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The All Writs Statute and the Injunctive Power of a Single Appellate Judge

In the federal court system the power of the judiciary to issue writs—formal orders requiring responsive action¹—is embodied in a single legislative provision, section 1651 of Title 28 of the United States Code, known as the All Writs Statute:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.²

Because section 1651 is general in its terms and incorporates by ref-

1. Compare *Poirier v. East Coast Realty Co.*, 84 N.H. 461, 152 Atl. 612 (1931), with *Watson v. Keystone Iron Works Co.*, 70 Kan. 43, 74 Pac. 269 (1904).

2. 28 U.S.C. § 1651 (1964). The provisions of § 1651 have been supplemented by statutes specifically granting the power to issue certain writs. For example, an entire chapter of Title 28—§§ 2241-55—is devoted to the writ of habeas corpus. Section 1651, however, confers upon the federal courts the general common-law writ power.

There is some question as to the ultimate source and nature of the § 1651 writ power. It has been suggested, for example, that the power of the Supreme Court to issue some § 1651 writs is greater than that of the courts of appeals, which owe their existence to statute rather than to the Constitution. Compare *McClellan v. Carland*, 217 U.S. 268 (1910), with *In re Philadelphia & Reading Coal & Iron Co.*, 103 F.2d 901 (3d Cir. 1939). See Wolfson, *Extraordinary Writs in the Supreme Court Since Ex Parte Peru*, 51 COLUM. L. REV. 977 (1951). Closely related is the question whether Congress could take away the power of federal appellate courts to keep a case in reviewable posture through § 1651(a). For an affirmative answer, see Note, *Powers of the Supreme Court Justice*, 112 U. PA. L. REV. 981, 1002 (1964). On the other hand, one might analogize this specific writ power to the contempt power, which some have suggested is inherent in the concept of a court. See GOLDFARB, *THE CONTEMPT POWER* 23 (1963). If this analogy is valid, then the very establishment of a court by a legislature would include a grant of the writ power.

erence the whole body of common law regarding writs, determining its proper function has sometimes been difficult. The proper scope of the statute's broader subsection, 1651(a), has been much more clearly delineated than has that of subsection (b), even though the latter, by comparison, appears to be of quite limited application. Indeed, while the role of subsection (a) as an aid to interlocutory review has been thoroughly debated,³ almost no analytical discussions of subsection (b) are to be found.⁴

Although section 1651 was enacted in its present form in 1948, the statutory language of subsection (a) can be traced back to the original Judiciary Act of 1789,⁵ in contrast to the terminology in

3. See, e.g., 6 MOORE, FEDERAL PRACTICE § 54.10 (2d ed. 1953); Wolfson, *supra* note 2. It is clear that the phrase "all writs" in § 1651(a) encompasses the common-law writs of mandamus, prohibition, and certiorari. See *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). Also included are injunctions, see *Scripps Howard Radio v. FCC*, 316 U.S. 4 (1942); subpoenas, see *Bethlehem Ship Building Corp. v. NLRB*, 120 F.2d 126 (1st Cir. 1941); writs of ne exeat, see *Judson v. Judson*, 8 F.R.D. 336 (D.D.C. 1943); and writs of habeas corpus, see *Price v. Hohnston*, 334 U.S. 266 (1948). Although courts of appeals cannot issue original writs of habeas corpus as they have no original jurisdiction, they may issue habeas corpus as an auxiliary writ when necessary in the exercise of their appellate jurisdiction. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1943).

The ways in which two subsection (a) writs, mandamus and prohibition, serve to "aid jurisdiction" by keeping a case in a reviewable posture merit brief discussion. These extraordinary writs traditionally have had a supervisory function. See generally 6 MOORE, *op. cit. supra*, § 54.10; WRIGHT, FEDERAL COURTS 402 (1963). By means of these writs, which are directed to a lower court judge after he has issued or refused to issue an interlocutory order, the federal appellate courts can correct errors without waiting for final disposition of the case and an appeal. Such use of § 1651(a) has been restrained, see *Parr v. United States*, 351 U.S. 513 (1956); recent dicta that the writs cannot be used as mere substitutes for appeal accurately describe the traditional practice. See, e.g., *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953); *Hall v. West*, 335 F.2d 481 (5th Cir. 1964). However, hints of a more positive approach to the use of § 1651(a) for review of interlocutory orders are found as early as the landmark case of *Ex parte Peru*, 318 U.S. 578 (1943), which held that even if an eventual right of appeal exists, § 1651(a) extraordinary writs can nevertheless issue. The Supreme Court declared that the issuance of such writs is not a question of power but rather one of discretion. A broad scope of power is assumed, and when the action below is sufficiently extraordinary, the court may exercise its discretion and issue the writ. The Supreme Court has continued to follow this view. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). *But cf.* *Bankers Life & Cas. Co. v. Holland*, *supra*.

