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David L. Norman, Chief
Appeals and Research Section

August 19, 1967

John Doar
Assistant Attorney General
Civil Rights Division

I am attaching a letter from Mr. Alanson Wilcox about Lee v. Macon County.

Because I think it is important for the Department to understand clearly what we are doing if we don't appeal, I am asking you to give this your most careful and immediate consideration.

I am also sending a copy of this letter to the Attorney General and the Deputy, and I am also alerting Ralph Spritzer about the problem.

There are certain things about the letter that I don't fully understand. For example, the sentence on Page 4 as to Libassi's testimony to the effect that HEW would accept a court order summitted under the Lee Decree and an assurance of compliance as satisfying Title VI requirements. I gathered he is referring to commitment rather than performance.

I also think that Slim takes too narrow a view of the commitment. I think the commitment is to desegregate the schools; and if this means more than literal following of the various specifics of the standard decree, then the school board cannot defend against action by HEW on the grounds that it has met its commitment.

I also note with interest the theme of the letter that HEW can audit court order districts for performance using, I suppose, the court order as the standard, rather than the guidelines.

I have always thought that HEW should do this and that it is necessary to achieving desegregation. If this is sound, then the Lee decision does impair that ~~opposition.~~ opportunity This is fully discussed on Page 9.

cc: Records
Chrono
Doar
Fiss
Rose

Finally, because I think the decision is so wrong from the standpoint of its construction of the regulations, from the standpoint of the power of a three-judge court, and from the standpoint of synchronizing judicial and administrative remedies, I believe the most serious thought should be given to what we should do.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

Send copy to
Fin
Moore
Rose
Speltzer
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Clark

AUG 18 1967

Honorable John Doar
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Doar: Re: Lee v. Macon County Board of Education,
C. A. No. 604-E, Middle District of Alabama

We have reviewed the preliminary injunction entered by the District Court in the above captioned case on July 28, 1967, against Secretary Gardner, and recommend that no appeal be taken. Although we believe that the court erred in enjoining the Secretary, the policy and practical considerations militate against appeal.

1. Time Limit

Notice of appeal to the Supreme Court would have to be filed no later than August 28. Although the three-judge court may have misdenominated its order of July 28, 1967 a "preliminary injunction," for purposes of computing the time for appeal we assume that it is properly denominated and that the 30-day time limit imposed by 28 U.S.C. 2101 (b) expires on August 27, a Sunday. If the order here in question should properly have been issued by a single judge, then the appeal should be to the Court of Appeals and the last day for noticing such an appeal would be September 26, 1967.

2. Prior Proceedings

This action was commenced in the United States District Court for the Middle District of Alabama in 1963 by the parents of Negro children seeking to desegregate the public schools of Macon County. On its own motion the court added the United States as a party and as amicus curiae. After a full hearing, the court, in August 1963,

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(3) order in standard of compliance.

ordered the schools to be desegregated. Lee v. Macon County, 221 F. Supp. 297. Thereafter, on three separate occasions during the 1963-64 school year, the court found it necessary to enjoin State officials from various forms of interference with the peaceful and orderly desegregation of schools in Macon County. The interference ranged from physically obstructing entry of pupils and teachers into desegregated schools to offering financial assistance for students enrolling in private, segregated schools. For a recitation of these events see United States v. Wallace, 222 F. Supp. 485 (September 1963); Lee v. Macon County, order of February 3, 1964, 9 R.R.L.R. 148 et seq.; and United States v. Rea, 231 F. Supp. 772 (February 1964).

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The court on July 13, 1964 entered its findings and conclusions that the defendant State officials had interfered with the court ordered desegregation of the schools in Macon County, that they were maintaining a dual school system based upon race throughout the State, and that the tuition grant statute was unconstitutional. Although the court declined at that time to enter a State-wide desegregation order, it did enjoin the defendant State officials from "interfering with, preventing or obstructing by any means, the elimination of racial discrimination by local school officials in any school district in the State of Alabama." See Lee v. Macon County, 267 F. Supp. 458, 461.

