Orig file

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24468

JOHN W. GARDNER, AS SECRETARY OF THE U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES, APPELLANT

v.

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND SECURITY OF THE STATE OF ALABAMA, APPELLEE

RESPONSE OF THE STATE OF ALABAMA TO THE MOTION FOR LEAVE TO PROCEED ON THE ORIGINAL RECORD

The appellee, the State of Alabama as above described (hereinafter referred to as the State) makes response to the motion of appellant for leave to proceed on the original record (which presumably includes by reference the motion for expedited consideration), as follows:

There is filed contemporaneously herewith the petition of the State of Alabama which, in the most capsulated form, invokes the provisions of Title 42, Section 1316, U.S.C.A., for review by this Court, against the contingency and in the event this Court should decide that the District Court does not have jurisdiction to review the action taken by the appellant for the cutting off of funds as to all of Alabama's welfare program or to entertain the attack made in the District Court upon that and other actions taken by the appellant in connection with the cutting off of funds on all of such programs. In view of the bringing of the District Court case into this Court by the appeal taken, the whole matter is now before this Court by reason

of the filing of the petition just referred to, this should enable this Court to reach a decision in the interest of justice unobstructed by technical considerations.

The State has no objection to a reasonably expedited hearing, upon the original record without printing. However, appellee submits that a sufficient number of unprinted copies should be furnished the Court, in order to facilitate consideration and decision, of the transcript of the proceedings on the administrative hearing in Washington, and of the affidavits introduced as exhibits on the hearing in the District Court, along with copies of the transcript of the proceedings. Attention is also called to the fact that the Alabama welfare program plans on file in the Department of Health, Education and Welfare in Washington were taken into consideration by the Hearing Examiner, but are not as yet a part of the record on this appeal. It has been agreed by the attorneys on both sides that this can and will be furnished, as well as possibly the transcript of the oral arguments made before the District Court (not yet filed with the Clerk of this Court), and that these matters can and will be handled by cooperation among the attorneys.

The cut off date fixed in the Secretary's directive of January 12, 1967, is February 28, 1967, as of midnight. However, the carrying into effect of this deadline date has been enjoined and the necessary postponement by the injunction granted in the District Court, following the refusal by the Secretary to postpone the effective date of action himself, pending judicial review, (as shown by the record on appeal) a step which he was authorized to take under Section 705, Title 5, U.S.C.A.

Therefore, any hearing before this Court will necessarily occur after February 28, 1967, and it therefore appears that there is now no necessity for an "emergency" decision, as may have been logically conceived to have been the case a little earlier in the proceeding. This statement is not intended to mean that appellee desires any unnecessary delay. The opposite is true. The matter should not be unduly prolonged, but it should not be resolved on precipitate consideration. It should be resolved only after full exploration of the issues as to both the facts and the law, a course the opposite of which we do not for one moment envision that this Court desires to take or will take. There should be adequate time for argument, both orally and by brief.

In the light of the motions made, and the implications that might be drawn from the references in the motions to the fact that it has been "almost two years" since HEW (the Federal Department abbreviated) commenced negotiations with the Alabama Department of Pensions and Security to obtain the assurance demanded, and lest such references be considered by this Court as urging a resolution at a critically early time, we deem it appropriate to point out that according to the record what negotiations there were, commenced about May, 1965, and were concluded before the hearing in Washington on October 21, 1965. There were no negotiations thereafter as far as any knowledge of the writer of this motion is concerned. Although the hearing lasted only one day, except for briefs, the Hearing Examiner did not reach a decision until April 5, 1966, over five months later. Exceptions were duly filed by the State Department which were heard by the Commissioner of Welfare on June 16, 1966, only

upon an oral argument in Washington on that day and not upon the taking of any further evidence. A period of exactly five months passed before the Commissioner, Honorable Ellen Winston, reached a decision on November 16, 1966, which, incidently, was only a few days after the holding of the general election in Alabama. All of this is shown by the record. The Secretary has expressed himself as deploring the necessity of cutting off the welfare funds at all, so we take it that the question of either spending or saving money depending upon the time of the determination of the issues, is not a factor for consideration whatsoever. Many statements that are in the Congressional Record, made by Senator Pastore and Senator Ribicoff, both of whom were charged with the responsibility as Floor Leaders for Title VI of presenting the matter to the Senate, which time does not permit us here to quote, but which will be referred to later upon the argument, emphasize that the purpose of Title VI was not punitive and was not to cut off funds, but to do so only as a last resort.