The importance of § 1651 as a means of interlocutory review in this area has been reduced by a 1958 amendment to the Judicial Code, 28 U.S.C. § 1292(b) (1964), which provides for discretionary review by a court of appeals of any interlocutory order if a district court judge certifies that such review is desirable. This statute eliminates the need for writs of mandamus and prohibition except when a district judge has refused certification and the order is appropriately reviewable by either of these extraordinary writs. See *United States v. Woods*, 295 F.2d 772 (5th Cir. 1961); *Holub Industries, Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961); WRIGHT, *op. cit. supra*, at 403-04.

4. For brief discussions of § 1651(b) which examine neither its language nor its history, see ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 438, at 893 n.10 (2d ed. Wolfson & Kurland 1951); 62 HARV. L. REV. 311 (1948).

5. Subsection (a) is based on the Act of March 3, 1911, c. 231, §§ 234, 262, 36 Stat. 1156, 1162, which was derived from REV. STAT. §§ 688, 716 (1875). These sections

subsection (b), the origins of which are obscure.⁶ It is clear, however, that both the alternative writ and the rule nisi are granted on motions *ex parte* and are in the nature of show-cause orders.⁷ These writs were at one time used in place of the modern summons or process and also served as a means of framing the issues to be contested before a court of either original or appellate jurisdiction.⁸ Functionally the two writs are closely related,⁹ and the use of the word "or" in the statute suggests that Congress may have viewed them as interchangeable to some extent. Their operation is simple. Once a rule nisi is obtained, notice is served on the party against whom redress is sought to show cause why the requested relief should not be granted. At the hearing, argument proceeds as upon an ordinary motion except that it is the party showing cause, rather than the party who brought about the issuance of the writ, who is entitled to open and close. If the party who secured the rule nisi prevails, or if the other party defaults, the rule is made final, and the requested

were in turn based on the Judiciary Act of 1789, §§ 13, 14, 1 Stat. 81 (1789). See *Ex parte Peru*, 318 U.S. 578 (1943).

6. The Reviser's Note to § 1651 indicates that subsection (b) is derived from 28 U.S.C. § 376 (1940), which provided that "writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court. . . ." The relationship of subsection (b) to § 376 is unclear. The writ of ne exeat is not an alternative writ in form. It is used "in equity against one who 'designing to avoid the justice and equity of the court, is about to go beyond the sea, so that the duty will be endangered if he goes.'" *In re Lipke*, 98 Fed. 970 (S.D.N.Y. 1900). It is probable that ne exeat would issue as a common-law writ under § 1651(a). See *Judson v. Judson*, 8 F.R.D. 336 (D.D.C. 1943). It is also probable that the Reviser's Note refers to the single-justice language of § 376, which provides the only similarity between the older provision and § 1651(b).

7. The following state decisions contain thorough discussions of the nature and use of alternative writs: *Burkett v. Youngs*, 135 Me. 459, 199 Atl. 618 (1936); *Libby v. York Shore Water Co.*, 125 Me. 144, 131 Atl. 862 (1926); *Hamlin v. Higgins*, 102 Me. 510, 67 Atl. 625 (1907); *State v. Sevier*, 68 S.W.2d 50 (Mo. 1934). Rules nisi are discussed in *Ex parte Shure*, [1926] 1 K.B. 127; *Rex v. Manchester & Leeds R.R.*, 8 A.D. & E. 413, 112 Eng. Rep. 895, 897-98 (K.B. 1838).

8. See *Aspinwall v. County Comm'rs*, 2 Fed. Cas. 67 (No. 593) (7th Cir.), *aff'd*, 65 U.S. (24 How.) 376 (1859). The following state cases discuss the functional aspects of the alternative writ: *Emery v. Superior Court*, 89 Ariz. 246, 360 P. 2d 1025 (1961); *State ex rel. Sharp v. Knight*, 224 Mo. App. 761, 26 S.W.2d 1011 (1930). The English case of *Rex v. Manchester & Leeds R.R.*, *supra* note 7, demonstrates the function of the rule nisi. See generally 3 STEPHENS, COMMENTARIES ON THE LAWS OF ENGLAND 679-80 (1st Am. ed. 1845). SCOTT & SIMPSON, CASES ON CIVIL PROCEDURE 866 (1950) indicates that before the reorganization of the English courts in 1875, a rule nisi could be used to bring trial court proceedings before the full bench of one of the superior courts at Westminster for review.

