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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1963

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
WALTER WYATT, Reporter of Decisions.*
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

*Note is on p. iv.

NOTE.

*Mr. Wyatt retired as Reporter of Decisions as of December 31, 1963. Preliminary publication of material in this volume was supervised by Mr. Wyatt through December 16, 1963, and after that date by Mr. Philip U. Gayaut, Assistant Reporter. Final publication was supervised by Mr. Henry Putzel, jr., who was appointed to succeed Mr. Wyatt as Reporter of Decisions on February 17, 1964.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Earl Warren, Chief Justice.

For the First Circuit, Arthur J. Goldberg, Associate Justice.

For the Second Circuit, John M. Harlan, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Earl Warren, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Tom C. Clark, Associate Justice.

For the Eighth Circuit, Byron R. White, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. iv.)

RETIREMENT OF REPORTER OF DECISIONS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JANUARY 6, 1964.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce that Mr. Walter Wyatt, who had reached the statutory age, retired from the service of the Supreme Court as of December 31, 1963.

"Mr. Wyatt, the twelfth Reporter of Decisions in the history of the Court, has served the Court well in that capacity for the past 18 years. He has been diligent and faithful in the work of preparing the Court's decisions for final publication, and has supervised the publishing of 49 volumes of the U. S. Reports. His efforts have helped to perpetuate a part of the Court's history, and he is entitled to great satisfaction in this accomplishment.

"We wish for him many years of happiness in the leisure he has earned and continued success in anything he may undertake in the future.

"His successor will be announced in the near future."

TABLE OF CASES REPORTED

NOTE: Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 801 *et seq.* are those in which orders were entered.

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TABLE OF CASES CITED

TABLE OF STATUTES CITED

(A) Statutes of the United States.

(B) Constitutions and Statutes of the States.

(C) Foreign Statute.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1963.

DAEGELE *v.* KANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 72, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 190 Kan. 613, 376 P. 2d 807.

Petitioner *pro se.*

William M. Ferguson, Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Kansas for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

For reasons expressed in his dissenting opinion in No. 16, Misc., *Pickelsimer* v. *Wainwright, post,* p. 3, and related cases, MR. JUSTICE HARLAN would set this case for argument of the question whether *Douglas* v. *California,* 372 U. S. 353, should be applied retroactively.

PICKELSIMER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 16, Misc. Decided October 14, 1963.*

Certiorari granted; judgments vacated; and cases remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

Petitioners *pro se.*

Richard W. Ervin, Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent in No. 16, Misc., No. 60, Misc., and No. 70, Misc. *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent in No. 36, Misc., No. 54, Misc., and No. 87, Misc. *Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent in No. 55, Misc., No. 62, Misc., No. 71, Misc., and No. 86, Misc.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The

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*Together with No. 36, Misc., *Mihelcich* v. *Wainwright, Corrections Director;* No. 54, Misc., *Cowan* v. *Wainwright, Corrections Director;* No. 55, Misc., *Dumond* v. *Wainwright, Corrections Director;* No. 60, Misc., *Sharp* v. *Wainwright, Corrections Director;* No. 62, Misc., *Baker* v. *Wainwright, Corrections Director;* No. 70, Misc., *Heard* v. *Wainwright, Corrections Director;* No. 71, Misc., *Campbell* v. *Wainwright, Corrections Director;* No. 86, Misc., *Mitchell* v. *Wainwright, Corrections Director;* and No. 87, Misc., *Kitchens* v. *Wainwright, Corrections Director,* all on petitions for writs of certiorari to the Supreme Court of Florida.

judgments are vacated and the cases are remanded to the Supreme Court of Florida for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MR. JUSTICE HARLAN, dissenting.

I am unable to agree with the Court's summary disposition of these 10 Florida cases, and believe that the federal question which they present in common is deserving of full-dress consideration. That question is whether the denial of an indigent defendant's right to court-appointed counsel in a state criminal trial as established last Term in *Gideon* v. *Wainwright,* 372 U. S. 335, overruling *Betts* v. *Brady,* 316 U. S. 455, invalidates his pre-*Gideon* conviction.

When this Court is constrained to change well-established constitutional rules governing state criminal proceedings, as has been done here and in other recent cases, see, *e. g., Mapp* v. *Ohio,* 367 U. S. 643; *Ker* v. *California,* 374 U. S. 23; *Douglas* v. *California,* 372 U. S. 353, it seems to me that the question whether the States are constitutionally required to apply the new rule retrospectively, which may well require the reopening of cases long since finally adjudicated in accordance with then applicable decisions of this Court, is one that should be decided only after informed and deliberate consideration. Surely no general answer is to be found in "the fiction that the law now announced has always been the law." *Griffin* v. *Illinois,* 351 U. S. 12, 26 (Frankfurter, J., concurring). Nor do I believe that the circumstance that *Gideon* was decided in the context of a state collateral proceeding rather than upon direct review, as were the new constitutional doctrines enunciated in *Mapp* and *Ker,* forecloses consideration of the retroactivity issue in this instance.[1]

[1] The Court's opinion in *Gideon* contains no discussion of this issue. Similarly, in cases decided last Term in which we summarily vacated

In the current swift pace of constitutional change, the time has come for the Court to deal definitively with this important and far-reaching subject.[2] Without intimating any view as to how the question should be decided in these cases, I would set one or more of them for argument.[3]

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the judgment and remanded for further consideration in light of *Gideon, e. g., Bryant* v. *Wainwright,* 374 U. S. 492, the question of retroactivity was not treated in the dispositions.

[2] Such cases as *Eskridge* v. *Washington State Prison Board,* 357 U. S. 214, and *Norvell* v. *Illinois,* 373 U. S. 420, hardly constitute precedents for a rule of general application.

[3] In all but two of these cases, the State suggests that the judgments can be supported on an adequate independent state ground, even though the Florida Supreme Court denied relief without hearing or explanatory opinion, and despite the apparent concession in Nos. 36 and 87 that the state court did face the federal question and rule adversely to the petitioners. It is abundantly clear that each of the state grounds suggested is either plainly unavailing or so tenuous that it would be disrespectful of the Florida Supreme Court to regard it as the basis of that court's judgment. Cf. *Klinger* v. *Missouri,* 13 Wall. 257; *Adams* v. *Russell,* 229 U. S. 353, 358–359; *Williams* v. *Kaiser,* 323 U. S. 471, 478–479. Accordingly, I am satisfied that the federal question is properly before this Court in all of the cases.

LEMMON ET AL. *v.* ROBERTSON ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 47. Decided October 14, 1963.

Appeal dismissed and certiorari denied.
Reported below: 189 Kan. 619, 371 P. 2d 175.

Jay W. Scovel for appellants.

Appellees *pro se.*

PER CURIAM.

The motion of appellees, Lewis Woodard and May Woodard, for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

AVERITT ET AL. *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 162. Decided October 14, 1963.

Appeal dismissed and certiorari denied.
Reported below: 246 Miss. 49, 149 So. 2d 320.

Forrest B. Jackson for appellants.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

HENRY ET AL. *v.* CITY OF ROCK HILL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 97. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 241 S. C. 427, 128 S. E. 2d 775.

Jack Greenberg, Constance Baker Motley, Matthew J. Perry, Lincoln C. Jenkins, Jr., Donald James Sampson and *Willie T. Smith, Jr.* for petitioners.

Daniel R. McLeod, Attorney General of South Carolina, and *Everett N. Brandon,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of *Edwards* v. *South Carolina,* 372 U. S. 229.

RAPOPORT *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 212. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 174 Ohio St. 134, 186 N. E. 2d 840.

Bernard R. Hollander for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

RYAN *v.* PRESIDENT OF THE SENATE, U. S. CONGRESS.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 127. Decided October 14, 1963.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Solicitor General Cox, Assistant Attorney General Douglas and *Sherman L. Cohn* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WILLIAMS *v.* CITY OF WICHITA.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 132. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 190 Kan. 317, 374 P. 2d 578.

Kenneth G. Speir, Herbert H. Sizemore and *Eugene Gressman* for appellant.

William M. Ferguson, Attorney General of Kansas, and *Charles S. Rhyne* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

TRUNKLINE GAS CO. *v.* HARDIN COUNTY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 153. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 311 F. 2d 882.

Cecil N. Cook for petitioner.

William Robert Smith for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit, it appearing that the State of Texas has passed a statute in connection with controversies of this kind since the petition for a writ of certiorari was filed in this Court. This order is entered without reaching the merits.

KAUKAS ET UX. *v.* CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 259. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 27 Ill. 2d 197, 188 N. E. 2d 700.

Harry G. Fins and *Favil David Berns* for appellants.

John C. Melaniphy and *Sydney R. Drebin* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SAYLES FINISHING PLANTS, INC., *v.* TOOMEY, TAX ASSESSOR.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND.

No. 188. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: See —— R. I. ——, 188 A. 2d 91.

Frederick Bernays Wiener and *Gerald W. Harrington* for appellant.

Charles S. Rhyne and *Alfred J. Tighe, Jr.* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BREWER ET AL. *v.* NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 291. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 258 N. C. 533, 129 S. E. 2d 262.

Malcolm B. Seawell and *William T. Hatch* for appellants.

Thomas Wade Bruton, Attorney General of North Carolina, and *Harry W. McGalliard,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

FRIEDMAN, JUSTICE, *v.* COURT ON THE JUDICIARY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK.

No. 285. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.

Theodore Kiendl and *Raphael H. Weissman* for appellant.

John R. Davison and *William R. Brennan* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

LOUISIANA EX REL. SCHWEGMANN BANK & TRUST CO. ET AL. *v.* JEANSONNE, STATE BANK COMMISSIONER.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

No. 311. Decided October 14, 1963.

Appeal dismissed and certiorari denied.

Reported below: 144 So. 2d 159.

Charles A. O'Niell, Jr. for appellants.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MILLER ET AL. *v.* CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 260. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 27 Ill. 2d 211, 188 N. E. 2d 694.

Harry G. Fins and *Favil David Berns* for appellants.

John C. Melaniphy and *Sydney R. Drebin* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BUTLER *v.* DUNBAR, CORRECTIONS DIRECTOR.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 244. Decided October 14, 1963.

Appeal dismissed and certiorari denied.
Reported below: 59 Cal. 2d 157, 378 P. 2d 812.

J. Perry Langford for appellant.

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

ROADWAY EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

No. 177. Decided October 14, 1963.

213 F. Supp. 868, affirmed.

Howell Ellis, Homer S. Carpenter and *John C. Bradley* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Colin A. Smith and *Robert W. Ginnane* for the United States et al.

Nuel D. Belnap, Harry C. Ames, Jr. and *Leonard A. Jaskiewicz* for motor carrier appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

MATSON *v.* QUEEN'S HOSPITAL.

APPEAL FROM THE SUPREME COURT OF HAWAII.

No. 353, Misc. Decided October 14, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

HIGBEE *v.* THOMAS, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 6, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

John B. Breckinridge, Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that the petition for a writ of certiorari should be denied.

GRAY *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 383, Misc. Decided October 14, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

IN RE JENISON.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 238. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 265 Minn. 96, 120 N. W. 2d 515.

John S. Connolly for petitioner.

Walter F. Mondale, Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for the State of Minnesota.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further consideration in light of *Sherbert* v. *Verner,* 374 U. S. 398.

JOHNSON *v.* WILKINS, WARDEN.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 141, Misc. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 12 N. Y. 2d 843, 187 N. E. 2d 473.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

STATE CORPORATION COMMISSION OF KANSAS *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

No. 217. Decided October 14, 1963.

216 F. Supp. 376, affirmed.

Byron M. Gray and *Robert Londerholm* for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane and *Stanton P. Sender* for the United States et al.

Harvey Huston and *Roth A. Gatewood* for railroad appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

SALAS *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 118, Misc. Decided October 14, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 365 S. W. 2d 174.

Joseph A. Calamia for appellant.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

REATZ *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 50, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

William I. Siegel for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for further consideration in light of *Griffin* v. *Illinois,* 351 U. S. 12, *Eskridge* v. *Washington Prison Board,* 357 U. S. 214, and *Norvell* v. *Illinois,* 373 U. S. 420.

CEPERO *v.* PELOSO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 116, Misc. Decided October 14, 1963.

Appeal dismissed for want of jurisdiction.

Appellant *pro se.*

Solicitor General Cox for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

KING ET AL. *v.* KING ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 153, Misc. Decided October 14, 1963.

Appeal dismissed and certiorari denied.
Reported below: 218 Ga. 534, 129 S. E. 2d 147.

Appellants *pro se.*

William K. Meadow and *Robert B. Troutman* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

RYAN *v.* TINSLEY, WARDEN.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 403, Misc. Decided October 14, 1963.

Appeal dismissed and certiorari denied.
Reported below: 316 F. 2d 430.

Appellant *pro se.*

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* CHICAGO & ILLINOIS MIDLAND RAILWAY CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 225. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded for dismissal because of mootness.

Reported below: 315 F. 2d 771.

Robert A. Stuart for petitioners.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of Illinois for dismissal because of mootness.

WABANINGO BOY SCOUT CAMP *v.* MICHIGAN TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 231. Decided October 14, 1963.*

Appeals dismissed for want of a substantial federal question.

Reported below: No. 231, 369 Mich. 165, 119 N. W. 2d 648; No. 232, 369 Mich. 1, 118 N. W. 2d 818.

Amos M. Mathews and *Alban Weber* for appellant in each case.

Frank J. Kelley, Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistant Attorneys General, for appellee in both cases.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of a substantial federal question.

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*Together with No. 232, *Evanston Y. M. C. A. Camp* v. *Michigan Tax Commission,* also on appeal from the same Court.

SCARNATO *v.* LAVALLEE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 8, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Fay* v. *Noia,* 372 U. S. 391.

MR. JUSTICE STEWART is of the opinion that the petition for a writ of certiorari should be denied.

NEWSOME *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 11, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Thomas Wade Bruton, Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MR. JUSTICE HARLAN, for the reasons stated in his dissenting opinion in *Pickelsimer* v. *Wainwright, ante,* p. 3, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

SHOCKEY *v.* ILLINOIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 20, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 25 Ill. 2d 528, 185 N. E. 2d 893.

John R. Snively for petitioner.

William G. Clark, Attorney General of Illinois, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, for the reasons stated in *Daegele* v. *Kansas, ante,* p. 1, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

COOPER *v.* ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 32, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 274 Ala. 471, 149 So. 2d 834.

Petitioner *pro se.*

Richmond M. Flowers, Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Alabama for further consideration in light of *Lane* v. *Brown,* 372 U. S. 477.

AUSBIE *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 52, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, and *William E. James,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, for the reasons stated in *Daegele* v. *Kansas, ante,* p. 1, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

NICHOLSON *v.* BOLES, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 68, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se*.

C. Donald Robertson, Attorney General of West Virginia, and *George H. Mitchell* and *J. Patrick Bower,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. In light of the confession of error by the Attorney General and upon an examination of the record, the judgment is vacated and the case is remanded to the Supreme Court of Appeals of West Virginia for further consideration.

MR. JUSTICE STEWART is of the opinion the petition for a writ of certiorari should be denied.

720-508 O-64-8

HERRERA *v.* HEINZE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 82, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, for the reasons stated in *Daegele* v. *Kansas, ante,* p. 1, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

TABB *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 83, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, and *William E. James,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE HARLAN, for the reasons stated in *Daegele* v. *Kansas, ante,* p. 1, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

BARNES *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 385, Misc. Decided October 14, 1963.

Certiorari granted; judgment vacated; and case remanded.

Samuel S. Mitchell for petitioner.

Thomas Wade Bruton, Attorney General of North Carolina, and *James F. Bullock,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MR. JUSTICE HARLAN, for the reasons stated in his dissenting opinion in *Pickelsimer* v. *Wainwright, ante,* p. 3, would have withheld disposition of this petition for certiorari until the disposition, after argument, of that case.

PANICO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 45. Decided October 21, 1963.

In the circumstances of this case, in which petitioner was convicted in a summary proceeding of criminal contempt and shortly thereafter was committed to a state mental hospital, the fair administration of criminal justice requires a plenary hearing under Federal Rule of Criminal Procedure 42 (b) to determine the question of his criminal responsibility for his conduct. Pp. 29–31.

308 F. 2d 125, certiorari granted; judgment vacated; and case remanded.

Jerome Lewis for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

PER CURIAM.

The petition for a writ of certiorari is granted.

The petitioner was one of numerous defendants in a lengthy criminal trial in the United States District Court for the Southern District of New York. He was found guilty, but his conviction was reversed on appeal. 319 F. 2d 916. For his conduct during the trial the petitioner was found guilty of criminal contempt in a summary proceeding conducted by the trial judge under Rule 42 (a) of the Federal Rules of Criminal Procedure after the trial had ended.[1] This contempt conviction was affirmed on appeal, one judge dissenting. 308 F. 2d 125.

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[1] "Rule 42. Criminal Contempt.

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

If the petitioner was legally responsible for his conduct during the trial, there can be no doubt that his conduct was contumacious. It is contended, however, that at the time of the conduct in question the petitioner was suffering from a mental illness which made him incapable of forming the criminal intent requisite for a finding of guilt. No separate hearing was had upon this issue in the contempt proceeding, although during the course of the previous criminal trial, the judge had heard conflicting expert testimony upon the different question of the petitioner's mental capacity to stand trial. Shortly after the contempt conviction, the petitioner was found by state-appointed psychiatrists to be suffering from schizophrenia and committed to a state mental hospital. Cf. *Bush* v. *Texas,* 372 U. S. 586.

In the light of these circumstances, we hold that the fair administration of federal criminal justice requires a plenary hearing under Rule 42 (b) of the Federal Rules of Criminal Procedure to determine the question of the petitioner's criminal responsibility for his conduct.[2] Ac-

[2] "Rule 42. Criminal Contempt.

. . . . . .

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

cordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN would affirm the judgment below substantially for the reasons given by Judge Smith in his opinion for the Court of Appeals. *United States* v. *Panico,* 308 F. 2d 125.

EVOLA *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 194. Decided October 21, 1963.*

Certiorari granted; judgments vacated; and cases remanded.
Reported below: 315 F. 2d 186.

Maurice Edelbaum for petitioner in No. 194. *Herbert S. Siegal* for petitioner in No. 195. *Edward Bennett Williams* and *Wilfred L. Davis* for petitioner in No. 196. *Wilfred L. Davis* for petitioner in No. 197. *Allen S. Stim* for petitioners in No. 149, Misc. *Robert S. Carlson* for petitioner in No. 224, Misc. Petitioners *pro se* in Misc. Nos. 79, 80 and 115.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Richard W. Schmude* for the United States.

PER CURIAM.

The petitions for writs of certiorari in Nos. 194, 195, 196 and 197, and the motions for leave to proceed *in forma pauperis,* as well as the petitions for certiorari in No. 79, Misc., No. 80, Misc., No. 115, Misc., No. 149, Misc., and No. 224, Misc., are granted.

The judgment of the Court of Appeals for the Second Circuit is vacated and the cases are remanded to that

*Together with No. 195, *Santora* v. *United States;* No. 196, *Genovese* v. *United States;* No. 197, *Gigante* v. *United States;* No. 79, Misc., *DiPalermo* v. *United States;* No. 80, Misc., *DiPalermo* v. *United States;* No. 115, Misc., *Mazzie* v. *United States;* No. 149, Misc., *Polizzano et al.* v. *United States,* and No. 224, Misc., *Barcellona* v. *United States,* also on petitions for writs of certiorari to the same Court.

court for reconsideration in light of *Campbell* v. *United States,* 373 U. S. 487, and for such further consideration as may be appropriate.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, concurring in part and dissenting in part.

I realize, of course, that in remanding these cases the Court neither decides that *Campbell* governs nor implies how the Court of Appeals should decide them. Nevertheless, I would grant the petitions for certiorari and set these cases for argument, since it is my feeling that it is futile to remand "for reconsideration in light of *Campbell* v. *United States,* 373 U. S. 487."

Although these cases were decided prior to *Campbell,* the Court of Appeals' disposition has support in the record and is worthy of argument.* All the evidence before the District Court was documentary and the Court of Appeals was therefore correct in making factual determinations on the basis of such evidence.

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*I deem plenary consideration here preferable to this remand because the delineation of the limits of the Jencks Act has been peculiarly the province of this Court. The remand will merely delay a final decision which could be made on the record now before the Court and the identical record will no doubt return here no matter what determination is made by the Court of Appeals.

While the Government accepts the District Court's finding that the Shaw notes should have been produced under 18 U. S. C. § 3500, this does not relieve the courts of the obligation to examine independently the error confessed. *Gibson* v. *United States,* 329 U. S. 338, and *Young* v. *United States,* 315 U. S. 257.

TIPTON *v.* SOCONY MOBIL OIL CO., INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 200. Decided October 21, 1963.

In this action by petitioner against respondent, his employer, under the Jones Act to recover damages for personal injuries, the principal issue was whether, in view of the nature of the work performed at the time of injury, petitioner was a seaman or member of the crew of a vessel, within the coverage of the Jones Act, or an offshore drilling employee. At the trial before a jury, the District Court, over petitioner's objection, admitted evidence that petitioner had accepted compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, as applied through the Outer Continental Shelf Lands Act, which is explicitly inapplicable to a "member of a crew of any vessel." In response to an interrogatory, the jury found that petitioner was not a seaman or a member of a crew of a vessel, within the meaning of the Jones Act; and judgment was entered upon the verdict for respondent. *Held:* The District Court's error in admitting evidence of other compensation benefits cannot, on the record in this case, be deemed harmless. Pp. 34–37.

315 F. 2d 660, certiorari granted; judgment vacated; and case remanded.

Clyde W. Woody for petitioner.

George B. Matthews for respondent.

PER CURIAM.

Petitioner brought this action in the District Court for the Southern District of Texas against his employer under the Jones Act. 46 U. S. C. § 688. The principal issue was whether, in view of the nature of the work performed at the time of injury, the petitioner was a seaman, hence within the coverage of the Jones Act, or an offshore drilling employee. At the trial before a jury, the District Court admitted evidence, over the objection of petitioner's counsel, that petitioner had accepted compensation bene-

fits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, as applied through the Outer Continental Shelf Lands Act, 43 U. S. C. § 1331 *et seq.* The latter Act, although extending longshoremen's compensation to a new group, is explicitly inapplicable to a "member of a crew of any vessel." 43 U. S. C. § 1333 (c)(1). In response to a special interrogatory the jury found that the petitioner was not a seaman or member of a crew of a vessel within the meaning of the Jones Act. Judgment was then entered upon the verdict for the respondent. The Court of Appeals for the Fifth Circuit unanimously held it error to have admitted the evidence of other compensation benefits but, with one judge dissenting, found the error harmless.[1] We grant the petition for a writ of certiorari and vacate the judgment.

We do not agree that on the record in this case the error may be regarded as harmless.[2] There can be no doubt that the evidence of other benefits was pressed upon the jury. Throughout the trial respondent's counsel emphasized that the petitioner "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act . . . ." The only argued relevance of this evidence was that it indicated what the petitioner had thought to be his legal status. The judge did not, however, frame a cautionary instruction or otherwise charge the jury that the evidence of other compensation might be considered only insofar as it revealed what the petitioner and others thought his status to be—whether seaman or drilling

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[1] 315 F. 2d 660, 662 (Brown, J., dissenting).

[2] The majority of the Court of Appeals explained its conclusion as follows:

"[I]n view of the fact that the jury, having decided the question of status adversely to appellant, never reached the issue of damages, we believe that the error did not prejudice appellant and was harmless." 315 F. 2d 660, at 662.

employee—and was not dispositive of the ultimate fact of whether he was a seaman. To the contrary, the judge's charge, containing an elaborate discussion of the Longshoremen's and Harbor Workers' Compensation Act and a restatement of the disputed evidence, only heightened the likelihood of prejudice.

A subsequent exchange between judge and jury did not, in our opinion, negate the cumulative impact of the evidence and the instructions. The jury, while deliberating, sent the following note to the judge:

> "If we find Mr. Tipton is not a seaman or a member of the crew of drilling barge No. 1, does he have recourse for compensation under the Outer Continental Shelf or other act?"

The judge immediately replied:

> "This is not a matter for the jury's consideration. You should consider only the questions submitted and the evidence thereon."

The petitioner contends, correctly we think, that this reply was insufficient to overcome the impact of the evidence of other compensation as submitted to the jury.[3] Although the judge's reply excluded from the jury's consideration the availability of alternative benefits in a future action, it did not preclude or restrict consideration of the evidence presented concerning prior receipt of compensation payments. The direction to consider "the questions submitted" was not illuminating and the further reference to "the evidence thereon" necessarily encompassed the admitted evidence of payments received and retained by petitioner.

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[3] Not until after the verdict and after the discharge of the jury did counsel learn of the jury's inquiry and the judge's reply. Petitioner's counsel, when informed, immediately took exception to the procedure and the reply. However, for present purposes we need not question the permissibility of the procedures involved.

We disagree with the suggestion of the Court of Appeals that the prejudicial effect of the evidence of other compensation would be restricted to the issue of damages and would not affect the determination of liability.[4] That suggestion ignores that the evidence was presumably considered without qualification as bearing on a basic fact essential to liability. Indeed, the jury's inquiry to the judge seems to indicate that, under the case as submitted, the jury was led to place undue emphasis on the availability of compensation benefits in determining the ultimate question of whether the petitioner was a seaman within the Jones Act. On such a record the disputed evidence cannot properly be deemed harmless. 28 U. S. C. § 2111; Fed. Rules Civ. Proc., 61. Cf. *Kotteakos* v. *United States,* 328 U. S. 750.

The judgment of the Court of Appeals for the Fifth Circuit is vacated and the case remanded to the District Court for the Southern District of Texas for proceedings in accordance with this opinion. *It is so ordered.*

MR. JUSTICE HARLAN, dissenting.

I am of the opinion that the petition for certiorari should have been denied in this case, which raises only a question of the admissibility of certain evidence and a ruling of the Court of Appeals that the admission of the evidence, which it thought erroneous, was harmless. See my opinion in *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U. S. 521, 559, and the dissenting opinion of Mr. Justice Frankfurter in the same case, *id.,* at 524.

Since the petition has been granted, I am constrained to say that I am doubtful of the ruling below that evidence probative of the petitioner's belief as to his status as a seaman or drilling employee was irrelevant to the issue of what his status actually was. His belief to be

[4] See note 2, *supra.*

sure did not amount to a demonstration of the fact; but it seems to me sufficiently relevant to be not clearly inadmissible on the issue of his status, to show which was the purpose for which the evidence was offered. In any event, I find no solid reason for disturbing the view of the Court of Appeals that the admission of this evidence in the circumstances of this case did not prejudice the petitioner and was, therefore, harmless error.

Accordingly, while I believe the case is not "cert-worthy," I would affirm the judgment below.

SHENANDOAH VALLEY BROADCASTING, INC., ET AL. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 323. Decided October 21, 1963.

In a suit by the United States under the Sherman Act, the District Court entered a decree requiring respondent, *inter alia,* to "grant to any user making written application therefor a nonexclusive license to perform all of the compositions" in respondent's repertory subject to a reasonable license fee. On request of petitioners for a license, respondent refused to fix a fee. Pursuant to the decree, petitioners applied to the District Court for an order fixing a reasonable fee. The District Court found that the decree did not require respondent to issue the type of license petitioners had requested, and it dismissed the application. Petitioners appealed to the Court of Appeals and also appealed directly to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29. This Court dismissed the direct appeal to it "for want of jurisdiction." 371 U. S. 540. Thereafter, the Court of Appeals dismissed the appeal to it, on the ground that all such appeals are "routed" to this Court by the Expediting Act. *Held:* An appeal from an ancillary order of this type is not within the Expediting Act, and an appeal does lie to the Court of Appeals under 28 U. S. C. § 1291. Pp. 39–41.

317 F. 2d 90, certiorari granted; reversed and cause remanded.

Ralstone R. Irvine and *Walter R. Mansfield* for petitioners.

Arthur H. Dean, William Piel, Jr., Herman Finkelstein and *Lloyd N. Cutler* for respondent.

PER CURIAM.

In 1950 the District Court for the Southern District of New York entered an amended consent decree in a gov-

ernment Sherman Act suit requiring ASCAP *inter alia* to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" subject to a reasonable license fee. On request of petitioners for a license ASCAP refused to fix a fee and, as provided by the amended consent decree, this application was filed for an order to fix a reasonable fee. The District Court found that the consent decree did not require ASCAP to issue the type of license petitioners requested and, therefore, dismissed the application. 208 F. Supp. 896. The petitioners took an appeal to the Court of Appeals and also perfected a direct one to this Court under § 2 of the Expediting Act. 15 U. S. C. § 29. We dismissed the appeal filed here for want of jurisdiction, 371 U. S. 540 (1963). Thereafter, the Court of Appeals dismissed the appeal perfected there, 317 F. 2d 90, on the ground that all appeals are "routed" to this Court by the Expediting Act and this petition brings that question here once again.

The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of "great and general importance" where the Government is the aggrieved party. See 36 Cong. Rec. 1679 (1903). The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned. Compare *Terminal R. R. Assn.* v. *United States,* 266 U. S. 17; *Aluminum Co. of America* v. *United States,* 302 U. S. 230. In these circumstances, and the order being final rather than

interlocutory, we believe that the appeal does lie under 28 U. S. C. § 1291. The petition is therefore granted and the judgment is reversed and the cause remanded to the Court of Appeals for consideration on its merits.

It is so ordered.

MR. JUSTICE BLACK acquiesces in the Court's judgment because of the holding in the prior appeal.

720-508 O-64-9

DUNLAP ET AL. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 288. Decided October 21, 1963.

Appeal dismissed and certiorari denied.

Melvin Schaengold for appellants.

William S. Mathews and *Calvin W. Prem* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

STOVER ET VIR *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 313. Decided October 21, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 12 N. Y. 2d 462, 191 N. E. 2d 272.

Morris L. Ernst for appellants.

Anthony T. Antinozzi for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

HUMBLE OIL & REFINING CO. ET AL. *v.* MALE, COMMISSIONER, DEPARTMENT OF LABOR & INDUSTRY, NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 326. Decided October 21, 1963.

Appeal dismissed for want of a substantial federal question.

T. Girard Wharton and *John W. Fritz* for appellants.

Arthur J. Sills, Attorney General of New Jersey, and *Theodore I. Botter,* First Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

DAVIS ET AL. *v.* CITY OF BOWLING GREEN, KENTUCKY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 331. Decided October 21, 1963.

Judgment affirmed.

Albert O. Scafuro for appellants.

Squire R. Ogden for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

FIELDS ET AL. *v.* SOUTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 335. Decided October 21, 1963.

Certiorari granted and judgment reversed.

Jack Greenberg, Constance Baker Motley, Matthew J. Perry and *Lincoln C. Jenkins, Jr.* for petitioners.

Daniel R. McLeod, Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *Julian S. Wolfe* for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is reversed. *Edwards* v. *South Carolina,* 372 U. S. 229.

CADE *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 340. Decided October 21, 1963.

Appeal dismissed and certiorari denied.

James Sharp, Jr. for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

HESS ET AL. *v.* KRIZ ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 318, Misc. Decided October 21, 1963.

Appeal dismissed and certiorari denied.
Reported below: 379 P. 2d 851.

Appellants *pro se.*

Tom W. Garrett for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

LUOMALA *v.* SHORE, CHIEF EXECUTIVE OF UNITED STATES BOARD OF PAROLE.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 426, Misc. Decided October 21, 1963.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Solicitor General Cox for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JACOBS *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 420, Misc. Decided October 21, 1963.

Appeal dismissed and certiorari denied.
Reported below: 93 Ariz. 336, 380 P. 2d 998.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CHODOROV *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 477, Misc. Decided October 21, 1963.

Appeal dismissed and certiorari denied.
Reported below: 12 N. Y. 2d 176, 188 N. E. 2d 124.

Arnold Schildhaus for appellant.

Leo A. Larkin, Seymour B. Quel and *John A. Murray* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

SIMMONS *v.* OSWALD, CHAIRMAN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 500, Misc. Decided October 21, 1963.

Appeal dismissed for want of a substantial federal question

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

THOMPSON *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 551, Misc. Decided October 21, 1963.

Appeal dismissed and certiorari denied.
Reported below: 363 S. W. 2d 711.

Eugene H. Buder for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, *v.* FIRST NATIONAL BANK OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1. Decided October 21, 1963.

Judgment vacated and case remanded to District Court with instructions to dismiss the cause as moot.

Reported below: 274 F. 2d 206.

Howard C. Westwood for petitioner.

John A. Wilson, Alexis C. Coudert and *Melber Chambers* for respondents.

PER CURIAM.

The motion to vacate the judgment is granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of Florida with instructions to dismiss the cause as moot.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, *v.* FIRST NATIONAL BANK OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 2. Decided October 21, 1963.

Judgment vacated and case remanded to District Court with instructions to dismiss the cause as moot.

Reported below: 287 F. 2d 219.

Howard C. Westwood for petitioner.

John A. Wilson, Alexis C. Coudert and *Melber Chambers* for respondents.

PER CURIAM.

The motion to vacate the judgment is granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the cause as moot.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

CREWS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 59, Misc. Decided October 21, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK dissent for the reason that the judgment rests on an adequate state ground.

BANKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 76, Misc. Decided October 21, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK dissent for the reason that the judgment rests on an adequate state ground.

BARTONE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 337. Decided October 28, 1963.

After a hearing in open court and in the presence of petitioner and his counsel, a Federal District Judge orally revoked petitioner's probation and sentenced him to imprisonment for one year. Later on the same day, in petitioner's absence, a written judgment was entered committing petitioner to imprisonment for one year and one day. Although the propriety of this enlargement of the sentence was presented on appeal, along with other questions, the Court of Appeals affirmed without mentioning this point. *Held:* Certiorari is granted and the judgment denying correction of the sentence is reversed, since the error in enlarging the sentence in the absence of petitioner was plain in light of the requirements of Federal Rule of Criminal Procedure 43. Pp. 52–54.

317 F. 2d 608, certiorari granted; reversed.

O. B. Cline, Jr. and *Nicholas J. Capuano* for petitioner.

Solicitor General Cox for the United States.

PER CURIAM.

Although there were other questions before the Court of Appeals, the sole question presented by this petition is stated as follows:

> "May a United States District Judge orally revoke the probation of a Defendant in open court and in the presence of the Defendant and his counsel and impose a sentence of confinement for a specific period of time and thereafter enter a formal written judgment and commitment in which a larger and longer sentence of confinement is imposed and set forth?"

It appears that on September 14, 1962, petitioner and his counsel appeared in the District Court, at which time

a sentence of confinement of one year was imposed. Subsequently, and in petitioner's absence, the court enlarged the penalty by one day.

The propriety of this enlargement of the sentence, along with other questions, was presented on the appeal to the Court of Appeals, which made no mention of it in its opinion. 317 F. 2d 608. The Court of Appeals did, however, deny a motion of the United States to remand the cause for the purpose of correcting the sentence—relief to which the United States concedes petitioner is entitled.[1] See *Rakes* v. *United States,* 309 F. 2d 686. The only question is whether the error will be corrected here and now or whether petitioner will be remitted to his remedy under Rule 35 of the Federal Rules of Criminal Procedure; and whether petitioner will be advantaged by one procedure or another is not our concern.

This error, in enlarging the sentence in the absence of petitioner, was so plain in light of the requirements of Rule 43[2] that it should have been dealt with by the Court of Appeals, even though it had not been alleged as error.

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[1] Rule 43 of the Federal Rules of Criminal Procedure provides:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

[2] *Supra,* note 1.

As seen from our Miscellaneous Docket for 1962, the use of collateral proceedings for relief from *federal* judgments of conviction is considerable:

OCTOBER TERM, 1962.—MISCELLANEOUS DOCKET.

	TOTALS.
Federal prisoners:	
Direct attack	109
28 U. S. C. § 2255	93
Habeas corpus through federal courts	38
Original habeas corpus (in this Court)	40
Rule 35, Fed. Rules Crim. Proc.	4
	284

Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding. See *Fay* v. *Noia,* 372 U. S. 391. But the situation is different in federal proceedings, over which both the Courts of Appeals and this Court (*McNabb* v. *United States,* 318 U. S. 332) have broad powers of supervision. It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding.

We grant certiorari and reverse the judgment denying correction of the sentence.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

Petitioner was convicted of attempting to export munitions of war from the United States to a foreign state without a license in violation of § 414 of the Mutual Security Act of 1954, 68 Stat. 848, as amended, 22 U. S. C. § 1934. This statute provides a maximum penalty of two years' imprisonment and $25,000 fine. Imposition of sen-

tence of confinement was withheld and petitioner was placed on probation for three years and fined $10,000 (later reduced to $7,500). Thereafter, the Probation Officer petitioned the District Court to issue a warrant and revoke petitioner's probation, alleging that petitioner had violated probation by participating in a contract to sell arms to the Republic of Honduras. After hearing, the court revoked the probation and orally sentenced petitioner to one year imprisonment. Bail was denied by the District Court but granted by the Court of Appeals pending petitioner's appeal. Before submission on the merits, the Government called the Court of Appeals' attention to the fact that the sentence was recorded as one year and one day rather than one year only and moved that the case be remanded to correct the sentence. The court denied the motion and thereafter affirmed the case on the merits. Petitioner sought rehearing, suggesting that the Court of Appeals "failed to consider" the sentencing error, which petitioner had not argued "fully." The petition was denied and the case came here on this issue alone.

The Court summarily reverses and directs that the sentence be corrected. I believe that this is error. The petitioner never presented this question to the District Court and that court has not passed upon it. Under Rule 35 of the Federal Rules of Criminal Procedure, an application to correct an illegal sentence may be made to the District Court at any time. In addition, Rule 36, as to clerical errors (which apparently this is), likewise places power in the District Court to make correction. This Court, however, by its action today makes this an appealable error even though it has never been called to the attention of the trial court. The Court has thereby created an additional remedy for obtaining relief from a sentencing error, despite the existence of the adequate relief already provided in Rule 35 or Rule 36 of the Federal Rules of Criminal Procedure. Heretofore, claims

of this nature have been prosecuted in the District Court by motion under Rule 35. The Court's new method of relief not only prevents the District Court from correcting its own error but also delays the final disposition of the case and creates confusion in the administration of justice. I would require petitioner, as the Rules provide, to apply to the District Court.

Moreover, petitioner may not understand the practical effect of the error on his term of prison sentence. Under 18 U. S. C. § 4161, petitioner is allowed six days per month deduction for good behavior if his sentence is a year and a day. Sentence of a year or less permits only five days per month deduction from the term of sentence. In practical effect, under this Court's order, petitioner may have to serve 11 days' additional time. The Court should require petitioner to proceed in the regular way by Rule 35 rather than force him to serve a longer sentence, especially since his petition may result from lack of familiarity with "good behavior" regulations. For these reasons I dissent.

SOUTH COAST FISHERIES, INC., ET AL. *v.* DEPARTMENT OF FISH AND GAME.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 372. Decided October 28, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 213 Cal. App. 2d 325, 28 Cal. Rptr. 537.

John J. Real for appellants.

Stanley Mosk, Attorney General of California, *Dan Kaufmann,* Assistant Attorney General, and *Neal J. Gobar,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ORKIN EXTERMINATING CO., INC., *v.* GULF COAST RICE MILLS.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT.

No. 424. Decided October 28, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 362 S. W. 2d 159.

John D. Richardson for appellant.

Lamar Carnes for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

720-508 O-64-10

CANTON CO. OF BALTIMORE *v.* COMPTROLLER OF THE TREASURY, RETAIL SALES TAX DIVISION, MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 365. Decided October 28, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 231 Md. 294, 190 A. 2d 92.

Francis D. Murnaghan, Jr. for appellant.

Thomas B. Finan, Attorney General of Maryland, *Robert C. Murphy,* Deputy Attorney General, and *Franklin Goldstein,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

UNITED STATES *v.* ZACKS ET UX.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 44. Argued October 21, 1963.—Decided November 12, 1963.

In 1952, a taxpayer received royalties on patents all substantial rights under which she had transferred to a manufacturer by way of an exclusive license. She and her husband reported such royalties as ordinary income in their joint return for 1952. This return was filed in 1953; the last payment of taxes thereunder was made in 1953; and a claim for refund was barred in 1956 by § 322 (b) (1) of the Internal Revenue Code of 1939. By the Act of June 29, 1956, Congress amended the Internal Revenue Code of 1939 so as to add § 117 (q), providing that amounts received in such circumstances should be taxed as capital gains, rather than as ordinary income, and it made the amendment applicable to tax years beginning after May 31, 1950. In reliance on this amendment, the taxpayers filed in 1958 a claim for a *pro tanto* refund of their 1952 income taxes. *Held:* Their claim was barred by the statute of limitations generally applicable to tax refund claims. Pp. 59–70.

150 Ct. Cl. 814, 280 F. 2d 829, reversed.

J. Mitchell Reese, Jr. argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Mildred L. Seidman.*

Scott P. Crampton argued the cause for respondents. With him on the brief were *Stanley Worth* and *Robert F. Conrad.*

Briefs of *amici curiae* were filed by *Robert H. Reiter* and *Otto L. Walter* for Anton Lorenz et al., and by *Grant W. Wiprud* and *Robert T. Molloy* for the New York, Chicago & St. Louis Railroad Company.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question in this case is whether § 117 (q) of the Internal Revenue Code of 1939, a 1956 amendment to

the Code which effected retroactive changes in the tax treatment of transfers of patent rights, gives rise to a claim for refund barred by the statute of limitations generally applicable to tax refund claims.

In 1952, Mrs. Zacks received royalties of about $37,000 on patents all substantial rights under which she had transferred by way of an exclusive license to a manufacturing corporation. In accordance with the then prevailing rulings of the Commissioner, the royalties were reported as ordinary income in the 1952 joint federal income tax return filed by Mrs. Zacks and her husband in 1953. The last payment of the taxes due was made in 1953. Under the statute of limitations governing a claim for refund of such taxes, the claim was barred in 1956. § 322 (b)(1), Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) § 322 (b)(1), 53 Stat. 91.[1] By Act of June 29, 1956, 70 Stat. 404, Congress amended the provisions of the 1939 Code governing the taxability of amounts received in consideration for the transfer of patent rights. The amendment, made applicable to tax years beginning after May 31, 1950, provided that in the circumstances present here such amounts should be taxed as capital gains rather than as ordinary income.

In reliance on this amendment, the taxpayers, on June 23, 1958, filed a claim for a *pro tanto* refund of their 1952

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[1] Section 322 (b)(1) provides:

"Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

Similar provisions are contained in § 6511 (a), (b) of the Internal Revenue Code of 1954, 26 U. S. C. § 6511 (a), (b), 68A Stat. 808.

income taxes. No action having been taken on the claim, they then commenced a refund suit in the Court of Claims. The United States asserted as a defense that the suit was barred by limitations under § 7422 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 7422 (a), 68A Stat. 876.[2] The Court of Claims granted the taxpayers' motion to strike this defense, 150 Ct. Cl. 814, 280 F. 2d 829, and, other issues in the case being settled by stipulation, entered judgment for the taxpayers.

Because of the recurring importance of the problem in the administration of the tax laws and a conflict between the decision below and those of some of the Courts of Appeals,[3] we granted certiorari. 371 U. S. 961. For reasons given hereafter, we hold that the taxpayers' claim was barred by limitations and, accordingly, reverse the judgment below.

Section 117 (q) here in question provides in pertinent part:

> "(q) TRANSFER OF PATENT RIGHTS.—
>
> "(1) GENERAL RULE.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such

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[2] Section 7422 (a) provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

[3] Compare *United States* v. *Dempster*, 265 F. 2d 666 (C. A. 6th Cir.), and *Tobin* v. *United States*, 264 F. 2d 845 (C. A. 5th Cir.), with the decision in this case and *Hollander* v. *United States*, 248 F. 2d 247 (C. A. 2d Cir.), involving a similar problem.

rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use, or disposition of the property transferred.

. . . . . .

"(4) APPLICABILITY.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

Since our sole concern is the intent of Congress in adding this section to the Code, it is necessary to look to the administrative and legislative background of the enactment. In 1946, the Commissioner of Internal Revenue announced his acquiescence in *Edward C. Myers,* 6 T. C. 258, in which the Tax Court held, as to a so-called "amateur" inventor,[4] that the transfer by exclusive license of all substantial rights under a patent was a sale or exchange of a capital asset, notwithstanding that the consideration for the license was royalties based on a percentage of the selling price of articles sold under the patent, and paid annually. 1946–1 Cum. Bull. 3. On March 20, 1950, the Commissioner reversed his position and announced the withdrawal of his acquiescence in *Myers,* stating that royalties measured or paid as in that case would be taxed as ordinary income. Mim. 6490,

[4] One not engaged in holding patent rights " 'primarily for sale to customers in the ordinary course of his trade or business,' " 6 T. C. 266, as distinguished from a "professional" inventor who is so engaged.

1950–1 Cum. Bull. 9. The new ruling was declared applicable to tax years beginning after May 31, 1950. In the years following 1950, the Commissioner adhered to his new position, despite its rejection by several courts.[5] The issue was settled for the future in 1954 by the enactment of § 1235 of the 1954 Code, 26 U. S. C. § 1235, 68A Stat. 329. Section 1235, applicable only prospectively, contains provisions identical in relevant part to those quoted above from § 117 (q).[6] Thus, prior to May 31, 1950, with exceptions noted hereafter,[7] and again from the beginning of 1954, the law has been that for which the taxpayers contend in their refund suit.