During August, September, and November 1966 additional supplemental complaints were filed attacking the constitutionality of a 1965-passed State tuition grant statute, again asking for a State-wide desegregation order and for an injunction against the use of State funds to support a dual school system.

After extensive discovery, two oral hearings and written briefs, the court on March 22, 1967 entered its order requiring, inter alia, the Alabama State education officials to disestablish all State enforced and encouraged segregation in the public schools and the State Superintendent of Education to notify all school systems, not already under court order, that they would be required to adopt a desegregation plan covering all grades commencing with the 1967-68 school year.

On April 17, 1967 the State Superintendent submitted to the court desegregation plans adopted by local school systems named in the court's decree of March 22, 1967. Among the plans which fully met the standards embodied in the decree was a plan submitted by the Lanett City system. In the ensuing weeks the court in a number of proceedings compelled all of the local systems to adopt plans meeting the court's requirements, and in some cases required specific steps to implement the plan, including the closing of small inadequate Negro schools, equalization of facilities, and the assignment of faculty members on a desegregated basis.

3. Show Cause Order and Hearing of July 22, 1967

On July 14, 1967 the court, without application having been made to it by any party to the suit, entered ex parte orders adding Secretary Gardner and two other HEW officials as parties defendant, temporarily restraining them from terminating financial assistance to the Lanett City system or any other of the 99 school systems named in the order of March 22, 1967, and requiring the added defendants to show cause why the temporary restraining order should not be expanded into a preliminary or permanent injunction. The court recited that the Superintendent of the Lanett City system had orally reported to the court that HEW had terminated Federal financial assistance to the system for the reported reason that "the board did not have enough mixing as a result of their freedom of choice plan." The court noted that Lanett had adopted the court's model plan and had reported to the court affirmative steps taken to implement the plan. Under these circumstances the court said that the action of HEW served "to thwart the implementation of the order of this Court of March 22, 1967." The hearing was held on July 22, 1967. The only evidence was that offered by the Department of Justice on behalf of Secretary Gardner.

The evidence established that on January 25, 1967 a hearing examiner, acting pursuant to Title VI and 45 CFR Part 80, found Lanett in noncompliance with the Act and the Regulation. Lanett was given notice of this decision. Thereafter, following the March 22, 1967 order in Lee v. Macon County, the Department notified Lanett that it could submit a plan based on the Lee decree, together with a description of the steps it intended to take to carry it out for the coming year, and that such submission would be acceptable under the Department's Title VI Regulation. Lanett did submit a desegregation plan based on the Lee decree to the State Superintendent of Education on April 11, 1967.

The Commissioner allowed the Initial Decision of the hearing examiner to become his final decision, and on May 8, 1967, after Lanett had submitted its plan to the State Superintendent, transmitted his final decision to the Secretary. After Lanett was given an opportunity to discuss its compliance and no affirmative response was received, the Secretary transmitted to Congress a final termination order for Lanett on June 14, 1967.

During the 30-day period before the termination order would become effective, Lanett entered into discussion with Department officials with respect to what steps would be necessary in order for Lanett to implement its plan submitted under the Lee decree. No agreement could be reached, and the termination order became effective, after which Lanett complained to the court.

F. Peter Libassi, Special Assistant to Secretary Gardner, testified that the Department would accept a court order submitted under the Lee decree and an assurance of compliance with that court order as satisfying Title VI requirements. He further testified that Federal funds would be terminated only for failure to comply with the court plan, which determination was to be made by the Department applying the standards set out in the court's March 22 model plan.

Although the Government offered to show that Lanett was not in fact complying with the court plan, the court declined the offer on the ground that the only issue in the proceeding was the propriety of the Department's terminating funds based on its own determination, whether right or wrong, of noncompliance with the model plan.

On July 28, 1967, the three-judge district court issued an order which it denominated a "preliminary injunction" prohibiting the Department of Health, Education, and Welfare from terminating Federal financial assistance to any of the school systems named in the court's March 22 order, including Lanett.

4. The Court's Holding and Possible Legal Error

In issuing the injunction the court said:

> The issue squarely presented is whether the Department of Health, Education and Welfare, acting independently and without court approval, has the authority to terminate Federal financial assistance to a school system when such school system is under a final court order, is in compliance with that order, and gives assurance to the Department of Health, Education and Welfare of compliance.

