

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

PLEADINGS

1. Appellant's Motion for Expedited Consideration
2. Response of the State of Alabama to the Motion
for Leave to Proceed on the Original Record
3. Brief for the State of Alabama, Appellee-Petitioner
4. Appendix to Brief of Appellee-Petitioner
5. Second Appendix to Brief of Appellee-Petitioner
6. Brief for John W. Gardner, Appellant-Respondent
7. Appendix to the Brief of Appellant-Respondent,
Volume I
8. Appendix to the Brief of Appellant-Respondent,
Volume II
9. Supplemental Memorandum for the State of Alabama,
Appellee-Petitioner
10. Memorandum for John W. Gardner, In Regards to
the Supplemental Memorandum of the State of
Alabama

our file

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24468

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DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
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MOTION FOR EXPEDITED CONSIDERATION

Appellant, John W. Gardner, Secretary of the United States Department of Health, Education and Welfare, moves this Court for expedited consideration of his appeal from an order of the United States District Court for the Northern District of Alabama entered on February 3, 1967. This motion is based upon the following considerations:

The record shows that almost two years ago officials of the Department of Health, Education and Welfare commenced negotiations with the Alabama Department of Pensions and Security (hereinafter the Alabama Department) to obtain from that agency an assurance required by the Regulation promulgated by HEW and approved by the President pursuant to §502 of Title VII of the Civil Rights Act of 1964.

That assurance requires the state agency to identify the areas where there is noncompliance with the anti-discriminatory requirements of the Regulation, to describe the methods for eliminating that discrimination, and to commit itself to implementing such measures. These negotiations continued through the Spring of 1965, and when it was determined that voluntary compliance with this Regulation could not be obtained, administrative proceedings were commenced against the Alabama Department on August 17, 1965.

A full hearing was held on October 21, 1965, before a hearing examiner, and in April 1966 the hearing examiner filed his recommended decision, finding the State agency in noncompliance and recommending termination of federal financial assistance to the agency under Title VI of the Civil Rights Act of 1964. Exceptions were taken to that decision, but on November 16, 1966, the Commissioner of Welfare of the United States Department of Health, Education and Welfare approved the hearing examiner's decision. The Secretary reviewed that order and on January 12, 1967, he issued a final order terminating federal financial assistance to the Alabama Department, which order was not to become effective until midnight, February 23, 1967. Pursuant to the requirements of section 602 of Title VI, the Secretary informed the appropriate congressional committees of his action on January 12th,

and on January 24, he refused the request of the Alabama Department to postpone the effectiveness of the date of his order any further.

On January 13, one day after the Secretary issued his order, the State of Alabama commenced this suit in the Northern District of Alabama, seeking judicial review of the Secretary's order. On January 26, the Secretary filed a motion to dismiss for lack of jurisdiction and, in the alternative a motion to transfer the case to another judicial district because of improper venue. The State moved for a preliminary injunction on the same day. Recognizing the urgency of the case, these motions were set down for a hearing on February 1, and on that day a full hearing was had before the District Judge. At the conclusion of all the arguments, the District Judge granted, from the bench, the State's motion for preliminary injunction. He stated (Transcript pp. 31-33):

As all of you know, I have been scheduled for over two months to hear a docket in Tampa beginning Monday morning, it is a criminal docket and could not be put off. It will take me from two to two and a half weeks to try that docket. Therefore, at this time I am going to try to decide this matter as best I can.

The motions filed by the Secretary raises a serious and intricate problem, as to jurisdiction and venue. I had hoped, due to the shortness of time and the urgency of this case, to be in position to decide these two motions from the bench. It now appears that in fairness to all of the parties and to myself, this cannot be done. Therefore, I am taking these two motions under advisement and will rule upon them as soon as I can reasonably do so upon my return from Florida.

This being a matter of such urgency and vital importance to the people who depend upon welfare funds for their very existence, and the cutoff order becoming effective February 20th, just a few short weeks from now, and the Court being of the opinion that in the event the cutoff of funds to the Alabama Department of Pensions and Security does become effective, irreparable harm and injury will be done; and the Court being of the further opinion that this matter will in all probability ultimately have to be resolved by the Court of Appeals and would be considered by that Court as an emergency matter and reached as quickly as possible, plaintiff's motion for preliminary injunction will be granted and issued at this time.

This action on the part of the Court will maintain the status quo and allow the Courts reasonable time in which to carefully consider and decide the matters in dispute.

Mr. Barnes, if you will prepare the preliminary injunction I will sign it before I leave Birmingham.

MR. BARNES: Do what? Sign it before when?

THE COURT: I will sign it before I leave Birmingham as soon as you can get it prepared.

MR. BARNES: Yes, sir.

THE COURT: And it is my hope and I would like for the record to show that this matter will resolve itself without the Courts having to consider it further; and if not, if it goes to the Court of Appeals I will be hopeful that they could consider the entire matter at that time and I feel like they would.

Thank you, gentlemen.

We filed a notice of appeal on February 10, 1967, on behalf of the Secretary and are now moving for expedited consideration of this appeal.

At the heart of this controversy is the validity of the HEW regulation: Can HEW lawfully require, as a condition of continued financial assistance, the Alabama Department to submit an assurance - identifying the areas of racial discrimination in its programs and in the institutions and facilities it uses in these programs, and describing the methods of administration it will use to eliminate that discrimination? More than two years have elapsed since the promulgation of that Regulation, and the Alabama Department stands alone among all the States in refusing to comply with it. The public importance in promptly resolving that question is clear, both from the viewpoint of providing security to the welfare recipients in Alabama and of taking the first step toward effectuating the national policies embodied in Title VI of the Civil Rights Act of 1964. This has been recognized from the outset by the District Court and the parties. Attorney for

the State has stated in open Court that the Alabama Department will submit the required assurance if it is judicially determined that the Regulation is valid.

The need for giving this appeal expeditious consideration is compounded by the fact that there is some doubt as to whether this substantive question has been put before the courts in a way susceptible of a proper judicial determination. This doubt stems from the fact that judicial review of the Secretary's order of January 12 was sought in a district court rather than the Court of Appeals. We contend that the exclusive forum for judicial review of the Secretary's order is the Court of Appeals. If we are correct, and the District Court is without jurisdiction, this Court might be unwilling to reach the merits of this substantive question until the Alabama Department formally instituted another review proceeding this time in this Court of Appeals. This could entail further delay. Whatever doubt there may exist as to the jurisdiction of the District Court should be resolved as quickly as possible, if for no other reason, than to eliminate all further barriers for a prompt judicial determination of the substantive question. The jurisdictional question is before the Court on this appeal because the District Court asserted jurisdiction, and thus impliedly denied our motion to dismiss,

by issuing a preliminary injunction that is not limited to the determination of the jurisdictional question.

It was the clear intention of the District Judge to have the Court of Appeals to decide "the entire matter" and to do so on an "emergency" basis, "as quickly as possible." We also believe that this appeal should be heard on an expedited basis, and urge this Court to grant our motion.

We are attaching to this motion a copy of the pertinent portions of the transcript of the February 1, 1967 hearing; a copy of the District Judge's order of February 3, 1967; and solely for the purposes of assisting the Court in ruling on this motion, a preliminary statement of the legal issues involved in this appeal. We are also concurrently filing a motion for leave to proceed on the original record.

Respectfully submitted,

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