The procedure respecting alternative writs is illustrative: (1) an *ex parte* petition or application is made to the court or a judge thereof; (2) the writ, which serves both as process and the first pleading, is issued; (3) a return or answer is made by the respondent, to which petitioner may demur, thus framing the issues to be considered by the court before granting or denying relief. See *Hamlin v. Higgins*, *supra* note 7; WILLEY, PROCEDURE IN THE COURTS 113 (1894).

9. See cases cited note 8 *supra*.

remedy is granted.¹⁰ Although the alternative writ, which originated with the ancient writ *praecipe*,¹¹ is used in the United States mainly in connection with the writ of peremptory (final) *mandamus*, the two are to be contrasted.¹² The alternative *mandamus* was once the prevalent initial step taken by one wishing to obtain the peremptory *mandamus*.¹³ It is a direction to the party against whom it is issued either to undertake some act or else to appear and show cause why the act need not be done. If sufficient cause is not shown at the hearing, a peremptory *mandamus* requiring performance will issue.¹⁴

Considering this historical background, it appears that section 1651 contemplates a two-step procedure with regard to alternative writs and rules nisi. The first step, issuance of the show-cause order, can be undertaken by a single judge or justice by virtue of subsection (b), but the second step, consideration of the merits of the movant's claim and issuance of a peremptory writ or absolute rule, is for a properly constituted court within the meaning of subsection (a). This conclusion is bolstered by the fact that it appears that any writ authorized by subsection (a) could be issued after proceedings are commenced by means of either an alternative writ or a rule nisi.¹⁵ Therefore, unless such a two-step procedure were intended an anomalous situation would exist. A party desiring a peremptory writ of *mandamus* to a trial judge, for example, could either obtain it directly from a three-judge panel of a court of appeals under subsection (a) or by indirection from one of the three judges if the petitioner chose to seek first an order under subsection (b) calling upon his adversary to show cause why the writ should not issue.¹⁶

Because of the show-cause nature of section 1651(b) writs, no substantive rights are finally determined merely by the issuance of such a writ. A person against whom one of these writs is directed

10. 3 STEPHENS, *op. cit. supra* note 8, at 680; see *United States v. Kendall*, 26 Fed. Cas. 702 (No. 15517) (D.C. Cir.), *aff'd*, 37 U.S. (12 Pet.) 524 (1837), for a discussion of the issuance of a "mandamus nisi."

11. See 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 273 (Wendell ed. 1854). The writ *praecipe* was one of the first original writs used by the Crown to initiate proceedings in its courts. See generally KIMBALL, INTRODUCTION TO THE LEGAL SYSTEM 68-70 (1961).

12. See, e.g., *Katsh v. Rafferty*, 12 F.2d 450 (E.D.N.Y. 1926); *West Va. No. R.R. v. United States*, 134 Fed. 198 (4th Cir. 1904); *Aspinwall v. County Comm'rs*, 2 Fed. Cas. 67 (No. 593) (7th Cir.), *aff'd*, 65 U.S. (24 How.) 376 (1859).

13. See 3 BLACKSTONE, *op. cit. supra* note 11, at 271. It is clear, however, that the alternative writ is no longer a required preliminary step in obtaining a peremptory *mandamus*, so long as the party against whom a remedy is sought has notice. See *Fairbanks v. Amoskey Nat. Bank*, 30 Fed. 602 (1st Cir. 1887); *Aspinwall v. County Comm'r*, *supra* note 12.

14. See note 8 *supra*.

15. See cases cited notes 7 & 8 *supra*.

16. Cf. text accompanying notes 21 & 22 *infra*.

is not required to alter his behavior until he has failed to show cause.¹⁷ This relative impotence of a show-cause order of the kind issued under section 1651(b) should be contrasted with the effect of a superficially related writ, the temporary restraining order. Although a temporary restraining order can be a first step toward securing a preliminary or permanent injunction and is obtained *ex parte*, it commands the person against whom it is issued *immediately* to do, or to refrain from doing, some act. Conformity to its directive is required even before an adversary hearing on the merits of the petitioner's prayer for relief.¹⁸ Its issuance is actually an exercise of the court's injunctive power.¹⁹ This important distinction between the first phase in the alternative writ or rule nisi process and the temporary restraining order has seemingly been ignored in several recent opinions in which individual judges of circuit courts of appeals have relied upon section 1651(b) as authority for granting temporary restraining orders.²⁰ Although it is clear that such an order will issue under section 1651(a),²¹ that provision grants its powers to the Supreme Court and other *courts*. This language, juxtaposed to that in section 1651(b), would seem to preclude the issuance under the All Writs Statute of a temporary restraining order, or any other writ not essentially the same as those authorized by subsection (b), by an individual judge of a multi-judge court.²²

Apparently the first suggestion that section 1651(b) embraces the injunctive power came in 1958 in *Aaron v. Cooper*.²³ Before

17. See note 8 *supra*. Of course, one has the alternative of obeying the writ without contest, just as one can ignore a civil summons and submit to a default judgment.

