Early Draft - file

Alabama v. Gardner - draft (10-31-67)

OPINIONS BELOW

The order ~~and findings~~ of the district court, together with the findings of fact and conclusions of law, and the opinion thereon, ~~is not~~ are unreported, but appears ~~at page ___ of the record~~ and as Appendix A to the petition for a writ of certiorari. The opinion of the court of appeals is not yet reported, but appears ~~at page ___ of the record~~ and as Appendix C to the petition.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1967, and ~~On September 25, 1967, the court of appeals stayed its mandate for 30 days or until final disposition of the cases by the Supreme Court.~~ The petition for a writ of certiorari was filed on October 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

~~1. Whether the court of appeals erred in~~

I. Whether the court of appeals for the Fifth Circuit was correct in sustaining the validity of the order of the Secretary of Health, Education, and Welfare terminating the payment to Alabama of federal funds for the state's welfare programs.

II. Whether the court of appeals was correct in basing its jurisdiction on the state'e petition for direct review.

STATEMENT

These consolidated cases essentially involve the validity of a regulation of the Department of Health, Education and Welfare (HEW), which requires the Alabama Department of Pensions and Security (the Alabama Department), to assume the responsibility of eliminating racial discrimination in the operation of the State welfare program as a condition of continuing to receive federal financial assistance.

1. Administrative Proceedings

The regulation in issue, was promulgated by the Department of Health, Education and Welfare under Title VI of the 1964 Civil Rights Act and became effective on December 3, 1964, after it was approved by the President.

1/ 42 U.S.C. §2000d-1.

2/ The affected programs (and their statutory bases) are the following: Old Age Assistance, Title I of the Social Security Act, 42 U.S.C. §§301-306; Aid to Needy Families, Title IV, 42 U.S.C. §§601-609; Child Welfare Services, Title V, part 3, 42 U.S.C. §§721-728; Aid to the Blind, Title X, 42 U.S.C. §§1201-1206; and Aid to the Permanently and Totally Disabled, Title XIV, 42 U.S.C. §§1351-1355.

The regulation contains a general prohibition against discrimination, on the ground of race, color or national origin, in programs of federal assistance administered by HEW. Under section 80.3 of the regulation, recipients of federal financial aid are prohibited from engaging[9] "directly or through contractual or other arrangements" in certain specific discriminatory actions and in the use of methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Section 80.4(b) requires that every application by a state agency to carry out a program involving continuing federal financial assistance covered by the regulation contain:

> . . . a statement that the program is [illegible]. . . conducted in compliance with all requirements imposed by. . . [the regulation], or a statement of the extent to which it is not, at the time the statement is made, so conducted, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such

could not be obtained by voluntary means. Pursuant to §602 of the 1964 Civil Rights Act, Dr. Winston offered the Alabama Department an opportunity for a hearing with respect to the question of its compliance with the regulation ( ).

On August 20, 1965, Ruben K. King, Commissioner of the Alabama Department, sent to Dr. Winston a letter which he described as a "statement of . . . compliance with Title VI. . . ." Commissioner King's letter stated that the Alabama Department was in full conformity with the 1964 Act regarding determination of eligibility for aid and the amount of aid. His letter indicated that in some local offices segregated facilities existed and that various institutions, organizations, and contractors from which the Alabama Department obtained services followed a policy of segregation. However, Commissioner King expressed the basic view that his Department had no authority to control the practices of physicians or of the hospitals, nursing homes, and other institutions ( ).

On August 27, 1965, HEW replied to Commissioner King's letter and informed him that the statement of compliance which he had submitted was not adequate ( ). It was pointed out, for example, that the statement did not indicate methods which would be used by the Alabama Department to correct existing discrimination.

