No. 347

8/31/62

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JAMES H. MEREDITH, on behalf of himself and others similarly situated, MOVANT

v.

CHARLES DICKSON FAIR, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Louisville, Mississippi, et al.

RESPONDENTS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE ON MOTION FOR VACATION OF STAY ORDERS

For Motion + Statement in Opposition
See Pleading File (1-Q)

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STATEMENT

James H. Meredith, a Negro, brought a class action on behalf of himself and other Negro students in the United States District Court for the Southern District of Mississippi against the respondents, claiming that he was denied admission to the University of Mississippi solely because of his race, and seeking to enjoin the respondents from denying his admission and that of the other members of his class on that ground (App. 25). [1] The district court (Judge Mize) denied a preliminary injunction (App. 19) and the Court of Appeals for the Fifth Circuit affirmed (App. 11-34). After a trial on the merits, the district court held that the plaintiff had failed to prove that he was denied admission because of race and dismissed his complaint. On June 25, 1962, the court of appeals (Circuit Judges Brown and Wisdom and District Judge DeVane (sitting by designation)) reversed the judgment, Judge DeVane dissenting (App. 45-87, 90). The court said that (App. 45-46):

> A full review of the record leads the Court inescapably to the conclusion that from the moment the defendants discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to discourage and to defeat by evasive tactics which would have been a credit to Quintus Fabius Maximus.

The court concluded (App. 82-83):

> We see no valid, non-discriminatory reason for the University's not accepting Meredith. Instead we see a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders.

The judgment of the court of appeals, which remanded the case to the district court "with directions that an injunction issue as prayed for in the complaint * * *" (App. #90), was mailed by the clerk of the court of appeals, "as and for the mandate," to the clerk of the district court on July 17, 1962 (App. 91). On the following day (July 18, 1962), upon respondents' application and without prior notice to the plaintiff Judge Cameron, a Circuit Judge of the Fifth Circuit who did not sit on the division of the court which rendered the judgment, entered an order

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[1] "App." refers to the appendix to the petition for certiorari.

staying execution and enforcement of the mandate (App. 93). The order stated that the stay was to continue in force until final disposition of the case by the Supreme Court, provided that within thirty days a petition for certiorari had been filed (App. 93).

On July 20, 1962, the clerk of the court of appeals, pursuant to instructions from that court, telegraphed counsel for the parties, requesting that they exchange and file "statements of their positions with memorandum briefs for or against the granting of any stays, including the vacating of the stay entered by Judge Cameron, the issuance by this Court of injunctions pending further appeal, or other appropriate action" (App. 97). On July 27, 1962, the division of the court of appeals which had rendered the judgment of June 25, 1962, entered an order vacating the stay of Judge Cameron, recalling its earlier mandate, and issuing a new mandate (App. 95, 104). All three members of the division agreed that the court had inherent power to review Judge Cameron's action and that once the court's mandate had been issued it was legally too late to stay it in the absence of a recall of the mandate (App. 96-98). In addition, Judges Brown and Wisdom were of the opinion that even if an appellate court has residual control over an issued mandate broad enough to support a stay in exceptional circumstances, the stay order should be vacated on the ground that it was improvidently granted (App. 98-102). The court also concluded that its mandate had been worded too loosely. It therefore directed that the mandate issued be recalled and issued an amended judgment explicitly requiring the district court to issue forthwith a permanent injunction prohibiting the respondents from excluding the plaintiff "from admission to continuous attendance at the University of Mississippi" (App. 103, 105-106). In its order the court issued its own preliminary injunction to this same effect "pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of * * * the plaintiff to, and the continued attendance thereafter at the University of Mississippi. * * *" (App. 103-104).

The clerk of the court of appeals mailed a certified copy of the amended judgment, " as and for the mandate," to the clerk of the district court on July 28, 1962, with a request that it be substituted for the first judgment, and that the first judgment be returned (App. 107). On the same day Judge Cameron issued an order purporting (1) to stay the execution and enforcement of both the court's order and its amended judgment of July 27, 1962, pending final disposition of the case by the Supreme Court, provided that within thirty days from the date of his new order a petition for a writ of certiorari had been filed, and (2) to extend the stay which he had granted on July 18, 1962 (App. 108-110).

