

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHANNON RICHEY FAULKNER,
individually and on behalf of all
others similarly situated,

Plaintiff-Appellee,

and the
UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

CASE NO. 94-1978

JAMES E. JONES, JR., et al.,

Defendants-Appellees

and the State of South Carolina, The Citadel,
the Military College of South Carolina,
and The Board of Visitors of The Citadel,
the Military College of South Carolina,
South Carolina,

Additional Defendants-Appellees.

APPELLANTS' EMERGENCY MOTION TO STAY
ORDERS PENDING APPEAL
AND
SUPPORTING MEMORANDUM

The United States District Court for the District of South Carolina has mandated the admission of Shannon R. Faulkner, a nineteen year-old woman, into the Corps of Cadets of The Citadel. In accordance with the Court's Order, she will report on August 15, 1994.

Pursuant to Fed. R. App. P. 8, and Fourth Circuit I.O.P.'s 8.1 and 27.5, defendants-appellants James E. Jones, Jr., The

Citadel, the Military College of South Carolina, and the State of South Carolina, et al., (collectively, "South Carolina") respectfully move to stay, pending appeal, the Orders entered July 22, 1994 and August 1, 1994 (the "Orders"). The July 22 Order was accompanied by an opinion, Faulkner v. Jones, Civ. Action No. 2:93-0488-2, slip op. (D.S.C. July 22, 1994), subsequently cited herein as "July 22, 1994 slip op. at ____" (attached as Ex. A) (case also available as Westlaw cite 1994 WL 387242). The defendants filed their motion for a stay on July 27, and, by agreement, it also applies to the August 1 Order. As of noon, Friday, August 5, the District Court had not ruled on defendants' motion. Defendants have noted an appeal from the Orders.

PRELIMINARY STATEMENT

On July 22, 1994, after a ten-day bench trial, the District Court found that there is insubstantial demand for an all-female institution like The Citadel. Nevertheless, the Court held that South Carolina's system of higher education violated the Equal Protection Clause because it ruled, as a matter of law, that the State's gender-neutral policy of providing educational opportunities in response to student demand does not justify the failure to offer to women a publicly supported, single-gender Citadel-type program. Based on this liability finding, the Court directed South Carolina to formulate and implement a remedial plan that would be effective for the 1995-1996 school year. The

Order contemplates that the remedy may provide an alternative to coeducation. However, the District Court also ordered Faulkner's immediate admission into the Corps of Cadets.

While purporting to give South Carolina the opportunity to continue public support of single-gender education by fashioning a remedy to extend the benefits of The Citadel's single-gender program to women, the Court eviscerates this right by ordering Faulkner immediately into the Corps. This premature remedial mandate effectively orders the fundamental changes to The Citadel that this Court has ruled in both United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992), cert. denied, --- U.S. ---, 113 S. Ct. 2431 (1993) ("VMI"), and Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) ("Faulkner"), are necessitated by coeducation. Because South Carolina and The Citadel should be afforded the opportunity to be heard by this Court on the merits of its public policy and should, in any event, have the opportunity to implement an acceptable remedy before The Citadel is compelled to transform itself, defendants request that the District Court's remedial orders be stayed pending appeal.

STATEMENT OF FACTS

The facts and procedural history of this case are set forth in this Court's previous opinion. Faulkner, 10 F.3d at 226.

On March 2, 1993, Faulkner commenced this action challenging The Citadel's single-gender admission policy for the Corps of

Cadets.¹ Faulkner alleged that The Citadel's policy constitutes gender discrimination in violation of the Equal Protection Clause and sought permanent declaratory and injunctive relief mandating her admission to the Corps of Cadets.

Faulkner moved for summary judgment on the authority of VMI, urging that South Carolina, like Virginia, could not justify offering the unique benefit of The Citadel's educational program only to men. Although Faulkner seeks admission to the Corps of Cadets, she moved for a preliminary injunction to compel her attendance as a day student only. In August 1993, the District Court granted Faulkner's motion. This Court upheld the injunction observing that the injunction "does not require structural changes to The Citadel's program" and is not tantamount "to integrating or altering the military program at The Citadel." Faulkner, 10 F.3d at 233. Faulkner began attending day classes at The Citadel in January 1994 and has now completed her freshman year as the sole civilian day student.

In affirming the preliminary injunction, this Court found no reason why the holdings in VMI would not apply to The Citadel. This Court noted, however, that South Carolina had re-affirmed its support for The Citadel through a Concurrent Resolution adopted by both houses of the South Carolina General Assembly in

¹On May 6, 1993, the United States moved to intervene in support of plaintiff and to add the State of South Carolina as a defendant. The District Court granted the motions on June 7, 1993. The State of South Carolina answered by declaring its unequivocal support for the single-sex educational program at The Citadel.

May 1993, and, unlike Virginia's unwillingness to take a position on liability in VMI, South Carolina is defending The Citadel in this litigation. Id. at 232. This Court found, however, that the resolution offered "no explanation for the failure to offer women the same opportunity to participate in a single-gender institution and achieve similar goals as that afforded to men at The Citadel. Although South Carolina has appointed a committee to review the absence of opportunity for women, the committee will not report to the legislature until January 1994." Id. at 232-33.