An evidentiary hearing to determine Alabama's compliance with the regulation was held on October 21, 1965, before Hearing Examiner Robert L. Irwin ( ). Commissioner King testified on behalf of the Alabama Department ( ). On April 5, 1966, the hearing examiner issued a decision recommending that the Commissioner of Welfare terminate federal financial assistance, under Titles I, IV, V (part 3), X and XIV of the Social Security Act, to the State of Alabama ( ). This decision, subject to certain modifications, was adopted by Commissioner Winston on November 16, 1966 ( ). On January 12, 1967, Secretary John W. Gardner approved the Commissioner's decision and ordered the termination

of aid to the State of Alabama.[4] Secretary Gardner found noncompliance on the part of the Alabama Department in the following respects: failure to make an adequate commitment to assure nondiscriminatory operation of its federally aided welfare programs even in those parts which involved direct payments from the Alabama Department to beneficiaries; refusal to accept any responsibility for assuring that third parties to whom it provides services or whom it compensates for care provided to beneficiaries provide such care without racial discrimination; failure to provide an adequate statement of the extent to which racial discrimination existed in connection with federally aided welfare programs; and failure to propose methods of administering welfare programs in a way which gave reasonable assurance of nondiscriminatory operation ( ).

II. Judicial Proceedings.

On January 13, 1967, the Alabama Department brought an action in the United States District Court for the Northern District of Alabama challenging the validity of Secretary Gardner's order and the underlying

regulation. The complaint was based on §10 of the Administrative Procedure Act, 5 U.S.C. §1009, and on 28 U.S.C. §1331. The Secretary filed a motion to dismiss for lack of jurisdiction.[1] However, on February 3, 1967, the district court granted a preliminary injunction against enforcement of the Secretary's order. Secretary Gardner filed a timely notice of appeal ( ).

On February 18, 1967, the State of Alabama filed in the United States Court of Appeals for the Fifth Circuit a petition for direct review of the Secretary's order. This action was based upon 42 U.S.C. §1316 and §603 of the 1964 Civil Rights Act and pertained to four of the five welfare programs (i.e., all except child welfare services, Title V, part 3). Alabama contended that jurisdiction for review as to all of the programs was properly in the district court, but, in the alternative, that if the court of appeals had sole jurisdiction over the four programs such review was sought.

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[1] Alabama sought to amend its complaint by adding as plaintiffs four individuals alleged to be welfare recipients. Over the objection of the United States, the district court allowed the filing of this amendment to the complaint (R.).

The court of appeals, on March 14, 1967, granted Secretary Gardner's motion to consolidate the appeal and the petition for review.

On August 29, 1967, the court of appeals rendered a decision upholding the validity of the HEW regulation and the decision of the Secretary Gardner. The court held that it had exclusive jurisdiction regarding review as to each of the five programs.

On September 25, 1967, the court of appeals stayed its mandate for 30 days or until final disposition of the cases by the Supreme Court.[1]

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[1] [It might be appropriate at this point to discuss the fact that negotiations are being conducted regarding an assurance which would be filed in the event certiorari is denied.]

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN UPHOLDING THE VALIDITY OF THE HEW REGULATION AND THE ORDER TERMINATING FINANCIAL AID.

The basic issue presented is the validity of Secretary Gardner's order regarding termination of payments to Alabama. We submit that the court of appeals was correct in concluding that the Secretary's order and the regulation upon which it was based were valid.

Secretary Gardner found that the State of Alabama had failed to satisfy the requirement, imposed by §80.4(b) of the HEW regulation, that it furnish an adequate assurance of compliance with the regulation. As to the general validity of this requirement, the court of appeals stated the following (R.).

> * * * We find this procedure of submitting an assurance form to be particularly appropriate because it conforms to the basic structure of the welfare statute and the regulations initially establishing the assistance programs.

Certainly, adoption of the assurance technique was a reasonable exercise of the authority granted to the

Department of Health, Education and Welfare by §602 of the 1964 Civil Rights Act.[/] Just as the Social Security Act requires the state to submit a suitable plan for operation of the welfare programs, so HEW is justified, under Title VI, in insisting that the state furnish an assurance which identifies the areas where racial discrimination is practiced in its programs and in the facilities used in these programs, which commits it to use its best efforts to eliminate that racial discrimination, and which describes how it proposes to go about that task.