Also on July 28, 1962, the court of appeals entered another injunctive order which, inter alia, required the respondents, pending compliance with the orders of the court of apppeals, to admit the plaintiff to the University either immediately or in September, at the plaintiff's option; prohibited the respondents from discriminating with respect to the plaintiff's admission to, and continued attendance at, the Univerasity; and ordered the respondents promptly to evaluate and approve the plaintiff's credits without discrimination and on a reasonable basis in keeping with standards applicable to transfers to the University of Mississippi (App. 111-112).

Respondents thereupon moved Judge Cameron for an order amending the stay order which he had entered on July 28, 1962. On July 31, 1962, Judge Cameron did amend his July 28 order so as to stay also the execution and enforcement of the injunctive order which the court of appeals had entered on July 28, 1962 (App. 115-116).

On August 4, 1962, the division of the court of appeals which had rendered the judgment proceeded to vacate and set aside the stays granted by Judge Cameron on July 28, 1962, and July 31, 1962, terming them "unauthorized, erroneous and improvident" for reasons set forth in the court's order of July 27, 1962. The court stated that its orders "continue in full force and effect and require full and immediate obedience and compliance" (Exhibit H To Motion For Vacation Of "Stay Order", etc. 2/).

On August 6, 1962, upon respondents' motion, Judge Cameron purported to stay the court's order of August 4, 1962, and again to stay the court's orders of July 17, 1962, July 27, 1962, and July 28, 1962, all the stays to continue in force until final disposition of the case by the Supreme Court, provided a petition for certiorari were filed within thirty days (Exhibit I to Motion For Vacation Of "Stay Order", etc.).

ARGUMENT

This application involves two questions. One is whether James Meredith shall be admitted to the University of Mississippi this September without discrimination, as he is entitled under the law of the land and the orders of the court of appeals. The second question--one perhaps even more important to maintenance of the rule of law--is whether there is any orderly remedy, when this Court is in vacation, against the unauthorized action of a single circuit judge who persists in entering orders purporting to set aside the decrees of a court of which he is only a single member after that court has ruled upon every question before him.

In order to make plain the precise nature of the latter question we depart from the customary sequence to show first that Judge Cameron's stays of the decrees of the court of appeals were properly vacated by that court and that the final stay issued by Judge Cameron was not only

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2/ This is the motion filed by Meredith in this Court.

improvident but void. We shall then turn to the question whether a single Justice of this Court has power to intervene or the law is helpless in the absence of a special session of the Court.

I

THE STAYS ISSUED BY JUDGE CAMERON ARE NULL AND VOID

We assume for the present purposes that a single judge of a court of appeals has authority under 28 U.S.C. 2101(f) to stay a judgment of his court pending certiorari in the absence of action by the court itself and even though he has not sat on the panel actually deciding the case.[3/] In this case, however, the Fifth Circuit has lawfully and properly vacated the first three stays entered by Judge Cameron. The fourth and last is null and void because, by that time, the court itself had acted upon all aspects of the precise question, leaving the single judge with no power in the premises.

A. SINCE THE COURT OF APPEALS PROPERLY VACATED THE FIRST THREE STAYS, THEY ARE NO LONGER IN EFFECT

1. A court of appeals has power to set aside a stay issued by a single circuit judge.

3/ There is considerable doubt whether a judge who was not on the panel has this authority. 28 U.S.C. 2101(f) provides that:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court * * *. (Emphasis added.)