In 1955, the Commissioner issued a further ruling declaring that he would adhere to his 1950 ruling for tax years beginning after May 31, 1950, and prior to 1954. Rev. Rule 55–58, 1955–1 Cum. Bull. 97. As a result, the

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[5] See *Kronner* v. *United States*, 126 Ct. Cl. 156, 110 F. Supp. 730; *Allen* v. *Werner*, 190 F. 2d 840 (C. A. 5th Cir.). The Commissioner's position was sustained by the Second Circuit in *Bloch* v. *United States*, 200 F. 2d 63.

Prior to 1946, several courts had taken the same position. *Commissioner* v. *Celanese Corp.*, 78 U. S. App. D. C. 292, 140 F. 2d 339; *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C. A. 2d Cir.).

[6] The relevant portions of § 1235 are:

"A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(1) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(2) contingent on the productivity, use, or disposition of the property transferred."

[7] Section 1235 of the 1954 Code, and § 117 (q) of the 1939 Code which follows § 1235, made changes in the prior law with respect to the status of professional inventors and the "holding period" for both amateur and professional inventors. See pp. 67–69, *infra*.

Commissioner's position was that during the period from May 31, 1950 to 1954 there was a gap in the consistent application of the law as administratively and judicially established in 1946. It is evident that Congress intended to fill this gap when it enacted § 117 (q) in 1956. But we are not able to say that Congress intended thereby to reopen for retroactive adjustment tax years with respect to which refund claims were already barred by limitations.

Section 117 (q) does not in terms waive the application of the statute of limitations to refund claims then finally barred. On its face, § 117 (q) does no more than overrule the Commissioner's position on a matter of substantive law respecting the years 1950–1954. Nor is there anything in the legislative history which suggests that such a waiver is to be implied. On the contrary, such indications as there are suggest that Congress intended only to terminate litigation then pending. Representative Cooper, then Chairman of the House Ways and Means Committee, stated on the floor of the House:

> "The relief provided by section 1235 [of the 1954 Code] is available only with respect to amounts received in any taxable year to which the 1954 Code applies. As the result of this and the announced policy of the Internal Revenue Service to continue its insistence on its position for years beginning after May 31, 1950, and prior to effective date of the 1954 Code taxpayers are still confronted with litigation for taxable years falling in this period in order to secure the rights to which the courts, with practical unanimity, have held they are entitled.
>
> "H. R. 6143 [the original version of § 117 (q)] eliminates the necessity for such litigation by making the provisions of the 1954 Code available to years beginning after May 31, 1950." 101 Cong. Rec. 12708 (Aug. 1, 1955).

There are other indications that Congress had only this limited intention. It is abundantly clear that Congress is aware of the limitations problem as it affects retroactive tax legislation. On numerous occasions, Congress has included an express provision reopening barred tax years. We need refer here to only a few examples. Section 14 of the Technical Amendments Act of 1958, 26 U. S. C. § 172 (f)(3), (4), (g)(3), 72 Stat. 1606, 1611, provided rules for computing net operating loss deductions for tax years starting in 1953 and extending into 1954 and short tax years wholly within 1954. Subsection (c), added to the House bill by the Senate, provided expressly for a six-month period during which barred claims could be made. The addition was explained in the Senate report as follows:

> "Your committee did amend the House provision, however, in one respect because 3 years have now elapsed since 1954 and many of the transitional years with which this provision is concerned are now closed years. To prevent relief from being denied in such cases, your committee amends this provision to provide that if a refund or credit with respect to this provision is prevented on the date of enactment of this bill or within 6 months after that time by the operation of any law or rule of law (except closing agreements or compromises) refund or credit, nevertheless, is to be allowed if the claim is filed within 6 months of the date of enactment of this bill." S. Rep. No. 1983, 85th Cong., 2d Sess. 24.

Again, by Act of August 9, 1955, 69 Stat. 607, Congress provided a one-year grace period for filing otherwise barred claims based on § 345 of the Revenue Act of 1951, 65 Stat. 452, 517, a retroactive relief measure affecting trust income accumulated for members of the Armed

Services dying in active service on or after December 7, 1941, and before January 1, 1948. The House report on the bill stated:

> "No relief was provided in the 1951 act, however, for cases where refunds or credits were barred by the expiration of the period of limitations, by prior court decisions, or for other similar reasons. Your committee is of the opinion that this failure was an oversight, and it believes that it is only equitable to extend treatment equivalent to that provided in section 345 of the Revenue Act of 1951 to cases where refunds or credits were barred by operation of law or rule of law (other than closing agreements or compromises)." H. R. Rep. No. 1438, 84th Cong., 1st Sess. 1–2.[8]

The most striking evidence of this sort, however, which we think is all but conclusive, is found in § 2 of the very Act here in dispute. That section, retroactively modifying § 106 of the 1939 Code, affected the taxation of payments received by a taxpayer from the United States with

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[8] For other examples of retroactive tax measures in which express provision was made for the limitations problem, see Technical Amendments Act of 1958, §§ 92, 93, 100, 72 Stat. 1606, 1667, 1668, 1673; Act of September 14, 1960, § 5, 74 Stat. 1010, 1013; Revenue Act of 1962, §§ 26, 27, 76 Stat. 960, 1067.

For examples of such measures in which no provision was made to extend the period of limitations, see Act of February 11, 1958, 72 Stat. 3; Act of February 11, 1958, 72 Stat. 4; Technical Amendments Act of 1958, § 103, 72 Stat. 1606, 1675; Revenue Act of 1962, § 30, 76 Stat. 960, 1069.

Contrary to fears seemingly entertained by one of the *amici* in this case, we do not suggest that congressional practice in this regard gives rise to a presumption that where Congress has not provided expressly for a special limitations period in a retroactive tax statute, the relevant general statute of limitations was intended to apply. The significance of such congressional silence is to be judged on a case-by-case basis, as with all questions of statutory construction.

respect to a claim arising out of a construction contract for the Armed Services. Subsection (b) deals with the limitations problem as follows:

> "(b) The amendment made by this section shall apply with respect to taxable years ending after December 31, 1948, notwithstanding the operation of any law or rule of law (other than section 3760 of the Internal Revenue Code of 1939 or section 7121 of the Internal Revenue Code of 1954, relating to closing agreements, and other than section 3761 of the Internal Revenue Code of 1939 or section 7122 of the Internal Revenue Code of 1954, relating to compromises). Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment made by this section shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act." 70 Stat. 405.

Section 2 went to the Conference Committee without such a provision. The Committee added the provision but made no comparable addition to § 1, with which we are concerned, or for that matter to § 3, which also made retroactive changes in the 1939 Code. It is plain, therefore, that the Congress had the limitations problem in mind at the very time that § 117 (q) was enacted. The taxpayers offer no justification for disregarding the difference in this respect between §§ 1 and 2, disrespect for which would render the carefully drawn limitations provisions of the latter section surplusage.

Both the taxpayers and the Government rely on *United States* v. *Borden Co.*, 308 U. S. 188, 198, where this Court said: "It is a cardinal principle of construction that repeals by implication are not favored. When there are

two acts upon the same subject, the rule is to give effect to both if possible." The correctness of this statement is not to be doubted. But the paucity of its assistance here is illustrated by the fact that both parties rely on it. The taxpayers place the second sentence in italics, and urge that § 117 (q) and the general statute of limitations are both given effect if the limitations period is made to run from the date of enactment of § 117 (q). The Government presses the first sentence, and urges that the taxpayers' position, in effect, repeals the statute of limitations *pro tanto*. There are difficulties with both of these analyses. Obviously, neither of them does more than cast a conclusion in terms of the general rules isolated from the particular circumstances of this case. Nor can the doctrine that remedial legislation is entitled to liberal construction, upon which the taxpayers also rely, be stretched to expand the reach of a statute of such evident limited purpose as this one.

A more difficult question is presented by the fact that § 117 (q) goes beyond the problem created by the Commissioner's vacillation affecting tax years between 1946 and 1954. By treating royalty payments as capital gains without regard to whether the patent rights transferred were capital assets, § 117 (q) made the favorable treatment available to professional as well as amateur inventors.[9] In addition, all royalties are treated as long-

[9] Such rights would not be capital assets if the patents were held for sale in the ordinary course of business. Internal Revenue Code of 1954, § 1221, 26 U. S. C. § 1221, 68A Stat. 321.

The taxpayers make much of the asserted fact that Mrs. Zacks was a professional inventor, reasoning therefrom that, as to her at least, § 117 (q) clearly established a new right. Cf. *Lorenz* v. *United States*, —— Ct. Cl. ——, 296 F. 2d 746. The Court of Claims made no finding as to whether Mrs. Zacks was an amateur or professional inventor. Whatever may be the validity and significance in other contexts of the distinction between creation of new rights and clarification of existing rights, we think that distinction is not controlling here, since Congress has evidenced its intent more directly.

term capital gains whether or not the rights transferred had been held for the requisite period. These provisions made clear changes in the law as it was in 1950 and subsequent years up to 1954. Insofar as they are applicable to years for which most claims for refund were barred in 1956, the Government's position renders the provisions without effect.

It is, of course, our duty to give effect to all portions of a statute if that is possible. *E. g., United States* v. *Menasche*, 348 U. S. 528, 538–539. But this general principle is meant to guide the courts in furthering the intent of the legislature, not overriding it. When rigid adherence to the general rule would require disregard of clear indications to the contrary, the rule must yield. Two considerations compel that result here. First, not only the administrative and legislative history of § 117 (q), discussed above, but also the selection of May 31, 1950, as the operative date leave no doubt that Congress was primarily concerned to settle the large volume of pending litigation arising out of the Commissioner's 1950 position, reaffirmed in 1955.[10] The date selected has no relevance either to the status of professional inventors or to the period for which patent rights must be held. Second, there is a ready explanation for the inclusion of the additional provisions. With irrelevant exceptions, § 117 (q) tracks the language of § 1235 of the 1954 Code. Pp. 61–62 and note 6, *supra*. It was wholly natural for Congress to deal with the pre-1954 period by adopting the language of the 1954 Code on the same subject. The House report on the bill leaves no doubt that this is what actually occurred. H. R. Rep. No. 1607, 84th Cong., 1st Sess. 1–2. It is a fair inference that but for the Commissioner's obduracy respecting amateur inventors, § 117 (q) would

[10] The existence of a substantial amount of such litigation is not questioned in this case. Some of it has been collected at pages 35–36 of the Government's brief.

not have been conceived. There is nothing to indicate that for some other reason Congress in 1956 had second thoughts about its failure in 1954 to make these identical provisions of § 1235 retroactive. To give the provisions in question the controlling weight that is claimed for them on the issue before us, would allow the tail to wag the dog. Of course, all of the amendatory provisions of § 117 (q) are fully effective with respect to years and claims not barred.

Finally, the taxpayers suggest that unless the statute of limitations is deemed waived, a premium is placed on taxpayer opposition to administrative rulings, since only those taxpayers who contested the Commissioner's position will now be able to claim a refund. But in view of the doubt surrounding the rulings involved in this case, emphasized by the cases overruling the Commissioner, this argument has less force than it might in another context. In any event, this problem always attends retroactive legislation of this sort, and acceptance of the taxpayers' argument would lead to the automatic waiver of the statute of limitations in every case. Whether or not this should be done is a matter for Congress to decide. Where Congress has decided otherwise, this Court has but one course.

Reversed.

MR. JUSTICE BLACK agrees with the Court of Claims and would affirm its judgment.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

PARSONS, UNITED STATES DISTRICT JUDGE, *v.* CHESAPEAKE & OHIO RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 32. Argued October 23, 1963.—Decided November 12, 1963.

A Federal District Court is not divested of discretion to deny a motion under 28 U. S. C. § 1404 (a) to transfer a suit brought therein to another district, when a suit upon the same cause of action, brought earlier in a state court in the same city, had been dismissed by the state court on the ground of *forum non conveniens*. Pp. 71–74.

307 F. 2d 924, reversed.

John J. Naughton argued the cause and filed briefs for petitioner.

Charles J. O'Laughlin argued the cause for respondent. With him on the brief was *Philip W. Tone.*

PER CURIAM.

The question presented by this case is whether a federal district judge in an action brought under the Federal Employers' Liability Act is divested of all discretion to deny a § 1404 (a) transfer motion,[1] when a suit upon the same cause of action, earlier brought in a state court in the same city, was dismissed by the state court on the ground of *forum non conveniens.*

Jack Filbrun commenced a Federal Employers' Liability Act suit for personal injuries against the respondent railroad in the Circuit Court of Cook County, Illinois. On the respondent's motion the state court dismissed the

[1] 28 U. S. C. § 1404 (a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

action on the ground of *forum non conveniens*. Filbrun did not appeal. Instead, he filed a complaint grounded on the same cause of action in the United States District Court for the Northern District of Illinois, sitting in Chicago. The respondent filed a motion pursuant to 28 U. S. C. § 1404 (a), requesting that the case be transferred to the United States District Court for the Western District of Michigan, sitting in Grand Rapids. The district judge denied the motion, and the respondent sought mandamus from the Court of Appeals for the Seventh Circuit to compel the judge to order the transfer. On rehearing, the Court of Appeals, one judge dissenting, vacated a previous judgment refusing mandamus, and issued a writ directing the transfer. 307 F. 2d 924. We granted certiorari, 371 U. S. 946, to review the action of the Court of Appeals. We reverse the judgment for the reasons stated below.

Under Illinois law a state court's determination to dismiss a case on the ground of *forum non conveniens* requires consideration of similar factors—convenience of the parties and of witnesses and the interests of justice—to those to be considered by a federal court in applying § 1404 (a).[2] The Court of Appeals accordingly reasoned that every point necessary to be passed upon by the federal district judge on respondent's § 1404 (a) transfer motion had already been adjudicated adversely to the plaintiff in the state court, and concluded that "the district court had no discretion but to recognize the authoritative value of the state court's ruling, made in a case commenced there by plaintiff." 307 F. 2d, at 926.

The discretionary determinations of both the state and federal courts in this case required, to be sure, evaluations

[2] In addition, the state court was required to determine whether plaintiff's selection of that court was dictated by a desire to vex and harass the defendant. *Cotton* v. *L. & N. R. Co.*, 14 Ill. 2d 144, 174, 152 N. E. 2d 385, 400.

of similar, but by no means identical, objective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation here presented.

Thus, for example, in determining that Cook County was an inconvenient forum, the state court in this case could appropriately consider the availability of a state forum at Ludington, Michigan, where Filbrun's alleged injury had occurred. But since there is no federal court in Ludington, the federal district judge in making his determination was limited to consideration of the alternative of a trial in the federal court in Grand Rapids, a city some 60 miles from Ludington. Obviously, the question whether the convenience of the parties and of the witnesses would be better served by a trial in a state court in Ludington is not the same question as whether those interests would be better served by a trial in a federal court in Grand Rapids. Similarly, a trial judge weighing the interests of justice could legitimately consider the condition of his court's docket an important factor.[3] While docket congestion is a problem facing all trial courts in large metropolitan areas, there is nothing to show that the problem in the federal court in Chicago is identical in either nature or quantity to the problem in the Cook County court system.

These considerations no more than illustrate the many variables which might affect the exercise of discretion by a state court, as contrasted to a federal court, in any given case. Since different factual considerations may be involved in each court's determination, we hold that a prior state court dismissal on the ground of *forum non con-*

[3] The Supreme Court of Illinois has observed that a serious court congestion problem exists in the Cook County courts. 14 Ill. 2d, at 171, 152 N. E. 2d, at 398.

veniens can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404 (a).

In its original opinion in this case, the Court of Appeals found that there had been no abuse of discretion by the district judge in denying the motion for transfer. We do not read the opinion on rehearing as having disturbed that finding, but only as having determined that the district judge had been divested of power to exercise his discretion at all—a determination we have now found to be erroneous. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings.

It is so ordered.

ALDRICH *v.* ALDRICH ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 55. Argued October 24, 1963.—Decided November 12, 1963, that questions be certified to Supreme Court of Florida.

It appearing that this case hinges on questions of Florida law with respect to which there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida, this Court initiates proceedings to certify* certain questions to the Supreme Court of Florida pursuant to Rule 4.61 of the Florida Appellate Rules. Pp. 75–76.

Reported below: 147 W. Va. 269, 127 S. E. 2d 385.

Herman D. Rollins for petitioner.

Charles M. Love for respondents.

PER CURIAM.

It appearing that there are questions of Florida law that are determinative of this cause, with respect to which questions there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida, this Court desires to certify to the Supreme Court of Florida, pursuant to Rule 4.61 of the Florida Appellate Rules, the following questions:

1. Is a decree of alimony that purports to bind the estate of a deceased husband permissible, in the absence of an express prior agreement between the two spouses authorizing or contemplating such a decree?

2. If such a decree is not permissible, does the error of the court entering it render that court without subject matter jurisdiction with regard to that aspect of the cause?

3. If subject matter jurisdiction is thus lacking, may that defect be challenged in Florida, after the time for

*[For subsequent certification of such questions, see *post*, p. 249.]

appellate review has expired, (i) by the representatives of the estate of the deceased husband or (ii) by persons to whom the deceased husband has allegedly transferred part of his property without consideration?

4. If the decree is impermissible but not subject to such attack in Florida for lack of subject matter jurisdiction by those mentioned in subparagraph 3, may an attack be successfully based on this error of law in the rendition of the decree?

The petitioner, within 20 days of the date of this opinion, is directed to file with the Clerk of this Court a proposed certificate consistent with this opinion and conforming to the requirements of Rule 4.61, *supra,* with proof of service of a copy thereof on counsel for the respondents. Within 10 days thereafter the respondents may file with the Clerk of this Court proposed amendments. When the certificate has been settled it will be transmitted by the Clerk of this Court to the Clerk of the Supreme Court of Florida for appropriate action.

It is so ordered.

BARKER ET UX. *v.* METROPOLITAN LIFE INSURANCE CO.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 388. Decided November 12, 1963.

Appeal dismissed and certiorari denied.

Reported below: 233 Ore. 111, 377 P. 2d 162.

Appellants *pro se.*

Kenneth E. Roberts for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MISSISSIPPI POWER & LIGHT CO. ET AL. *v.* CAPITAL ELECTRIC POWER ASSOCIATION ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 403. Decided November 12, 1963.

Appeal dismissed and certiorari denied.

Reported below: — Miss. —, —, 149 So. 2d 504, 150 So. 2d 534.

Sherwood W. Wise, Fred B. Smith, Garner W. Green and *Joshua Green* for appellants.

T. Harvey Hedgepeth for appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

COURTESY SANDWICH SHOP, INC., ET AL. *v.* PORT OF NEW YORK AUTHORITY ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 399. Decided November 12, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 12 N. Y. 2d 379, 190 N. E. 2d 402.

Edward S. Greenbaum, Morris L. Ernst, Leo Rosen, W. Bernard Richland and *Jerome M. Alper* for appellants.

Sidney Goldstein and *Daniel B. Goldberg* for appellees.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Daniel M. Cohen,* Assistant Attorney General, *Arthur J. Sills,* Attorney General of New Jersey, and *Theodore I. Botter,* First Assistant Attorney General, for intervenor-appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GOTTHILF *v.* SILLS ET AL.

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 50. Argued October 24, 1963.—Decided November 18, 1963.

This Court granted certiorari to review a judgment of the Appellate Division, Supreme Court of New York, First Judicial Department, which the Court of Appeals of New York held could not be appealed to it as of right because it did not finally determine the action. Section 589 of the New York Civil Practice Act provides, *inter alia,* that appeals from nonfinal orders can be taken to the Court of Appeals only by leave of the Appellate Division upon certified questions; but petitioner at no time applied to the Appellate Division for such permission. *Held:* The judgment of the Appellate Division is not that of the "highest court of a State in which a decision could be had," within the meaning of 28 U. S. C. § 1257, and the writ of certiorari is dismissed as improvidently granted. Pp. 79–80.

Writ of certiorari dismissed.

O. John Rogge argued the cause and filed briefs for petitioner.

Theodore Charnas argued the cause and filed a brief for respondents.

Louis J. Lefkowitz, Attorney General of New York, filed a brief as *amicus curiae,* urging dismissal of the writ as improvidently granted or, in the alternative, affirmance. With him on the brief was *Paxton Blair,* Solicitor General.

PER CURIAM.

The Supreme Court of New York County issued an order granting body execution (N. Y. Civ. Prac. Act § 764) against petitioner for failure to pay a money judgment which had been finally entered against him in that court in an action premised on fraud and deceit. On appeal to

the Appellate Division, First Judicial Department, petitioner attacked § 764 as being violative of both the state and federal constitutions. The order was affirmed, 17 App. Div. 2d 723. Petitioner then filed a motion in the Court of Appeals of New York for leave to appeal (N. Y. Civ. Prac. Act § 589) which was dismissed for want of jurisdiction because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." 12 N. Y. 2d 761, 186 N. E. 2d 563. See *Chase Watch Corp.* v. *Heins,* 283 N. Y. 564, 27 N. E. 2d 282 (1940); cf. *Knickerbocker Trust Co.* v. *Oneonta, C. & R. S. R. Co.,* 197 N. Y. 391, 90 N. E. 1111 (1910). An appeal to the Court of Appeals as of right (N. Y. Civ. Prac. Act § 588) was dismissed on the same ground. 12 N. Y. 2d 792, 186 N. E. 2d 811. Certiorari was granted to review the judgment of the Appellate Division, First Judicial Department. 372 U. S. 957.

Section 589 of the New York Civil Practice Act provides *inter alia* that appeals from nonfinal orders can only be taken to the Court of Appeals by leave of the Appellate Division upon certified questions. The petitioner at no time applied to the Appellate Division for such permission. It therefore appears that the Appellate Division, First Judicial Department, "was not the last state court in which a decision of that [constitutional] question could be had." *Gorman* v. *Washington University,* 316 U. S. 98, 100 (1942). The judgment of the Appellate Division is not that of the "highest court of a State in which a decision could be had" within the meaning of 28 U. S. C. § 1257. Whether, under the same section, that judgment is "final," a question of purely federal law, involves entirely different considerations. The petition for certiorari was therefore improvidently granted and the writ is

Dismissed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

The majority concludes that petitioner is not seeking review of the decision of the "highest court of a State in which a decision could be had" within the meaning of 28 U. S. C. § 1257. It is said that petitioner could have, by employment of the certified question procedure, obtained a full review of his constitutional questions by the New York Court of Appeals, but instead chose a route that resulted in the dismissal of his appeal.

The determination of the Court of Appeals that this body execution order is a nonfinal order subject to appeal only *via* the certified question route came as a surprise. Theretofore, the *one and only* New York case involving a body execution order and the question of how one should obtain review in the Court of Appeals was *Chase Watch Corp.* v. *Heins,* 283 N. Y. 564, 27 N. E. 2d 282, decided in 1940. The *creditor* took an appeal from an order of the Appellate Division *vacating* an order authorizing body execution. 258 App. Div. 968, 17 N. Y. S. 2d 880. The Court of Appeals dismissed on the ground that the order was not final, giving the creditor, however, 20 days within which to seek certification of a question from the Appellate Division. This was done (259 App. Div. 888, 18 N. Y. S. 2d 742) and the creditor ultimately prevailed (284 N. Y. 129, 29 N. E. 2d 646). It is argued that the *Chase Watch* case clearly established the type of procedure that petitioner should have followed. The vacation of a body execution order, however, as in *Chase Watch,* is far less final than the converse, which is the present case. In *Chase Watch,* the order determined nothing finally; the creditor was merely momentarily frustrated in his collection efforts, and was forced to rely on other devices. Here, on the other hand, the debtor

faces incarceration; he has fought for his right to remain out of jail; and he has lost. If he lacks money with which to pay the judgment, nothing further is available for him by New York law. The case illustrates that concepts of finality in one context cannot always be transferred to another.

In my opinion, petitioner might reasonably have concluded that a final order had been entered in this case and that *Chase Watch* did not control. Therefore, his action in docketing an appeal in the Court of Appeals, and not invoking the certification procedures applicable only to nonfinal orders, was justifiable as a matter of federal law. The decision of the Court of Appeals in this case establishes, of course, as a matter of state law that the order was not final. While that determination is binding on us, it does not preclude us from holding that the decision was sufficiently unexpected so as not to bar, in the interests of justice, the certiorari route here. See *NAACP* v. *Alabama,* 357 U. S. 449, 457–458:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

The current decision was a surprise which could not reasonably be anticipated, and it was then too late for petitioner to avail himself of the new procedure.

While 28 U. S. C. § 1257 also requires that judgments brought here for review be "final," we have recognized an exception—sometimes even to the point of reviewing interlocutory decrees—where the controversy has proceeded to a point where the "losing party [will] . . . be irreparably injured if review [is] . . . unavailing." *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 68.

Unless the case is reviewed now, petitioner goes to jail—or stays outside New York.*

In my opinion the case is properly here and the Court should consider, on the merits, the constitutional questions presented.

*There is no suggestion that after the Court of Appeals dismissed the appeal, petitioner should have repaired once more to the Appellate Division for a certificate or in the words of Section 592, 5 (c) of the New York Civil Practice Act "for permission to appeal." It should be noted, however, that this procedure is available only with qualifications, as that sub-section makes the granting of the application contingent not only on the discretion of the Appellate Division but also on the explicit proviso "that the proceedings have not been improperly delayed."

CERTIFIED CREDIT CORP. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 430. Decided November 18, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 174 Ohio St. 239, 188 N. E. 2d 594.

Robert L. Barton, Joseph B. DeVennish and *Joseph R. Hague* for appellant.

William B. Saxbe, Attorney General of Ohio, and *Daronne R. Tate,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

FAHY *v.* CONNECTICUT.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 19. Argued October 16, 1963.—Decided December 2, 1963.

Petitioner waived trial by jury and was convicted in a Connecticut State Court of wilfully injuring a public building by painting swastikas on a synagogue. At his trial, a can of paint and a paint brush were admitted in evidence over his objection. On appeal, the Supreme Court of Errors held that the paint and brush had been obtained by means of an illegal search and seizure, and that, therefore, the trial court erred in admitting them in evidence, but that their admission was a harmless error, and it affirmed the conviction. *Held:* On the record in this case, the erroneous admission of this illegally obtained evidence was prejudicial to petitioner; it cannot be called harmless error; and the conviction is reversed. Pp. 85–92.

149 Conn. 577, 183 A. 2d 256, reversed.

Francis J. McNamara, Jr. argued the cause for petitioner. With him on the brief were *Raymond T. Benedict* and *John F. Spindler.*

John F. McGowan, Assistant State's Attorney for Connecticut, argued the cause for respondent. With him on the brief was *Otto J. Saur,* State's Attorney.

Mr. Chief Justice Warren delivered the opinion of the Court.

Petitioner waived trial by jury and was convicted in a Connecticut state court of wilfully injuring a public building in violation of Connecticut General Statutes § 53–45 (a). Specifically, petitioner and his codefendant Arnold [1] were found guilty of having painted swastikas

[1] Arnold was tried and convicted with petitioner Fahy, and their appeals were heard and decided together. Arnold also filed a petition for certiorari; however, that petition was dismissed on Arnold's motion before we granted Fahy's petition.

on a Norwalk, Connecticut, synagogue. The trial took place before our decision in *Mapp* v. *Ohio,* 367 U. S. 643, but the conviction was affirmed on appeal after that decision. *Connecticut* v. *Fahy,* 149 Conn. 577, 183 A. 2d 256 (1962). At the trial of the case, a can of black paint and a paint brush were admitted into evidence over petitioner's objection. On appeal, the Connecticut Supreme Court of Errors held that the paint and brush had been obtained by means of an illegal search and seizure. It further held that the *Mapp* decision applies to cases pending on appeal in Connecticut courts at the time that decision was rendered, and, therefore, the trial court erred in admitting the paint and brush into evidence. However, the court affirmed petitioner's conviction because it found the admission of the unconstitutionally obtained evidence to have been harmless error.[2] We granted certiorari, 372 U. S. 928 (1963).

On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of "harmless error" under the federal standard of what constitutes harmless error. Compare *Ker* v. *California,* 374 U. S. 23. We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed

[2] Connecticut's statutory harmless error rule states that the Supreme Court of Errors need not reverse a judgment below if it finds the errors complained of "have not materially injured the appellant." Connecticut General Statutes § 52–265 (1958).

to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial.

On February 1, 1960, between the hours of 4 and 5 a. m., swastikas were painted with black paint on the steps and walls of a Norwalk synagogue. At about 4:40 a. m., Officer Lindwall of the Norwalk police saw an automobile being operated without lights about a block from the synagogue. Upon stopping the car, Lindwall found that Fahy was driving and Arnold was a passenger. Lindwall questioned Fahy and Arnold about their reason for being out at that hour, and they told him they had been to a diner for coffee and were going home. Lindwall also checked the car and found a can of black paint and a paint brush under the front seat. Having no reason to do otherwise, Lindwall released Fahy and Arnold. He followed the car to Fahy's home. Later the same morning, Lindwall learned of the painting of the swastikas. Thereupon, he went to Fahy's home and—without having applied for or obtained an arrest or search warrant—entered the garage under the house and removed from Fahy's car the can of paint and the brush. About two hours later, Lindwall returned to the Fahy home, this time in the company of two other Norwalk policemen. Pursuant to a valid arrest warrant, the officers arrested Fahy and Arnold.

At trial, the court admitted the paint and brush into evidence over petitioner's objection. We assume, as did the Connecticut Supreme Court of Errors, that doing so was error because this evidence was obtained by an illegal search and seizure and was thus inadmissible under the rule of *Mapp* v. *Ohio*. Examining the effect of this evidence upon the other evidence adduced at trial and upon the conduct of the defense, we find inescapable the conclusion that the trial court's error was prejudicial and cannot be called harmless.

Obviously, the tangible evidence of the paint and brush was itself incriminating. In addition, it was used to corroborate the testimony of Officer Lindwall as to the presence of petitioner near the scene of the crime at about the time it was committed and as to the presence of a can of paint and a brush in petitioner's car at that time. When Officer Lindwall testified at trial concerning that incident, the following transpired:

"Q. Will you tell the Court what you found in the car?

. . . . . .

"A. Checking on the passengers' side, under the front seat I found a small jar of paint and a paint brush.

"Q. Are you able to identify this object I show you?

"A. Yes.

"Q. What is it?

"A. A jar of paint I found in the motor vehicle.

. . . . . .

"Q. I show you this object and ask you if you can identify that.

"A. Yes, sir.

"Q. What is it?

"A. A paint brush.

"Q. Where did you first see this paint brush?

"A. Under the front seat of Mr. Fahy's car."

The brush and paint were offered in evidence and were received over petitioner's objection. The trial court found: "13. The police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by Officer Lindwall earlier in the morning." It can be inferred from this that the admission of the illegally seized evidence made Lindwall's testi-

mony far more damaging than it would otherwise have been.

In addition, the illegally obtained evidence was used as the basis of opinion testimony to the effect that the paint and brush matched the markings on the synagogue, thus forging another link between the accused and the crime charged. At trial, Norwalk Police Officer Tigano testified that he had examined the markings on the synagogue and had determined that they were put on with black paint. He further testified that he had examined the contents of the can illegally seized from Fahy's car and had determined that it contained black paint. Even more damaging was Tigano's testimony that he had taken the illegally seized brush to the synagogue "to measure the width of the brush with the width of the paintings of the swastikas." Over objection, Tigano then testified that the brush "fitted the same as the paint brush in some drawings of the lines and some it did not due to the fact the paint dripped." Thus the trial court found: "14. The two-inch paint brush matched the markings made with black paint upon the synagogue." In relation to this testimony, the prejudicial effect of admitting the illegally obtained evidence is obvious.

Other incriminating evidence admitted at trial concerned admissions petitioner made when he was arrested and a full confession made at the police station later. Testifying at trial, Norwalk Police Lieutenant Virgulak recounted what took place when Fahy, who was just waking up at the time, was arrested:

> "I told him I [*sic*, he] was under arrest for painting swastikas on the synagogue. He said, 'Oh, that?' and he appeared to lay back in bed.
>
> . . . . .
>
> "Q. Did you have any further conversation with Fahy before you reached the police station that you remember?

"A. I asked him what the reason was for painting the swastikas and he said it was only a prank and I asked him why and he said for kicks."

At the police station, there was further questioning, and Fahy told Lieutenant Virgulak that he, Fahy, would take the responsibility for painting the swastikas. In addition, some hours after the arrest Arnold was asked to give a statement of the events, and he complied, dictating a complete confession of two typewritten pages. After this confession was admitted against Arnold at trial, Lieutenant Virgulak testified that he had read the confession to Fahy and:

"Q. After you finished reading it, will you tell us whether or not he [Fahy] made any comment?

"A. I asked him what his version was and he said the story was as I had it from Mr. Arnold. I asked him if he would like to give a written statement and he declined."

The record does not show whether Fahy knew that the police had seized the paint and brush before he made his admissions at the time of arrest and en route to the police station. In oral argument, however, counsel for the State told the Court that Fahy "probably" had been told of the search and seizure by then. Of course, the full confession was more damaging to the defendants, and unquestionably the defendants knew the police had obtained the paint and brush by the time they confessed. But the defendants were not allowed to pursue the illegal search and seizure inquiry at trial, because, at the time of trial, the exclusionary rule was not applied in Connecticut state courts. Thus petitioner was unable to claim at trial that the illegally seized evidence induced his admissions and confession. Petitioner has told the Court that he would so claim were he allowed to challenge the search and seizure as illegal at a new trial. And we think that such

a line of inquiry is permissible. As the Court has noted in the past: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; see also *Nardone* v. *United States,* 308 U. S. 338; *Wong Sun* v. *United States,* 371 U. S. 471. Thus petitioner should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence.

Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial. It was only after admission of the paint and brush and only after their subsequent use to corroborate other state's evidence and only after introduction of the confession that the defendants took the stand, admitted their acts, and tried to establish that the nature of those acts was not within the scope of the felony statute under which the defendants had been charged.[3] We do not mean to suggest that petitioner has presented any valid claim based on the privilege against self-incrimination. We merely note this course of events as another indication of the prejudicial effect of the erroneously admitted evidence.

From the foregoing it clearly appears that the erroneous admission of this illegally obtained evidence was prejudicial to petitioner and hence it cannot be called

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[3] The Connecticut Supreme Court of Errors rejected petitioner's argument that painting swastikas on a synagogue was "defacement," not "injury," to a public building. The statute involved was passed in 1832 and made it illegal to "injure or deface" a public building. In 1875, the words "or deface" were omitted, and the statute remained essentially unchanged thereafter. The Connecticut Supreme Court of Errors held that "injure" includes defacement and thus includes petitioner's acts.

harmless error. Therefore, the conviction is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The only question in this case which merits consideration by this Court, and which alone accounts for the case being here at all, is that which the majority does not reach: Does the Fourteenth Amendment prevent a State from applying its harmless-error rule in a criminal trial with respect to the erroneous admission of evidence obtained through an unconstitutional search and seizure? The majority avoids this issue only by disregarding the finding of the Connecticut Supreme Court of Errors that the erroneously admitted evidence was without prejudicial effect on the outcome of petitioner's trial.

Evidentiary questions of this sort are not a proper part of this Court's business, particularly in cases coming here from state courts over which this Court possesses no supervisory power. This is not the rare instance of a state conviction which rests upon a record that is devoid of any evidence to support the charge against the defendant, see *Thompson* v. *Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157. The most that can be said is that the record leaves the issue of harmless error open to differing conclusions. That, however, furnishes no ground for this Court's intervention, even in the name of avoiding the constitutional question which brought the case here.

Furthermore, taking the Court's opinion on its own bottom, I feel compelled to say, with due respect, that I am unable to understand its evaluation of the record.

The opinion below provides the full answer to the petitioner's claim that the admission into evidence of the can of paint and paint brush prejudiced him:

> ". . . The defendants do not claim, nor, as the transcript shows, could they claim, that the illegal search and seizure induced their admissions or confessions. Their claim is that, '[h]ad they been able to preclude the admission of the illegally seized evidence, [their] confessions would not have been admissible,' under the rule of *State* v. *Doucette,* 147 Conn. 95, 98, 157 A. 2d 487, because there was, apart from the confessions, insufficient evidence of the corpus delicti, that is, that the crime charged had been committed by someone. In other words, their claim is that the state, in order to prove that a crime had been committed, had to rely solely on the admission in evidence of the paint jar and the brush. The answer to that claim is that there was ample evidence besides the defendants' confessions and the jar of paint and the brush to prove that swastikas had been painted on the synagogue between the hours of 4 and 5 o'clock on the morning of February 1, 1960. This was sufficient to establish that the crime charged had been committed by someone. The confessions were not inadmissible on the ground claimed, and no other ground of inadmissibility is advanced.
>
> "The paint jar and the brush, which were exhibits, were, at most, cumulative. The transcript of the evidence of the state's case, in chief, discloses overwhelming evidence of the guilt of the defendants. They were observed a block from the scene of the crime at approximately the time when it was committed, riding in an automobile without lights, and were brought to a stop only after a police officer had pursued them for upwards of a mile. When the

police later in the morning came with warrants to arrest them, they admitted their guilt at once and attempted to excuse their conduct as a 'prank.' Both later freely confessed. . . ." 149 Conn. 577, 587–588, 183 A. 2d 256, 261–262.

The Court's discussion of corroborative and cumulative evidence and its effect on the conduct of the defense is surely beside the point in a case in which both before and during trial it was not disputed that the petitioner had committed the acts in question and the only defense raised was that the acts were not criminal as charged.[1]

This brings me to the question which the Court does not reach: Was it constitutionally permissible for Connecticut to apply its harmless-error rule to save this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence? I see no reason why not. It is obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission. The question of harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case. Erroneously admitted "constitutional" evidence may often be more prejudicial than erroneously admitted "unconstitutional" evidence. Since the harmless-error rule plainly affords no shield under which prosecutors might use damaging evidence, unconstitutionally obtained, to secure a conviction, there is no danger that application of the rule will undermine the prophylactic function of the rule of inadmissibility.

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[1] As the quoted portion of the opinion below shows, our Court, by relying on the petitioner's statement that he would claim at a new trial that the unlawfully seized evidence induced his admissions and confession, accepts a claim which, apart from its lack of foundation in the record, is made for the first time here.

Cases in which this Court has held that the sufficiency of other evidence will not validate a conviction if an unconstitutionally obtained confession is introduced at trial, *e. g., Malinski* v. *New York,* 324 U. S. 401, are inapposite. It may well be that a confession is never to be considered as nonprejudicial. In any event, the standard applied here required a determination that exclusion of the unconstitutional evidence could not have changed the outcome of the trial. That is a much stricter standard than that of independently sufficient evidence, which leaves open the possibility that the trier of fact did rely on the unconstitutional evidence and, therefore, would have reached a different conclusion if the evidence had been excluded.[2]

I would affirm.

[2] There is no need to consider whether a state or federal standard of harmless error governs, since the state standard applied here is as strict as any possible federal standard.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 13. Argued April 18, 1963.—Decided in part and set for reargument on one issue June 3, 1963.—Reargued October 16–17, 1963.—Decided December 2, 1963.

Petitioner union and an employer in Florida entered into a collective bargaining agreement containing an "agency shop" clause, which left union membership optional with the employees but required that, as a condition of continued employment, nonunion employees pay to the union sums equal to the initiation fees and periodic dues paid by union members. Nonunion employees of the employer sued in a Florida State Court for a declaratory judgment that this provision was "null and void" and unenforceable under the Florida right-to-work law and for an injunction against petitioner union and the employer to prevent them from requiring nonunion employees to contribute money to the union. *Held:* The Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against an "agency shop" clause in an executed collective bargaining agreement. *San Diego Council* v. *Garmon,* 359 U. S. 236, distinguished. Pp. 97–105.

141 So. 2d 269, affirmed.

S. G. Lippman reargued the cause for petitioners. With him on the briefs on the reargument were *Tim L. Bornstein* and *George Kaufmann,* and on the original argument *Mr. Bornstein, Claude Pepper* and *Russell Specter.*

Bernard B. Weksler reargued the cause for respondents. With him on the brief was *John L. Kilcullen.*

Solicitor General Cox, by invitation of the Court, 373 U. S., at 757, argued the cause for the United States on the reargument, as *amicus curiae,* urging affirmance. With him on the brief were *Arnold Ordman, Dominick L. Manoli* and *Norton J. Come.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief on the reargument for the American Federation of Labor and Congress

of Industrial Organizations, as *amicus curiae,* urging reversal. With them on the brief on the original argument were *Joseph L. Rauh, Jr., John Silard* and *Harold A. Cranefield* for the United Automobile, Aerospace and Agricultural Implement Workers of America.

Richard W. Ervin, Attorney General of Florida, filed a brief on the reargument for the State of Florida, as *amicus curiae,* urging affirmance, joined and supported by the Attorneys General for their respective States as follows: *Robert Pickrell* of Arizona, *Evan L. Hultman* of Iowa, *William M. Ferguson* of Kansas, *Joe T. Patterson* of Mississippi, *Clarence A. H. Meyer* of Nebraska, *T. Wade Bruton* of North Carolina, *Daniel R. McLeod* of South Carolina, *Frank Farrar* of South Dakota, *George F. McCanless* of Tennessee, *Waggoner Carr* of Texas and *A. Pratt Kesler* of Utah, each of whom also joined and supported his brief on the original argument, together with *Eugene Cook* of Georgia, *Harvey Dickerson* of Nevada, *Helgi Johanneson* of North Dakota, *Robert Y. Button* of Virginia, *George Thompson* of Wisconsin, *John F. Raper* of Wyoming, and *John L. Kilcullen. Richmond M. Flowers,* Attorney General of Alabama, was also on the brief on the original argument. *D. Gardiner Tyler,* Assistant Attorney General of Virginia, and *Frederick T. Gray,* Special Assistant Attorney General, were with *Mr. Button* on a separate *amicus curiae* brief for the Commonwealth of Virginia on the original argument.

William B. Barton and *Harry J. Lambeth* filed a brief on the original argument for the Chamber of Commerce of the United States, as *amicus curiae,* urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

The sole question in the case is the one we set down for reargument in 373 U. S. 746, 747–748: "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce

the State's prohibition" against an "agency shop" clause in a collective bargaining agreement.

In this case the union and the employer negotiated a collective bargaining agreement that contained an "agency shop" clause providing that the employees covered by the contract who chose not to join the union were required "to pay as a condition of employment, an initial service fee and monthly service fees" to the union. Nonunion employees brought suit in a Florida court to have the agency shop clause declared illegal, for an injunction against enforcement of it, and for an accounting. The Florida Supreme Court held that this negotiated and executed union-security agreement violates the "right to work" provision of the Florida Constitution and that the state courts have jurisdiction to afford a remedy. 141 So. 2d 269.

We agree with that view.

While § 8 (a)(3) of the Taft-Hartley Act provides[1] that it is not an unfair labor practice for an employer and

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[1] Section 8 (a)(3) reads as follows:

"It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee

a union to require membership in a union as a condition of employment provided the specified conditions are met, § 14 (b) (61 Stat. 151, 29 U. S. C. § 164 (b)) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

We start from the premise that, while Congress could preempt as much or as little of this interstate field as it chose, it would be odd to construe § 14 (b) as permitting a State to prohibit the agency clause but barring it from implementing its own law with sanctions of the kind involved here.

Section 14 (b) came into the law in 1947, some years after the Wagner Act. The latter did not bar as a matter of federal law an agency-shop agreement.[2] Section 8

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for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 61 Stat. 140–141, as amended, 65 Stat. 601, 73 Stat. 525, 29 U. S. C. (Supp. IV) § 158 (a) (3).

[2] As stated in the Senate Report on the Wagner Act:

". . . the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated . . . ." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11–12. Prior to enactment of the Wagner Act in 1935, the States had unquestioned power to regulate or prohibit the closed shop and other forms of union-security agreements. While § 8 (3) of the Wagner Act said "nothing in this Act, . . . or in any other statute of the United States, shall preclude" such agreements, it left open the power of a State to "preclude" them.

(a)(3) of the Taft-Hartley Act also allowed it, saying that "nothing in this Act, or in any other statute of the United States, shall preclude" one.[3]

By the time § 14 (b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices[4]—a state power which we sustained in *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525. These laws—about which Congress seems to have been well informed during the 1947 debates[5]—had a wide variety of sanctions, including injunctions, damage suits, and criminal penalties. In 1947 Congress did not outlaw union-security agreements *per se;* but it did add new conditions, which, as presently provided in § 8 (a)(3),[6] require that there be a 30-day waiting period before any employee is forced into a union, that the union in question is the appropriate representative of the employees, and that an employer not discriminate against an employee if he has reasonable grounds for believing that membership in the union was not available to the employee on a nondiscriminatory basis or that the employee's membership was denied or terminated for reasons other than failure to meet union-shop requirements as to dues and fees. In other words, Congress undertook pervasive regulation of union-security agreements, raising in the minds of many whether it thereby preempted the field under the decision in

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[3] Note 1, *supra.*

[4] See State Laws Regulating Union-Security Contracts, 21 L. R. R. M. 66.

[5] H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 34; S. Rep. No. 105, 80th Cong., 1st Sess., p. 6.

[6] Note 1, *supra;* H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 9. As to the differences between agreements for "closed" shops, "union" shops, and related devices, see *Lincoln Union* v. *Northwestern Co., supra,* at 528, n. 2; *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538, 550–553.