[/] Each of the federal departments which adopted regulations implementing Title VI included a requirement that an assurance be given as a condition for the grant or continuation of federal aid. See, e.g., 32 C.F.R. §300.6 (Department of Defense); 7 C.F.R. §15.4 (Department of Agriculture).

During the congressional debate on Title VI, it was recognized that the assurance method would be an appropriate means of administration. See, e.g., 110 Cong. Rec. 7059 (April 7, 1964) (remarks of Senator Pastore).

The primary objection which Alabama has raised pertains to the requirement that the assurance cover not only state instrumentalities, but also "third parties" who provide services in connection with the welfare programs. Section 80.3 of the regulation prohibits recipients (here, the state) from discriminating "directly or through contractual or other arrangements."[1/]

1/ In January 1965, HEW sent to each state agency which administered an approved public assistance plan a handbook which outlined the agency's responsibilities under Title VI and included a sample assurance form, Form CB-FS-5022 (R.). Contained in this sample form was the following: "The state agency will take such steps as necessary to assure that any other agency, institution or organization participating in the program, through contractual or other arrangements, will comply with the Act and Regulation."

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Section 80.5(a) states, by way of illustration, that the prohibition against discrimination extends to "services purchased. . . [by the state] from hospitals, nursing homes, schools, and similar institutions. . . and to the facilities in which such services are provided. . . ."

Alabama has refused to submit an assurance that would apply to doctors, hospitals, nursing homes, and other institutions which play a part in the welfare programs. The basis for this refusal was the contention that the state had no authority to control such institutions.

The court of appeals sustained the third-party provisions, holding that their requirement was "that Alabama assume the responsibility and make a good faith effort toward eliminating racial discrimination in its state-wide federally assisted welfare program" (R.).

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As noted by the court of appeals (R.), the form included in the handbook is merely a sample; that is, HEW does not insist that it be followed exactly.

Clearly, there is no merit in the view that Alabama can disclaim all responsibility for the actions of the private individuals and agencies which participate in the welfare programs.

It is important to bear in mind the fact that Alabama is challenging the regulation itself, not application of the third-party requirement to particular situations. Thus, there is no occasion in this litigation to determine whether a particular physician or a particular institution falls within the scope of the HEW regulation.

Moreover, the question here is not whether the "third parties" can be regarded as agents of the state for purposes of the Fourteenth Amendment. [1] The issue is whether Title VI authorizes a regulation which prohibits not only discrimination by the state directly

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[1] Even though the question here is one of statutory (rather than constitutional) obligation, certain decisions construing the Fourteenth Amendment are relevant. The following are among the decisions which indicate that a state's constitutional duties can apply when state-related functions

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but also discrimination "through contractual or other arrangements." The purpose of Title VI would surely be defeated if a state could avoid the requirement of nondiscrimination simply by delegating to private agencies functions connected with the welfare programs.[1]

A relevant decision in this regard is Boynton v. Virginia, 364 U.S. 454, where the Court held that §216(d) of Part II of the Interstate Commerce Act, 49 U.S.C. §316(d), which made it unlawful for a "common carrier by motor vehicle. . . to subject any particular person. . . to any unjust discrimination. . .," was

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are performed by private agencies: Burton v. Wilmington Parking Authority, 365 U.S. 715; Evans v. Newton, 382 U.S. 296; Derrington v. Plummer, 240 F.2d 922 (C.A. 5); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A. 4), cert. denied, 376 U.S. 938. The same princple should be applicable to the responsibilities which Title VI of the 1964 Civil Rights Act places upon the states.

applicable to a restaurant located in a bus terminal.[1] Thus, the carrier's statutory duty was extended to a facility which furnished services to the passengers

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[1] Following the decision in Boyton v. Virginia, the Interstate Commerce Commission, entered an order in a proceeding entitled Discrimination in Operation of Interstate Motor Carriers of Passengers, Dkt. No. MC-C335 (Sept. 22, 1961), which provided in part as follows:

> 180a(4) No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, or follow any practice which includes the availability of, any terminal facilities which are so operated, arranged, or maintained as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed, or national origin.