The language, "a judge of the court rendering the judgment or decree," is susceptible of two possible interpretations. It could mean either (1) any judge of the entire court, or (2) a judge who participated in the rendition of the judgment sought to be stayed. The first construction has been followed in a dissenting opinion by a single judge of the Supreme Court of California, who, without elaborating, has stated that there is no requirement that the judge granting the stay must have participated in the judgment. In re Chessman, 43 Cal. 2d 408, 413, 274 P. 2d 645. The second construction is reflected in Rule 26 of the Rules of the Court of Appeals for the Ninth Circuit, which allows a stay only "by the order of a Circuit Judge who participated in [the] decision."

The initial stays issued by Judge Cameron were lawfully vacated by the court of appeals and therefore have no further effect. "/T/he general rule is that where a court, in the exercise of its jurisdiction, directs an order previously entered by it to be stricken out, it is the same as if such order had never existed." In re Rochester Sanitarium & Baths Co., 222 Fed. 22, 26 (C.A. 2).

There is no doubt that a court has inherent power to vacate its own judgments. See Bronson v. Schulten, 104 U.S. 410; Sandusky v. National Bank, 23 Wall. 289, 293; Tucker v. American Sur. Co. of N.Y., 191 F. 2d 959 (C.A. 5); I Freeman, Judgments § 194 (5th ed.), and the cases cited therein at note 14. A court similarly has power to vacate an order issued by one of its members. E.g., Railroad Co. v. Shutte, 100 U.S. 644 (supersedeas bond which was approved by a single Justice vacated by the Court); People v. McDonald, 2 Hun. 70 (N.Y. Sup. Ct.) (writ of certiorari awarded by judge in chambers quashed by court); Key v. Paul, 61 N.J.L. 133, 134, 38 Atl. 823 (orders of a single judge are "generally subject to review by the court itself * * * even though the judge acts by the express authority of a statute").[4] Thus, in Green Valley Creamery v. United States, 105 F. 2d 754 (C.A. 1), an order of an individual judge staying an injunction was vacated by the court. In Alexander v. United States, 173 F. 2d 865 (C.A. 9), the Ninth Circuit, sitting en banc, vacated a stay granted by a single judge on the ground that the judge had no power to make the order. On several occasions this Court has itself entertained, though denied, motions to vacate stays granted by single Justices. See, e.g., Land v. Dollar, 341 U.S. 737; Johnson v. Stevenson, 335 U.S. 801. And in Rosenberg v. United States, 346 U.S. 273, the Supreme Court did vacate a stay granted by a single Justice.[5]

4/ See also Red Star Motor Driver's Association v. Detroit, 210 N.W. 496 (Mich. Sup. Ct.), writ of error dismissed, 275 U.S. 486; Commonwealth v. MacDonald, 94 Pa. Super. 486; In re Epley, 64 Pac. 18 (Okla. Sup. Ct.).

5/ Admittedly, however, the source of the Court's authority to vacate the stay in Rosenberg was different from that of the court of appeals here. In Rosenberg, the Court stated that "/t/he power which we exercised in this case derives from this Court's role as the final forum to render the ultimate answer to the question preserved by the stay. * * * In the exercise of our jurisdiction to decide the question which was preserved for decision, it lay within our power to bring the new claim before us and examine its merits without further delay." 346 U.S. at 286. The majority opinion in Rosenberg, however, does not either in terms or impliedly, determine whether there are other sources of power which would authorize the Supreme Court, or a court of appeals to vacate a stay granted by a single judge.

We recognize that Mr. Justice Black expressed doubt in the Rosenberg case about the power of the Court to set aside the stay granted by Justice Douglas. 346 U. S. at 296, 297. We submit that there are two significant differences between the power of the Court in that case and that of the Court of Appeals here. First, the stay granted by Mr. Justice Douglas was concededly within his power. In the present case the stays issued by the single circuit judge were not only improvident but an excess of power (See infra). Second, the difficulty in pointing to a statutory source of authority is less serious here. In the Rosenberg case, Mr. Justice Douglas granted a stay at the same time that he denied an application for habeas corpus, the stay to be effective until the question raised could be determined by the district court and court of appeals. Consequently, at the time the full Court vacated the stay, it was arguable that the case was not before the Court for consideration on the merits. Here, the court of appeals had heard the appeal on the merits, and although the mandate had issued, it had, of course, the normal power to recall its mandate and reassume full jurisdiction of the cause. Consequently, the court of appeals had authority to make such orders as might be just under the circumstances.