Having answered the question posed in the negative, the court proceeded to issue an injunction against the Department, commenting:

> The action of the Department of Health, Education and Welfare in terminating Federal financial assistance to the City of Lanett school system based upon a determination of "noncompliance" made by the Department of Health, Education and Welfare prior to the entry of the said court order is invalid and in violation of the provisions of 45 C.F.R. 80.4(c). So that there cannot be any misunderstanding, as a general proposition, this Court now holds that there can be no termination of federal financial assistance by the Department of Health, Education and Welfare as to any of the school systems under the order of this Court, where said systems have given assurance of compliance to the Department of Health, Education and Welfare and are in full compliance with the requirements of the said court order, without prior Court approval. To permit the Department of Health, Education and Welfare to terminate funds to school systems under the order of this Court would be an abdication on the part of the Court of its authority to require compliance with a court order. There can be no administrative supervision or review of a judicial decree. There must be judicial approval of the termination of federal financial assistance when a school system is operating under a court order.

The court's holding and its issuance of the injunction against the Department are based on three determinations. First, the court determined that Lanett and the other school systems named in the March 22 decree were "subject to a final order of a court." Second, it determined that by terminating Federal financial assistance to the named school

districts the Secretary was undertaking administrative supervision or review of a judicial decree. Third, it concluded that the Secretary, by doing so, interfered with the decree.

The court's conclusion that Lanett and the other school districts named in the March 22 order are all "subject" to the order is questionable, absent collusion between one of the named school districts and a defendant State official or agency. While it is true that several of these school systems were made parties to the action, absent collusion the others were not immediately subject to contempt proceedings or other judicial sanctions. This raises a serious question as to whether the latter districts were "subject to a final order of a court" within the meaning of the Department's Regulation, 45 CFR 80.4(c)(1), and as to whether the Secretary was required to accept the order as the standard for compliance by those districts with Title VI of the Act. Indeed, the Department of Justice urged to the contrary at the July 22 hearing.

Assuming that all the named school systems can be properly characterized as being "subject to a final order of a court", we believe that the court erred in finding that the Secretary undertook to subject the decree to administrative supervision or review. Section 80.4(c) of 45 CFR establishes two procedures by which school districts continuing to maintain a dual school system based on race may demonstrate their eligibility to receive Federal financial assistance. Under the regulation a school district may either (1) submit a voluntary plan for desegregation and an assurance of compliance with such plan, or (2) a final court order for the desegregation of its school system and an assurance of compliance with the order including any future modifications thereof.

In the case of a school district submitting a voluntary plan for desegregation, the standard for compliance is the "guidelines." In the case of a school district under a court ordered plan of desegregation, the standard for compliance is the court order rather than the "guidelines." In short, the Secretary merely adopts the standards as set out in the court order for determining compliance with Title VI, but he does not "enforce" the order as such. A court cannot terminate Federal financial assistance under the provisions of Title VI; nor can the Secretary punish a school district for contempt for a failure to discharge its responsibilities under the 14th Amendment and thus the March 22 order. The Secretary, therefore, administers and enforces Title VI, as he is required to do by law, and not the court order--as the court in Lee suggests.

Just as the Secretary has a continuing obligation to audit performance under voluntary plans of desegregation submitted under the Regulation he must also audit performance of court ordered plans submitted under the Regulation. This duality of function was both recognized and respected by the 5th Circuit Court of Appeals in United States v. Jefferson County Board of Education, 372 F. 2d 836 (1966). There the court, in large part, adopted the standards set out in the "guidelines" as minimum standards under the 14th Amendment. No one suggested that the court, by doing so, was seeking to enforce Title VI or that it could terminate Federal financial assistance.

