COMMENTS UPON THE EFFECT OF THE RECENT SUPREME COURT DECISIONS UPON THE JURISDICTIONAL QUESTIONS HERE INVOLVED

1. The opinions referred to, issued May 22, 1967, and reported in the United States Law Week, May 23, 1967, respectively, at pp. 4431, 4433, 4439, and 4441 (the latter constituting a concurring opinion in No. 336 and a dissenting opinion in Nos. 39 and 438), are as follows:

> The Toilet Goods Association v. Gardner (No. 336),
> Abbott Laboratories v. Gardner (No. 39),
> Gardner v. The Toilet Goods Association (No. 438),
> and The Toilet Goods Association v. Gardner
> (showing the concurring and dissenting opinions
> in the three cases above mentioned).

We do not think that we can be very helpful to the Court by any extended discussions or analyses of these cases. The only possible aid that we can provide, if we can provide any at all, would be by discussion and analysis in as brief and succinct a form as possible.

All involved regulations promulgated by the Commissioner of Food and Drugs in the Department of Health, Education and Welfare. Under the first of these (No. 39), p. 4431, the Court, through Justice Harlan, held that under the circumstances of that particular case a

declaratory judgment suit was premature, the controversy not having ripened, and that on account of that fact, a determination after a suspension of certificates by the Commissioner could promptly be challenged through an administrative procedure provided in the Act, with judicial review; that such review would provide an adequate forum for "testing the regulation in a concrete situation." The Court found that under the circumstances it was necessary to decide whether eventually a judicial review, if the point were ever reached, would properly be invoked in the District Court or any Court of Appeals, under the provisions of the particular Act.

In the second listed case (No. 39), p. 4433, the Court held that, since the enactment by the Commissioner or the Department of the regulation complained of, if exceeding the authority of the Act itself, constituted such an immediate threat to the complaining company as that it might cause an irreparable injury for the company to await an administrative hearing, a declaratory judgment suit in the District Court would lie, despite the fact that there was provided in the Act a right of appeal

to a Court of Appeals from the decision of the administrative agency. The Court also held that under the circumstances of the case the complaining industry was not required to take steps which might constitute a violation of the law and regulations if held valid and await another judicial review consisting of proceedings by the Government to compel enforcement. The holding was that, as we understand it, the validity of certain regulations in such case involved a legal question to be decided, not encompassed by the decision before the administrative agency (only on a factual issue) or the Court of Appeals which could review only the decision of the administrative agency, and since the regulations complained of were not encompassed under the statutory procedure for the administrative hearing with special review, the complaining industry had a right to invoke declaratory judgment or injunction procedures under the Administrative Procedure Act, Title 5, §703, et seq. (formerly §1009).

In the third case (No. 438), p. 4439, the holding was essentially the same, although involving different regulations and requirements. In both of the

two said decisions, it was held that the circumstances were such that the complainant was not required to exhaust its administrative remedies, such being inadequate and not actually involving the legal validity of the regulation, and might invoke a "pre-enforcement review" of the regulation, in a District Court by declaratory judgment or injunction suit, under the so-called "catch-all" clause of the Administrative Procedure Act, despite the fact that the Food and Drug Act specifically mentioned only one judicial review in cases for certain regulations (the Court of Appeals) and a proceeding by the Government to compel enforcement. Admittedly, as we understand it, in enforcement proceedings by the Government after alleged violation of the Act and regulations, the complainant would be entitled to set up any defense. However, the penalty might be so great, and irreparable injury so imminent, that the complainant had the right to go into a District Court of its own choosing, having proper venue, to test the validity of the regulation.

Under the circumstances of the cases involved in the second and third listed opinions, the fact that

Congress prescribed a certain court, or courts, in which review could be had, would not preclude a review under the Administrative Procedure Act by declaratory judgment or injunction in the District Court, in the absence of a provision in the Act expressly excluding such a remedy.

The fourth opinion, setting forth the dissenting or concurring opinions of Justices Fortas and Clark, sheds light upon the effect of the holding of the majority, and upon the rejection by the majority opinion of the contentions made by the Government.