2. The court of appeals did not err in vacating the initial stays entered by Judge Cameron.

Since, as we have shown, the court of appeals had power to vacate the stays issued by Judge Cameron, its orders would be binding even if based upon an error of law. It is plain, however, that the court of appeals did not err. The initial stays were void because the mandate had gone down before the stays were granted. The stays were also so improvident as to require reversal by the court.

(a) The mandate of the court of appeals first issued on July 17, 1962 (App. 91, 93).[6/] Judge Cameron's order was not entered until the following day (App. 106). Once a mandate has issued from an appellate court, neither

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6/ The amended mandate, issued on July 27, 1962 (App. 106), was stayed on July 28, 1962.

the court nor a judge thereof has any further power over the case in the absence of a recall of the mandate. Sibbald v. United States, 12 Pet. 487, 491; Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F. 2d 764, 769 (C.A. 3), reversed on other grounds, 322 U.S. 238; Omaha Electric Light & Power Co. v. City of Omaha, 216 Fed. 848, 854-855(C.A. 8); In re Nevada-Utah Mines & Smelters Corp., 204 Fed. 984 (C.A. 2); Kozman v. Transworld Airlines, 145 F. Supp. 140 (S.D. N.Y.). Since Judge Cameron clearly did not have power to recall the mandate in these cases, and did not even purport to do so, he was without power to grant the stays. This principle, which was recognized by the court of appeals (App. 97-98), prevents two different courts from having jurisdiction over the same mandate at the same time. If both courts had simultaneous jurisdiction, unseemly conflict could easily arise when one wished to stay the mandate pending further review and the other did not. The principle, as the court of appeals also recognized (App. 98), is embodied in Rule 32 of the Fifth Circuit's own rules.

(b) In any event Judge Cameron acted improvidently in granting the stays. In the first place, the law relating to stays has long stressed the role of judges familiar with the case. Therefore, this Court has said that a stay application "should, in the first instance, be made to the Circuit Court of Appeals which with its complete knowledge of the cases may with full consideration promptly pass on it." Magnum Import Co. v. Coty, 262 U.S. 159, 163. It is because of the lower court's "complete knowledge of the case" that the Supreme Court requires an "extraordinary showing" before it will grant a stay refused by the court of appeals. Id. at 164. See also Cumberland Telephone & Telegraph Co. v. Public Service Commission, 360 U.S. 212, 219; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 437 (1951). Here, in contrast to the members of the sitting division, Judge Cameron did not read the briefs, hear the argument, study the record or discuss the case in conference. He was not, as they were, intimately familiar with the facts and with the law.

While there may be circumstances, such as the unavailability of the original panel, which might justify a nonparticipating judge in issuing a stay, such circumstances are not present in this case since the panel was available. Thus, there was no need for Judge Cameron to issue stays when the three members of the original panel, including one who agreed with respondents on the merits, could decide whether a stay was necessary on the basis of their detailed knowledge of the case. The issuance of a stay by another judge when the division which decided the case was available was likely to result and did result in the present conflict between the court and one of its judges.

Second, it is well established that a stay of a judgment pending review should not be issued as a matter of course. On the contrary, there must be "a reasonable liklihood of satisfying the standards governing review on certiorari" (Board of Education of New Rochelle v. Taylor, 82 S.Ct. 10, 11; Edwards v. People of the State of New York, 76 S.Ct. 1058; 1059), and a balance of convenience in favor of the applicant. Board of Education of New Rochelle v. Taylor, supra; Magnum Import Co. v. Coty, 262 U.S. 159, 164.