Finally, the court's conclusion that the Secretary interfered with the implementation of the court's order is unsupported by precedent. If, by "interference," the court meant that the Department was undermining the court's attempt to make desegregation acceptable to the white people of Alabama it may be correct in its characterization of the Department's enforcement of the requirements under Title VI as an interference. The court's judgment in this respect is not susceptible of objective verification. But if, on the other hand the court means interference with the terms of its decree and the implementation thereof, the court is in error. Possibly the court is drawing an analogy between the facts in the case and the civil rights cases in which the Federal courts have enjoined State officials from interfering with court orders. See Faubus v. United States, 254 F.2d 797 (8th Cir. 1958); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962); United States v. Wallace, 218 F.Supp. 290 (N.D.Ala. 1963); Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960). In one of those cases, Faubus, supra, the court said, at pages 804-805:

> It was proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgment and to prevent them from being thwarted by force or otherwise.

But, unlike the interference with the court's orders by State officials, which earlier in this case and in the cases cited above involved attempts to discourage compliance with affirmative orders of a court, the undisputed evidence here is that the Department, in every way, encouraged compliance with the court's March 22 decree. It has asked school districts to do nothing inconsistent with that decree, and in fact insists that they comply in every way. It is difficult to see how this could in any way be called an "interference." Furthermore, the court had no evidence before it to determine whether Lanett's compliance with the court order had been interfered with. The court found, in the abstract and with no evidentiary basis in fact, that the Department "interfered," not only with implementation of the order in Lanett, but in every school district in Alabama.

5. Discussion

The effect of the court order is to invert the statutorily established procedure for review of administrative determinations under Title VI--at least with respect to school systems that have qualified for financial assistance by submitting a court order pursuant to the provisions of § 80.4(c) of the Regulations. The statute and the Regulations contemplate judicial review only after the administrative action becomes final. This procedure accords with long established principles of administrative law. The court here, however, requires the administrator himself to seek judicial approval prior to giving effect to the administrative sanction. Furthermore, even though the record in the administrative proceeding may have been completed before the administrator seeks court approval, the order in this case contemplates that the judicial review will be de novo and will afford the respondent an opportunity to offer evidence and presumably urge defenses not presented to the administrative tribunal.

For the reasons already stated we believe that the court erred. An argument may be made, however, to sustain the court's order, and we cannot say with certainty that an appellate court would reverse the three-judge district court. In any event, we believe that the policy considerations are of more significance in this case than the bare legal considerations.

The decision whether to appeal this order turns upon two principal factors: first, the practical advantage that can be expected in HEW's Title VI enforcement program in Alabama if a reversal is obtained, and second, the danger, if any, which this decision poses as a precedent in connection with Title VI enforcement outside of Alabama and in the administration of other HEW programs.

I doubt that a successful appeal in this case would materially increase the effectiveness of Title VI enforcement in Alabama. The Lee court has adopted essentially all of the standards embodied in the Commissioner's Guidelines, including requirements for the closing of inadequate schools, the reorganization of the transportation systems, and the desegregation of faculty. It is perhaps too early to say how effective the court will be in enforcing prompt compliance with these standards. It has, however, been acting with dispatch and has within recent weeks taken firm action to require the State Superintendent to implement more effectively the school equalization and transportation provisions. The court has also taken a firm line on faculty desegregation, making it clear that teachers must be assigned against their wishes if this is necessary in order to accomplish faculty desegregation. Resulting assignments in those systems about which we have information are encouraging, and in general exceed the amount of faculty desegregation we have been achieving in comparable areas in other States.

Regardless of whether the injunction against the Secretary remains outstanding, the Lee court is going to determine the standard of compliance under Title VI in Alabama. Whether this determination in particular cases is made before or after an administrative termination of funds is not of primary significance. As long as the court will hear and decide motions relating to individual school systems with as much dispatch as this Department would be able to prosecute administrative proceedings against the same systems, nothing of substance will be lost by the mode of enforcement on which the court has determined. In light of the court's past performance and the fact that it has now deliberately arrogated to itself this burden of review, I believe that the court will be at least as effective in enforcing compliance with its order as the administrative arm would be. The taking of an appeal, on the other hand, would involve the Government in a further dispute with the court that might impair the effectiveness of the Government's enforcement program. It could not only affect the attitude of the members of the court, but might impair local acceptance of HEW enforcement.