After this Court's ruling, the Legislative Study Committee reported its findings and recommendations to the General Assembly in January 1994. The Committee had been appointed to "formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women." Committee Report May 20, 1993 H. 4170 Concurrent Resolution at 9 (pages not numbered) (attached as Ex. B). During the Committee's deliberations, it conferred with the presidents of South Carolina's two independent women's colleges, Dr. Thomas R. McDaniel, Interim President of Converse College, and Dr. Peter T. Mitchell, President of Columbia College, each of whom explained the history, philosophy and methodology of their respective single-gender programs. January 1994 Legislative Committee To Study the Provision of Single-Gender Educational Opportunities for Women (Legislative Study Committee Report) at 2; 26-28 (attached as Ex. C). Both gentlemen expressed to the

Committee their respective institution's "interest in continuing to explore the development of alternative programs." Id. at 29.³

Based on its inquiries and deliberations, the Committee listed several possible alternatives for enhancing single-gender opportunities for women. The Committee Report concluded, however, that "no final definitive recommendation reasonably can be adopted and implemented without further clarification from the courts and development by education experts." Id. at 21.³ Although the Concurrent Resolution did not authorize further action, the Committee indicated that it "stands ready to further assist the General Assembly as it may direct in ensuring the appropriate provision of single-gender educational opportunities for the women of South Carolina." Id. at 30. During the 1994 Session, the General Assembly approved and adopted The Legislative Study Committee Report reaffirming the State's commitment to support single-gender education and its election to

³The District Court stated that it had found "no indication that the committee contacted Mary Baldwin College or Converse College about the possibility of a compact arrangement with those institutions. Columbia College advised the committee that it was not interested in such an arrangement." July 22, 1994 slip op. at 18. However, the Committee Report demonstrates not only consultations with Converse and Columbia, but also communication with MBC. Notwithstanding its criticism of South Carolina for what the Court thought was the State's failure to contact MBC about a compact arrangement, the Court gratuitously held that "such a compact would be unconstitutional." July 22, 1994 slip. op. at 31, n.15.

³Referring to United States v. Commonwealth of Virginia, the Committee stated that "[t]he conclusions reached in this litigation will necessarily define what may be required of the State of South Carolina." Ex. D at 29.

pursue a parallel program as an alternative to coeducation at The Citadel if the Court were to make a liability determination that required a remedy.⁴

On March 1, 1994, the District Court ordered a trial to commence on May 16, 1994 on the issues of both liability and remedy. The Court directed that the liability issues be limited to the public policy defense of South Carolina that defendants asserted differentiate this case from VMI and precluded summary judgment for Faulkner. The Court based its order to try the issue of remedy simultaneously with South Carolina's justification defense on the erroneous belief that the Legislative Study Committee had been working on a remedy in the Faulkner case for nearly one year. The Court directed South Carolina to file a remedial plan by April 1, 1994.

On March 7, 1994, the State and The Citadel defendants filed a Motion to Bifurcate or, in the Alternative, to Continue. The defendants asserted that a liability determination delineating the scope of the constitutional violation should precede development of a remedial plan and that, in any event, expert testimony established that thirty days was insufficient time to

⁴The District Court erred in its findings regarding South Carolina General Assembly action on the Legislative Study Committee's report. The Court stated that "there is nothing in the record to suggest that the General Assembly gave further consideration to [the Legislative Study Committee report] during its 1994 Session." July 22, 1994 slip op. at 18. This is wrong. Def. Ex. 377 (attached as Ex. D) shows that the South Carolina General Assembly adopted and accepted the Report of the Legislative Study Committee appointed pursuant to the Concurrent Resolution.

develop a viable remedial plan.⁵ The defendants further explained that the purpose of the Legislative Study Committee was not to develop a remedy but merely to recommend options to enhance single-gender educational opportunities for women in South Carolina.

Defendants filed the affidavit of Robert J. Sheheen, Speaker of the South Carolina House of Representatives (attached as Ex. E), in support of their motion. Speaker Sheheen stated:

At this time we have little guidance as to what type of plan, if any, may be constitutionally required or allowed. We are anticipating a ruling soon from the district court in the VMI litigation which may be instructive in this regard.

It is anticipated that any plan which the State adopts will affect many students for many years to come. While it would not be the desire of the General Assembly to delay unnecessarily the progress of the pending litigation concerning The Citadel, it is respectfully submitted that the State cannot serve the interests of the public by proposing a plan which is not clearly permitted under direction of the Court.

Ex. E at 3. On March 8, 1994, the District Court denied the Motion. 3/8/94 Hearing Tr. at 7-8 (attached as Ex. F).

⁵A detailed liability determination appeared particularly necessary in this case because, from the outset, plaintiff consistently argued that South Carolina was not entitled to the remedial options afforded in VMI. According to plaintiff, neither single-gender education in general nor The Citadel's program in particular provided any demonstrable benefits. The district court did not clearly reject this argument and embrace VMI until after the trial had begun. Furthermore, Faulkner contended that no single-gender program could be an adequate remedy. If the Court were to determine that South Carolina's system is unconstitutional because of the absence of a coeducational military college, the remedial alternatives arguably would be different from those in VMI.

In accordance with the District Court's March 8 order, the defendants filed their Proposed Remedial Plan (attached as Ex. G) on April 1, 1994. Because the precise nature of constitutional violation could not be known until the Court found liability, if any, the Remedial Plan lists several options for future development from which the State could choose in response to a finding of liability. Each alternative provides additional single-sex or coeducational opportunities for women while preserving single-gender education at The Citadel.

The District Court conducted a bench trial from May 16 through May 27, 1994.⁶ Defendants' evidence at trial demonstrated that the absence in South Carolina at the present time of a public single-gender institution for women results, not from invidious discrimination against women, but from an absence of adequate demand among young women to make such an institution economically and educationally viable. The District Court did not find to the contrary. Indeed, the District Court specifically determined that there was insubstantial demand by women for an all-female Citadel type institution. July 22, 1994 slip op. at 19. Moreover, the evidence showed that both private women's colleges in South Carolina have substantial excess capacity and that Winthrop College, South Carolina's last public

⁶Unfortunately, the District Court did not clearly state the extent to which VMI controlled this case until well into the trial. As a result, defendants released numerous witnesses during trial once it was clear that the Court intended not to hear testimony on certain issues. Furthermore, the Court did not consider the testimony of most of plaintiff's expert witnesses.

women's college went coed in 1974, primarily because of declining enrollment. West Testimony Trial Tr. Vol. V at 37 (attached as Ex. H).

At the close of the evidence, the Court directed the parties to file proposals for the matriculation of Faulkner into the Corps of Cadets within 30 days. The District Court required that the plans include provisions to prevent sexual harassment of Faulkner.