It is well established that a Negro cannot be barred because of race from admission to a state institution of higher learning. Brown v. Board of Education, 347 U.S. 483; Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala.), affirmed, 228 F. 2d 619 (C.A. 5), certiorari denied, 351 U.S. 931; Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga.). Indeed, the law is so well-settled in this area that this Court has consistently refused to suspend judgments requiring admission of Negroes to previously segregated schools. Ennis v. Evans, 364 U.S. 802; Houston Independent School District v. Ross, 364 U.S. 803; Orleans Parish School Board v. Bush and Davis v. Williams, 364 U.S. 803; Lucy v. Adams, 350 U.S. 1; Danner v. Holmes, 364 U.S. 939. And the court of appeals' careful review of the facts in this case leaves little doubt of the correctness of its conclusion that the University's refusal to admit Meredith was solely because of his race (see App. 46-55). It is thus extremely unlikely that certiorari will be granted in this case.

Nor does the balance of convenience favor the respondents. There is no showing whatever that the respondents would be irreparably injured in the absence of a stay. As the court of appeals noted in its opinion of July 27, 1962 (App. 98), "other Southern Universities are not shrivelling up because of the admission of Negroes." In the improbable event that this Court should review and reverse the judgment of the court of appeals, the University can simply terminate Meredith's attendance. A stay, on the other hand, would irreparably injure Meredith, not only because he would continue to be deprived of his constitutional right to a non-segregated public education, but also because the additional time he would lose would be irretrievable.

B. THE SUBSEQUENT STAYS ENTERED BY JUDGE CAMERON ARE NULL AND VOID BECAUSE A SINGLE JUDGE OF A COURT OF APPEALS LACKS POWER TO OVERTURN A DECISION OF HIS COURT DENYING A STAY UPON THE SAME GROUNDS

The orders vacating the stays entered by Judge Cameron were a final adjudication by the Court of Appeals for the Fifth Circuit that the judgment would not be stayed pending certiorari. As we understand the case, every ground upon which a stay could be sought was available for argument, and was pressed upon the court of appeals. The single judge simply assumed power to frustrate the decision of his own court.

We submit that the statutes confer no such authority upon a single judge. The second sentence of 28 U.S.C. 2101(f), supra, authorizes " a judge of the court rendering the judgment or decree" to stay its execution and enforcement pending certiorari, but this general delegation must be read in conformance with established practice and common sense. Although this section does not explicitly give the courts of appeals power to stay their own decrees, the power is, of course, part of a court's general power to make such disposition of a case as seems just and proper (see 28 U.S.C. 1651, 2106), and it has the sanction of long usage. It will hardly be suggested that it is proper for a single judge to reverse the action of his own court in the absence of some change in circumstances. We think it plain that in enacting 28 U.S.C. 2101(f) Congress did not intend to grant the power to take such action. Any other interpretation would be inconsistent with the orderly functioning of the judicial system. It would allow a sort of perpetual merry-go-round with the court and single judge entering contrary decrees seriatim, ad infinitum. The situation is as absurd as it is to suppose that Mr. Justice Douglas or any other single Justice of this Court would have had power to grant another stay in the Rosenberg case upon the same grounds considered by the full Court when it vacated the stay granted by Mr. Justice Douglas. The authority granted by 28 U.S.C. 2101(f) must therefore be held to be limited to situations in which the court of which the single judge is a member has not acted or in which new grounds have arisen which have not been presented to the court.

It follows that the subsequent stays entered by Judge Cameron were null and void.

II

A SINGLE JUSTICE IS AUTHORIZED TO SET ASIDE A VOID STAY ISSUED BY A SINGLE CIRCUIT JUDGE

At present the plaintiff has an order from the court of appeals directing his admission to the University of Mississippi this September. He confronts the obstacle of a void order issued by a single judge countermanding the order of the court of appeals. Ultimately he could obtain relief from the Supreme Court of the United States either by applying for a writ of prohibition or upon an appropriate order bringing the case before the Court. There is no doubt of the power of this Court to vacate stays issued by a lower court or therefore by a single judge of the court of appeals prior to making a decision upon the merits. See, e.g., Lucy v. Adams, 350 U.S. 1; United States v. Ohio, 291 U.S. 644; Virginian Ry. v. United States 272 U.S. 658.[1/] But in the present case this course of action is no remedy at all, either from the standpoint of the plaintiff who would not secure his constitutional right to enter college this September or from the standpoint of the integrity of the judicial system, for the circuit judge would have successfully frustrated an order of his own court. Since the Supreme Court of the United States is in vacation until October 1, no relief that it can grant, unless a special Term is called, could have practical application.

