

PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1493

Mayor and City Council of Baltimore,
a municipal corporation; Board of
School Commissioners of Baltimore
City,

Appellees,

versus

F. David Mathews, individually and as
Secretary of the United States Depart-
ment of Health, Education and Welfare;
Martin H. Gerry, individually and as Acting
Director, Office for Civil Rights, United
States Department of Health, Education
and Welfare; United States Department of
Health, Education and Welfare, an agency
of the United States of America; and
Irvin N. Hackerman, individually and as
Administrative Law Judge, United States
Department of Health, Education and Welfare,

Appellants,

NAACP Legal Defense and Education
Fund, Inc.

Amicus Curiae.

No. 76-1494

Marvin Mandel, Governor of the State of
Maryland; State of Maryland; Maryland
State Board for Community Colleges, an
agency of the State of Maryland; Maryland
Council for Higher Education, as agency of
the State of Maryland; Board of Trustees
of Morgan State University, an agency of
the State of Maryland; Board of Trustees of
St. Mary's College of Maryland, an agency
of the State of Maryland; Board of Trustees

of the State Colleges of Maryland, an agency of the State of Maryland; The university of Maryland, an agency of the State of Maryland; Board of Trustees of The Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland,

Appellees,

versus

United States Department of Health, Education, and Welfare, an agency of the United States of America; F. David Mathews, individually and in his official capacity as Secretary of the United States Department of Health, Education and Welfare; Martin H. Gerry, individually and in his official capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Dewey E. Dodds, individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Roy McKinney, individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Burton Taylor, individually, and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; St. John Barrett, individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and Welfare; and Ronald Gilliam, individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of Health, Education, and Welfare,

Appellants,

NAACP Legal Defense and Educational
Fund, Inc.,

Amicus Curiae,

The American Council on Education,
The Association of American
Universities, The National
Association of State Univ. Land
Grant Colleges, The American
Association of State Colleges and
Universities and The American
Association of State Colleges and
Universities and The American
Association of Community and Junior
Colleges; The National Association
of Attorneys Generals; and The States
of Alaska, Arizona, Connecticut,
Delaware, Florida, Idaho, Illinois,
Iowa, Kansas, Louisiana, Michigan,
Mississippi, Missouri, Montana, Nebraska,
Nevada, New Hampshire, New Mexico, New
York, North Carolina, Ohio, Oregon, South
Dakota, Tennessee, Texas, Utah,
Washington, West Virginia, Wisconsin,
and Wyoming, and the Commonwealth of
Kentucky and Virginia,

Amici Curiae,

The Commonwealth of Pennsylvania,

Amicus Curiae,

Trustees of the California State
University and Colleges and Regents
of the University of California,

Amici Curiae.

Appeals from the United States District Court for the District
of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Decided: February 16, 1978

Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN,* BUTZNER,
RUSSELL, WIDENER, and HALL, Circuit Judges, sitting en banc.

* Judge Craven died May 3, 1977.

Cynthia L. Attwood and Brian K. Landsberg, Attorneys, Appellate Section, Department of Justice (J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, and Marie E. Klimesz, Attorney, Department of Justice; Frank K. Krueger, Jr., Attorney, Office of General Counsel, Department of Health, Education, and Welfare, on brief) for Appellants in 76-1493 and 76-1494;

E. Stephen Derby (David F. Tufaro, Benjamin L. Brown, City Solicitor, William Hughes, Chief Solicitor, Elise J. Mason, Assistant City Solicitor, and William L. Marbury, Of Counsel, on brief) for Appellees in 76-1493;

Francis B. Burch, Attorney General of Maryland, and Walter G. Lohr, Jr., Assistant Attorney General (Henry R. Lord, Deputy Attorney General, and David H. Feldman, Assistant Attorney General; Benjamin L. Brown, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, William Hughes, Chief Solicitor, and Blanche G. Wahl, Special Assistant City Solicitor, on brief) for Appellees in 76-1494;

Jack Greenberg, James M. Nabrit, III, and Drew S. Days, III, Attorneys for the NAACP Legal Defense and Educational Fund, Inc., filed a brief urging reversal in 76-1493 and 76-1494;