Hill v. *Florida,* 325 U. S. 538, and put such agreements beyond state control. That is one reason why a section, which later became § 14 (b), appeared in the House bill [7]—a provision described in the House Report [8] as making clear and unambiguous the purpose of Congress not to preempt the field. That purpose was restated by the House Conference Report in explaining § 14 (b).[9] Sen-

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[7] Section 13 of H. R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. of the Labor Management Relations Act, 1947, 207–208.

[8] "Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act. In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view." H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 44.

[9] H. R. Rep. No. 510, 80th Cong., 1st Sess., p. 60:

"Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act . . . to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (3) of the existing act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there

ator Taft in the Senate debates stated that § 14 (b) was to continue the policy of the Wagner Act and avoid federal interference with state laws in this field. As to the Wagner Act he stated, "But that did not in any way prohibit *the enforcement of State laws* which already prohibited closed shops." [10] (Italics added.) He went on to say, "That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill, [§ 14 (b)] we in no way change the bill as passed by the Senate of the United States." [11]

In light of the wording of § 14 (b) and this legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws. Otherwise, the reservation which Senator Taft felt to be so critical would become empty and largely meaningless.

As already noted, under § 8 (a)(3) a union-security agreement is permissible, for example, if the union represents the employees as provided in § 9 (a) (subject to rescission of the authority to make the agreement as provided in § 8 (a)(3)). Those are federal standards entrusted by Congress to the Labor Board. Yet even if the union-security agreement clears all federal hurdles, the States by reason of § 14 (b) have the final say and may

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should be no question about this, section 13 was included in the House bill. *The conference agreement, in section 14 (b), contains a provision having the same effect.*" (Italics added.)

[10] 93 Cong. Rec. 6520, 2 Leg. Hist. of the Labor Management Relations Act, 1947, 1597.

[11] *Ibid.*

outlaw it. There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements. It is argued that if there is a violation of a state union-security law authorized by § 14 (b), it is a federal unfair labor practice and that the federal remedy is the exclusive one. It is urged that that course is necessary if uniformity is to be achieved. But § 14 (b) gives the States power to outlaw even a union-security agreement that passes muster by federal standards. Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington.

This result on its face may seem to be at war with *San Diego Council* v. *Garmon,* 359 U. S. 236, decided in 1959, and holding that where action is "arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.,* at 245. In *Garmon* a state court was held precluded by the Taft-Hartley Act from awarding damages under state law for economic injuries resulting from peaceful picketing of a plant by labor unions that had not been selected by a majority of the employees as their bargaining agents.

Garmon, however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations; and it did not present the problems posed by § 14 (b), *viz.,* whether the Congress had precluded state enforcement of select state laws adopted pursuant to its authority. The purpose of Congress is the ultimate touchstone. Congress under the Commerce Clause may displace state power (*Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 234–236; *San Diego Council* v.

Garmon, supra) or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime. See *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, 141–143.

The Court in *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 314, stated that "§ 14 (b) was included to forestall the inference that federal policy was to be exclusive" on this matter of union-security agreements. In that case a state agency issued a cease-and-desist order against an employer from giving effect to a maintenance of membership agreement and ordered an employee reinstated and made whole for any loss of pay suffered. It was urged that since § 10 (a) of the Wagner Act gives the Federal Board "exclusive" power to prevent "any unfair labor practice," state power in the federal commerce field was displaced. *Id.*, at 305. State power, however, was held to exist alongside of federal power because of the special legislative history of the union-security provisions of the Act. The dissent did not deny that; rather it proceeded on the ground that, since the dispute arose prior to the 1947 Act, the case was to be judged by the pre-1947 construction of § 8 (a)(3), as to which the majority and minority of the Court were in disagreement.

It also was argued in *Algoma Plywood Co.* that § 14 (b) displaced state law that "regulates" the union shop. The Court said:

> "But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the circumstances 'is prohibited' by the State, the legislative history of the section would dispel it." 336 U. S., at 314.

Congress, in other words, chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements

authorized by § 14 (b) and decided to suffer a medley of attitudes and philosophies on the subject.

As a result of § 14 (b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field. As noted, *Algoma Plywood Co.* v. *Wisconsin Board, supra,* upheld the right of a State to reinstate with back pay an employee discharged in violation of a state union-security law. On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (*Local Union 429* v. *Farnsworth & Chambers Co.,* 353 U. S. 969, and *Local No. 438* v. *Curry,* 371 U. S. 542), because state power, recognized by § 14 (b), begins *only with actual negotiation and execution of the type of agreement described by § 14 (b).* Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon.*

We held in *Plumbers' Union* v. *Borden,* 373 U. S. 690, and in *Iron Workers* v. *Perko,* 373 U. S. 701, that *Garmon* preempted the field where employees were suing unions for damages arising out of practices that arguably were unfair labor practices subject to regulation by the National Labor Relations Board. Those cases, however, did not present for decision any problem under § 14 (b), though the question was tendered in the *Borden* case but not passed on either by the state tribunal or by us. 373 U. S., at 692, n. 2.

The relief prayed for below is within the ambit of *Algoma Plywood Co.* v. *Wisconsin Board, supra,* and the regulatory scheme that Congress designed when it adopted § 14 (b).

Affirmed.

Mr. Justice Goldberg took no part in the consideration or decision of this case.

DURFEE ET UX. *v.* DUKE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 37. Argued October 24, 1963.—Decided December 2, 1963.

Petitioners sued respondent in a Nebraska State Court to quiet title to certain land on the Missouri River, which is the boundary between Nebraska and Missouri. The Nebraska Court had jurisdiction over the subject matter only if the land was in Nebraska, and that depended on whether a shift in the river's course had been caused by avulsion or accretion. Respondent appeared in the Nebraska Court and fully litigated the issues, including that as to the Court's jurisdiction over the subject matter. The Court found in favor of petitioners and ordered that title to the land be quieted in them. The Nebraska Supreme Court affirmed, finding specifically that the rule of avulsion was applicable, that the land was in Nebraska, that the Nebraska courts had jurisdiction over the subject matter and that title to the land was in petitioners. Subsequently, respondent sued in a Missouri State Court to quiet title to the same land, claiming that it was in Missouri. The case was removed to a Federal District Court. *Held:* The judgment of the Nebraska Supreme Court was *res judicata* as to all issues, including the issue of jurisdiction, and it was binding on the District Court under the Full Faith and Credit Clause of the Constitution and the federal statute enacted to implement it. Pp. 107–116.

308 F. 2d 209, reversed.

August Ross argued the cause for petitioners. With him on the briefs was *Harold W. Kauffman.*

Robert A. Brown argued the cause and filed a brief for respondent.

Clarence A. H. Meyer, Attorney General of Nebraska, filed a brief for the State of Nebraska, as *amicus curiae,* urging reversal.

Thomas F. Eagleton, Attorney General of Missouri, and *Joseph Nessenfeld* and *Howard L. McFadden,* Assistant Attorneys General, filed a brief for the State of Missouri, as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The United States Constitution requires that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." [1] The case before us presents questions arising under this constitutional provision and under the federal statute enacted to implement it.[2]

In 1956 the petitioners brought an action against the respondent in a Nebraska court to quiet title to certain bottom land situated on the Missouri River. The main channel of that river forms the boundary between the States of Nebraska and Missouri. The Nebraska court

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[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. IV, § 1.

[2] "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Act of June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. § 1738.

The progenitor of the present statute was enacted by the First Congress in 1790. 1 Stat. 122.

"The Act extended the rule of the Constitution to all courts, federal as well as state. *Mills* v. *Duryee*, 7 Cr. 481, 485." *Davis* v. *Davis*, 305 U. S. 32, 40.

had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska. Whether the land was Nebraska land depended entirely upon a factual question—whether a shift in the river's course had been caused by avulsion or accretion.[3] The respondent appeared in the Nebraska court and through counsel fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter of the controversy.[4] After a hearing the court found the issues in favor of the petitioners and ordered that title to the land be quieted in them. The respondent appealed, and the Supreme Court of Nebraska affirmed the judgment after a trial *de novo* on the record made in the lower court. The State Supreme Court specifically found that the rule of avulsion was applicable, that the land in question was in Nebraska, that the Nebraska courts therefore had jurisdiction of the subject matter of the litigation, and that title to the land was in the petitioners. *Durfee* v. *Keiffer,* 168 Neb. 272, 95 N. W. 2d 618. The respondent did not petition this Court for a writ of certiorari to review that judgment.

Two months later the respondent filed a suit against the petitioners in a Missouri court to quiet title to the same land. Her complaint alleged that the land was in Missouri. The suit was removed to a Federal District Court by reason of diversity of citizenship. The District Court after hearing evidence expressed the view that the land was in Missouri, but held that all the issues had been

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[3] Throughout this litigation there has been no dispute as to the controlling effect of this factual issue. See *Nebraska* v. *Iowa,* 143 U. S. 359, 370.

[4] This is, therefore, not a case in which a party, although afforded an opportunity to contest subject-matter jurisdiction, did not litigate the issue. Cf. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371.

adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata* and "is now binding upon this court." The Court of Appeals reversed, holding that the District Court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not applicable because the controversy involved land and a court in Missouri was therefore free to retry the question of the Nebraska court's jurisdiction over the subject matter. 308 F. 2d 209. We granted certiorari to consider a question important to the administration of justice in our federal system. 371 U. S. 946. For the reasons that follow, we reverse the judgment before us.

The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." [5] Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it. "By the Constitutional provision for full faith and credit, the local doctrines of *res judicata,* speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here." *Riley* v. *New York Trust Co.,* 315 U. S. 343, 349.

It is not questioned that the Nebraska courts would give full *res judicata* effect to the Nebraska judgment quieting title in the petitioners.[6] It is the respondent's

[5] See note 2, *supra.*

[6] The Nebraska Supreme Court has clearly postulated the relevant law of the State: "This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given pro-

position, however, that whatever effect the Nebraska courts might give to the Nebraska judgment, the federal court in Missouri was free independently to determine whether the Nebraska court in fact had jurisdiction over the subject matter, *i. e.*, whether the land in question was actually in Nebraska.

In support of this position the respondent relies upon the many decisions of this Court which have held that a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment. As Mr. Justice Bradley stated the doctrine in the leading case of *Thompson* v. *Whitman,* 18 Wall. 457, "we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." 18 Wall., at 469. The principle has been restated and applied in a variety of contexts.[7]

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ceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding. Brandeen v. Lau, 113 Neb. 34, 201 N. W. 665; County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569." *Gergen* v. *Western Union Life Ins. Co.,* 149 Neb. 203, 210; 30 N. W. 2d 558, 562.

[7] See, *e. g., D'Arcy* v. *Ketchum,* 11 How. 165; *Knowles* v. *Gaslight & Coke Co.,* 19 Wall. 58; *Hall* v. *Lanning,* 91 U. S. 160; *Cole* v. *Cunningham,* 133 U. S. 107; *Grover & Baker Machine Co.* v. *Radcliffe,* 137 U. S. 287; *Thormann* v. *Frame,* 176 U. S. 350; *Bell* v. *Bell,* 181 U. S. 175; *Andrews* v. *Andrews,* 188 U. S. 14; *National*

However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

With respect to questions of jurisdiction over the person,[8] this principle was unambiguously established in *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that question had been fully litigated in the Missouri forum. "Public policy," said the Court, "dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, pre-

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Exchange Bank v. *Wiley*, 195 U. S. 257; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25; *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348; *Grubb* v. *Public Utilities Comm'n*, 281 U. S. 470.

[8] It is not disputed in the present case that the Nebraska courts had jurisdiction over the respondent's person. She entered a general appearance in the trial court, and initiated the appeal to the Nebraska Supreme Court.

sents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." 283 U. S., at 525–526.[9]

Following the *Baldwin* case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. *Davis* v. *Davis,* 305 U. S. 32; *Stoll* v. *Gottlieb,* 305 U. S. 165; [10] *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66; *Sherrer* v. *Sherrer,* 334 U. S. 343.[11] In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.

In the *Davis* case it was held that the courts of the District of Columbia were required to give full faith and credit to a decree of absolute divorce rendered in Virginia, despite the claim that the Virginia court had lacked jurisdiction because the plaintiff in the Virginia proceedings

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[9] This decision was adhered to the following year in *American Surety Co.* v. *Baldwin,* 287 U. S. 156. In his opinion for a unanimous Court in that case, Mr. Justice Brandeis said: "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." 287 U. S., at 166.

[10] The question in *Stoll* was what effect the courts of Illinois must give to the judgment of a federal court sitting in that State. The case, therefore, did not directly involve the Full Faith and Credit Clause of the Constitution, but, like the present case, it involved the federal statute enacted to implement the constitutional provision. 305 U. S., at 170, n. 5. See note 2, *supra.*

[11] See also *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 403; *Jackson* v. *Irving Trust Co.,* 311 U. S. 494.

had not been domiciled in that State. In the course of the opinion the Court stated:

> "As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation." 305 U. S., at 40.

This doctrine of jurisdictional finality was applied even more unequivocally in *Treinies, supra,* involving title to personal property, and in *Sherrer, supra,* involving, like *Davis,* recognition of a foreign divorce decree. In *Treinies,* the rule was succinctly stated: "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." 308 U. S., at 78.

The reasons for such a rule are apparent. In the words of the Court's opinion in *Stoll* v. *Gottlieb, supra,* "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end

as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." 305 U. S., at 172.

To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb* v. *Feuerstein,* 308 U. S. 433; *United States* v. *United States Fidelity Co.,* 309 U. S. 506.[12] But no such overriding considerations are present here. While this Court has not before had occasion to consider the applicability of the rule of *Davis, Stoll, Treinies,* and *Sherrer* to a case involving real prop-

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[12] It is to be noted, however, that in neither of these cases had the jurisdictional issues actually been litigated in the first forum.

The Restatement of Conflict of Laws recognizes the possibility of such exceptions:

"Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

"(a) the lack of jurisdiction over the subject matter was clear;

"(b) the determination as to jurisdiction depended upon a question of law rather than of fact;

"(c) the court was one of limited and not of general jurisdiction;

"(d) the question of jurisdiction was not actually litigated;

"(e) the policy against the court's acting beyond its jurisdiction is strong." Restatement, Conflict of Laws, § 451 (2) (Supp. 1948). See Restatement, Judgments, § 10 (1942).

erty, we can discern no reason why the rule should not be fully applicable.[13]

It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States.[14] This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter "to be resolved by judicial determination." *Sherrer* v. *Sherrer,* 334 U. S., at 349. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative.

It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there. Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question. *Fowler* v. *Lindsey,* 3 Dall. 411; *New York* v.

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[13] In two previous cases the Court has expressly left open the question of the applicability of the rule of jurisdictional finality to cases involving real property. See *Stoll* v. *Gottlieb,* 305 U. S., at 176; *United States* v. *United States Fidelity Co.,* 309 U. S., at 514.

[14] See *Fall* v. *Eastin,* 215 U. S. 1; *Carpenter* v. *Strange,* 141 U. S. 87, 105–106; *Olmsted* v. *Olmsted,* 216 U. S. 386.

Connecticut, 4 Dall. 1; *Land* v. *Dollar,* 330 U. S. 731, 736–737. Either State may at any time protect its interest by initiating independent judicial proceedings here. Cf. *Missouri* v. *Nebraska,* 196 U. S. 23.[15]

For the reasons stated, we hold in this case that the federal court in Missouri had the power and, upon proper averments, the duty to inquire into the jurisdiction of the Nebraska courts to render the decree quieting title to the land in the petitioners. We further hold that when that inquiry disclosed, as it did, that the jurisdictional issues had been fully and fairly litigated by the parties and finally determined in the Nebraska courts, the federal court in Missouri was correct in ruling that further inquiry was precluded. Accordingly the judgment of the Court of Appeals is reversed, and that of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BLACK, concurring.

Petitioners and respondent dispute the ownership of a tract of land adjacent to the Missouri River, which is the boundary between Nebraska and Missouri. Resolution of this question turns on whether the land is in Nebraska or Missouri. Neither State, of course, has power to make a determination binding on the other as to which State the land is in. U. S. Const., Art. III, § 2; 28 U. S. C. § 1251 (a). However, in a private action brought by these Nebraska petitioners, the Nebraska Supreme Court has held that the disputed tract is in Nebraska. In the present suit, brought by this Missouri respondent in Missouri, the United States Court of Appeals has refused to be bound by the Nebraska court's judgment. I concur in

[15] The alternative of a negotiated settlement of any dispute between the States over the location of the boundary would also always be available. See U. S. Const., Art. I, § 10.

today's reversal of the Court of Appeals' judgment, but with the understanding that we are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two States under Art. I, § 10, that the disputed tract is in Missouri.

UNITED STATES *v.* STAPF ET AL., EXECUTORS AND TRUSTEES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 54. Argued October 23–24, 1963.—Decided December 2, 1963.

Respondents' decedent died in 1953 a resident and domiciliary of Texas. In addition to his separate estate, he owned a larger amount of property in community with his wife. His will required that his widow elect either to retain her one-half interest in the community property or to take under the will and allow its terms to govern the disposition of her community interest. If she elected to take under the will, she would be given, after specific bequests to others, one-third of the community property and one-third of her husband's separate estate; she would allow her one-half interest in the community property to pass into a trust for the benefit of the children; and the executors would pay "all and not merely one-half" of the community debts and administration expenses. She elected to take under the will and actually received less than she would have received had she retained her interest in the community property. *Held:*

1. Since the widow gave up more than she received, the estate is not entitled to any marital deduction under § 812 (e) of the Internal Revenue Code of 1939. Pp. 123–129.

2. Since half of the claims against the estate were chargeable to the widow's half of the community property, such claims could not be deducted in full from the decedent's gross estate as "claims against the estate," within the meaning of § 812 (b) (3). Pp. 130–133.

3. That portion of the administration expenses which was chargeable to the widow's share of the community property could not be deducted from the value of the estate as "administration expenses" under § 812 (b) (2). Pp. 133–134.

4. Even if the testator's assumption of responsibility for his wife's share of the community debts and for her share of administration expenses were treated as marital gifts, rather than as claims or expenses, no marital deduction could be allowed under § 812 (e) on account of such gifts, because the widow gave up more than she received. Pp. 134–135.

309 F. 2d 592, reversed and remanded.

Wayne G. Barnett argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson.*

W. M. Sutton argued the cause for respondents. With him on the brief was *H. A. Berry.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Respondents brought this suit against the Government in the District Court for the Northern District of Texas for a refund of estate taxes paid pursuant to an asserted deficiency. The Court of Appeals for the Fifth Circuit held that respondents were entitled to certain marital deductions under § 812 (e) of the Internal Revenue Code of 1939 [1] and also to deductions for other payments as

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[1] 62 Stat. 117 (1948), now Int. Rev. Code of 1954, § 2056 (b) (4)(B). The provisions involved are § 812 (e)(1)(A) and (E)(ii):

"(e) BEQUESTS, ETC., TO SURVIVING SPOUSE.—

"(1) ALLOWANCE OF MARITAL DEDUCTION.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

. . . . . .

"(E) Valuation Of Interest Passing To Surviving Spouse.—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

. . . . . .

"(ii) where such interest or property is incumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such incumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

"claims against the estate" and "administration expenses" under § 812 (b)(3) and (2) of the 1939 Code.[2] 309 F. 2d 592. We granted certiorari to consider questions of statutory interpretation important to the administration of the federal estate tax laws. 372 U. S. 928.

Lowell H. Stapf died testate on July 29, 1953, a resident and domiciliary of Texas, a community property jurisdiction. At the time of his death he owned, in addition to his separate estate, a substantial amount of property in community with his wife. His will required that his widow elect either to retain her one-half interest in the community or to take under the will and allow its terms to govern the disposition of her community interest. If Mrs. Stapf were to elect to take under the will, she would be given, after specific bequests to others, one-third of the community property and one-third of her husband's sepa-

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[2] 53 Stat. 123 (1939), now Int. Rev. Code of 1954, § 2053 (a). Subsequent references will be to the 1939 Code under which the case arose. The pertinent provisions of § 812 (b) authorize deductions for:

"(b) EXPENSES, LOSSES, INDEBTEDNESS, AND TAXES. — Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate, and

"(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

"as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth . . . ."

rate estate. By accepting this bequest she would allow her one-half interest in the community to pass, in accordance with the will, into a trust for the benefit of the children. It was further provided that if she chose to take under the will the executors were to pay "all and not merely one-half" of the community debts and administration expenses.

The relevant facts and computations are not in dispute. The decedent's separate property was valued at $65,100 and the community property at $258,105.[3] The only debts were community debts totalling $32,368. The administration expenses, including attorneys' fees, were $4,073. If Mrs. Stapf had not elected to take under the will, she would have retained her fully vested one-half interest in the community property ($129,052) which would have been charged with one-half of the community debts ($16,184) and 35% of the administration expenses ($1,426).[4] Thus, as the parties agree, she would have received a net of $111,443.

In fact Mrs. Stapf elected to take under the will. She received, after specific bequests to others, one-third of the combined separate and community property, a devise valued at $106,268,[5] which was $5,175 less than she would

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[3] The figures stated throughout are rounded to the nearer dollar.

[4] The apportionment of administration expenses was initially determined by a revenue examiner and was sustained by the District Court. 189 F. Supp. 830, 838.

[5] This includes $700 for an automobile specifically bequeathed to Mrs. Stapf. There is some question as to whether Mrs. Stapf should be credited with receiving the full value of the automobile ($1,400) or only a one-half interest ($700). For present purposes the difference is immaterial for it is insufficient to alter the basic fact that the widow did not receive a net benefit by electing to take under the will. We therefore accept the figures used by the courts below and consider Mrs. Stapf as receiving only a one-half interest ($700) in the automobile.

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have received had she retained her community property and refused to take under the will.[6]

In computing the net taxable estate, the executors claimed a marital deduction under § 812 (e)(1) of the Internal Revenue Code of 1939 for the full value of the one-third of decedent's separate estate ($22,367) which passed to his wife under the will. The executors also claimed a deduction for the entire $32,368 of community debts as "claims against the estate" under § 812 (b)(3) and for the entire $4,073 of expenses as "administration expenses" under § 812 (b)(2). The Commissioner of Internal Revenue disallowed the marital deduction and the deductions for claims and administration insofar as these represented debts (50%) and expenses (35%) chargeable to the wife's one-half of the community. Respondents then instituted this suit for a tax refund. The District Court allowed the full marital deduction but disallowed the disputed claims and expenses. 189 F. Supp. 830. On cross-appeals the Court of Appeals, with one judge dissenting on all issues, held that each of the claimed deductions was allowable in full. 309 F. 2d 592. For reasons stated below, we hold that the Commissioner was correct and that none of the disputed deductions is allowable.[7]

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[6] The parties agree that the net effect of taking under the will may be computed by another method. As explained by the Court of Appeals, "Computed differently but with the same result, the widow retained a one-third interest out of the one-half of the community owned by her, thereby transferring only a one-sixth interest under the election to take. Under this method of computation she transferred property having a valuation of $27,541.16 and received property being the one-third interest in the separate property of the husband and the one-half interest in the automobile of the aggregate value of the $22,366.66, making a net loss to her of $5,174.50." 309 F. 2d 592, 594.

[7] The Commissioner did in fact allow a marital deduction for $700, representing a one-half interest in the automobile. 309 F. 2d 592,

I. The Marital Deduction.

By electing to take under the will, Mrs. Stapf, in effect, agreed to accept the property devised to her and, in turn, to surrender property of greater value to the trust for the benefit of the children. This raises the question of whether a decedent's estate is allowed a marital deduction under § 812 (e)(1)(E)(ii) of the 1939 Code where the bequest to the surviving spouse is on the condition that she convey property of equivalent or greater value to her children. The Government contends that, for purposes of a marital deduction, "the value of the interest passing to the wife is the value of the property given her less the value of the property she is required to give another as a condition to receiving it." On this view, since the widow had no net benefit from the exercise of her election, the estate would be entitled to no marital deduction. Respondents reject this net benefit approach and argue that the plain meaning of the statute makes detriment to the surviving spouse immaterial.

Section 812 (e)(1)(A) provides that "in general" the marital deduction is for "the value of any interest in property which passes . . . from the decedent to his surviving spouse." Subparagraph (E) then deals specifically with the question of valuation:

> "(E) Valuation Of Interest Passing To Surviving Spouse.—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—
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> . . . . . .

597, n. 5. That allowance was not challenged by the Government in the District Court. We therefore do not review the judgment of the Court of Appeals insofar as it allows this $700 deduction.

> "(ii) where such interest or property is incumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such incumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

The disputed deduction turns upon the interpretation of (1) the introductory phrase "any obligation imposed by the decedent with respect to the passing of such interest," and (2) the concluding provision that "such . . . obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

The Court of Appeals, in allowing the claimed marital deduction, reasoned that since the valuation is to be "as if" a gift were being taxed, the legal analysis should be the same as if a husband had made an *inter vivos* gift to his wife on the condition that she give something to the children. In such a case, it was stated, the husband is taxable in the full amount for his gift. The detriment incurred by the wife would not ordinarily reduce the amount of the gift taxable to the husband, the original donor.[8] The court concluded:

> "Within gift tax confines the community property of the widow passing under the will of the husband to others may not be 'netted' against the devise to

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[8] See, *e. g., Commissioner* v. *Wemyss,* 324 U. S. 303. There the Court stated that under the Revenue Act of 1932 mere detriment to the transferee did not constitute the requisite "consideration in money or money's worth" to the transferor so as to relieve him of gift tax liability. Respondents' reliance on this case ignores that it involved neither a determination of who was to be considered the beneficial donee nor a valuation of the gift received by such donee.

the widow, and thus testator, were the transfer inter vivos, would be liable for gift taxes on the full value of the devise." 309 F. 2d 592, 598.

This conclusion, based on the alleged plain meaning of the final gift-amount clause of § 812 (e)(1)(E)(ii),[9] is not supported by a reading of the entire statutory provision. First, § 812 (e) allows a marital deduction only for the decedent's gifts or bequests which pass "to his surviving spouse." In the present case the effect of the devise was not to distribute wealth to the surviving spouse, but instead to transmit, through the widow, a gift to the couple's children. The gift-to-the-surviving-spouse terminology reflects concern with the status of the actual recipient or donee of the gift. What the statute provides is a "marital deduction"—a deduction for gifts *to the surviving spouse*—not a deduction for gifts to the children or a deduction for gifts to privately selected beneficiaries. The appropriate reference, therefore, is not to the value of the gift moving from the deceased spouse but to the net value of the gift received by the surviving spouse.

Second, the introductory phrases of § 812 (e)(1)(E)(ii) provide that the gift-amount determination is to be made "where such interest or property is incumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest . . . ." The Government, drawing upon the broad import of this language, argues: "An undertaking by the wife to convey property to a third person, upon which her receipt of property under the decedent's will is conditioned, is plainly an 'obligation imposed by the de-

[9] The portion of the language relied upon provides that the valuation be "in the same manner as if the amount of a gift to such spouse of such interest were being determined."

cedent with respect to the passing of such interest.'" Respondents contend that "incumbrance or obligation" refers only to "a payment to be made *out of* property passing to the surviving spouse." Respondents' narrow construction certainly is not compelled by a literal interpretation of the statutory language. Their construction would embrace only, for example, an obligation *on* the property passing whereas the statute speaks of an obligation *"with respect* to the passing" gift. Finally, to arrive at the real value of the gift "such . . . obligation shall be taken into account . . . ." In context we think this relates the gift-amount determination to the net economic interest received by the surviving spouse.

This interpretation is supported by authoritative declarations of congressional intent. The Senate Committee on Finance, in explaining the operation of the marital deduction, stated its understanding as follows:

> "If the decedent bequeaths certain property to his surviving spouse *subject,* however, *to her agreement,* or a charge on the property, for payment of $1,000 to X, the value of the bequest (and, accordingly, the value of the interest passing to the surviving spouse) is the value, reduced by $1,000, of such property." S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 6. (Emphasis added.)

The relevant Treasury Regulation is directly based upon, if not literally taken from, such expressions of legislative intent. Treas. Reg. 105, § 81.47c (b) (1949). The Regulation specifically includes an example of the kind of testamentary disposition involved in this case:

> "A decedent bequeathed certain securities to his wife in lieu of her interest in property held by them as community property under the law of the

> State of their residence. The wife elected to relinquish her community property interest and to take the bequest. For the purpose of the marital deduction, the value of the bequest is to be reduced by the value of the community property interest relinquished by the wife." [10]

We conclude, therefore, that the governing principle, approved by Congress and embodied in the Treasury Regulation,[11] must be that a marital deduction is allowable only to the extent that the property bequeathed to the surviving spouse exceeds in value the property such spouse is required to relinquish.

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[10] Treas. Reg. 105, § 81.47c (b)(3) (1949), now Treas. Reg. § 20.2056 (b)–4 (b)(3) (1958). The Regulation provides another relevant illustration "of property interests which passed from the decedent to his surviving spouse subject to the imposition of an obligation by the decedent: (1) A decedent devised a residence valued at $25,000 to his wife, with a direction that she pay $5,000 to his sister. For the purpose of the marital deduction, the value of the property interest passing to the wife is only $20,000."

See Lowndes and Kramer, Federal Estate and Gift Taxes (1962), § 17.4: "[W]hat the Regulations are driving at seems to be this. If a decedent bequeaths property to his wife in lieu of her interest in community property, which is not part of his estate and which does not pass to her from him, it seems clear that the only thing which the surviving spouse actually receives from the decedent is the excess of the interest bequeathed to her over and above the value of her interest in the community property. Therefore, this should be the only amount which qualifies for the marital deduction . . . ."

[11] This Court has frequently "given considerable and in some cases decisive weight to . . . interpretative Regulations of the Treasury and of other bodies that were not of adversary origin." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Although the weight to be given to an interpretative rule varies with its statutory and legislative context, a Treasury Regulation is particularly persuasive when, as in this case, it is supported by declarations of congressional intent.

Our conclusion concerning the congressionally intended result under § 812 (e)(1) accords with the general purpose of Congress in creating the marital deduction. The 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions.[12] Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes and to adhere to the patterns of state law, the marital deduction permits a deceased spouse, subject to certain requirements, to transfer free of taxes one-half of the non-community property to the surviving spouse. Although applicable to separately held property in a community property state, the primary thrust of this is to extend to taxpayers in common-law States the advantages of "estate splitting" otherwise available only in community property States. The purpose, however, is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includible in the surviving spouse's gross estate.[13] Respondents' construction of § 812 (e)(1) would, nevertheless, permit one-half of a spouse's wealth to pass from one generation to another without being subject either to gift or estate

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[12] See H. R. Rep. No. 1274, 80th Cong., 2d Sess., pp. 24–26; S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26–29; Sugarman, Estate and Gift Tax Equalization—The Marital Deduction (1948), 36 Cal. L. Rev. 223, 228–230.

[13] The congressional concern with the eventual taxability of marital-deduction property is indicated by the terminable interest rule of § 812 (e)(1)(B). See S. Rep. No. 1013, *supra*, note 12, p. 28; Warren and Surrey, Federal Estate and Gift Taxation (1961), pp. 759–760.

taxes.[14] We do not believe that this result, squarely contrary to the concept of the marital deduction, can be justified by the language of § 812 (e)(1). Furthermore, since in a community property jurisdiction one-half of the community normally vests in the wife, approval of the claimed deduction would create an opportunity for tax reduction that, as a practical matter, would be more readily available to couples in community property jurisdictions than to couples in common-law jurisdictions.[15] Such a result, again, would be unnecessarily inconsistent with a basic purpose of the statute.

Since in our opinion the plain meaning of § 812 (e)(1) does not require the interpretation advanced by respondents, the statute must be construed to accord with the clearly expressed congressional purposes and the relevant Treasury Regulation. We conclude that, for estate tax purposes, the value of a conditional bequest to a widow should be the value of the property given to her less the value of the property she is required to give to another. In this case the value of the property transferred to Mrs. Stapf ($106,268) must be reduced by the value of the community property she was required to relinquish ($111,443). Since she received no net benefit, the estate is entitled to no marital deduction.

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[14] The Court of Appeals recognized the effect of its decision: "Here estate taxes are due now on the property of the husband with the devise to the widow excluded. It is a part of the marital deduction or exclusion on which taxes are deferred to the estate of the widow to be assessed on so much of it as survives on another day. The net of the transfer by the widow became subject to gift taxes at the time of the transfer. The property transferred by the widow will, to the extent of an amount equal to the devise to her, escape both gift and estate taxes." 309 F. 2d 592, 598. For an illustration of the tax effects of the decision, see the dissent of Judge Wisdom. 309 F. 2d, at 608–609.

[15] See 76 Harv. L. Rev. 1671, 1675.

II. Claims Against the Estate and Administration Expenses.

A. *Claims Against the Estate.*

Section 812 (b)(3) of the 1939 Code provides for the deduction from the gross estate of "Such amounts . . . for claims against the estate . . . as are allowed by the laws of the jurisdiction . . . under which the estate is being administered . . . ." The community debts in this case total $32,368, consisting largely of taxes due for past income. The decedent's will directed that his executors pay "all and not merely one-half" of the community debts. Under Texas law, absent this provision, only one-half of the community debts would be charged to the decedent's half of the community. The issue presented is whether, as a result of the testamentary direction, a deduction may be taken for the entire amount of the community debts as "claims against the estate . . . allowed by" state law.

The first question to consider is whether the claim is of the type intended to be deductible.[16] It cannot be denied that where the executors are directed to pay the debts of another party the substance of the direction is to confer a beneficial gift on that party. Respondents' contentions in effect require that § 812 (b)—designed to

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[16] See *Morgan* v. *Commissioner*, 309 U. S. 78, 80–81 (concerning the meaning of "general power of appointment" under a federal revenue act): "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law." See Hart and Wechsler, The Federal Courts and the Federal System (1953), pp. 456–457.

allow deductions for "expenses, losses, indebtedness, and taxes"—be construed to authorize tax-free gifts despite the general policy that wealth not be transmitted tax free at death.[17] The provisions of § 812 (b) demonstrate that it was not intended to allow deductions for voluntary transfers that deplete the estate merely because the testator described the transfers or payments as the settlement of "claims" or "debts." This intent is evidenced by the treatment of claims or debts founded upon promises or agreements. The section carefully restricts the deductible amount "in the case of claims against the estate . . . or any indebtedness . . . , when founded upon a promise or agreement, . . . to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. . . ." Absent such an offset or augmentation of the estate, a testator could disguise transfers as payments in settlement of debts and claims and thus obtain deductions for transmitting gifts. As this requirement suggests, a deduction under § 812 (b) should not be predicated solely on the finding that a promise or claim is legally enforceable under the state laws governing the validity of contracts and wills.[18] The claims referred to by the statute are those "claims against" the property of the deceased which are allowed by and enforceable under the laws of the administering State and not those claims created by the deceased's gratuitous assumption of debts attaching to the property of another.

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[17] See, *e. g.*, Lowndes and Kramer, *op. cit.*, *supra*, note 10, §§ 1.2, 2.2.

[18] The majority of the Court of Appeals passed over the adequate-consideration provision because "the debts here were in the main for income taxes and ad valorem taxes, debts imposed by law." 309 F. 2d 592, 596. However, since one-half of the taxes were chargeable to the wife's community property, the disputed claims were in fact imposed on the estate only by the terms of the will and the widow's election to take under those terms.

The pertinent Treasury Regulation states that the deductible claims are "such only as represent personal obligations of the decedent . . . ." [19] We cannot agree with respondents' contention that the debts chargeable to the wife's community property are "personal obligations" of the decedent within the meaning of the Regulation. It is true, as the Court of Appeals stated, that under Texas law the husband, as manager of the community property, was personally liable for the full amount of community debts. 309 F. 2d 592, 596. His liability for the portion of debts chargeable to his wife's community property was, however, accompanied by a right over against her half of the community. *Ibid.* The basic rule of Texas law is that the community is liable for its debts, and, accordingly, half the debts attach to the wife's community property. Since the will of the decedent cannot be allowed to define what is an "obligation" or a "claim," where, as in this case, the community is solvent, the debts chargeable to the wife's property cannot realistically be deemed "personal obligations" of the decedent or "claims against" his estate.

The provisions of § 812 (b), like those of § 812 (e) allowing marital deductions, must be analyzed in light of the congressional purpose of equalizing the incidence of

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[19] Treas. Reg. 105, § 81.36 (1942), now Treas. Reg. § 20.2053–4 (1958): "Claims against the estate.—The amounts that may be deducted under this heading are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. . . . Only claims enforceable against the decedent's estate may be deducted. . . ." With regard to the disputed deduction for the wife's share of community debts, it has been suggested that: "because the decedent's estate is not bound, even under state law, until after the widow elects, allowance of the deduction may be incompatible with the regulation requiring that the claims be in existence at the decedent's death. This requirement could only be fulfilled by an election which would work retroactively." 37 Tul. L. Rev. 297, 315.

taxation upon couples in common-law and community property jurisdictions. If the deductible "claims" were to include all community debts that might be, in a literal sense, "personal obligations" of the husband as surety, then a married couple in a community property State might readily increase their tax-free estate transfers. For example, by borrowing against the value of the community property and then requiring that his executors pay all community debts, the husband could obtain a tax deduction for what would in effect be a testamentary gift to his wife.[20] That gift might or might not qualify for treatment as a marital deduction,[21] but it certainly was not intended to be made deductible by § 812 (b). A contrary interpretation of § 812 (b)(3) would, in our opinion, generally tend to create unwarranted tax advantages for couples in community property States.[22]

B. *Administration Expenses.*

The testator's will provided that administration expenses, as well as community debts, should be paid entirely out of his half of the community property. The administration expenses totalled $4,073. Under Texas law an allocable share of these costs was chargeable to the

[20] 309 F. 2d 592, 604 (Wisdom, J., dissenting): "For example, in the twilight of their years, a couple with community property worth $1,000,000 could borrow an additional $1,000,000 and invest it in securities, using the $2,000,000 as collateral. As a result, the community property would be increased from one million to two million dollars, and would have debts against it of one million dollars. If the husband provided by will that all community debts be paid out of his share of the community property, upon his death his share of the community property would be worth $1,000,000. All of this, however, would be matched by deductible community debts. Thus, under the Court's holding, the entire 'net' estate of $1,000,000 would pass, untaxed, to the wife."

[21] See *infra*, p. 134.

[22] See 76 Harv. L. Rev. 1671, 1675.

surviving spouse's community property. That allocable share was determined to be 35% or $1,426. The issue is whether the executors' payment of the costs attributable to the wife's property are deductible "administration expenses . . . allowed by" the law of the State under § 812 (b)(2).

The interpretation of "administration expenses" under § 812 (b)(2) involves substantially the same considerations that determine the interpretation of "claims against the estate" under § 812 (b)(3). In both instances, the testator, by directing that payment be made of debts chargeable to another or to non-estate property, reduces his net estate and in effect confers a gift or bequest upon another. We believe that the provisions of § 812 (b), like those of § 812 (e) providing the marital deduction, must be read in light of the general policies of taxing the transmission of wealth at death and of equalizing the tax treatment of couples in common-law and in community property jurisdictions. We hold, therefore, that a deduction may not be allowed for administration costs chargeable to the surviving spouse's community property.

C. *The Payment of Debts and Expenses as a Marital Gift.*

In our view the payments made as a result of the testator's assumption of responsibility both for his wife's share of the community debts and for her share of the administration expenses are more properly characterized as marital gifts rather than as "claims" or "expenses." Since these gifts were to the surviving spouse, respondents contend that a marital deduction should be allowed. Our interpretation of § 812 (e) disposes of this argument, for under any view of the facts, even if these items are deemed to be gifts to the wife, the will required her to surrender property more valuable than the bequests

she received.[23] In the absence of a net benefit passing to the surviving spouse, no marital deduction is allowable.

The judgment of the Court of Appeals for the Fifth Circuit is reversed and the case remanded for proceedings in accordance with this opinion.

It is so ordered.

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[23] Respondents concede that "even with the benefit of the bequest of 1/3 of the separate property to her and the benefit of the debt and expense assumption provisions, Mrs. Stapf ended up with less than she would have owned had she elected to take against the will." Her share of the gross community assets was $129,052. The portion of the debts ($16,184) and administration expenses ($1,426) chargeable to her was $17,610. When the assumption of the debts and expenses is viewed as a legacy, the effect of taking under the will may be summarized as follows: Mrs. Stapf, in effect retained one-third of the total community property remaining after certain bequests ($83,902; see note 5, *supra*) and allowed the balance of her community ($129,052 minus $83,902) to pass into the trust for the children. Thus she gave up property worth $45,151. In return she was given separate property valued at $22,367 (see note 6, *supra*) and the benefit of the debt and expense assumption, or $17,610, a total transfer of $39,976. Thus, the exchange produced a net loss to Mrs. Stapf of $5,175.

DRESNER ET AL. *v.* CITY OF TALLAHASSEE.

CERTIORARI TO THE CIRCUIT COURT OF FLORIDA, SECOND JUDICIAL CIRCUIT.

No. 35. Argued October 23, 1963.—Questions certified to Supreme Court of Florida December 2, 1963.

Considering that there are questions of Florida law answers to which are necessary to enable this Court to determine its jurisdiction over this cause, and with respect to which there appear to be no precise controlling precedents in the decisions of the Supreme Court of Florida, this Court directs that certain questions be certified to the Supreme Court of Florida, pursuant to Rule 4.61 of the Florida Appellate Rules. Pp. 136–139.

For opinion below, see *post*, p. 139.

Howard Dixon and *Carl Rachlin* argued the cause for petitioners. With them on the briefs were *Alfred I. Hopkins* and *Tobias Simon*.

Edward J. Hill and *Roy T. Rhodes* argued the cause for respondent. With them on the brief was *Rivers Buford, Jr.*

PER CURIAM.

Considering that there are questions of Florida law answers to which are necessary to enable this Court to determine its jurisdiction over this cause, and with respect to which there appear to be no precise controlling precedents in the decisions of the Supreme Court of Florida, this Court desires to certify to the Supreme Court of Florida, pursuant to Rule 4.61 of the Florida Appellate Rules, the questions stated hereafter.

The petitioners have been tried and convicted in the Municipal Court of Tallahassee for unlawful assembly, under a municipal ordinance which incorporates by refer-

ence the state unlawful assembly statute.[1] The convictions were affirmed in the Circuit Court of the Second Judicial District, Leon County, Florida.[2] The unre-

[1] Section 23–38 of the Tallahassee Code, which provides that it shall be unlawful for any person to commit an act which is or shall be recognized by the laws of the State as a misdemeanor.

Chapter 61–237, Laws of 1961, Florida Statutes § 870.04 provides:

"If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality, the sheriff or his deputies, or any constable or justice of the peace of the county, or the mayor, or any commissioner, councilman, alderman or police officer of the said city or municipality, or any officer or member of the florida [*sic*] highway patrol, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such rioter or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, refuses or neglects to obey such command, or, when required by such officers to depart from the place, refuses and neglects to do so, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly."

The State refers in its brief to a Tallahassee ordinance specifically prohibiting unlawful assembly, which is also included in the record by stipulation of the parties. This ordinance is similar in substance to the state statute quoted above. However, all parties seemingly have proceeded on the premise that the petitioners were charged and convicted only under the general ordinance which incorporated the state statute. The Circuit Court plainly decided the case on that basis. See Appendix, *post*, p. 139.

[2] The petitioners appealed their convictions directly to the Supreme Court of Florida. The Supreme Court ruled that it lacked jurisdiction and ordered the appeal transferred to the Circuit Court. 134 So. 2d 228.

After the convictions were affirmed in the Circuit Court and prior to the filing of a petition for certiorari in this Court, the petitioners attempted to file, and subsequently withdrew, a petition for certiorari in the District Court of Appeal.

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ported opinion of that court, a copy of which, taken from the record, is attached to this certificate as an Appendix, contains a statement of the facts on which the convictions rested. The petitioners sought certiorari in this Court, which the City of Tallahassee opposed on the ground, *inter alia,* that the judgment of the Circuit Court was not "rendered by the highest court of a State in which a decision could be had," as required by 28 U. S. C. § 1257. This Court granted certiorari, 372 U. S. 963, and subsequently directed counsel to file briefs on the jurisdictional issue, which counsel have done.

The questions which this Court desires to certify are:

1. On a timely petition for writ of certiorari or other process, does the Florida District Court of Appeal or any other court of Florida have jurisdiction to review a judgment of the Circuit Court affirming a conviction in the Municipal Court of a violation of a municipal ordinance which incorporates a state statute by reference, where the questions presented for review concern the federal constitutionality of the ordinance on its face and as applied?

2. If the District Court of Appeal or any other court of Florida does have such jurisdiction and had granted review in this case by way of a writ of certiorari or other process, would it have been empowered to consider fully each of the following contentions, all indisputably properly preserved:

> (a) "Petitioners were peaceable and orderly at all times; hence, there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore Petitioners have been denied due process of law under the Fourteenth Amendment";
>
> (b) "The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment";

(c) "The arrests and convictions herein constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution";

(d) "The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment"?

If not, in what respects would the scope of review have been limited?

The Clerk of this Court is directed to transmit this certificate, signed by THE CHIEF JUSTICE and under the official seal of the Court, to the Supreme Court of Florida, and simultaneously to transmit copies thereof to the attorneys for the respective parties.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA.*

Order Affirming Judgments.

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others [1] as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously occupy certain chairs and

*Entered August 16, 1962. (Footnote supplied.)