An alternative course open to the plaintiff is to insist that the university authorities comply with the order of the court of appeals and, if they refuse, to institute proceedings in that court for contempt. Since the stays are nullities, the orders of the court of appeals are still binding and disobedience would be a contempt. But invoking the coercive powers of the court against a party who has secured what is purportedly

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1/ Cases such as Lambert v. Barrett, 157 U.S. 697, which hold that the Supreme Court has no jurisdiction over a habeas corpus order issued by a district judge in chambers are inapposite. In this case the Court has jurisdiction over the case by virtue of the petition for certiorari, which seeks to review the underlying judgment to which the stay order pertains.

a stay from one of its judges would exacerbate an unseemly conflict by bringing the issue to the threshold of physical power.

The question presented here, therefore, is whether there is any other mechanism in our judicial system, short of convening a special session of the Supreme Court of the United States, for dealing with the orders entered by a single judge in virtual defiance of a court of which he is a member. In a legal sense his action is altogether lawless, and the question is whether such lawless activities are beyond immediate control.

We have found no statute clearly conferring upon a single Justice the authority to vacate a stay issued by a circuit judge. Nor is there any precedent directly in point. We believe, however, that this power is conveyed by the all writs statute and the inherent power of Courts to retain effective jurisdiction. This conclusion is supported by secondary authority and decisions in analogous cases.

Individual Justices clearly have the power to determine whether a stay is necessary or proper pending review by the Court. Thus, on many occasions Justices have exercised the power to issue a stay pending disposition of a case by the full Court. See, e.g., Johnson v. Stevenson, 335 U.S. 801; Rosenberg v. United States, 346 U.S. 273; Land v. Dollar, 341 U.S. 737, 738. While a Justice is normally called upon to exercise his authority by either granting or denying a stay, this does not mean that his authority is confined to that particular situation. There is no legal reason why the power over stays should not include the authority to vacate a stay improvidently granted, if the circumstances of the case so require. Indeed, if the relief sought were characterized, not as vacation of a stay but as staying the effect of ~~stay~~ stay orders granted below, it clearly would be within the power of a Justice to grant. Surely the form of the order cannot be dispositive of the question of power. Thus, Stern and Gressman state (Supreme Court Practice, 249 (2d ed., 1954)) that "The Supreme Court or a single Justice of the Court has power, on application, * * * to grant a stay denied below, or to vacate a stay granted below (emphasis added)."

In Danner v. Holmes, 364 U.S. 939, the district court granted a stay of its injunction requiring the defendants to admit the plaintiffs to the University of Georgia pending a review of its decision on appeal. 5 Race Rel. L. Rep. 1089 (M.D. Ga.). Circuit Judge Tuttle entertained a motion to vacate, and issued an order vacating the stay and reinstating the injunction. Id. at 1091. The Supreme Court thereafter denied the defendant's motion to vacate the order setting the stay aside. 364 U.S. 939. Just as Judge Tuttle had the power to vacate a stay issued by a lower court, so an individual Justice of this Court can vacate the stays of Judge Cameron.[8/]

An order vacating a stay is essentially analogous to the familiar orders entered by single Justices granting stays which operate as injunctions pendente lite even though the same relief was denied by the lower court. When a plaintiff's application for equitable relief is denied by the lower court and that court also denies a stay order pending appeal, a single Justice of this Court may issue a stay, i.e., an injunction, binding upon the defendant until further action by the Court. The authority is derived from the all writs statute (28 U.S.C. 1651.)[9/]

8/ Cf. In re Labor Board, 304 U.S. 486, 496, where the Court authorized the clerk, upon the order of a single Justice, to issue a writ requiring the court of appeals to vacate its order if the court of appeals would not do so of its own initiative.

