against unlawful and violent interference with or prevention of the orderly processes of justice and equal protection of due process of law."

The suggested changes in the wording have been made in the copy of the Act, which is attached hereto and marked Exhibit "D".

While none of the above-indicated changes in wording are essential to render the Act valid or constitutional, it is nevertheless believed that they do improve the wording of the bill.

Gordon Dean.

Bates Booth.

APPROVED:

William T. Connor.

BRIEN McMAHON,
Assistant Attorney General.

COMPARISON OF THE PROPOSED BILL WITH THE COSTIGAN-WAGNER AND DYER BILLS

Proposed Bill (1937)	Costigan-Wagner Bill (1935)	Dyer Act (1921)
1. Enacted to enforce 14th Amendment. State deemed to have denied victim of lynching equal protection and due process when it or its subdivision fails to employ lawful means to protect against lynching or unlawful abduction followed by lynching.	2. When state or subdivision fails to protect life or person against mob, whether by preventing its acts or punishing its members, it has denied due process and equal protection.	2. State or subdivision which fails to protect life against mob is deemed to hav denied equal protection of law.
2. When 3 or more exercise physical violence without authority to correct or punish any person in custody or suspected, charged with or convicted of any offense, with purpose of preventing apprehension, trial or punishment by law, it constitutes a "mob". Such mob violence causing death or serious injury shall constitute "lynching". Provided, "lynching" not to include gangster or labor violence.	1. "Mob or riotous assemblage": when 3 or more acting in concert kill or injure any person for purpose of preventing apprehension, trial or punishment by law.	1. "Mob or riotous assemblage": when 5 or more deprive person of life without authority, as punishment for offense.
3. When lynching occurs, officer with duty or authority to protect, who wilfully fails and officer having custody who wilfully fails to protect person from lynching and officer who having duty fails to make all diligent effort to apprehend, keep and prosecute members of mob, guilty of felony: up to 5 years and or $5,000.	3. (a) Officer having duty to protect, or having suspect in custody fails to protect from death or injury, or having duty to apprehend members of mob, fails to: felony, up to 5 years and or $5,000. (b) Officer having prisoner in custody and members of mob conspiring together to take from custody to injure or kill: felony, 5 to 25 years.	3. Officer who having duty fails or refuses to make all diligent efforts to prevent death, or fails duty of apprehending members of mob: felony, up to 5 years and/or $5000. Any person who participates in mob taking prisoner from custody of officer, or prevents apprehension suspect & puts such person to death: felony, 5 years to life.

Proposed Bill (1937)	Costigan-Wagner Bill (1935)	Dyer Act (1934)
	4. U.S. District Court where person injured or killed shall have jurisdiction to try & punish according to state law any person participating in mob. Provided: it appears to court: (1) state officers have failed to apprehend, prosecute or punish offenders, or (2) jurors obtainable for state court are so prejudiced that there is probability that such persons will go unpunished. Failure for 30 days to apprehend or indict, or failure to diligently prosecute, shall constitute prima facie evidence of such failure.	4. Any person participating in mob putting person to death: felony, 5 years to life.
4. When lynching occurs and information on oath is submitted to the Attorney General of the U. S. that officers have failed as above, Sec. 3, the Attorney General shall cause investigation to be made.		
5. (1) State subdivision having police functions is responsible for lynching in its jurisdiction & for lynching outside jurisdiction following abduction within; is liable to victim injured, or if he is dead, to next of kin, determined by intestate laws of decedent's domicile. Compensation $2000 to $10000. Provided: governmental subdivision may by affirmative defense & preponderence of evidence prove due diligence by its officers. And provided: satisfaction of judgment against one subdivision is bar as to any other. (2) Liability enforceable by U. S. District Court in district where governmental subdivision is. Action brought by Attorney General of U.S. for use of party in interest, or by counsel of victim's choosing, without prepayment of costs.	5. County where injury or death by mob occurs by reason of failure of state officers, is liable to the person injured, or his estate or legal representative if dead, for $2000 to $10000 distributed according to the laws of the state where death occurs. D.C. where injury or death occurs has jurisdiction; action to be brought by U.S. District Attorney. Officer failing to comply with order of court guilty of contempt.	5. County in which person put to death by mob subject to forfeit of $10000 acti therefor in name of U.S. for use of family. If no family forfeit goes to U.S Action in U. S. District Court by U.S. District Attorney.

