

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE *file*

Memorandum

TO : Mr. Barrett

DATE: May 15, 1967

FROM : Mr. Fiss

DMF

SUBJECT: Stay in Lee v. Macon County
Board of Education

Attached is a copy of a brief we received today in Lee v. Macon County Board of Education in support of the application to the Supreme Court for a stay. Our memorandum in opposition was prepared without the "benefit" of that brief, but after reading it, I am of the view that it is neither necessary nor appropriate to submit anything further to the Court.

cc: Norman
Claiborne

Errata:

Re: Wallace v. Lee - Brief of Appellants on Motion for Stay -
Mailed May 9, 1967.

Please substitute the attached title page which contains
corrected spelling of certain names of parties to the
suit and attorneys.

John C. Satterfield

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

LURLEEN BURNS WALLACE, Governor of the
State of Alabama and President Alabama State
School Board of Education;
ALABAMA STATE BOARD OF EDUCATION;
ERNEST STONE, Secretary and Executive
Officer, and
JAMES D. NETTLES, ED DANNELLY, MRS.
CARL STRANG, FRED L. MERRILL, W. M.
BECK, VICTOR P. POOLE, W. C. DAVIS,
CECIL WORD and HAROLD C. MARTIN,
Members, Alabama State Board of Education

Appellants and Applicants
For Stay Pending Appeal

V.

NO. _____

ANTHONY T. LEE, UNITED STATES OF
AMERICA, et als

Appellees

BRIEF OF MOVANTS AND APPELLANTS ON MOTION FOR STAY

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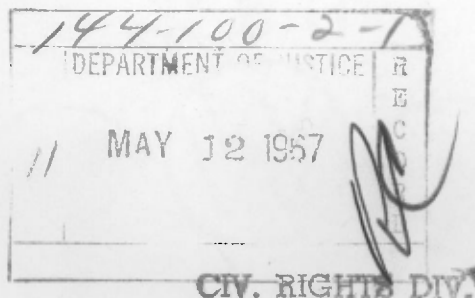
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MAY 15 1967

APPEALS & RESEARCH SECTION
CIVIL RIGHTS DIVISION

BRIEF OF MOVANTS AND APPELLANTS ON MOTION FOR STAY



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OCTOBER TERM, 1966

LURLEEN BURNS WALLACE, Governor of
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Appellants and Applicants
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V.

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BRIEF OF MOVANTS AND APPELLANTS ON MOTION FOR STAY

I.

AN ORDERLY PROCESS OF DESEGREGATION IS CONTINUING IN THE
ELEMENTARY AND SECONDARY PUBLIC SCHOOLS OF ALABAMA.
A STAY OF THE ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONAL
REQUIREMENTS OF THIS DECREE WILL NOT AFFECT SUCH PROCESS.

Upon presentation of the motion for a stay to the three-judge court (as is provided by the statute) the Department of Justice filed a brief opposing such stay. In such brief it said:

Further delay of desegregation of Alabama's public schools is inconsistent with the Supreme Court's directive: "Delays in desegregating school systems are no longer tolerable. Goss v. Board of Education, 373 U.S. 683, 689; Calhoun v. Latimer, 377 U.S. 263, 264-265; see Watson v. City of Memphis, 373 U.S. 526." Bradley v. School Board of City of Richmond, 382 U.S. 103, 195 (1965). State authorities are "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." Cooper v. Aaron, 358 U.S. 1, 7.

We recognize the above as a correct statement of the law. This motion for a stay is based thereon. We challenge such statement to the extent that it may be considered a statement of fact. This case does not involve the duty to "initiate" desegregation or the "elimination of racial desegregation in the public schools."

This is an attempt to violate the decisions of the Supreme Court of the United States in Brown I, Brown II, Bradley, Cooper, and all other cases decided by this Court. By this action all District Courts of the United States in Alabama would be divested of jurisdiction of any proceedings affecting public schools. This case goes hand in hand with Jefferson County, decided by the Court of Appeals of the Fifth Circuit March 29, 1967 (seven days after the decision of this case). It is contrary to the decisions of the Supreme Court of the United States in every case involving public schools since Brown I. This action is unprecedented, unconstitutional, in violation of the federal statutes and without any basis in right or reason.

Jefferson County is an attempt by the Court of Appeals of the Fifth Circuit to arrogate to itself all of the rights, duties, and powers of every District Court within the Fifth Circuit and to require each District Court to enter a uniform order unless a showing is made of "exceptional circumstances".

This is a parallel and supplementary case in which there is an attempt by a three-judge court (empaneled to consider a suit against one school district within the jurisdiction of the original District Court and to consider the constitutionality of a state statute) to likewise arrogate to itself the right to determine all questions involving desegregation of all public schools within one state.

The original defendants in this case, the School Board of Macon County, have entered a perfunctory appearance. However, none of the evidence in this case has any bearing whatsoever upon their present status. It all has to do with state-wide and area-wide matters without relation to such Board.

The most vital matter totally ignored by attorneys for opposing parties in their memoranda filed with the three-judge court below and also ignored by such court in denying the stay is that desegregation has been begun and is

proceeding in an orderly manner in the elementary and secondary public schools of Alabama. This has been found by the Court of Appeals of the Fifth Circuit in Jefferson County and is demonstrated by the testimony of the officials of the Department of Health, Education and Welfare in this particular case.

The original finding appears in the opinion of the Court of Appeals of the Fifth Circuit in Jefferson County which was rendered December 29, 1966, petition for rehearing denied by the Court en banc on March 29, 1967.

This finding appears on page 140, Table 3 (III) of the original panel opinion entitled

~~222~~ Status of Desegregation
Seventeen Southern and Border States and D. C.

The Court of Appeals of the Fifth Circuit found that of the 118 school districts in Alabama, 105 thereof were "in compliance" with the requirements of the "Office of Education", which is administering Title VI of the Civil Rights Act of 1964 insofar as it affects public education through the Department of Health, Education and Welfare. This finding was recognized by the Court of Appeals of the Fifth Circuit as being applicable to the school session 1964 - 1965.