The District Court heard final arguments on June 16, 1994, and announced its decision on July 22. On the issue of liability, the District Court held as a matter of law that the absence of demand by women for a Citadel-type single-gender program did not justify the State's failure to offer to women a single-gender program that afforded them the opportunity to achieve the same goals as men achieve at The Citadel. July 22, 1994 slip op. at 31-32. Although the State's justification for providing a public single-sex institution for men and not for women was based on an even-handed application of the longstanding State policy of providing educational programs in response to demand, the Court erred by testing the constitutionality of the State's system of higher education under the standards for evaluating gender classifications. While The Citadel's admission policy is admittedly a gender classification that is subject to the intermediate scrutiny test, the State policy of responding to demand in allocating resources is gender-neutral and passes constitutional muster unless the plaintiff has proven that it is

the product of intentional discrimination. The record shows the total absence of any intentional or invidious discrimination.

The District Court also erred on the issue of remedy. The Court purported to be bound by VMI and its holding that, in light of "the generally recognized benefit that VMI provides," VMI, 976 F.2d at 900, there are alternatives to coeducation. The District Court nonetheless ordered the immediate admission of Faulkner into the Corps of Cadets. The District Court based this Order upon the erroneous conclusion that there is no other alternative available to Faulkner. The District Court also found, however, that "[s]tudents transferring into the Corps of Cadets may do so as late as the first semester of their junior year." July 22, 1994 slip op. at 9. Faulkner may therefore, continue as a day student for her sophomore year and transfer into the Corps in the fall semester of 1995 if no other remedy is then available.⁷

The District Court properly adhered to VMI to the extent of also ordering the defendants to "pursue their proposed remedial plan without delay and formulate, adopt, and implement a plan . . . by the beginning of the school year 1995-1996 . . . to provide an adequate remedy for any constitutional grievances

⁷The Order is also based upon the District Court's belief, without a scintilla of proof, "that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program." July 22, 1994 slip op. at 38. This conclusion is not only lacking any basis in the record but ignores the fact that Faulkner has testified that she would not attend any single-gender institution or program.

future female applicants to The Citadel may have." July 22, 1994 slip op. at 41-42.

The District Court scheduled a hearing on August 1 governing Faulkner's admission. Id. at 38, n.19. At the August 1 hearing, the District Court largely adopted the "Defendants' Proposed Contingency Plan for Admission of Shannon Faulkner" (attached as Ex. I).⁸

On July 27, 1994 the defendants filed in the District Court their motion to stay the Court's July 22 Order. At the August 1 hearing, the Court agreed to apply the motion for stay to its August 1 ruling. The parties also agreed to the Court's ruling on the stay motion without further briefing or argument.

On August 4, 1994, the United States filed its Motion for Reconsideration of Approval of Defendants' Contingency Plan and Disapproval of Plaintiff's Proposed Remedial Plan or Alternatively for Stay of Disputed Provisions of Defendants' Plan Pending Appeal (attached as Ex. R). In its supporting memorandum, the United States argues for reconsideration of the terms and conditions of Faulkner's admission and "[a]lternatively the United States seeks a stay of implementation of defendants' contingency plan and withdraws its objection to that portion of defendants' motion to stay the July 22 order relating to

⁸The defendants filed the proposed contingency plan, "reserving in all respects the positions set forth at trial and in the motions filed to date. . . . The proposals set forth in this plan relate specifically to the possible court-ordered admission of Shannon Faulkner. They do not reflect a voluntary change in any policies or regulations of The Citadel or the State of South Carolina." Ex. I at 1-2.

admission of Ms. Faulkner to the Corps of Cadets for the 1994-95 school year pending appeal."

On August 5, the District Court announced that it would hold a hearing on Wednesday, August 10, on "all pending matters." If the Court does not rule on the Defendants' motion for a stay until that date, it will leave only two business days before Faulkner reports as a member of the Corps. This delay will effectively preclude mature consideration by this Court of the defendants' motion for a stay.

STANDARD OF REVIEW

The factors governing the issuance of a stay pending appeal are: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

ARGUMENT

I. THE CITADEL WILL BE IRREPARABLY INJURED ABSENT A STAY.

Admitting Faulkner immediately to the Corps of Cadets irreparably harms The Citadel. Obviously and most fundamentally, The Citadel will no longer be a single-gender institution. As the Court found in VMI, the mission of VMI, and hence of The

Citadel, can be accomplished only in a single-gender environment.
VMI, 976 F.2d at 897.

In VMI, this Court also found that co-education would "destroy the opportunity" women seek and "would tear at the fabric of VMI's unique methodology." VMI, 976 F.2d at 897. Amplifying this very point in Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993), this Court stated that "coeducation would so fundamentally change VMI's military program that neither males nor females would receive the training which VMI offered through its single-gender program." Id. at 231. Indeed, twice in its Order, the District Court below quoted VMI as follows: "[T]he introduction of women at VMI will materially alter the very program in which women seek to partake. . . ." July 22, 1994 slip op. at 3, 26 (quoting VMI, 976 F.2d at 899).

This Court cataloged the fundamental changes that coeducation inevitably would cause in an adversative single-gender program like that at The Citadel:

- a. "[I]f women were to be admitted, [The Citadel] would have to convert to a dual-track physical training program in order to subject women to a program equal in effect to that of men," VMI, 976 F.2d at 896;
- b. "cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by [The Citadel's] methodology," id.;
- c. "coeducation would tear at the fabric of [The Citadel's] unique methodology," id. at 897;
- d. "at least . . . three aspects of [The Citadel's] program -- physical training, the absence of privacy, and the adversative approach

-- would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of [The Citadel's] training," id. at 896-97;

e. "[The Citadel's] mission [of educating and training citizen-soldiers] can be accomplished only in a single-gender environment," id. at 897; and

f. "[coeducation] would deny . . . women the very opportunity they sought because the unique characteristics of [The Citadel's] program would be destroyed by coeducation," id. at 897; see also id. at 899.

Dual tracking is already contemplated by the housing of Faulkner, in proximity to, but outside the barracks and limiting her presence in barracks to formations and other official company functions. Dual tracking will also occur with different physical training standards for Faulkner.

