No. 24468
No. 24561

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
APPELLANT-RESPONDENT

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, ET AL.,
APPELLEE-PETITIONERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
AND ON PETITION FOR REVIEW

BRIEF FOR JOHN W. GARDNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPELLANT-RESPONDENT

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INDEX

CITATIONS

Page

Cases-Continued

Cases-Continued

STATUTES

Statutes Cont.: Page

Statutes Cont.:

REGULATIONS

Page

MISCELLANEOUS

STATUTES INVOLVED

Title VI - Nondiscrimination in Federally Assisted Programs

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: PROVIDED, HOWEVER, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 603. 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. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Sec. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Sec. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

42 U.S.C. 1316. Administrative and Judicial Review of Public Assistance Determinations.

(a)(1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, IV, X, XIV, XVI, or XIX of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such title. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such title. Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under section 304, 604, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be

forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of title 28.

(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, IV, X, XIV, XVI, or XIX of this chapter may, at the option of the State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, IV, X, XIV, XVI, or XIX of this chapter shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance. Aug. 14, 1935, c. 531, Title XI, §1116, as added July 30, 1965, Pub. L. 89-97, Title IV, §404(a), 79 Stat. 419.

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BRIEF OF THE APPELLANT-RESPONDENT

STATEMENT OF THE CASE

I. Introduction

This proceeding involves both an appeal from a preliminary injunction entered by the District Court for the Northern District of Alabama restraining

the Secretary of the Department of Health, Education, and Welfare from enforcing an order he issued, and an alternative petition for direct review by this Court of the same order of the Secretary.

The Secretary's order directed the termination of payment of approximately $100 million in federal financial assistance payable annually to the Alabama Department of Pensions and Security (hereinafter the Alabama Department).[1/] The Secretary's termination order was based on a finding that the Alabama Department had failed to comply with the regulation of the Department of Health, Education, and Welfare (hereinafter HEW), requiring state welfare agencies to file an assurance which either states that the program is conducted in accord with the nondiscriminatory requirements of Title VI of the Civil Rights Act of 1964, or, if such a statement

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1/ The federal funds terminated are authorized under the Social Security Act, as follows:

Title I, Old Age Assistance (42 U.S.C. 301-306);
Title IV, Aid to Needy Families (42 U.S.C. 601-609);
Title V, Part 3, Child Welfare Services (42 U.S.C. 721-728);
Title X, Aid to the Blind (42 U.S.C. 1201-1206);
Title XIV, Aid to the Permanently and Totally Disabled (42 U.S.C. 1351-1355).

could not be made, to identify the areas where racial discrimination existed and to indicate how and when the deficiencies will be corrected [R. 23-24; A. Vol. II, pp. 285-287].[2/] The Alabama Department's primary contention is that the regulation is invalid.

The District Court on February 3, 1967, granted a preliminary injunction restraining the Secretary from terminating, under his order, any federal financial assistance to the Alabama Department [R. 86]. We filed this appeal and Alabama petitioned for direct review of the Secretary's order in this Court, since the Secretary claimed not only that his order was valid, but that jurisdiction to review his order was exclusive in the Court of Appeals. Thus this consolidated proceeding--the Secretary's appeal and Alabama's petition for review makes possible consideration of the substantive issue in this case --

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2/ "R" refers to the printed record. "A" Vol. I or Vol. II refers to Appellant-Respondent's Appendix.

the validity of the HEW regulation--regardless of this Court's disposition of the jurisdictional issue. If the district court had jurisdiction, the substantive issue is reached on the appeal, and if not, it is reached on the petition for review.

II. Background: Title VI and the HEW Regulation

A. Title VI and the Regulation Prohibiting Racial Discrimination. Section 601 of Title VI of the Civil Rights Act of 1964 provides that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 directs "[e]ach Federal department or agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty,...to effectuate the provisions of section 601...by issuing rules, regulations, or orders of general applicability...."

Pursuant to the congressional authorization and directive, HEW promulgated a regulation on November 27, 1964, which became effective after the President's approval on December 3, 1964 [A. Vol.II, p. 254]. The regulation is designed "to effectuate the provisions of Title VI of the Civil Rights Act of 1964...." (45 C.F.R. §80.1) [A. Vol.II, p.248]. In language paralleling section 601 of the Act, the regulation generally forbids discrimination in any covered program and it enumerates "specific discriminatory actions" which any "recipient" of federal financial assistance is prohibited to engage in. (§80.3(a)(b)) [A. Vol.II, p. 249]. Recipients are prohibited from engaging in any of the enumerated discriminatory practices either "directly or through contractual or other arrangements" (§80.3(b)(1)), and the regulation also provides that, in determining the kinds of services of benefits they will provide under any program of federal financial assistance, recipients "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration" which are discriminatory (§80.3(b)(2)). The

regulation, by way of illustrating the scope of the prohibition on such indirect discrimination, defines this prohibition to encompass care or treatment in private "hospitals, nursing homes, schools, and similar institutions" where discrimination is practiced. (§80.5(a)) [A. Vol.II, pp. 249, 250].

B. The Assurance Requirement of the Regulation. The first step in the enforcement of section 601 of the Act and the implementing regulation is the procedural requirement that state agencies file an assurance of compliance with the statute and the regulation. 45 C.F.R. §80.4(b) declares that "[e]very application by a State or a State agency to carry out a program involving continuing Federal financial assistance"--the category into which all programs here involved fall--shall as a prerequisite to obtaining federal funds--

> ...(1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to [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 adminis-

> tration for the program as are found by the responsible Department [of Health, Education, and Welfare] official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such programs will comply with all requirements imposed by or pursuant to [the regulation], including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under subparagraph (1) of this paragraph will be corrected. [A. Vol. II, pp. 249-250].

With receipt of an acceptable assurance this initial phase of the enforcement structure of Title VI is complete. The state agency then has the obligation of performing its commitment. If the State agency refuses to submit the assurance, §80.8(b) of the regulation authorizes the agency to terminate federal assistance in accordance with the procedures set forth in the statute and regulation.

III. Enforcement Proceedings Against the Alabama Department

A. Efforts to obtain voluntary compliance

Shortly after enactment of the Civil Rights Act of 1964 the Commissioner of Welfare transmitted a copy of the Act to each state welfare agency [A. Vol. II, p.220]. In October 1964 HEW sponsored a meeting of all state welfare administrators for the purpose of discussing implementation of Title VI and details of the proposed departmental regulation which were then being formulated [A. Vol. II, p. 220]. Representatives of the Alabama Department of Pensions and Security attended the meeting [A. Vol. II, p. 220]. After adoption of the regulation on December 3, 1964, copies were sent to each state welfare agency [A. Vol. II, pp. 194,220]. In late December 1964 and early January 1965 information concerning relevant portions of the HEW regulation were sent to the state welfare agencies, and on January 19, 1965 HEW sent to all state agencies administering approved public assistance plans a handbook which outlined the state agency's responsibilities, explained the assurance requirement, and

contained a suggested sample assurance form. Form CB-FS-5022, which is reproduced at pp. 42-47 of the Record and again in our Appendix, Vol. I, p. 158 A-C [A. Vol. II, p. 220]. By August 1965, every state except Alabama had filed an assurance accepted by HEW as adequate under §80.4(b) [R. 17; A. Vol. II, pp. 275, 196].

Efforts to negotiate with the Alabama Department and bring that agency into voluntary compliance with Title VI and the regulation were extensive. The correspondence between representatives of HEW and the Alabama Department is set out in our Appendix, Vol. I, pp. 161-179. This correspondence illustrates the divergence of views on issues between the Alabama Department and HEW, which are issues essentially those raised in this proceeding with respect to the validity of the regulation.

Briefly, the record reflects the following:

On March 1, 1965, Mr. Rubin King, Commissioner of the Alabama Department, wrote HEW officials stating in effect that his Department did not and would not deny aid, care, or service to any individual on the grounds of race, color, or national origin; but he took the position

that the statement of compliance required by the Commissioner of Welfare was unreasonable and that he was instructed not to sign it [A. Vol. I, p. 161]. In response, HEW officials sought to determine if the difficulty was with the wording of the statement as distinguished from its substance and requested that the Alabama Department let them know what the difficulty was [A. Vol. I, pp. 162-163]. Commissioner King, on March 12, 1965, responded by quoting his prior letter and indicated that it would be inappropriate to comment further [A. Vol. I, p. 164].