This is supported by the deposition of Mr. Lawrence E. Crowder taken on November 30, 1966. On page 11 thereof he testified that 94 of the 118 school districts in Alabama were in voluntary compliance. Nineteen of such districts are under court order. Hence it is undisputed that as of the beginning of the 1966 - 1967 school year 113 of 118 school districts in Alabama carried out desegregation in a proper manner. Hence the record in this case shows, by the testimony of HEW itself, that 113 out of the 118 districts in Alabama are in compliance in the due and proper process of desegregation of the schools in accordance with the holding of Brown I, Brown II, Sharp, Aaron, Bradley, Paul and (to the extent it is applicable) the Civil Rights Act of 1964.

The granting of a stay in this cause will not prevent the enforcement and carrying out of the mandate of the Supreme Court of the United States. It will, however, maintain in status quo the desegregation properly proceeding throughout the State of Alabama until this Court may pass upon the unprecedented and novel questions raised in this case, which constitute an unconstitutional denial of due process of law for the school children, members of the faculty and parents within ninety-nine school districts in the State of Alabama.

As pointed out below, the decree and opinion in this case must be construed in parallel with the decision of the Court of Appeals of the Fifth Circuit in Jefferson County, including the original panel opinion and the later opinion granted en banc. A single case cannot be considered in a vacuum. The everlasting tides of the seas ebb and flow in a recognizable pattern but the changing and changeable desires of HEW (and of any court which acquiesces therein) are unknown, unknowable and unpredictable. They are destructive of constitutional rights of the citizens of the United States.

II.

DUE PROCESS OF LAW IS VIOLATED BY THE DECREE GRANTED IN THIS CASE. THE NINETY - NINE LOCAL SCHOOL DISTRICTS (THE ACTUAL DEFENDANTS WHOSE RIGHTS ARE AFFECTED) HAVE NOT BEEN SERVED WITH PROCESS NOR HAVE THEY HAD AN OPPORTUNITY TO BE HEARD.

If the scope of relief sought in these two proceedings had been limited to judgments or decrees affecting solely the rights, duties and powers of the state officials, the local school officials would not have been necessary parties. In these proceedings the Court may limit the scope of the issues and relief granted to actions materially affecting only the parties to the suit. Local school officials are not necessary parties to a suit which only affects the rights, powers and duties of a state officer. But when their rights, powers and duties are materially affected,

such local officers are necessary, and, to that extent, indispensable parties. It is one thing to enjoin the State Superintendent of Education (or any other state official) from improperly performing his duties and powers and quite another thing to require him by mandatory injunction to force local school officials to act as he may demand. This certainly may not be done without due process of law in a proceeding in which the local officials have not had the opportunity to be heard. Their local school systems might be destroyed by orders granted in a proceeding to which they are not parties.

This is admitted, at least impliedly, on pages 124-126 of the Government's brief in the Court below. In this law suit the brief states "to this end we believe the record in this case would fully support the Court in adding each of the school districts as a party-Defendant pursuant to Rule 21 of the Federal Rules of Civil Procedure." The brief then suggests alternative procedures whereby plans of desegregation might be submitted to either the Commissioner of Education or be required by this Court to be submitted to the Alabama State Department of Education. In the latter event, the brief states "individual school districts would then be added as parties-Defendant in this suit only if they failed or refused to submit the plan as required."

The brief for the individual Appellees below expresses an even more elastic view of due process and proposed a decree which would require the 118 school districts in Alabama to be subject to the judgment entered in these proceedings (P. 39, 47-50).

The relief prayed for by the Plaintiffs and Intervenors in Civil Action No. 604-E (Appellee here) would, among other things, prevent the disbursement of state funds by state officials to separate school districts dependent upon such funds for the discharge of their statutory and constitutional duties. That such school districts have an interest in the continuing flow of authorized and appropriated

funds admits of no question. It is equally obvious that equity and good conscience will not tolerate a decree enjoining the disbursement of funds to a few school districts which might be made parties-Defendants while leaving unfettered the flow of funds to other school districts within the state.

The Court of Appeals of the Fifth Circuit in Standard Oil Company v. Marshall, 265 F. 2d 46, stated that "the classic definition of indispensable parties is that in Shields v. Barrow, 1855, 17 How. 129; 58 U. S. 129, 15 L. Ed. 158." Such definition by this Court, which has prevailed and is still recognized after one hundred twelve years, defines the three classes of parties to a suit as follows:

"1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

In State of Washington v. U. S., 87 F. 2d 421, the Court of Appeals of the Ninth Circuit quoted numerous decisions of the Supreme Court of the United States including the following:

"In Barney v. Baltimore, 73 U. S. (6 Wall.) 280, 284, 18 L. Ed. 325, it is said: 'There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to the jurisdiction. . .'"

"In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from Shields v. Barrow, supra, 17 How. 130, 141, 15 L. Ed. 158: 'As is observed by this court, in Mallow v. Hinde, 12 Wheat. (193) 198 (6 L. Ed. 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case up on the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' See, also, Barney v. Baltimore, supra, 6 Wall. 280, 285, 18 L. Ed. 825; State of California v. Southern Pac. Co., supra, 157 U. S. 229, 250, 15 S. Ct. 591, 39 L. Ed. 683; Minnesota v. Northern Securities Co., supra, 184 U. S. 199, 236, 22 S. Ct. 308, 46 L. Ed. 499; Bogart v. Southern Pac. Co., supra, 228 U. S. 137, 146, 33 S. Ct. 497, 57 L. Ed. 768."

Should the stay be denied the decree will result in irreputable injury through violation of constitutional principles embodied in the concept of "due process of law." Certainly this Court may "proceed to administer such relief as may be in its power, between the parties before it" but just as surely "no Court can adjudicate directly upon a persons' right without the party being either actually or constructively before the Court."

III.

THIS MOTION FOR A STAY IS DIRECTED SOLELY TO THE MANDATORY FEATURE OF THE INJUNCTION.

The statutory right to an appeal in this case arises from Title 28, U. S. C. Section 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress, to be heard and determined by a district court of three judges."

Direct appeals to the Supreme Court are governed by Rules 10 through 18 of this court. The appeal has been perfected by the filing of a Notice of Appeal under Rule 10, Paragraph 1, which states:

"An appeal permitted by law to this court shall be taken by filing a notice of appeal, in the form and at the place prescribed by this rule."