The adversative method of the "knob system" (the analogy to the rat line at VMI) will also be "materially affected" by Faulkner's admission. The District Court's order directed that Faulkner be treated as any other "knob." However, this Court has already found, based on the experience with coeducation at West Point, that "cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by [The Citadel's] methodology." VMI, 976 F.2d at 896. To minimize this inevitable result of coeducation, The Citadel would have to exclude Faulkner from its adversative training. However, abandoning the adversative system as to Faulkner will produce the dual track system that the Court found, also from the West Point experience, will lead to jealousy and

resentment. Neither prong of this Hobson's choice is palatable to Faulkner or to The Citadel and its 2,000 male cadets. Both alternatives can be avoided by a stay.

II. FAULKNER WILL NOT SUFFER ANY SUBSTANTIAL HARM BY THE GRANT OF A STAY.

In contrast, Faulkner will suffer little, if any, harm by continuing as a day student under the District Court's current injunction.⁹ As this Court has stated, the very purpose of this injunction is to protect Faulkner's interests pending a decision on the merits and, if necessary, the implementation of any remedy. Faulkner, 10 F.3d at 233. Moreover, as the District Court found, Faulkner may transfer into the Corps of Cadets as late as the first semester of her junior year (the 1995-1996 academic year). July 22, 1994 slip op. at 9. Thus, under current Citadel regulations, Faulkner, a rising sophomore, could become a member of the Citadel Corps of Cadets as late as the fall of 1995, if South Carolina has not provided another acceptable remedial plan. She would be eligible to participate in the Citadel Corps of Cadets, to receive a Citadel diploma and ring, and to become part of what she describes as The Citadel "network." Trial Tr. Vol. XVII at 118-19 (attached as Ex. J).

⁹Under the Defendants Proposed Contingency Plan for Admission of Shannon Faulkner, plaintiff, as a day student, could participate in all activities and utilize all facilities, except those not open to any student -- male or female -- who is not a member of the Corps of Cadets. Ex. I at 3-4.

That which Faulkner seeks will not be denied to her by granting the requested stay.

III. DEFENDANTS WILL LIKELY PREVAIL ON THE MERITS. THE DISTRICT COURT'S ORDER COMPELLING COEDUCATION OF THE CITADEL'S CORPS OF CADETS IS BASED UPON AN ERRONEOUS INTERPRETATION OF THE EQUAL PROTECTION CLAUSE AND REMEDIAL PRINCIPLES GOVERNING THE EXERCISE OF FEDERAL REMEDIAL POWER.

A. The District Court Misapplied the Equal Protection Clause.

In the liability phase, the District Court chose to try only "the issue of justification," a term the District Court used to describe the State's articulation of an important policy that substantially supports offering the unique benefits of a Citadel-type education to men and not to women. July 22, 1994 slip op. at 4, n.4. This is the issue that distinguishes South Carolina from the posture of Virginia in VMI. Id. at 5. Unlike the Commonwealth of Virginia in the liability phase of VMI, the State of South Carolina adequately answered the "larger question" of why the State provided no publicly supported single-gender program for women.

Before 1974, South Carolina provided public single-gender higher education to men and women through The Citadel and Winthrop College, respectively. In 1974, responding primarily to lack of demand and the then-perceived benefit to women of coeducation, South Carolina authorized Winthrop College to become coeducational.

On this issue, the District Court found that the

allocation of the State's resources for higher education has always been an issue of concern for the South Carolina General Assembly. The South Carolina General Assembly seeks to get the maximum benefit in education for its dollars. As a result, the State has tried to implement educational programs as the demand for such programs arises.

Id. at 15. The District Court elaborated by finding that it

is and has been the policy of the State of South Carolina to provide educational opportunities in its system of higher education when dictated by its policies of responding to reasonable demand, student choice, institutional autonomy, diversity, and economy of resources.

Id. at 18-19.

Finally, the District Court found South Carolina higher educational public policy was expressly stated in the Concurrent Resolution passed by the South Carolina General Assembly adopted in May, 1993:

Based upon the past actions of the State of South Carolina and the expressions of its General Assembly in the Concurrent Resolution of 1993 this court concludes that it is now and has been for some time the policy of the State of South Carolina to provide educational opportunities to its citizens based on reasonable demand, student choice, institutional autonomy, diversity and economy of resources.

Id. at 28.

Consistent with these policy considerations, the Concurrent Resolution states that

South Carolina has historically supported and continues to support single-gender educational institutions . . . where sufficient demand has existed for particular single-gender programs thereby justifying the

expenditure of public funds to support such programs.

Ex. B at 8. The District Court specifically found that "[c]learly, Winthrop College did not become coeducational to discriminate against women." July 22, 1994 slip op at 8.

All of these fact findings of the District Court support the inescapable conclusion that South Carolina has not unconstitutionally discriminated against women in the provision of single-gender education. To the contrary, South Carolina has responded to demand as a determining factor in the allocation of its resources.¹⁰

After finding that the facts support South Carolina's justification, the District Court committed two fundamental errors in its conclusions of law, either of which will require reversal. The District Court erroneously held:

1. Demand is irrelevant as a matter of law in evaluating an equal protection claim. Id. at 29-32.
2. The plaintiff did not have to prove invidious intent to prevail in this case. Id. at 32-34.

¹⁰There is no evidence that women in South Carolina are deprived of the opportunity to receive a college education in their chosen field. In academic year 1992-93, 8,390 women and 6,551 men were awarded degrees in the State of South Carolina. (Def. Ex. 276 at 45) (attached as Ex. K). In the fall of 1993, there were 32,642 women and 22,831 men enrolled in South Carolina public institutions of higher education. (Def. Ex. 277 at 25) (attached as Ex. L). There is no degree program offered to the Corps of Cadets at The Citadel that is not offered also by one or more public institutions in South Carolina, all of which are coeducational. (Def. Ex. 420A) (attached as Ex. M). The Citadel itself maintains a coeducational evening college and summer school program.