The I.C.C. order was held to be valid in Georgia v. United States, 201 F. Supp. 813 (N.D. Ga.), aff'd per curiam, 371 U.S. 9.

of the carrier. The reasoning in Boynton helps to indicate the validity of the prohibition, in the HEW regulation, against discrimination on the part of those who, as the result of "contractual or other arrangements" with the state, provide services in connection with the welfare programs. [1]

[1] Although the following cases arose in contexts quite different from that of the present cases, they lend support to the general proposition that statutory obligations cannot be avoided by permitting "third parties" to perform the functions in question: Sinkler v. Missouri Pacific RR Co., 356 U.S. 326 (FELA); Carney v. Pittsburgh & Lake Erie RR Co., 316 F.2d 277 (C.A. 3), cert. denied, 375 U.S. 814 (FELA); Libbey-Owens Ford Glass Co., v. FTC, 352 F.2d 415 (C.A. 6).

It should be noted that part II of Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), which deals with nondiscrimination in employment, applies to both "Government contracts" and the subcontracts and purchase orders of the contract holders. In Farmer v. Philadelphia Electric Co., 329 F.2d 3, 7 (C.A. 3), the court stated the general view that Executive Order No. 10925, 26 Fed. Reg. 1977 (1961), which was the same in substance as Part II of No. 11246, had the force and effect of law. This dictum was followed by the Fifth Circuit in Farkas v. Texas Instrument, Inc., 375 F.2d 629.

Petitioner makes a number of other assertions regarding the HEW regulation and the termination order, but we submit that none of these matters calls for further review.

The state contends that one defect of Secretary Gardner's termination order is that it applies to parts of the welfare programs involving payments which go directly from the state to beneficiaries. In his January 12, 1967 decision, Secretary Gardner pointed out that, although Alabama could have offered to comply regarding the parts of the programs which did not involve third-party services, the state had failed to do so. (R. .) Moreover, Secretary Gardner specifically invited the state to submit a satisfactory compliance statement covering at least the direct-payment porition of the programs (R.), and even urged Alabama to do so before the effective date of the termination order (R.). The state's failure to come forward with a satisfactory assurance meant, of necessity, that the Secretary's order continued to encompass both the direct and the third-party aspects of the welfare programs.

The court of appeals was correct in concluding that there was no merit in Alabama's contention that the HEW regulation was inconsistent with the objectives of the Social Security Act.[1] Title VI of the 1964 Civil Rights Act imposes the requirement of nondiscrimination in federally aided programs. As the court of appeals determined, the regulation in question represented a proper means of implementing Title VI. The court found, in particular, that the assurance requirement was consistent with the framework of the Social Security Act.

Throughout the course of their dealings with the Alabama Department, HEW personnel sought to achieve voluntary compliance. Alabama's continuing refusal to submit an acceptable assurance made necessary use, as a last resort, of the sanction of aid termination.[2] As the court of appeals determined, Secretary Gardner's order and the regulation upon which it was based were in accord with the provisions of Title VI of the Civil Rights Act of 1964.

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[1] Section 602 of the 1964 Civil Rights Act, 42 U.S.C. §2000d-1, states that agency regulation issued under Title VI must be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

[2] Section 80.8(b) of the HEW regulation provides that in the event of failure or refusal to furnish a required assurance, financial assistance can be refused.

II. THE COURT OF APPEALS WAS CORRECT IN BASING ITS JURISDICTION UPON THE PETITION FOR DIRECT REVIEW.

We believe that the court of appeals acted properly in basing its jurisdiction upon the petition for direct review, rather than on the appeal from the decision of the district court. Section 603 of the 1964 Civil Rights Act, 42 U.S.C. §2000d-2, provides, in part, that: "Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." As to four of the welfare programs involved in this litigation, a provision of the Social Security Act, 42 U.S.C. §1316, grants to the courts of appeals jurisdiction to review administrative orders terminating, on the ground of noncompliance with the state plan, the payment of federal funds. Thus, in view of the latter provision and §603, the court of appeals was the correct forum for review of Secretary Gardner's order as it affected the four programs expressly covered by 42 U.S.C. §1316. [1]

[1] (see next page.)