Our further conclusion is that, under the rationale of these decisions, if the issue is one required by the particular Act to be decided by an administrative agency, then the administrative remedies must be exhausting, including the prescribed method of judicial review, whatever this may be, but that otherwise the remedy need not be exhausted[1] and the complaining party may proceed

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[1]This premise is effectively demonstrated in Skinner & Eddy Corp. v. United States, 249 U.S. 557 (Hdn. 1), 563, in the following language:

"First. The defendants contend that the district court did not have jurisdiction of the subject

in the District Court under the catch-all clause of the Administrative Procedure Act to review a final action of the administrative agency the final action in such case, as stated in the Supreme Court decisions, being the putting into effect of a rule or regulation asserted by the complainant to be in excess of the agency's statutory power and thus invalid.

(cont'd)

matter of this suit; because orders entered in a 4th section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§ 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission;" [citing cases] "and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law." [citing cases] "But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

certainly did not think that the validity of the regulations or requirements was a matter to be decided either on the administrative hearing or by him, as evidenced by the following provision of his "Approval of Decision", Vol. II, Appendix to the Secretary's brief, paragraph 1, as follows:[2]

> "The Alabama agency recognizes that the 'legality' of this Department's Title VI Regulation is not a question to be considered in this proceeding. This issue may be raised before the court."

If the Secretary is correct in stating that he had no authority to strike down his regulation or requirement, then the administrative proceeding was palpably inadequate for deciding the issue, and such inadequacy, in our opinion, would be transferred to any specific statutory provision for a review of the Secretary's decision in a Court of Appeals. If for any reason the

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[2]He is in error in stating that the Alabama agency recognized that the "legality" of the Department's regulation is not a question to be considered in the administrative proceeding. Nowhere have we made that admission. We merely stated in effect that we were not naive enough to think that the Department would strike down its own regulation or requirement. Be that as it may, the Secretary has declined to pass upon any question of validity, stating that this is an issue to be raised before the courts.

specific statutory review provision is inadequate, then under the terms of the Administrative Procedure Act itself, a review of the Federal agency's action in promulgating invalid regulations or requirements in a District Court by declaratory or injunction proceeding becomes the proper remedy. The fact that the State agency chose as a matter of precaution to await a decision on an administrative hearing does not, in our opinion, alter the principle.

Apparently the cases cited in the Government's brief, such as Whitney Bank v. New Orleans Bank, 379 U.S. 411, is one where, under the circumstances, the issue was one to be decided only by an administrative body and thus subject only to the special statutory review specified.

3. Another reason for inadequacy--one already advanced; no provision for judicial review for cutting off of funds on any ground, either before or after the passage of the Civil Rights Act, has been provided by the Social Security Act in the case of the Child Welfare Service. This is admitted by the Government, but the Government argues that because the administration of the five programs, and especially the programs involving children, are

so intertwined or interwoven, this would confer authority upon the Court of Appeals for a statutory review. We say this cannot logically result. Nothing can confer jurisdiction upon a Court of Appeals to review, in connection with any program unless there is an express statutory provision therefor. One of the cases cited in the Government's brief, Fletcher v. United States Atomic Energy Commission, 192 F.2d 29, refutes the Government's contention in that regard. We quote from 192 F.2d 32:

> "If what the petitioners sought was 'just compensation,' the petition for review must be denied at the threshold because we have no power to review a Commission decision on that subject. One aggrieved thereby may sue the United States in the Court of Claims or in a district court, but he may not come to us for review. In the fact of these statutory provisions, we are not inclined to assert the power to review the Commission's decision concerning 'just compensation' in this case merely because the same petitioners simultaneously seek review of the Commission's decision concerning an 'award' of which we have jurisdiction." [underscoring ours]

At the time the State filed its suit in the District Court, there was only one order in effect (as there is now) for the cutting off of funds, a composite order of

the Secretary applying to all programs. If these programs were so interwoven that the administration of one depended upon the other, as our affidavit evidence on the preliminary injunction tended to show, this, in our opinion, clearly demonstrated the inadequacy of any statutory remedy conferring special jurisdiction upon a particular court in connection with only a part of the program; and under the Administrative Procedure Act, if such inadequacy exists, the parties are clearly relegated to the District Court under the general but clear provisions of §703, et seq., Title 5, U.S.C.