The District Court's ruling defies established equal protection jurisprudence. It deprives the General Assembly of the ability to make public policy decisions based upon gender neutral factors if the result is a disproportionate effect on men or women.

Demand is a legitimate and constitutionally supportable justification as amply demonstrated by the District Court's own findings. The Court found that there was no substantial demand in South Carolina for an all-female military institution like The Citadel. Id. at 19. However, the District Court made clear at the August 1 hearing that any remedy must be virtually identical to The Citadel. Can South Carolina now develop an all-female military college when it knows, and the District Court has found, that there is no demand? It is this very type of superficial gesture of equality that the constitution forbids.

The Supreme Court has not hesitated to look at a wide range of criteria to evaluate the legitimacy of governmentally prescribed classifications. For example in Washington v. Davis, 426 U.S. 229, 242 (1976), a case involving a civil service exam for police officers which had a disproportionately adverse impact on minority applicants, the Court considered the "totality of the relevant facts;" in Personnel Adm'r v. Feeney, 442 U.S. 256, 275 (1979), a case involving hiring preferences for veterans which had a disproportionately adverse impact on women, the Court considered "legitimate noninvidious purposes;" and in Schlesinger v. Ballard, 419 U.S. 498, 510 (1975), a case involving different

time spans for male and female Navy officers to obtain promotions, the Court considered different career opportunities and the "Navy's current needs." The Constitution does not preclude consideration of legitimate factors in evaluating equal protection claims. Indeed, as this Court's decision in Faulkner reflects, the Equal Protection Clause does not deprive courts of the opportunity, indeed the obligation, to consider all relevant factors including, specifically, demand. 10 F.3d at 232. Ignoring this mandate, the District Court erred in concluding that the "defendants have called the court's attention to no case that supports the proposition that lack of demand is a sufficient justification for the State of South Carolina providing single-sex education to men but not to women. A thorough search by this court has also failed to find any such precedent." July 22, 1994 slip op. at 29.¹¹

In characterizing the State's gender-neutral educational policy as facially discriminatory, the District Court has confused The Citadel's male-only admissions policy with South

¹¹The District Court mischaracterizes the defendants' citation to Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), erroneously suggesting defendants relied on this case and other pre-Brown decisions to support demand as a proper justification. July 22, 1994 slip op. at 29-32. Defendants distinguished these cases as having no application. Unlike such separate but equal cases, South Carolina does not use the factor of demand to escape an obligation to remedy extant overt discrimination. Rather, it relies on this factor and applies it in a gender-neutral manner to determine whether to offer single-gender education to either sex. For this reason, there is no discrimination ab initio. The "separate, but equal" line of cases also is inapposite because, unlike the pedagogical value associated with single-sex education, there is no justifiable reason to separate the races for educational purposes.

Carolina's policy of supporting single-gender education where justified by demand. The Citadel's policy is a gender classification. This Court's ruling in VMI demonstrates that the policy satisfies the intermediate scrutiny standard that applies to gender classifications. See VMI, 976 F.2d at 898 ("[T]he record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so. . . . [T]his conclusion answers the question of whether VMI's male-only policy is justified by its institutional mission").¹²

Because the state policies of demand and allocation of resources are gender-neutral and not based on an express gender classification, an equal protection violation can be established only by showing that the South Carolina policy is the product of

¹²An exchange between defendants' counsel and the District Court leaves little doubt as to the basis upon which defendants tried the issues below. Defendants were led to believe that The Citadel's admission policy would be treated identically to VMI's and that "justification" would be the sole issue on liability.

"Mr. Clineburg: Okay. What I'm hearing is we were to take the Fourth Circuit opinion and substitute Citadel for VMI, that you would consider for the purpose of this proceeding that all that they say about VMI controls here.

The Court: That's my view of it. And I think if I do any different from that, then I've got to put everybody on notice, and we've got to back up and go in another direction."

Ex. N at 82.

intentional, invidious discrimination. See Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (gender); see also Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (race); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265, 264-66 (1977) (race); Washington v. Davis, 426 U.S. 229, 242 (1976) (race). To establish discriminatory intent within the meaning of the Equal Protection Clause, it must be proved that "the [state] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [South Carolina college-age women]." Feeney, 442 U.S. at 279 (emphasis added). Manifestly, that was not done here and there is no finding that could support such a conclusion. To the contrary, the District Court found that "clearly, Winthrop College did not become coeducational to discriminate against women." July 22, 1994 slip op. at 8.

In Feeney, Supreme Court upheld the constitutionality of a statutory hiring preference for veterans against a challenge that the preference discriminated against women because there were substantially fewer female veterans. According to the Court, "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place." Feeney, 442 U.S. at 279. The statute expressed a preference for veterans, "not for men over women." Id. at 280.

Likewise in Geduldig v. Aiello, 417 U.S. 484 (1974), the Supreme Court considered whether California's publicly-funded disability insurance program violated the Equal Protection Clause by not covering disabilities related to pregnancy. The state argued that its insurance program was constitutional because the decision to cover certain disabilities and not others was based on factors unrelated to gender. The Supreme Court agreed, concluding that the exclusion of pregnancy from coverage did not amount to invidious discrimination against women. 417 U.S. at 485. As the Court explained:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis

Id. at 496 n.20.

The Supreme Court in Bray v. Alexandria Women's Health Clinic, --- U.S. ---, 113 S. Ct. 753 (1993), recently applied this same analysis to conclude that § 1985(3), which requires class-based invidiously discriminatory animus, does not provide a cause of action against abortion protesters obstructing access to abortion clinics. In the course of its analysis, the Court explained that discriminatory purpose means "a purpose that focuses upon women by reason of their sex." 113 S. Ct. at 759. (emphasis added) The Court held that the record did not show

that the abortion protests were "motivated by a purpose (malevolent or benign) directed specifically at women as a class." Id. Although only women obtain abortions, the Court also held that opposition to abortion was not a proxy for opposition to women as a group. Id. at 760 (observing that "[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward . . . women as a class -- as is evident from the fact that men and women are on both sides of the issue").