18. See FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 53 (1930); WILLEY, *op. cit. supra* note 8, at 120.

19. "Injunctive writs are of three general classes: first, the temporary restraining order or injunction *ad interim*, which in the ordinary course issues *ex parte* without notice or hearing; second, the temporary injunction, or injunction *pendente lite* issuing after notice and opportunity to be heard; third, the permanent injunction, based on a full hearing and enforcing the final decision on the merits. Hearings on motions to continue or dissolve a restraining order or temporary injunction are intervening stages in this process." FRANKFURTER & GREENE, *op. cit. supra* note 18, at 53-54.

20. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.) (Wright, J.), *cert. denied*, 84 Sup. Ct. 1883 (1964); Woods v. Wright, 8 RACE REL. L. REP. 445 (5th Cir. May 22, 1963); Aaron v. Cooper, 261 F.2d 97 (8th Cir.), *aff'd*, 358 U.S. 1 (1958). The terminology in these cases differs because some judges characterize their orders as preliminary or temporary injunctions. However, it is clear that their writs fall within the category of "temporary restraining orders." See note 19 *supra*.

21. See Scripps Howard Radio v. FCC, 316 U.S. 4 (1942); Eastern Greyhound Lines v. Fusco, 310 F.2d 632 (6th Cir. 1962); Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950).

22. Cf. text accompanying notes 15 and 16 *supra*. It would seem that courts and judges are distinguishable entities and that the act of a judge is not necessarily the act of the court on which he sits. See Textile Mills, Securities Corp. v. Commissioner, 314 U.S. 326 (1941); 23 U.S.C. § 46 (1964); cf. note 25 *infra*.

23. 261 F.2d 97 (8th Cir.), *aff'd*, 358 U.S. 1 (1958).

the case came on for hearing by the court of appeals, two judges of that court, acting in concert while the court itself was in adjournment, had enjoined the sale of public schools by an Alabama school board to a private corporation intending to operate them on a racially segregated basis. Apparently, they had ruled under section 1651(b), for dicta in the court's opinion indicated that section 1651(b) would have supported the use of the injunctive power by either of the two acting alone. Several policy considerations which could well be raised *against* the issuance of an injunction by a single appellate court judge were then listed:

[I]t has been the practice of . . . the Eighth Circuit, by agreement among ourselves, to require (except in extreme emergency situations) that any application for a writ receive the consideration of at least two judges. . . . The object of the practice is to prevent any attempt at "shopping" as to such applications; to make the soundness of the action on such applications more certain; and to avoid the public unseemliness of a single circuit judge setting up his judgment against that of another individual (the district judge).²⁴

The policy factors thus presented in *Aaron*, coupled with the difference in effect between show-cause writs and injunctive orders, suggest that the distinction established by the All Writs Statute between an alternative writ or rule nisi and a temporary restraining order relative to whether they can be issued by a single judge of a multiple judge court is one properly maintained; the specific language of section 1651(b) should not be interpreted to include injunctive power for a single appellate court judge.

Perhaps an even more persuasive reason for denying the injunctive power to a single appellate court judge is that the very quality which distinguishes a temporary restraining order from an alternative writ or rule nisi—required conformity to the command of a temporary order *before* a court hearing—creates the possibility that substantive issues can be decided by a single court of appeals judge.²⁵

24. 261 F.2d at 101 n.1. See also note 46 *infra*. While the *Aaron* dicta indicated that any application for a writ should receive the scrutiny of at least two judges, the context suggests that the court did not have orders to show cause in mind when it made the statement. In any event, it would seem that the court's policy is more appropriately addressed to the injunctive power than to the relatively impotent show-cause writ power.

25. Decision of substantive issues by a single circuit court judge would be contrary to the policy embodied in 28 U.S.C. § 46 (1964), which reads in part: "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges . . . (d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum." Without this quorum, a court of appeals may not legally transact business. See *Tobin v. Ramey*, 206 F.2d 505 (5th Cir. 1953).