On March 19, 1965, the Commissioner of Welfare, Dr. Ellen Winston, wrote Commissioner King, explaining to him that the requirement of the regulation was important, that compliance with it was called for now, and that failure to comply with it could result in the discontinuance of grants under the federal welfare program. Commissioner Winston suggested a meeting between the officials of the two agencies [A. Vol. I, p. 165-166]. On March 23, 1965, Commissioner King responded to that letter, suggested that April 21 rather than March 25, as suggested by Commissioner Winston, would be an appropriate date for

the meeting [A. Vol. I, p. 167]. On April 2, 1965, Commissioner Winston responded to Commissioner King, regretting the delay in the proposed meeting but made arrangements for a meeting with him on April 21, 1965 [A. Vol. I, p. 168]. After this meeting occurred, Commissioner Winston wrote Commissioner King confirming her understanding that the Alabama Department would let her know within two weeks whether it planned to submit a statement of compliance as required by the regulation [A. Vol. I, p. 169]. On May 7, 1965, Commissioner King wired Commissioner Winston as follows:

> STATE BOARD OF PENSIONS AND SECURITY IN SESSION TODAY, AUTHORIZING A SUIT TO CONTEST VALIDITY OF REGULATIONS PROMULGATED BY HEALTH, EDUCATION AND WELFARE UNDER TITLE VI OF THE CIVIL RIGHTS ACT. [A. Vol. I, p. 170].

On August 17, 1965, Commissioner Winston initiated administrative proceedings by notifying the Alabama Department of its noncompliance and offering it an opportunity for an administrative hearing [R. 17; A. Vol. II, pp. 275, 223].

Three days later, on August 20, 1965, Commissioner King wrote Commissioner Winston setting out a statement of

his Department's "compliance with Title VI of the Federal Civil Rights Act of 1964" [A. Vol. I, pp. 171-173]. The letter claimed that "the Department of Pensions and Security is in full conformity with the Federal Civil Rights Act in determining who can get aid and how much they are entitled to get," and also that, "other services are given according to the need for the service and available resources and not on the basis of race, color, or national origin." The letter continued:

> In a number of counties office space is furnished by local governing bodies with no Federal or state participation. This agency has no authority to control the use of the physical arrangements in these buildings. It would be impossible to enforce discontinuance of separate facilities in these departments and also impossible to make other housing arrangements in many of these counties.

Turning to discrimination by "vendors" or "third parties," the letter said:

> The Alabama Department of Pensions and Security is told that segregation exists in some institutions, agencies, and organizations within the state from whom aid, care, services and other benefits are received on behalf of applicants or recipients of the department through contractual or other arrangements.

* * * * * *

> While many of the hospitals are complying with the Civil Rights Act of 1964, and others are taking definite steps toward integration of their facilities, this agency has no authority to control such hospitals and cannot enforce compliance.
>
> * * * * * * * * *
>
> This agency has no authority to control nursing homes and would have no authority to see that compliance was effected.

With respect to children's institutions, Commissioner King's letter contended that voluntary child-care institutions and agencies are not operated by the Department of Pensions and Security but by other boards which have full responsibility over their admission policies; that a number of children in them are under juvenile court jurisdiction with the Department having only supervisory responsibility; and that "any change in plans would be at the discretion of the courts and not the department." It further stated that all licensed day care centers were under private auspices and that Alabama "has no authority to enforce compliance on the part of these centers."[3/] With respect to services rendered by physicians, the letter stated:

3/ Commissioner King's letter also said that although his Department "participates as probation officers in planning for admission" to training schools, "the courts and schools make the final decision."

> The State Department of Pensions and Security is of the opinion that it is not within its province nor its duty to attempt to require physicians to comply with the Civil Rights Act nor does it think that needy people who are in need of a physician's service should be denied the right of freedom of choice in this matter. Unavailability of physicians' services in some areas would result in lack of equity of treatment to individuals in those areas and violate the principle of statewideness.

The letter concluded by saying that "The Alabama Department of Pensions and Security does not deny aid, care, or services to any individual on the ground of race, color, or national origin."[4/]

The Commissioner responded to the Alabama Department's letter through Assistant General Counsel Yourman on August 27, 1965. Mr. Yourman's letter stated that the statement of compliance "falls far short of what has been required from and provided by every other state agency administering the public assistance and child welfare service programs" [A. Vol. I, pp. 174-176]. He then explained in detail the reasons why, in HEW's opinion, the August 20th letter from the Alabama Department could not be accepted as an adequate statement of compliance. Briefly,

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4/ The letter also dealt with dissemination of information about Title VI and the Regulations and complaint procedures.

the objections were, among others, that while the Alabama Department's statement of compliance indicated that some of the institutions, agencies, and organizations discriminate on the basis of race in providing services, the statement did not indicate what methods the Alabama Department would implement to correct this situation. Nor had the agency taken action to determine the extent of noncompliance in third-party arrangements, even though it indicated there was some racial discrimination practiced by these third parties.

Efforts to achieve voluntary compliance continued after the administrative process began, but to no avail; [A. Vol. II, p. 221] and on September 29, 1965, Commissioner King again wired Commissioner Winston. That the telegram stated:

> STATE BOARD OF PENSIONS AND SECURITY, IN SESSION TODAY, REAFFIRMED AUTHORIZATION FOR TESTING VALIDITY OF RULES AND REGULATIONS PROMULGATED BY DEPARTMENT OF HEW UNDER TITLE VI OF THE CIVIL RIGHTS ACT [A. Vol. I, p. 179].

B. The Administrative Proceeding

On August 17, 1965, the Commissioner of Welfare formally advised Alabama of her "Determination of Inability to Secure Compliance by Voluntary Means" [R. 17; A. Vol. II, pp. 13, 275, 223, 187]. On the same day, acting under section 602 of the Act and sections 80.8(c) and 80.9 of the regulations, she offered

the Alabama Department an opportunity for a hearing to determine formally whether it was in compliance with the regulation [A. Vol. II, p. 224].

After the administrative pleadings were in, an evidentiary hearing was held in Washington, D. C. on October 21, 1965, before a Civil Service Hearing Examiner [A. Vol. II, pp. 17, 225]. Commissioner King's testimony verified the statements contained in his letter of August 20 about the discriminatory practices of vendors and other third parties and the Alabama Department's refusal to concern itself with that matter. Thus, he testified that most physicians' offices in Alabama are segregated by race; that most doctors, in his opinion, will not desegregate their waiting rooms; that many child-care institutions, hospitals, and nursing homes are segregated; and that he believed the Alabama Department had no responsibility to determine which physicians' offices were segregated, and had not undertaken such a survey [A. Vol. I, pp. 98-99, 101-103, 110-113]. He testified that:

> I will tell you, Mr. Yourman, we never intended to sign a compliance statement ... whereby we had to take in consideration contractual arrangements with third parties [A. Vol. I, p. 128].

He also testified that he would be opposed to assigning Negro welfare caseworkers to white cases, thus indicating that segregation is practiced even in programs under the direct control of the Alabama Department [A. Vol. I, p. 133].

On April 5, 1965, the hearing examiner issued a decision, finding inter alia, that the statement of compliance submitted by the Alabama Department by letter dated August 20 "is not adequate to meet the requirements of section 80.4(b)" of the regulation. The examiner recommended termination of federal financial assistance to the State of Alabama under Titles I, IV, V (part 3), X and XIV of the Social Security Act.[5/]

5/ The examiner also found that there was actual racial discrimination in the operation of various aspects of the welfare programs in Alabama [A. Vol. II, pp. 229-231, 241-242]. These findings were based on the testimony of and correspondence with Commissioner King.

C. The Decision of the Commissioner of Welfare. As required by the regulation (§80.10(a)) the hearing examiner's recommended decision was certified to the Commission of Welfare for a final decision. She heard oral argument on June 16, 1966, and on November 16, 1966 she rendered a final decision, rejecting the objections made by the Alabama Department to the examiner's recommended decision and adopting that decision with minor modifications not pertinent to this proceeding [A. Vol. II, pp. 262-269].

D. The Decision of the Secretary

Pursuant to the regulation, the Commissioner's final decision was transmitted to the Secretary of Health, Education, and Welfare, whose duty under the regulation is to "approve such decision", "vacate it", or "remit or mitigate" the termination sanction imposed by the Commissioner of Welfare (45 C.F.R. §80.10(e)). On January 12, 1967, the Secretary approved the Commissioner's decision and ordered termination of funds to Alabama effective midnight February 28, 1967 [R. 16-41; A. Vol. II, pp. 273-316]. On the same day, pursuant to the requirements

of section 602, the Secretary transmitted a letter to the appropriate congressional committees informing them of his action [6] [R.40; A. Vol. II, pp. 315-319-322]. However, the Secretary once again expressly invited Alabama to file an adequate assurance covering all or only the non-third party aspects of the welfare programs.

In his opinion the Secretary said that "The refusal [by the Alabama Department] to submit the required assurances and methods of administration is more than a matter of form" [P.22; A.Vol.II, p. 283].