[1] Of these three one was acquitted and the other two were granted a nolle prosequi. (Original footnotes renumbered.)

seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded by a police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61–237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,[2] is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons . . . are unlawfully, riotously or tumultuously assembled in any . . . city or municipality . . . any . . . police officer of said city or municipality . . . shall go among the persons so assembled . . . and shall, in the name of the state command all the persons so assembled immediately

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[2] Sec. 23–38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

> and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present . . . when required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of . . . the persons unlawfully assembled and may be prosecuted and punished accordingly."

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court.

The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegregation. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time

and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride", as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus station a number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P. M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for

the flight. The other eight boarded the plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E. A. L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport terminal would close for the night at approximately

11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort security protection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gatherings of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified himself and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier

and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and fears of more unrest. He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were violative of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandise vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawful assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizen of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However, it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the

constitutions and laws of the nation and state for the declaring, securing and enforcement of constitutional and other legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accommodate and facilitate those legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the restaurant, which was closed. In the meantime their conduct and persistence was arousing increased re-

sentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minute cancellations prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However, such means must be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently presented to and adjudicated by the United States District Court for the Northern District of Florida. Brooks, et al. v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of fully and effectively delivering their message and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed.

Ben C. Willis, Circuit Judge

CHICAGO & EASTERN ILLINOIS RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 275. Decided December 2, 1963.

The Interstate Commerce Commission ordered appellants to cancel a joint barge-rail rate of $3.36 per net ton, in minimum lots of 5,000 net tons, for the movement of bituminous coal from Huntington, W. Va., via Mount Vernon, Ind., to the Chicago, Ill., district, on the ground that the rate was noncompensatory and, therefore, unjust and unreasonable under § 1 (5) of the Interstate Commerce Act. A three-judge Federal District Court dismissed appellants' suit to set aside the order, and appellants appealed directly to this Court. *Held:* The judgment is affirmed.

Affirmed.

Richard M. Freeman and *F. F. Vesper* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Elliott H. Moyer, Robert W. Ginnane and *Stanton P. Sender* for the United States and the Interstate Commerce Commission.

Richard J. Murphy, John W. Hanifin and *Robert H. Bierma* for rail carrier appellees.

PER CURIAM.

The motion to add the Baltimore and Ohio Railroad Company et al., as parties appellee, is granted. The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

In the Transportation Act of 1940 Congress amended the Interstate Commerce Act to authorize the Interstate Commerce Commission to regulate rates of interstate water carriers as well as of railroads and motor carriers. 54

Stat. 929, 49 U. S. C. § 901 *et seq.* At the time the Act was passed there was active opposition in Congress from those who feared that the Commission in exercising the power granted it would be too "railroad-minded." 84 Cong. Rec. 5965; see also *id.*, at 5880–5883. For this reason, as was pointed out in *Interstate Commerce Comm'n* v. *Mechling*, 330 U. S. 567, 574–577, and *Interstate Commerce Comm'n* v. *Inland Waterways Corp.*, 319 U. S. 671, 692 (dissenting opinion), the draftsmen of the legislation specifically wrote into the Act the "National Transportation Policy," 54 Stat. 899, 49 U. S. C. preceding § 1, making explicit the command of Congress that there should be a "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each." In the *Mechling* case, decided in 1947, and several times in recent years this Court and District Courts have had to protect inland barge lines from Commission action which would have frustrated the intent of Congress to secure for them the benefit of the inherent advantages of their low-cost mode of carriage. See generally *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 673 (dissenting opinion). Sometimes the Commission has used procedural delaying devices to deny barge lines their inherent advantage over railroads, see *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (D. C. N. D. Ala.), aff'd *sub nom. State Corporation Comm'n* v. *Arrow Transportation Co.*, 361 U. S. 353; [1] again, the Commission has taken away the

[1] ". . . [W]e would be remiss in our duty if we did not take note of the fact that for over eight years plaintiffs have been seeking relief in this proceeding from discriminatory rail rates which we find are in violation of the Interstate Commerce Act. Section 10 (e) of the Administrative Procedure Act provides that the reviewing court 'shall . . . compel agency action unlawfully withheld or unreasonably delayed.' It is the opinion of this court that the present case

inherent advantage of barge lines through "the device of a joint rate allowed carriers by rail but denied carriers by water," see *Dixie Carriers, Inc.*, v. *United States*, 351 U. S. 56, 59. Sometimes, as in the present case, the Commission has resorted to use of inadequate or obscure findings of fact. See, *e. g.*, *Interstate Commerce Comm'n* v. *Mechling*, 330 U. S. 567; see also *Mechling Barge Lines, Inc.*, v. *United States*, 368 U. S. 324, 331 (dissenting opinion).[2] And barge lines have been denied the benefit of their inherent advantage when railroad rates challenged and later found to be unlawful have been permitted to take effect because of the long delay of the Commission in passing upon their unlawfulness.[3]

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is an appropriate one for application of this statutory provision, and that the plaintiffs are entitled to prompt relief from the discriminatory rates presently in effect. The case is therefore remanded with instructions to the Commission to enter an order prescribing lawful, reasonable, and nondiscriminatory rates . . . ." 176 F. Supp., at 421.

[2] "The formula used here which lumps all through rail grain rates, irrespective of the services rendered, to give rail-carried grain a preferred rate over barge-carried grain, is indistinguishable in cause and consequence from an order which directly raises barge rates to relieve the railroads from barge competition. In any event, there has been no showing by the Commission as to how much, if any, of the 3-cent reshipping rate increase is attributable to the fact that ex-barge grain requires more terminal service on the average than does ex-rail grain." *Interstate Commerce Comm'n* v. *Mechling*, 330 U. S. 567, at 582.

[3] The unfolding of such an episode can be seen in the *Arrow* litigation, in which railroads proposed suddenly to cut their rates for all-rail grain shipments to the Southeast by more than half. Although the District Court subsequently found that the rates if approved probably would put the competing barge lines out of business in a short time, the Commission still had taken no action after seven months and so under the statute the rates went into effect. For a history of the *Arrow* litigation, see *Arrow Transportation Co.* v. *Southern R. Co.*, Civil No. 10,224 (D. C. N. D. Ala.), Aug. 3, 1962 (denying, for lack of jurisdiction, injunction of unlawful railroad rates); *Arrow Trans-*

Therefore it may be significant that the Commission in the present case, at the instance of the large Eastern railroads and without finding basic facts to support its conclusion, disallowed as noncompensatory a proposed joint rate of a small railroad and a barge line which would give shippers of coal from West Virginia and eastern Kentucky to Chicago the advantage of a rate appreciably less than that charged by the Eastern railroads for the same haul. 315 I. C. C. 129. In doing this the Commission denies the small railroad the right to ship coal for a division of $2.04 per ton in a barge-rail rate and leaves it with no alternative, if it wants this business, but to accept a division of $1.66 per ton for a substantially identical haul in combination with one of the large Eastern railroads. The obscure report of the Commission leaves an impression that its order may, in violation of the congressional will, have nullified an inherent advantage of the barge line and the cooperating railroad. It is true

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portation Co. v. *Southern R. Co.*, 83 Sup. Ct. 1 (in chambers) (extending order of circuit judges temporarily restraining rates); *Arrow Transportation Co.* v. *Southern R. Co.*, 308 F. 2d 181 (C. A. 5th Cir.) (affirming District Court); *Arrow Transportation Co.* v. *Southern R. Co.*, 83 Sup. Ct. 3 (in chambers) (restraining rates pending disposition of case by Supreme Court); *Grain in Multiple-Car Shipments—River Crossings to the South,* I. C. C. Division 2, 318 I. C. C. 641 (upholding unlawful rates in part); *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (affirming Court of Appeals, thereby permitting rates to take effect). In short, Division 2 of the Commission waited 17 months before taking any action on the protest of the barge lines, thereby permitting rates to take effect which the District Court had said would destroy the barge lines. And it was nearly six months more before the full Commission on reconsideration held the rates unlawful. *Grain in Multiple-Car Shipments—River Crossings to the South,* I. &. S. Docket No. 7656, July 1, 1963, 321 I. C. C. 582. The same rates remain in effect today, for the railroads have obtained an order restraining the Commission's latest order. *Cincinnati, N. O. & T. P. R. Co.* v. *United States,* 220 F. Supp. 46 (D. C. S. D. Ohio).

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that the Commission clearly found as an ultimate fact that the joint barge-rail rate was noncompensatory, and also set forth a series of figures which it said represented elements of cost and added them together to obtain a figure 5.6 cents per ton higher than the proposed rate. I have checked the Commission's addition, and find it correct. But when I turn to what should be the basic findings of fact to support the accuracy of these figures, any illusory clarity in the Commission's report vanishes. I have examined the report with all the care of which I am capable in an effort to determine whether its ultimate conclusion is supported by substantial evidence. I am compelled to say that the Commission could have informed me just as well if it had written its so-called findings in ancient Sanskrit. I get no more enlightenment from the findings of fact and law of the District Court which left this Commission order standing on the legal assumption, plainly erroneous under decisions of this Court as I shall later point out, that the Commission's ultimate conclusion was enough, without the support of basic findings of fact. Nor have the labored and at times inconsistent efforts of government counsel and counsel for the Eastern railroads been successful in transforming the Commission's "findings" into meaningful English. Nevertheless, our Court approves both the action of the Commission and the ruling of the District Court without even permitting the proponents of the barge-rail rate to be heard in oral argument. While such summary treatment often is warranted,[4] I am constrained to say that in the present case it is so unjustified as to deny the right of direct appeal from the District Court which Congress authorized, see 28 U. S. C. § 1253, and which should never be treated lightly since it makes ours the only existing

[4] See Douglas, The Supreme Court and Its Case Load, 45 Cornell L. Q. 401.

court of review. I am sorry that the Court has not chosen to write an opinion to support its affirmance. I must admit for myself that I would find the task impossible and the attempt embarrassing.

Summary affirmance is particularly out of place here because the District Court proceeded on a clearly incorrect assumption of law, one contrary on its face to the command of Congress in the Administrative Procedure Act, and one which, in being approved here, apparently overrules a line of previous decisions of this Court. The District Court ruled that "the Commission is only required to set out ultimate and not evidentiary facts supporting its conclusions." With this contrast the requirement of § 8 (b) of the Administrative Procedure Act, 5 U. S. C. § 1007 (b), that "all decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact . . . ." Contrast also statements by this Court that "findings based on the evidence must embrace the basic facts which are needed to sustain the order," *Morgan* v. *United States,* 298 U. S. 468, 480, and that "we have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest." *Colorado-Wyoming Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 626, 634. See also, *e. g., Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193, 201–202; *Florida* v. *United States,* 282 U. S. 194, 215.

The insufficiency of the Commission's basic findings is made clearer by the facts and circumstances of this case. The Chicago and Eastern Illinois Railroad, appellant here, operates a line from the southern Indiana town of Mount Vernon, on the Ohio River, to the steel plants of the Chicago area. Most coal shipped to Chicago for steelmaking comes from the West Virginia area over the large Eastern railroads, intervening appellees, which, although authorized if not required by §§ 3 (4),

15 (3) and 15 (4) of the Interstate Commerce Act, 24 Stat. 380, 384, as amended, 49 U. S. C. §§ 3 (4), 15 (3), 15 (4), have refused to establish joint rates with any barge line. Some years ago the C&EI filed a tariff for hauling coal which came to Mount Vernon by barge. The Eastern roads protested. The Commission refused to approve a rate lower than $2.045 per ton, which it found to be the C&EI's 1957 cost. 308 I. C. C. 87; 310 I. C. C. 181. The C&EI then turned to the Ohio River Company, a barge line operating down the Ohio from the coal mines to Mount Vernon, and established with it a joint rate of $3.36, of which the railroad's share was to be $2.04. The joint rate saved paperwork and the expense of weighing coal transferred from the barges. The Eastern lines were charging $4.75 for the all-rail shipment.

The Eastern roads swiftly demanded that the ICC set aside the joint rate, claiming it was below cost and therefore illegal under § 1 (5) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 (5). Both the C&EI and the Eastern roads presented cost averages for each step of the operation. There were disputes on many factual points, and when the smoke had cleared the Commission emerged with its own set of figures, unlike that of either party, though the Commission did not make clear, and no one else in my judgment could tell, exactly why. In its opinion the Commission simply added up the figures it had mysteriously produced, found the sum to be $3.416, and held the rate proposed by the C&EI and the barge line to be illegal as 5.6 cents below cost. Review in the District Court produced some embarrassment, for both the Commission and the Eastern railroads filed briefs to demonstrate the crystal-clarity of the Commission's findings; however, their respective explanations of how the Commission had arrived at the figure it had were in part inconsistent.

One example should suffice to demonstrate the puzzling nature of the "findings" which the District Court upheld. Representatives of the C&EI testified that trains from Mount Vernon would, instead of being switched and weighed as they had been before the joint tariff, pass right through the switching yard without stopping except perhaps to change crews. The Eastern lines contended that the total costs should include the costs of weighing and switching, as before. The Commission finally made no charge for weighing, but charged for switching the cars just the same. Why the cars would be switched if they were not going to be weighed is not explained. No witness for either party had suggested such a thing. This switching charge alone accounts for 4.2 cents of the 5.6 cents on which the Commission relied to invalidate the tariff. The record reveals other disputes, resolved whether by analysis, inattention or whimsy no one can tell. The Commission's lawyers urged in the District Court that even if there was no way of justifying the 4.2 cents charge, it really didn't make any difference because that alone would not suffice to bring the total costs down to the level of the tariff. In fact, said the Commission, it "could have met all legal requirements by accepting *in toto* protestants' figures"; in effect, that the purpose of the hearing was not to determine what costs really were, but rather to produce a report setting forth figures to justify a conclusion. Heretofore I had thought that orders of administrative agencies were not to be sustained unless based on substantial evidence supported by the record. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. Yet how can this Court tell whether there was substantial evidence when it cannot tell how the Commission arrived at its figures? "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago,*

M., St. P. & P. R. Co., 294 U. S. 499, 511. Explicit reasons for its result would seem all the more called for where the Commission under its earlier decisions had compelled those protesting a proposed initial rate like that in this case to bear the burden of proving the rate's invalidity. See, *e. g.*, *Cotton from New Orleans*, 49 I. C. C. 751; *Bay State Milling Co.* v. *Great Lakes Transit Corp.*, 43 I. C. C. 338. The opinion of the Commission here means simply that the Commission strikes down the tariff, and reviewing courts will please trust that it had good reasons for doing so.

Furthermore, in *Interstate Commerce Comm'n* v. *Mechling*, 330 U. S. 567, 581–583, we held that use by the Commission of general formulas and unsifted averages could not take the place of findings. Yet the Commission here admits to basing much of its result on averages taken from the 1959 annual report of the C&EI on all its operations, leaving unanswered and unrebutted the protests of the C&EI that many costs which it incurs on other routes are not applicable to the Mount Vernon-Chicago run. In addition, the Commission increased costs taken from the annual report by 2.9% on the theory that operating expenses of the C&EI had increased by that amount during the year between the time of the report and the time of the hearing. This figure was stated to be the increase in costs of all railroads in the United States for the period. The C&EI protested that comparison of its 1957 and 1959 annual reports showed that many of its costs had been, contrary to any national average, decreasing slightly, and argued that there was no basis for the apparent conclusion that its costs had not continued to decrease, however much those of other railroads might have increased. But so fond was the Commission of its 2.9% "trending factor" that it seems to have included it as a part of the cost of the barge segment of the joint rate as well, without explaining how a supposed national increase in cost of labor and equipment for railroads is necessarily accompanied by one

for barge lines also. I am unable to grasp the logic which apparently determined that increases in costs of steel rails and maintenance of rolling stock made the Ohio River Company's barges more expensive to operate.

It appears that the Commission has ignored commands of Congress and of this Court. The large railroads have succeeded in this case in doing a great injury to a barge line and to a small railroad which dared willingly to cooperate with another mode of transport, as the law required it to do, in order to profit from the inherent advantages of each and thereby benefit the public. The Commission asks us to believe that the C&EI schemed to carry on an operation on which it would lose money, losing greater and greater sums the more coal it hauled, presumably in the hope of living on its capital until it had driven out of business such companies as the New York Central and the Pennsylvania. I find this a difficult proposition to accept, and should like to have the Commission explain in plain understandable English how it reached such a conclusion. Unfortunately, the report as it stands makes it impossible for me to say whether the ultimate findings are supported by substantial evidence or not. Yet instead of requiring the Commission to comply with the law at least sufficiently that its acts may be reviewed, my Brethren silently affirm a lower court judgment which I think is completely out of line with the mandate of Congress and our past emphatic holdings. The Commission apparently seeks to make a rubber stamp of any court reviewing its orders. I do not like that role. If summary disposition is in order, I should think reversal the appropriate judgment.

MEEKER ET UX. *v.* AMBASSADOR OIL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 46. Argued November 19–20, 1963.—Decided December 2, 1963.

308 F. 2d 875, reversed.

O. R. Adams, Jr. argued the cause for petitioners. With him on the brief was *R. F. Deacon Arledge.*

C. Harold Thweatt argued the cause for respondent. With him on the brief was *Vivian Diffendaffer.*

PER CURIAM.

The judgment of the Court of Appeals for the Tenth Circuit is reversed. *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500; *Dairy Queen, Inc.*, v. *Wood*, 369 U. S. 469.

BERRY *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

No. 163, Misc. Decided December 2, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Michael R. Canestrano for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, for further consideration in light of *Gideon* v. *Wainwright*, 372 U. S. 335.

KIRKLAND *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 465. Decided December 2, 1963.

Appeal dismissed and certiorari denied.

Clyde W. Woody for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

ABERNATHY ET AL. *v.* EASTERN AIR LINES, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 450. Decided December 2, 1963.*

Appeals dismissed and certiorari denied.

Reported below: 259 N. C. 190, 130 S. E. 2d 292.

Whiteford S. Blakeney for appellants in No. 450. *Wade W. Mitchem* for appellants in No. 451.

William D. Holoman for appellee Employment Security Commission of North Carolina.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

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*Together with No. 451, *Charlotte Council, Air Line Pilots Association, et al.* v. *Eastern Air Lines, Inc., et al.*, also on appeal from the same Court.

UNITED STATES *v.* BEHRENS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 86. Argued October 17, 1963.—Decided December 9, 1963.

Respondent was convicted in a Federal District Court of an offense punishable under 18 U. S. C. § 113 (a) by imprisonment for not more than 20 years. The Trial Judge issued an oral order under 18 U. S. C. § 4208 (b) committing respondent to the custody of the Attorney General pending receipt of a report from the Bureau of Prisons. His order provided that, after the report was received, respondent's commitment, deemed to be for 20 years, would "be subject to modification in accordance with" § 4208 (b). After the report was received, the Trial Court entered an order fixing the period of imprisonment at 5 years and providing that the Board of Parole might decide when respondent should be eligible for parole. Neither respondent nor his counsel was present when this order was entered, and respondent subsequently moved to vacate sentence under 28 U. S. C. § 2255. *Held:* The first order under § 4208 (b) was a preliminary commitment postponing action as to the final sentence; the later order fixing the sentence at 5 years was an "imposition of sentence," within the meaning of Federal Rule of Criminal Procedure 43; and the District Court erred in fixing final sentence in the absence of respondent and his counsel. Pp. 162–166.

312 F. 2d 223, affirmed.

Louis F. Claiborne argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Ralph S. Spritzer, Beatrice Rosenberg* and *Theodore George Gilinsky.*

Aribert L. Young argued the cause and filed a brief for respondent.

Leon B. Polsky filed a brief for the Legal Aid Society, as *amicus curiae,* urging affirmance.

Mr. Justice Black delivered the opinion of the Court.

Respondent was convicted in a United States District Court of an assault with intent to murder, an offense

punishable under 18 U. S. C. § 113 (a) "by imprisonment for not more than twenty years." Desiring more detailed information as a basis for determining the sentence to be imposed, the trial judge decided to proceed "under the flexible provisions of [§] 4208" of 18 U. S. C. Accordingly, he committed respondent to the custody of the Attorney General to await a study by the Director of the Bureau of Prisons of respondent's previous delinquency, criminal experience, social background, etc. His order provided that after the results of the study and the Director's recommendations were reported to the court, respondent's commitment, deemed to be for 20 years, would "be subject to modification in accordance with Title 18 U. S. C. 4208 (b)." [1]

After the Director's report was received, the trial court entered an order providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years" and that the Board of Parole might decide when the respondent should be eligible for parole. Neither respondent nor his counsel was present when this modification of

[1] 18 U. S. C. § 4208 (b) provides:

"If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

the court's previous commitment under § 4208 (b) was entered. No direct appeal was taken, but respondent moved to vacate sentence under 28 U. S. C. § 2255. The trial court denied relief, but the Court of Appeals reversed and remanded with directions to vacate the sentence on the ground that it was error for the district judge to impose the final sentence under § 4208 (b) in the absence of petitioner and his counsel.[2] In another case, *Corey* v. *United States,* 307 F. 2d 839, the Court of Appeals for the First Circuit held that it was the original commitment under § 4208 (b), not the fixing of the final sentence, which marked the point from which time to appeal began running. Because of the disagreement between the two appellate courts' interpretation of § 4208 (b) and the general confusion in District Courts and Courts of Appeals as to this section's exact meaning and effect, we granted certiorari in both cases.[3]

In asking that we grant certiorari in the present case, the Solicitor General conceded that if the action of the District Court in fixing the final term of imprisonment under § 4208 (b) was a final judgment for the purposes of appeal, then the defendant would plainly be entitled to have himself and his counsel present when the final action was taken. We have decided today, for reasons set out in our opinion in the *Corey* case, *post,* p. 169, that the action of a District Court finally determining under § 4208 (b) the sentence to be imposed upon a defendant is a final, appealable order. For those reasons as well as those set out below, we hold that the District Court erred in the present case when, modifying its original oral § 4208 (b) order, it fixed the final sentence in the absence of respondent and his counsel. It is plain that as far as the sentence is concerned the original order entered

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[2] 312 F. 2d 223.

[3] 371 U. S. 966; 373 U. S. 902.

under § 4208 (b) is wholly tentative. That section merely provides that commitment of a defendant to the custody of the Attorney General "shall be deemed to be for the maximum sentence," but does not make that the final sentence. The whole point of using § 4208 (b) is, in its own language, to get "more detailed information as a basis for determining the sentence *to be imposed* . . . ." (Emphasis supplied.) It is only after the Director of the Bureau of Prisons makes his report that the court makes its final decision as to what the sentence will be. Rule 43 of the Federal Rules of Criminal Procedure specifically requires that the defendant be present "at every stage of the trial including . . . the imposition of sentence . . . ." It is true that the same rule provides that a defendant's presence is not required when his sentence is reduced under Rule 35. But a reduction of sentence under Rule 35 is quite different from the final determination under § 4208 (b) of what a sentence is to be. Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect. There is no such finality of sentence at a § 4208 (b) preliminary commitment. The use of § 4208 (b) *postpones* action as to the final sentence; by using that section the court decides to await studies and reports of a defendant's background, mental and physical health, etc., to assist the judge in making up his mind as to what the final sentence shall be. It is only then that the judge's final words are spoken and the defendant's punishment is fixed. It is then that the right of the defendant to be afforded an opportunity to make a statement to the judge in his own behalf is of most importance. This right, ancient in the law, is recognized by Rule 32 (a) of the Federal Criminal Rules, which requires the court to "afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." This right would be largely lost in the § 4208 proceeding if for ad-

ministrative convenience the defendant were not permitted to invoke it when the sentence that counts is pronounced.[4] We hold that it was error to impose this sentence in the absence of respondent and his counsel.

Affirmed.

MR. JUSTICE HARLAN, concurring in the result.

I agree with the result reached in this case, but not with all of the reasoning of my Brother BLACK'S opinion. More particularly, disagreeing as I do with the rationale of the *Corey* decision, *post,* p. 169, I draw no support from it for the conclusion here reached.

The language of § 4208 (b) is not explicit on the question whether a defendant must be allowed to be present when the District Court imposes final sentence.[1] It is,

[4] It is true that the House Committee on the Judiciary in reporting favorably on a proposed section identical to § 4208 (b) indicated that it saw no necessity for a defendant being present when final action on his sentence was taken. H. R. Rep. No. 1946, 85th Cong., 2d Sess., p. 10. This section failed of passage in the House but an identical one was added by the Senate and adopted without discussion of the point in the Senate committee and conference reports. See S. Rep. No. 2013, 85th Cong., 2d Sess.; H. R. Rep. No. 2579, 85th Cong., 2d Sess. No language supporting this position appeared in the Senate bill or in the Act itself. We are not inclined to expand the language of the section, and thereby make necessary a constitutional decision, by reading the silence of the Act as depriving a defendant of a right to urge upon the court reasons for leniency at the time when the judge at last has the relevant materials for decision before him.

[1] Section 4208 (b) provides:

"If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not

however, clear that the statute does not contemplate that the district judge will have deliberated and decided upon an appropriate sentence at the time of the original commitment. As the first words of § 4208 (b) make plain, the procedures outlined therein are called into play "if the court desires more detailed information as a basis for determining the sentence to be imposed . . . ." Although the statute refers later to "the sentence of imprisonment originally imposed," this is quite plainly intended merely to permit the district judge to impose as a final sentence the "maximum sentence of imprisonment prescribed by law" under which the defendant is "deemed to be" committed. The *Corey* case well illustrates the absurdity of any other conclusion; there the defendant was originally deemed to be committed for a term of 375 years on a conviction of making false claims against the Government. See *post,* p. 171.

Once it is clear that a defendant is not actually sentenced until after the § 4208 (b) inquiry during commitment is completed, the requirements of criminal justice, always subject to this Court's supervisory power over the federal courts, leave no doubt of his right to be present when a final determination of sentence is made. The elementary right of a defendant to be present at the imposition of sentence and to speak in his own behalf, which is embodied in Rule 32 (a) of the Federal Rules of Criminal Procedure, is not satisfied by allowing him to be present and speak at a prior stage of the proceedings which re-

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to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

sults in the deferment of the actual sentence. Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the district judge will remember the defendant's words in his absence and give them due weight. Moreover, only at the final sentencing can the defendant respond to a definitive decision of the judge.

Whether or not the Constitution would permit any other procedure it is not now necessary to decide. Congress not having spoken clearly to the contrary,[2] I concur in the judgment of the Court.

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[2] A bill now pending in Congress provides that the defendant's presence is not required at final sentencing but the defendant may be present in the discretion of the court. S. 1956, 88th Cong., 1st Sess.

Neither the legislative history set out in the opinion of the majority, *ante*, p. 166, note 4, nor the pending proposal seems to me sufficient indication of congressional intent to require disregard of the important right involved in this case, particularly in light of the possible constitutional issues which would be raised.

COREY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 31. Argued October 17, 1963.—Decided December 9, 1963.

Petitioner was convicted in a Federal District Court of 75 violations of 18 U. S. C. § 287. The Court entered an order under 18 U. S. C. § 4208 (b) committing him to the custody of the Attorney General pending receipt of a report from the Bureau of Prisons. More than three months later, after receiving and considering such report, the Court, in the presence of petitioner and his counsel, entered an order suspending imposition of sentence and placing petitioner on probation for two years. Three days later, petitioner filed a notice of appeal. The Court of Appeals dismissed the appeal, on the ground that the time for appeal had expired 10 days after entry of the Trial Court's initial order committing petitioner under § 4208 (b). *Held:* In cases such as this, an appeal may be taken within the time provided by Federal Rule of Criminal Procedure 37 (a)(2) after either the first or the second sentence under 18 U. S. C. § 4208 (b), at the option of the convicted defendant. Pp. 169–176.

307 F. 2d 839, reversed.

Russell Morton Brown argued the cause for petitioner. With him on the brief was *Maurice C. Goodpasture.*

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky.*

Leon B. Polsky filed a brief for the Legal Aid Society, as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted by a jury in the United States District Court in Massachusetts upon a 75-count indictment for making false claims against the Govern-

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ment in violation of 18 U. S. C. § 287. The trial judge, after preliminary sentencing hearings, came to the conclusion that it would be helpful "for the Court to know something more about the defendant than I have seen or heard up to date." Accordingly, the court entered an order committing the petitioner "to the custody of the Attorney General of the United States under Title 18, United States Code, 4208 (b)." [1] More than three months later, after considering the report which the Bureau of Prisons had submitted in accordance with § 4208 (b), the trial judge, in a proceeding at which the petitioner and his counsel were present, entered an order suspending imposition of sentence and placing the petitioner on probation for two years. Three days later the petitioner filed a notice of appeal.

Upon motion of the Government the appeal was dismissed as untimely, on the ground that the period for appeal had expired 10 days after entry of the trial court's initial order committing the petitioner for study under

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[1] 18 U. S. C. § 4208 (b) provides:

"If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section."

18 U. S. C. § 4208 (b). Pointing out that § 4208 (b) provides that such a commitment "shall be deemed to be for the maximum sentence of imprisonment prescribed by law," [2] the Court of Appeals reasoned that "at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time that he should have acted." [3] 307 F. 2d 839, 840. We granted certiorari, 371 U. S. 966, to consider questions which have arisen in the District Courts and Courts of Appeals in the application of 18 U. S. C. § 4208 (b).[4]

The procedural rules governing the usual course of criminal appeals in the federal judicial system are well settled. After a plea or finding of guilty, sentence is to be imposed "without unreasonable delay." [5] A judgment of conviction setting forth the sentence is then entered,[6] and a notice of appeal must be filed within 10 days thereafter.[7] The record is filed with the Court of Appeals and

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[2] See note 1, *supra*.

[3] Since the petitioner was convicted upon each of 75 counts under 18 U. S. C. § 287, and since each offense under that statute is punishable by a prison term of up to five years, "the extent of his punishment," if it was the "maximum sentence of imprisonment prescribed by law," was 375 years in prison. Such a sentence, if actually imposed for the substantive offenses in question, would obviously raise a serious issue under the Eighth Amendment of the Constitution.

[4] In *Behrens* v. *United States*, 312 F. 2d 223 (1962), certiorari granted, 373 U. S. 902, the Court of Appeals for the Seventh Circuit, holding that the defendant and his counsel must be present when sentence is imposed following receipt of the Bureau of Prisons report, apparently considered that proceeding—rather than the earlier commitment order—as the one from which the time for appeal would begin to run. On the question of the right of the defendant and his counsel to then be present, we have today affirmed that decision. *United States* v. *Behrens*, *ante*, p. 162. See also *United States* v. *Johnson*, 315 F. 2d 714 (C. A. 2d Cir. 1963).

[5] Rule 32 (a), Fed. Rules Crim. Proc.

[6] Rule 32 (b), Fed. Rules Crim. Proc.

[7] Rule 37 (a)(2), Fed. Rules Crim. Proc.

the appeal docketed within 40 days thereafter,[8] and the appeal is heard "as soon . . . as the state of the calendar will permit." [9] Pending disposition of the appeal, the sentence is stayed unless the defendant elects otherwise,[10] and the defendant may be released on bail.[11]

The dominant philosophy embodied in these rules reflects the twin concerns that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit, and that the imposition of actual punishment be avoided pending disposition of an appeal. In the ordinary criminal case, where the imposition of a sentence follows promptly upon a determination of guilt, no problem arises in the application of these appellate rules or in the effectuation of the policies which they reflect. An appeal may not be taken until after the pronouncement of sentence, and must be taken promptly after sentence is imposed.

But under the provisions of 18 U. S. C. § 4208 (b) the trial judge sentences a convicted defendant not once, but twice. The judge first imposes a sentence of imprisonment "deemed to be" the maximum prescribed by the law, and then, after the defendant has been imprisoned for three or six months, the judge fixes a new sentence which may be quite different from the one originally imposed. The present case illustrates the problem which then arises. That problem, simply stated, is how, in cases where trial judges have utilized the sentencing provisions authorized by 18 U. S. C. § 4208 (b), the rules governing criminal appeals are to be applied so as neither to frustrate their purpose nor to impair the efficacy of the flexible sentencing procedure which Congress devised in enacting

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[8] Rule 39 (c), Fed. Rules Crim. Proc.

[9] Rule 39 (d), Fed. Rules Crim. Proc.

[10] Rule 38 (a)(2), Fed. Rules Crim. Proc.

[11] Rule 46 (a)(2), Fed. Rules Crim. Proc.

18 U. S. C. § 4208 (b).[12] We have concluded that in such cases an appeal may be taken within the time provided by Rule 37 (a)(2), Fed. Rules Crim. Proc., after either the first *or* the second sentence under § 4208 (b), at the option of the convicted defendant.

It would obviously contravene the basic policies of the criminal appellate rules to require a defendant sentenced under § 4208 (b) to defer his appeal until after he had submitted to the three or six months of incarceration and diagnostic study prescribed by the statute. Such a requirement would not only forestall any opportunity of a prompt appeal from an underlying criminal conviction, but would deprive a convicted defendant of the substantial right to be enlarged on bail while his appeal was pending. Indeed, the imposition of such a mandatory three- or six-month term of imprisonment before the defendant could file an appeal might raise constitutional problems of significant proportions.

But we need not consider such problems, because a § 4208 (b) commitment is clearly not lacking in sufficient "finality" to support an immediate appeal, and there is nothing to indicate that Congress intended that the right of appeal be mandatorily suspended in cases where the provisions of § 4208 (b) are utilized. The provisions of § 4208 (b) are invoked only after "a judgment of conviction." [13] The defendant is committed under § 4208 (b)

[12] Section 4208 (b) was enacted in 1958 as part of broad legislation to improve sentencing practices in the federal courts. See 28 U. S. C. § 334 (providing for judicial sentencing institutes to be held in the various circuits); 18 U. S. C. § 4209 (extending the application of the Federal Youth Corrections Act to offenders between 22 and 26); 18 U. S. C. § 4208 (a) (authorizing a sentencing judge to delegate wide discretion to the Parole Board).

[13] 18 U. S. C. § 4208 (a) begins: "Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public

"to the custody of the Attorney General" as in the case of all sentenced prisoners.[14] It is provided that the term of the final sentence "shall run from date of original commitment under this section."

A sentence under these provisions, which is imposed only after the whole process of the criminal trial and determination of guilt has been completed, sufficiently satisfies conventional requirements of finality for purposes of appeal. The litigation is complete as to the fundamental matter at issue—"the right to convict the accused of the crime charged in the indictment." *Heike* v. *United States,* 217 U. S. 423, 429. "Final judgment in a criminal case," the Court has said, "means sentence. The sentence is the judgment." *Berman* v. *United States,* 302 U. S. 211, 212. This concept was later explained and amplified in words of complete applicability here: "The 'sentence is judgment' phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control. . . . But certainly when discipline has been imposed, the defendant is entitled to review." *Korematsu* v. *United States,* 319 U. S. 432, 434.

For these reasons it is clear to us that the petitioner in the present case could have appealed his conviction within 10 days after the entry of the original commitment order under § 4208 (b). Had he done so, the Court of Appeals could have reviewed all claims of error in the trial proceedings, and its determination would have been final,[15] subject only to discretionary review by this Court.

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require that the defendant be sentenced to imprisonment for a term exceeding one year, may . . . ." While these words are not repeated in subsection (b), it is plain that they serve as an introduction to all of § 4208.

[14] See 18 U. S. C. § 4082.

[15] Only the final sentence which was later imposed would still have been open, under accepted procedures, to attack in the trial court

It does not follow, however, simply because a defendant *could* have sought review of his conviction after the initial commitment under § 4208 (b), that Congress intended to deny altogether the right of appeal to a defendant who chose to adopt the course followed by the petitioner in the present case. While an initial commitment under § 4208 (b) is, as we have pointed out, freighted with sufficiently substantial indicia of finality to support an appeal, the fact remains that the proceedings in the trial court are not actually terminated until after the period of diagnostic study, review of the same by the district judge, and final sentence. Cf. *United States* v. *Behrens, ante,* p. 162. There might be many reasons why a convicted defendant or his counsel would prefer to await final termination of the trial court proceedings before taking an appeal. For instance, a defendant might think, rightly or wrongly, that the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence. Moreover, if every defendant initially committed under § 4208 (b) to the maximum prison term prescribed by law were faced

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and review on appeal, *e. g.*, for failure to accord the defendant and his counsel the right to be present and to be heard at the final sentencing proceeding. See *United States* v. *Behrens, ante,* p. 162.

If a defendant appeals after a preliminary commitment under § 4208 (b) and is enlarged on bail pending appeal, the further procedures under § 4208 (b) (including the pronouncement of final sentence) will necessarily be postponed until the appeal is determined (and eliminated entirely if the conviction is reversed), because the diagnostic study by the Bureau of Prisons cannot be carried out if the defendant is not incarcerated. On the other hand, if a defendant taking an appeal after an initial commitment under § 4208 (b) does not seek bail but elects to commence service of his sentence, there is no reason why the diagnostic study contemplated by the statute should not proceed. Modifications of sentences have in fact been made under § 4208 (b) while cases were on appeal. See *Armstrong* v. *United States,* 306 F. 2d 520, 521, n. 1 (C. A. 10th Cir. 1962); *United States* v. *Varner,* 283 F. 2d 900, 901 (C. A. 7th Cir. 1961).

with the choice of then and there seeking review of his conviction or forever losing the right of appeal, he might well feel obliged to take an appeal because of his very ignorance of what his sentence was eventually going to turn out to be. As a practical matter, the severity of the sentence actually imposed might in any case be a major factor in determining whether an appeal is to be taken.

Long-accepted and conventional principles of federal appellate procedure require recognition of the defendant's right to await the imposition of final sentence before seeking review of the conviction. That is the general rule. *Miller* v. *Aderhold,* 288 U. S. 206; *Berman* v. *United States,* 302 U. S. 211; *Cobbledick* v. *United States,* 309 U. S. 323; Rule 37 (a), Fed. Rules Crim. Proc. We find nothing to indicate that Congress intended to depart from that rule in enacting § 4208 (b). *Reversed.*

MR. JUSTICE HARLAN, dissenting.

While I agree with the majority that a criminal defendant who has been committed to the custody of the Attorney General under 18 U. S. C. § 4208 (b) has the right to prosecute an immediate appeal from the judgment of conviction, I am unable to accept the view, so contrary to long-accepted principles governing the time for seeking review, that he has also the alternative right to await final sentencing and then prosecute an appeal from the judgment of conviction. Accordingly, I would hold that the petitioner's attempted appeal at that stage of the proceedings was untimely.

It is clear that a § 4208 (b) commitment, which is necessarily preceded by a judgment of conviction, see 18 U. S. C. § 4208 (a), fully satisfies the requirement of finality under 28 U. S. C. § 1291. At that point in the proceedings, the merits have been fully litigated, the defendant has been adjudged guilty, and "discipline has been imposed," *Korematsu* v. *United States,* 319 U. S.

432, 434. In that case this Court held that after a finding of guilt an order placing the defendant on probation was a final appealable order. In the absence of an explicit statement of contrary congressional intent,[1] *Korematsu* controls this case, in which the disciplinary measure taken was an actual commitment to prison. The liberalization of sentencing procedures under § 4208 (b) does not require or even suggest that a defendant be deprived of his right speedily to test the validity of his conviction.

It is otherwise, however, with respect to an appeal following the imposition of final sentence in accordance with § 4208 (b). Of course it is true, as the majority points out, that the general rule is that the defendant may "await the imposition of final sentence before seeking review of the conviction," *ante,* p. 176. Indeed, the general rule is that he has no choice but to wait. The majority and I agree, for the reasons stated, that the separation of final judgment and final sentence under § 4208 (b) makes the rule inapplicable in this situation. Nevertheless, after having discarded the rule for one-half of its opinion, the majority relies on it as a justification for allowing the defendant the alternative of postponing his appeal until long after the final judgment of conviction has been rendered. This is explained only by a distinction, novel in this context, between final judgments and proceedings "not actually terminated," *ante,* p. 175. Congress could, of course, arm defendants committed under § 4208 (b) with this double-barreled shotgun. But there is nothing to indicate that it has done so.[2] In the absence of any

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[1] I intimate no view as to whether such a statute would infringe constitutional rights.

[2] There is now pending in Congress a bill to amend § 4208 which provides that "the right to appeal shall run from the date the original sentence was imposed under subsection (b) of this section." S. 1956, 88th Cong., 1st Sess.

such indications, so radical a departure from long-established procedural principles should be made, in what is presumably an exercise of this Court's supervisory power over the administration of federal criminal justice, only where fairness imperatively so demands.

The majority finds such necessity in a defendant's possible preference to await final sentencing before deciding whether or not to appeal. A defendant, it is suggested, might fear that his taking of an appeal would have an adverse impact on the sentencing judge; or he might be disinclined to appeal if he is ultimately to receive a light sentence. Neither of these possibilities warrants the majority's innovation in review procedures. It should be a simple matter for a defendant who prefers to await the outcome of the § 4208 (b) proceeding before prosecuting his appeal to file a notice of appeal within the prescribed time after the original commitment and then secure a continuance pending final sentencing in the District Court.[3] I see no reason why a Court of Appeals should be reluctant to grant a continuance in these circum-

[3] I agree with the majority that if a defendant elects to commence service of sentence, the filing of a notice of appeal in the Court of Appeals would not prevent the § 4208 (b) proceedings from going forward in the District Court. Cases like *Berman* v. *United States*, 302 U. S. 211, and *United States* v. *Smith*, 331 U. S. 469, involved different problems and are not relevant in the present context. Final § 4208 (b) sentences have in fact been imposed in the District Court while an appeal was pending. See cases cited in the majority's opinion, *ante*, p. 175, note 15.

The requirement of Rule 39 (d), Federal Rules of Criminal Procedure, that an appeal be set for argument "not less than 30 days after the filing . . . of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit" would obviously not prevent a continuance in these circumstances.

Of course, if a defendant chooses to be released on bail pending appeal, the proceedings under § 4208 (b) would then be postponed until remand of the case to the District Court following appellate affirmance of the conviction.

stances; were this not the case, such a requirement could be imposed by this Court in the exercise of its supervisory powers. That a defendant might believe, surely in all but the rare instance incorrectly, that the mere filing of a notice of appeal would weigh against him with the sentencing judge is hardly a persuasive consideration; with as much reason, he might believe that it would have the effect of stimulating the sentencing judge to reduce his sentence. In any event, it is surely inappropriate to structure review procedures around hypothetical beliefs of defendants in the maladministration of criminal justice.

New procedures designed to better the administration of criminal justice, such as § 4208 (b), should not without manifest need be the occasion for radical departures from established theory and practice. Seeing no need for such a departure in this case, I respectfully dissent and would affirm the judgment below.

SECURITIES AND EXCHANGE COMMISSION *v.* CAPITAL GAINS RESEARCH BUREAU, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 42. Argued October 21, 1963.—
Decided December 9, 1963.

Under the Investment Advisers Act of 1940, the Securities and Exchange Commission may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for long-term investment and then immediately selling his own shares at a profit upon the rise in the market price following the recommendation, since such a practice "operates as a fraud or deceit upon any client or prospective client," within the meaning of the Act. Pp. 181–201.

(a) Congress, in empowering the courts to enjoin any practice which operates "as a fraud or deceit" upon a client, did not intend to require proof of intent to injure and actual injury to the client; it intended the Act to be construed like other securities legislation "enacted for the purpose of avoiding frauds," not technically and restrictively, but rather flexibly to effectuate its remedial purposes. Pp. 186–195.

(b) The Act empowers the courts, upon a showing such as that made here, to require an adviser to make full and frank disclosure of his practice of trading on the effect of his recommendations. Pp. 195–197.

(c) In the light of the evident purpose of the Act to substitute a philosophy of disclosure for the philosophy of *caveat emptor,* it cannot be assumed that the omission from the Act of a specific proscription against nondisclosure was intended to limit the application of the antifraud and antideceit provisions of the Act so as to render the Commission impotent to enjoin suppression of material facts. Pp. 197–199.

(d) The 1960 amendment to the Act does not justify a narrow interpretation of the original enactment. Pp. 199–200.

(e) Even if respondents' advice was "honest," in the sense that they believed it was sound and did not offer it for the purpose of furthering personal pecuniary objectives, the Commission was entitled to an injunction requiring disclosure. Pp. 200–201.

306 F. 2d 606, reversed and remanded.

David Ferber argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Daniel M. Friedman* and *Philip A. Loomis, Jr.*

Leo C. Fennelly argued the cause and filed a brief for respondents.

Mr. Justice Goldberg delivered the opinion of the Court.

We are called upon in this case to decide whether under the Investment Advisers Act of 1940 [1] the Securities and Exchange Commission may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of a security for his own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation. The answer to this question turns on whether the practice—known in the trade as "scalping"—"operates as a fraud or deceit upon any client or prospective client" within the meaning of the Act.[2] We hold that it does and that the Commission may "enforce compliance" with the Act by obtaining an

[1] 54 Stat. 847, as amended, 15 U. S. C. § 80b–1 *et seq.*

[2] 54 Stat. 852, as amended, 15 U. S. C. (Supp. IV) § 80b–6, provides in relevant part that:

"It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud any client or prospective client; [*Footnote 2 continued on p. 182*]

injunction requiring the adviser to make full disclosure of the practice to his clients.[3]

The Commission brought this action against respondents in the United States District Court for the Southern District of New York. At the hearing on the application for a preliminary injunction, the following facts were established. Respondents publish two investment advisory services, one of which—"A Capital Gains Re-

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"(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

"(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction. . . ."