Even outside the context of the court-single judge problem the law is wary of letting a temporary order preclude appeal. It has been held that a temporary injunction

This possibility materialized in a 1964 case, *Application of President & Directors of Georgetown College, Inc.*,²⁶ which arose when a woman who was bleeding to death from a ruptured ulcer refused blood transfusions on religious grounds. The hospital in which she was a patient, fearing liability if the woman were allowed to die, requested permission from the district court to administer blood. When this petition was denied, oral application for authorization to give blood was made to Judge Wright of the Court of Appeals for the District of Columbia Circuit. In order to preserve the status quo in a case over which his court had probable jurisdiction to review the district court's denial of relief, Judge Wright ordered the hospital to transfuse the patient to the extent "necessary to save her life."²⁷ By the time Judge Wright's ruling was reviewed by the court of appeals en banc, the substantive questions were deemed moot because the patient had recovered and the order was no longer in effect.²⁸ Thus, a single court of appeals judge's directive, equivalent to a temporary restraining order, effectively disposed of such questions as the patient's constitutional rights to the free exercise of her religion and liberty from invasion of her person without due process of law.²⁹

In justifying his individual use of the injunctive power, Judge Wright utilized several alternative arguments. He relied primarily upon section 1651(b) and Rule 62(g) of the Federal Rules of Civil Procedure, noting *Aaron* with approval.³⁰ Rule 62(g) simply provides that

will be denied when its effect would be "to give [the party requesting the injunction] the fruits of victory whether or not the appeal has merit." *Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958). Nevertheless, other opinions indicate that an injunction may issue even though substantive questions are thereby settled or rendered moot before appeal. Compare *Organized Village of Kake v. Egan*, 80 Sup. Ct. 33 (Brennan, Circuit Justice, 1959) (enforcement of an Alaskan statute prohibiting fish traps enjoined pending final determination of its validity by the Supreme Court although fishing season would have expired by time of hearing on merits), with *Griffin v. County School Bd.*, 375 U.S. 391 (1964) (injunction against state aid to segregated private schools granted although most of school year would expire before scheduled hearing on merits). But see *Johnson v. Stevenson*, 335 U.S. 801 (1948) (injunction against the certification of the name of Lyndon B. Johnson as a Democratic party nominee denied because review of Texas primary was impossible before the general election and the injunction would therefore have granted applicant all the relief sought).

26. 331 F.2d 1000 (D.C. Cir.) (Wright J.), *cert. denied*, 84 Sup. Ct. 1883 (1964).

27. Judge Wright issued the order to the hospital and not the patient. In other words, he directed his "injunction" at the party which had requested it, instead of the "offending" party.

28. See *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 84 Sup. Ct. 1883 (1964).

29. See generally 34 GEO. WASH. L. REV. 159 (1965). Significant procedural questions were also presented. No formal complaint had been filed and no notice of appeal was given. It is not certain that a case or controversy was presented in the application to the district court because it was not at all clear that the hospital would be liable in damages for the death of the patient. For a discussion of these and other questions raised by the *Georgetown* case, see 39 N.Y.U.L. REV. 706 (1964).

30. In addition, Judge Wright cited *Woods v. Wright*, 8 RACE REL. L. REP. 445

the other subsections of Rule 62, which regulate a district court's power to issue stays and injunctions pending appeal, do not "limit any power of an appellate court or judge to . . . grant an injunction during the pending of an appeal. . . ." These words make no positive delegation of power;³¹ they merely signify an intention to leave undisturbed any authority that may be granted elsewhere. The burden of justification for Judge Wright's action must therefore rest entirely upon section 1651(b), even though the writs which it authorizes differ significantly from a temporary restraining order.³²

As a second ground to support his exercise of the injunctive power, Judge Wright referred to subsection (a) of the All Writs Statute and suggested that although its grant of power is to "courts," where the issuance of such writs as it authorizes has been customarily undertaken by individual judges of courts of appeals, "courts" should be construed to include an individual appellate court judge.³³

(5th Cir. May 22, 1963), in which Negro parents filed a class suit in a federal district court, asking for a temporary restraining order against the suspension or expulsion of their children from school for participation in civil rights demonstrations. When the district court denied relief, application was made to Chief Judge Tuttle of the Court of Appeals for the Fifth Circuit, who granted an injunction purportedly resting on the authority of § 1651(b) and rule 62(g). Judge Tuttle stated: "These orders of suspension and expulsion, in my opinion, will not be permitted to stand when the case is reached on the merits in the Court of Appeals. It, therefore, becomes my duty to maintain the status quo of these individual students to the end that their education is not illegally interfered with, until the case can be argued and decided in the Court of Appeals." *Id.* at 477.