> ...Correspondence from the Commissioner [of Welfare] and the General Counsel and their statements in this proceeding make clear that they have remained ready to consider any reasonable modification proposed by the State to the suggested procedures which would still meet the requirements of the regulation....[7] [R.22; A. Vol. II, p. 283].

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6 / The letter was sent to the Senate Finance Committee and to the House Ways and Means Committee [R.40].

7 / The Secretary also said that "the [Alabama Department]...also has been advised that it may negate any inference that it is guaranteeing the compliance of those whom it compensates for furnishing services to beneficiaries of Federal Services." [R.23; A.Vol. II, p.284].

The Secretary specifically found that the Alabama Department "remains in noncompliance in at least the following respects":

> 1. It has not made a clear and adequate commitment to insure nondiscriminatory operation of its Federally aided welfare programs even in those parts which involve payments or the provision of services directly to beneficiaries by the [Alabama] agency. As stated by the General Counsel at page 4 of his brief dated December 22, 1965, "This prohibition against discrimination extends to any differential treatment on account of race in any aspect of the making of money payments, including the treatment of individuals in facilities where application is made, any medical examinations incident to the determination of eligibility, the determination of eligibility itself and the amount or type of benefits or social services, and the assignment of case workers." The prohibition against discrimination similarly extends to other matters which are under the Agency's control such as the location of local offices.
>
> 2. The Alabama agency has refused to accept any responsibility for assuring that third parties to whom it provides services, or whom it compensates in connection with care they provide to beneficiaries, shall provide such care without racial discrimination.
>
> 3. It has not provided an adequate statement of the extent to which racial discrimination presently exists in connection with its Federally-assisted welfare programs.

4. It has not agreed to or proposed methods of administering its Federally-assisted welfare programs--even in connection with those matters which do not involve the services of third parties--in a way that gives reasonable assurance that those parts of its programs will be operated on a non-discriminatory basis. More specifically, it has not:

(a) provided sufficiently for instruction or dissemination of information about the rights and responsibilities under Title VI of staff members, beneficiaries or third parties providing services;

(b) proposed any system of surveying compliance, keeping records or filing reports that would enable compliance to be properly evaluated;

(c) suggested a complaint process that offers all interested or affected persons an adequate opportunity for consideration of complaints of alleged non-compliance.

In short, more than two years after promulgation of this Department's Title VI Regulation and more than 16 months after receipt of the bill of particulars contained in the General Counsel's letter of August 27, 1965, the Alabama agency has not offered to correct any of the deficiencies in compliance as to any part of any of its Federally-assisted programs [R. 23-24; A. Vol. II, pp. 285-287].

The Secretary went on to consider in detail, and reject, a series of objections and arguments made by the Alabama Department [R. 25-39; A. Vol. II, pp. 288-312]. Addressing himself to the State's objection to filing an assurance about services rendered by vendors and other third parties, the Secretary said [R. 30; A. Vol. II, p. 297-298]:

However it is phrased, the Alabama agency is saying that in complying with Title VI it should not have any responsibility to avoid arrangements with third parties who discriminate.

No one has suggested that it can compel private parties to provide services to Federally-assisted beneficiaries without discrimination.

Our Regulation under Title VI is based upon the premise that most of those providing such services can be persuaded to provide them nondiscriminatorily and to the extent they will not, that Federal funds should not be paid to help perpetuate such discriminatory practices against innocent beneficiaries. Alternate, acceptable services should be found and developed.

The Alabama agency has refused to be a party to such persuasion and administrative action, at least until it has exhausted its rights to judicial review. Assuming the legality of our Regulation were upheld, the Agency apparently would then accept responsibility for seeking third party compliance--although, of course, it will have no greater power than to compel such compliance than it now has.

IV. The District Court Proceedings

The State's complaint, on behalf of the Alabama Department, filed on January 13, 1967 and amended the first time on January 16, purported to invoke the district courts jurisdiction under section 10 of the Administration Procedure Act, 5 U.S.C. 1009, and 28 U.S.C. 1331, and alleged an amount in controversy in excess of $10,000 [R.6,7,48]. The complaint challenged the validity of the Secretary's order and the underlying regulation requiring the submission of the assurance as a condition of continuing to receive federal financial assistance.

On January 26, 1967, the Secretary filed a motion to dismiss or, in the alternative, for a change of venue [R.65]. The motion asserted that the District Court lacked jurisdiction because jurisdiction to review the action of the Secretary "is in the United States Court of Appeals for the Fifth Circuit", and sought, in the alternative, an order transferring the case to another jurisdiction because the District Court for the Northern District of Alabama did not have venue under 28 U.S.C. 1391 [R.65-66].

On February 1, 1967, the Secretary filed an answer, and on the same date Alabama sought to file a second amended complaint [R.70-72,73-76]. The answer denied that the district court had jurisdiction of the subject matter, denied that failure to execute the assurance in the form contained in the Health, Education, and Welfare Handbook resulted in the discontinuance of federal funds, but admitted that the failure to execute an assurance "which contained substantially the same information" as that suggested on the sample form, and failure to comply in other respects with the regulation, did result in termination [R.74]. Otherwise, the answer, while admitting certain factual allegations, denied the basic allegations of the various paragraphs of the complaint. [R.73-76].

The second amendment to the complaint, filed the same day as the answer, sought to join as parties plaintiff four citizens of Alabama who were "aged person(s) receiving public assistance from the Department of Pensions and Security ..." and were representative of large numbers of other welfare

recipients residing in the Northern District of Alabama [R.70-71]. The four individuals alleged that they would be irreparably injured themselves if the Secretary's order was carried out [R. 71].

A hearing was held before the district court on February 1. At the hearing, counsel for the Secretary reserved the right to object to the second amended complaint which had been served upon him only shortly before [R. 91, 92, 96]. Exhibits were introduced in evidnece by both sides, including the entire administrative record. The remainder of the hearing was devoted primarily to argument. At the close of the argument, the district court ruled that "in the event the cutoff of funds ... does become effective, irreparable harm and injury will be done," and that because "in all probability" the matter will "ultimately have to be resolved in the Court of Appeals and would be considered by that Court as an emergency matter and reached as quickly as possible," it would grant plaintiff's motion for a preliminary injunction [R. 111-112]. The order granting the preliminary injunction was formally entered on February 3, 1967 [R. 87]. On that same

date, the district court filed its findings of fact and conclusions of law [R. 77-85]. It also permitted the filing of the second amended complaint [R. 79]. The district court noted that while it was "not passing upon" the merits but only ruling on a request for preliminary relief, it viewed the questions as to the validity of the regulations and other federal requirements as "substantial."

The Secretary filed a notice of appeal on February 10, 1967, and on February 13, 1967, he filed a motion for an expedited hearing by this Court and for leave to proceed on the original record. This Court denied the request to proceed on the original record, but granted the motion for expedited consideration with the reservation that the argument should not be scheduled for a date earlier than April 30, 1967.

On February 18, 1967, Alabama filed in this Court a petition for direct review of the Secretary's order, invoking jurisdiction under 42 U.S C 1316 and section 603 of the Civil Rights Act of 1964 with respect to four of the five welfare programs

involved in this case (excluding Title V, part 3 (child welfare services)). Alabama's petition for review contended that jurisdiction to review the Secretary's order with respect to all five programs was properly in the district court, but that, "in the alternative, ...if under the statutes the United States Court of Appeals for the Fifth Circuit has sole jurisdiction over the four welfare programs..." (other than Title V, part 3) "...such a review is hereby sought and prayed for as to each and all of such four programs" on the same grounds as were alleged in the district court proceeding.

On March 14, 1967, this Court granted appellee's motion to consolidate the appeal and the petition for review.

SPECIFICATIONS OF ERROR

The District Court abused its discretion in issuing a preliminary injunction, because:

1. It has no jurisdiction to review the Secretary's order, and
2. The HEW regulation upon which the Secretary's order was based is clearly valid.

ARGUMENT

I. The Jurisdictional Issues

A consolidation of this appeal from the District Court's order granting a preliminary injunction with Alabama's alternative petition for review of the Secretary's order, permits this Court -- either on the appeal or on the petition for review -- to reach the substantive issue of this case -- the validity of the HEW regulation requiring the submission of an assurance. This is true regardless of who prevails on this appeal on the jurisdictional question whether the Court of Appeals had exclusive jurisdiction to review the Secretary's order. If the Secretary prevails on his claim with respect to any of the five programs that jurisdiction to review the termination order is vested exclusively in this Court, then the substantive question could and should be decided on the petition for review, and that determination would be binding on the District Court in reviewing whatever aspect of the order, if any, is within its jurisdiction to review. In the event that the Secretary does not prevail on the jurisdictional issue with respect to any of the five programs, then the substantive issue can be decided on the appeal from the preliminary injunction. The granting of a preliminary injunction must be conditioned on the District Court making a determination that the movant has a significant likelihood of succeeding on the merits, and this Court could decide

the substantive issues by deciding that there is no likelihood of the Alabama Department succeeding in its claim that the HEW regulation is invalid. See, e.g., Wooten v. Ohler, 303 F.2d 759 (C.A. 5, 1962); Johnson v. Kirkland, 290 F.2d 440 (C.A. 5, 1961), cert. denied, 368 U.S. 889 (1961); Flight Engineers' Inter. Ass'n. v. American Airlines, Inc., 303 F.2d 5, 11 (C.A. 5, 1962), appeal dismissed 314 F.2d 500 (1963); United States v. Brown, 331 F.2d 362 (C.A. 10, 1964).