[3] 54 Stat. 853, as amended, 15 U. S. C. (Supp. IV) § 80b–9, provides in relevant part that:

"(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond."

port"—is the subject of this proceeding. The Report is mailed monthly to approximately 5,000 subscribers who each pay an annual subscription price of $18. It carries the following description:

> "An Investment Service devoted exclusively to (1) The protection of investment capital. (2) The realization of a steady and attractive income therefrom. (3) The accumulation of CAPITAL GAINS thru the timely purchase of corporate equities that are proved to be undervalued."

Between March 15, 1960, and November 7, 1960, respondents, on six different occasions, purchased shares of a particular security shortly before recommending it in the Report for long-term investment. On each occasion, there was an increase in the market price and the volume of trading of the recommended security within a few days after the distribution of the Report. Immediately thereafter, respondents sold their shares of these securities at a profit.[4] They did not disclose any aspect of these transactions to their clients or prospective clients.

On the basis of the above facts, the Commission requested a preliminary injunction as necessary to effectuate the purposes of the Investment Advisers Act of 1940. The injunction would have required respondents, in any future Report, to disclose the material facts concerning, *inter alia,* any purchase of recommended securities "within a very short period prior to the distribution of a recommendation . . . ," and "[t]he intent to sell and the sale of said securities . . . within a very short period after distribution of said recommendation . . . ." [5]

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[4] See Appendix, *infra,* p. 202.

[5] The requested injunction reads in full as follows:

"WHEREFORE the plaintiff demands a temporary restraining order, preliminary injunction and final injunction:

"1. Enjoining the defendants Capital Gains Research Bureau, Inc. and Harry P. Schwarzmann, their agents, servants, employees, at-

The District Court denied the request for a preliminary injunction, holding that the words "fraud" and "deceit" are used in the Investment Advisers Act of 1940 "in their technical sense" and that the Commission had failed to show an intent to injure clients or an actual loss of money to clients. 191 F. Supp. 897. The Court of Appeals for the Second Circuit, sitting *en banc*, by a 5-to-4 vote accepted the District Court's limited construction of "fraud" and "deceit" and affirmed the denial

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torneys and assigns, and each of them, while the said Capital Gains Research Bureau, Inc. is an investment adviser, directly and indirectly, by the use of the mails or any means or instrumentalities of interstate commerce from:

"(a) Employing any device, scheme or artifice to defraud any client or prospective client by failing to disclose the material facts concerning

"(1) The purchase by defendant, Capital Gains Research Bureau, Inc., of securities within a very short period prior to the distribution of a recommendation by said defendant to its clients and prospective clients for purchase of said securities;

"(2) The intent to sell and the sale of said securities by said defendant so recommended to be purchased within a very short period after distribution of said recommendation to its clients and prospective clients;

"(3) Effecting of short sales by said defendant within a very short period prior to the distribution of a recommendation by said defendant to its clients and prospective clients to dispose of said securities;

"(4) The intent of said defendant to purchase and the purchase of said securities to cover its short sales;

"(5) The purchase by said defendant for its own account of puts and calls for securities within a very short period prior to the distribution of a recommendation to its clients and prospective clients for purchase or disposition of said securities.

"(b) Engaging in any transaction, practice and course of business which operates as a fraud or deceit upon any client or prospective client by failing to disclose the material facts concerning the matters set forth in demand 1 (a) hereof."

of injunctive relief.[6] 306 F. 2d 606. The majority concluded that no violation of the Act could be found absent proof that "any misstatements or false figures were contained in any of the bulletins"; or that "the investment advice was unsound"; or that "defendants were being bribed or paid to tout a stock contrary to their own beliefs"; or that "these bulletins were a scheme to get rid of worthless stock"; or that the recommendations were made "for the purpose of endeavoring artificially to raise the market so that [respondents] might unload [their] holdings at a profit." *Id.*, at 608–609. The four dissenting judges pointed out that "[t]he common-law doctrines of fraud and deceit grew up in a business climate very different from that involved in the sale of securities," and urged a broad remedial construction of the statute which would encompass respondents' conduct. *Id.*, at 614. We granted certiorari to consider the question of statutory construction because of its importance to the investing public and the financial community. 371 U. S. 967.

The decision in this case turns on whether Congress, in empowering the courts to enjoin any practice which operates "as a fraud or deceit upon any client or prospective client," intended to require the Commission to establish fraud and deceit "in their technical sense," including

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[6] The case was originally heard before a panel of the Court of Appeals, which, with one judge dissenting, affirmed the District Court. 300 F. 2d 745. Rehearing *en banc* was then ordered.

The Court of Appeals purported to recognize that "federal securities laws are to be construed broadly to effectuate their remedial purpose." 306 F. 2d 606, 608. But by affirming the District Court's "technical" construction of the Investment Advisers Act of 1940 and by requiring proof of "misstatements," unsound advice, bribery, or intent to unload "worthless stock," the court read the statute, in effect, as confined by traditional common-law concepts of fraud and deceit.

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intent to injure and actual injury to clients, or whether Congress intended a broad remedial construction of the Act which would encompass nondisclosure of material facts. For resolution of this issue we consider the history and purpose of the Investment Advisers Act of 1940.

I.

The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's.[7] It was preceded by the Securities Act of 1933,[8] the Securities Exchange Act of 1934,[9] the Public Utility Holding Company Act of 1935,[10] the Trust Indenture Act of 1939,[11] and the Investment Company Act of 1940.[12] A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.[13] As we recently said in a related context, "It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail"

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[7] See generally Douglas and Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171 (1933); Loomis, The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, 28 Geo. Wash. L. Rev. 214 (1959); Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227 (1933). Cf. Galbraith, The Great Crash (1955).

[8] 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*

[9] 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.*

[10] 49 Stat. 838, as amended, 15 U. S. C. § 79 *et seq.*

[11] 53 Stat. 1149, as amended, 15 U. S. C. § 77aaa *et seq.*

[12] 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.*

[13] See H. R. Rep. No. 85, 73d Cong., 1st Sess. 2, quoted in *Wilko* v. *Swan,* 346 U. S. 427, 430.

in every facet of the securities industry. *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 366.

The Public Utility Holding Company Act of 1935 "authorized and directed" the Securities and Exchange Commission "to make a study of the functions and activities of investment trusts and investment companies . . . ." [14] Pursuant to this mandate, the Commission made an exhaustive study and report which included consideration of investment counsel and investment advisory services.[15] This aspect of the study and report culminated in the Investment Advisers Act of 1940.

The report reflects the attitude—shared by investment advisers and the Commission—that investment advisers could not "completely perform their basic function—furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments—unless all conflicts of interest between the investment counsel and the client were removed." [16] The report stressed that affiliations by invest-

[14] 49 Stat. 837, 15 U. S. C. § 79z–4.

[15] While the study concentrated on investment advisory services which provide personalized counseling to investors, see Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H. R. Doc. No. 477, 76th Cong., 2d Sess., 1 (hereinafter cited as SEC Report) the Senate Committee on Banking and Currency did receive communications from publishers of investment advisory services, see, *e. g.,* Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., pt. 3 (Exhibits), 1063, and the Act specifically covers "any person who, for compensation, engages in the business of advising others, either directly or through publication or writings . . . ." 54 Stat. 847, 15 U. S. C. § 80b–2.

[16] SEC Report, at 28.

ment advisers with investment bankers, or corporations might be "an impediment to a disinterested, objective, or critical attitude toward an investment by clients . . . ." [17]

This concern was not limited to deliberate or conscious impediments to objectivity. Both the advisers and the Commission were well aware that whenever advice to a client might result in financial benefit to the adviser—other than the fee for his advice—"that advice to a client might in some way be tinged with that pecuniary interest [whether consciously or] subconsciously motivated . . . ." [18] The report quoted one leading investment adviser who said that he "would put the emphasis . . . on subconscious" motivation in such situations.[19] It quoted a member of the Commission staff who suggested that a significant part of the problem was not the existence of a "deliberate intent" to obtain a financial advantage, but rather the existence "subconsciously [of] a prejudice" in favor of one's own financial interests.[20] The report incorporated the Code of Ethics and Standards of Practice of one of the leading investment counsel associations, which contained the following canon:

> "[An investment adviser] should continuously occupy an impartial and disinterested position, as free as humanly possible from the *subtle* influence of prejudice, *conscious or unconscious;* he should scrupulously avoid any affiliation, or any act, which subjects his position to challenge in this respect." [21] (Emphasis added.)

Other canons appended to the report announced the following guiding principles: that compensation for investment advice "should consist exclusively of direct

[17] *Id.*, at 29.
[18] *Id.*, at 24.
[19] *Ibid.*
[20] *Ibid.*
[21] *Id.*, at 66–67.

charges to clients for services rendered"; [22] that the adviser should devote his time "exclusively to the performance" of his advisory function; [23] that he should not "share in profits" of his clients; [24] and that he should not "directly or indirectly engage in any activity which may jeopardize [his] ability to render unbiased investment advice." [25] These canons were adopted "to the end that the quality of services to be rendered by investment counselors may measure up to the high standards which the public has a right to expect and to demand." [26]

One activity specifically mentioned and condemned by investment advisers who testified before the Commission was *"trading by investment counselors for their own account in securities in which their clients were interested . . . ."* [27]

This study and report—authorized and directed by statute [28]—culminated in the preparation and introduction by Senator Wagner of the bill which, with some changes, became the Investment Advisers Act of 1940.[29] In its "declaration of policy" the original bill stated that

> "Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission . . . it is hereby declared that the national public interest and the interest of investors are adversely affected— . . . (4) when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients.

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[22] *Id.*, at 66.
[23] *Id.*, at 65.
[24] *Id.*, at 67.
[25] *Id.*, at 29.
[26] *Id.*, at 66.
[27] *Id.*, at 29–30. (Emphasis added.)
[28] See text accompanying note 14, *supra.*
[29] S. 3580, 76th Cong., 3d Sess.

> "It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is presently practicable to eliminate the abuses enumerated in this section." S. 3580, 76th Cong., 3d Sess., § 202.

Hearings were then held before Committees of both Houses of Congress.[30] In describing their profession, leading investment advisers emphasized their relationship of "trust and confidence" with their clients [31] and the importance of "strict limitation of [their right] to buy and sell securities in the normal way if there is any chance at all that to do so might seem to operate against the interests of clients and the public." [32] The president of the Investment Counsel Association of America, the leading investment counsel association, testified that the

> "two fundamental principles upon which the pioneers in this new profession undertook to meet the growing need for unbiased investment information and guidance were, first, that they would limit their efforts and activities to the study of investment problems from the investor's standpoint, not engaging in any other activity, such as security selling or brokerage, which might directly or indirectly bias their investment judgment; and, second, that their remuneration for this work would consist solely of definite, professional fees fully disclosed in advance." [33]

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[30] Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (hereinafter cited as Senate Hearings). Hearings on H. R. 10065 before Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess. (hereinafter cited as House Hearings).

[31] Senate Hearings, at 719.

[32] *Id.*, at 716.

[33] *Id.*, at 724.

Although certain changes were made in the bill following the hearings,[34] there is nothing to indicate an intent to alter the fundamental purposes of the legislation. The broad proscription against "any . . . practice . . . which operates . . . as a fraud or deceit upon any client or prospective client" remained in the bill from beginning to end. And the Committee Reports indicate a desire to preserve "the personalized character of the services of investment advisers," [35] and to eliminate conflicts of interest between the investment adviser and the clients [36] as safeguards both to "unsophisticated investors" and to "bona fide investment counsel." [37] The Investment Advisers Act of 1940 thus reflects a congressional recognition "of the delicate fiduciary nature of an investment advisory relationship," [38] as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—

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[34] The bill as enacted did not contain a section attributing specific abuses to the investment adviser profession. This section was eliminated apparently at the urging of the investment advisers who, while not denying that abuses had occurred, attributed them to certain fringe elements in the profession. They feared that a public and general indictment of all investment advisers by Congress would do irreparable harm to their fledgling profession. See, *e. g.*, Senate Hearings, at 715–716. It cannot be inferred, therefore, that the section was eliminated because Congress had concluded that the abuses had not occurred, or because Congress did not desire to prevent their repetition in the future. The more logical inference, considering the legislative background of the Act, is that the section was omitted to avoid condemning an entire profession (which depends for its success on continued public confidence) for the acts of a few.

[35] H. R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (hereinafter cited as House Report). See also S. Rep. No. 1775, 76th Cong., 3d Sess. 22 (hereinafter cited as Senate Report).

[36] See Senate Report, at 22.

[37] *Id.*, at 21.

[38] 2 Loss, Securities Regulation (2d ed. 1961), 1412.

consciously or unconsciously—to render advice which was not disinterested. It would defeat the manifest purpose of the Investment Advisers Act of 1940 for us to hold, therefore, that Congress, in empowering the courts to enjoin any practice which operates "as a fraud or deceit," intended to require proof of intent to injure and actual injury to clients.

This conclusion moreover, is not in derogation of the common law of fraud, as the District Court and the majority of the Court of Appeals suggested. To the contrary, it finds support in the process by which the courts have adapted the common law of fraud to the commercial transactions of our society. It is true that at common law intent and injury have been deemed essential elements in a damage suit between parties to an arm's-length transaction.[39] But this is not such an action.[40] This is a

[39] See cases cited in 37 C. J. S., Fraud (1943), 210.

Even in a damage suit between parties to an arm's-length transaction, the intent which must be established need not be an intent to cause injury to the client, as the courts below seem to have assumed. "It is to be noted that it is not necessary that the person making the misrepresentations intend to cause loss to the other or gain a profit for himself; it is only necessary that he intend action in reliance on the truth of his misrepresentations." 1 Harper and James, The Law of Torts (1956), 531. "[T]he fact that the defendant was disinterested, that he had the best of motives, and that he thought he was doing the plaintiff a kindness, will not absolve him from liability so long as he did in fact intend to mislead." Prosser, Law of Torts (1955), 538. See 3 Restatement, Torts (1938), § 531, Comment *b*, illustration 3. It is clear that respondents' failure to disclose the practice here in issue was purposeful, and that they intended that action be taken in reliance on the claimed disinterestedness of the service and its exclusive concern for the clients' interests.

[40] Neither is this a criminal proceeding for "willfully" violating the Act, 54 Stat. 857, as amended, 15 U. S. C. § 80b–17, nor a proceeding to revoke or suspend a registration "in the public interest," 54 Stat. 850, as amended, 15 U. S. C. § 80b–3. Other considerations may be relevant in such proceedings. Compare *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284.

suit for a preliminary injunction in which the relief sought is, as the dissenting judges below characterized it, the "mild prophylactic," 306 F. 2d, at 613, of requiring a fiduciary to disclose to his clients, not all his security holdings, but only his dealings in recommended securities just before and after the issuance of his recommendations.

The content of common-law fraud has not remained static as the courts below seem to have assumed. It has varied, for example, with the nature of the relief sought, the relationship between the parties, and the merchandise in issue. It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages.

> "Law had come to regard fraud . . . as primarily a tort, and hedged about with stringent requirements, the chief of which was a strong moral, or rather immoral element, while equity regarded it, as it had all along regarded it, as a conveniently comprehensive word for the expression of a lapse from the high standard of conscientiousness that it exacted from any party occupying a certain contractual or fiduciary relation towards another party." [41]

> "Fraud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element." [42]

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[41] Hanbury, Modern Equity (8th ed. 1962), 643. See Letter of Lord Hardwicke to Lord Kames, dated June 30, 1759, printed in Parkes, History of the Court of Chancery (1828), 508, quoted in Snell, Principles of Equity (25th ed. 1960), 496:

"Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive."

[42] De Funiak, Handbook of Modern Equity (2d ed. 1956), 235.

> "Fraud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." [43]

Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment adviser to be, to establish all the elements required in a suit against a party to an arm's-length transaction. Courts have imposed on a fiduciary an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," [44] as well as an affirmative obligation "to employ reasonable care to avoid misleading" [45] his clients. There has also been a growing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.[46] The 1909 New York case of *Ridgely* v. *Keene,* 134 App. Div. 647, 119 N. Y. Supp. 451, illustrates this continuing development. An investment adviser who, like respondents, published an investment advisory service, agreed, for compensation, to influence his clients to buy shares in a certain security. He did not disclose the agreement to his client but sought "to excuse his conduct by asserting that . . . he honestly

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[43] *Moore* v. *Crawford,* 130 U. S. 122, 128, quoting 1 Story, Equity Jur. § 187.

[44] Prosser, Law of Torts (1955), 534–535 (citing cases). See generally Keeton, Fraud—Concealment and Non-Disclosure, 15 Texas L. Rev. 1.

[45] 1 Harper and James, The Law of Torts (1956), 541.

[46] See generally Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227 (1933).

believed, that his subscribers would profit by his advice . . . ." The court, holding that "his belief in the soundness of his advice is wholly immaterial," declared the act in question "a palpable fraud."

We cannot assume that Congress, in enacting legislation to prevent fraudulent practices by investment advisers, was unaware of these developments in the common law of fraud. Thus, even if we were to agree with the courts below that Congress had intended, in effect, to codify the common law of fraud in the Investment Advisers Act of 1940, it would be logical to conclude that Congress codified the common law "remedially" as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries, not "technically" as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels.

The foregoing analysis of the judicial treatment of common-law fraud reinforces our conclusion that Congress, in empowering the courts to enjoin any practice which operates "as a fraud or deceit" upon a client, did not intend to require proof of intent to injure and actual injury to the client. Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation "enacted for the purpose of avoiding frauds," [47] not technically and restrictively, but flexibly to effectuate its remedial purposes.

II.

We turn now to a consideration of whether the specific conduct here in issue was the type which Congress intended to reach in the Investment Advisers Act of 1940.

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[47] 3 Sutherland, Statutory Construction (3d ed. 1943), 382 *et seq.* (citing cases). See Note, 38 N. Y. U. L. Rev. 985; Comment, 30 U. of Chi. L. Rev. 121, 131–147.

It is arguable—indeed it was argued by "some investment counsel representatives" who testified before the Commission—that any "trading by investment counselors for their own account in securities in which their clients were interested . . ." [48] creates a potential conflict of interest which must be eliminated. We need not go that far in this case, since here the Commission seeks only disclosure of a conflict of interests with significantly greater potential for abuse than in the situation described above. An adviser who, like respondents, secretly trades on the market effect of his own recommendation may be motivated—consciously or unconsciously—to recommend a given security not because of its potential for long-run price increase (which would profit the client), but because of its potential for short-run price increase in response to anticipated activity from the recommendation (which would profit the adviser).[49] An investor seeking the advice of a registered investment adviser must, if the legislative purpose is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving "two masters" or only one, "especially . . . if one of the masters happens to be economic self-interest." *United States* v. *Mississippi Valley Co.*, 364 U. S. 520, 549.[50] Accord-

[48] See text accompanying note 27, *supra*.

[49] For a discussion of the effects of investment advisory service recommendations on the market price of securities, see Note, 51 Calif. L. Rev. 232, 233.

[50] This Court, in discussing conflicts of interest, has said:

"The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such

ingly, we hold that the Investment Advisers Act of 1940 empowers the courts, upon a showing such as that made here, to require an adviser to make full and frank disclosure of his practice of trading on the effect of his recommendations.

III.

Respondents offer three basic arguments against this conclusion. They argue first that Congress could have made, but did not make, failure to disclose material facts unlawful in the Investment Advisers Act of 1940, as it did in the Securities Act of 1933,[51] and that absent specific language, it should not be assumed that Congress intended to include failure to disclose in its general proscription of any practice which operates as a fraud or deceit. But considering the history and chronology of the statutes, this omission does not seem significant. The Securities

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trust relations, but includes within its purpose the removal of any temptation to violate them. . . .

". . . In *Hazelton* v. *Sheckells*, 202 U. S. 71, 79, we said: 'The objection . . . rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear.'" *United States* v. *Mississippi Valley Co.*, 364 U. S. 520, 550, n. 14.

[51] 48 Stat. 84, as amended, 15 U. S. C. § 77q (a), provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Act of 1933 was the first experiment in federal regulation of the securities industry. It was understandable, therefore, for Congress, in declaring certain practices unlawful, to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against nondisclosure. It soon became clear, however, that the courts, aware of the previously outlined developments in the common law of fraud, were merging the proscription against nondisclosure into the general proscription against fraud, treating the former, in effect, as one variety of the latter. For example, in *Securities & Exchange Comm'n* v. *Torr,* 15 F. Supp. 315 (D. C. S. D. N. Y. 1936), rev'd on other grounds, 87 F. 2d 446, Judge Patterson held that suppression of information material to an evaluation of the disinterestedness of investment advice "operated as a deceit on purchasers," 15 F. Supp., at 317. Later cases also treated nondisclosure as one variety of fraud or deceit.[52] In light of this, and in light of the evident purpose of the Investment Advisers Act of 1940 to substitute a philosophy of disclosure for the philosophy of *caveat emptor,* we cannot assume that the omission in the 1940 Act of a specific proscription against nondisclosure was intended to limit the application of the antifraud and antideceit provisions of the Act so as to render the Commission impotent to enjoin suppression of material facts. The more reasonable assumption, considering what had transpired between 1933 and 1940, is that Congress, in enacting the Investment Advisers Act of 1940 and proscribing

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[52] See *Archer* v. *Securities & Exchange Comm'n,* 133 F. 2d 795 (C. A. 8th Cir.), cert. denied, 319 U. S. 767; *Charles Hughes & Co.* v. *Securities & Exchange Comm'n,* 139 F. 2d 434 (C. A. 2d Cir.), cert. denied, 321 U. S. 786; *Hughes* v. *Securities & Exchange Comm'n,* 85 U. S. App. D. C. 56, 174 F. 2d 969; *Norris & Hirshberg* v. *Securities & Exchange Comm'n,* 85 U. S. App. D. C. 268, 177 F. 2d 228; *Speed* v. *Transamerica Corp.,* 235 F. 2d 369 (C. A. 3d Cir.).

any practice which operates "as a fraud or deceit," deemed a specific proscription against nondisclosure surplusage.

Respondents also argue that the 1960 amendment [53] to the Investment Advisers Act of 1940 justifies a narrow interpretation of the original enactment. The amendment made two significant changes which are relevant here. "Manipulative" practices were added to the list of those specifically proscribed. There is nothing to suggest, however, that with respect to a requirement of disclosure, "manipulative" is any broader than fraudulent or deceptive.[54] Nor is there any indication that by adding the new proscription Congress intended to narrow the scope of the original proscription. The new amendment also authorizes the Commission "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." The legislative history offers no indication, however, that Congress intended such rules to substitute for the "general and flexible" antifraud provisions which have long been considered necessary to control "the versatile inventions of fraud-doers." [55] Moreover, the intent of Congress must be culled from the events surrounding the passage of

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[53] 74 Stat. 887, 15 U. S. C. (Supp. IV) § 80b–6 (4).

The amendment, as it is relevant here, made it unlawful for an investment adviser:

"(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative."

[54] See, *e. g.*, 48 Stat. 895, as amended, 15 U. S. C. § 78o (c)(1), which refers to such devices "as are manipulative, deceptive, or *otherwise* fraudulent." (Emphasis added.)

[55] *Stonemets* v. *Head*, 248 Mo. 243, 263, 154 S. W. 108, 114. See also note 41, *supra*.

the 1940 legislation. "[O]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940." *Securities & Exchange Comm'n* v. *Capital Gains Research Bureau, Inc.,* 306 F. 2d 606, 615 (dissenting opinion). See *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 348–349.

Respondents argue, finally, that their advice was "honest" in the sense that they believed it was sound and did not offer it for the purpose of furthering personal pecuniary objectives. This, of course, is but another way of putting the rejected argument that the elements of technical common-law fraud—particularly intent—must be established before an injunction requiring disclosure may be ordered. It is the practice itself, however, with its potential for abuse, which "operates as a fraud or deceit" within the meaning of the Act when relevant information is suppressed. The Investment Advisers Act of 1940 was "directed not only at dishonor, but also at conduct that tempts dishonor." *United States* v. *Mississippi Valley Co.,* 364 U. S. 520, 549. Failure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive. To impose upon the Securities and Exchange Commission the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute. Reading the Act in light of its background we find no such requirement commanded. Neither the Commission nor the courts should be required "to separate the mental urges," *Peterson* v. *Greenville,* 373 U. S. 244, 248, of an investment adviser, for "[t]he motives of man are too com-

plex . . . to separate . . . ." *Mosser* v. *Darrow,* 341 U. S. 267, 271. The statute, in recognition of the adviser's fiduciary relationship to his clients, requires that his advice be disinterested. To insure this it empowers the courts to require disclosure of material facts. It misconceives the purpose of the statute to confine its application to "dishonest" as opposed to "honest" motives. As Dean Shulman said in discussing the nature of securities transactions, what is required is "a picture not simply of the show window, but of the entire store . . . not simply truth in the statements volunteered, but disclosure." [56] The high standards of business morality exacted by our laws regulating the securities industry do not permit an investment adviser to trade on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients.

Experience has shown that disclosure in such situations, while not onerous to the adviser, is needed to preserve the climate of fair dealing which is so essential to maintain public confidence in the securities industry and to preserve the economic health of the country.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[56] Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227, 242.

APPENDIX TO OPINION OF THE COURT.

On one occasion respondents sold short some shares of a security immediately before stating in their Report that the security was overpriced. After the publication of the Report, respondents covered their short sales.

Respondents' transactions are summarized by the Commission as follows:

Stock	Purchased	Purchase price	Recommended	Sold	Sale price	Profit
Continental Insurance Co.	3/15/60	47¾–47⅞	3/18/60	3/29/60	50⅛	$1, 125. 00
United Fruit Co	5/13, 16, 19, 20/60	21¼ 22⅛	5/27/60	6/6, 7, 9, 10/60	23⅝-24½	10, 725. 00
Creole Petroleum Corp	7/5, 14/60	25¼–28¾	7/15/60	7/20, 21, 22/60	27⅛–29	1, 762. 50
Hart, Schaffner & Marx	8/8/60	23	8/12/60	8/18, 22/60	24⅞–25¼	837. 00
Union Pacific	10/28, 31/60	25⅝–25⅝	11/1/60	11/7/60	27	1, 757. 00
Frank G. Shattuck Co	10/11/60 (purchased calls)	16.83 (2.53 call cost, plus 14.30 option price)	10/14/60	10/25/60 (exercised calls and sold)	19½ 20⅛	695. 17
Chock Full O'Nuts	10/4/60 (sold short)	68¾–69 (sale price)	10/14/60 (disparaged)	10/24/60 (covered short sale)	62–62½ (purchase price)	2, 772. 33

Although some of the above figures relating to profits are disputed, respondents do not substantially contest the remaining figures.

MR. JUSTICE HARLAN, dissenting.

I would affirm the judgment below substantially for the reasons given by Judge Moore in his opinion for the majority of the Court of Appeals sitting *en banc,* 306 F. 2d 606, and in his earlier opinion for the panel. 300 F. 2d 745. A few additional observations are in order.

Contrary to the majority, I do not read the Court of Appeals' *en banc* opinion as holding that either § 206 (1) of the Investment Advisers Act of 1940, 54 Stat. 847 (prohibiting the employment of "any device, scheme, or artifice to defraud any client or prospective client"), or § 206 (2), 54 Stat. 847 (prohibiting the engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client"), is confined by traditional common law concepts of fraud and deceit. That court recognized that "federal securities laws are to be construed broadly to effectuate their remedial purpose." 306 F. 2d, at 608. It did not hold or intimate that proof of "intent to injure and actual injury to clients" (*ante,* p. 186) was necessary to make out a case under these sections of the statute. Rather it explicitly observed: "Nor can there be any serious dispute that a relationship of trust and confidence should exist between the advisor and the advised," *ibid.,* thus recognizing that no such proof was required. In effect the Court of Appeals simply held that the terms of the statute require, at least, some proof that an investment adviser's recommendations are not disinterested.

I think it clear that what was shown here would not make out a case of fraud or breach of fiduciary relationship under the most expansive concepts of common law or equitable principles. The nondisclosed facts indicate no more than that the respondents personally profited

from the foreseeable reaction to sound and impartial investment advice.[1]

The cases cited by the Court (*ante*, p. 198) are wide of the mark as even a skeletonized statement of them will show. In *Securities & Exchange Comm'n* v. *Torr*, 15 F. Supp. 315, reversed on other grounds, 87 F. 2d 446, defendants were in effect bribed to recommend a certain stock. Although it was not apparent that they lied in making their recommendations, it was plain that they were motivated to make them by the promise of reward. In the case before us, there is no vestige of proof that the reason for the recommendations was anything other than a belief in the soundness of the investment advice given.

Charles Hughes & Co. v. *Securities & Exchange Comm'n*, 139 F. 2d 434, involved sales of stock by customers' men to those ignorant of the market value of the stocks at 16% to 41% above the over-the-counter price. Defendant's employees must have known that the customers would have refused to buy had they been aware of the actual market price.

The defendant in *Norris & Hirshberg, Inc.*, v. *Securities & Exchange Comm'n*, 85 U. S. App. D. C. 268, 177 F. 2d 228, dealt in unlisted securities. Most of its customers believed that the firm was acting only on their behalf and that its income was derived from commissions; in fact the firm bought from and sold to its customers, and received its income from mark-ups and mark-downs. The nondisclosure of this basic relationship did not, the court stated,

[1] According to respondents' brief (and the fact does not appear to be contested), the annual gross income of Capital Gains Research Bureau from publishing investment information and advice was some $570,000. Even accepting the S. E. C.'s figures, respondents' profit from the trading transactions in question was somewhat less than $20,000. Thus any basis for an inference that respondents' advice was tainted by self-interest, which might have been drawn had respondents' buying and selling activities been more significant, is lacking on this record.

"necessarily establish that petitioner violated the anti-fraud provisions of the Securities and Securities Exchange Acts." *Id.*, at 271, 177 F. 2d, at 231. Defendant's trading practices, however, were found to establish such a violation; an example of these was the buying of shares of stock from one customer and the selling to another at a substantially higher price on the same day. The opinion explicitly distinguishes between what is necessary to prove common law fraud and the grounds under securities legislation sufficient for revocation of a broker-dealer registration. *Id.*, at 273, 177 F. 2d, at 233.

Arleen Hughes v. *Securities & Exchange Comm'n*, 85 U. S. App. D. C. 56, 174 F. 2d 969, concerned the revocation of the license of a broker-dealer who also gave investment advice but failed to disclose to customers both the best price at which the securities could be bought in the open market and the price which she had paid for them. Since the court expressly relied on language in statutes and regulations making unlawful "any omission to state a material fact," *id.*, at 63, 174 F. 2d, at 976, this case hardly stands for the proposition that the result would have been the same had such provisions been absent.

In *Speed* v. *Transamerica Corp.*, 235 F. 2d 369, the controlling stockholder of a corporation made a public offer to buy stock, concealing from the other shareholders information known to it as an insider which indicated the real value of the stock to be considerably greater than the price set by the public offer. Had shareholders been aware of the concealment, they would undoubtedly have refused to sell; as a consequence of selling they suffered ascertainable damages.

In *Archer* v. *Securities & Exchange Comm'n*, 133 F. 2d 795, defendant copartners of a company dealing in unlisted securities concealed the name of Claude Westfall, who was found to be in control of the business. Westfall was thereby enabled to defraud the customers of the

brokerage firm of Harris, Upham & Co., for which he worked as a trader. Securities of the customers of the latter firm were bought by defendants' company at under the market level, and defendants' company sold securities to the clients of Harris, Upham & Co. at prices above the market.

In all of these cases but *Arleen Hughes,* which turned on explicit provisions against nondisclosure, the concealment involved clearly reflected dishonest dealing that was vital to the consummation of the relevant transactions. No such factors are revealed by the record in the present case. It is apparent that the Court is able to achieve the result reached today only by construing these provisions of the Investment Advisers Act as it might a pure conflict of interest statute, cf. *United States* v. *Mississippi Valley Co.,* 364 U. S. 520, something which this particular legislation does not purport to be.

I can find nothing in the terms of the statute or in its legislative history which lends support to the absolute rule of disclosure now established by the Court. Apart from the other factors dealt with in the two opinions of the Court of Appeals, it seems to me especially significant that Congress in enacting the Investment Advisers Act did not include the express disclosure provision found in § 17 (a)(2) of the Securities Act of 1933, 48 Stat. 84,[2] even though it did carry over to the Advisers Act the comparable fraud and deceit provisions of the Securities Act.[3]

[2] That section makes it unlawful "to obtain money or property by means of . . . any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ."

[3] Section 17 (a) of the 1933 Act makes it unlawful "(1) to employ any device, scheme, or artifice to defraud . . . (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Compare the language of these provisions with that of § 206 (1), (2) of the Investment Advisers Act, *supra,* p. 203.

To attribute the presence of a disclosure provision in the earlier statute to an "abundance of caution" (*ante,* p. 198) and its omission in the later statute to a congressional belief that its inclusion would be "surplusage" (*ante,* p. 199) is for me a singularly unconvincing explanation of this controlling difference between the two statutes.[4]

However salutary may be thought the disclosure rule now fashioned by the Court, I can find no authority for it either in the statute or in any regulation duly promulgated thereunder by the S. E. C. Only two Terms ago we refused to extend certain provisions of the Securities Exchange Act of 1934 to encompass "policy" considerations at least as cogent as those urged here by the S. E. C. *Blau* v. *Lehman,* 368 U. S. 403. The Court should have exercised the same wise judicial restraint in this case. This is particularly so at this interlocutory stage of the litigation. It is conceivable that at the trial the S. E. C. would have been able to make out a case under the statute construed according to its terms.

I respectfully dissent.

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[4] The argument is that by the time of enactment of the Investment Advisers Act in 1940 Congress had become aware that the courts "were merging the proscription against nondisclosure [contained in the 1933 Securities Act] into the general proscription against fraud" also found in the same act. *Ante,* p. 198. However, the only federal pre-1940 case cited is *Securities & Exchange Comm'n* v. *Torr, ante,* p. 198, and *supra,* p. 204. There the failure of a fiduciary to disclose that his advice was prompted by a "bribe" was equated by the trial judge with deceit. Such a decision can hardly be deemed to establish that *any* nondisclosure of a fact material to the recipient of investment advice is fraud or deceit. Saying the least, it strains credulity that a provision expressly proscribing material omissions would be thought by Congress to be "surplusage" when it came to enacting the 1940 Act. This is particularly so when it is remembered that violation of the fraud and deceit section is punishable criminally (§ 217 of the Investment Advisers Act of 1940, 54 Stat. 857); Congress must have known that the courts do not favor expansive constructions of criminal statutes.

DENNIS *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 25. Argued November 19, 1963.—Decided December 9, 1963.

In this case arising under the Federal Employers' Liability Act, in which a jury awarded petitioner a verdict for damages for the loss of two fingers by frostbite after he had been required by his foreman to work outdoors in very cold weather, the evidence was sufficient to support the jury's conclusion that respondent railroad's negligence contributed to the injury, and the State Supreme Court erred in vacating the jury's verdict and ordering entry of judgment for respondent. Pp. 208–210.

13 Utah 2d 249, 372 P. 2d 3, reversed and remanded.

Wayne L. Black argued the cause for petitioner. With him on the brief were *Calvin W. Rawlings, Harold E. Wallace, Brigham E. Roberts* and *John L. Black.*

Clifford L. Ashton argued the cause for respondent. With him on the brief were *Dennis McCarthy* and *Grant Macfarlane, Jr.*

PER CURIAM.

Petitioner, a section laborer employed by respondent railroad, brought this suit under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, in a Utah State Court to recover damages for personal injury sustained as a result of respondent's alleged negligence. The jury, finding respondent negligent and petitioner contributorily negligent, assessed "general damages" at $20,000 and deducted $10,000 "by reason of contributory negligence," leaving a verdict of $10,000 for petitioner. The Supreme Court of Utah vacated the jury verdict and ordered the entry of judgment for respondent.

13 Utah 2d 249, 372 P. 2d 3. We granted certiorari, 371 U. S. 946, to consider whether the Supreme Court of Utah erred in its action.

From the evidence adduced at trial the jury could have concluded that: Petitioner was required to work from about 5 p. m. to about 5 a. m. in temperatures ranging from 10° Fahrenheit to minus 5° Fahrenheit, in 10 inches of snow, with "the wind a-blowing pretty hard," to repair a damaged section of railroad track; petitioner was dressed less warmly than the other members of the crew, and the foreman knew this; the only source of heat (outside of the cab of the truck which had transported the crew to the worksite) was a fire built from a single railroad tie, which did not give "very much" heat; at about midnight, petitioner, while handling a cold wrench, noticed that "two [of his] fingers were clamped shut and [he] had to pull them apart . . . before [he] could get [his] glove off"; he also noticed a "kind of burning, tingling sensation" in these fingers; although he communicated some or all of this to the foreman, petitioner was permitted to continue working on the track for about three and one-half hours; he spent only about one-half hour in the heated cab of the truck; as a result of this exposure, petitioner suffered frostbite and lost two fingers.

There can be little dispute that these facts, if believed, establish negligence by respondent railroad, since they show that the foreman, who had full control over petitioner's activities while on this job, did not take all necessary and reasonable precautions to prevent injury to petitioner when put on notice of his condition. *Lavender* v. *Kurn,* 327 U. S. 645; *Boston & M. R. Co.* v. *Meech,* 156 F. 2d 109, cert. denied, 329 U. S. 763.

It is true that there was evidence in conflict with petitioner's version of what occurred. For example, other members of the work crew testified that immediately after

his complaint petitioner was transferred to the heated cab where he stayed until the end of the job, whereas petitioner testified that after his complaint he spent only one-half hour in the heated cab and three and one-half hours working outside. There was also evidence from which the jury could reasonably have concluded that petitioner's own negligence was the sole cause of his injury. But in FELA cases this Court has repeatedly held that where "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender* v. *Kurn, supra,* at 653. "Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear." *Ibid.* Once it is shown that "employer negligence played any part, even the slightest, in producing the injury," *Rogers* v. *Missouri Pac. R. Co.,* 352 U. S. 500, 506, a jury verdict for the employee may not be upset on the basis of his own negligence, no matter how substantial it may have been, although the jury may, of course, take petitioner's contributory negligence into account, as it did here, in arriving at the final verdict.

In this case, petitioner's evidence, though vigorously disputed, was sufficient to support the jury's conclusion that respondent's negligence contributed to the injury. Hence, "the appellate court's function [was] exhausted," *Lavender* v. *Kurn, supra,* at 653, and it could not properly substitute its judgment for that of the jury and decide, as the Supreme Court of Utah did here, that "it seems quite inescapable that it was [petitioner's] own conduct . . . that resulted in this regrettable injury." 13 Utah 2d, at 255; 372 P. 2d, at 7.

The judgment of the Supreme Court of Utah is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN concurs, dissenting.

The cases cited by the Court to reverse the Utah Supreme Court are familiar ones that involve the duty of an employer to provide the employee with a safe place to work. *Lavender* v. *Kurn,* 327 U. S. 645, 651–653; *Boston & M. R. Co.* v. *Meech,* 156 F. 2d 109, 111–112. That issue was covered by the instructions to the jury in the present case.* But as I read the record there is no evidence of negligence on the issue of "a reasonably safe place in which to work." In this case each workman furnished his own clothes. If it were the custom of the railroad to furnish gloves or other clothes to the employees or if, under a collective bargaining agreement, it had become its duty to do so and petitioner had been issued faulty garments, we would have a different case. We would also have a different case if failure to furnish an employee with certain kinds of equipment were tantamount to a failure to provide him a safe place to work. See, *e. g., Williams* v. *Atlantic Coast Line R. Co.,* 190 F. 2d 744; *Young* v. *Clinchfield R. Co.,* 288 F. 2d 499; *Ferrara* v. *Boston & M. R. Co.,* 338 Mass. 323, 155 N. E. 2d 416. But no such issue is tendered here.

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*"It is the duty of a railroad company to exercise reasonable care in furnishing its employees with a reasonably safe place in which to work. This duty does not require the absolute elimination of all danger, but it does require the elimination of all dangers which the exercise of reasonable care would remove or guard against.

"In this connection, you are instructed that if you find from a preponderance of the evidence, that the railroad company failed to exercise reasonable care in that it subjected plaintiff to unreasonable exposure to harm from weather conditions, then you are instructed that defendant was negligent in failing to discharge its duty as hereinabove set forth; and if you further find that such negligence, if any, in whole or in part, proximately caused plaintiff to sustain injuries, then you should return a verdict in favor of the plaintiff and against defendant and assess damages in accordance with these instructions."

The weather was bitter, and the emergency job of repairing a section of a damaged rail could only be done outdoors. But there was a heated truck cab for protection against the weather and outdoors there was a fire. There is nothing to suggest that petitioner was barred from using either, that pressures were put on him to remain outdoors and away from the fire or the heated cab, or that disciplinary measures would be used against those who took frequent recesses to keep warm. Rather, it was admitted that the men generally took turns using the fire and that each was the best judge of when he should warm himself.

Knowledge of the foreman that petitioner was dressed less warmly than the other crew members would be relevant if it were coupled with the foreman's insistence that he perform labor for which his attire was not suitable. That, too, is a different case. The strongest possible case for petitioner, as the Court says, is that he was "permitted" to continue working after his fingers, with the knowledge of the foreman, became very cold. But unless employers are to become insurers of these industrial accidents, that is no evidence of negligence in a society where everyone is presumed to have enough sense "to come in out of the rain."

MR. JUSTICE HARLAN, dissenting.

I do not believe this case should have been taken for review and I now dissent from the reversal of the judgment of the Utah Supreme Court, for reasons already expressed in past cases of this type. See *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 559; *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512, 559; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 559; *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360, 361; *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 25; *Davis* v. *Virginian R. Co.*, 361 U. S. 354, 358; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 332;

Gallick v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 122; *Basham* v. *Pennsylvania R. Co.*, 372 U. S. 699, 701.

In this instance we are not even precisely informed by the Court's opinion wherein the respondent's conduct was negligent. The means for requiting unfortunate industrial accidents of this sort should be found not in destroying the supervisory power of the courts over jury verdicts unsupported by evidence of employer fault, but in legislative expansion of the concepts of workmen's compensation laws, under which compensation is not dependent upon a showing of employer negligence. Cf. *Gallick* v. *Baltimore & Ohio R. Co., supra.*

KAYE *v.* SPENCE CHAPIN ADOPTION HOME.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 478. Decided December 9, 1963.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Richard Jones for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

ECKSTROM *v.* READING POLICE HOME ASSOCIATION OF READING, PA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 497. Decided December 9, 1963.

Appeal dismissed and certiorari denied.
Reported below: 410 Pa. 282, 189 A. 2d 745.

Charles H. Weidner and *Arthur Littleton* for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

FRANK ADAMS & CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 506. Decided December 9, 1963.

Affirmed.

Howard Gould for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission.

F. B. Henderson, Richard J. Murphy, Kemper A. Dobbins, R. B. Claytor and *Robert H. Bierma* for appellee rail carriers.

PER CURIAM.

The motion of Henry B. Street for leave to withdraw his appearance as counsel for the appellants is granted. The motions to affirm are granted and the judgment is affirmed.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 510. Decided December 9, 1963.*

221 F. Supp. 19, affirmed.

Clarence M. Mulholland, Richard R. Lyman, Edward J. Hickey, Jr., William G. Mahoney and *Harry A. Carson* for appellants in No. 510. *Charles S. Rhyne, Edward D. Means, Jr.* and *Alfred J. Tighe* for appellants in No. 511.

Solicitor General Cox for the United States, and *Robert W. Ginnane* and *Fritz R. Kahn* for the Interstate Commerce Commission, appellees.

Edward K. Wheeler, Hewitt S. Biaett, Robert G. Seaks and *Kenneth H. Ekin* for appellee carriers.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

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*Together with No. 511, *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes et al.* v. *United States et al.*, also on appeal from the same Court.

FOTI *v.* IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 28. Argued October 17, 21, 1963.—Decided December 16, 1963.

Under § 106 (a) of the Immigration and Nationality Act, as added in 1961, a Federal Court of Appeals has sole and exclusive jurisdiction to review an administrative determination of the Attorney General denying a suspension of deportation sought by an alien under § 244 (a)(5). Pp. 217–232.

308 F. 2d 779, reversed and remanded.

James J. Cally argued the cause and filed a brief for petitioner.

Philip R. Monahan argued the cause for respondent. With him on the brief were *Solicitor General Cox* and *Assistant Attorney General Miller.*

Jack Wasserman and *David Carliner* filed a brief for the Association of Immigration and Nationality Lawyers, as *amicus curiae,* urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Involved in this case is the single question of whether the Federal Courts of Appeals have the initial, exclusive jurisdiction, under § 106 (a) of the Immigration and Nationality Act, to review discretionary determinations of the Attorney General, relating to the suspension of deportation, under § 244 (a)(5) of the Act.