9/ Section 1651 provides:

> Writs
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> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Rule 62(g) provides:

> Power of An Appellate Court Not Limited
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> The provisions of this rule [relating to the stay of proceedings to enforce a judgment] do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

In Danner v. Holmes, supra, Judge Tuttle relied on Rule 62(g).

Porter v. Dicken, 328 U.S. 252, 254; Rule 50(2) of the Rules of this Court; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 438, note 10 (1951); opinion of Mr. Justice Reed in In re Equitable Office Building Corp., reprinted in Robertson & Kirkham, supra, p. 903; Moore, Judicial Code 603 (1949). Rule 62(g) of the Federal Rules of Civil Procedure recognizes that a Justice may restore as well as grant an injunction. In every substantial sense, a stay of Judge Cameron's order, which would restore the injunction issued by the court of appeals, would have the same effect as an injunction issued by a single Justice. We submit that the all writs statute is not to be construed so meticulously as to distinguish between a direct injunction and a stay which restores an injunction issued by a lower court.

Moreover, an appellate court has the inherent power to render its jurisdiction efficacious by preserving the subject matter of the litigation. United States v. United Mine Workers, 330 U.S. 258, 292; United States v. Shipp, 203 U.S. 563, 573; see In re McKenzie, 180 U.S. 536, 551; cf. Landis v. North American Co., 299 U.S. 248, 255; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, §438, note 9. Surely this power may be exercised by an individual Justice when the Court is in vacation. We therefore believe that an individual Justice can vacate a void stay of a lower court at least when the full Court is not in session. In view of the considerable portion of the year during which the Court is not in session and the large amount of procedural detail which the Court must handle, the need for individual members of the Court to have the power to give parties temporary relief is apparent. See 62 Harv. L. Rev. 311, 313 (1948). Effective interim relief may on occasion require vacating a stay and reinstating an injunction previously granted, as well as granting a stay. As the Court said in the Landis case, "occasions may arise when it would be 'a scandal to the administration of justice' * * * if power to coordinate the business of the Court efficiently and sensibly were lacking altogether." 296 U.S. at 255.

Here, again, there would seem to be a vital difference between the issue presented in Rosenberg v. United States and the question involved in this case. In Rosenberg, Mr. Justice Black pointed out that the all writs statute "says nothing about dissolution of a stay order." 346 U.S. at 297. It was arguable in Rosenberg, however, that, since writs have not traditionally been issued by a Court for the purpose of superseding an order entered by one of its own members, vacation of the stay was not within the authority conferred by the all writs statute. But the case is wholly different where a member of an appellate tribunal is asked to vacate a stay issued by a single judge of a lower court. This is the kind of responsibility normally resting upon appellate tribunals and coming within the all writs statute. Moreover, here, as we have noted above, the authority of Mr. Justice Black rests not only on the all writs statute but on the inherent power of the Court, and therefore of a Justice, to protect the Court's jurisdiction.

III

AN INJUNCTION SHOULD BE ISSUED RESTRAINING RESPONDENTS FROM REFUSING TO COMPLY WITH THE ORDERS OF THE COURT OF APPEALS

The plaintiff has asked for such additional relief as may be appropriate. The government believes that relief in addition to vacation of the stay orders is warranted here in order to make it unmistakeably clear to the respondents that no shadow is cast upon the effectiveness of the judgments and orders of the court of appeals implementing Meredith's constitutional right, and to render unavailing any action that Judge Cameron might take--even in the face of an order vacating his previous stays--to stay again the effect of the judgments and orders of the court of appeals. We believe that it would be appropriate, in the extraordinary circumstances of this case, to issue an injunction, pending disposition by the full Court, restraining the respondents from refusing to comply with the judgments and orders of the court of appeals.