Although we believe the substantive issue underlying this legal controversy can be resolved regardless of how the jurisdictional question is resolved, the jurisdictional issue must still be reached by this Court; it is the threshold issue which determines whether the substantive issue is to be resolved on the appeal or the alternative petition for review. Moreover, this Court can reach the jurisdictional issue on this appeal from the order of the District Court granting the motion for a preliminary injunction. The very issuance of the preliminary injunction put the jurisdictional issue before this Court, because, under established doctrine, as a matter of law it would be an abuse of discretion for a district court to issue a preliminary injunction for the duration of the pendency of the review proceedings, as the District Court did in this case, when it had no jurisdiction to review the underlying administrative order. See, e.g., Eighty Regional War Labor Board v. Humble Oil & Refining Co., 145 F.2d 462,

464-465 (C.A. 5, 1945) cert. denied 325 U.S. 883 (1946), see Johnson v. Stevenson, 170 F. 2d 108 (C.A. 5, 1948), cert. denied, 368 U.S. 889 (1961). See also Green v. Green, 218 F. 2d 130, 136 (C.A. 7, 1954), cert. denied 336 U.S. 904 (1944); United States v. First National City Bank, 312 F. 2d 14, 17 note 3 and cases cited (C.A. 2, 1963), reversed on other grounds 379 U.S. 378 (1964).

The judicial review provision of Title VI, section 603, provides for judicial review of administrative action terminating federal assistance in the manner that "may otherwise be provided by law for similar action taken by such department or agency on other grounds."[8] In the event judicial review is not so provided, §603 states that review should be had in accordance with section 10 of the administrative procedure Act which in turn provides

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[8] Sec. 603. 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. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either), may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deeded committed to unreviewable agency discretion within the meaning of that section.

for review in any court specified by statute or in the absence or inadequacy thereof ". . . in any court of competent jurisdiction." 5 U.S.C. ~~703.~~ 1009(b),[9]

A. Titles I, IV, X, XIV of the Social Security Act

Secretary Gardner's order of January 12, 1967 terminated federal assistance to the Alabama Welfare Department under five titles of the Social Security Act.[10] With respect to four of these five titles, Titles I, IV, X. XIV, which collectively are responsible for about 99 per cent of

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9/ ~~§703.~~ 1009(b) Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

10/ Title I, 42 U.S.C. 301-306 (Old Age Assistance); Title IV, 42 U.S.C. 601-609 (Aid to Needy Families); Title V, part 3, 42 U.S.C. 721-725 (Child Welfare Services); Title X, 42 U.S.C. 1201-1206 (Aid to the Blind); Title XIV, 42 U.S.C. 1351-1355 (Aid to Permanently and Totally Disabled).

the annual federal grant to the Alabama Department, the Social Security Act specifically provides, for administrative termination of federal money "on other grounds" independent of Title VI, 42 U.S.C. 304, 604, 1204, 1354. Hence, for these four titles judicial review, according to §603, is in the forum prescribed by the Social Security Act, and that Act declares that orders terminating federal financial assistance under Titles I, IV, X and XIV are reviewable in the court of appeals for the circuit in which the state is located. 42 U.S.C. 1316(a)(3). That provision reads:

> Any State which is dissatisfied with a final determination of the Secretary under section 304, 604, 1204, 1354, 1384 or 1396c of this title may . . . file with the United States Court of Appeals for the circuit in which such State is located a petition for review of such determination.

Thus it is beyond any doubt that section 603 and 42 U.S.C. 1316(a)(3) together place exclusive authority to reviewing Secretary Gardner's order in this Court, and not the district court, as it relates to the assistance programs under Titles I, IV, X and XIV. A simple reading of the statute[11/]

11/ The fact that the State has sought to join private individuals in this action does not affect the obligation of the State to proceed in the statutory forum -- the Court of Appeals. The issues as to whether or not the private litigants are properly joined, have standing to sue, or have a cause of action have not been decided by District Court. That Court merely permitted the filing of the second Amended Complaint which added four party plaintiffs who are private individuals. In any event, the express jurisdiction of this Court granted by section 1316 as to Titles I, IV, X, and XIV cannot be defeated by attempting to join parties who may not

(Cont. on following page)

is all that is necessary to reach this result, and that reading is confirmed by both the settled case law and the legislative history of section 603.

It is settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive. See Fletcher v. Atomic Energy Commission, 192 F. 2d 29 (C.A. D.C. 1951), cert. denied, 342 U.S. 914 (1952); Whitney Bank v. New Orleans Bank, 379 U.S. 411 (1965); Almour v. Pace, 193 F. 2d 699 (C.A. D.C. 1951); Piazza Co. v. West Coast Line, 113 F. Supp. 193 (S.D. N. Y. 1953), aff'd. 210 F. 2d 947, cert. denied, 348 U.S. 839 (1954). Nor does this result depend on Congress using the work "exclusive" in the statute providing for forum for judicial review. The word "may" in the statute relates to the permissiveness of seeking judicial review at all, not to the choice of forum. The designated forum is the exclusive forum.

In Black River Valley Broadcasts v. McNinch, 101 F. 2d 235 (C.A. D.C. 1938) cert. denied 307 U.S. 623 (1938), for example, an action was commenced in the District Court seeking to enjoin implementation of a Federal Communication Commission order and for declaratory relief. The relevant

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11/ (Cont. from preceding page)

be able to proceed directly in this court on petition for review.

It should also be noted that the Secretary's order of January 12, 1967 is, as required by 42 U.S.C. §1316, a "determination made after December 31, 1965" and is therefore subject to the provisions of that section.

statute[12] provided that review of F.C.C. action "may be taken" by appeal to the Court of Appeals for the District of Columbia. The District Court dismissed the complaint, and its ruling was affirmed. The Court of Appeals said Congress had "provided that any party aggrieved may have its rights reviewed here" and, viewing this as "the exclusive remedy," held that the District Court lacked jurisdiction over the controversy.

Similarly, in Whitney Bank v. New Orleans Bank, 379 U.S. 411 (1965), the pertinent statute gave the Federal Reserve Board power to decide whether a new branch bank should be established and it also provided that

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[12] Sec. 402(b), Communications Act of 1934, 47 U.S.C. §402(b):

> "(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
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> "(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
>
> "(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

review of the Board's decision "may" be had in the court of appeals where the bank was to be established. A suit was brought in the District Court against the Comptroller of the Currency to enjoin establishment of a branch bank, and an injunction issued. The Supreme Court reversed and held that the matter must go first to the Board and "is subject to review only in the courts of appeals, not ... in the district courts." With reference both to the administrative scheme and the judicial review statute, the Supreme Court reasoned that where Congress "has enacted a specific statutory scheme for obtaining review ... the statutory mode of review must be adhered to notwithstanding the absence of an express statutory command of exclusiveness." 379 U.S., at 422-423.

Thus, if assistance were terminated under these titles for reasons unrelated to noncompliance with Title VI, review would be had exclusively in the courts of appeals. The legislative history of section 603 of Title VI indicates that Congress wished to preserve that reviewing structure. Section 603 was not intended to disturb the settled principles regarding the proper forum for judicial review. Senator Pastore, a floor manager for Title VI, stated in this regard:

> Additional safeguards against arbitrary action are provided in section 603. Under that section 602 would be subject to judicial review to the extent and in the manner provided by existing law applicable to similar action taken by the agency on other grounds.

> Thus, where special statutory review procedures are available under certain statutes, these procedures should be followed.
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> 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 funds thereunder. The same procedures would be followed under Title VI. 110 Cong. Rec., 88th Cong., 2nd Sess., p. 7063.[13]

See also, remarks of Chairman Celler, 110 Cong. Rec., part 2, 88th Cong., 2nd Sess., p. 1586.

In summary, the language of section 603, its legislative history, and the case law make clear that this Court -- not the district court -- is the exclusive forum for judicial review of Secretary Gardner's order insofar as it terminates assistance under Titles I, IV, X, XIV of the Social Security Act.