Petitioner, a 47-year-old alien and a native and citizen of Italy, last entered the United States in late 1950,

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through the port of Norfolk, Virginia, on a seaman's visa which authorized him to remain in this country for a period not to exceed 29 days. He remained here illegally for more than 10 years, leaving his wife and three minor children in Italy. In 1961, deportation proceedings were instituted against petitioner, directing him to appear before a special inquiry officer of the Immigration and Naturalization Service and show cause why he should not be deported under § 241 (a)(2) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1251 (a)(2), as an alien who had unlawfully overstayed the period for which he had been admitted. At a hearing conducted before a special inquiry officer under § 242 (b) of the Act, petitioner conceded his deportability, and applied, in the alternative, for two forms of discretionary relief which the Attorney General is authorized by the Act to grant to deportable persons who meet defined eligibility requirements. He sought, pursuant to § 244 (a)(5) of the Act, a suspension of deportation on the ground that it would be difficult for him to earn a living for his family in Italy if he were deported and deportation would result in his having to liquidate the bakery business which he owned and operated in Brooklyn, New York. Alternatively, if suspension of deportation were refused, petitioner requested, pursuant to § 244 (e) of the Act, the privilege of voluntary departure at his own expense in lieu of deportation. The special inquiry officer, although finding that petitioner met the good moral character and 10 years' continuous presence in the United States requirements of § 244 (a)(5), denied his application for suspension of deportation, on the ground that petitioner was ineligible for that form of discretionary relief since his deportation would not result "in exceptional and extremely unusual hardship . . . ." Petitioner's alternative request for the privilege of voluntary departure was

granted, however.[1] Petitioner appealed to the Board of Immigration Appeals from that part of the order of the special inquiry officer which denied his request for suspension of deportation. The Board, on November 28, 1961, dismissed the appeal. Petitioner was directed to effect his departure by December 18, 1961. Prior to that date, petitioner commenced an action in the Federal District Court for the Southern District of New York, seeking declaratory and injunctive relief from the administrative refusal to grant his request for suspension of deportation. The District Court dismissed the action on the ground that, under the recently enacted § 106 (a) of the Immigration and Nationality Act, 8 U. S. C. § 1105a (a),[2] the sole and exclusive procedure for obtaining judicial review of such a determination was by a petition for review filed in an appropriate Federal Court of Appeals. Accordingly, petitioner then sought review in the Court of Appeals for the Second Circuit. On September 21, 1962, the Court of Appeals, sitting *en banc* and by a five-to-four vote, dismissed the petition for lack of jurisdiction, holding that the term "final orders of deportation" in § 106 (a) does not include a denial of discretionary relief under § 244 (a)(5). 308 F. 2d 779. Because of a conflict among the Courts of Appeals regarding the interpretation of this jurisdictional language in

[1] The granting of voluntary departure relief does not result in the alien's not being subject to an outstanding final order of deportation. In this case, the order granting voluntary departure was combined with a contingent deportation order, which directed that petitioner be deported if he failed to depart within the prescribed time and was to become effective automatically if petitioner did not depart the country by the date fixed by the District Director.

[2] Immigration and Nationality Act, § 106, as added by § 5 (a) of Public Law 87–301, approved September 26, 1961, 75 Stat. 651, 8 U. S. C. (Supp. IV, 1962) § 1105a.

§ 106 (a),[3] we granted certiorari, limited to the question whether Courts of Appeals have jurisdiction to review final administrative orders with respect to discretionary relief sought during deportation proceedings. 371 U. S. 947.

The issue involved here is solely one relating to procedures incident to deportation proceedings. In the present posture of the case, we need not be concerned with the ultimate merits as to petitioner's deportability,[4] since he concedes that he is deportable and the question of the propriety of the administrative refusal of suspension of deportation has not as yet been reviewed in any lower

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[3] Compare *Fong* v. *Immigration and Naturalization Service,* 308 F. 2d 191 (C. A. 9th Cir. 1962), *Blagaic* v. *Flagg,* 304 F. 2d 623 (C. A. 7th Cir. 1962), and *Roumeliotis* v. *Immigration and Naturalization Service,* 304 F. 2d 453 (C. A. 7th Cir. 1962), cert. denied, 371 U. S. 921, with *Holz* v. *Immigration and Naturalization Service,* 309 F. 2d 452 (C. A. 9th Cir. 1962), *Zupicich* v. *Esperdy,* 207 F. Supp. 574 (D. C. S. D. N. Y. 1962), and the decision below.

[4] On October 24, 1962, subsequent to the decision below and while the case was pending before this Court on petition for certiorari, Congress enacted Public Law 87–885, § 4, 76 Stat. 1247, effective the same date. This enactment provides, in relevant part, for the amendment of § 244 of the Act, the source of the Attorney General's power to suspend the deportation of eligible classes of aliens, by the addition of a new subsection, which states: "(f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman . . . ." Although petitioner concededly entered the United States as a crewman, and the Government has indicated that, when the merits of this case are reached, it will argue that petitioner is now absolutely ineligible for the relief sought, because of the 1962 amendment to § 244, we agree with the parties that the enactment of this amendment did not necessarily have the effect of rendering moot the jurisdictional issue involved in this litigation. The applicability of this provision to one in petitioner's situation is an arguable matter, and, since it is not undisputed but remains debatable whether the relief sought by petitioner could still be granted, we have determined it not improper to consider and decide the threshold question of the jurisdiction of the Court of Appeals.

federal court. The only question presented for decision involves the scope of judicial review by the Courts of Appeals of administrative determinations made during the course of deportation proceedings. Specifically, we must decide a rather narrow question of statutory construction—whether a refusal by the Attorney General to grant a suspension of deportation is one of those "final orders of deportation" of which direct review by Courts of Appeals is authorized under § 106 (a) of the Act. Both parties have contended that it is. While the question is not free of difficulty, as evidenced by the division in the court below and the conflict among the various Courts of Appeals on the matter, we have concluded that the court below erred in holding that it was not.

The statutory provision in question, § 106 (a) of the Immigration and Nationality Act, provides that the procedure for judicial review by the Courts of Appeals of certain orders [5] of the Federal Communications Commission, Secretary of Agriculture, Federal Maritime Board and Atomic Energy Commission shall also "apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act or comparable provisions of any prior Act . . . ." Section 242 provides a detailed administrative procedure for determining whether an alien should be deported. Sections 243 and 244 relate to certain situations in which the Attorney General may suspend deportation in his discretion. In its decision below, the Court of Appeals for the Second Circuit held that § 106 (a) applies only to orders required by statute to be made in a § 242 (b) hearing, *i. e.*, findings of de-

[5] Hobbs Act, 64 Stat. 1129 (1950), as amended, 5 U. S. C. § 1031–1042, vesting the Courts of Appeals with exclusive jurisdiction to review final orders of certain designated federal agencies.

portability. Both petitioner and the Government have urged that the decision below should be reversed, and that the statutory language should be so construed as to include both an adjudication of deportability and an order denying suspension of deportation. Based on the historical background of the Immigration and Nationality Act,[6] the manifest purpose of Congress in enacting § 106 (a), the context of the statutory language when viewed against the prevailing administrative practices and procedures, and pertinent legislative history of § 106 (a), we are led to the conclusion that the interpretation argued for by petitioner and the Government is the correct one.

Prior to 1940, the Attorney General had no discretion with respect to the deportation of an alien who came within the defined category of deportable persons. The expulsion of such a person was mandatory; his only avenue of relief in a hardship case was by a private bill in Congress. Therefore, any differentiation that might have been made prior to 1940 between a determination that an alien was deportable and the order directing his deportation would have been merely formalistic and essentially meaningless. In fact, the determination of deportability necessarily resulted in, and was invariably accompanied by, a deportation order. Since 1940, however, when the Attorney General was given the power to grant discretionary relief under various circumstances in deportation cases,[7] administrative regulations having the force and effect of law have provided for the practice of determining deportability and ruling on an application

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[6] On the history of the recent congressional enactments relating to deportation, see Comment, 71 Yale L. J. 760 (1962).

[7] Regarding the extent of the Attorney General's discretion in suspension of deportation cases, see, *e. g.*, *Jay* v. *Boyd*, 351 U. S. 345, 354, 357–358 (1956).

for suspension of deportation in a single proceeding conducted by the Immigration and Naturalization Service. Thus, the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order, and discretionary relief, if sought, must be requested prior to or during the deportation hearing. The hearings on deportability and on an application for discretionary relief have, as a matter of traditional uniform practice, been held in one proceeding before the same special inquiry officer, resulting in one final order of deportation. Significantly, when suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable.

It must be concluded that Congress knew of this familiar administrative practice and had it in mind when it enacted § 106 (a). These usages and procedures, which were actually followed when the provision was enacted, must reasonably be regarded as composing the context of the legislation. A colloquy between Congressmen Walter, Lindsay and Moore, all knowledgeable in deportation matters,[8] is definitely corroborative of this view. This colloquy occurred during the House debates on the predecessor to the bill which was enacted in 1961 and contained § 106 (a).[9] Representative Lindsay suggested that the

[8] Representative Walter was the chairman of a subcommittee of the House Judiciary Committee responsible for immigration and nationality matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area of immigration law. Representative Lindsay was thoroughly familiar with the problems in this area and the role of discretionary determinations denying suspension in the deportation process, as a result of having represented the Government, three years earlier, in *Jay* v. *Boyd*, 351 U. S. 345 (1956). Representative Moore was a co-sponsor of the bill under discussion and a member of the House Judiciary Committee out of which the bill containing § 106 (a) was reported.

[9] 105 Cong. Rec. 12728.

legislative history should make absolutely clear "that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final." Representative Walter agreed, and stated that "the final order means the final administrative order." With Representative Moore concurring, all three congressmen agreed that there would be no "final order of deportation" until after determination of the question of suspension. Significantly, Representative Walter, in discussing the running of the time period provided for the filing of petitions for review by the Courts of Appeals under the proposed legislation, stated that "the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings." With the dissenters below, we feel that the court's speculation that few congressmen were present at the time of this exchange was unwarranted and probably immaterial.

It can hardly be contended that the meaning of the phrase "final orders of deportation" is so clear and unambiguous as to be susceptible of only a narrow interpretation confined solely to determinations of deportability. If anything, the literal language would appear to include a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding. In arriving at the intended construction of this language, we must therefore inevitably turn to the purpose of Congress in enacting this legislation. The fundamental purpose behind § 106 (a) was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts. A House Judiciary Committee report succinctly stated the problem

to which Congress addressed itself in enacting § 106 (a).[10] It indicated that the Committee "has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country." Pointing to the essence of the problem, the report continued:

> "Other aliens, mostly subversives, gangsters, immoral [persons], or narcotic peddlers, manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process. Without any reflection upon the courts, it is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings."

The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court. As stated in the same Committee report, the plain objective of § 106 (a) was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens . . . ." [11] Fur-

[10] H. R. Rep. No. 1086, 87th Cong., 1st Sess. 22–23 (1961).

[11] In further elucidating the purpose of the proposed legislation on the floor of the House, Representative Walter, in reference to one of the predecessor bills in 1958, stated: "Most important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." 104 Cong. Rec. 17173.

ther evidence of a specific congressional intent to give Courts of Appeals exclusive jurisdiction to review denials of discretionary relief in deportation proceedings is contained in the legislative history. Case histories of abuse of the existing judicial review process, as summarized in the various Committee reports, include references to litigation arising out of discretionary determinations. And a reference chart reproduced in the Committee reports shows the denial of discretionary relief as being antecedent to and a constituent part of the "final order of deportation." Although deportability and whether to grant a suspension are determined in the same hearing, the decision below means that an alien may appeal only the deportability finding to a Court of Appeals and must initially seek review of a denial of suspension in a District Court. A short analysis of the reasoning of the court below demonstrates that its conclusion is inconsistent with this manifest purpose of Congress.

Although the Court of Appeals agrees that the basic purpose of § 106 (a) was to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts, it fails to apply that interpretation to the question presented in this case. Its finding that the bifurcated procedure resulting from an alien's seeking review of a denial of discretionary relief in a District Court and review of an adjudication of deportability, as is admittedly required by § 106 (a), in a Court of Appeals would expedite the deportation is without foundation. It is premised on its assumption that, in actions to review denial of discretionary relief, District Courts rarely grant restraining orders. Reliance upon such an assumption, we feel, is unjustified.[12] At all events, under the

[12] According to the General Counsel of the Immigration and Naturalization Service, the Service's policy and practice is to stay deportation, *sua sponte*, when a petition to obtain judicial review of deter-

procedure urged by the petitioner and the Government, an alien can obtain an automatic stay of deportation under § 106 (a) by seeking a review of the finding of deportability and can simultaneously seek review of the denial of discretionary relief in a Court of Appeals. Review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations should therefore be made by the same court at the same time. We realize that deportability is conceded in a large number of cases.[13] But this fact hardly detracts from our view as to a proper interpretation of § 106 (a).[14]

In substance, we feel that the Court of Appeals was wrong in limiting the phrase "final orders of deportation"

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minations made during the administrative proceedings is not "patently frivolous." See Comment, 111 U. of Pa. L. Rev. 1226, 1230 (1963). Consequently, temporary restraining orders issued by District Courts would usually be unnecessary to prevent deportation, and whether District Courts grant restraining orders rarely or frequently is rather irrelevant. And the assumption of the court below that, since the Attorney General can moot the proceedings in the District Courts (unless a restraining order is issued) by deporting the alien *pendente lite*, ultimate deportation would be expedited by permitting bifurcated judicial review seems unwarranted. Also, an assumption that the practice of District Courts is merely to issue restraining orders pending final disposition in a Court of Appeals of all of the questions presented for judicial review in a deportation case appears unjustified. See, *e. g.*, *Zupicich* v. *Esperdy*, 207 F. Supp. 574 (D. C. S. D. N. Y. 1962).

[13] Deportability is conceded in about 80% of the cases. See Gordon and Rosenfield, Immigration Law and Procedure, § 5.7a, at 541 (1962). Even so, the bifurcation problem remains in that type of case which prompted the enactment of § 106 (a), where judicial review of both an adjudication of deportability and a denial of discretionary relief is sought.

[14] Because of the effect of our holding here, it is of course unnecessary to consider the Government's contention that, where deportability is actually adjudicated, a Court of Appeals has "pendent jurisdiction" to review a denial of discretionary relief in the same proceeding.

in § 106 (a) to adjudications of deportability. The finding of the court below that the phrase was a "term of art" with a well-understood meaning, merely because it was used several times in §§ 242 and 244 when plainly referring only to rulings on deportability, cannot be substantiated. Section 106 (a) was of course not enacted contemporaneously with §§ 242 and 244, and it is solely concerned with the rather different problem of judicial review. And the language of § 242 (b) indicates that Congress plainly distinguished determinations of deportability from orders of deportation. We regard this as of especial relevance since § 106 (a), in describing the "final orders of deportation" intended to be encompassed thereunder, specifically refers to administrative proceedings conducted under § 242 (b).

Paragraph (4) of the subsidiary exceptions to § 106 (a) provides for review solely upon the administrative record and indicates that the findings of fact below are conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole." However, this does not necessarily mean that Congress intended review in the Courts of Appeals to be restricted to adjudications of deportability. Admittedly, the standard of review applicable to denials of discretionary relief cannot be the same as that for adjudications of deportability, since judicial review of the former is concededly limited to determinations of whether there has been any abuse of administrative discretion. While paragraph (4) clearly applies only to review of adjudications of deportability, and possibly to review of administrative findings of eligibility for discretionary relief,[15] this is not decisive with respect to

[15] In the instant case the special inquiry officer not only found that petitioner failed to meet the eligibility requirements for suspension of deportation, since no hardship would result from his deportation, but further indicated that, even had the hardship requirement been met,

the intent of Congress. The inclusion in one of the "exceptions" to the principal provision of § 106 (a) of a proviso which primarily could apply only to determinations of deportability does not necessarily indicate that the principal provision of the section was also intended to be thus limited. Since the adjudication of deportability is certainly the principal ingredient, and an indispensable one, of the ultimate result of the proceeding—a final order of deportation—it would not be unusual for Congress to include in an overall enactment relating to judicial review of all final orders of deportation a specific provision pertinent to the primary constituent of such an order.

Also, it seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to § 244 (e) and orders denying the withholding of deportation under § 243 (h), are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106 (a). We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the

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relief would have been denied as a discretionary matter. Since a special inquiry officer cannot exercise his discretion to suspend deportation until he finds the alien statutorily eligible for suspension, a finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters. And since the finding of eligibility involves questions of fact and law, paragraph (4) of § 106 (a) might be read to require that this finding be based on substantial evidence in the record. See Comment, 111 U. of Pa. L. Rev. 1226, 1229 (1963). However, we need not pass on this question here. And, of course, denial of suspension of deportation as a discretionary matter is reviewable only for arbitrariness and abuse of discretion, and thus could hardly be within the procedural and evidentiary requisites of paragraph (4).

Courts of Appeals.[16] Furthermore, we do not regard it "in the last degree unlikely" that Congress intended a court of three judges to initially review discretionary determinations denying suspension of deportation. Much of the litigation in deportation cases with respect to the setting aside of an administrative determination on the ground of arbitrariness involves disputed eligibility questions and matters of statutory construction. Additionally, the concern of the court below does not comport with the declared purpose of § 106 (a) to eliminate the District Court stage of the judicial review process in an effort to prevent dilatory tactics. And the suggestion of the court below that it is "incredible" that Congress meant to burden the Courts of Appeals with review of all orders denying discretionary relief in deportation cases is uncon-

[16] When § 106 (a) was enacted, the withholding of deportation under § 243 (h) was a matter determined by an official other than the special inquiry officer conducting the deportation hearing, on a later occasion, under regulations promulgated by the Attorney General, and the designation of the country of deportation was not made until after the issuance of the warrant of deportation. Under revised and currently effective regulations, both the designation of the country of deportation and the decision on any § 243 (h) request for relief which the alien might wish to make are effected in the deportation proceedings and reflected in the final order of deportation. While presumably denials of § 243 (h) relief were not covered by § 106 (a) at the time of its enactment, it does not seem incongruous to assume that such orders, because of the change in administrative regulations making such decisions an integral part of the deportation proceedings conducted by a special inquiry officer, are now within the reach of § 106 (a)'s judicial review provisions. Such a result simply means that, while the jurisdiction of the Courts of Appeals is limited now, as when § 106 (a) was enacted, to the review of "all final orders of deportation," a change in the administrative regulations relating to the processing and determination of applications for § 243 (h) relief had the incidental effect of expanding the decisional content of such orders. Clearly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders.

vincing. Congress presumably realized that, in practical effect, those engaged in dilatory tactics would hardly hesitate to appeal to a Court of Appeals from an adverse District Court determination where discretionary relief had been denied in the administrative proceeding.[17]

We need not pass at this time on whether § 106 (a) extends the exclusive jurisdiction of the Courts of Appeals to include review of orders refusing to reopen deportation proceedings.[18] The question is admittedly a somewhat different one, since such an administrative determination is not made during the same proceeding where deportability is determined and discretionary relief is denied. And, of course, our decision in this case in no way impairs the preservation and availability of habeas corpus relief.[19]

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[17] Compare, however, 308 F. 2d, at 785, n. 6, where the court below referred to the "inarticulate premise that all deportation suits are appealed . . ." from District Courts to Courts of Appeals.

[18] The court below manifested its concern that, if it were to find that it had jurisdiction in this case, the door would then be opened to the obtaining of review of a refusal to reopen a deportation proceeding in the Courts of Appeals. 308 F. 2d, at 785. And the Government has argued in its brief that, although the question is a close one, an order refusing to reopen a deportation proceeding should be regarded as within the provisions of § 106 (a) with respect to judicial review in the Courts of Appeals, though occurring subsequent to the issuance of a final deportation order. Brief for respondent, pp. 51–54. Compare *Giova* v. *Rosenberg*, 308 F. 2d 347 (C. A. 9th Cir. 1962), petition for cert. pending, No. 15, Misc., October Term, 1963. Cf. *Dentico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C. A. 2d Cir. 1962), holding that Courts of Appeals have exclusive jurisdiction to review denials of motions to reopen deportation proceedings, where review of a final order of deportation is sought at the same time.

[19] Compare the provisions of § 106 (c) purporting to restrict the availability of habeas corpus relief in deportation cases. But see the provisions of § 106 (a) (9) with respect to the availability of habeas corpus relief to aliens held in custody pursuant to a deportation order.

We believe that the controlling intention of Congress, in enacting § 106 (a), was to prevent delays in the deportation process by vesting in the Courts of Appeals sole jurisdiction to review "all final orders of deportation." It seems apparent that, because of the consistent practice under the administrative regulations since 1940 of adjudicating deportability and passing on applications for discretionary relief in the same proceeding, the final administrative action that Congress was thinking of in using the phrase "final orders of deportation" included denials of suspension of deportation. To so construe § 106 (a) does not constitute an expansion of "the words used by Congress beyond their well-understood meaning." Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language. Therefore, this matter can and should be passed upon by the Courts of Appeals, resulting in a judicial review procedure that would be both fair to the petitioner and expeditious for the Government. The decision below is therefore reversed and the case is remanded to the Court of Appeals for further consideration consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

Believing that a jurisdictional statute of this kind should be circumspectly construed, cf. *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 156–157, and recognizing the force of the considerations which concerned the majority of the Court of Appeals, 308 F. 2d 779, I am nevertheless satisfied that the legislative history of § 106 (a) of the Immigration and Nationality Act leaves no room for a conclusion other than that which this Court has reached.

I therefore concur in the judgment.

MEYER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 61. Argued October 24, 1963.—
Decided December 16, 1963.

Petitioner's husband owned four life insurance policies which named petitioner, his wife, as beneficiary. He pledged them to a bank as collateral security for a loan. Subsequently, the Commissioner of Internal Revenue assessed against the insured deficiencies covering income taxes due by him and filed notice of a tax lien for such deficiencies, plus interest. After the death of the insured, the insurance company paid the full amount of the loan to the bank and the remaining proceeds of the policies to petitioner. The United States sued petitioner individually and as executrix of her husband's estate for the full amount of the taxes due. Petitioner tendered the difference between the cash surrender value of the policies and the amount paid to the bank but claimed the remainder as exempt under a state law which exempted the proceeds of life insurance policies from levy by creditors of the insured. *Held:* The tax lien could not be satisfied out of that portion of the proceeds of the life insurance policies that represented the cash surrender value by marshaling the funds and paying the bank's claim from the remainder of the proceeds, since the equitable doctrine of marshaling of assets is not applicable to assets exempted by state law from levy by creditors. Pp. 233–240.

309 F. 2d 131, reversed.

Samuel W. Sherman argued the cause for petitioner. With him on the brief was *Martin A. Gettinger.*

Joseph Kovner argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Louis F. Claiborne.*

Richard Katcher filed a brief for *Lillian Wintner,* as *amicus curiae,* urging reversal.

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MR. JUSTICE CLARK delivered the opinion of the Court.

The ultimate issue in this case is the applicability of the doctrine of marshaling of assets. The Government urges that it be applied to effect the collection of its junior income tax lien on the cash surrender value of certain life insurance policies. The senior lien is secured by the entire proceeds of the policies and absorbs practically all of their cash surrender value. The proceeds of the policies are exempt from levy by creditors of the insured under state law.

In 1943 the deceased, Peter Meyer, pledged his insurance policies to a bank as collateral security for a loan, giving the bank the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death." When Mr. Meyer died, the insurance company paid the amount of the loan to the bank and the balance to the petitioner, Mr. Meyer's widow and beneficiary. The Commissioner claims, however, that the insurance proceeds must be marshaled, that the Government's admittedly junior tax lien must be paid from the cash surrender value of the policies and the bank from the remaining proceeds. The District Court agreed, 202 F. Supp. 606, and the Court of Appeals affirmed, 309 F. 2d 131. We granted certiorari because of the importance of the question in the administration of the income tax laws. 372 U. S. 934. We disagree with both courts and reverse the judgment.

I.

Peter Meyer owned four life insurance policies which named the petitioner, his wife, as beneficiary. Their face amount was $50,000 and their cash surrender value at his death was $27,285.87. He had retained the usual powers under such policies, namely, to change the beneficiaries, demand the cash surrender value and assign the

policies. In 1943, long before the tax assessments in this suit, he assigned the policies as collateral security for the repayment of a loan from the Huntington National Bank of Columbus, Ohio. The bank was given the right, in the event of death, to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death." At the time of Meyer's death, $26,844.66 was due on this loan.

It is not disputed that the Commissioner assessed deficiencies covering income taxes due by Mr. Meyer for the years 1945 and 1946, with a balance of $6,159.09 plus interest due at his death, and that notice of lien was filed in 1955. Meyer died on December 28, 1955, and petitioner was named executrix of his estate. After the insurance company paid the full amount of the loan to the bank and the balance remaining due on the policies to the petitioner, this suit was begun against petitioner, individually and as executrix, for the recovery of the full amount of the taxes due. Petitioner tendered the sum of $441.21, the difference between the cash surrender value and the amount paid to the bank, but claimed the remainder as exempt under New York Insurance Law § 166.* The District Court, however, granted summary judgment for the Government on the theory that the tax lien could be satisfied out of that portion of the proceeds that represented the cash surrender value by marshaling the funds and paying the bank's claim from the remainder

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* "1. If any policy of insurance has been or shall be effected by any person on his own life in favor of a third person beneficiary, or made payable, by assignment, change of beneficiary or otherwise, to a third person, such third person beneficiary, assignee or payee shall be entitled to the proceeds and avails of such policy as against the creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts of the person effecting the insurance." New York Insurance Law § 166.

of the proceeds. It followed the holding of the Second Circuit in *United States* v. *Behrens,* 230 F. 2d 504. The Court of Appeals affirmed on the same basis. We cannot agree.

II.

This Court has held and the parties do not dispute that: absent a lien, recovery of unpaid federal income taxes from a beneficiary of insurance can be had only to the extent that applicable state law permits such recovery by other creditors of the insured, *Commissioner* v. *Stern,* 357 U. S. 39, 46–47 (1958); the insured taxpayer's "property and rights to property" under § 3670 of the Internal Revenue Code of 1939 are measured by the policy contract as enforced by applicable state law, *United States* v. *Bess,* 357 U. S. 51, 55–56 (1958); the cash surrender value of an insurance policy, where subject to the control of the insured, is "property and rights to property" under the section, *id.,* at 59; finally, the priority of liens is determined by the principle "first in time, first in right," *United States* v. *New Britain,* 347 U. S. 81 (1954). Applying New York law, this results in the bank's lien being the senior one on the entire proceeds of the policies with the tax lien only attaching to the cash surrender value subject to the bank's claim. The narrow question remaining is whether in such a situation the doctrine of marshaling of assets is compelled.

III.

This Court has said that "[t]he equitable doctrine of marshalling [*sic*] rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Sowell* v. *Federal Reserve Bank,* 268 U. S. 449, 456–457 (1925). The Courts of Appeals of two Circuits have applied the doctrine, despite state law, to the collection of federal tax

liens. *United States* v. *Behrens, supra,* and *United States* v. *Wintner,* 200 F. Supp. 157, aff'd 312 F. 2d 749 (C. A. 6th Cir.). We note, however, that *Behrens* antedates our *Stern* and *Bess* opinions as well as those in *Aquilino* v. *United States,* 363 U. S. 509 (1960), and *United States* v. *Durham Lumber Co.,* 363 U. S. 522 (1960). These latter two cases held that competing liens of the Government for taxes and of subcontractors for labor and materials to a fund due the taxpayer under a general construction contract were controlled by applicable state law. This Court has never applied the doctrine of marshaling to federal income tax liens although it did deny the petition for certiorari filed in the *Behrens* case, *supra,* 351 U. S. 919. Nor has the Congress seen fit to lay down any rules with reference to the application of the doctrine, apparently leaving the problem to this Court.

IV.

In considering the relevance of the doctrine here it is well to remember that marshaling is not bottomed on the law of contracts or liens. It is founded instead in equity, being designed to promote fair dealing and justice. Its purpose is to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security. It deals with the rights of all who have an interest in the property involved and is applied only when it can be equitably fashioned as to all of the parties. Thus, state courts have refused to apply it where state-created homestead exemptions would be destroyed, *Sims* v. *McFadden,* 217 Ark. 810, 233 S. W. 2d 375; or where the rights of insurance beneficiaries would be adversely affected, *Bruns* v. *First Trust & Deposit Co.,* 250 App. Div. 370, 295 N. Y. Supp. 412; or where the rights of third parties having equal equity would be prejudiced, *Barbin* v. *Moore,* 85 N. H. 362, 159 A. 409; or where the

"head of the household" exemption was involved, *Westgrove Savings Bank* v. *Dunlavy,* 190 Iowa 1054, 181 N. W. 404, and *Pugh* v. *Whitsitt & Guerry,* 161 S. W. 953 (Tex. Ct. Civ. App.). Federal courts have likewise accepted this principle of the nonapplicability of the doctrine where, as here, one of the funds is exempt under state law. See *In re Bailey,* 176 F. 990, where a state legislative homestead exemption was held to be a superior equity in the hands of a bankrupt, preventing the marshaling of assets to his disadvantage; *Robert Moody & Son* v. *Century Savings Bank,* 239 U. S. 374, 378 (1915), where Iowa's requirement that a homestead, even when validly mortgaged, may be sold only for a deficiency remaining after exhausting all other property was declared available to a junior mortgagee to prevent a marshaling of assets; and *Lockwood* v. *Exchange Bank,* 190 U. S. 294, 300–301 (1903), where a waiver of state exemption statutes was held to have no effect in bankruptcy since the title to the exempted property remained in the bankrupt and never reached the trustee's hands. It, therefore, seems clear that the courts have considered state exemption statutes when weighing the equities between parties to determine the applicability of the marshaling doctrine. This is in line with that deference to state law of our recent cases, discussed above, holding that state law controls the determination of what is included within the "property or right to property" covered by § 3670 and upon which the federal tax lien could attach. In addition, this Court in *United States* v. *Brosnan,* 363 U. S. 237 (1960), when faced with a comparable problem involving collection of federal taxes, found

> "it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes . . . . However,

> when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. . . . We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule." At 241–242.

Congress has not seen fit to change the rules this Court fashioned in these cases. Indeed, it has not only permitted them to stand but, as was said in *Holden* v. *Stratton,* 198 U. S. 202, 213–214 (1905), "It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws." There are many examples, among which is the incorporation in the bankruptcy law of the exemptions made available by the State of a bankrupt's domicile. See 52 Stat. 847, 11 U. S. C. § 24. This includes the exemption of life insurance proceeds. See *Holden* v. *Stratton, supra,* at 212–213. In addition, other exemptions have been added from time to time, such as the exclusion from taxation of the benefits from life insurance policies, Internal Revenue Code of 1954, § 101 (a), and the exception of life insurance benefits in which the surviving spouse has exclusive power of appointment from the rule that terminal interests may not qualify for the marital deduction, Internal Revenue Code of 1954, § 2056 (b)(6).

We cannot overlook this long-established policy. In the absence of a definitive statutory rule to the contrary we therefore adopt the state rule and refuse to extend the equitable doctrine of marshaling assets to this situation. New York has a specific statute which exempts insurance benefits of a widow from the claim of creditors of her hus-

band's estate and its courts have refused to marshal assets where to do so will diminish those rights. *Bruns* v. *First Trust & Deposit Co., supra.* To apply marshaling in this case would overturn New York's beneficent policy and, in addition, would enlarge the federal tax lien that the Congress has provided in § 3670. This we will not do. The judgment is therefore

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur, dissenting.

I cannot for several reasons join the Court in reversing the decision of the Court of Appeals.

1. It is, of course, federal law which should rule this case. We are dealing here with a federal income tax lien, created by congressional enactment. Problems of interpretation under that legislation are federal problems, and should be governed as nearly as may be, by principles of uniform application throughout the various States. Determining the priority of § 3670 liens by reference to state law may permit the United States to assert its lien in one State but forbid it in another in precisely the same circumstances.

The very proposition upon which the Court's decision seems to rest—that the Government's lien under § 3670 depends on whether state law recognizes similar liens asserted by private creditors—was rejected in *United States* v. *Bess,* 357 U. S. 51, where it was argued that the United States had no claim against the cash surrender value of insurance policies because a New Jersey statute barred the similar claims of private creditors. This Court looked to local law to determine whether the taxpayer had "sufficient interests . . . to satisfy the requirements of § 3670" but declared state law "inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. . . . The fact that in § 3691 Congress

provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of liens under § 3670."

The basic principle in *Bess* was further amplified by *Aquilino* v. *United States,* 363 U. S. 509, and *United States* v. *Durham Lumber Co.,* 363 U. S. 522, where the following guidelines were laid down:

> "[A]s we held only two Terms ago, Section 3670 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law . . . .' *United States* v. *Bess,* 357 U. S. 51, 55. However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's 'property' or 'rights to property.' [Citing cases in this Court.] The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes." 363 U. S., at 513–514.

Undoubtedly the deceased taxpayer here possessed property—the cash surrender value of insurance policies—to which the tax lien attached by the force of federal law. The problem remaining is the reconciliation of the competing claims to the proceeds. Under *Bess, Aquilino* and *Durham* the problem must be solved as a matter of federal law. State law may be one of the sources guiding the formation of federal policy, but according to prior

cases in this Court, it is not controlling and does not have the compelling force given it by the Court.

2. Whatever force local law is to have, however, I find it difficult to accept the Court's exposition of New York policy.

Section 166 of the New York Insurance Law, the Court says, protects insurance benefits from the claims of creditors of the deceased insured. Obviously, however, no part of the proceeds of the policy, whether cash surrender value or otherwise, is protected from the claims of the secured creditor who has taken an assignment of the policy as collateral security during the lifetime of the insured. This is apparent from the face of the statute itself,[1] and in this very case no question has been raised about the rights of the bank, surely a creditor, to collect every dollar owed to it from the proceeds of the policy. Likewise, had there been no bank loan here, or had it been paid by the insured prior to his death, it is conceded that the federal tax lien would be satisfied from the proceeds to the extent of the cash surrender value. In fact, the beneficiary in this case paid over to the United States the portion of the cash surrender value remaining after the debt of the bank had been paid.

New York, therefore, cannot be said to have a policy of insulating the proceeds of insurance policies from the claims of creditors who have acquired a security interest in the proceeds during the lifetime of the insured. The insured in this case, the owner of the policy, could change the beneficiary and destroy the latter's interest entirely. He could likewise encumber the proceeds and limit the beneficiary's rights to the net amount remaining after the payment of creditors with liens on the proceeds. The protected interest of the beneficiary extends only to the

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[1] Section 166 is quoted in part in the footnote to the Court's opinion. It obviously protects assignees, even creditor-assignees, from the other creditors of the insured.

net proceeds. *In re Kelley's Estate,* 251 App. Div. 847, 296 N. Y. Supp. 923. The beneficiary has an unsecured claim, inferior to that of encumbrancers, but good as against unsecured creditors of the insured. This is what the New York policy is, as it seems to me.

Neither is there anything in *Bruns* v. *First Trust & Deposit Co.,* 250 App. Div. 370, 295 N. Y. Supp. 412, which validates the Court's definition of New York policy. In that case a bank held both insurance policies and other property as collateral security for debts owed it by the insured. The Appellate Division refused to permit collection of the bank loan from the insurance proceeds in order that unsecured creditors could resort to the other property held by the bank. The case prefers the beneficiary to the unsecured creditor who has no independent claim to the proceeds, but it does not suggest that those with security interests in the proceeds would be likewise subordinated.

Moreover, further question about New York policy is raised by *In re Kelley's Estate, supra,* a case which is difficult to reconcile with *Bruns.* In that case, as in *Bruns,* the insured had assigned a policy and had pledged shares of stock as security for a bank loan. Upon his death the bank was paid from the insurance proceeds and the stock remained available to the executor and the insured's estate. The Appellate Division apparently saw nothing wrong with such an application of the insurance proceeds, denied that the widow had any interest in them to the extent they were necessary to pay the bank loan and further denied the widow's claim to be subrogated to the bank's rights in the stock.[2]

[2] "When the husband executed his certificate on August 15, 1932, revoking the designation of his wife as the absolute beneficiary and redesignating her as beneficiary subject to the assignment to the Manufacturers Trust Company, he thereby diminished her interest in the policy *pro tanto* and, in effect, constituted the trust company the primary beneficiary to the extent necessary to satisfy its loan

Twice—in this case and in *United States* v. *Behrens*, 230 F. 2d 504 (C. A. 2d Cir.)—the Court of Appeals has ordered payment of both the lien of a bank and the inferior federal tax lien. In neither case did it indicate it was trenching upon an established state policy involving marshaling of assets. If the result is to depend upon state policy, which at the very least is shrouded in doubt and which it seems to me is not what the Court says it is, I would follow our usual custom [3] of leaving to the Court of Appeals the ascertainment of the local law in which it specializes.[4] Pitching the result upon state law, even as a guide to the governing federal law, should lead to a remand rather than to decision here.

3. The deceased made the assignment to the bank in 1943. Deficiencies in federal income taxes for the years 1945 and 1946 were assessed on May 22, 1946, and June 17, 1947, respectively. Partial payments were made upon the 1945 assessments, none on the 1946. The deceased in 1951 extended the time for collection of the 1945 de-

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to him and appellant, the secondary beneficiary, as to any residue which may remain. Under section 52 of the Domestic Relations Law and section 55–a of the Insurance Law, the wife may acquire a vested irrevocable right to the proceeds of the policy, free from the claims of the husband's creditors and representatives, only if the husband die without exercising his reserved right to change the beneficiary in accordance with the provisions of the policy. Here the husband exercised that right to the extent necessary to satisfy his loan. Hence, when the trust company applied the proceeds of the policy to the payment of the loan, it was not utilizing appellant's property and she could not be subrogated to the rights of the bank with respect to the stock of the Fairview Foundry Incorporated." *In re Kelley's Estate*, 251 App. Div. 847–848, 296 N. Y. Supp. 923–924.

[3] *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 526–527; *Propper* v. *Clark*, 337 U. S. 472, 486–487.

[4] The Court of Appeals has frequently dealt with § 166 of the New York Insurance Law. See for example *Fried* v. *New York Life Ins. Co.*, 241 F. 2d 504; *United States* v. *Behrens*, 230 F. 2d 504, cert. denied, 351 U. S. 919; *Rowen* v. *Commissioner*, 215 F. 2d 641.

ficiencies until 1956 and of the 1946 deficiency until 1957. He submitted an offer of compromise in 1955 which was rejected by the Government in May of that year. Notice of tax lien was filed in July 1955, and the deceased died the following December. At that time the cash surrender value of the policies had grown to $27,285.87 and the amount due on the bank loans totaled $26,844.66. The insurance company remitted the amount of the loans to the bank and paid the remainder of the proceeds to the named beneficiary of the policies. There are no facts or findings to indicate that the amount paid to the bank by the insurance company was paid from the cash surrender value. In these circumstances I see no reason for assuming that it was and no basis for forbidding collection of the tax lien from the amounts paid the beneficiary.

The deceased first reduced the beneficiary's interest in the proceeds of the policies by making the assignment to the bank. He then allowed another lien to attach by his own default, thereby further invading the proceeds. Where there is no prior assignment, it is clear that the government lien effectively diminishes the proceeds in the hands of the beneficiary since the Government's interest in the proceeds is superior to that of the beneficiary. It is unsound to hold, as the Court does, that the lien may not have like effect when the insured has given a prior lien on the proceeds to secure a bank loan. True, paying the tax lien from the cash surrender value results in the bank's being paid from the remainder. But this is precisely what the insured arranged for since the loan, by its very terms, was collectible from any part of the proceeds, which were more than sufficient to pay both the loan and government lien.[5]

[5] Where the tax lien is inferior to local lien A but superior to local lien B, the tax lien is to be paid even though lien A, superior to the federal lien, is cut out because under local law it is inferior to lien B. *United States* v. *Buffalo Savings Bank*, 371 U. S. 228; *United States*

Nor is there any superior equity in the beneficiary to prevent the application of the well-established rule of marshaling, a rule long recognized by this Court.[6] It is not unreasonable to suppose that the beneficiary enjoyed the benefits of the bank loan which is here used to insulate the cash surrender value from the government lien. What is more, the insured and his family used and spent the income which should have been used to pay federal taxes which had been due and payable for many years. Paying both the bank and the tax lien from the proceeds is wholly consistent with the arrangements made by the insured and with this Court's holding in *Bess*.

Finally, the federal revenue deserves more protection than it receives today. The Court may now protect a widow, but the rule announced will protect all beneficiaries, varied as they may be.[7] Congress has declared that the United States shall have a lien on the assets of those persons who do not discharge their federal tax obli-

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v. *City of New Britain*, 347 U. S. 81. In the case at bar there is more reason to recognize and pay the tax lien; for if it is paid, it is only an inferior interest, that of the beneficiary, which is invaded.

[6] "The equitable doctrine of marshalling rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Sowell* v. *Federal Reserve Bank*, 268 U. S. 449, 456–457. See also *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 138; *Scruggs* v. *Memphis & Charleston R. Co.*, 108 U. S. 368; *Savings Bank* v. *Creswell*, 100 U. S. 630, 641; *Fenwick* v. *Chapman*, 9 Pet. 461, 474; 2 Story's Equity Jurisprudence, §§ 758, 760, 853–871; 2 Pomeroy's Equity Jurisprudence, §§ 396, 410; 4 Pomeroy's Equity Jurisprudence, § 1414.

[7] Since § 166 would not protect the insurance proceeds from creditors' claims where the insured or his estate is the beneficiary, I would suppose the Court's opinion would likewise permit payment of the tax lien in such circumstances. Would the same apply to where the executor or administrator is the beneficiary? And what is the result when the beneficiary is the insured's partner or business associate, or a corporation in which he has an interest?

gations. This Court now creates an exception to that policy by holding that the tax lien may not be paid from the cash surrender value of the insurance policy, solely because prior to the attachment of the tax lien Mr. Meyer had assigned the entire proceeds as collateral for a bank loan. I would not invite or validate the utilization of continuing and growing bank loans for the sole purpose of insulating insurance proceeds from the federal tax lien which otherwise would be satisfied from the policy proceeds.

There are in this case two secured creditors and two funds. The total assets are sufficient to satisfy the claims of both creditors, but the junior claimant has a lien on only one of the funds. It is entirely appropriate here to require the payment of both liens.

For the foregoing reasons, I respectfully dissent.

FIELDS ET AL. *v.* CITY OF FAIRFIELD.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 30. Argued December 10–11, 1963.—Decided December 16, 1963.

273 Ala. 588, 143 So. 2d 177, reversed.

Melvin L. Wulf argued the cause for appellants. With him on the brief were *Charles Morgan, Jr.* and *Richard J. Medalie.*

Frank B. Parsons argued the cause and filed a brief for appellee.

Assistant Attorney General Marshall, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glickstein.*

Jack Greenberg, James M. Nabrit III and *Shirley Fingerhood* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae,* urging reversal.

PER CURIAM.

The judgment of the Supreme Court of Alabama is reversed. *Thompson* v. *City of Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157.

ALDRICH *v.* ALDRICH ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 55. Argued October 24, 1963.—Decided November 12, 1963, that questions be certified to Supreme Court of Florida.—Questions certified to Supreme Court of Florida December 16, 1963.

It appearing that this case hinges on questions of Florida law with respect to which there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida, this Court, on its own motion, certifies certain questions to the Supreme Court of Florida pursuant to Rule 4.61 of the Florida Appellate Rules. Pp. 249–252.

Reported below: 147 W. Va. 269, 127 S. E. 2d 385.

Herman D. Rollins for petitioner.

Charles M. Love for respondents.

Counsel for both parties submitted proposed forms of certificates in accordance with the action taken by this Court on November 12, 1963, *ante,* p. 75.

PER CURIAM.

This Court, on its own motion, hereby certifies to the Supreme Court of Florida, pursuant to Rule 4.61, Florida Appellate Rules, the questions of law hereinafter set forth.

STATEMENT OF FACTS.

Petitioner, Marguerite Loretta Aldrich, was granted a divorce from M. S. Aldrich by the Circuit Court of Dade County, Florida, by decree entered on May 31, 1945. The jurisdiction of that court to award the divorce was not contested then, nor is it contested in this action.

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The divorce decree awarded alimony to the plaintiff, in the following provision:

> "4. That the defendant, Moriel Simeon Aldrich, be and he is hereby ordered and required to pay to the plaintiff, Marguerite Loretta Aldrich, the monthly sum of $250.00 as and for her permanent alimony, said sum to be paid to her monthly at the office of the Clerk of the Circuit Court of Miami, Dade County, Florida, and in the event the defendant, Moriel Simeon Aldrich, shall predecease the plaintiff, Marguerite Loretta Aldrich, said monthly sum of $250.00 shall, upon the death of said defendant, become a charge upon his estate during her lifetime; and this Court retains jurisdiction in respect thereto . . . ."

There was no prior express agreement between the parties that the estate would be bound. Subsequently, the divorce defendant petitioned the Florida court for a rehearing, which was denied, but the court reduced alimony from $250 to $215 per month. No appeal was taken by either party.

M. S. Aldrich died testate, a resident of Putnam County, West Virginia, on May 29, 1958. His will was duly probated in Putnam County and petitioner filed a claim against the estate for alimony which accrued after the death of M. S. Aldrich. The appraisal of the estate showed assets of $7,283.50. Petitioner commenced this action in the Circuit Court of Putnam County, West Virginia, in order to have her rights in the estate determined. She also demanded that certain allegedly fraudulent transfers of real and personal property made by M. S. Aldrich be set aside and the properties which were the subject of such transfers administered as a part of the estate, so as to be subject to her claim for alimony under the Florida divorce decree.

The defendants are identified as follows: William T. Aldrich is a son of M. S. Aldrich and petitioner, and Natalie Aldrich is the wife of William T. Aldrich. Angela Aldrich is the widow of M. S. Aldrich. M. S. Aldrich & Associates, Inc., is a corporation which petitioner alleges was principally, if not solely, owned by M. S. Aldrich during his lifetime or until shortly before his death. Aldrich-Slicer Company is a corporation, one of the organizers of which was William T. Aldrich. John C. White is executor of the last will and testament of M. S. Aldrich.