31. See *Alexander v. United States*, 173 F.2d 865 (9th Cir. 1949).

32. The language of § 1651(b) presents another vexing problem under the facts of *Georgetown*. Subsection (a) provides for the issuance of writs "in aid of jurisdiction" and has been held to be available in cases potentially within a court's appellate jurisdiction, even though no appeal had yet been taken. See, e.g., *McClelland v. Carland*, 217 U.S. 268 (1910); *United States v. District Court*, 238 F.2d 713 (4th Cir.), *cert. denied*, 352 U.S. 981 (1956); *In re Previn*, 204 F.2d 417 (1st Cir. 1953). *But cf.* *United States v. Spadafora*, 207 F.2d 291 (7th Cir. 1953). On the other hand, there is a possibility that the language of subsection (b) would restrict an appellate judge's use of that provision to cases where an appeal has been taken, because subsection (b) allows issuance of an alternative writ or rule nisi only by a member of a court which "has jurisdiction," seemingly a more restrictive concept than that in subsection (a). See *Woods v. Wright*, 8 RACE REL. L. REP. 455 (5th Cir. May 22, 1963), where Chief Judge Tuttle was careful to note that a good appeal from a final order had been taken. He concluded that "it is clear . . . that the Court of Appeals had jurisdiction of this appeal within the contemplation of § 1651(b)." *Id.* at 446. If this reasoning is applied to the facts of *Georgetown*, where no semblance of a formal appeal was in progress and there was even a question whether the jurisdiction of the district court had been properly invoked, Judge Wright would appear to have had no power to issue *any* writ under subsection (b). However, such an implication in Judge Tuttle's statement appears untenable in view of the show-cause nature of subsection (b) writs. A requirement that an actual appeal be perfected before subsection (b) writs could issue would eliminate the very function for which these show-cause writs are designed: the initiation of proceedings for subsection (a) writs, including writs of mandamus and prohibition to correct an error of a trial court in an interlocutory order. See note 3 *supra*; cases cited notes 7 & 8 *supra*.

33. *Cf.* *Bennett v. Bennett*, 3 Fed. Cas. 212 (No. 1318) (D. Ore. 1867), where a statutory construction problem remarkably similar to that confronting Judge Wright

Limited authority for an individual Supreme Court Justice or a judge of a court of appeals to issue injunctions was expressly provided for prior to the 1948 revision of Title 28 of the United States Code,³⁴ but was omitted from the later version, apparently because it was felt that the Rules of Civil Procedure made it unnecessary.³⁵ However, even before 1948 individual court of appeals judges could grant a temporary injunction only in enumerated circumstances, such as the unavailability of a district court judge,³⁶ not present in *Georgetown*, where the district judge had actually denied such an order. Therefore, this second argument, while perhaps more viable than an interpretation of the specific language of subsection (b) as including the injunctive power, is nevertheless questionable.

Judge Wright relegated what was perhaps his best argument for the existence of injunctive power in a single judge to a footnote in which he cited Rule 6 of the District of Columbia Court of Appeals General Rules and Rule 51 of the United States Supreme Court Rules.³⁷ Rule 6 states that "except as otherwise provided in [the General Rules], the practice in [the Court of Appeals] shall so far as practicable be the same as in the Supreme Court of the United States." Thus, Judge Wright was implying that this provision made

in *Georgetown* was presented. This case considered the power of an individual judge to grant habeas corpus under the Judiciary Act of 1789, ch. XIX, § 14, 1 Stat. 81, which read in part that "all of the before mentioned courts of the United States shall have power to issue writs of habeas corpus, and all other writs not specially provided for by statute which may be necessary for exercise of their respective jurisdiction and agreeable to the principles and usages of law." The judge concluded that the power conferred on the "court to issue the writ ad subjucendum [a form of habeas corpus] may be exercised by the judge thereof. This is 'agreeable to the principles and usages of law' regulating the issuing of this writ." *Bennett v. Bennett*, *supra* at 219. It should be noted, however, that the problem presented in *Bennett* concerned the power of a judge of a single-judge court to issue habeas corpus in chambers, and not the power of a single judge of a multi-judge court to act by himself. Indeed, the judge in *Bennett* noted that "where a court is constituted with more than one judge, it might well be from the nature of its organization, that a grant of power to such a court, to issue writs of habeas corpus ad subjucendum, could not be exercised by a single judge thereof." *Ibid.*

34. REV. STAT. § 719 (1875). This statute was incorporated in 28 U.S.C. § 378 (1946), which read as follows: "Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any case pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge."

35. See *In re Equitable Office Bldg.*, 72 Sup. Ct. 1086, 1088 n.4 (Reed, Circuit Justice 1946); ROBERTSON & KIRKHAM, *op. cit. supra* note 4, at 893.

36. See note 34 *supra*.

37. 331 F.2d at 1006 n.14.

available to him the same power exercised by Supreme Court Justices by virtue of Rule 51, which declares that a Justice acting alone can issue an injunction in any situation where the Court could grant one.³⁸ Rule 51 has made it possible for Justices to avoid the questionable practice of relying upon section 1651(b) when faced with a situation similar to that confronting Judge Wright. In *Meredith v. Fair*,³⁹ for example, Mr. Justice Black vacated a Fifth Circuit Court of Appeals judge's stay of a judgment of that court and enjoined respondents from seeking further stays. To justify his individual use of the injunctive power, Mr. Justice Black referred merely to section 1651 and Rule 51.