Rule 18, also applicable to appeals generally, contains the usual type of provisions permitting the court in its discretion to grant a stay of the enforcement of the judgment or a supersedeas thereof pending its appeal. There is no particular Supreme Court rule applicable to mandatory injunctions such as that granted here. Application for a stay has been made to the court below and has been denied.

Rule 62 (c) of the Rules of Civil Procedure contains a special provision providing that the court may suspend, modify, restore or grant an injunction during the pendency of an appeal from "an interlocutory or final judgment granting, dissolving, or denying an injunction". It particularly provides procedures where a three-judge court is involved. In this case, the motion for a stay was presented to the full court sitting "in open court" and was denied. Hence, under rule 18 of the Supreme Court this matter may now be presented to a judge of this court.

Both Rule 18 of the Supreme Court and Rule 62 (c) of the Rules of Civil Procedure should be construed in relation to the general rules of law in existence when they were adopted and for many years prior thereto. There is a very great difference between the effect of an appeal involving a prohibitory injunction and one involving a mandatory injunction. Both of these rules were necessarily adopted by the courts in the light of the principles of law applicable to both types.

Both state and federal statutes set up formalities under which supersedeas may be obtained. All of these statutes, however, are subject to the general basic rules that the courts desire and intend to maintain the status quo so that if an appellant is successful in his appeal it will not be an "empty victory". It is interesting to note that even though a state or federal statute may provide for a supersedeas, such supersedeas will not suspend the effect of a prohibitory

injunction. It is further of great importance to note that even though a supersedeas may not be granted, if a judgment or decree includes a mandatory injunction, (compliance with which will change the status quo) the perfection of a statutory right of appeal will maintain the status quo (i.e. prevent enforcement of the mandatory features of the injunction) even though a supersedeas is not involved.

The effect of the taking of an appeal in relation to prohibitory injunctions and mandatory injunctions is stated in 4 Am. Jr. 2d., Page 855, Appeal and Error Section 387, as follows:

"A prohibitory injunction being self-executing, its operation is not automatically stayed by an appeal. However, even as to a purely prohibitory decree, the appellate court has inherent power to issue supersedeas if such action is necessary or proper to the complete exercise of its appellate jurisdiction.

"All proceedings on a mandatory injunction are stayed by an appeal from the order granting the injunction."

"An injunction may grant both prohibitive and mandatory relief, and when it is of this dual character, and an appeal is taken, such appeal will stay the mandatory provisions but not the prohibitive feature of the injunction, although if the prohibitory portion cannot be separated from the mandatory, the injunction is treated as if it were mandatory and is stayed by the appeal."

The above text cites as authority note contained in 93 A. L. R., beginning at Page 710, which includes the following:

"This annotation deals only with the question whether an appeal from the award of an injunction stays or supersedes the injunction. It does not discuss the power of courts to grant stays or supersedeas, nor does it discuss grounds for such stay or supersedeas. . ."

"It is well settled that an injunction which is strictly prohibitory in character is not stayed or superseded by an appeal from the order granting the injunction."

" It is well settled that all proceedings on a mandatory injunction are stayed by an appeal from the order granting the injunction."

"United States. - Green Bay & M. Canal Co. v. Norrie (1904; C. C. A. 2d) 128 F. 896 (affirming (1902; C. C.) 118 F. 923), also citing supporting cases from sixteen states."

In Dewey v. Superior Ct. (1889) 81 Cal. 64, 22 P. 333, where the decree, after

restraining the Defendant from diverting water, further required him to remove a dam and fill up a ditch, the court held that the mandatory provisions were stayed by the perfecting of an appeal, saying:

"A prohibitory injunction remains in full force pending such an appeal, and the court below may enforce obedience thereto; but a mandatory injunction is stayed by the operation of such appeal, the object of the rule in both cases being to preserve the status quo. Otherwise, the result of the final adjudication might often be a barren victory. During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered."

In Clute v. Superior Ct. (1908) 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54, it was held in an action by a hotel corporation to enjoin a person who had been its manager, and was in possession of its property, from holding himself out as such or interfering with the business of the hotel, on the ground that he had been removed from his position by the board of directors, in which the Defendant disputed the right and authority of those claiming to act as directors to represent the corporation, that an injunction restraining the Defendant from collecting or disbursing any money, and from representing himself as manager, and from interfering with, or directing, or attempting to direct or control, the employees of the corporation, was mandatory in its effect, and, pending an appeal therefrom, the Defendant could not be punished in a contempt proceeding for its violation.

In Helms Groover & Dubber Co. v. Copenhagen (1919) 93 Or. 410, 177 P. 935, the Court said:

"A mandatory injunction - that is, one which compels affirmative action by the Defendant instead of merely preserving the status quo - cannot be enforced pending a duly perfected appeal."

The above A. L. R. note further states the rule concerning the distinction between mandatory and prohibitory injunctions as follows:

"The following principles appear to be well settled: A prohibitory injunction is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury. In other

words, it is an injunction which has the effect of preserving the status quo. Wolf v. Gall (1916) 174 Cal. 140, 162 P. 115; Ohaver v. Fenech (1928) 206 Cal. 118, 273 P. 555.

"A mandatory injunction is one which goes beyond a mere restraint, - it commands acts to be done or undone; it compels the performance of some affirmative act. Such an injunction necessarily contemplates a change in the status quo. Clute v. Superior Ct. (1908) 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54; Wolf V. Gall (1916) 174 Cal. 140, 162 P. 115; Ohaver v. Fenech (1928) 206 Cal. 118, 273 P. 555; Joerger v. Mt. Shasta Power Corp. (1932) 214 Cal. 630, 7 P. (2d) 706.

"In Ohaver v. Fenech (1928) 206 Cal. 118, 273 P. 555, the court said that, 'when the injunction merely grants preventative relief, it is prohibitive, ' and when it 'directly or indirectly grants affirmative relief it is mandatory.'"