The possible influence of the Lee decision as an unfavorable precedent poses a more serious problem. As a precedent it has two principal aspects: first, as a precedent in Title VI enforcement, and second, as a precedent in the general field of administrative law bearing on the relationship between judicial and court enforcement.

The court's holding that the various Alabama school systems are "subject to a final order of a court" within the meaning of §80.4(c) of the Regulations is of no particular significance as a precedent. The Lee case is unique in recent years in seeking to accomplish desegregation of a State school system by orders directed against State rather than local school officials. It is unlikely that this situation will arise again in Title VI enforcement. In any event, the court's holding in this regard is simply a construction of the Secretary's Regulation, and the Regulation can at any time be amended.

The more serious aspect of the Lee case as a precedent involves its holding that the Executive cannot utilize the administrative sanction to enforce a court-determined standard without first seeking approval from the court. The Lee case will be used as a precedent, and I believe will be successfully used, for the principle that there can never be administrative fund termination with respect to a school system desegregating under a court order unless prior court approval is obtained. While this rule might not be a serious impediment to enforcement in Alabama, because of the character of the particular court there involved, it could be a much more serious impediment in other States. To date, however, the Department has not sought administratively to terminate funds to court ordered systems, and the alternative remedy of court enforcement on motion of the Department of Justice is so readily available that I do not consider the Lee precedent in this regard to be overly damaging.

The Lee decision might be used even more broadly as a precedent for the proposition that where alternative judicial and administrative proceedings are available for enforcing the same legal standard, that the administrative sanction cannot be given effect without prior court approval if a court proceeding for enforcement has also been instituted. Indeed, there is presently pending in the United States District Court for the Middle District of Georgia a motion to add the Commissioner as a party defendant to a school desegregation suit filed by the Attorney General under Title IV of the 1964 Civil Rights Act. The defendant school officials urge in support of their motion that the Commissioner ordered the termination of funds just four days before the Attorney General filed his suit. The school board attorneys will undoubtedly rely on the Lee case as supporting their contention that the Commissioner should be a party. In my judgment, however, arguments such as that which I anticipate in the Georgia case can be successfully resisted without appealing the Lee decision.

A review of programs administered by this Department convinces us that the precedent of the Lee case will not impede administrative enforcement of standards that are also subject to court enforcement. You may, however, wish to consider whether the Lee precedent might be troublesome in other areas of the Government.

For the reasons which I have discussed, this Department recommends against the taking of an appeal from the order of July 28, 1967.

Sincerely yours,

Alanson W. Willcox

Alanson W. Willcox
General Counsel

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

AUG 18 1967

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Assistant Attorney General
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4. The Court's Holding and Possible Legal Error

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The court's holding and its issuance of the injunction against the Department are based on three determinations. First, the court determined that Lanett and the other school systems named in the March 22 decree were "subject to a final order of a court." Second, it determined that by terminating Federal financial assistance to the named school

districts the Secretary was undertaking administrative supervision or review of a judicial decree. Third, it concluded that the Secretary, by doing so, interfered with the decree.

The court's conclusion that Lanett and the other school districts named in the March 22 order are all "subject" to the order is questionable, absent collusion between one of the named school districts and a defendant State official or agency. While it is true that several of these school systems were made parties to the action, absent collusion the others were not immediately subject to contempt proceedings or other judicial sanctions. This raises a serious question as to whether the latter districts were "subject to a final order of a court" within the meaning of the Department's Regulation, 45 CFR 80.4(c)(1), and as to whether the Secretary was required to accept the order as the standard for compliance by those districts with Title VI of the Act. Indeed, the Department of Justice urged to the contrary at the July 22 hearing.

Assuming that all the named school systems can be properly characterized as being "subject to a final order of a court", we believe that the court erred in finding that the Secretary undertook to subject the decree to administrative supervision or review. Section 80.4(c) of 45 CFR establishes two procedures by which school districts continuing to maintain a dual school system based on race may demonstrate their eligibility to receive Federal financial assistance. Under the regulation a school district may either (1) submit a voluntary plan for desegregation and an assurance of compliance with such plan, or (2) a final court order for the desegregation of its school system and an assurance of compliance with the order including any future modifications thereof.