4. We now come to a discussion of the point which has not been emphasized before, a point raising the question: Did §603 of Title VI, providing for judicial review, encompass specific provisions for judicial review enacted after the passage of Title VI? The first sentence of §603 is as follows:

> "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." [underscoring ours]

The second sentence provides that in case of action not otherwise subject to judicial review, "any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review under Section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion."

The provisions of the Social Security Act providing for review of Secretary's action cutting off the funds "on other grounds", were enacted after the passage of the Civil Rights Act. These provisions are contained in 42 U.S.C., §1316, enacted on July 30, 1965. They provide for the cutting off of funds by the Secretary under any of four programs which Alabama had under the Social Security Act, but only on the ground that the State has failed to follow, or has deviated from, the terms of the plan submitted by the State and approved by HEW, or has so changed the plan as to make it conflict with a particular section of the Social Security Act, having nothing to do with the Civil Rights Act (already enacted).

When Congress inserted in the Civil Rights Act of 1964 a general provision for judicial review which should be applicable under many laws providing for financial assistance, and stated that a judicial review should be followed where provided for on "similar action" on other grounds, surely Congress intended this to apply only to judicial review provisions that had already been inserted under various laws. We quote from Senator Ribicoff (110 Congressional Record 6837-6844, Daily ed., April 7, 1964):

> "For example, Public Law 815 and the Hill-Burton Act - 20 United States Code 641(b), 42 United States Code 291(j) - provide for special review procedures for denial of a grant and for withholding of funds thereunder. The same procedures would be followed under title VI. If no review is provided by existing law, agency action cutting off financial assistance would be subject to judicial review in 'any applicable form of legal action' as authorized by the Administrative Procedure Act, 5 United States Code 1009. What that means in practical terms is that a suit for injunction or declaratory judgment could be brought in the U. S. District Court. Under recent amendment to the Judicial Code, the suit could be maintained either in the district where the plaintiff resides or where the cause of action arose - 20 United States Code supplement 1963 1391(e)." [underscoring ours]

A reading of sections 304, 604, 1204, and 1354 (applying to the four programs involved), will show that this is true.

Senator Ribicoff (who was ably assisting Senator Pastore, who was floor leader for Title VI, spoke if review under other statutes under "existing law", and this term was also used by Senator Pastore. Senator Ribicoff used the Hill-Burton Act as an example. At the time of passage of the Civil Rights Act there was a special provision under the Hill-Burton Act. We think that the only logical conclusion that can be drawn is that Congress intended only to provide as a means of judicial review under the Civil Rights Act a provision under then existing laws for similar action on other grounds, under various financial assistance acts. At that time, remedies already existing under various statutes would necessarily be for a cutoff on "other grounds", for the reason that the Civil Rights Act had not been passed (at the time the judicial review remedies were inserted under other laws), and there would not have been any specific provisions for cutoff because of racial discrimination, hence the insertion of the phrase "on other grounds" in Section 603, Title VI.

However, is it conceivable that Congress in later amending the Social Security Act to provide for a judicial review of a cutoff of funds (where before there had been none) on the sole grounds stated in Sections 304, 604, 1204, and 1354, of Title 42, for example, that a state agency had deviated from its approved plan, would have omitted in the amendment the specific ground of specific violation of the Civil Rights Act, a ground of which both HEW and Congress were necessarily fully conscious. It appears to us that where Congress later passes a law providing for cut off of funds on other grounds, without mentioning discrimination under the Civil Rights Act, it cannot be logically said that Congress intended such a judicial review to apply to a ground that it did not mention. If this premise is sound, then there is no remedy for review in this Court, adequate or inadequate, and the sole remedy is in the District Court.