"The object of the rule that a prohibitory injunction remains in full force pending an appeal, while a mandatory injunction is stayed by the operation of the appeal, is in both cases to preserve the status quo of the parties until a final determination. Otherwise, the result of the final adjudication might often be a barren victory. Dewey v. Superior Ct. (1889) 81 Cal. 64, 22 P. 333; Stewart v. Superior Ct. (1893) 100 Cal. 543, 35 P. 156, 563.

In the case of Stewart v. Superior Ct. (1893) 100 Cal. 543, 35 P. 156, it was held:

"An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted, or the decree is entered. To hold that an appeal from a judgment granting such an injunction does not stay the operation of the judgment would often render a reversal of the judgment entirely ineffectual, - 'a barren victory.'"

The above A. L. R. note states the rule concerning an injunction containing both mandatory and prohibitory provisions as follows:

"An injunction may grant both prohibitive and mandatory relief, and when it is of this dual character, and an appeal is taken, such appeal will not stay the prohibitive feature of the injunction, but as to its mandatory provisions the injunction will be stayed." (Citing authority)

The case of Helbig v. Phillips, 109 N. J. Eq. 546, 158 Atl. 441, 93 A. L. R. 706, is the leading case to which the above annotation is appended. This gives a clear and lucid explanation of the reason for the rule and may be referred to for

clarification thereof. The essence of the decision is included in the following quotation from the earlier case of Pennsylvania R. R. Co. v. National Docks, Co., 54 N. J. Eq. 647, 35 Atl. 433:

"Chief Justice Beasley said, at page 653 of 54 N. J. Eq., 35 A. 433, 435: 'The very essence of the remedy by appeal is to protect (printed 'prevent' but this is an obvious error in copying), for the time being, the appellant from the execution of the existing decree; and, this being so, it is indisputable that, when the statute grants the right of appeal, it grants such protection,' and in conclusion he said 'the opinion of this court is that the decree in question lost, for the time, all its force, and that the appellant could not fall into contempt by resisting its execution,' and he significantly added, 'it is likewise the opinion of this court that an appeal in all cases will have the effect given to it which shall be necessary to preserve the subject to which the appellate procedure relates in such a condition as will enable this court to render an efficacious decree in the premises, and that for this purpose an injunction decree will be suspended or continued, or a previous injunction revived, by the act of filing an appeal, whenever such construction shall be necessary for the end just stated.'"

The above authority is supported by the case of Merrimack River Sav. Bank v. Clay Center, 55 L. Ed. 320, 325, 219 U. S. 527, in which the Supreme Court of the United States recognizes the difference between a decree or judgment for a sum of money and a decree in a suit praying for an injunction whether or not a stay was granted upon the appeal. It held as follows:

"The plain purpose of the order continuing the injunction pending this appeal was to preserve the subject-matter of the litigation until the rights of the complaint could be heard and decided. It is well settled that the force and effect of a decree dismissing a bill and discharging an injunction is neither suspended nor annulled as a mere consequence of an appeal to this court, even if a super sedeas is allowed. Slaughter-house Cases, 10 Wall, 273, 297, 19 L. ed. 915, 922; Hovey v. McDonald, 109 U. S. 150, 161, 27 L. ed. 888, 891, 3 Sup. Ct. Rep. 136; Leonard v. Ozark Land Co., 115 U. S. 465, 29 L. ed. 445, 6 Sup. Ct. Rep. 127; Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8. That the circuit court, to the end that the status quo might be preserved pending such appeal, had the power to continue an injunction in force by virtue of its inherent equity power, is not doubtful..."

"It does not necessarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not

be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since, irrespective of any such injunction actually issued, the willful removal beyond the reach of the court of the subject-matter of the litigation, or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of (536) this court. That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent. See United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265; Richard v. Van Meter, 3 Cranch, C. C. 214, Fed. Cas. No. 11,763; Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17,210; State ex rel. Morse v. District Ct. 29 Mont. 230, 74 Pac. 412; Ex Parte Kellogg, 64 Cal. 343, 344, 30 Pac. 1030; State ex rel. Coleman v. Pittsburg, 80 Kan. 710, 712, 25 L. R. A. (N.S.) 226, 133 Am. St. Rep. 227, 104 Pac. 847."

The constitutional necessity of maintaining the status quo exists and is recognized by the Courts whether the injunction is appealed from is prohibitory or mandatory. In fact, even though the statutes and the rules of the court rendering the judgment provide for a supersedeas and it is granted, it will not be permitted; such supersedeas will not affect the prohibitory injunction so as to affect the status quo.

The alternative is that which here exists. A mandatory injunction will not be permitted to be enforced even though supersedeas is denied. However, in this case, as hereinafter set forth, it will be necessary for this Court to affirmatively grant a stay to prevent the lower Court from acting and causing irreputable injury not only to the parties to the suit but also to hundreds of thousands of students, thousands of teachers, and ninety-nine school districts.

Although the case of Virginian R. Co. v. United States, 71 L. Ed. 463, 469, 272 U. S. 685, involved a prohibitory injunction it stated the converse of the rule

here. Without making any distinction between the two types of injunctions, the Supreme Court stated the rule applicable to prohibitory injunctions.

"Sixth. The cross appeal is directed to so much of the final decree as stays enforcement of the Commission's order pending the appeal. It is settled that the force and effect of a decree of a federal court dismissing a bill and dissolving an interlocutory injunction is not suspended (669) as a mere consequence of an appeal to this court, even if a supersedeas is allowed. Hovey v. McDonald, 109 U. S. 150, 161, 27 L. Ed. 888, 891, 3 Sup. Ct. Rep. 136; Knox County v. Harshman, 132 U. S. 14, 33 L. Ed 249, 10 Sup. Ct. Rep. 8. An injunction which was in terms dissolved by the decree, or which expired BY LIMITATION, CANNOT BE REVIVED TO TAKE effect during the pendency of an appeal except by a new exercise of power by a court having the authority. Ordinarily such authority is vested in the lower federal court, as well as in this court. Under Equity Rule 74 the judge who allows the appeal may, if he took part in the decision of the cause, make, at the time of such allowance, an order continuing an interlocutory injunction which would otherwise be vacated. Merrimack River Sav. Bank v. Clay Center, 219 U. S. 527, 535, 55 L. Ed. 320, 325, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513."