The District Court failed to follow this well-established equal protection jurisprudence in evaluating the constitutionality of South Carolina's educational policy. The District Court found that the only single-gender colleges which the State of South Carolina has maintained in the past fifty years were Clemson University, an all-male military college until 1955; Winthrop University, a women's college until 1974, and The Citadel. July 22, 1994 slip op. at 7. As discussed supra, the evidence demonstrates conclusively that the absence of a state-supported single-gender college for women resulted from the prudent decision in 1974 to allow Winthrop to admit men and has been continued by the application of gender-neutral state policies governing allocation of resources in higher education. "Winthrop University did not become coeducational to discriminate

against women."¹³ July 22, 1994 slip op. at 8. Nonetheless, the District Court erred in finding that "[t]here is, however, no evidence in the record to support a conclusion that Winthrop University could not have survived as a single sex female institution." Id. at 7-8. In fact, former Governor West, governor at the time Winthrop coeducated, testified that Winthrop needed to be a coeducational institution, otherwise it would not survive. Ex. H at 7. There was no evidence to the contrary. At the time Winthrop became coeducational, the South Carolina Tuition Assistance Grants program, which partially underwrites tuition for students attending private colleges in South Carolina, was able to fund almost eighty percent of the average tuition of grant recipients.¹⁴ (Def. Ex. 289 at 19) (attached as Ex. O). Thus, the private women's colleges in South Carolina could easily meet any residual demand for publicly funded women's single-gender education.

¹³Similarly, the District Court found that the decision to coeducate Clemson University "resulted from the realization by the Clemson Board of Trustees that the school would not grow with the State of South Carolina and adequately serve the educational needs of its citizens if it remained a single-sex military college." July 22, 1994 slip op. at 7.

¹⁴Independent institutions are an integral part of the South Carolina higher education plan. South Carolina relies on independent institutions to meet student needs and uses the Tuition Grants Program to meet its objectives in higher education. According to a Carnegie Foundation study by researchers for the National Association of Independent Colleges, South Carolina is one of a small number of states which include independent institutions as an integral part of the state plan, although they are not part of the state system. (Richardson testimony, Tr. Vol. XI at 37-38) (attached as Ex. P).

Governor West also testified that the same criteria would apply to The Citadel, which would be required to coeducate if there were no demand for its single-gender program. Ex. H at 37. The record fully supports the absence of a lack of intent to discriminate on the part of the State of South Carolina.

The absence of a state-supported women's college at the present time is the result of the application of gender-neutral state policies governing the allocation of increasingly scarce resources available for the support of higher education. There is no evidence that the criteria employed by the State of South Carolina to assess demand and to decide whether to approve post-secondary educational programs has been used as a pretext to discriminate against women's programs.¹⁵ The unrebutted evidence is that these criteria have been employed even handedly to all programs. Gallagher testimony, Tr. Vol. VIII at 49 (attached as Ex. Q).

The State of South Carolina's policy is to offer single-gender education to either sex according to the same criterion,

¹⁵The South Carolina Commission on Higher Education was created to provide a professional approach to the allocation of scarce resources available for higher education in South Carolina. Ex. H at 16. The Commission looks at demand as one of the primary justifications for new programs. Ex. Q at 8. New programs are approved only if there is sufficient demand to make the program self-sufficient. In the 20 years since Winthrop became coeducational, not one request for a single-sex program or institution for women has been submitted to the Commission, a fact the Commission considers determinative on the issue of demand. *Id.* at 26-27; 48-49; 65-68). Similarly, there is no evidence of demand sufficient to justify offering an adversative military single-gender education to women. July 22, 1994 slip op at 19.

the gender-neutral factor of demonstrated demand. Prudent educational policy and effective resource allocation simply do not permit states to offer educational programs to suit the desires of each individual citizen. Id. at 24-29; 49. When declining demand and other non-gender based factors no longer justify maintaining a school's single-gender admission policy, the State applies its policy in a gender-neutral manner and accords equal treatment to both sexes.

On this record and applying the proper legal standard, there is a strong likelihood that the District Court's liability determination will be reversed.

B. The District Court Erred as a Matter of Law in Ordering Faulkner's Immediate Admission into the Corps of Cadets.

1. The District Court Violated Principles Controlling The Exercise of Federal Remedial Power By Ordering Faulkner Into The Corps.

Even assuming the District Court did not err on liability, it erred in ordering Faulkner into the Corps of Cadets. Well-settled principles of comity and federalism in our governmental system constrain and temper the exercise of federal authority to remedy unconstitutional state practices. Although state practices must conform to the requirements of the federal constitution, federal courts, as a prudential matter, permit states the opportunity to correct constitutional violations before imposing a remedy on the states. As the Supreme Court held in the desegregation context, "[r]emedial judicial authority

does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (emphasis added).

The Supreme Court also has recognized this principle of remedial restraint in other contexts involving fundamental equal protection rights. See Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (voting rights); Murray v. Giarratano, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (prisoner rights); Bounds v. Smith, 430 U.S. 817, 819, 830-32 (1977) (same); see also William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 694-95 (1982) (observing that "[t]he only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body" to implement a remedy); Hon. Frank M. Johnson, Jr., The Role of the Federal Courts in Institutional Litigation, 32 Ala. L. Rev. 271, 273 (1981) (recognizing that "principles of federalism" require federal courts in institutional litigation to issue an "injunction to the responsible government officials, putting them on notice of their constitutional derelictions and leaving to them the [initial] responsibility of formulating and effectuating appropriate reforms"); Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1248 (1977) (observing that "[a]bsent clear proof of an intention of noncompliance by the defendants,

it would seem that initial restraint is always the appropriate course for the federal court, with the judge adopting a more activist role . . . only . . . in the face of default by government officials").

The constraints of comity and federalism apply with even greater force where, as here, the litigation involves important issues of state policy and resource allocation that admit of more than one constitutionally acceptable remedy. See Giarratano, 492 U.S. at 14 (Kennedy, J., concurring). This Court's remedial order in VMI faithfully adhered to these guiding principles. Because of the "generally recognized benefit that VMI provides," VMI, 976 F.2d at 900, and because "the unique characteristics of VMI's program would be destroyed by coeducation," id. at 897, -- conclusions which this Court found in Faulkner to apply with equal force to The Citadel -- this Court remanded the case to the District Court to permit the Commonwealth "to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied," id. at 900.