B. Title V (part 3) of the Social Security Act

Title V (part 3) relates to child welfare services, and involves about one million of the $100 million in federal funds which were terminated by the Secretary's order. The Social Security Act is silent as to the proper forum for review of administrative action respecting that Title, and that silence is the basis of the Alabama Department's claim that it has the option to seek review of all five

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[13]/ Both of statutes mentioned by Senator Pastore provide for review in the Court of Appeals.

titles in the district court. The argument is that the silence of the Social Security Act means, that under §603 of Title VI and section 10 of the Administrative Procedure Act, review of the Secretary's order with respect to that title must be in the district court, and that since that title must be reviewed in the district Court, the remaining titles may be reviewed there because compelling them to proceed in two courts renders "inadequate" review of the other four titles by this Court. The thrust of their argument is to give the State the option of choosing either the district court or the Court of Appeals for the forum to initiate review proceedings respecting the four titles other than Title V (part 3), and that with respect to that Title the exclusive forum for initiating review is the district court.

We believe that this argument errs in two respects. First, Title V (part 3) is, in our view, also reviewable in the court of appeals, and second, even if it were not, that would not divest this Court of exclusive jurisdiction to review the order as it affects the other four titles.

Fairly construed, section 603, providing for judicial review "as may otherwise be provided by law for similar action taken by such department or agency on other grounds," and section 1316 of Title 42, together vest in this Court by implication the authority to review the order with respect

to Title V (part 3). This conclusion follows from a consideration of the nature of the several welfare programs, the congressional policy favoring quick and final review of federal administrative action taken against state agencies, and sensible judicial administration.

The rationale of the judicial review provision of the Social Security Act, 42 U.S.C. 1316, is that federal administrative action taken against a state agency affecting state-wide operations should be subject to speedy and final judicial review.[14/] Hence, whenever the Social Security Act provides for judicial review of a state-wide program, the review is in the courts of appeals. Title V (part 3) like Titles I, IV, X and XIV, is concerned with a state-wide welfare program and requires the state agency to submit a state plan as a condition to eligibility for federal funds. Thus, the principle of section 1316 that administrative orders affecting states and state-wide programs are to be reviewed in courts of appeals is equally applicable to Title V (part 3) and sections 603 and 1316 should be construed to vest such jurisdiction here, absent some indication of a contrary congressional intention.

14/ See 89th Cong., 1st Sess., Sen. Rep. 404, Finance Committee, pp. 150-151; 89th Cong., 1st Sess., House Rep. 213, Ways and Means Committee, p. 131.

The only suggestion of a congressional intent in the Social Security Act that review should be in district courts is where benefits are cut off under Title II of the Act, dealing with federal old-age survivors and disability payments. There, judicial review is to be in district courts and the statute so provides. 42 U.S.C. 405(g) The underlying reasons why review is lodged in the district courts under Title II is that private individuals would be the complainants in Title II proceedings, and the typical private plaintiff is a person of modest means who might find it burdensome to litigate initially in the court of appeals. See Jaffe, Judicial Control of Administration Action, p. 158 (1963). Of course, that reasoning is wholly inapplicable to Title V (part 3) since the state is easily able to litigate directly in the court of appeals and, indeed, may do so with respect to Title V (part 3) with no further burden, if any, than it must assume in any event under Titles I, IV, X, and XIV.

Another reason why Title V (part 3) ought to be reviewed here is that it is almost inseparably related to the child welfare services provided to needy families under Title IV -- and exclusive jurisdiction of Title IV is in this Court. One requirement of a child welfare plan under Title V (part 3) is to have adequate coordination with the child welfare programs under Title IV. 42 U.S.C. 723. In fact, one of the functions of Title V plans is to reduce the burden of providing child welfare services under Title

IV. Senate Report No. 1189 (87th Cong., 2d Sess.), 1962 U. S. Code, Cong. and Adm. News, pp. 1943, 1949, 1957. Since the statute expressly vests review of Title IV in this Court and economical judicial administration suggests that the two programs should be reviewed together, this Court should review them both. Such a result is consistent with congressional purposes. Where it is clear in which court Congress intended one of the titles to be reviewed, but doubtful where Congress intended the other to be reviewed, review should be in the court which plainly is supposed to hear at least one title -- not in the court whose jurisdiction to hear one title is doubtful and which is plainly not the court Congress wanted to hear the other.

To be sure, had Congress expressly declared that Title V (part 3) was to be reviewed in district courts and the other titles in the courts of appeals, we would concede that review would have to proceed in two courts. See Fletcher v. Atomic Energy Commission, supra. But that is not this case. Congress has not declared where Title V (part 3) shall be reviewed, and hence it is open to this Court to decide that question consistent with sound principles of judicial administration and the overall scheme of judicial review set forth in 42 U.S.C. 1316 and section 603 of Title VI.

However, even assuming that jurisdiction of Title V (part 3) is properly had in the district court, such juris-

diction would not justify the district court taking jurisdiction over any of the other titles. Such a result would be totally inconsistent with any kind of sould judicial administration, cf. Almour v. Pace, supra at 702 and DiBenedette v. Morgenthau, 148 F. 2d 223 (C.A. D.C. 1945), petition dismissed on motion of petitioners, 326 U.S. 686 (1945), and is totally inconsistent with the purpose and intent of the Social Security Act in providing for judicial review in the Court of Appeals for state-wide welfare plans.[15/] It would have the $1 million tail wagging the $100 million dog.

Nor would the district court be vested with jurisdiction over the four titles, as well as Title V (part 3) on the theory that review of the four titles other than Title V (part 3) here would be"inadequate" because if this Court reviews the four titles Alabama will be forced to litigate in two courts. Since the same legal issues are involved under all five titles, and no factual questions are -- or can be -- raised in this review proceeding, whatever this Court decides as to the validity of the Secretary's order as it relates to Titles I, IV, X and XIV will dispose of the validity of the very same order as it relates to Title V (part 3) as well. The District Court will be bound by

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15/ As has been noted on many occasions:

> Section 10 of the Administrative Procedure Act does not establish jurisdiction in a federal court over an act not otherwise cognitive by it. Section 10(b) does not render competent a court which lacks jurisdiction on other grounds.

whatever this Court ultimately decides about the validity of the Secretary's order or the underlying regulation as it relates to the other four titles.

We therefore believe that this Court is the exclusive forum for review of the Secretary's action, and that the order granting the motion for preliminary injunction be vacated and reversed, and the complaint filed below dismissed. This Court would then proceed to decide the substantial issues as to the validity of the Secretary's order and the underlying regulation on Alabama's alternative petition for review.

15/(Cont. from preceding page)

Kansas City Power and Light v. McKay, 225 F. 2d 924 (1955), cert. denied, 350 U.S. 884 (1955). See Fletcher v. Atomic Energy Commission, supra; Aktiebolaget Befors v. United States, 194 F. 2d 145, 149 (C.A. D.C. 1951); Almour v. Pace, supra.

II. The Validity of the HEW Regulation.

The central issue in this case is whether HEW, in excercising the rule-making power granted to it under §602, can lawfully require the Alabama Department to submit 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. The validity of the HEW regulation has been challenged primarily because it requires the Alabama Department to assume responsibility for the elimination of racial discrimination in the facilities and services provided by third parties in connection with the state welfare program, but also because it requires the Alabama Department to assume full responsibility for eliminating racial discrimination in the parts of its programs that involve payments or the provision of services directly to beneficiaries.

We submit that the HEW regulation is not only one among many reasonable means of implementing Title VI, but that also it is perhaps the most appropriate regulation

that could be promulgated by the agency to carry out the congressional mandate. It must be recognized, however, that the reviewing court need not concur in that judgment. The reviewing court must, according to traditional administrative law doctrine, defer to the judgment of the administrative agency on the widsom of the regulation since this regulation is an exercise of the rule-making power conferred on the agency by Congress, and because the agency has complied with the procedural requirement for the exercise of that rule-making power.[16] As Professor Davis puts it, "the reviewing court has no authority to substitute [its] judgment as to the content of the rule, for the legislative body has placed the power in the agency and not in the court." 1 Davis, Administrative Law, p. 299 (1958). This observation was based on such cases as American Telephone & Telegraph Co. v. United States, 299 U S 232, 236-37 (1936) where Mr. Justice Cardozo said for a unanimous court:

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[16] The procedural requirement contained in §602 is that the President must approve the regulation, and this regulation has been so approved. Because the regulation relates to "loans, grants, benefits, or contracts" within the meaning of §4 of the Administrative Procedure Act, 5 U.S.C. §553(a)(2), the hearing and notice requirements of that section respecting the promulgation of rules or regulations are inapplicable.