The Supreme Court recognizes that there is a distinction between a judgment for a sum of money and a judgment or decree of a different nature, in the case of Hovey v. McDonald, 27 L. Ed. 888, 891, 109 U. S. 150. However, it stated the general rule without distinguishing between the two types of injunctions as follows:

"But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the Complainants; and no execution was applicable to, or could be issued in the case, except an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to a supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to a supersedeas can only be brought in by way of analogy. . . ."

"It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary."

IV.

THE PROCEEDINGS HERE HAS BEEN TRANSFORMED INTO
A THINLY DISGUISED ACTION FOR A MANDAMUS AGAINST
THE OFFICERS OF A STATE.

In these proceedings we and other parties have referred to the mandatory features of the injunctions granted by the three-judge court. This terminology has been used, however, because of its use by that Court and by parties opposite. In fact, this action has been transformed into a proceeding to obtain a mandamus against state officials. The general rule is stated in Cyclopedia of Federal Procedure, Third Edition, Volume 15, Paragraph 84.34, Page 353, as follows:

'Except as conferred by special federal statutes, federal district courts have no general original jurisdiction in mandamus proceedings. This is true even where the relief sought concerns an alleged right secured by the United States Constitution. Moreover, the courts generally have refused to make any distinction in this matter between the issuance of an order in the nature of mandamus to a public officer and one to a private person or a corporation and its officers. General original jurisdiction in mandamus is not conferred by the statutory endowment of original jurisdiction on the district courts. Nor is such jurisdiction conferred on the district courts by the Declaratory Judgment Act."

This court has long recognized that a mandatory injunction of this nature is legally the equivalent of a mandamus. One of the early cases is that of Warner Valley Stock Co. v. Smith, 165 U. S. 28, 41 L. ed. 621 in which the following statement of the law was made by this Court:

"The main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to plaintiff for the lands in question. The mandatory injunction prayed for was in effect equivalent to a writ of mandamus to him. The reasons for holding a suit, which has this object, to have abated, as to him, by his resignation, are as applicable to this bill in equity, as to a petition for a writ of mandamus at common law. Consequently, as against the defendant Hoke Smith, this suit must be held to have abated by his resignation of the office of Secretary of the Interior."

Although the following statement is material to a point later made in this brief, it will be presented here as it is from Warner:

"That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered as so well settled that in many of the cases no opinion has been filed and no official report published. Cox v. United States, 76 U. S. 9 Wall. 298, 313 (19:579, 584); United States v. Boutwell, 84 U. S. 17 Wall. 604, 609 (21:721, 723); Leavenworth County Comrs. v. Sellev, 99 U. S. 624, 626 (25:332, 335); United States v. Schurz, 102 U. S. 378, 408 (26:167, 220); Thompson v. United States, 103 U. S. 480, 484 (26:521, 523); United States, Warden, v. Chandler, 122 U. S. 643 (30:1244); United States International Contracting Co. v. Lamont, 155 U. S. 303, 306 (39:160, 163). "

The above rule was recognized and reiterated by this Court in 1933 in Migel v. McCarl, 291 U. S. 442, 78 L. ed. 901 as follows:

"The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations. Warner Valley Stock Co. v. Smith, 165 U. S. 28, 31, 33, 41 L. ed. 621-623, 17 S. Ct. 225. With the foregoing well settled rule in mind we turn to the pertinent legislation. "

A brief but excellent review of these authorities appears in New York Technical Institute of Maryland v. Limburg, 87 Fed. Supp. , 308, 313, as follows:

"It is also well settled that district courts (at least outside of the District of Columbia) have no original jurisdiction to issue writs of mandamus or orders in the nature of writs of mandamus in the absence of special statutory authority. Smith v. Bourbon County, 127 U. S. 105, 88 Ct. 1043, 32 L. Ed. 73; Covington & C. Bridge Co. v. Hager, 203 U. S. 109, 27 S. Ct. 24, 51 L. Ed. 111; Branham v. Langley, 4 Cir., 139 F. 2d 115. The mandatory injunction is in effect equivalent to a writ of mandamus and should be governed by like considerations. Miguel v. McCarl, 291 U. S. 442, 54 S. Ct. 465, 78 L. Ed. 90 ."

Since the adoption of Congress in 1962 of the act now appearing as 28 U. S. C. A., Paragraph 1361, this rule has been reiterated and classified by the U. S. Court of Appeals of the Third Circuit in the case of Henry V. Wolenski, 324 F. 2d 309, decided December 20, 1963 as follows:

"Treating the papers filed by the petitioner as requesting the district court to issue a writ of mandamus compelling action by a state official, it is clear that the district court had no jurisdiction to grant such relief. Until recently only the District Court for the District of Columbia had original jurisdiction of an action in the nature of mandamus. Green v. United States, 283 F. 2d 687 (C. A. 3, 1960). In 1962 the Congress gave such jurisdiction to all Federal district courts, but only "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 76 Stat. 744, 28 U. S. C. A., Paragraph 1361. Thus, the district court was without power to compel the Orphans' Court to act in this matter."

The present action was instituted by certain individuals to bring about the proper desegregation of the schools of Macon County, Alabama. Thereafter, during the course of the proceedings, there arose the question of the validity of the "Grant in Aid Tuition" statute of Alabama. This three-judge court was empaneled by Chief Judge Tuttle of the Court of Appeals of the Fifth Circuit because the constitutionality of that state statute was involved. There were added upon motion of the United States as Intervenor the various state officials who are now defendants in the suit. They were properly added in relation to the desegregation of the public schools of Macon County. This has been effectuated. No issue now exists as to such schools. These officials are improperly retained as defendants for other purposes as set forth in the application for stay and this brief.

Thereby this suit has been transformed from one involving a proper action against a local school system to a suit which in truth and in fact is a suit for a mandamus against state officers in their official capacity. It attempts to determine, adjudicate, adversely affect and mandatorily require actions which will materially affect the rights of every school child in 99 school districts in Alabama. In fact, the only reason it does not include 118 school districts (the total number existing in Alabama) is that nineteen of them are already under proper court order. Now there has been an attempt to cause this to be a state-wide action and to divest all of the District Courts of the State of Alabama of their jurisdiction and pre-empt such jurisdiction to this three-judge court.