George W. Liebmann and Frank, Bernstein, Conaway & Goldman, Of Counsel; Sheldon Elliot Steinbach, Attorney for The American Council on Education and The American Association of Community and Junior Colleges; John Holt Myers and Williams, Myers & Quiggle, Attorneys for The Association of American Universities and The American Association of State Colleges and Universities; Gerald Roschwalb, Attorney for the National Association of State Universities and Land Grant Colleges; Avrum Gross, Attorney General of Alaska, and Richard M. Burnham, Assistant Attorney General; Bruce E. Babbitt, Attorney General of Arizona; Carl R. Ajello, Attorney General of Connecticut, and Bernard McGovern, Assistant Attorney General; Richard R. Wier, Jr., Attorney General of Delaware; Robert L. Shevin, Attorney General of Florida; Wayne L. Kidwell, Attorney General of Idaho; William J. Scott, Attorney General of Illinois; Richard C. Turner, Attorney General of Iowa; Curt T. Schneider, Attorney General of Kansas, and Donald R. Hoffman, Assistant Attorney General; William J. Guste, Jr., Attorney General of Louisiana, and Vanue B. Lacour, Special Assistant Attorney General; Frank J. Kelley, Attorney

General of Michigan; A. F. Summer, Attorney General of Mississippi; John C. Danforth, Attorney General of Missouri; Robert L. Woodahl, Attorney General of Montana, and Charles E. Erdmann, Assistant Attorney General; Paul L. Douglas, Attorney General of Nebraska, and Harold Mosher, Assistant Attorney General; Robert List, Attorney General of Nevada, and James H. Thompson, Chief Deputy Attorney General; David H. Souter, Attorney General of New Hampshire; Toney Anaya, Attorney General of New Mexico; Louis J. Lefkowitz, Attorney General of New York; Rufus L. Edmisten, Attorney General of North Carolina; William J. Brown, Attorney General of Ohio, and Richard J. Dickinson, Special Assistant Attorney General; R. Lee Johnson, Attorney General of Oregon, James W. Durham, Deputy Attorney General, and Michael W. Gillette, Solicitor General; William Janklow, Attorney General of South Dakota; R. A. Ashley, Jr., Attorney General of Tennessee, and Richard Lodge, Assistant Attorney General; John L. Hill, Attorney General of Texas, David M. Kendall, First Assistant Attorney General, Elizabeth Levatino, Assistant Attorney General, and M. Lynn Taylor, Assistant Attorney General; Vernon B. Romney, Attorney General of Utah; Slade Gorton, Attorney General of Washington, and James B. Wilson, Senior Assistant Attorney General for the University of Washington; Chauncey H. Browning, Jr., Attorney General of West Virginia; Bronson C. La Follette, Attorney General of Wisconsin, and David J. Hanson, Deputy Attorney General; and E. Frank Mendicino, Attorney General of Wyoming, on behalf of their respective States; Robert F. Stephens, Attorney General of Kentucky, and Robert L. Chenoweth, Assistant Attorney General; and Andrew P. Miller, Attorney General of Virginia, and Walter H. Ryland, Assistant Attorney General, on behalf of their respective Commonwealths, filed a brief urging affirmance in 76-1494.

Robert P. Kane, Attorney General of Pennsylvania, J. Justin Blewitt, Jr., Deputy Attorney General, Chief, Civil Litigation, and Allen C. Warshaw, Deputy Attorney General, on behalf of the Commonwealth of Pennsylvania, filed a brief urging affirmance in 76-1494.

Evelle J. Younger, Attorney General of California, N. Eugene Hill, Assistant Attorney General, and James D. Claytor, Deputy Attorney General, Attorneys for Trustees of the California State University and Colleges and Regents of the University of California; Donald L. Reidhaar, General Counsel for the Regents of the University of California, and James H. Holst, Assistant General Counsel, filed a brief urging affirmance in 76-1494.

PER CURIAM:

Upon consideration of the appellees' petitions for rehearing and the response filed by the appellants, we conclude that Judge Craven's vote cannot be counted in the disposition of these appeals. Judge Craven died after approving Parts I and II of the opinion that Judge Winter wrote expressing the views of a majority of the court. His death occurred, however, before the dissenting and concurring opinions were written and before the court's decision was announced. Therefore, Judge Craven's approval of Judge Winter's draft cannot be tallied for the purpose of deciding the appeals. Cf. United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960).