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear ... to be the expression of a whim rather than an exercise of judgment. [17]

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[17] See also e.g., National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 224 (1943); Securities & Exchange Commission v. Cherney Corp., 332 U.S. 194, 207, 209 (1947); Boske v. Comingore, 177 U.S. 459, 470 (1900), where the Court upheld a procedural regulation of an agency stating that "[i]n determining whether the regulations ... are consistent with" the Act, "we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation ... should not be disregarded or annulled unless ... it is plainly and palpably inconsistent with the law." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194 (1941); Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U.S 265, 282 (1949); Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 143 (1940). And in enacting §602 of Title VI Congress intended to vest that kind of broad discretion in the various federal agencies. Thus, Senator Pastore said (110 Cong. Rec. 7058 (1964)):

"Action is mandatory, but the procedure by which that action is accomplished is discretionary, subject, however, to the approval of the President."

This deference to the judgment of the administrative agency is particularly appropriate in an instance such as this where the regulation in issue is a "contemporaneous construction of a [new] statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." United States v. American Trucking Association, Inc., 310 U.S. 534, 549 (1940), quoting Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933). This is not to ignore or belittle the role of the reviewing court as the safeguard against arbitrary administrative action. The reviewing court has the power and responsibility of determining whether the regulation is valid, and that determination depends on the court's judgment as to the arbitrariness of the regulation and its consistency with the statutory grant of power.

A The Assurance Requirement in General

Preliminarily we emphasize that the requirement to submit an assurance is not a requirement to sign any particular form. The Handbook relating to federally financed welfare programs contains a form (CB-FS 5022)

which a state welfare agency could sign in order to comply with the HEW regulation. But this form is merely provided for the convenience and assistance of the state welfare agencies. HEW has never insisted that this particular form be signed, and it has always stood ready to accept any written statement of the Alabama Department that contained information and commitment specifically called for in §80.4(b) of the regulation. The letter of the Alabama Department of August 20, 1965, was rejected by HEW as an inadequate assurance, not because the HEW recommended form had not been submitted, but because of the content of the purported assurance, or more precisely, because the Alabama Department failed to provide in that letter the commitment and information called for by the regulation. See pp. 11-15, supra. The regulation requires the state agency, in this assurance, to identify the areas and degree of noncompliance with Title VI and substantive provisions of the regulation, to commit itself to undertake appropriate measures and to describe the "methods of administration" to be implemented by the state agency to correct the non-compliance. The assurance requirement is a procedure for initiating the NEW enforcement program by casting the

responsibility on the state agency to devise and implement measures to bring its welfare program into accord with federal civil rights requirements.

It seems hardly debatable that it is reasonable for a federal agency, as a condition of dispensing to a state agency almost $100,000,000 a year from the United States Treasury, to require the state agency to make some commitment that the money will be spent in conformity with the requirements of federal law, in this instance Title VI. The agency needs some enforceable assurance that the program will be operated, or, in one sense, the money spent as federal law requires. Moreover, it is also eminently reasonable for the federal agency to place the responsibility on the state agency - the direct recipient - to make an inventory of the areas of noncompliance in its programs, and also to formulate methods of administration for correcting that noncompliance. Under Title VI HEW is charged with the responsibility of eliminating racial discrimination in the great variety of welfare programs throughout the Nation that are assisted by federal funds. Without some basic information or assistance from the state agencies, it would be impossible for HEW to make a survey

of every aspect of every state welfare program and to formulate correctional measures. This would require HEW to deal directly, not with a signle state agency such as the Alabama Department,[18] but with an endless multitude of county and regional welfare offices, nursing homes, child day-care centers, child-caring residential institutions, hospitals, clinics, private physicians, and other agencies integrally involved in the statewide welfare program. The administrative burdens on HEW, especially since this would have to be done not just for Alabama but for all the States, would be virtually insurmountable.

This assurance requirement is particularly appropriate because it conforms to the basic structure of the welfare statutes and regulations initially establishing the assistance programs. These laws place the responsibility of formulating and implementing a plan on the state agency, and require reports from the state agency regarding this performance. For example, Title IV of the Social Security

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[18] Cf. Lee v. Macon County Board of Education, (M.D. Ala., CA 604-E, March 22, 1967), where the three judge-district court sought to have a single state agency, the State Superintendent of Education, assist in having local school systems throughout the state adopt consitutionally required desegregation plans.

Act, which covers aid to needy families and is involved in this proceeding, provides that the state agency must submit for the approval of the Secretary a plan that accords with certain standard, and it authorizes the Secretary to stop further payments under the program if in the administration of the approved plan there is a failure to satisfy statutory criteria. 42 U.S.C. §§ 602, 604. See also 42 U.S.C. §§302, 305 (Old Age Assistance); §§1202, 1204 (Aid to the Blind); §§1352, 1354 (Aid to the Permanently, and Totally Disabled). In many respects the requirement to submit a Title VI assurance is like the requirement of the state agency to formulate and submit a basic plan. It is merely an adaptation of the standard federal-state arrangement by which a state qualifies for federal welfare assistance. The assurance requirement recognizes or presupposes the primary responsibility of the state agency in the operation of the state-wide welfare program and asks the state agency to identify the areas of racial discrimination and to formulate and submit methods of administration for eliminating that racial discrimination.

It is also of some significance that, apart from Title VI, in other federal assistance programs assurances of one sort or another have to be filed indicating the way in which the applicant intends to operate if the federal agency grant what it seeks. See for example, the Impacted Areas Act, 20 U.S.C. §636;[19] the Hill-Burton Hospital Act 42 U.S.C. 291(e). Moreover, the provision in the HEW regulation in question requiring the submission of an assurance has its parallel in the regulations promulgated by other Federal agencies under §602 of Title VI of the Civil

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19/ That section provides in pertinent part:

* * *

(b)(1) Each application by a local educational agency shall set forth the project for the construction of school facilities for such agency with respect to which it is filed, and shall contain or be supported by --

* * *

(B) assurance that such agency has or will have title to the site, or the right to construct upon such site school facilities as specified in the application and to maintain such school facilities on such site for a period of not less than twenty years after the completion of the construction;

(C) assurance that such agency has legal authority to undertake the construction of the project and to finance any non-Federal share of the cost thereof as proposed, and assurance that adequate funds to defray any such non-Federal share will be available when needed;

(D) assurance that such agency will cause work on the project to be commenced within a reasonable time and prosecuted to completion with reasonable diligence;

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Rights Act. See, for example, 32 C.F.R. §300.6(h) (Dept. of Defense); 43 C.F.R. §17.4(b)(1) (Dept. of Interior); 7 C.F.R. §15.4(b) (Dept. of Agriculture).

Finally, the reasonableness of the assurance requirement and its consistency with the grant of statutory power is clearly demonstrated by the legislative history. In the Congressional debate it was recognized that the Federal agencies might well rely upon written assurances as one of many means to implement Title VI. Senator Pastore said (110 Cong. Rec. 7059, 1964):

19/ (Cont. from preceding page)

> (E) assurance that the rates of pay for laborers and mechanics engaged in the construction will be not less than the prevailing local wage rates for similar work as determined in accordance with sections 276a to 276a-5 of Title 40;
>
> (F) assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district; and
>
> (G) assurance that such agency will from time to time prior to the completion of the project submit such reports relating to the project as the Commissioner may reasonably require.

> "The rule or regulation issued by the particular Federal agency would vary, depending on the nature and method of administration of the particular assistance program. There might be rules, for example, governing the conduct of recipients of assistance, or orders specifying a standard form of written assurance or understanding to be given by each applicant for assistance, or perhaps a standard provision-of-assistance contract."

And Senator Ribicoff added (Id. at 7066):

> "For example, the most effective way for an agency to proceed [under Title VI] 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 . . . ."

Thus, we submit that the HEW regulation requiring the submission of an assurance is eminently reasonable and consistent with the statute, and that it is therefore valid.

B. Responsibility of the Alabama Department for Racially Discriminatory Practices of Third Parties. The Alabama Department's refusal to submit the required assurance has been based primarily on the ground that such an assurance would commit it to taking some action to eliminate racial discrimination practiced by third parties--such as hospitals, nursing homes or doctors--that are used in connection with the state welfare program.

The Alabama Department claims that because it does not own or operate such third party facilities, it has no control over them, and that therefore the HEW regulation is invalid because it requires the state welfare agency to submit an assurance in which it would assume responsibility for eliminating racial discrimination where it has no power to do so. The Alabama Department disclaims all responsibility for the elimination of racial discrimination in the services performed by those facilities or institutions for welfare recipients. In support of that contention the Alabama Department puts forward various hypothetical situations, mostly involving segregated waiting rooms of a white physician who happens to be the only doctor in the county; and it maintains that since there is "nothing" that it could do to eliminate racial discrimination in such instances, it is essentially arbitrary to make it promise to do so.