The District Court in this case ignored these controlling principles in ordering plaintiff's admission forthwith into The Citadel Corps of Cadets. South Carolina has not defaulted its remedial obligations. Indeed, the District Court has permitted the State to develop a remedy to be effective for the 1995-1996 school year. The Court nonetheless summarily ordered a change in Faulkner's day student status and ordered her immediate admission

in the Corps of Cadets. Under the District Court's order, Faulkner may well be the only woman to join the Corps of Cadets.

The District Court justified its incongruous remedial order on the ground that, unlike VMI, this case involves a "live" plaintiff. July 22, 1994 slip op. at 3, n.2. According to the District Court, the same time pressure that apparently justified granting Faulkner preliminary injunctive relief permitting her to attend classes pending the outcome of this case on the merits also justifies truncating South Carolina's remedial right and effectively coeducating the Corps of Cadets. Relying on Watson v. City of Memphis, 373 U.S. 526 (1963), Florida ex rel. Hawkins v. Board of Control, 351 U.S. 915 (1956) (per curiam),¹⁶ and Meredith v. Fair, 305 F.2d 343 (5th Cir.), cert. denied, 371 U.S. 828 (1962), the District Court concluded that this case falls into a category of cases in which the concept of "all deliberate speed" does not apply and remedial deference to state authorities is unnecessary.

The District Court's analysis is flawed for three principal reasons. First, the state's prerogative to propose a constitutionally acceptable remedy does not turn on the concept of "all deliberate speed." The principle of remedial deference to state authorities is grounded in "our federalism" and operates independently of any concept of all deliberate speed. This now tainted concept affected only the time in which states had to

¹⁶The District Court erroneously cites to the Supreme Court's order denying rehearing at 351 U.S. 915 (1956).

remedy an unconstitutional condition, not their right to do so. See Green v. County School Board of New Kent County, 391 U.S. 430, 439, 442 (1968) (discarding "all deliberate speed" and ordering school authorities to propose a plan that "promises realistically to work now"). Moreover, as discussed above, the Supreme Court frequently has recognized the principle of remedial deference to state authorities outside the desegregation context in which the all deliberate speed concept applied. See Wise, 437 U.S. at 540; Bounds, 430 U.S. at 819, 830-32; see also Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988)

Second, whenever, as here, more than one remedial option is available to a state that has not defaulted in its remedial obligations, the presence of a live plaintiff seeking to vindicate equal protection rights does not pretermitt a state's right to remedy its unconstitutional practices. See, e.g., Green, 391 U.S. at 439, 442; Bounds, 430 U.S. at 819, 830-32; Knight v. Alabama, 787 F. Supp. 1030, 1371, 1377 n.175 (N.D. Ala. 1991), aff'd in part, vacated in part, and rev'd in part on other grounds and remanded, 14 F.3d 1534 (11th Cir. 1994). Were it otherwise, the principle of remedial deference to state actors would be wholly illusory since it is the unusual case where the rights of a "live" plaintiff are not at stake.

Third, the cases relied upon by the District Court to justify Faulkner's admission are thoroughly inapposite. In each case, judicial remedial action was justified either by a state's intentional and unreasonable delay in complying with a

longstanding duty to desegregate or by the absence of any remedial alternative other than that chosen by the court.

In Watson, for example, the City of Memphis had known for eight years of its duty to desegregate public parks and recreation facilities. During that time, city authorities accomplished little and sought to further delay proposing a viable desegregation plan. Given the extended time the City already had to desegregate, The Supreme Court rejected the City's plea for more time under the doctrine of "all deliberate speed." See Watson, 373 U.S. at 530, 533. In contrast to school desegregation, the Court found that the comparatively minor obstacles to desegregating parks did not justify further delay. Moreover, the only remedial option available to the City appears to have been a simple order mandating full access to public recreational facilities.

Although involving desegregation of a graduate school and a college, respectively, Hawkins and Meredith are readily distinguishable as well. In Hawkins, the Court in a per curiam decision ordered that a black applicant be admitted promptly to a state law school "under the rules and regulations applicable to other qualified candidates." Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413, 414 (1956). Not only did the principle of all deliberate speed not apply to post secondary education, but, more importantly, there was no other remedial option available to remedy the denial of plaintiff's equal protection rights.

Likewise, in Meredith, plaintiff, a black college student, had an unquestioned right to attend the University of Mississippi free of discrimination. The state defendants nonetheless engaged in a persistent course of conduct to thwart plaintiff's attempts to enroll by imposing unreasonable and discriminatory admission requirements. Under these circumstances, with no other remedial action available or contemplated, the Fifth Circuit properly enjoined the state to admit plaintiff to the school.

In sharp contrast to these cases, South Carolina has several remedial options other than coeducation at The Citadel to remedy the constitutional shortcoming the District Court found in the State's system of higher education. Moreover, South Carolina has expressed its intention and taken steps even before the liability determination to provide for the expansion of public support for single-gender education.

Furthermore, far from seeking delay, South Carolina and The Citadel defendants sought to expedite resolution of both the liability and remedy portions of this case. During trial, counsel for The Citadel advised the District Court that, to the extent they could do so without waiving all appellate rights, the defendants wished to avoid multiple interlocutory appeals. To this end, the defendants suggested permitting them to present a remedial plan within sixty days of any liability determination. In this way, the District Court could have rendered a prompt ruling on remedy as well as liability and permitted this Court to

decide the entire case on one appeal. The District Court did not adopt this suggestion.

Accordingly, the District Court erred as a matter of law in ordering Faulkner's immediate admission to the Corps of Cadets. Given the absence of a remedial default by the State and the availability of multiple remedial options, the State should be afforded the opportunity promptly to select and implement a remedy before the court imposes one of its own, even for one woman. Even if the District Court could exercise remedial authority at this juncture of the proceedings, the Court abused its discretion by expanding the existing injunction to order Faulkner into the Corps.