These rules have been uniformly announced and sustained by the Courts of Appeal of various Circuits in the United States over a period of many years. In White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 (1965), the Court said:

The appellants would have us find Congressional authorization for their suit in the Act of October 5, 1962, 28 U.S.C. Sec. 1361, which provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

To find in Sec. 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, i.e., that the courts do not have jurisdiction to order the Government to specifically perform its contracts, would be to make too much of a short and simple piece of legislation. In McEachern v. United States, 212 F.Supp. 706, 712 (E.D. Va.), the court said, of Sec. 1361:

"The Act does not create new liabilities or new causes of action against the United States Government or its officials,"

and cited the pertinent legislative history in support of its statement. In Rose v. McNamara, 225 F.Supp. 891, 893 (E.D. Pa.), the court said that Sec. 1361

"did not restrict the previous notions of sovereign immunity nor did it authorize actions previously prohibited which, though in form against the officers, were in reality against the United States."

See also Sprague Electric Co. v. The Tax Court of the United States, 230 F.Supp. 779, 782 (D.C. Mass.).

In Petrowski v. Nutt, 161 F.2d 938 (1947), the Court said:

District Courts of the United States have no original jurisdiction to issue writs of mandamus in the absence of constitutional or statutory provisions conferring such jurisdiction. While it is clear that Congress has the power to confer original jurisdiction in mandamus on district courts, and has done so in certain instances, the statutory delegation in each instance has expressly enumerated and designated the court as being a district court and the writ as being a writ of mandamus. None of these instances of legislative authorization are applicable to the facts of this case.

Board of Commissioners of Knox County v. Aspinwall et al, 24 How. 376, 384, 65 U.S. 376, 384, 16 L.Ed. 735; Cudahy Packing Co. v. United States, 7 Cir., 15 F.2d 133, 134; Crites v. Hill, Warden, D.C., 9 F.Supp. 975; Appalachian Electric Power Co. v. Smith, 4 Cir., 67 F.2d 451;

Platek v. Aderhold, Warden, 5 Cir., 73 F.2d 173, 175 and cases cited; Hellawell v. Grafeld, D.C., 22 F.Supp. 765, 767; United States v. Rollnick, D.C., 33 F.Supp. 863.

Kendall v. United States, 12 Pet. 524, 617, 37 U.S. 524, 617, 9 L.Ed. 1181; Secretary of Interior v. McGarrahan, 9 Wall. 298, 311, 76 U.S. 298, 311, 19 L.Ed. 579.

In the case of Longview Tugboat Company v. Jameson, 218 F.2d 547 (1955), the Court said:

It will be noted that the prayer of the complaint, quoted above, is for declaratory relief and for "an appropriate order" requiring the Collector of Customs to issue a license or other appropriate document. An order of that character would be in substance a writ of mandamus. District Courts of the United States have no original jurisdiction to grant that kind of relief. *Petrowski v. Nutt*, 9 Cir., 161 F.2d 938. The fact that appellant prayed for a declaration of rights under the Declaratory Judgment Act, Title 28, Sections 2201, 2202, does not serve to furnish a ground of federal jurisdiction. As we said in *Southern Pac. Co. v. McAdoo*, 9 Cir., 82 F.2d 121, 122, "The Declaratory Judgment Act * * * is limited in its operation to those cases which would be within the jurisdiction of the federal courts if affirmative relief were being sought. * * * The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction.

In the case of Green v. United States, 283 F.2d 687 (1960) the following statement was made by the Court.

The district court properly interpreting the petition as one asking for relief in the nature of mandamus, held:

"In the United States District Courts mandamus or its equivalent is of an ancillary nature only, except in the District of Columbia, and an original proceeding will not lie."

That decision is entirely sound. *Truth Seeker Co. v. Durning*, 2 Cir., 1945, 147 F.2d 54; *Fussa v. Taylor*, D.C., M.D.Pa. 1958, 168 F. Supp. 302.

Ballf v. Kranz, 82 F.2d 315 (1936) contains the following statement by the Court:

The prayer of the petition is for a writ of mandamus, compelling appellee to restore appellant to his position in the district office of the civil service commission * * *. No other relief is sought.

This clearly is an original proceeding in mandamus. Of such proceedings the District Courts of the United States have no jurisdiction. They have power to issue writs of mandamus in aid of their jurisdiction only, in cases already pending, wherein jurisdiction has been acquired by other means and by other process. *Covington & C. Bridge Co. v. Hager*, 203

U.S. 109, 110, 27 S.Ct. 24, 51 L.Ed. 111; Knapp v. Lake Shore & Michigan Southern R. Co., 197 U.S. 536, 541, 25 S.Ct. 538, 49 L.Ed. 870; Bath County v. Amy, 13 Wall. 244, 247, 20 L.Ed. 539; McIntire v. Wood, 7 Cranch, 504, 505, 3 L.Ed. 420; Barber v. Hetfield (C.C.A. 9) 4 F.2d 245; Fox v. Pasadena (C.C.A. 9) 78 F.2d 948, 950. This is not such a case. Appellant's petition was properly dismissed.

V.

THE APPELLANT STATE OFFICIALS DO NOT POSSESS THE STATUTORY AUTHORITY TO CONTROL THE ACTIONS OF LOCAL SCHOOL BOARDS TO THE EXTENT REQUIRED BY THE MANDAMUS (OR MANDATORY INJUNCTION) GRANTED BELOW.

These defendant state officials completely lack the power under the Alabama Constitution and statutes to take the actions which would be required of them by the plaintiffs and by the decree submitted to the Court for consideration. The basic framework of the actions attempted to be required by injunction, either directly or by the withholding of state funds, consists of:

1. The placement, assignment and transfer of pupils from one public school to another public school within a city or county school system.
2. The transfer or reassignment of teachers from one public school to another public school within a city or county system.
3. The closing of public schools within a city or county school system.
4. The expenditure of funds in the nature of grants-in-aid to students in the public school system.
5. The furnishing, direction and control of the transportation of pupils within any city or county school system.

Each and every one of the above powers and duties has been expressly and specifically held by the Supreme Court of Alabama to be vested in "the local school boards of education". The Supreme Court of Alabama has specifically held that the defendants in these causes have no authority in relation to such matters.