Judge Wright's argument, however, does not give clear support to the concept of a general injunctive power in a single judge of an appellate court. In the first place, the validity of Rule 51 itself may be suspect. The enabling act which grants the Court the power to formulate its own rules provides that all such rules "shall be consistent with Acts of Congress. . . ."⁴⁰ The language of section 1651 indicates that subsection (a) writs are to be issued by the Supreme Court.⁴¹ Rule 51 would seem inconsistent with this language insofar as it purports to authorize a single Justice to exercise injunctive power. So, too, the Supreme Court rules are only to regulate its procedure and must neither enlarge nor restrict its jurisdiction, nor abrogate or modify substantive law.⁴² If granting injunctive power constitutes either a jurisdictional or a substantive change, then Rule 51 is questionable.⁴³ Second, even if Rule 51 were deemed

38. U.S. SUP. CR. R. 51. It is interesting to note that this provision was added to the Supreme Court Rules in 1954, suggesting perhaps that the Supreme Court questioned the existence of any injunctive power in a single Justice under then existing law.

39. 371 U.S. 29 (1962). Although Mr. Justice Black felt that he clearly had this power, he was careful to consult with his fellow Justices before issuing the injunction. *Ibid.*

The staying of a judgment should not be confused with the exercise of the writ power under § 1651. Stays merely postpone the enforcement of a duly rendered judgment, usually pending appeal. See FED. R. CIV. P. 62. In cases where a final judgment is subject to review by the Supreme Court on writ of certiorari, 28 U.S.C. § 2101(f) (1964) expressly provides that "a stay may be granted by a judge of the court rendering the judgment or by a justice of the Supreme Court"

40. 28 U.S.C. § 2071 (1964).

41. See text accompanying notes 21 and 22 *supra*.

42. See *Washington So. Nav. Co. v. Baltimore & Phila. Steamboat Co.*, 263 U.S. 629 (1924); *Standish v. Gold Creek Mining Co.*, 92 F.2d 662 (9th Cir.), *cert denied*, 302 U.S. 765 (1937).

43. The Supreme Court has considered the validity of its exercise of the power to prescribe the Federal Rules of Civil Procedure, now granted by 28 U.S.C. § 2072 (1964). In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1945), the Court stated: "The fact that this Court promulgated the rules as formulated and recommended by the committee does not foreclose consideration of their validity, meaning or consistency." *But cf.* *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the Court upheld, by a five-to-four vote, the validity of rule 35, which provides for mental and physical examinations of litigants.

valid, it is not clear that the term "practice" in Rule 6 of the District of Columbia Court of Appeals Rules is broad enough to incorporate a provision like Supreme Court Rule 51.⁴⁴ Moreover, not all courts of appeals rules contain counterparts of Rule 6.⁴⁵ The circuitous derivation of authority utilized by Judge Wright is not available in the Eighth Circuit, for example, where *Aaron* was decided.

There may be cases in which an individual judge of a court of

In so doing, the Court relied heavily upon the fact that the Supreme Court must submit proposed Rules of Civil Procedure to Congress, where they may be vetoed if contrary to congressional policy. If Congress takes no adverse action during a specified period after submission, the proposed rules become final by virtue of § 2072, superseding prior conflicting law. See generally *Hanna v. Plumer*, *supra*. Section 2071 of Title 28, under which the Supreme Court makes its own rules, has no comparable provision for congressional scrutiny and the rules promulgated pursuant thereto do not supersede prior conflicting law, but must be consistent with acts of Congress. See generally 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* 6-7 (2d ed. Wright 1960).

In discussing the power of the Supreme Court to prescribe the Federal Rules of Civil Procedure, Professor Sunderland has suggested that "all remedies which constituted interference with personal liberty or control over property" should be deemed substantive on grounds of public policy and therefore not within the purview of the Rules. Sunderland, *Character and Extent of Rule Making Power Granted Supreme Court*, 21 A.B.A.J. 404, 406 (1935). While *Sibbach v. Wilson & Co.*, *supra*, indicates that this policy distinction is a dead letter with regard to the Federal Rules of Civil Procedure, it may nevertheless remain sound in regard to Supreme Court Rules because of the lack of a requirement of congressional scrutiny. Professor Moore cites the Supreme Court's failure to promulgate Rule 77 of the Advisory Committee's April 1937 draft of the Federal Rules of Civil Procedure as "an excellent illustration of the great caution normally exercised by the Supreme Court in observing the statutory and self-imposed limitations on its power to make rules . . ." 2 MOORE, *FEDERAL PRACTICE* § 1.04(2) (2d ed. 1964). Rule 77 would have allowed registration of judgments rendered by one district court in any other district. The fact that the Court did not promulgate this desirable rule, which was subsequently embodied in an amendment to the Judicial Code, 28 U.S.C. § 1963 (1964), indicates, Moore suggests, that the Court believed that the matter was of a substantive or jurisdictional nature, and therefore beyond the scope of the Rules. *Ibid.*