Moreover, the court of appeals concluded that §603, in conjunction with 42 U.S.C. §1316, gave it jurisdiction with respect to the fifth program, Title V, part 3.

Considering the circumstances of this case, the court's conclusion was proper. As the court of appeals noted, there is a close relationship between the child welfare services (Title V, part 3) and the program, under Title IV of the Social Security Act, for aid to dependent children.**/ A single order dealt with the five welfare programs, and the substantive legal issues raised by the state's request for review were the same for all the programs. The reasoning of the court of appeals is consonant with the provisions of §603 and with the principles of sound judicial administration.

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*/The four programs which are ~~written~~ within the express coverage of 42 U.S.C. §1316 are those established ~~and~~ under Titles I, IV, X, and XIV of the Social Security Act.

**/The Social Security Act expressly requires, in 42 U.S.C. § 723(a)(1)(A), that state plans for child welfare services provide for "coordination between the services provided under such plan and the services provided for dependent children under. . .[Title IV]...." As noted above, the judicial review provisions of 42 U.S.C. § 1316 expressly cover Title IV programs.

The court of appeals was correct in stating that this Court's decisions in Abbott Laboratories, 387 U.S. 136, and Gardner v. Tiolet Goods Ass'n., 387 U.S. 167, are inapplicable to the present cases. The former cases involved the construction of statutory patterns which differed materially from that of Title VI of the 1964 Civil Rights Act. Also, in those cases, the respective plaintiffs were not seeking judicial review of administrative action specifically directed at them, but sought to challenge certain regulations issued under the Federal Food, Drug, and Cosmetic Act before enforcement of those regulations.

Finally, there is no merit in the state's contention that the court of appeals erred in declining to determine ~~xhx~~ the standing of the four individuals whom the state sought to join as plaintiffs in the district court action.—/

__/ Regarding the status of the four individuals, the court of appeals relied on its decision that the district court was without jurisdiction. It should be noted that, while the district court granted leave to the state to file its amendment providing for the addition of the individual plaintiffs, the district court did not decide the questions of standing and joinder. See R. _____. This was acknowledged by Alabama in its supplemental memorandum in the court of appeals (p. 16 of the supplemental memorandum).

We submit, for the reasons outlined above, that the court of appeals resolved the jurisdictional matter properly. However, even if it is assumed, for the sake of argument, that Alabama's theory regarding jurisdiction is correct, the actual outcome of the litigation is not affected. The decision of the district court to issue a preliminary injunction was before the court of appeals by virtue of Secretary Gardner's appeal. Therefore, without regard to the state's petition for direct review, the appeal from the district court provided a basis for determination by the court of appeals of the validity of the HEW regulation and the termination order.[/]

Under these circumstances, there is clearly no need for this court to review the question of the jurisdictional basis for the decision of the court of appeals.

[/] One issue presented on review of the preliminary injunction was whether there was a significant likelihood that the state would prevail on the merits. See, e.g., Wooten v. Ohler, 303 F.2d 759, 762 (C.A. 5).

CONCLUSION

None of the questions raised by the petition requires review by this Court. Accordingly, the writ of certiorari should be denied.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §2000d to d-4, Nondiscrimination in Federally Assisted Programs.

[Entire title will be inserted in final draft.]

2. Judicial review provision of Social Security Act, 79 Stat. 419 (1965), 42 U.S.C. §1316 (1965 Supp.).

[In final draft, insert this section.]

3. HEW Regulation on Nondiscrimination in federally assisted programs, 45 C.F.R. §§80.1-80.13 (Jan. 1, 1967, rev.).

[In final draft, insert §§80.1, 80.3(a), (b), (e), 80.4(b), 80.5(a), 80.8(b).]