On motion for summary judgment by the defendants, the Circuit Court of Putnam County held that the decree of the Florida divorce court was invalid and unenforceable insofar as it purported to impose upon the estate of M. S. Aldrich an obligation to pay alimony accruing after his death. On appeal, the Supreme Court of Appeals of West Virginia affirmed the decision of the lower court, one judge dissenting. The majority and minority opinions of the West Virginia court are reported in *Aldrich* v. *Aldrich*, 147 W. Va. 269, 127 S. E. 2d 385. Review by this Court was sought and obtained on the basis of Art. IV, § 1, of the Constitution of the United States, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State." The case was heard on October 24, 1963, and on November 12, 1963, the Court issued a *per curiam* opinion, 375 U. S. 75, pursuant to which the following questions are certified to the Supreme Court of Florida:

1. Is a decree of alimony that purports to bind the estate of a deceased husband permissible, in the absence of an express prior agreement between the two spouses authorizing or contemplating such a decree?

2. If such a decree is not permissible, does the error of the court entering it render that court without subject matter jurisdiction with regard to that aspect of the cause?

3. If subject matter jurisdiction is thus lacking, may that defect be challenged in Florida, after the time for appellate review has expired, (i) by the representatives of the estate of the deceased husband or (ii) by persons to whom the deceased husband has allegedly transferred part of his property without consideration?

4. If the decree is impermissible but not subject to such attack in Florida for lack of subject matter jurisdiction by those mentioned in subparagraph 3, may an attack be successfully based on this error of law in the rendition of the decree?

EICHEL *v.* NEW YORK CENTRAL RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 480. Decided December 16, 1963.

In this suit by petitioner under the Federal Employers' Liability Act to recover damages for a permanently disabling injury resulting from respondent's negligence, the jury returned a verdict of $51,000 for petitioner, and the District Court entered judgment accordingly. The Court of Appeals reversed on the ground that the District Court had committed prejudicial error in excluding evidence that petitioner was receiving a disability pension of $190 per month under the Railroad Retirement Act of 1937. *Held:* The District Court properly excluded the evidence of disability payments. Pp. 253–256.

319 F. 2d 12, reversed and remanded.

Arnold B. Elkind and *Richard C. Machcinski* for petitioner.

Gerald E. Dwyer for respondent.

PER CURIAM.

Petitioner, who had been employed by respondent New York Central Railroad for 40 years, brought this action against respondent under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, in the District Court for the Southern District of New York. The complaint alleged that in 1960, as a result of respondent's negligence, petitioner suffered a permanently disabling injury. The jury returned a verdict of $51,000 for petitioner and the District Court entered judgment in accordance with that verdict. Respondent offered evidence that petitioner was receiving $190 a month in disability pension payments under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U. S. C. § 228b (a) 4.

This evidence was offered for the purpose of impeaching the testimony of petitioner as to his motive for not returning to work and as to the permanency of his injuries. The trial court excluded the evidence in response to the objection of petitioner's counsel. The Court of Appeals for the Second Circuit reversed, holding it prejudicial error to exclude the evidence of the disability pension, and remanded "for a new trial, limited, however, to the issues of injury and resulting damages . . . ." 319 F. 2d 12, 14. The court affirmed the judgment "as to the determination of negligence." *Ibid.* We grant certiorari and reverse the judgment of the Court of Appeals.

Respondent does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner. Thus it has been recognized that:

> "The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. . . . The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." *New York, N. H. & H. R. Co.* v. *Leary,* 204 F. 2d 461, 468, cert. denied, 346 U. S. 856.[1]

Respondent argues that the evidence of the disability payments, although concededly inadmissible to offset or mitigate damages, is admissible as bearing on the extent and duration of the disability suffered by petitioner. At the trial counsel for respondent argued that the pension would show "a motive for [petitioner's] not continuing

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[1] See *Sinovich* v. *Erie R. Co.,* 230 F. 2d 658, 661; *Page* v. *St. Louis S. R. Co.,* 312 F. 2d 84, 94. See also Gregory and Kalven, Cases and Materials on Torts (1959), pp. 480–482; McCormick, Damages (1935), p. 310, n. 2; Comment, 38 Mich. L. Rev. 1073.

work, and for his deciding not to continue going back to work after the last accident." On the basis of this argument the Court of Appeals concluded that the disputed evidence should have been admitted because: "Its substantial probative value cannot reasonably be said to be outweighed by the risk that it will . . . create substantial danger of undue prejudice through being considered by the jury for the incompetent purpose of a set-off against lost earnings." 319 F. 2d, at 20.

We disagree. In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence.[2] Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U. S. C. § 228b (a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U. S. 34.[3] It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse.[4] Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability pay-

[2] Cf. McCormick, Evidence (1954), c. 19; 2 Wigmore, Evidence (1940), § 282a.

[3] See Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L. J. 158, 169.

[4] See notes 1–3, *supra*.

ments. Accordingly, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Once again, I am obliged to record my view that certiorari should not have been granted in a case of this kind, involving only a question of the admissibility of evidence in a suit under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51. See my dissenting opinion in *Tipton* v. *Socony Mobil Oil Co., Inc.*, earlier this Term, *ante,* p. 37.

On the merits, I agree with the majority that the judgment below should be reversed, but for different reasons. Whether or not evidence that the petitioner was receiving disability pension payments under the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. § 228a, should have been admitted depends on a balance between its probative bearing on the issue as to which it was offered, in this case the respondent's claim that petitioner was a malingerer, and the possibility of prejudice to the petitioner resulting from the jury's consideration of the evidence on issues as to which it is irrelevant. When a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial judge, subject to review for abuse. See Uniform Rules of Evidence, Rule 45; Model Code of Evidence, Rule 303. It is he who is in the best position to weigh the relevant factors, such as the value of the disputed evidence as compared with other proof adducible to the same end and the effectiveness of limiting instructions. Believing that

this rule should have been followed here, I concur in reversing the judgment below, which not only held the evidence not inadmissible as a matter of law but also directed its admission on retrial.

For the same reasons, however, I dissent from the majority's holding that the evidence is required to be excluded. I see no reason why evidentiary questions should be given different treatment when they arise in an F. E. L. A. case than when they arise in other contexts.

FAIR DRAIN TAXATION, INC., ET AL. *v.* CITY OF ST. CLAIR SHORES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 604. Decided December 16, 1963.

219 F. Supp. 646, affirmed.

Wilson M. Jackson, William L. Sanders and *Raymond M. Jacobson* for appellants.

John H. Yoe and *Charles R. Moon* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MACON *v.* INDIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 37, Misc. Decided December 16, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 243 Ind. 429, 185 N. E. 2d 619.

Petitioner *pro se.*

Edwin K. Steers, Attorney General of Indiana, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Indiana for further consideration in light of *Lane* v. *Brown,* 372 U. S. 477.

SMITH *v.* CALIFORNIA.

CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 72. Decided December 16, 1963.

Judgment vacated and case remanded.

Stanley Fleishman and *Sam Rosenwein* for petitioner.

Roger Arnebergh, Philip E. Grey and *Wm. E. Doran* for respondent.

Briefs of *amici curiae,* urging reversal, were filed by *Edward de Grazia* for Allen et al.; by *Thomas M. Thomas* for American Library Association, and by *Nathan L. Schoichet, A. L. Wirin* and *Fred Okrand* for American Civil Liberties Union of Southern California.

Charles H. Keating, Jr. for Citizens for Decent Literature, Inc., et al., as *amici curiae,* in support of respondent.

PER CURIAM.

The motion of Citizens for Decent Literature, Inc., et al., for leave to file a brief, as *amici curiae,* is granted. The judgment is vacated and the case is remanded to the Appellate Department of the Superior Court of California, County of Los Angeles, for further consideration in light of the decision of the Supreme Court of California in *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152.

McALLISTER *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 721, Misc. Decided December 16, 1963.

Appeal dismissed and certiorari denied.
Reported below: 244 La. 42, 150 So. 2d 557.

Ernest A. Carrere, Jr. for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CAREY, PRESIDENT OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, *v.* WESTINGHOUSE ELECTRIC CORP.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 21. Argued December 11–12, 1963.—Decided January 6, 1964.

Petitioner union (IUE) and respondent employer entered into a collective bargaining agreement covering workers at several plants including one where the dispute here involved occurred. The agreement states that the employer recognizes IUE and its locals as exclusive bargaining representatives for each of those units for which IUE or its locals have been certified by the National Labor Relations Board as the exclusive bargaining representative; and the agreement lists among those units for which IUE has been certified a unit of "all production and maintenance employees" at the plant where the controversy arose, "but excluding all salaried technical . . . employees." The agreement also contains a grievance procedure for the use of arbitration in case of unresolved disputes, including those involving the "interpretation, application or claimed violation" of the agreement. IUE filed a grievance asserting that certain employees in the engineering laboratory at the plant in question, represented by another union which had been certified as the exclusive bargaining representative for a unit of "all salaried, technical" employees, excluding "all production and maintenance" employees, were performing production and maintenance work. The employer refused to arbitrate on the ground that the controversy presented a representation matter for the National Labor Relations Board. IUE petitioned a New York state court for an order compelling arbitration. *Held:* Whether the dispute be considered one involving work assignment or one concerning representation, it is not within the exclusive jurisdiction of the National Labor Relations Board, and there is no barrier to use of the arbitration procedure. Pp. 263–273.

11 N. Y. 2d 452, 184 N. E. 2d 298, reversed.

Benjamin C. Sigal argued the cause for petitioner. With him on the briefs were *David S. Davidson* and *Isadore Katz.*

John F. Hunt, Jr. argued the cause for respondent. With him on the brief was *James F. Smith.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Arnold Ordman, Dominick L. Manoli* and *Norton J. Come.*

Mr. Justice Douglas delivered the opinion of the Court.

The petitioner union (IUE) and respondent employer (Westinghouse) entered into a collective bargaining agreement covering workers at several plants including one where the present dispute occurred. The agreement states that Westinghouse recognizes IUE and its locals as exclusive bargaining representatives for each of those units for which IUE or its locals have been certified by the National Labor Relations Board as the exclusive bargaining representative; and the agreement lists among those units for which IUE has been certified a unit of "all production and maintenance employees" at the plant where the controversy arose, "but excluding all salaried technical . . . employees." The agreement also contains a grievance procedure for the use of arbitration in case of unresolved disputes, including those involving the "interpretation, application or claimed violation" of the agreement.

IUE filed a grievance asserting that certain employees in the engineering laboratory at the plant in question, represented by another union, Federation, which had been certified as the exclusive bargaining representative for a unit of "all salaried, technical" employees, excluding "all production and maintenance" employees, were performing production and maintenance work. Westinghouse refused to arbitrate on the ground that the controversy presented a representation matter for the National Labor

Relations Board. IUE petitioned the Supreme Court of New York for an order compelling arbitration. That court refused. The Appellate Division affirmed, one judge dissenting, 15 App. Div. 2d 7, 221 N. Y. S. 2d 303. The Court of Appeals affirmed, one judge dissenting, holding that the matter was within the exclusive jurisdiction of the Board since it involved a definition of bargaining units. 11 N. Y. 2d 452, 230 N. Y. S. 2d 703. The case is here on certiorari. 372 U. S. 957.

We have here a so-called "jurisdictional" dispute involving two unions and the employer. But the term "jurisdictional" is not a word of a single meaning. In the setting of the present case this "jurisdictional" dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing particular work. If this controversy is considered to be the former, the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*) does not purport to cover all phases and stages of it. While § 8 (b)(4)(D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another,[1] the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike. The Act and its remedies for "jurisdictional" controversies of that nature come into play only by a strike or a threat of a

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[1] § 8 (b)(4)(D):

"It shall be an unfair labor practice for a labor organization or its agents—

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or other-

strike. Such conduct gives the Board authority under § 10 (k) to resolve the dispute.[2]

Are we to assume that the regulatory scheme contains a hiatus, allowing no recourse to arbitration over work assignments between two unions but forcing the controversy into the strike stage before a remedy before the Board is available? The Board, as admonished by § 10 (k),[3] has often given effect to private agreements to settle disputes of this character; [4] and that is in accord

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wise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." 29 U. S. C. (Supp. IV) § 158 (b) (4) (D).

[2] Section 10 (k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." 29 U. S. C. § 160 (k).

[3] Section 10 (k), *supra*, note 2, provides that the Board shall determine the dispute, ". . . unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

[4] See *United Brotherhood of Carpenters*, 96 N. L. R. B. 1045; *Wood, Wire & Metal Lathers Union*, 119 N. L. R. B. 1345; *Millwrights Local 1102*, 121 N. L. R. B. 101, 106–107; *Ironworkers Local No. 708*, 137 N. L. R. B. 1753, 1757. Section 201 of the Labor Man-

with the purpose as stated even by the minority spokesman in Congress [5]—"that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire." 93 Cong. Rec. 4035; 2 Leg. Hist. L. M. R. A. (1947) 1046. And see *Labor Board* v. *Radio Engineers,* 364 U. S. 573, 577.

As Judge Fuld, dissenting below, said: "The underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process." 11 N. Y. 2d 452, 458, 230 N. Y. S. 2d 703, 706.

Grievance arbitration is one method of settling disputes over work assignments; and it is commonly used, we are told. To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. Yet the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it. The case in its present posture is analogous to *Whitehouse* v. *Illinois Central R. Co.,* 349 U. S. 366, where a railroad and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one

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agement Relations Act of 1947 declares the national policy to be the use of governmental facilities for conciliation, mediation, and voluntary arbitration of disputes between employers and employees. 61 Stat. 152, 29 U. S. C. § 171 (b). Section 203 (d) provides:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases." 61 Stat. 154, 29 U. S. C. § 173 (d).

[5] Senator Murray of Montana. And see S. Rep. No. 105, 80th Cong., 1st Sess., p. 27, 1 Leg. Hist. L. M. R. A. (1947) 433.

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union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, "Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it." *Id.*, at 373.

Since § 10 (k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.

What we have said so far treats the case as if the grievance involves only a work assignment dispute. If, however, the controversy be a representational one, involving the duty of an employer to bargain collectively with the representative of the employees as provided in § 8 (a)(5),[6] further considerations are necessary. Such a charge, made by a union against the employer, would, if proved, be an unfair labor practice, as § 8 (a)(5) ex-

[6] Section 8 (a)(5) provides, "It shall be an unfair labor practice for an employer— . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." 29 U. S. C. § 158 (a)(5).

Section 9 (a) provides that the representatives shall be chosen by the majority of employees "in a unit appropriate" for collective bargaining. 29 U. S. C. § 159 (a). Section 9 (b) gives the Board authority to determine what unit is the appropriate one—"the employer unit, craft unit, plant unit, or subdivision thereof." 29 U. S. C. § 159 (b).

Section 9 (c)(1) provides:

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is

pressly states. Or the unions instead of filing such a charge might petition the Board under § 9 (c)(1) to obtain a clarification of the certificates they already have from the Board; and the employer might do the same.

Thus in *Kennametal, Inc.*, 132 N. L. R. B. 194, a union was certified to represent "production and maintenance employees" excluding, among others, "technical" and "laboratory" employees. It filed a motion for clarification of its certificates, contending that certain employees in the laboratory were "an accretion to the existing certified production and maintenance unit and are not embraced in the classification of laboratory employees excluded from the established unit." *Id.*, at 196–197. The employer contended that the laboratory operation in question was still in the research and development stage. The Board found that some of the employees in question were performing production rather than experimental laboratory work and constituted an accretion to the existing unit; and it clarified the certification by specifically including those employees in the production and maintenance unit. What a union can do, an employer can do, as evidenced by numerous Board decisions. See *Western Cartridge Co.*, 134 N. L. R. B. 67; *Blaw-Knox Co.*, 135

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being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U. S. C. § 159 (c)(1).

N. L. R. B. 862; *Lumber & Millwork Industry Labor Committee,* 136 N. L. R. B. 1083.

If this is truly a representation case, either IUE or Westinghouse can move to have the certificate clarified. But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith* v. *Evening News Assn.,* 371 U. S. 195. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by § 301 (a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U. S. C. § 185 (a); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448), or before such state tribunals as are authorized to act (*Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502; *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S. 95) is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him.

The policy considerations behind *Smith* v. *Evening News Assn., supra,* are highlighted here by reason of the blurred line that often exists between work assignment disputes and controversies over which of two or more unions is the appropriate bargaining unit. It may be claimed that A and B, to whom work is assigned as "technical" employees, are in fact "production and maintenance" employees; and if that charge is made and sustained the Board, under the decisions already noted, clarifies the certificate. But IUE may claim that when the work was assigned to A and B, the collective agreement was violated because "production and maintenance" employees, not "technical" employees, were entitled to it. As noted, the Board clarifies certificates where a certified union seeks to represent additional employees; but it will not entertain a motion to clarify a certificate where the union merely seeks additional work for employees already

within its unit. See *General Aniline & Film Corp.*, 89 N. L. R. B. 467; *American Broadcasting Co.*, 112 N. L. R. B. 605; *Employing Plasterers Assn.*, 118 N. L. R. B. 17. The Board's description of the line between the two types of cases is as follows:

> ". . . a Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitute an appropriate unit for collective bargaining purposes, and that in making such determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not *per se* preclude the employer from adding to, or subtracting from, the employees' work assignments. While that finding may be determined by, it does not determine, job content; nor does it signify approval, in any respect, of any work task claims which the certified union may have made before this Board or elsewhere." *Plumbing Contractors Assn.*, 93 N. L. R. B. 1081, 1087.

As the Board's decisions indicate, disputes are often difficult to classify. In the present case the Solicitor General, who appears *amicus,* believes the controversy is essentially a representational one. So does Westinghouse. IUE on the other hand claims it is a work assignment dispute. Even if it is in form a representation problem, in substance it may involve problems of seniority when layoffs occur (see Sovern, Section 301 and the

Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529, 574–575 (1963)) or other aspects of work assignment disputes. If that is true, there is work for the arbiter whatever the Board may decide.

If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award,[7] provided the procedure was

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[7] See, *e. g.*, *Raley's, Inc.*, 143 N. L. R. B. 256, 258–259:

"In the recently decided International Harvester Company case, a majority of the Board indicated that it would give 'hospitable acceptance to the arbitral process' in order 'to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.' Relying on various statutory provisions, particularly Section 203(d) of the Labor-Management Relations Act, 1947, and on decisions of the United States Supreme Court which recognize arbitration as 'an instrument of national labor policy for composing contractual differences,' the Board concluded that it would withhold its undoubted authority to adjudicate unfair labor practice charges and give effect to arbitration awards involving the same subject matter 'unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.' While it is true that International Harvester, as well as other cases in which the Board honored arbitration awards, involved unfair labor practice proceedings, we believe that the same considerations which moved the Board to honor arbitration awards in unfair labor practice cases are equally persuasive to a similar acceptance of the arbitral process in a representation proceeding such as the instant one. Thus, where, as here, a question of contract interpretation is in issue, and the parties thereto have set up in their agreement arbitration machinery for the settlement of disputes arising under the contract, and an award has already been rendered which meets Board requirements applicable to arbitration awards, we think that it would further the underlying objectives of the Act to promote industrial peace and stability to give effect thereto. It is true, of course, that under Section 9 of the Act the Board is empowered to decide questions concerning representation. However, this authority to decide questions concerning representation does not preclude the Board in a proper case from considering an arbitration award in determining whether such a question exists."

a fair one and the results were not repugnant to the Act.[8] As the Board recently stated:

> "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10 (a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> "The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective." *International Harvester Co.*, 138 N. L. R. B. 923, 925–926.

Thus the weight of the arbitration award is likely to be considerable, if the Board is later required to rule on phases of the same dispute. The Board's action and the awards of arbiters are at times closely brigaded. Thus where grievance proceedings are pending before an arbiter, the Board defers decision on the eligibility of discharged employees to vote in a representation case, until the awards are made. See *Pacific Tile & Porcelain Co.*, 137 N. L. R. B. 1358, 1365–1367, overruling *Dura Steel Products Co.*, 111 N. L. R. B. 590. See 137 N. L. R. B., p. 1365, n. 11.

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[8] *Monsanto Chemical Co.*, 97 N. L. R. B. 517; *Wertheimer Stores Corp.*, 107 N. L. R. B. 1434.

Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301. But that is not peculiar to the present type of controversy. Arbitral awards construing a seniority provision (*Carey* v. *General Electric Co.*, 315 F. 2d 499, 509–510), or awards concerning unfair labor practices, may later end up in conflict with Board rulings. See *International Association of Machinists*, 116 N. L. R. B. 645; *Monsanto Chemical Co.*, 97 N. L. R. B. 517. Yet, as we held in *Smith* v. *Evening News Assn.*, *supra*, the possibility of conflict is no barrier to resort to a tribunal other than the Board.

However the dispute be considered—whether one involving work assignment or one concerning representation—we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration may have a pervasive, curative effect even though one union is not a party.

By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" (*Textile Workers* v. *Lincoln Mills*, *supra*, at 455) and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

Reversed.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with a brief comment. As is recognized by all, neither position in this case is without its difficulties. Lacking a clear-cut command in the statute itself, the choice in substance lies between a course which would altogether preclude any attempt at resolving disputes of this kind by arbitration, and one which at worst will expose those concerned to the hazard of duplicative proceedings. The undesirable consequences of the first alternative are inevitable, those of the second conjectural. As between the two, I think the Court at this early stage of experience in this area rightly chooses the latter.

MR. JUSTICE BLACK, with whom MR. JUSTICE CLARK joins, dissenting.

The International Union of Electrical Workers (IUE), of which petitioner is president, and another union, the Federation, each have collective bargaining contracts with and are certified bargaining agents for employees of the respondent, Westinghouse Electric Corporation. IUE's contract covers "all production and maintenance" employees, but not "salaried technical" employees. Federation's contract covers "all salaried, technical" employees but not "production and maintenance" employees. IUE demanded that Westinghouse stop permitting a number of Federation employees to do certain work, claiming that what they were doing was "production and maintenance" work and that therefore IUE's members, not Federation's, were entitled to these jobs. Westinghouse refused to make the change, whereupon IUE, instead of filing an appropriate proceeding to have the dispute decided by the National Labor Relations Board (as I understand the Court to hold that it could have done), called on Westinghouse to arbitrate the dispute

with IUE. This demand rested on a provision of the IUE–Westinghouse contract agreeing to arbitration of grievances growing out of the "interpretation, application or claimed violation" of the contract. Westinghouse resisted arbitration, contending that the dispute ought to be resolved by the National Labor Relations Board, and the Court of Appeals of New York, agreeing with Westinghouse, refused to compel Westinghouse to arbitrate.[1]

I agree with the New York court and would affirm its judgment. Stripped of obscurantist arguments, this controversy is a plain, garden-variety jurisdictional dispute between two unions. The Court today holds, however, that the National Labor Relations Act not only permits but compels Westinghouse to arbitrate the dispute with only one of the two warring unions. Such an arbitration could not, of course, bring about the "final and binding arbitration of grievance[s] and disputes" that the Court says contributes to the congressional objectives in passing the Labor Act. Unless all the salutary safeguards of due process of law are to be dissipated and obliterated to further the cause of arbitration, the rights of employees belonging to the Federation should not, for "policy considerations," be sacrificed by an arbitration award in proceedings between IUE and Westinghouse alone. Although I do not find the Court's opinion so clear on the point as I would like, I infer that it is not holding that this misnamed "award" would be completely final and binding on the Federation and its members. What the Court does plainly hold, however—that "the weight of the arbitration award is likely to be considerable, if the Board is later required to rule on phases of the same dispute"—seems only a trifle less offensive to established due process concepts. And this means, I suppose, that this same award, *ex parte* as to Federation, must be given

[1] 11 N. Y. 2d 452, 184 N. E. 2d 298, 230 N. Y. S. 2d 703.

the same or greater weight in any judicial review of the Board's final order involving the same "phases of the same dispute."

Moreover, the Court holds that suits for damages can be filed against the employer in state courts or federal courts under § 301 of the Taft-Hartley Act, 29 U. S. C. § 185, for the "unfair labor practice" of failing to bargain with the right union when two unions are engaged in a jurisdictional dispute. The employer, caught in that jurisdictional dispute, is ordinarily in a helpless position. He is trapped in a cross-fire between two unions. All he can do is guess as to which union's members he will be required by an arbitrator, the Labor Board, or a court to assign to the disputed jobs. If he happens to guess wrong, he is liable to be mulcted in damages. I assume it would be equally difficult for him to prophesy what award an arbitrator, the Labor Board, or a judge will make as to guess how big a verdict a court or a jury would give against him. It must be remembered that the employer cannot make a choice which will be binding on either an arbitrator, the Board, or a court. The Court's holding, thus subjecting an employer to damages when he has done nothing wrong, seems to me contrary to the National Labor Relations Act as well as to the basic principles of common everyday justice.

The result of all this is that the National Labor Relations Board, the agency created by Congress finally to settle labor disputes in the interest of industrial peace, is to be supplanted in part by so-called arbitration which in its very nature cannot achieve a final adjustment of those disputes. One of the main evils it had been hoped the Labor Act would abate was jurisdictional disputes between unions over which union members would do certain work.[2]

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[2] See *Labor Board* v. *Radio & Television Broadcast Engineers Union,* 364 U. S. 573; cf. *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, 567.

The Board can make final settlements of such disputes. Arbitration between some but not all the parties cannot. I fear that the Court's recently announced leanings to treat arbitration as an almost sure and certain solvent of all labor troubles has been carried so far in this case as unnecessarily to bring about great confusion and to delay final and binding settlements of jurisdictional disputes by the Labor Board, the agency which I think Congress intended to do that very job.

I would affirm.

HARDY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 112. Argued November 21, 1963.—
Decided January 6, 1964.

After an indigent defendant in a federal court had been convicted and sentenced to imprisonment, the court-appointed lawyer who represented him at the trial withdrew his appearance. The Court of Appeals appointed different counsel to represent the indigent, and this counsel moved for a transcript of the entire proceedings of the trial to aid him in obtaining leave to appeal *in forma pauperis*. That motion was denied. *Held:* Counsel was entitled to be furnished a free transcript of the trial. Pp. 279–282.

(a) Where new counsel represents an indigent on appeal, he cannot faithfully discharge his obligation either in obtaining leave to appeal or in presentation of an appeal unless he has the entire transcript. Pp. 279–280.

(b) The right, under Rule 52 (b) of the Federal Rules of Criminal Procedure, to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended. P. 280.

(c) The duty of counsel on appeal is not to serve as *amicus* to the Court of Appeals, but as advocate for the appellant. Pp. 281–282.

(d) The Court here deals only with the statutory scheme and does not reach a consideration of constitutional requirements. P. 282.

Reversed.

Mozart G. Ratner argued the cause and filed briefs for petitioner.

Louis F. Claiborne argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan.*

John H. Pratt, Daniel M. Singer and *Louis M. Kaplan* filed a brief for the Bar Association of the District of Columbia, as *amicus curiae,* urging reversal.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a pauper, has been convicted and sentenced to prison. After conviction the court-appointed lawyer, who represented him at the trial, withdrew his appearance with the approval of the court. The present court-appointed attorney is a different person, appointed by the Court of Appeals after the indigent had prepared *pro se* a petition for leave to appeal *in forma pauperis.* The District Court denied leave to appeal *in forma pauperis.* The Court of Appeals, although empowered to allow the appeal (*Coppedge* v. *United States,* 369 U. S. 438, 455), merely allowed petitioner to proceed *in forma pauperis* for purposes of the appeal "to the extent of having the stenographic transcript of the testimony and evidence presented by the government prepared at the expense of the United States," as those parts of the transcript were the only ones that relate "to the conclusory allegations" formulated by the indigent defendant *pro se.* See *Ingram* v. *United States,* 315 F. 2d 29, 30–31. After a petition for rehearing was denied, petitioner moved the Court of Appeals for a transcript of the balance of the proceedings in the District Court. This motion was denied by a divided Bench. The case is here on certiorari. 373 U. S. 902.

We deal with the federal system where the appeal is a matter of right (*Coppedge* v. *United States, supra,* at 441; 28 U. S. C. §§ 1291, 1294), and where the appellant is entitled to "the aid of counsel unless he insists on being his own." *Johnson* v. *United States,* 352 U. S. 565, 566. Congress has buttressed that right of appeal in several ways. It has provided in 28 U. S. C. § 1915 that any federal court may authorize an "appeal" *in forma pau-*

peris, except that such an appeal may not be taken if the trial court certifies that "it is not taken in good faith." Further, a transcript is available for appeal purposes, Congress having provided in the Court Reporter Act, 28 U. S. C. § 753 (b), that a transcript "by shorthand or by mechanical means" of "all proceedings in criminal cases had in open court" shall be made. The United States Attorney for the District of Columbia has adopted the practice of furnishing to indigents a full transcript on request if the cost to the United States is not more than $200.[1] That policy draws a distinction not present in the statute nor in the Rules of the Court of Appeals which provide that, when the court allows an appeal *in forma pauperis,* it shall then determine "whether and to what extent, a transcript will be necessary for the proper determination of the appeal." D. C. Cir. Rule 33 (b)(2)(i).

We have here a case where an appeal *in forma pauperis* has not yet been allowed. But whether counsel seeks an entire transcript at that stage or later on, the problem seems to us to be the same.

A court-appointed counsel who represents the indigent on appeal gets at public expense, as a minimum, the transcript which is relevant to the points of error assigned. *Coppedge* v. *United States, supra,* at 446; *Ingram* v. *United States, supra.*[2] But when, as here, new

[1] During oral argument of this case, counsel for respondent stated that the United States Attorney for the District of Columbia initiated, since this case was before the lower courts, a practice of not filing an opposition to a motion for a full transcript where the cost of such a transcript will not exceed $200. This is usually the case when the trial does not exceed three days. This practice is followed because the United States Attorney feels that the time and effort necessary to oppose such a motion will, in terms of dollars, exceed $200. According to counsel, the Federal District Court, pursuant to a "tacit" understanding, usually grants unopposed motions for a complete transcript.

[*Footnote 2 is on p. 280*]

counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that. For Rule 52 (b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.[3]

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[2] In *Ingram* the Court of Appeals said:

". . . when a *pro se* petition is filed, upon direct appeal from judgment of conviction, and the claims of error stated therein (e. g., 'insufficiency of evidence,' 'unlawful search and seizure,') are so conclusory in nature that 'their substance cannot adequately be ascertained,' counsel will be appointed and, simultaneously, the portion of the transcript of proceedings which relates to the conclusory allegations will be ordered so that appointed counsel may determine their merit. Of course, counsel will not be limited to the transcript initially allowed if he can in good conscience advance other claims of error requiring additional portions of the transcript." *Id.*, at 30–31.

[3] Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 792–793 (1961), in speaking of the task of counsel who is appointed to represent the appellant and who did not serve as trial counsel, says:

". . . the new counsel is operating under serious handicaps. Normally he has no prior acquaintance with the trial proceedings and no personal knowledge of the case which would form a basis for sound judgment. Normally no transcript is in existence at this stage, so he cannot make his own independent analysis of the trial proceedings.

"In order to investigate whether the appeal involves one or more 'not plainly frivolous' issues, counsel may examine the formal documents on record in the trial court; he may interview his client; he may discuss the case with defendant's trial counsel and with the prosecutor; he may try to work out with the prosecutor an 'agreed statement' of the case, despite the fact that he lacks the information necessary to assure himself that the agreed statement would be an accurate one; he may ask the official court reporter as a courtesy to read back certain limited portions of the reporter's shorthand notes

The duty of counsel on appeal, as we noted in *Ellis* v. *United States,* 356 U. S. 674, 675, is not to serve as *amicus* to the Court of Appeals, but as advocate for the appellant:

> "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel. *Johnson* v. *United States,* 352 U. S. 565. In this case, it appears that the two attorneys appointed by the Court of Appeals, performed essentially the role of *amici curiae.* But representation in the role of an advocate is required. If counsel is convinced, *after conscientious investigation,* that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel *has diligently investigated* the

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(or all of them, if the trial was a short one); and it has been suggested—though perhaps without too much regard for the practicalities of some situations—that he may even interview the trial judge and seek to inspect any notes which the trial judge kept of the trial proceedings. Such efforts are apt to be incredibly time-consuming and frustrating, and sometimes may arouse in counsel a feeling that he would be well advised to avoid future assignments of appellate in forma pauperis work. But worse than that, in many instances these efforts will be wholly unsatisfactory as a means of safeguarding the defendant's rights.

"Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be seen—let alone assessed—without reading an accurate transcript. Particularly is this true of questions relating to evidence or to the judge's charge; and it may also apply to many other types of questions. Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible 'plain error,' even though trial counsel was not aware of their existence; and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal. In short, a conscientious counsel freshly entering the case at the appellate stage normally is likely to conclude that a full or partial transcript of the trial proceedings will be indispensable if the requisite 'dependable record' is to be obtained as a basis for evaluating the case."

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possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." (Italics added.)

We deal here only with the statutory scheme and do not reach a consideration of constitutional requirements. We see no escape from the conclusion that either where the requirements of a nonfrivolous appeal prescribed by *Coppedge* v. *United States, supra,* are met, or where such a showing is sought to be made, and where counsel on appeal was not counsel at the trial, the requirements placed on him by *Ellis* v. *United States, supra,* will often make it seem necessary to him to obtain an entire transcript.

We conclude that this counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution.

Reversed.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring.

I join the Court's opinion which is written narrowly within the framework of prior decisions. I concur separately, however, to state my conviction that in the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal criminal cases to defendants who cannot afford to purchase them, whenever they seek to prosecute an appeal.

The problem here arises out of the different procedures by which criminal appeals taken by indigent and nonindigent defendants are processed in the District of

Columbia and other federal courts. The procedure for nonindigents, who are represented by retained counsel and who are generally free on bail pending appeal, is automatic, direct and prompt. Within 10 days after judgment, counsel files a simple notice of appeal with the clerk of the District Court; a transcript is purchased and filed with the Court of Appeals; and the case is then automatically placed on the calendar for briefing and argument on the merits.[1] The procedure for indigents, who are generally incarcerated pending appeal because of their inability to make bail,[2] is indirect, dilatory and discretionary. A key difference is that while a nonindigent may appeal, in effect, as a matter of right, an indigent must make a showing that his claims of error are not frivolous before he is given permission to appeal. A brief description of the process by which the federal courts seek to screen frivolous attempts to appeal *in forma pauperis* is necessary to an understanding of the problem raised by this case.

Following the conviction and sentencing of an indigent defendant, his court-appointed trial lawyer often withdraws from the case.[3] If the right to appeal is to be pre-

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[1] Rule 39 (d) of the Federal Rules of Criminal Procedure provides that:

"Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases."

[2] See *Pannell* v. *United States,* 115 U. S. App. D. C. 379, 320 F. 2d 698; Committee on the Administration of Bail of the Junior Bar Section of the Bar Association of the District of Columbia, Report on the Bail System of the District of Columbia (1963).

[3] Permitting the trial lawyer to withdraw at that stage probably reflects a recognition both of the burden of serving as uncompensated trial counsel and of the different skills often possessed by trial and

served, the defendant *pro se* must file a notice of appeal within 10 days after the entry of the judgment and must apply to the District Court for leave to appeal *in forma pauperis*. The application must include a statement of the alleged errors the defendant seeks to raise on appeal. Unless the District Court concludes that the appeal is not taken in "good faith," leave to appeal *in forma pauperis* must be granted. If the District Court denies leave to appeal *in forma pauperis*, the defendant, who, as previously noted, is often without the services of an attorney, may apply to the Court of Appeals for leave to appeal. If the Court of Appeals can determine from the application that a nonfrivolous claim of error exists, it

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appellate lawyers. By noting the existence of a hiatus in representation at such a critical period, I do not intend to signify approval.

The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice described this phase of the process as follows: "[T]he convicted defendant must file a notice of appeal within ten days after the entry of the judgment, if the right to appeal is to be preserved. Since an assigned counsel under present practices often does not conceive it to be part of his obligations to advise the defendant of his right to appeal or to assist in perfecting that right, and since many district courts do not routinely advise the defendant of his appeal rights, some financially disadvantaged defendants, because of their ignorance of the jurisdictional requirements, irrevocably lose their rights to appeal. The defendant who is unable to pay the costs of a trial transcript or to pay court costs is required to apply for leave to appeal *in forma pauperis*. The application, which is in affidavit form, contains allegations of financial incapacity and the reasons relied on by defendant to obtain redress in the appellate courts. Because normally no provision is made for counsel at this stage of the proceedings, the application is often inexpertly prepared and conceived, frequently resulting in injury to the defendant's interests and to the sound administration of justice." Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, Report on Poverty and the Administration of Federal Criminal Justice (1963), 100 (hereinafter cited as Attorney General's Report).

must grant leave to appeal. If leave is granted, either by the District Court or the Court of Appeals, a lawyer is then appointed and supplied with the portions of the transcript relating to the nonfrivolous claims. If he then desires any additional portion of the transcript to help him prepare his appeal on the merits, he must ask the Court of Appeals to order its preparation.

If the District Court has denied leave to appeal *in forma pauperis,* and if "the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing . . ." that the case presents a nonfrivolous issue. *Coppedge* v. *United States,* 369 U. S. 438, 446. A "record of sufficient completeness" has been interpreted by the Court of Appeals for the District of Columbia to mean "the portion of the transcript of proceedings which relates to the conclusory allegations" made by the defendant in his *pro se* application. *Ingram* v. *United States,* 114 U. S. App. D. C. 283, 285, 315 F. 2d 29, 31. After receiving the relevant portion of the transcript, the appointed lawyer has the duty of preparing a memorandum showing, if he can, that the case presents a nonfrivolous issue and that leave to appeal should be granted. If the lawyer finds what he considers a nonfrivolous claim of error in the portion of the transcript he has been given, he files the memorandum. If the court then agrees that there is a nonfrivolous issue, it must grant leave to appeal *in forma pauperis,* and the same previously described procedure is then followed as would be followed if leave had been granted originally by the District Court or the Court of Appeals.

If the lawyer has examined the portions of the transcript relating to the *pro se* claims of error and has satisfied himself that they contain no issue which he can assert to be nonfrivolous, he then has these alternatives. Deeming his appointed function exhausted, the attorney may seek leave from the Court of Appeals to withdraw from the case on the ground that he is satisfied that the case presents no issue which is nonfrivolous.[4] If leave to withdraw is granted, a new lawyer is generally not appointed, and the defendant is informed that he may submit his own memorandum in support of his application. Since the *pro se* memorandum will rarely add anything to the original application, once the lawyer is given leave to withdraw denial of the defendant's application is virtually inevitable.

The lawyer who has satisfied himself that the transcript originally ordered contains no nonfrivolous issue may, however, decide to request additional portions of the transcript before seeking to withdraw from the case. If his examination of the original portions of the transcript leads him to suspect specific error in other portions of the transcript, the Court of Appeals, upon being presented with these new claims of error, will order the production of those portions of the transcript relating to these claims.

Where the appointed lawyer can find no nonfrivolous claim of error in the portion of the transcript relating to the claims raised in the defendant's *pro se* application but has no idea whether the remainder of the transcript will disclose any such claim, he cannot in good conscience allege any new claim of error to which additional portions of the transcript would be relevant. Nor can he, without being furnished with the remainder of the transcript, conclude in good conscience that the case presents no issue which is nonfrivolous.

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[4] In the District of Columbia, many lawyers chose this course and, at least until recently, leave to withdraw was freely granted.

Counsel in this case was presented with precisely this dilemma and sought resolution of it by asking the Court of Appeals either to order the production of the remainder of the transcript, or to terminate his responsibility in that court by denying leave to appeal *in forma pauperis*. The Court of Appeals granted neither request. Thus we now have before us for resolution the problem of the conscientious appointed counsel at this critical stage in the screening process.

This case, therefore, although it arises in the context of a request for portions of a transcript, raises fundamental questions concerning the proper role of appointed counsel on appeal. If the function of appointed counsel is essentially to aid the court, as *amicus curiae,* in assessing the claims of errors made in the *pro se* petition and in determining whether they include a nonfrivolous issue, then the practice now prevailing is perfectly suited to its end. It is then entirely logical to give the appointed lawyer only those portions of the transcript relating to the *pro se* claims of error, and to permit him to withdraw from the case if those portions of the transcript reveal no nonfrivolous claims. However, if the proper function of the appointed lawyer is essentially the same as that of the retained lawyer—to be an effective advocate in an adversary system—then there can be no justification for limiting him to those portions of the transcript relating to the claims of error raised by his indigent and often illiterate client and for permitting—indeed in effect requiring—him to withdraw from the case without examining the remainder of the trial transcript. It cannot seriously be suggested that a retained and experienced appellate lawyer would limit himself to the portions of the transcript designated by his client or even by the trial attorney, especially where the Courts of Appeals may, and not infrequently do, reverse convictions for "plain errors" not raised at trial.

The proper function of appointed counsel on appeal has been described by this Court. "[R]epresentation in the role of an advocate is required." *Ellis* v. *United States*, 356 U. S. 674, 675. It is not enough that the appointed counsel perform "essentially the role of *amici curiae*." *Ibid.* If this requirement is to be more than a hollow platitude, then appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.[5] Anything short of a complete transcript is incompatible with effective appellate advocacy.

The opinion of the Court agrees with this conclusion as it relates to "one whose lawyer on appeal enters the case after the trial is ended." *Ante*, at 280. I believe that it is equally applicable to one whose appointed lawyer on appeal was also his lawyer at trial. No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal. Nor should this be required of an appointed lawyer. An appointed lawyer, whether or not he represented the defendant at trial, needs a complete trial transcript to discharge his full responsibility of preparing the memorandum supporting the application to proceed *in forma pauperis*.[6]

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[5] See, *e. g.*, *Tatum* v. *United States*, 88 U. S. App. D. C. 386, 190 F. 2d 612; *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862; *United States* v. *Currens*, 290 F. 2d 751; *McDonald* v. *United States*, 114 U. S. App. D. C. 120, 312 F. 2d 847; *Miller* v. *United States*, 116 U. S. App. D. C. 45, 320 F. 2d 767.

[6] Under the practice now prevailing, problems relating to transcripts may arise both before and after leave to appeal *in forma*

I believe further that the availability of a complete transcript should not be made to depend on the facts of each case. This Court has recently condemned "the inevitable delay that surrounds a procedure in which the courts give piecemeal attention to the series of motions that indigents must make before a final adjudication of the merits of their cases is reached." *Coppedge* v. *United States,* 369 U. S., at 450. One of the prime reasons for this delay has been the "separate considerations of motions . . . for the preparation of a transcript of the trial proceedings . . . ." *Ibid.* A case-by-case approach—regardless of the governing standard—must inevitably contribute to this delay. Experience in this area has shown the need for a clear and simple across-the-board rule that would obviate the necessity for further court considerations of transcript requests. This rule should be that any criminal defendant desiring to appeal who cannot afford a transcript [7] must be given one to help his appointed lawyer prepare a memorandum establishing the existence of a nonfrivolous issue in support of the application for leave to appeal *in forma pauperis.*

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pauperis is granted. If counsel were provided with a complete transcript upon being appointed to prepare the memorandum in support of the application to appeal *in forma pauperis,* the problem of supplying additional portions of the transcript after leave is granted would become moot.

[7] Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." Attorney General's Report, at 8. An accused must be deemed indigent when "at any stage of the proceedings [his] lack of means . . . substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right." *Ibid.* Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.

The Government suggests that such a memorandum can be adequately prepared, even by a lawyer newly appointed on appeal, without more transcript than is presently provided. It would have the lawyer conduct an investigation, including interviews with the trial judge, the prosecuting attorney and the trial defense counsel, in an effort to reconstruct the events of the trial. At best, however, this is a poor substitute for a transcript in disclosing possible error. Moreover, a lawyer appointed to represent the interests of a defendant should not be required to delegate his responsibility of determining whether error occurred at trial to participants at that trial whose conduct may have formed the very basis for the errors. Finally, this interview requirement is unduly burdensome on the appointed lawyers who are required to serve without compensation. As the Attorney General's Committee on Poverty and the Administration of Criminal Justice recently observed: "It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses." [8]

I conclude, therefore, that the interests of equal justice and the viability of our adversary system [9] are impaired

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[8] Attorney General's Report, at 102.

[9] *Id.*, at 10–11: "The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements

when an indigent defendant's access to a trial transcript is not as complete as that of a paying defendant. This "concept of 'equal justice' does not confuse equality of treatment with identity of treatment." [10] It does, however, require the Government to do "all that can reasonably be required of it to eliminate those factors that inhibit the proper and effective assertion" of the defendant's claims.[11]

Providing a complete transcript to all defendants who cannot afford to purchase one will not create an undue financial burden on the Government. Statistics for the last three years for which figures are available indicate that almost 90% of the criminal trials in the District of Columbia lasted three days or less and that a "transcript of a three-day trial will generally cost less than $200 to prepare . . . ." [12] The Government informs us that its present practice in the District of Columbia is not to

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and by the large, but indeterminate, numbers of persons, able to pay some part of the costs of defense, but unable to finance a full and proper defense. Persons suffering such disabilities are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, [is] great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community."

[10] *Id.*, at 9.