This treatment of the court rules and the Federal Rules of Civil Procedure can be compared with the treatment of the injunctive power under the equitable remedial rights doctrine in diversity cases after *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In *Black v. Mahogeny Ass'n*, 129 F.2d 227 (3d Cir. 1942), the Court of Appeals for the Third Circuit held that the injunctive power was remedial rather than substantive and that, therefore, the fact that state law made no provision for injunctions in trade libel cases did not prevent federal courts from granting such relief. This holding is questioned by Professor Moore, who maintains that "if a federal court properly proceeds to adjudication it must in a diversity case grant or decline to give an injunction . . . strictly in accordance with applicable state law. The *Erie* case demands this . . ." 2 MOORE, *op. cit. supra*, § 2.09. Moreover, the doctrine has been rejected by other courts on the ground that the granting of equitable remedies involves more than a question of procedural law, the area in which, after *Erie*, federal courts have been able to apply their own rules in diversity cases. See, e.g., *McAndress v. Belknap*, 141 F.2d 111 (6th Cir. 1944); *Meyer v. City of Eufaula*, 132 F.2d 648 (10th Cir. 1942). See generally 2 MOORE, *op. cit. supra*, § 2.09; 55 YALE L.J. 401 (1946).

44. See 2 MOORE, *op. cit. supra* note 43, § 1.04.

45. The following circuits have rules comparable to Rule 6 of the District of Columbia Circuit: the First Circuit (Rule 9); the Fourth Circuit (Rule 7); the Ninth Circuit (Rule 8(2)); and the Tenth Circuit (Rule 8). The proposed Uniform Appellate Rules, however, contain no provision similar to Rule 6.

appeals should have the power to issue a temporary restraining order; however, if the policy considerations presented in *Aaron* are valid, an unrestricted grant of the injunctive power to a single appellate judge would be unwise.⁴⁶ The language of section 1651(b) provides no limitations on the exercise of its powers; there is no requirement that irreparable harm be imminent unless some action is taken, that a judge of a multi-judge court consult with other members of the court where possible, or that no writ be issued thereunder when that action could lead to substantive issues being decided prior to an adversary hearing. No such limitations are needed for a show-cause writ, which serves merely to initiate proceedings. Perhaps it is this show-cause nature of rules nisi and alternative writs which prompted language expressly granting to a single judge the power to issue them under section 1651(b) while apparently limiting the authority to issue subsection (a) writs, including temporary restraining orders, to a court. Furthermore, an interpretation of subsection (b) as encompassing the injunctive power would seem to open a Pandora's Box. If the phrase "alternative writ or rule nisi" includes the temporary restraining order, why should it not also encompass other section 1651(a) writs⁴⁷ such as those of peremptory mandamus and prohibition? Once section 1651(b) is expanded to embrace more than show-cause writs, its language no longer affords any logical basis for drawing a line excluding any writs from the scope of the provision.

It appears that the Judicial Code, perhaps inadvertently, makes no provision for the issuance of injunctions by a single appellate court judge. Arguably, such a power is essential to effective judicial administration. In emergencies, when a multi-judge court cannot be formally convened, a single judge should have the power to preserve the status quo, so long as the substantive issues are left intact for review by the court. An amendment to the Judicial Code, couched in the language of Supreme Court Rule 51, but with express limitations such as those mentioned above,⁴⁸ would clarify this confused area and would render unnecessary the current judicial efforts to expand section 1651(b) beyond its proper scope.

46. See Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). Referring to federal injunctions against the enforcement of state statutes, Professor Currie argued in favor of a three-judge district court to hear cases involving a question of constitutionality of state legislation, noting that "injunctions—especially federal ones—have been a long-standing source of special discomfort and the frequent subject of special legislation. An injunction paralyzes action until final decision of the case, perhaps after two appeals. Reversal of an erroneous injunction is often little solace to the victim; in the interval, irreparable damage may have been done. . . . While it is possible that two judges out of a panel of three may be mistaken or even prejudiced, it is more possible that a single judge may be; and if the mistake is an honest one, even one clear-eyed judge among the three may be able to forestall a bad decision." *Id.* at 6-8.

47. See generally note 3 *supra*.

48. See text following note 46 *supra*.