Accordingly, we withdraw the opinions that were previously filed, affirm by an equally divided court the district court's orders granting preliminary injunctions, and remand the case to the district court for trial.

Regrettably, these cases have been delayed by our initial misapprehension of the effect of Judge Craven's death on their outcome. Consequently, we request the district court to try them and enter a final order as expeditiously as possible.

WINTER, Circuit Judge, concurring and dissenting:

Because there is not unanimity within the court as to whether Judge Craven, before concurring in the opinion which I prepared, was fully cognizant of, considered and rejected all the views of the dissenting judges, I agree that we should not allow our previous divided decision to stand. I disagree, however, that we should decide the case now by an equally divided court.

The case is an important one with national implications, and it reaches us at a stage in which there will inevitably be further proceedings, judicial and administrative. Even if affirmed, the cases must be returned to the district court for consideration of the prayer for a permanent injunction, unless, of course, the Secretary concludes to confess error and submit to the preliminary injunction.

The district court granted preliminary injunctions against administrative enforcement of Title VI which, although negative in character, provided that the Secretary might reinstitute administrative enforcement proceedings if (in

the case of Baltimore), (a) Baltimore was informed in detail and in writing of all areas in which its present desegregation plan was deficient, (b) the Secretary recommended in writing specific steps which Baltimore might take to achieve compliance, (c) the Secretary specified each program or part of a program under which he claimed that Baltimore failed to comply with Title VI and schools at which noncompliance was believed to exist, (d) the Secretary specified in writing the particular noncompliance in each particular program at each particular school where noncompliance was thought to exist, (e) the Secretary made a good-faith effort to obtain voluntary compliance, and (f) Baltimore was given a reasonable opportunity to achieve voluntary compliance through adoption and implementation of a voluntary remedial plan with an opportunity for community participation in the development of a remedial plan. With respect to Maryland, the comparable conditions were that (a) the Secretary promulgate and adopt specific standards for compliance with Title VI by institutions of higher education, said regulations to be of general applicability and to apply uniformly throughout the United States; (b) the Secretary made a separate and specific analysis of each and every program to determine the existence of noncompliance

in the administration of the program; (c) the Secretary made a good-faith effort to achieve compliance by voluntary means in each separate program in which noncompliance is alleged to have been found; and (d) the Secretary specified, wherever noncompliance in a particular program was believe to exist, the actions necessary to remedy the alleged noncompliance and the standards by which the existence of noncompliance would be determined. Since the district court did not enjoin the Secretary from carrying out his duties under Title VI, and since Title VI requires him to take steps to achieve compliance, the preliminary injunction may be fairly construed as a mandatory injunction requiring the Secretary to take the various actions set forth in each of the two injunctions.

Although the cases were decided in the district court by the granting of a preliminary injunction, an analysis of the record and the evidence before the district court makes it clear that on remand the entry of a permanent injunction will be a pro forma action. From the very full record before us, it is inconceivable to me that there is additional evidence to be considered by the district court.

From the opinion of the district court, I would doubt also that its views would be dislodged on consideration of the entry of a permanent injunction.

From these considerations, I am led to the conclusion that we ought not to proceed to decide the cases on their merits by an equally divided court. Rather, a fairer and more equitable approach would be to grant rehearing and restore the cases to the hearing calendar, deferring hearing until Judge Craven's successor has been selected and qualified. I do not doubt the appropriateness of our granting rehearing in banc, but I question the wisdom of affirming by an equally divided court. Although other courts of appeals have done just that in cases of lesser importance, I would stress that here further proceedings are inevitable.

If the district court makes permanent its preliminary injunctions--a result that I fully expect--there will be an opportunity for a further appeal. Presumably that appeal will not be heard and decided by less than a full court, but in the interim the Secretary will be required to expend time and money to effect compliance with the injunction when it may well be that a majority of the full court in a second

appeal will decide that such expenditures are unnecessary. Of course the effect of a permanent injunction may be stayed by the district court, or it may be stayed by us pending appeal. But even if a stay is granted, I think that we quite unnecessarily subject the parties to the formality of the entry of a permanent injunction and the expense and inconvenience of a second appeal when it is perfectly obvious that we can give no definitive answer to the basic questions presented by these consolidated appeals until there is a full court.