However, as before stated and without regard to this premise, under the principles enunciated in these recent Supreme Court decisions, as we construe them, the State would be afforded a review of the final action of the Federal agency in promulgating excessive and invalid regulations or rules

and in ordering a cut-off of funds for failure of the State agency to comply therewith, irrespective of the administrative hearing,[3] in the District Court.

5. Mention should be made of the fact of joinder by amendment of individual beneficiaries of Alabama's Welfare Programs as parties plaintiff by class suit, both Negro and white, since Section 603 of Title VI affords a judicial review to every "person aggrieved" by the action of the Federal agency. Dealing with the question of the remedy, these beneficiaries certainly had no right of appeal or review under Section 1316, Title 42, and their only recourse would be in the District Court. It is realized that they were not made appellees and that on the injunction hearing

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[3] An additional statement made by the Secretary in his Order of January 12, 1967, pertaining to his inability or unwillingness to consider the legality of the Regulation, is shown on page 305, Vol. II, Appendix to the Secretary's brief, as follows:

> "As stated earlier the legality of the Regulation will not be considered in this proceeding and the expressed intention of the Alabama agency to seek judicial review of this Regulation will not be accepted in lieu of compliance with the Regulation." [underscoring ours]

the District Court did not adjudicate the propriety of their joinder or standing to sue. Nevertheless, they were and are present in the case on appeal from the District Court and whatever rights they have may be relevant to a consideration of the question of jurisdiction.

6. We have asked leave to submit this additional memorandum solely because we realize that this Court must decide the jurisdictional questions involved, although the question, or questions, should not affect the overall result of the Court's decision. That this is true is recognized in the Government's brief on page 30, by the statement that in the present posture of the case this Court is permitted to reach the "substantive issue of this case"--"because of the consolidation of the appeal with Alabama's alternative petition for review."

We cannot conceive of a holding that the District Court would not have jurisdiction in connection with Alabama's Child Welfare Service Program, and should this Court decide that this Court is due to entertain jurisdiction on the alternative petition review as to the other four programs, this would mean that the District Court had jurisdiction

of part of the case and this Court the other part. In any event, the entire case is now before this Court.

BRIEF COMMENTS RELATING TO THAT WHICH TRANSPIRED DURING THE ORAL ARGUMENT

7. As we understood Mr. Owen Fiss, the esteemed attorney representing the Department of Justice and the Government at the hearing, the Government in effect seeks only an interpretation (or he may have said agreement), that the State Department in complying with the law and regulations, or giving an assurance of compliance, need only act in good faith, or put forth its efforts to obtain or to persuade the third parties, such as physicians, nursing homes, church homes, etc.,(all private businesses or institutions) to refrain from discrimination (we do not pretend to quote the words used, and if we are not correct in any sense, we will stand corrected). We expressed surprise at the statement, regardless of the intended meaning, and certainly felt surprised. We stated that was the first time we had heard such words from any representative of the Government, and according to the record before this Court,

the writer of this brief had participated in the administrative hearing in October, 1965, as well as conferences during the preceding month (as well as personal presentation before the Commissioner of Welfare in June, 1966). In any case, we can only say that our position has been, and is now, that the regulation, particularly as to third parties, taken in connection with the so-called implementing form (page 158A-158C, Vol. I, Appendix to the Secretary's brief) are too stringent (I believe that a member of the Court stated that this might be true, although nothing that was said by any member of the panel was taken by us as any indication of what the Court will hold). In our opinion, the State Department should not be required to do more than to try, or persuade, or to act in good faith, no matter what the appropriate language may be, and should continue to receive Federal funds even though it tries and fails, and should not be under the onus of dispensing with the services of the private physicians, and the other private institutions mentioned merely because any might refuse to go as far as the Government thinks they should go.

The State should not have its funds cut off if it tries and fails, provided there is no actual discrimination by the State against any class of beneficiaries, white or Negro.

It has been stated before by the highest authority in the State that the State upon judicial review will comply with the decision of the Court (without waiving right of appeal), pertaining to what it must do in order that Federal funds not be withheld from its two thousand or more needy recipients, but it should not be required to take any step other than what shall be "consistent with achievement of objectives" of the Social Security Act providing Federal financial assistance.

Respectfully submitted,

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