As we have shown above, a single Justice has the power to issue an injunction to preserve the jurisdiction of the full Court pending disposition of the case by the Court. Thus, in Porter v. Dicken, 328 U.S. 252, the Price Administrator under the Emergency Price Control Act sought an order from a district court restraining the defendant from evicting a tenant. The district court dismissed the complaint and the court of appeals denied an application by the Administrator for an injunction pending an appeal to that court. Before judgment in the court of appeals, the Administrator applied for certiorari directly to the Supreme Court. Mr. Justice Reed, to prevent eviction of the tenant, granted an injunction pending final disposition of the case in the Supreme Court. 328 U.S. at 254.

In Porter v. Dicken, Mr. Justice Reed was acting to preserve the status quo. Issuance of an injunction in this case would also preserve the status quo in that it would restore the situation to that which would have existed had Judge Cameron not improperly entered his stay orders. Moreover, as Rule 62(g) recognizes, a single judge of an appellate court has the power to enter an order "to preserve * * * the effectiveness of the judgment subsequently to be entered." The effectiveness of a denial of certiorari or an affirmance of the judgment below certainly would be impaired if the plaintiff were not permitted to enter the University until the following semester.

CONCLUSION

We respectfully submit that the stay order of Judge Cameron should be vacated. In addition, we submit that an injunction should be issued restraining the respondents from refusing to comply with the judgments and orders of the court of appeals until the Court has acted on the petition for a writ of certiorari.

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AUGUST 1962.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19,475

JAMES H. MEREDITH

v.

CHARLES DICKSON FAIR, ET AL.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION OF UNITED STATES FOR DESIGNATION AS AMICUS CURIAE

I

Courts Can Call Upon Law Officers of The United States To Serve As Amici Curiae

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575 (1946)

Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514 (C.A. 3, 1948)

II

The United States Has A Legal Interest In The Due Administration of Justice And The Protection of The Integrity of the Judicial Process

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908 (1961)

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La., 1961), affirmed 368 U.S. 11 (1961)

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La., 1960), affirmed 365 U.S. 569 (1961), and affirmed sub nom New Orleans v. Bush, 366 U.S. 861

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La., 1960), affirmed 365 U.S. 569

Faubus v. United States, 254 F. 2d 797 (C.A. 8, 1957), cert. denied, 358 U.S. 829 (1958)

Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La., 1961), affirmed 368 U.S. 515 (1962)

Allen v. State Board of Education, No. 2106 (E.D. La.)(Order of March 17, 1961)

Angel et al. v. State Board of Education, No. 1658 (E.D. La.)(Order of March 17, 1961)

Davis v. East Baton Rouge Parish School Board, No. 1662 (E.D. La.)(Order of March 17, 1961)

cf:

United States v. Louisiana, 180 F. Supp. 916 (E.D. La., 1960), stay denied, 364 U.S. 500

In re Debs, 158 U.S. 564, 584 (1895)

United States v. California, 332 U.S. 19 (1946)

Sanitary District of Chicago v. United States, 266 U.S. 405 (1928)

Kern River Co. v. United States, 257 U.S. 147 (1921)

United States v. Throckmorton, 98 U.S. 61 (1878)

Vitamin Technologists, Inc. v. Wisconsin Alumni Research Foundation, 146 F. 2d 941 (1945)

III

In Connection With Its Amicus Participation, The United States Can Be Authorized To File Pleadings and Briefs, submit Evidence and Make Arguments

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La., 1961), affirmed 367 U.S. 908 (1961)

Bush v. Orleans Parish School Board, 194 F. Supp. 182 (E.D. La., 1961), affirmed 368 U.S. 11 (1961)

Bush v. Orleans Parish School Board, 190 F. Supp. 861 (E.D. La., 1960), affirmed 365 U.S. 569 (1961) and affirmed sub nom New Orleans v. Bush, 366 U.S. 861

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