There are four reasons why their argument is wrong. First, appellees' reliance on hypothetical situations, such as those relating to segregated waiting rooms of physicians, obscures the posture of this case. This litigation does not involve the validity of application of the HEW regulation to particular third-party situations or the institution of administrative proceedings for failure by Alabama to take action against particular third parties. Instead, what is at stake in this litigation is only the general question whether the Alabama Department is obliged to assume any responsibility to take reasonable steps to eliminate racial discrimination in facilities and services provided by third parties.[20/] No useful purpose would be served by having this Court attempt to anticipate all possible application of the regulations, and to speculate that the regulation might conceivably be applied by HEW to some third party situation in a way that would be invalid. The

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20/ Compare Times Film Corp. v. City of Chicago, 365 U.S. 43, 50 (1961), where the challenge was to the agency's "basic authority", and the Supreme Court disclaimed intimating any view, "as to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented...."

reasonableness of any particular administrative action under the HEW regulation would be subject to judicial review when such an application is made and challenged, and nothing in this case would foreclose the reviewing court from deciding for itself the legality of such an application. The limited question to be decided by this court is whether HEW can lawfully require the Alabama Department to assume some responsibility for the racial discrimination practiced by third parties in connection with performing services under the state welfare program, or to state the question conversely, whether the Alabama Department is entitled to disclaim all responsibility for racial discrimination of these facilities and institutions.

Second, it must be recognized that the HEW regulation does not require the Alabama Department to eliminate racial discrimination practiced by third parties at the risk of having all funds terminated or the assurance breached. What it is asking the Alabama Department to assume is some responsibility for the elimination of racial discrimination practiced by third parties. It is asking the Alabama Department to try to do something. Moreover, it is not asking the Alabama

Department--any more than it asked all 49 other state welfare departments--to attempt to accomplish something where it has no power to do so and there is no chance of success. The state agency knows which third parties perform services for welfare recipients; it is in a suitable position to report on the extent of noncompliance in such activities; and it can take many steps, including negotiations, to bring about an end to racial discrimination in those institutions and facilities. Indeed, some of these so-called third parties participate in the vendor payment program and, as stated in the Secretary's order, the Alabama Department "either directly or through other state agencies...negotiates or sets the fees which it will pay and...is involved--as the Agency itself admits--in at least 'helping' make arrangements for medical care 'if requested to do so.'"[R.28;A.Vol.II, p.293]. The regulation merely requires the state welfare agency to take reasonable steps to obtain compliance by the third parties, and if compliance cannot be obtained within a reasonable time, to make adjustment to cease using those

particular noncomplying facilities. As the Secretary clearly stated in his order:

> Our Regulation under Title VI is based upon the premise that most of those providing such services can be persuaded to provide them nondiscriminatorily and to the extent they will not, that Federal funds should not be paid to help perpetuate such discriminatory practices against innocent beneficiaries. Alternate, acceptable services should be found and developed.
>
> The Alabama agency has refused to be a party to such persuasion and administrative action, at least until it has exhausted its rights to judicial review. Assuming the legality of our Regulation were upheld, the Agency apparently would then accept responsibility for seeking third party compliance -- although, of course, it will have no greater power then to compel such compliance than it now has [R. 30; A. Vol. II, pp. 297-298].

Third, we submit that these third parties are within the coverage of Title VI because they perform services that are an integral part of the state welfare program. We deal, not with the prohibition of the Constitution in this case, but with a specific statute regulating the distribution of federal funds, and that statute prohibits these third parties from engaging in racial discrimination in their performance of services under the state welfare program. Title VI declares in the most comprehensive terms that no person shall be "subjected to discrimination under any program or activity receiving Federal financial assistance," and, as has been recognized in the plans submitted by the Alabama Department, the provision of welfare and medical services by these third parties or vendor facilities is an integral part of the

state welfare program. It is through these third parties the Alabama Department implements and discharges its responsibilities to welfare recipients, and the services performed by these facilities are in this very real sense a part of the state welfare program. Although these facilities are not owned or operated by the state, the services are obtained through contractual or other arrangements with the state agency, and to subject a person to discrimination in the provision of third-party services to subject him to discrimination under the state's welfare program. See A. Vol. II, pp. 214-216 (Hearing Examiner's description of the role of these third party facilities in the state welfare program). Indeed for many welfare beneficiaries it is only in the area of services rendered by third parties that discrimination can be practiced against them, and the third-party area is, therefore, precisely the point at which they most need the protection of Title VI. 21/

21/ By way of analogy we note that language similar to that of Title VI has been read to cover not only discrimination in the services provided by a common carrier's motor vehicle, but also services provided by third parties which by contractual or other arrangements provide services to patrons of the carrier. The pertinent statute, §216(d) of the Interstate Commerce Act, 49 U.S.C. 316(d), provides that "it shall be unlawful for any common carrier . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever...." The Supreme Court held that it was a violation of the carrier's duty for it to arrange to use a terminal where discrimination was practiced against the carrier's passengers. Boynton v. Virginia, 364 U.S. 454 (1960).

Pursuant to the Boynton decision the I.C.C. issued a regulation providing that:

(Cont. on following page)

To subject a person to racial discrimination in obtaining or receiving these services from such third parties, is, we submit, in essence, to subject them to racial discrimination under the state welfare program.

21/ (Cont. from preceding page)

> 180 a(4) Discrimination in terminal facilities
> 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, ... 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. (Emphasis added.)

A three-judge court in State of Georgia v. United States, 201 F. Supp. 813 (N.D. Ga. 1961), aff'd. 371 U.S. 9 (1962) upheld this regulation. Similarly, §216(d) has been read to cover discrimination in waiting rooms in terminal facilities, see United States v. Lassiter, 203 F. Supp. 20 (W.D. La. 1962) aff'd, 371 U.S. 10 (1962), and in terminal restaurants, see Boynton v. Virginia, 364 U.S. 454, 457-463 (1960). Accord Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5, 1961); United States v. City of Jackson, Mississippi, 318 F. 2d 1 (C.A. 5, 1963).

Fourth, the legislative history clearly demonstrates that Congress intended to reach such third parties, particularly third party facilities used under the vendor payment program. For example, in the course of the congressional yearings, the then Secretary Celebrezze made it clear that under Title VI the state walfare agencies would have to make adjustments in their vendor payment programs:[22]

> Secy. Celebrezze: In the vendor payment for medical care of public assistance recipients, we know that there are participating hospitals, nursing homes, and clinics in all sections of the country which engage in racial discrimination in some degree. Many adjustments may be necessary, such as greater use of local governmental facilities where they are available, provision for transporting patients to more distant institutions, perhaps special contract arrangements with some community hospitals for nondiscriminatory treatment of their indigent patients.
>
> * * * *

22/ Excerpts from hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 7152, 88th Cong., 1st Sess., pp. 1544-1546. See also, Additional Views on H.R. 7152 of Hon. William W. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, House Committe on the Judiciary, 88th Cong., 1st Sess., p. 24, where it is explicitly stated that vendor payment programs are covered by Title VI:

(footnote cont'd)

Mr. Cramer: In the vendor payment programs for medical care for your public recipients, that is administered by the local public welfare board, is it not?

Secy. Celebrezze: Yes, to a degree, but the payments are made directly to the supplier of the service by the States.

Mr. Cramer: The States determine whether the person is qualified to receive welfare payments, do they not?

Secy. Celebrezze: Under the vendor payment program, yes. The State has to adopt it. We have to adopt it under the State program. Once we adopt the State program under vendor payment, they make the payments directly to the physician or directly to the hospital, whatever the case may be, under the vendor payment program.

Mr. Cramer: Therefore, you would not make payments to a doctor, for instance, who chose a hospital or nursing home that practiced discrimination. If the doctor chose a given nursing home and that nursing home discriminated, you could not make payment to that doctor, is that correct?

22/ (footnote cont'd)

"In a related fashion, racial discrimination has been found to exist in vendor payment programs for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs and, in some, Negro recipients have received less than equal advantage."

Secy. Celebrezze: This isn't the way in which I described it in my statement. In my statement I said that the reason we wanted discretion rather than completely cutting it off is that I am dealing with human problems. If we completely cut off funds we still have these sick people we have to send to hospitals. If the only hospital that is available is a segregated hospital, and it is a matter of life or death with the individual, we would have to send them to that particular hospital. Meanwhile, I would try to make other arrangements later on either to use other governmental facilities or other institutions that can render service. If a man needs medical attention we are not going to argue about the treatment while the patient is dying.

Mr. Cramer: I understand that, but I wanted to get into the aspect that you would be controlling the choice of either the doctor or patient or the nurse as to the hospital or clinic or nursing home to which he might wish to go.