2. The Court Failed to Consider Required Factors Before Granting the Injunction.

The District Court failed to consider the relevant factors before enjoining The Citadel, apparently permanently, to admit Faulkner to the Corps. However, whether viewed as a permanent injunction or as an extension of the current preliminary injunction, the District Court failed to "balance the equities" and consider "the benefit to the plaintiff if injunctive relief is granted and hardship if such relief is denied; the hardship on the defendant if injunctive relief is granted; [and] the hardship on third parties." Philadelphia Welfare Rights Org. v. O'Bannon, 525 F. Supp. 1055, 1057-58 (E.D. Pa. 1981) (permanent injunction); see also Sierra Club v. Alexander, 484 F. Supp. 455, 471 (N.D.N.Y.), aff'd, 633 F.2d 206 (2d Cir. 1980) (permanent injunction); Minnesota Pub. Interest Research Group v.

Butz, 358 F. Supp 584, 625 (D. Minn. 1973) (permanent injunction), aff'd 498 F.2d 1314 (8th Cir. 1974); Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977) (preliminary injunction).

The District Court did not purport to address the "benefit" to Faulkner by granting the mandatory injunction. The reason for this legal error is, perhaps, obvious -- given the inevitable changes with coeducation at The Citadel, no one knows what, if any, benefits she may obtain.

Further, the District Court erred in concluding "that the only adequate remedy available to provide the plaintiff the rights guaranteed to her by the Equal Protection Clause is her immediate admission to the Corps of Cadets at The Citadel." Order at 38. Faulkner's constitutional rights can be fully guaranteed by continuing her day student status pending the adoption and implementation of a remedial plan, as this Court contemplated in upholding the grant of preliminary injunctive relief. See Faulkner, 10 F.3d at 233. Moreover, if the defendants adopt and implement an adequate remedy, Faulkner would have no right to continue at The Citadel and her only alternative would be to participate in the option developed by the defendants, if she so chooses.

The District Court also erred as a matter of law by failing to address the dual issues of hardship to the defendants and third parties by the grant of the injunctive relief. While purporting to follow this Court's ruling in VMI, and seemingly

acknowledging the impact on The Citadel of coeducation, the District Court did not address the "hardship" to The Citadel caused by Faulkner's admission. Moreover, the District Court failed to consider at all the hardship imposed on third parties. Currently, there are approximately 2,000 male cadets at The Citadel who matriculated, in large part, because The Citadel is male-only. Their desires for a single-gender education are irreparably harmed by Faulkner's premature admission to the Corps.

3. The Court Did Not Order the Least Intrusive Remedy.

Given the principles of federalism and comity implicated in granting permanent remedial injunctive relief against the defendants, the District Court failed to fashion "the least intrusive remedy that will still be effective." Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir.), aff'd in part and vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); see also Consumer Party v. Davis, 778 F.2d 140, 146 (3d Cir. 1985) (discussing principles of federalism as a constraint on district court discretion in fashioning injunctive relief).

Despite the existence of a less intrusive remedy, the Court ordered Faulkner into the Corps of Cadets. As previously stated, Faulkner is currently enrolled as a day student at The Citadel and is a rising sophomore. She can continue as a day student until the Fall of 1995, and participate, if she chooses, in the remedial option adopted and implemented by the defendants at that

time. This is the adequate, less intrusive, course that the District Court has charted for other potential female applicants to The Citadel (whose constitutional rights the District Court also found to be violated). Faulkner should be entitled to no greater remedial rights.

IV. THE DISTRICT COURT'S ORDER COMPELLING COEDUCATION OF THE CITADEL'S CORPS OF CADETS IS CONTRARY TO PUBLIC POLICY.

The authority for establishing higher education policy in South Carolina rests with the General Assembly. As noted previously, the General Assembly has by Concurrent Resolution resoundingly reaffirmed its support for The Citadel's single-sex admission policy and has directed that alternatives be studied for providing additional single-sex educational opportunities for women. The Resolution indicates the General Assembly's preference for a "parallel" or "creative" remedy that extends new options to women while preserving at The Citadel the single-sex admission policy whose educational value this Court affirmed in VMI.

The public interest would be served by staying the District Court's Order. The South Carolina General Assembly has emphatically and overwhelmingly endorsed single-sex education and The Citadel's single-sex admission policy. What the United States Supreme Court said in Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471 n.6 (1981), applies equally here:

Certainly this decision of the [South Carolina] Legislature is as good a source as is this Court in deciding what is 'current' and what is 'outmoded' in the perception of women.

Public interest may also be found in the reasonable expectations of the nearly 2,000 cadets who have enrolled at The Citadel to pursue their college education in a single-gender environment. Their expectations will be frustrated if The Citadel is required to transform itself before the defendants have the opportunity to develop and implement a remedial plan.

Far from militating in favor of immediate admission of Faulkner into the Corps of Cadets, the public interest demands that "a national institution as venerable as" The Citadel be given the opportunity to develop a remedial plan before being forced to transform itself. Virginia Military Institute v. United States, --- U.S. ---, 113 S. Ct. 2431 (1993) (Scalia, J.).

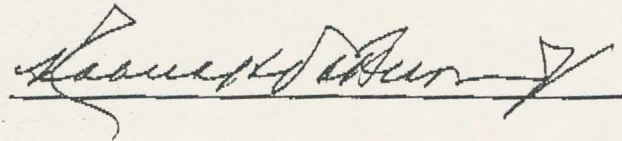
CONCLUSION

For the foregoing reasons, South Carolina and The Citadel defendants respectfully request that the Court stay, pending appeal, the District Court's Orders compelling the immediate admission of plaintiff into The Citadel's Corps of Cadets.

Respectfully submitted,

JAMES E. JONES, ET AL.

By



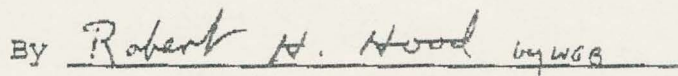
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