In the case of a school district submitting a voluntary plan for desegregation, the standard for compliance is the "guidelines." In the case of a school district under a court ordered plan of desegregation, the standard for compliance is the court order rather than the "guidelines." In short, the Secretary merely adopts the standards as set out in the court order for determining compliance with Title VI, but he does not "enforce" the order as such. A court cannot terminate Federal financial assistance under the provisions of Title VI; nor can the Secretary punish a school district for contempt for a failure to discharge its responsibilities under the 14th Amendment and thus the March 22 order. The Secretary, therefore, administers and enforces Title VI, as he is required to do by law, and not the court order--as the court in Lee suggests.

Just as the Secretary has a continuing obligation to audit performance under voluntary plans of desegregation submitted under the Regulation he must also audit performance of court ordered plans submitted under the Regulation. This duality of function was both recognized and respected by the 5th Circuit Court of Appeals in United States v. Jefferson County Board of Education, 372 F. 2d 836 (1966). There the court, in large part, adopted the standards set out in the "guidelines" as minimum standards under the 14th Amendment. No one suggested that the court, by doing so, was seeking to enforce Title VI or that it could terminate Federal financial assistance.

Finally, the court's conclusion that the Secretary interfered with the implementation of the court's order is unsupported by precedent. If, by "interference," the court meant that the Department was undermining the court's attempt to make desegregation acceptable to the white people of Alabama it may be correct in its characterization of the Department's enforcement of the requirements under Title VI as an interference. The court's judgment in this respect is not susceptible of objective verification. But if, on the other hand the court means interference with the terms of its decree and the implementation thereof, the court is in error. Possibly the court is drawing an analogy between the facts in the case and the civil rights cases in which the Federal courts have enjoined State officials from interfering with court orders. See Faubus v. United States, 254 F.2d 797 (8th Cir. 1958); Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962); United States v. Wallace, 218 F.Supp. 290 (M.D.Ala. 1963); Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960). In one of those cases, Faubus, supra, the court said, at pages 804-805:

> It was proper for the court to do all that reasonably and lawfully could be done to protect and effectuate its orders and judgment and to prevent them from being thwarted by force or otherwise.

But, unlike the interference with the court's orders by State officials, which earlier in this case and in the cases cited above involved attempts to discourage compliance with affirmative orders of a court, the undisputed evidence here is that the Department, in every way, encouraged compliance with the court's March 22 decree. It has asked school districts to do nothing inconsistent with that decree, and in fact insists that they comply in every way. It is difficult to see how this could in any way be called an "interference." Furthermore, the court had no evidence before it to determine whether Lanett's compliance with the court order had been interfered with. The court found, in the abstract and with no evidentiary basis in fact, that the Department "interfered," not only with implementation of the order in Lanett, but in every school district in Alabama.

5. Discussion

The effect of the court order is to invert the statutorily established procedure for review of administrative determinations under Title VI--at least with respect to school systems that have qualified for financial assistance by submitting a court order pursuant to the provisions of § 80.4(c) of the Regulations. The statute and the Regulations contemplate judicial review only after the administrative action becomes final. This procedure accords with long established principles of administrative law. The court here, however, requires the administrator himself to seek judicial approval prior to giving effect to the administrative sanction. Furthermore, even though the record in the administrative proceeding may have been completed before the administrator seeks court approval, the order in this case contemplates that the judicial review will be de novo and will afford the respondent an opportunity to offer evidence and presumably urge defenses not presented to the administrative tribunal.

For the reasons already stated we believe that the court erred. An argument may be made, however, to sustain the court's order, and we cannot say with certainty that an appellate court would reverse the three-judge district court. In any event, we believe that the policy considerations are of more significance in this case than the bare legal considerations.

The decision whether to appeal this order turns upon two principal factors: first, the practical advantage that can be expected in HEW's Title VI enforcement program in Alabama if a reversal is obtained, and second, the danger, if any, which this decision poses as a precedent in connection with Title VI enforcement outside of Alabama and in the administration of other HEW programs.