The responsibility for public education in Alabama has traditionally centered at the local level. Title 52, Section 62, Code of Alabama 1940, provides as follows:

The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education.

The philosophy that the education of children is a community concern and should be directed and controlled at the local level is clearly set forth in the various statutes contained in Title 52 of the Alabama Code.

Section 71 provides that real estate and other property of public schools is vested in, and held in trust by, the County Boards of Education which shall maintain a uniform and effective system of public schools throughout their respective counties. Section 73 provides that "the County Boards of Education shall determine, with and on the advice of the County Superintendent of Education, the educational policy of the County, and shall prescribe rules and regulations for the control and management of the schools." Section 74 provides that,

. . . the County Board of Education shall exercise through its executive officers, the County Superintendent of Education and his professional assistants, control and supervision of the public school system of the County. The Board shall consult and advise through its executives and his professional assistants, with school trustees, principals, teachers and interested citizens, and shall seek in every way to promote the interests of the schools under its jurisdiction.

Section 76 provides that "the County Board of Education shall consolidate schools whenever in its judgment it is practicable, and arrange, if necessary, for the transportation of pupils to and from such consolidated schools. . . ." Section 82 sets forth the procedure which must be followed by County and City Boards of Education in order to effect the consolidation of City and County School Systems. Among other requirements, this section provides for a referendum to be held in the affected county. Section 86 provides that the County Board of Education shall appoint all principals, teachers and assistants authorized by the Board. Section 87 provides

that the County Board shall prescribe the courses of study for the schools under its jurisdiction. Section 61(4), et seq., confers on the local boards the sole responsibility and authority for assignment and transfer of students and teachers, and such boards are constituted judicial tribunals for this purpose.

It is true that the State Board of Education is granted by statute "general control and supervision" over the public schools. Title 52, Section 14. However, as the Alabama Supreme Court emphatically pointed out in Opinion of the Justices, copy of which is attached to the application for stay, this general supervisory authority does not supersede or impair the specific responsibilities conferred upon the local boards by statute.

A survey of the statutes granting specific responsibilities to the State Board of Education reveals that in practical effect it is primarily a coordinating agency whose primary functions consist of providing technical services for the local board and rendering informational advice and assistance when requested. The State Board establishes policies binding on the local systems only in instances specifically defined and delineated by statute, such as the establishment of minimum standards governing sanitation, construction sites, courses of study, grading of schools, and teacher training. Title 52, Section 14, et seq. The State Board is responsible generally for the administration of the minimum program fund, but such responsibility consists primarily of carrying out a highly detailed and inflexible formula established by the legislature for the distribution of funds to the various local systems. Title 52, Section 208, et seq. The responsibility for meeting the requisite criteria for becoming eligible for participation in the fund rests with each local board.

Referring to such opinion of the Supreme Court of Alabama, this three-judge court said (231 F.Supp. 743, 755); in the former appearance of this case:

This court recognizes the authority of the Supreme Court of Alabama when it interprets the Alabama law, as it informally did in these advisory opinions.

Although the Court referred to "these informal opinions", the opinion was rendered by the Supreme Court of Alabama by authority of and in accordance with the statute of the State and hence, as recognized, is valid and binding. Thereafter a similar question was before the Supreme Court of the United States in Shuttlesworth v. Birmingham, 15 L.Ed. 2d 176, decided on November 15, 1965. Mr. Justice Stewart delivered the opinion of the Supreme Court and referred to the construction of an Alabama statute by the Alabama courts and said:

It is our duty, of course, to accept this state judicial construction of the ordinance. Winters v. New York, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665; United States v. Burnison, 339 U.S. 87, 94 L.Ed. 675, 70 S.Ct. 503; Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U.S. 495, 92 L.Ed. 99, 68 S.Ct. 167.

There is no need to multiply authorities but in Winters, thus cited as supporting the statement of law contained in Shuttlesworth, the Supreme Court of the United States referred to the construction of a state statute by the Court of Appeals of New York and then said:

This construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature. Hebert v. Louisiana, 272 U.S. 312, 317, 71 L.Ed. 270, 273, 47 S.Ct. 103, 48 A.L.R. 1102; Skiriotes v. Florida, 313 U.S. 69, 79, 85 L.Ed. 1193, 1201, 61 S.Ct. 924.

A detailed comparison of the decree of this Court and the opinion of the Supreme Court of Alabama attached to our application demonstrates that the relief therein proposed cannot be maintained unless this Court holds that the State Superintendent of Education or the other defendants possess authority expressly negated by the Constitution and the statutes of the State of Alabama as construed by the Supreme Court thereof.

VI.

UNLESS THIS APPLICATION FOR A STAY PENDING APPEAL IS GRANTED, IRREPARABLE INJURY WILL BE SUFFERED BY THE DEFENDANTS AND THE 99 SCHOOL DISTRICTS AFFECTED BY THE ACTION OF THE COURT BELOW AND A SUCCESSFUL APPEAL WOULD BE A BARREN VICTORY.

The filing of this application for a stay pending appeal was intentionally delayed in order to determine whether or not the plaintiffs, the intervenors and the three-judge court below would take action calculated to result in irrevocable changes affecting not only the actual defendants but also the 99 local school districts and the other educational institutions whose rights are materially affected by the decree and opinion of the court. That such action will be taken has now been demonstrated.

Rather than state our own conclusions concerning the extent to which the Plaintiffs and Intervenors intend to arbitrarily extend the jurisdiction of the court and to supervise the administration of the elementary and secondary schools of Alabama, we attach hereto as Exhibit A a copy of motion filed by the Intervenor in this suit which is made a part of this brief by reference.