Also time does not permit a substantial argument in this response on the merits of the case, and for that reason we deplore the fact that the Department of Justice has seen fit to present such an argument on the motion for expedition.

We think any intimation that this Court should summarily or without the expenditure of much time or thought dispose of this case because there is really nothing to it should have been studiously avoided on this motion (by this we intend no criticism as far as the motives of the esteemed attorneys on the other side are concerned); but because of the comments made, including a statement that there can be no "doubt" that the

regulations and the actions sought to be taken by the Secretary are valid, we ask leave to make brief references to the Congressional Record involving the legislative history of Title VI, which relate only to a principal question, and not by any means to all the principal questions, that is, whether the action of the Secretary directing the cutting off of funds, as dintinguished from 'bther means authorized by law" (Section 602, Title VI, Civil Rights Act), should have been employed at all. The first quotation is from Senator Ribicoff:

> "The remedies provided by section 602 are withholding of assistance and any other means authorized by law. In general, the consistent-with-the-objectives requirement would make withholding of funds a last resort, to be used only when other means authorized by law were unavailable or ineffective.
>
> "To make that clear: The witholding of funds would be the last step to be taken only after the administrator or the agency had used every other possible means to persuade or to influence the person or the agency offending to stop the discrimination.
>
> "Seventh. Looking first to the 'other means authorized by law,' the agency could, for example, ask the Attorney General to initiate a lawsuit under Title IV, if the recipient were a school district or public college; or the agency could use any of the remedies avilable to it by virtue of its own 'rule, regulation, or order of general applicability.' For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient. Then violation of such a requirement would normally give the agency the right to bring a lawsuit to enforce its own contract; or, in the absence of a technical contract, the agency would have authority to sue to enforce compliance with its own regulations. All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance." [Underscoring supplied]
> (110 Con. Rec. 6846-6847, daily ed., April 7, 1964--Note: We do not have the final page number, but will attempt to supply this at the proper time.)

We next quote from Senator Saltonstall of Massachusetts:

> "Furthermore, it is important to note that section 602 states that any rules or regulations established to effectuate the provisions of this title 'shall be consistent with achievement of the objectives of the statute authorizing the financial assistance.' Thus, where Federal funds are used to feed needy children through a program which is operated on a segregated basis, this section does not intend that the children be deprived of the food because the administrators of the program are violating the law. However, we cannot justify the expenditure of Federal funds collected from all citizens on programs which are being administered in a way which clearly deprives some of them of the equal protection of the laws."
> [Underscoring supplied]
> (110 Con. Rec.--Senate, Number 11, page 12263)

Senator Saltonstall was, as we understand it, the Chairman of the Bi-Racial Senate Conference whipping the final version of the substitute into effect, as finally passed, and made the above statement shortly before the passage. This statement, we submit, is entitled to great weight.

It appears to us that the above quotations should suffice to create at least a glimmer of doubt in the minds of even the most skeptical and the most partisan, without regard to the other substantial issues involved.

We reiterate: We do not oppose a reasonably expedited hearing, and, in fact, we state that we will cooperate to that end. We submit that because of the volumes of words that were spoken and which have a bearing upon the legislative history of the Act, and for other reasons, all relating to the importance of the issues to be decided, necessarily time should be allowed for the submission of comprehensive briefs and argument.

Respectfully submitted,

STATE OF ALABAMA

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