I doubt that a successful appeal in this case would materially increase the effectiveness of Title VI enforcement in Alabama. The Lee court has adopted essentially all of the standards embodied in the Commissioner's Guidelines, including requirements for the closing of inadequate schools, the reorganization of the transportation systems, and the desegregation of faculty. It is perhaps too early to say how effective the court will be in enforcing prompt compliance with these standards. It has, however, been acting with dispatch and has within recent weeks taken firm action to require the State Superintendent to implement more effectively the school equalization and transportation provisions. The court has also taken a firm line on faculty desegregation, making it clear that teachers must be assigned against their wishes if this is necessary in order to accomplish faculty desegregation. Resulting assignments in those systems about which we have information are encouraging, and in general exceed the amount of faculty desegregation we have been achieving in comparable areas in other States.

Regardless of whether the injunction against the Secretary remains outstanding, the Lee court is going to determine the standard of compliance under Title VI in Alabama. Whether this determination in particular cases is made before or after an administrative termination of funds is not of primary significance. As long as the court will hear and decide motions relating to individual school systems with as much dispatch as this Department would be able to prosecute administrative proceedings against the same systems, nothing of substance will be lost by the mode of enforcement on which the court has determined. In light of the court's past performance and the fact that it has now deliberately arrogated to itself this burden of review, I believe that the court will be at least as effective in enforcing compliance with its order as the administrative arm would be. The taking of an appeal, on the other hand, would involve the Government in a further dispute with the court that might impair the effectiveness of the Government's enforcement program. It could not only affect the attitude of the members of the court, but might impair local acceptance of HEW enforcement.

The possible influence of the Lee decision as an unfavorable precedent poses a more serious problem. As a precedent it has two principal aspects: first, as a precedent in Title VI enforcement, and second, as a precedent in the general field of administrative law bearing on the relationship between judicial and court enforcement.

The court's holding that the various Alabama school systems are "subject to a final order of a court" within the meaning of §80.4(c) of the Regulations is of no particular significance as a precedent. The Lee case is unique in recent years in seeking to accomplish desegregation of a State school system by orders directed against State rather than local school officials. It is unlikely that this situation will arise again in Title VI enforcement. In any event, the court's holding in this regard is simply a construction of the Secretary's Regulation, and the Regulation can at any time be amended.

The more serious aspect of the Lee case as a precedent involves its holding that the Executive cannot utilize the administrative sanction to enforce a court-determined standard without first seeking approval from the court. The Lee case will be used as a precedent, and I believe will be successfully used, for the principle that there can never be administrative fund termination with respect to a school system desegregating under a court order unless prior court approval is obtained. While this rule might not be a serious impediment to enforcement in Alabama, because of the character of the particular court there involved, it could be a much more serious impediment in other States. To date, however, the Department has not sought administratively to terminate funds to court ordered systems, and the alternative remedy of court enforcement on motion of the Department of Justice is so readily available that I do not consider the Lee precedent in this regard to be overly damaging.

The Lee decision might be used even more broadly as a precedent for the proposition that where alternative judicial and administrative proceedings are available for enforcing the same legal standard, that the administrative sanction cannot be given effect without prior court approval if a court proceeding for enforcement has also been instituted. Indeed, there is presently pending in the United States District Court for the Middle District of Georgia a motion to add the Commissioner as a party defendant to a school desegregation suit filed by the Attorney General under Title IV of the 1964 Civil Rights Act. The defendant school officials urge in support of their motion that the Commissioner ordered the termination of funds just four days before the Attorney General filed his suit. The school board attorneys will undoubtedly rely on the Lee case as supporting their contention that the Commissioner should be a party. In my judgment, however, arguments such as that which I anticipate in the Georgia case can be successfully resisted without appealing the Lee decision.

A review of programs administered by this Department convinces us that the precedent of the Lee case will not impede administrative enforcement of standards that are also subject to court enforcement. You may, however, wish to consider whether the Lee precedent might be troublesome in other areas of the Government.

For the reasons which I have discussed, this Department recommends against the taking of an appeal from the order of July 28, 1967.

Sincerely yours,

Alanson W. Willcox

Alanson W. Willcox
General Counsel