Proposed Bill (1937)	Costigan-Wagner Bill (1935)	Dyer Act (1921)
Payment enforceable by processes available under state law, or by use of contempt proceedings against officer failing to execute order of court. Cause of action survives death. Judgment exempt from creditors. (3) Judge may try suit any place in district, but not within defendant governmental subdivision.	Court may levy on county's property. Judgment exempt from creditors.	Court may levy on county property, compel levy and collection of tax or issue mandamus to collect judgment. Officers failing to execute order liable for contempt.
6. Lindbergh Law amended to include interstate transportation of persons abducted for punishment, correction or intimidation.	6. County where seized and county where injured or killed jointly and severally liable. Judge may designate any place in district for trial.	Each county through which victim transported liable jointly and severally. District of Columbia and Louisiana parishes deemed to be counties.
7. Purpose of Act: protection of lives and persons of U.S. citizens against violent interference with orderly processes of justice and against dereliction of duty by states, their subdivisions and officers.		
Separability clause	7. Separability clause	7. Separability clause.

APPENDIX B

COMPILED BY INTERSTATE REFERENCE BUREAU FROM SUMMARY OF STATUTES APPEARING IN "LYNCHING AND THE LAW", BY J. H. CHADBOURN, UNIVERSITY OF NORTH CAROLINA PRESS, 1933

	Punishment prescribed for			Maximum liability of city or county for mob violence causing		Peace officer who permits lynching removed by	Prisoner may be sent to another Co. on order of
	Lynching	Aiding A Lynching	Mob Violence	Personal Injury	Property Damage		
Alabama	5 yrs.-death	1-21 yrs				Impeachment	
Arkansas *							
California					(2)		
Connecticut				(2)	(2)		
Florida							Governor
Georgia	1 yr.-death						Court
Idaho							Court
Illinois			30 days-5 yrs (1)	$5000	$5000	Governor	Sheriff
Indiana	life-death	2-21 yrs				Conviction	Court
Kansas	5 yrs-life	5 yrs-life		(2)	(2)	Coroner	Sheriff
Kentucky	life-death	life-death	1-15 yrs		(2)(3)	Governor	Court
Louisiana							Court
Maine					(4)		Court
Maryland					(2)(3)		
Massachusetts					(4)		
Michigan							Court
Minnesota				$7500		Governor	
Mississippi							Court
Missouri					(2)		Sheriff
Montana					(2)		Court
Nebraska				$7500			
Nevada							Governor
New Hampshire					(2)		Court
New Jersey			30 days-5 yrs (1)	$5000		Governor	Court
New Mexico							Court
New York					(2)		
North Carolina	2-15 yrs.(1)			(2)			
Ohio				$5000			
Pennsylvania	death	death	death	$10,000			

Rhode Island				(4)			Court
South Carolina				$2000(5)		Conviction	
Tennessee						Conviction (6)	Sheriff
Vermont							Governor
Virginia	death	death	1 yr-death				
West Virginia	death	death	30 days-5 yrs (1)	$5000			
Wisconsin				(2)			

(1) Also a fine
(2) Amount of damage done
(3) If preventable
(4) Three-fourts of damage done
(5) Minimum liability
(6) Applies only to sheriff

* Special terms of court for inflamatory offenses (Arkansas)

APPENDIX "C"

Suggested Amendment of the Kidnapping Statute to Cover Lynching in Interstate Commerce.

Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, and whoever shall knowingly transport or cause to be transported, or aid or abet in transporting in interstate or foreign commerce, any person or persons for the purpose of lynching, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: Provided, That the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.