

SEP 27 1967

The Files

September 26, 1967

OMF:jpw
DJ 171-1-3

Owen M. Fiss
Special Assistant
Civil Rights Division

Alabama v. Gardner -- Stay of the
Mandate of the Court of Appeals

On September 21, 1967 I telephoned Mr. Reid Barnes to learn whether the State was intending to submit a statement of compliance. He then, advised me that the State had applied to Judge Gewin a short while ago for a stay of its mandate in order to permit the State to apply for certiorari. Immediately after finishing my telephone conversation with Mr. Barnes I spoke to Ed Yourman of HEW. He told me that he had just spoken to Miss Mary Lee Stapp of the State Attorney General's office, and she said that she had applied for a stay on behalf of the State a short while ago.

After consulting with Mr. Owen, I telephoned Judge Gewin's secretary. I stated that I was the attorney for the Government in this case and I wished to be heard on the application for a stay. She immediately said that she was very familiar with the case and that Judge Gewin would want to speak to me about it. I was then connected to Judge Gewin and I identified myself. I said the purpose of this call was solely to advise him that the Government wished to be heard and that we have not yet been served with the papers. He then said that he had consulted with judges about this matter and he was inclined to rule on the application for a stay in the immediate future. He, therefore, said that the Government could only be heard in the course of this telephone conversation and he asked me to express the views of the Government. He then read the papers that had been submitted by the State and I responded as follows:

cc: Chrono
Owen
Rose
Fiss ✓
Mrs. Rosenberg

The Government opposed the application for the stay because we believed that the State could file the statement of compliance within the remaining 10 days without compromising any of its rights to have the Supreme Court review the issues. I also pointed out that more than 20 days had lapsed since the issuance of the decision of the Court of Appeals in this case and that the State has taken no action to bring itself into compliance or to prepare a petition for certiorari even though HEW offered assistance in preparing the statement of compliance. Finally, I urged that the denial of the State by this Court would nevertheless leave the State free to apply to a Justice of the Supreme Court for a stay. I expressed the view that such a procedure would be preferable since the Justice would get the feeling of conference as to whether there was any prospect of granting certiorari. At various points throughout the conversation I stated I was extremely reluctant to express these views in the absence of counsel for the other side; but the Judge insisted that this was the only opportunity to have these views expressed and he very much wanted to hear what the Government's position was. Throughout the conversation he emphasized the importance of giving the State an opportunity to have the matter finally adjudicated without causing undue alarm or anxiety in the real parties in interest -- to the welfare recipients. On the basis of these remarks, in my judgment, it appeared that he was inclined to grant the stay.

On about 11:00 on Friday, September 22, I telephoned Miss Stapp to inquire as to whether the Judge ruled on the stay. She said that the Judge had entered a ruling that morning granting the stay. She was unclear as to the precise terms of the stay, but thought it gave them within 30 days in which to file the petition for certiorari. At the end of the conversation she stated that she had given Mr. Barnes a

copy of the statement of compliance and advised me to inquire of Mr. Barnes whether he would start negotiating the terms of the statement of compliance so that it can be expeditiously filed when and if certiorari is denied.