Secy. Celebrezze: When a man goes into the hospital he certainly gets medical treatment and we are not concerned as to the doctor who treats him. That is a question we are not primarily concerned with at this point. We may have that decision coming out of the separate-but-equal lawsuit under the Hill-Burton program. That is why I say that it is difficult to define these areas. Take the Hill-Burton program, for example. Let us assume the hospital is integrated, but it only has whites on its medical staff. What decision do you as an administrator come to?

Are you concerned that the patient is treated equally or are you also concerned with the internal operations of the hospital? These are difficult decisions. That is why I say there are a hundred different ways this may apply.

Mr. Cramer: But you have authority under Title VI if a given hospital does not have any Negro doctors on the staff to withhold funds under the vendor payment program and thus prevent a person from going to that hospital and receive medical service at that hospital.

Secy. Celebrezze: You could do that if you carried it that far, and wanted to get into the internal management of the hospital.

Mr. Cramer: You have it under Title VI if you wish to use it; right?

Secy. Celebrezze: I think we could.

* * * *

Mr. Cramer: The same is true in a nursing home. If in fact a given nursing home refuses to employ Negro nurses, for instance, but permits Negroes as patients, you would have authority to cut off funds?

Secy. Celebrezze: We can go on and on with examples.

Mr. Cramer: Precisely.

Thus, for these reasons we believe there is no merit to the Alabama Department's contention in that the HEW regulation requiring the submission of an assurance is unlawful because the submission of such an assurance would commit it to trying to eliminate racial discrimination in third party facilities that are used as an integral part of the welfare program.

C. Responsibility With Respect to Direct Services. The Alabama Department's primary contention with respect to its responsibility under the HEW regulation relates to the services performed by so-called third parties. However, the Alabama Department, by refusing to submit the required assurance, has also refused to assume the responsibility imposed under the HEW regulation with respect to the services and programs directly operated by it. Although the Alabama Department has insisted that it does not deny benefits on account of race, it has not, as found by the Secretary, adequately identified the extent to which racial discrimination exists in, for example, the physical facilities used by the state agencies and the assignment of case workers, nor has the Alabama Department formulated or proposed adequate methods of administration for correcting that racial discrimination [R.23-24; A.Vol.II, pp.285-287]. It has not, for instance, provided for the dissemination of information about the rights and responsibilities under Title VI; nor has it proposed any system of surveying compliance, for keeping records or for filing reports that would enable performance to be properly

evaluated; nor has it formulated a complaint procedure that would give beneficiaries an adequate opportunity to present complaints of alleged noncompliance. The Alabama Department has refused to acknowledge any responsibility for doing these things, and has thus challenged the validity of the HEW regulation requiring the submission of the assurance because, in that assurance, the state agency must identify areas of noncompliance and propose methods of administration designed to eliminate that noncompliance.

As was true of the other contentions respecting the validity of the HEW regulation, this contention is without merit. If Title VI is going to have any meaning with respect to the federally financed welfare program, HEW must have the power, through the promulgation of regulations under section 602, to require the Alabama Department to take such steps with respect to its direct programs and activities. There can be no doubt that such programs and activities are within the coverage of Title VI, and that HEW was entitled to impose the initial responsibility on the state welfare agency to make

an inventory of its own activities and programs, and to propose methods of administration for bringing that program or agency into compliance with Title VI.

III. Other Questions Relating to the Validity of the Secretary's Order.

In the proceedings before the District Court the attorneys for the Alabama Department stated that the state agency would submit the required assurance if the HEW regulation were judicially determined to be valid. Similarly, if the regulation is determined to be invalid, the Secretary will not seek to give his order effect. Hence, the principal question before this Court is the validity of that regulation.

However, aside from the validity of the regulation, certain other questions are raised in the complaint filed in the District Court relating to the validity of the Secretary's order, and in the interest of completeness we deal with those questions here.

A. Procedural Questions

In paragraph 16A of its first amended complaint, it is claimed also the Secretary's order is invalid because he erred in denying the following three motions or requests: (1) the request of the Alabama Department to make an oral presentation before him; (2) the motion of the Alabama Department to be allowed to present further evidence and current data concerning civil rights in Alabama relating to grants and services under the child welfare and public assistance programs; (3) the motion of the Alabama Department to be allowed to incorporate into the proceeding the question whether its proposed Medical Assistance plan or program under Title XIX of the Social Security Act, 42 U.S.C. 1396, satisfies the requirements of Title VI.

We believe that the Secretary did not err in denying these motions and requests.

(1) The Secretary has the discretion to decide whether there should be oral presentation before him, and in the circumstances of this case he did not abuse that discretion in denying the request. There was a full evidentiary hearing be-

fore the Hearing Examiner; there was written and oral presentation to the Commissioner of Welfare; and the issues were fully explored in the exhibits, briefs, recommendations, and decisions that were before the Secretary.

(2) The offer of the Alabama Department to introduce allegedly "current" evidence of racial discrimination in the operation of the federally-assisted child welfare and public assistance programs in Alabama was properly rejected by the Secretary. That evidence could in no way justify the failure of Alabama to comply with the requirement of the HEW regulation to submit an assurance identifying the remaining areas of noncompliance and describing methods of administration formulated and adopted by the agency to eliminate that noncompliance. As the Secretary stated in his decision, "such evidence of decreased discrimination alone would not compensate for the failure of the Alabama agency to commit itself to achieve non-discriminatory care and services in Federally-assisted programs as called for in Section 80.4(b) of this Department's

Regulation. Were it willing to do so, however, this evidence would, of course, be relevant and needed to evaluate the adequacy of the methods of administration which it would propose to use to assure compliance with Title VI." [A.Vol.II, p.278].

(3) The Alabama Department's motion to incorporate Title XIX in the proceedings was, in the Secretary's judgment untimely and an inappropriate manner to resolve conflicts over the Title VI requirements with respect to that program. Moreover, it is difficult to understand how the failure of the Secretary to include Title XIX within the proceeding before him could render invalid his order that affect only Titles I, IV, V(part3), X, and XIV. If it was expedited consideration that the Alabama Department wanted, the Secretary made clear that could be achieved without incorporating Title XIX in this proceeding. He said:

> This Department shares the expressed interest of the Alabama welfare agency in bringing the benefits of Title XIX to the people of Alabama as soon as possible.
>
> We stand ready to help it to resolve all of the issues-civil rights and otherwise - which presently stand in the way of approval of its Title XIX plan.

> If the Commissioner of Welfare determines that voluntary compliance with Title VI requirements cannot be obtained for that plan, formal action on the matters in dispute will be expedited. [A.Vol.II,p.279.]

B. The Appropriateness of Administrative Proceedings. The Alabama Department also contends that the initiation of termination proceedings by HEW here, as opposed to his employing "other means authorized by law", was arbitrary and capricious and that therefore the Secretary's order is invalid. In support of that contention, a statement made by Senator Ribicoff during the course of the congressional debate on Title VI is cited, and that statement reads as follows:

> Sixth***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 withholding 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 available 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. (110 Cong. Rec. 6846, daily ed., April 7, 1964.)

HEW has consistently recognized that administrative proceedings to terminate assistance is "a last resort", to be used when all else fails. The purpose of Title VI and HEW's enforcement program is not to terminate federal assistance, but to eliminate racial discrimination in federally-assisted programs. But the record in this case clearly demonstrates that it was the Alabama Department's repeated refusal to comply with regulations after two years of constant efforts by HEW to secure voluntary compliance that led to the initiation of termination proceedings and the Secretary's order. Indeed, in this case termination of federal financial assistance was "the last step" and "a last resort" to obtain compliance with the regulation, and Section 80.8(b) of the presidentially approved regulations specifically authorizes the agency to terminate federal financial assistance according to prescribed procedures, such as those meticulously followed in this case when a recipient refuses to furnish the assurance required under section 80.4 of the Regulations.

The commencement of administrative proceedings was an appropriate and effective manner, authorized by the statute and the regulation, to implement the requirements of the regulation. It gave the Alabama Department an opportunity to litigate its challenge to the enforcement program, and for this Court to review the validity of the regulation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court should be reversed and vacated and the complaint dismissed, and the order of the Secretary should be reviewed on Alabama's alternative petition for review and held valid.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Appellant-Respondent's Brief and Appendix to the Brief (Volumes I and II) have been served by official United States mail in accordance with the rules of this Court to the attorneys for appellee-petitioners as follows:

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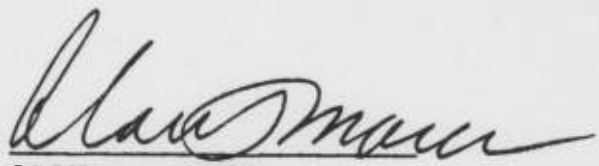

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