The application for stay pending appeal lists the twenty-seven mandatory aspects of the injunction or the mandamus granted herein. These now must be construed in conjunction with the decree and opinion issued on May 3, 1967 in the case of Alabama NAACP State Conference of Branches et al v. Lurleen Burns Wallace, Governor of the State of Alabama, et als, by a parallel three-judge court, consisting of Circuit Judge Rives and District Judges Johnson and Pittman, being Civil Action No. 2457-N, in the United States District Court for the Middle District of Alabama, Northern Division. The original decree in the case at bar was framed so that, at least in its theoretical aspects, it was in accord with the former decisions of the Court of Appeals of the Fifth Circuit. It was issued on March 22, 1967. On March 29, 1967, the Court of Appeals of the Fifth Circuit issued a decree and an opinion, en banc, on Jefferson County which

largely adopted the opinion and decree of a panel of such court dated December 29, 1966.

In Alabama NAACP, the three-judge court there stated the following:

It is the clear duty of this District Court to follow the decision of our Court of Appeals...even if we were not bound by the decision of the Court of Appeals, the decision of that Court en banc is entitled to such great deference and respect we would be willing to depart from it.

It is now demonstrated that the mandamus or mandatory injunction granted in this particular case will be construed to carry with it the necessity of action as set forth in Jefferson County. The en banc opinion overruled nine preceding cases decided by the Court of Appeals of the Fifth Circuit and is now subject to petition for writ of certiorari.

Hence, while this appeal is pending, unless the stay is granted, all of the parties affected hereby may reasonably expect to be required to accede to the finding of the Court in the original Jefferson County opinion, including the following:

These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. (Slip opinion p. 39)

A school board must "adopt policies that would increase the percentage of pupils who are obtaining a desegregated education....(The) failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up....the desegregation process....Where the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal. (Slip opinion p. 54.)

Moreover, freedom of choice, as now administered, necessarily promotes resegregation. The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system--lock, stock, and barrel. If this process be "integration"....so be it. (Slip opinion p. 73.)

If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park.--Note 124--The Princeton plan involves establishing

attendance zones including more than one school and assigning students by grade rather than by residence location. Thus all of the zone's students in grades 1 through 3 would attend school A, while all students in grades 4 through 6 would attend school B. (Slip opinion p. 115.)

Actions taken under this decree will be irreparable. We will not review all the actions set forth in Exhibit IV to the Application for a Stay. They will not only affect school districts, school boards and the schools as institutes, but they will affect the lives and professional standings of teachers and the lives of students and their parents.

In fact, the Justice Department has announced it is reopening some 75 desegregation cases in district courts and that the NAACP Defense Fund is now reopening 121 such cases. These include 20 in Alabama, 27 in Florida, 33 in Louisiana, 30 in Mississippi, 6 in Georgia, and 5 in Texas. It has been announced that all of these actions are to require a revision of every decree so that each will conform with the action taken in Jefferson County.

VII.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA HAS EXCEEDED ITS JURISDICTION.

The amazing thing about this case is the complete abandon with which the parties have totally disregarded the Constitution of the United States and the statutes enacted by the Congress. This action originated as a conventional suit to desegregate the schools of Macon County. It was filed in the United States District Court for the Middle District of Alabama, Eastern Division. It appears on the docket of that court as Civil Action No. 604-E. After adversary action was taken as to the Macon County Schools by the Governor of the State of Alabama, the Superintendent of Education of the State and the Board of Education such parties were joined to permit complete relief. The supplemental complaint was filed February 6, 1964. It also involved Macon Academy, a private school which received certain grants-in-aid under Title 52, Code of Alabama, Section 61 (13-19) and 61 (20-21). Chief Judge Elbert P. Tuttle of the Court of Appeals of the Fifth Circuit convened this three-judge

court because the constitutionally of a state statute was involved.

Thereafter, on July 13, 1964, this three-judge court rendered an opinion which appears in 231 F Supp. 743. The reported opinion of the Court covers some 15 pages. The decision and the relief therein granted was confined to the Macon County Board of Education. However, much dicta was included as to possible future action which might be taken.

In the decree from which this appeal is taken there are listed, affected without due process of law and under the procedure now commenced will be joined as parties (unless they obey the demands of HEW and the Department of Justice), 52 school boards which lie in the Northern District of Alabama and 19 school boards which lie in the Southern District of Alabama. This court is wholly without any jurisdiction of such districts. In fact, there are only 13 districts listed in the decree which lie in the Eastern Division of the Middle District of Alabama.

are
There/approximately 484,084 students enrolled in the grammar schools of Alabama and approximately 377,597 students enrolled in the junior high schools and high schools thereof. Hence this is an attempt to affect the rights of a wholly undetermined number out of such 862,041 students. In such schools of the State of Alabama there were some 30,433 teachers during the present teaching session. These are in addition to the more than 10,000 students enrolled in vocational schools, 5,295 students are enrolled in the junior colleges and 13,000 students enrolled in the senior colleges.

None of the students and members of the faculty in such elementary and secondary schools are represented by any person whatsoever who is a party to this suit, except those in the Macon County system. It will be noted that the decree gives no relief whatsoever as to that County although in truth and in fact, is the only material defendant.

As to the students and the members of the faculty of the vocational schools, the senior colleges and the junior colleges, this is a class action brought by students in the secondary and elementary school system of Macon County.

There is no plaintiff whatsoever appearing as a representative of any such class.

We therefore respectfully submit that the Application for a Stay should be granted in order to prevent irreparable injury not only to parties to the suit but to many parties who are not before the lower court by due process of law. We feel that this court should pass upon the merits of this controversy before the status quo is so greatly changed that it could never be restored. Truly a successful appeal would be a barren victory if this stay is not granted.

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

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ATTORNEYS FOR APPLICANTS FOR STAY

PROOF OF SERVICE

I, John C. Satterfield, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State School Board of Education and the other Appellants and Applicants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9th day of May, 1967, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof with air class postage prepaid to Ben Hardeman, Esq., United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in a duly addressed envelope, with air class postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esq.
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Solicitor General, Dept. of Justice,
Washington 25, D. C.

3. I have also give telegraphic notice of the filing of this brief supporting the Application for Stay in this proceeding to all of the persons above named in the capacities stated.

4. In accordance with rule 33 of this court I hereby enter my appearance in this appeal as counsellor for the parties named above.

John C. Satterfield, one of the Attorneys
for the above named Appellants and Applicants

From
John C. Satterfield
Box 466
Yazoo City, Mississippi



AIR MAIL



Ramsey Clark, Esquire
United States Attorney General
Washington, D. C.