[11] *Ibid.*

[12] Special Committee of the Junior Bar Section of the Bar Association of the District of Columbia, Report to the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, reprinted in Brief of the Bar Association of the District of Columbia as *amicus curiae*, at A–9, A–16.

oppose the preparation of transcripts which cost $200 or less to prepare. It seems likely, therefore, that a system of free transcripts will, in the long run, be less expensive than the present system with its multiple proceedings and frequent delays.[13] Moreover, the financial costs are relatively unimportant when compared

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[13] The Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice made the following observation concerning the real cost of the present system: "The Committee believes that proper evaluation of comparative costs requires that attention be directed to the 'hidden costs' of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement. It should be carefully noted that in a system of adequate representation involving the use of compensated counsel the shifting of many of these burdens to counsel will no longer be possible. In many cases the provision of a transcript at the outset of the appellate process will involve substantially less expense to the government than the payment of attorneys' fees for time spent by counsel in an effort to settle a record for disposition of the application to appeal *in forma pauperis* and in other proceedings made necessary by the present system. Fourth, a system that obstructs access to direct review is likely to encourage resort by prisoners to collateral attack on their convictions and sentences with losses of time and money thereby occasioned. Such has been the uniform experience of state systems of criminal justice." Attorney General's Report, at 114.

The Bar Association of the District of Columbia, in their brief *amicus curiae*, state that "On the basis of [their] experience as appointed counsel, [they] believe strongly that providing a trial transcript in every case will significantly reduce the number of collateral attack proceedings under 28 U. S. C. 2255, habeas corpus, or coram nobis." The Attorney General's Report also points out "the fact

with the unnecessary hardship to defendants, many of whom are incarcerated during their attempts to secure appellate review because of their inability to raise the necessary bail.[14] I agree with Judge Learned Hand: "If

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that the free accessibility and quality of appellate review has reduced collateral attacks on sentences imposed by courts martial [where the 'record is supplied the defendant at government expense'] to an absolute minimum." Attorney General's Report, at 109. Thus, the automatic provision of free transcripts to all federal criminal defendants who cannot afford to purchase them would seem to be entirely consistent with the spirit of our recent decision in *Bartone* v. *United States*, 375 U. S. 52, where the Court observed that "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Id.*, at 54.

[14] The recent case of William H. Kemp, arising in the District of Columbia, illustrates the complexity of the *in forma pauperis* procedures, the attendant delays, and the resulting injuries to the accused. The procedural history of the case, as compiled by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, follows:

1960, Dec. 13..... Joint indictment with one Gray for the crime of housebreaking, petty larceny, and unauthorized use of vehicle. Crim. No. 1033–60.

Dec. 16..... Kemp pleaded not guilty.

1961, Feb. 3..... Gray convicted of all three counts; Kemp acquitted of housebreaking and larceny, convicted of unauthorized use of motor vehicle.

Mar. 17..... Judgment entered sentencing Kemp to imprisonment for a period of one to three years.

Mar. 21..... Kemp's application to proceed on appeal without prepayment of costs was denied as plainly frivolous and not taken in good faith.

Apr. 17..... Application to proceed on appeal without prepayment of costs filed in the court of appeals.

May 18..... Application for leave to appeal denied by a panel of the court of appeals, one judge dissenting.

June 1..... Petition for rehearing *en banc* filed.

[*Footnote 14 continued on page 294*]

we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." [15]

Finally, the foregoing discussion leads me to the ultimate conclusion that the cause of equal justice is unduly hindered by the cumbersome obstacles to appeal which have been erected by the procedure for screening frivolous attempts to appeal *in forma pauperis*. I agree, therefore, with my Brothers STEWART and BRENNAN, in their concurring opinion in *Coppedge*, 369 U. S., at 458, that "each Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply" eliminating the entire process for screening *in forma pauperis* appeals and by treating such appeals in the same manner as paid appeals are now

June 15..... Petition for rehearing *en banc* denied, two judges noting that they would grant the petition.

July 14..... Petition for leave to proceed *in forma pauperis* and petition for writ of certiorari filed in the Supreme Court of the United States. No. 311, Misc.

1962, May 14..... Motion for leave to proceed *in forma pauperis* and petition for certiorari granted; judgment vacated and case remanded for consideration in light of *Coppedge*.

July 18..... *Per curiam* order in Court of Appeals directing that petitioner be allowed to appeal without prepayment of costs and with transcript at government expense.

Dec. 13..... *Per curiam* reversal and remand with directions to enter a judgment n. o. v. and discharge of appellant.

Kemp was arrested on November 24, 1960. At the time of the opinion ordering his release, he had been confined well over two years. Attorney General's Report, at 103–104.

[15] Address before Legal Aid Society of New York, Feb. 16, 1951.

Even if I were to assume, as the Government argues, that requiring the provision of free services for indigents may sometimes have the effect of placing them in a more advantageous position than that of

treated.[16] Since "no *a priori* justification can be found for considering [*in forma pauperis* appeals], as a class, to be more frivolous than those in which costs have been paid," *id.*, at 449, it would seem to follow that no justification exists for erecting artificial barriers to appeal for indigent defendants, "[p]articularly since [these] litigants . . . may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition . . . ." *Id.*, at 450.[17] However,

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the defendant who, while not indigent, has limited financial resources, the answer to this problem would not be to deny the means of an effective appeal to the former; it would be to make such means more easily available to the latter, by broadening the concept of "indigency," see note 7, *supra*, by adopting a system whereby the accused pays what he can afford and the Government pays the rest, or by providing some or all of these resources freely to anyone who requests them regardless of financial ability. See note 13, *supra*.

[16] "The Government would then be free in any case to file before argument a motion to dismiss the appeal as frivolous, as every appellee is always free to do." *Coppedge* v. *United States*, 369 U. S., at 458.

[17] Attorney General's Report, at 113–114: "[T]he Committee believes that the present practices are largely self-defeating and that they can be abandoned without creating unmanageable burdens of costs or necessitating undue expenditures of judicial time. Every justification of the present practices which has come to the Committee's attention is predicated on the assumption that the screening procedures are required to prevent an inundation of frivolous appeals and that the increases in the number of appeals will result in large monetary costs to the government and in substantial burdens on adjudication in the courts of appeals. We believe that even if these fears were substantial, such considerations are not entitled to be given decisive weight by a system of criminal justice dedicated to the objective of full and equal justice to all accused persons and to the proper and vigorous operation of the adversary system. The Committee notes, however, that many American states—some sufficiently populous to provide reasonable comparisons with the federal system of justice—have granted financially disadvantaged defendants full access to appellate review without experiencing bur-

as long as the Courts of Appeals continue to require a preliminary showing before granting an indigent leave to appeal, we can do no less than require, under our supervisory power, that a full transcript be made available, without limitation, to the lawyer appointed to help make that showing.

MR. JUSTICE CLARK, concurring in the result.

A half dozen years ago, 28 U. S. C. § 1915 clearly directed that no indigent appeal may be taken "if the trial court certifies in writing that it is not taken in good faith." The words of the statute are identical today but the Court's interpretations have stripped them of the apparent congressional meaning. In *Johnson* v. *United States,* 352 U. S. 565 (1957), we said that counsel must be appointed to represent an indigent who wishes to contest the validity of a certificate under § 1915 and that such counsel must be "enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith." At 566. In *Farley* v. *United States,* 354 U. S. 521 (1957), counsel for the indigent claimed that the evidence was insufficient to justify the conviction, and this Court required a transcript to be furnished on that point. A year later in *Ellis* v. *United States,* 356 U. S. 674 (1958), it appeared that counsel appointed by the Court of Appeals "performed essentially the role of *amici curiae,*" at 675, and the Court held that "representation in the role of an advocate is required," *ibid.,* vacating the judgment on the

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dens approaching the magnitude of those sometimes predicted as the consequence of similar measures in the federal courts. We believe, also, that forecasts of inordinate burdens do not take adequate account of the fact that the proliferation of motions and petitions produced by present practice is highly expensive of judicial time."

concession of the Solicitor General that the question of probable cause raised by petitioner could not necessarily be called frivolous. In 1962 in *Coppedge* v. *United States,* 369 U. S. 438, the Court held:

> "It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts. It is the burden of the Government, in opposing an attempted criminal appeal *in forma pauperis,* to show that the appeal is lacking in merit, indeed, that it is so lacking in merit that the court would dismiss the case on motion of the Government, had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements." At 448.

Today we are faced with the question whether counsel, appointed on an appeal to represent an indigent, but not present at the trial of the case in the District Court, is entitled to a full transcript so as to enable him to determine whether plain error or defects affecting substantial rights occurred during the trial. As I see the problem, the Government has not met the burden placed upon it by the above language in *Coppedge,* namely to sustain the frivolity of the appeal, insofar as plain error is concerned. It appears to me that the Government must furnish the full transcript in order to enable petitioner's new counsel to determine whether plain error occurred during the trial, and likewise to enable the Court of Appeals to pass upon the point.

While I dissented in *Coppedge* as well as *Farley,* I feel bound by their holdings and therefore concur in the result here. In so doing, I trust that when Congress adopts the

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Criminal Justice Act or similar legislation* which provides compensation for counsel representing indigents, the same counsel who tried the case in the District Court will be appointed in the Court of Appeals.

MR. JUSTICE HARLAN, dissenting.

I think the Court should not, in the name of exercising its supervisory powers, engraft this further requirement on 28 U. S. C. § 1915.[1] The holding is that an indigent convict who—following the trial court's certification that his appeal was frivolous and not taken in good faith—has received at the direction of the Court of Appeals a free copy of that portion of the trial transcript germane to the errors asserted as grounds for appeal, is entitled as of right to a free copy of the balance of the transcript if his appellate counsel was not the lawyer who represented him at the trial. The theory is that this is necessary to enable the new lawyer to discover possible "plain error."

Four members of the Court would go further. They would furnish complete transcripts as a matter of course to all indigent appellants, whether or not represented at the appellate stage by the same lawyer who acted for them

*S. 1057, the proposed Criminal Justice Act, was passed by the Senate August 6, 1963. The Judiciary Committee of the House of Representatives and the Rules Committee reported favorably a compromise bill, H. R. 7457, and on December 10, 1963, the House voted to take up the legislation on the floor.

[1] "§ 1915. *Proceedings in forma pauperis.*

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

at the trial. *Ante,* p. 288. And recognizing that any indigent receiving such a transcript is thus advantaged over an appellant who has to pay for his transcript, they go on to suggest that fairness may require that appellants who are not indigent, but impoverished, should be furnished free transcripts to the extent that they cannot afford to pay for them. *Ante,* p. 289, n. 7. Although the majority opinion stops short of both of these propositions, given what is now done can it be said that these more expansive positions are without force? Be that as it may, the Court has taken a long step in derogation of the hitherto consistently maintained view, both in federal and state criminal cases, that an indigent defendant is not automatically entitled to a free transcript simply because those economically better situated can obtain their transcripts at will. See *Johnson* v. *United States,* 352 U. S. 565, 566; *Griffin* v. *Illinois,* 351 U. S. 12, 20; *Eskridge* v. *Washington Prison Board,* 357 U. S. 214, 216; *Draper* v. *Washington,* 372 U. S. 487, 495.

Granting that § 1915 has not caught up with this Court's recent pronouncements in this area (see concurring opinion of CLARK, J., *ante,* pp. 296–298) and that, as recommended in the recent report of the Attorney General's Committee,[2] the time has come for a comprehensive overhauling of the procedures governing *in forma pauperis* appeals in the federal system, I believe that such an undertaking is more appropriately to be accomplished by congressional action, taken in collaboration with the Judicial Conference of the United States, than by piecemeal adjudications of this Court. Especially meet for such a course is the innovation made today, a step which in countrywide application affects the public treasury to an

[2] Poverty and the Administration of Federal Criminal Justice, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).

unknown degree, and whose wisdom should not be judged in the abstract or upon the limited data presently before the Court.

A balanced solution of a problem having such unforeseeable ramifications requires consideration of the informed views of those on the firing line of the administration of criminal justice—District judges, Circuit judges, United States attorneys, defense lawyers and Legal Aid Societies—and exploration of differing conditions among the Circuits. It might be concluded that a nationwide requirement of this sort would be unsound, and that the matter is best left for discrete treatment by the Judicial Councils in the various Circuits, subject of course to constitutional limitations. Remotely situated as this Court is from the day-to-day workings of the criminal system, it should hesitate to promulgate blanket requirements on this subject based largely upon theoretical considerations. Cf. *Sanders* v. *United States,* 373 U. S. 1, 23 (dissenting opinion of this writer).

I would dispose of this case as the Government suggests by remanding it to the Court of Appeals for further consideration in light of that court's subsequent decision in *Ingram* v. *United States,* 315 F. 2d 29. I do not understand this Court's decision to rest on constitutional grounds, nor do I think it well could.

Syllabus.

LINER ET AL. *v.* JAFCO, INC., ET AL.

CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE.

No. 43. Argued November 21, 1963.—Decided January 6, 1964.

The Chattanooga Building Trades Council comprises numerous building trades unions, including the Hod-Carriers Union and its Local 846, two of the petitioners. Respondent Rea Construction Co., a large North Carolina building contractor, was engaged by respondent Jafco, Inc., as general contractor to erect a shopping center on a site in Tennessee. Rea operated an open shop, and workers on the project were paid lower wages than the union scale. The Council authorized the Hod-Carriers to place a picket at the site in protest, and petitioner Liner began peaceful picketing, whereupon construction workers on the job promptly ceased work. On the same day, Jafco sought an *ex parte* injunction from a Tennessee state court, which ordered the injunction to issue upon the execution and filing of an injunction bond. The next day Jafco filed a bond to indemnify petitioners in damages if the injunction was "wrongfully" sued out. Petitioners' motion in the state court to dissolve the injunction was denied; the injunction was made permanent by a final decree; and on appeal the decree was affirmed. Pending decision on the appeal, construction at the site was completed. The State Supreme Court denied certiorari. *Held:* The issuance of the injunction was beyond the power of the Tennessee courts, and the judgment is reversed. Pp. 304–310.

(a) This Court is not bound by the state appellate court's holding that this case was rendered moot by the completion of construction, since in this case the question of mootness is itself a question of federal law upon which this Court must pronounce final judgment. P. 304.

(b) The petitioners plainly have a substantial stake in the judgment, deriving from the respondent's undertaking in the injunction bond, which survives the completion of construction. P. 305.

(c) Since a holding of mootness would frustrate national labor policy and encourage interference with the exclusive jurisdiction of the National Labor Relations Board, the Court should be astute to avoid hindrances in the way of reviewing the state court's adverse decision on the claim of federal preemption. Pp. 306–308.

(d) Whether the facts showed a "labor dispute" within the meaning of 29 U. S. C. § 152 (9) is at least arguable, wherefore the

state courts had no jurisdiction to issue an injunction or to adjudicate the controversy, which lay within the exclusive powers of the National Labor Relations Board. Pp. 309–310.

Reversed and remanded.

S. Del Fuston argued the cause for petitioners. With him on the brief was *H. G. B. King.*

John A. Chambliss, Jr. argued the cause for respondents. With him on the brief was *James F. Corn.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Chattanooga Building Trades Council, AFL, is composed of 17 building trades unions, including Hod-Carriers Building and Common Laborers' Union of America and its Local 846, two of the petitioners. Respondent Rea Construction Company, a large North Carolina building contractor, was engaged by respondent Jafco, Inc., as general contractor to erect a shopping center on a site in Cleveland, Tennessee. Rea operated an open shop, and workers on the project were paid lower wages than the union scale. The Council authorized the Hod-Carriers to place a single picket at the site in protest. The petitioner Liner, carrying a sign which read "Rea Construction Co., not under contract with Chattanooga Building Trades Council, A. F. of L.," began peaceful picketing on August 8, 1960. Construction workers on the job promptly ceased work. On the same day respondent Jafco, Inc., sought an *ex parte* injunction against the picketing from the Tennessee Chancery Court, which ordered the injunction to issue upon the execution and filing of an injunction bond. See 5 Tenn. Code Ann., 1955, § 23–1901. The next day, August 9, Jafco filed a bond providing that, if the injunction action failed, Jafco "shall well and truly pay and satisfy the said [petitioners] all such costs, damages, interest, and other sums

as may be awarded and recovered against the said Jafco, Inc. in any suit or suits which may be hereafter broyght [*sic*] for wrongfully suing out said Injunction . . . ." Thereupon the *ex parte* injunction issued,[1] the picketing ceased in compliance with it, and work on the project was resumed.

The petitioners moved promptly in the Chancery Court to dissolve the injunction on the ground that the state court was without jurisdiction to adjudicate the controversy because the subject matter of the picketing was exclusively within the cognizance of the National Labor Relations Board. The motion was denied on September 29 by an order which recited, "There is no bona fide labor dispute between the parties in this litigation and therefore the state court has jurisdiction of the matter and the same has not [been] preempted by the National Labor Relations Board." [2] Following a hearing, the injunction was made permanent by a final decree entered on June 16, 1961. Petitioners appealed to the Court of Appeals of Tennessee, Eastern Section, which affirmed on January 12, 1962. The opinion, not officially reported, is reported in 49 L. R. R. M. 2585. Pending decision on the appeal, construction at the site had been completed. Noting this fact, the court stated, "In the first

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[1] The respondent Rea Construction Company was added as a party complainant by an amended and supplemental bill filed August 10, 1960.

[2] In its opinion on making the injunction perpetual, the trial court also found "that the erection of the shopping center does not involve Interstate Commerce. It is a localized action and by no definition of the term can it be said that this operation amounts to Interstate Commerce." The respondents do not support this finding in this Court. The proof was that, before the hearing, Rea Construction Company purchased outside Tennessee and brought to the site materials costing $147,099.67. This meets the direct inflow standards set by the National Labor Relations Board for the exercise of its jurisdiction. See 23 N. L. R. B. Ann. Rep. 8 (1958).

place the questions in this case have become moot." However, the court went on to say, "Further, we concur with the Chancellor's finding that a bona fide labor dispute did not exist." 49 L. R. R. M., at 2587. The Supreme Court of Tennessee, by an unreported order, denied certiorari. We brought the case here, 371 U. S. 961, to consider the validity of the injunction in light of our decision in *Local 438, Construction Laborers* v. *Curry*, 371 U. S. 542. We hold that the issuance of the injunction was beyond the power of the Tennessee courts and therefore reverse the judgment.

We must first consider respondents' challenge to our jurisdiction to review the Tennessee courts' rejection of the petitioners' federal preemption claim. The argument is that we are bound by the state appellate court's holding that this case was rendered moot by the completion of construction. We think, however, that in this case the question of mootness is itself a question of federal law upon which we must pronounce final judgment. *Love* v. *Griffith*, 266 U. S. 32. In that case a Texas trial court dismissed a suit to enjoin the enforcement of an allegedly unconstitutional rule which barred Negroes from voting in a single Houston Democratic primary election. An appeal from the dismissal was in turn dismissed by the Texas Court of Civil Appeals on the ground that, since the election was, at that time, long since passed, the cause of action had ceased to exist. This Court, speaking through Mr. Justice Holmes, implicitly denied that the state court's finding of mootness precluded our independent determination of that question, saying,

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. *Davis* v. *Wechsler*, 263 U. S. 22, 24. Whether the right was denied or not given due recognition by the Court of Civil Appeals is a question as to which

> the plaintiffs are entitled to invoke our judgment. *Ward* v. *Love County,* 253 U. S. 17, 22." 266 U. S., at 33–34.

The Court did not, however, think that the action of the Texas Court of Civil Appeals prejudiced the appellants' constitutional rights. Since the election had been held, any order reversing the trial court and ordering the injunction to issue would have been futile; an injunction could not at that date redress the alleged constitutional injury. The Court said:

> "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up. But that is not the situation. The rule promulgated by the Democratic Executive Committee was for a single election only that had taken place long before the decision of the Appellate Court. No constitutional rights of the plaintiffs in error were infringed by holding that the cause of action had ceased to exist. The bill was for an injunction that could not be granted at that time. There was no constitutional obligation to extend the remedy beyond what was prayed." 266 U. S., at 34.

In contrast, the prejudice to the petitioners from the action of the Tennessee Court of Appeals in affirming the injunction which did issue in the instant case is clear. The petitioners plainly have "a substantial stake in the judgment . . . ," *Fiswick* v. *United States,* 329 U. S. 211, 222, which exists apart from and is unaffected by the completion of construction. Their interest derives from the undertaking of respondent Jafco, Inc., in the injunction bond to indemnify them in damages if the injunction was "wrongfully" sued out. Whether the injunction was wrongfully sued out turns solely upon

the answer to the federal question which the petitioners have pressed from the beginning. If the answer of the Tennessee Court of Appeals to that question may not be challenged here, the petitioners have no recourse against Jafco on the bond. Thus, unlike *Love* v. *Griffith, supra,* the federal issues remain of operative importance to the parties as they come to this Court; here it may be said that the Tennessee courts have in substance and effect denied a federal right, and the completion of construction cannot be deemed a hindrance to our review of the federal question. This is not a case where this Court's decision on the merits of that question "cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States,* 319 U. S. 41, 42.[3]

Moreover, this is particularly a case in which "we should be astute to avoid hindrances in the way of taking" up that question. Despite the completion of construction, our superintendence of a state court injunction against conduct alleged to be cognizable exclusively by the National Labor Relations Board is desirable "if the danger of state interference with national policy is to be averted," *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 245. This controversy involves the fundamental question of whether the Tennessee courts had any power whatever to adjudicate the dispute between the parties. Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act. *San Diego Building Trades Council* v. *Garmon, supra.* If the peaceful picketing com-

[3] Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. See Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. of Pa. L. Rev. 125 (1946); Note, 103 U. of Pa. L. Rev. 772 (1955).

plained of in this case is such conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. The issuance of the state injunction in this case tended to frustrate this federal policy. This would be true even if the picketing were prohibited conduct. For although the National Labor Relations Board is not barred from granting appropriate remedies by the fact that the challenged conduct has ceased, *Labor Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, or that the construction has been completed, *Local 74, Carpenters Union* v. *Labor Board*, 341 U. S. 707, charges of unfair labor practices must be filed within six months of their occurrence,[4] and an employer armed with a state injunction would have no incentive to initiate Board proceedings. It would encourage such interference with the federal agency's exclusive jurisdiction if a state court's holding of mootness based on the chance event of completion of construction barred this Court's review of the state court's adverse decision on the claim of federal preemption.[5] We have given significant weight to the vital importance of preventing state injunctions from frustrating federal

[4] 29 U. S. C. § 160 (b).

[5] The petitioners sought to advance the hearing and decision of their appeal to the Tennessee Court of Appeals. The court said, 49 L. R. R. M., at 2587: "The [petitioners] in brief filed June 22nd, 1961, in which they were seeking to advance the cause for hearing, stated:

" 'In the instant case, the right of picketing will become moot by August 1, 1961, as the construction will be completed and the building ready for occupancy. Appellants know that they desire to picket one of the complainants, Rea Construction Company, this coming fall on a project which will require approximately six or eight months of construction. Without judicial review of this case they can only expect the same Trial Court to act the same, and again they cannot possibly get the case to the appellate court for a decision within that time.' "

labor policy in situations which the Congress has ordained shall be dealt with exclusively by the Board. In *Construction Laborers* v. *Curry, supra,* we considered whether a state court temporary injunction in a labor dispute should be considered to be a final judgment for purposes of our review under 28 U. S. C. § 1257. We held that the temporary injunction should be deemed a final judgment "particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts," and said further, "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board." 371 U. S., at 550.

In *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, a patent licensee defended against a suit for unpaid royalties by attacking the validity under the Sherman Act of a price-fixing stipulation in his license. The lower courts held that having accepted the license with the price-fixing stipulation, the licensee was estopped to deny the validity of the stipulation. This Court reversed. The question presented was "whether the doctrine of estoppel as invoked below is so in conflict with the Sherman Act's prohibition of price-fixing that this Court may resolve the question even though its conclusion be contrary to that of a state court." 317 U. S., at 175. We held that local rules of estoppel would not be permitted to thwart the purposes of statutes of the United States. We said, 317 U. S., at 176:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled

> by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. . . . When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; . . ."

If in *Sola* a state substantive rule of law had to yield to the federal statute and policy, even more so here—where the claim is that the federal statute and policy oust state courts of any power whatever to deal with the conduct in question—local rules which purport to preclude state appellate court adjudication of the federal preemption claim cannot conclusively render the case moot for the purposes of this Court's review.

We turn then to the merits. Our discussion need not be extended, for in our view the case is squarely governed by our decision in *Construction Laborers* v. *Curry, supra.* Whether or not the facts showed a "labor dispute" within the meaning of 29 U. S. C. § 152 (9)[6] is certainly at least

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[6] "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

arguable. Consequently, as we said in *Curry*, "the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board." 371 U. S., at 546–547.

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus.

NATIONAL EQUIPMENT RENTAL, LTD., *v.* SZUKHENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 81. Argued November 20, 1963.—Decided January 6, 1964.

Petitioner, a corporation with its principal place of business in New York, sued respondents, residents of Michigan, in a federal court in New York, claiming that respondents had defaulted in payments due under a farm equipment lease. The lease was on a printed form, 1½ pages in length, and consisted of 18 numbered paragraphs. The last paragraph, appearing just above respondents' signatures, provided that "the Lessee hereby designates Florence Weinberg, 47–21 Forty-First Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York." The respondents were not acquainted with Florence Weinberg, and she had not expressly undertaken to transmit notice to them. The Marshal delivered two copies of the summons and complaint to Florence Weinberg. That same day she mailed the summons and complaint to the respondents, together with a letter stating that the documents had been served upon her as the respondents' agent for the purpose of accepting service of process in New York, in accordance with the agreement contained in the lease. The petitioner itself also notified the respondents by certified mail of the service of process upon Florence Weinberg. *Held:* Prompt notice to the respondents having been given, Florence Weinberg was their "agent authorized by appointment" to receive process within the meaning of Federal Rule of Civil Procedure 4 (d) (1). Pp. 316–318.

(a) No questions of subject matter jurisdiction or of venue are here presented. Federal jurisdiction existed by reason of diversity of citizenship. 28 U. S. C. § 1332. P. 313, n. 2.

(b) Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no question of due process is reached or decided. P. 315.

(c) Parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. P. 315.

(d) Florence Weinberg's prompt acceptance and transmittal to the respondents of the summons and complaint pursuant to the

authorization was itself sufficient to validate the agency, even though there was no explicit previous promise on her part to do so. P. 316.

(e) There is no relevant concept of state law which would invalidate the agency here at issue. P. 316.

(f) The fact that the designated agent was not personally known to the respondents at the time of her appointment, and that she may be related to an officer of the petitioner corporation, did not invalidate the agency. P. 317.

(g) The case of *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154, is inapposite. P. 317, n. 8.

311 F. 2d 79, reversed.

Wilbur G. Silverman argued the cause and filed a brief for petitioner.

Harry R. Schwartz argued the cause and filed a brief for respondents.

David Hartfield, Jr., Allen F. Maulsby, Benjamin C. Milner III, Merrell E. Clark, Jr. and *Henry L. King* filed a brief for the Bankers Trust Co. et al., as *amici curiae*, urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Federal Rules of Civil Procedure provide that service of process upon an individual may be made "by delivering a copy of the summons and of the complaint to an agent authorized by appointment . . . to receive service of process." [1] The petitioner is a corporation with

[1] Federal Rule of Civil Procedure 4 (d) provides, in pertinent part:

"(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion

its principal place of business in New York. It sued the respondents, residents of Michigan, in a New York federal court, claiming that the respondents had defaulted under a farm equipment lease. The only question now before us is whether the person upon whom the summons and complaint were served was "an agent authorized by appointment" to receive the same, so as to subject the respondents to the jurisdiction of the federal court in New York.[2]

The respondents obtained certain farm equipment from the petitioner under a lease executed in 1961. The lease was on a printed form less than a page and a half in length, and consisted of 18 numbered paragraphs. The last numbered paragraph, appearing just above the respondents' signatures and printed in the same type used in the remainder of the instrument, provided that "the Lessee hereby designates Florence Weinberg, 47–21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."[3] The respondents were not acquainted with Florence Weinberg.

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then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

[2] No questions of subject matter jurisdiction or of venue are presented. Federal jurisdiction exists by reason of diversity of citizenship. 28 U. S. C. § 1332. Venue in the United States District Court for the Eastern District of New York has not been contested. 28 U. S. C. § 1391.

[3] The paragraph in its entirety read as follows:

"This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47–21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

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In 1962 the petitioner commenced the present action by filing in the federal court in New York a complaint which alleged that the respondents had failed to make any of the periodic payments specified by the lease. The Marshal delivered two copies of the summons and complaint to Florence Weinberg. That same day she mailed the summons and complaint to the respondents, together with a letter stating that the documents had been served upon her as the respondents' agent for the purpose of accepting service of process in New York, in accordance with the agreement contained in the lease.[4] The petitioner itself also notified the respondents by certified mail of the service of process upon Florence Weinberg.

Upon motion of the respondents, the District Court quashed service of the summons and complaint, holding that, although Florence Weinberg had promptly notified the respondents of the service of process and mailed copies of the summons and complaint to them, the lease agreement itself had not explicitly required her to do so, and there was therefore a "failure of the agency arrangement to achieve intrinsic and continuing reality." 30 F. R. D. 3, 5. The Court of Appeals affirmed, 311 F. 2d 79, and we granted certiorari, 372 U. S. 974. For the reasons stated in this opinion, we have concluded that Florence Weinberg was "an agent authorized by appointment . . . to receive service of process," and accordingly we reverse the judgment before us.

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[4] The complaint, summons, and covering letter were sent by certified mail, and the letter read as follows:

"Gentlemen:

"Please take notice that the enclosed Summons and Complaint was duly served upon me this day by the United States Marshal, as your agent for the purpose of accepting service of process within the State of New York, in accordance with your contract with National Equipment Rental, Ltd.

"Very truly yours,
"Florence Weinberg"

We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice, such as *Schroeder* v. *City of New York,* 371 U. S. 208; *Walker* v. *Hutchinson City,* 352 U. S. 112; and *Mullane* v. *Central Hanover Tr. Co.,* 339 U. S. 306. Similarly, as the Court of Appeals recognized, this Court's decision in *Wuchter* v. *Pizzutti,* 276 U. S. 13, is inapposite here. In that case a state nonresident motorist statute which failed to provide explicitly for communication of notice was held unconstitutional, despite the fact that notice had been given to the defendant in that particular case. *Wuchter* dealt with the limitations imposed by the Fourteenth Amendment upon a statutory scheme by which a State attempts to subject nonresident individuals to the jurisdiction of its courts. The question presented here, on the other hand, is whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rule of Civil Procedure 4 (d)(1), where the agent is not personally known to the party, and where the agent has not expressly undertaken to transmit notice to the party.

The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. The contract specifically provided that "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York." And it is settled,

as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. See, *e. g.*, *Kenny Construction Co.* v. *Allen,* 248 F. 2d 656 (C. A. D. C. Cir. 1957); *Bowles* v. *Schmitt & Co., Inc.,* 170 F. 2d 617 (C. A. 2d Cir. 1948); *Gilbert* v. *Burnstine,* 255 N. Y. 348, 174 N. E. 706 (1931).

Under well-settled general principles of the law of agency, Florence Weinberg's prompt acceptance and transmittal to the respondents of the summons and complaint pursuant to the authorization was itself sufficient to validate the agency, even though there was no explicit previous promise on her part to do so. "The principal's authorization may neither expressly nor impliedly request any expression of assent by the agent as a condition of the authority, and in such a case any exercise of power by the agent within the scope of the authorization, during the term for which it was given, or within a reasonable time if no fixed term was mentioned, will bind the principal." 2 Williston on Contracts (3d ed. 1959), § 274.

We deal here with a Federal Rule, applicable to federal courts in all 50 States. But even if we were to assume that this uniform federal standard should give way to contrary local policies, there is no relevant concept of state law which would invalidate the agency here at issue. In Michigan, where the respondents reside, the statute which validates service of process under the circumstances present in this case contains no provision requiring that the appointed agent expressly undertake to notify the principal of the service of process.[5] Similarly, New York law, which it was agreed should be applicable to the lease provisions, does not require any such express promise by the agent in order to create a valid agency for receipt of

[5] Mich. Stat. Ann., 1962, § 27A.1930.

process. The New York statutory short form of general power of attorney, which specifically includes the power to accept service of process,[6] is entirely silent as to any such requirement.[7] Indeed, the identical contractual provision at issue here has been held by a New York court to create a valid agency for service of process under the law of that State. *National Equipment Rental* v. *Graphic Art Designers,* 36 Misc. 2d 442, 234 N. Y. S. 2d 61.[8]

It is argued, finally, that the agency sought to be created in this case was invalid because Florence Weinberg may have had a conflict of interest. This argument is based upon the fact that she was not personally known to the respondents at the time of her appointment and upon a suggestion in the record that she may be related to an officer of the petitioner corporation. But such a contention ignores the narrowly limited nature of the agency here involved. Florence Weinberg was appointed the respondents' agent for the single purpose of receiving service of process. An agent with authority so limited can in no meaningful sense be deemed to have had an interest antagonistic to the respondents, since both the

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[6] McKinney's N. Y. Laws, General Business Law, § 229 (6).

[7] McKinney's N. Y. Laws, General Business Law, § 220.

[8] It is argued that the state court decisions upholding the agency designation here at issue would have been different if the case of *Rosenthal* v. *United Transp. Co.,* 196 App. Div. 540, 188 N. Y. S. 154, had been brought to the attention of the courts. *Rosenthal* interpreted the forerunner of § 227 of the Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 3A, 1942, § 227 (1963 Supp.), which creates a procedure whereby a resident of New York may appoint an agent for the receipt of process by designation of a person to receive service and the filing thereof with the County Clerk. The *Rosenthal* case is entirely inapposite, because § 227 clearly applies only to residents of New York who leave the State, and even as to them, the provision is permissive rather than exclusive. *Phillips* v. *Garramone,* 36 Misc. 2d 1041, 233 N. Y. S. 2d 842; *Torre* v. *Grasso,* 11 Misc. 2d 275, 173 N. Y. S. 2d 828.

petitioner and the respondents had an equal interest in assuring that, in the event of litigation, the latter be given that adequate and timely notice which is a prerequisite to a valid judgment.[9]

A different case would be presented if Florence Weinberg had not given prompt notice to the respondents, for then the claim might well be made that her failure to do so had operated to invalidate the agency. We hold only that, prompt notice to the respondents having been given, Florence Weinberg was their "agent authorized by appointment" to receive process within the meaning of Federal Rule of Civil Procedure 4 (d)(1).

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

The petitioner, National Equipment Rental, Ltd., is a Delaware corporation with its principal place of business in greater New York City. From that location it does a nationwide equipment rental business. The respondents,

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[9] There is no allegation that Weinberg had any pecuniary interest in the subject matter of the litigation. Nor is the issue here the applicability of a statute which permits service on a foreign corporation by service on persons who are generally authorized to act as agents of the corporation, when the agent upon whom service is made has a personal interest in suppressing notice of service: see, *e. g., John W. Masury & Son* v. *Lowther,* 299 Mich. 516, 300 N. W. 866 (1941) (involving a garnishment proceeding in which service under such a statute was attempted upon that employee of the foreign corporation who had incurred the debt on which the suit was based, who therefore had a personal interest in concealing from his employer the fact of service, and who did not notify the employer that service had been made). See *Hartsock* v. *Commodity Credit Corp.,* 10 F. R. D. 181, also involving a situation where the agent "sustains such a relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service . . . ." 10 F. R. D., at 184.

Steve and Robert Szukhent, father and son farming in Michigan, leased from National two incubators for their farm, signing in Michigan a lease contract which was a standard printed form obviously prepared by the New York company's lawyers. Included in the 18 paragraphs of fine print was the following provision:

> ". . . the Lessee hereby designates Florence Weinberg, 47–21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

The New York company later brought this suit for breach of the lease in the United States District Court for the Eastern District of New York. Rule 4 (d)(1) of the Federal Rules of Civil Procedure authorizes service of process for suits in federal courts to be made on "an agent authorized by appointment or by law to receive service of process." Process was served on Mrs. Weinberg as "agent" of the Michigan farmers. She mailed notice of this service to the Szukhents. A New York lawyer appeared especially for them and moved to quash the service on the ground that Mrs. Weinberg was not their agent but was in reality the agent of the New York company.

The record on the motion to quash shows that the Szukhents had never had any dealings with Mrs. Weinberg, their supposed agent. They had never met, seen, or heard of her. She did not sign the lease, was not a party to it, received no compensation from the Szukhents, and undertook no obligation to them. In fact, she was handpicked by the New York company to accept service of process in any suits that might thereafter be filed by the company. Only after this suit was brought was it reluctantly revealed that Mrs. Weinberg was in truth the wife of one of the company's officers. The district judge, applying New York law to these facts, held that there had been no effective appointment of Mrs. Weinberg as agent of the Szukhents, that the service on her as their

"agent" was therefore invalid, and that the service should be quashed. 30 F. R. D. 3 (D. C. E. D. N. Y.). The Court of Appeals, one judge dissenting, affirmed, agreeing that no valid agency had been created. 311 F. 2d 79 (C. A. 2d Cir.).[1] This Court now reverses both courts below and holds that the contractual provision purporting to appoint Mrs. Weinberg as agent is valid and that service of process on her as agent was therefore valid and effective under Rule 4 (d)(1) as on an "agent authorized by appointment . . . to receive service of process." I disagree with that holding, believing that (1) whether Mrs. Weinberg was a valid agent upon whom service could validly be effected under Rule 4 (d)(1) should be determined under New York law and that we should accept the holdings of the federal district judge and the Court of Appeals sitting in New York that under that State's law the purported appointment of Mrs. Weinberg was invalid and ineffective; (2) if, however, Rule 4 (d)(1) is to be read as calling upon us to formulate a new federal definition of agency for purposes of service of process, I think our formulation should exclude Mrs. Weinberg from the category of an "agent authorized by appointment . . . to receive service of process"; and (3) upholding service of process in this case raises serious questions as to whether these Michigan farmers have been denied due process of law in violation of the Fifth and Fourteenth Amendments.

I.

No federal statute has undertaken to regulate the sort of agency transaction here involved.[2] There is only Rule 4 (d)(1), which says nothing more than that in federal

[1] Both the District Court and the Court of Appeals also rested their decisions on the contract's lack of provision for notice of the service of process.

[2] Of course, Congress would not lack power to regulate at least some aspects of contracts like this one. Cf. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533.

courts personal jurisdiction may be obtained by service on an "agent." The Rule does not attempt to define who is an "agent." To me it is evident that the draftsmen of the Rules did not, by using the word "agent," show any intention of throwing out the traditional body of state law and creating a new and different federal doctrine in this branch of the law of agency. Therefore, it is to the law of New York—the State where this action was brought in federal court, the place where the contract was deemed by the parties to have been made, and the State the law of which was specified as determining rights and liabilities under the contract [3]—that we should turn to test the validity of the appointment.[4]

I agree with the district judge that this agency is invalid under the laws of New York. The highest state court that has passed on the question has held that, because of New York statutes, the designation by a nonresident of New York of an agent to receive service of process is ineffective; the court, in denying an order for interpleader, held that only residents of New York can make such an appointment, and even then only in compliance with the terms of the controlling statute. *Rosenthal* v. *United Transp. Co.*, 196 App. Div. 540, 188 N. Y. S. 154. Even the dissenting judge in the Court of Appeals in the present case acknowledged that the purported appointment of

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[3] This is not to suggest that a contractual stipulation as to what state law should govern would necessarily be binding on state courts which did not choose to recognize it, including the courts of Michigan, where the Szukhents lived, signed the lease contract, and received the leased property. See *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66; see also *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 213 (dissenting opinion); *Order of United Commercial Travelers of America* v. *Wolfe*, 331 U. S. 586, 625 (dissenting opinion).

[4] If New York would look in turn to the law of Michigan, the place where the contract was signed by the Szukhents and was to be performed, then we should do the same. Cf. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487.

Mrs. Weinberg "would not subject the defendants to the jurisdiction of the courts of the State of New York." The company cites three decisions of trial judges in two of New York's 62 counties which have upheld service upon purported agents in circumstances like these.[5] In fact, two of those cases, both decided in Nassau County, where the company does business, upheld service on this same Mrs. Weinberg as "agent" in suits brought for breach of contract by this same company, one against a defendant living in the distant State of California. But these trial courts did not even mention the *Rosenthal* case, decided by a higher court, and in fact cited no higher court opinions at all which dealt with the question here raised. In seeking to apply New York's definition of "agent" we should follow the considered opinions of the highest appellate courts which have passed upon the question, not unexamined decisions of trial courts. In so doing, we see that under New York law this service of process is invalid. Also, we should accept the view of the question taken by the federal courts sitting in the State whose law is being applied unless we are shown "clearly and convincingly" that these courts erred.[6] Here there is no showing that the Court of Appeals—where neither the majority nor the dissenter disputed the District Court's view of New York law—has erred.[7]

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[5] *National Equipment Rental, Ltd.*, v. *Graphic Art Designers, Inc.*, 36 Misc. 2d 442, 234 N. Y. S. 2d 61 (Sup. Ct., Nassau County); *National Equipment Rental, Ltd.*, v. *Boright*, N. Y. L. J., July 17, 1962, p. 8, col. 8 (Sup. Ct., Nassau County); *Emerson Radio & Phonograph Corp.* v. *Eskind*, 32 Misc. 2d 1038, 228 N. Y. S. 2d 841 (Sup. Ct., N. Y. County).

[6] *Helvering* v. *Stuart*, 317 U. S. 154, 164; see also *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 526–527; *Propper* v. *Clark*, 337 U. S. 472, 486–487.

[7] Since New York would not hold Mrs. Weinberg a valid agent to receive service of process, service cannot be upheld as authorized by that part of Rule 4 (d)(7) which validates service "in the manner prescribed by the law of the state."

II.

If Rule 4 (d)(1) is to be read as requiring this Court to formulate new federal standards of agency to be resolved in each case as a federal question, rather than as leaving the question to state law, I think the standards we formulate should clearly and unequivocally denounce as invalid any alleged service of process on nonresidents based on purported agency contracts having no more substance than that naming Mrs. Weinberg.

A. In the first place, we should interpret the federal rule as contemplating a genuine agent, not a sham.[8] Here the "agent," Mrs. Weinberg, was unknown to respondents. She was chosen by the New York company, was under its supervision, and, indeed, was the wife of one of its officers—facts no one ever told these farmers.[9] State courts in general quite properly refuse to uphold service of process on an agent who, though otherwise competent, has interests antagonistic to those of the person he is meant to represent.[10] In Michigan, the place where the contract here involved was signed and where the machinery was delivered, the State Supreme Court has said that to hold otherwise would open "wide the door for the perpetration of fraud and maladministration of justice." [11] There is no reason for a federal rule to tolerate a less punctilious regard for fair dealing in a matter so very important to a person being sued. I cannot believe that Rule 4 (d)(1), which may under some cir-

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[8] See *Szabo* v. *Keeshin Motor Express Co.*, 10 F. R. D. 275 (D. C. N. D. Ohio); *Fleming* v. *Malouf*, 7 F. R. D. 56 (D. C. W. D. N. Y.).

[9] Apparently the district judge asked the company to supply particulars of Mrs. Weinberg's relationship to the company, but this information was never furnished. For all that appears, she may be a stockholder or director of the company.

[10] See cases collected in 72 C. J. S., Process § 50.

[11] *John W. Masury & Son* v. *Lowther*, 299 Mich. 516, 525, 300 N. W. 866, 870.

cumstances be used to subject people to jurisdiction thousands of miles from home, was ever meant to bring a defendant into court by allowing service on an "agent" whose true loyalty is not to the person being sued but to the one bringing suit. The Canons of Ethics forbid a lawyer to serve conflicting parties, at least without express consent given after full disclosure.[12] If we are to create a federal standard, I would hold a 4 (d)(1) agent to a like duty. Furthermore, as the courts below pointed out, there was no provision in the contract assuring the defendants of notice of any action brought against them in New York, and no undertaking by their purported agent or anyone else to notify them. It is true that actual notice was given. But there is a prophylactic value, especially where contracts of this kind can in future cases be used to impose on a nonresident defendant, in requiring that the contract provide for notice in the first place. We have, on due process grounds, required as much of state statutes which declare a statutory agent for substituted service on nonresidents. *Wuchter* v. *Pizzutti,* 276 U. S. 13.

B. But even if this contract had named a disinterested agent and required that notice of service be given to the Szukhents, I think that any federal standards we formulate under Rule 4 (d)(1) should invalidate purported service of process in the circumstances of cases like this one. To give effect to the clause about service of process in this standardized form contract amounts to a holding that when the Szukhents leased these incubators they then and there, long in advance of any existing justiciable dispute or controversy, effectively waived all objection to the jurisdiction of a court in a distant State the process of which could not otherwise reach them. Both the nature of the right given up and the nature of the contractual

[12] Canon of Ethics 6.

relation here make such an application of the contract impossible to square with the context of American law in which Rule 4 (d)(1) was written. The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta.[13] States generally have refused to enforce agreements in notes purporting to consent to foreign jurisdiction along with consent to confession of judgment, sometimes because such provisions are outlawed by statutes [14] and sometimes because they are outlawed by courts in the absence of specific statutory prohibitions.[15] In countless cases courts have refused to allow insurance companies to arrange that suits against them on their policies may be brought only at the home office of the company.[16] And prior decisions of our own

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[13] Magna Charta, cc. 17–19:

"17. Common Pleas shall not follow our Court, but shall be held in any certain place.

"18. Trials upon the Writs of Novel Disseisin, of Mort d'Ancestre (death of the ancestor), and Darrien Presentment (last presentation) shall not be taken but in their proper counties, and in this manner:— We, or our Chief Justiciary, if we are out of the kingdom, will send two Justiciaries into each county, four times in the year, who, with four Knights of each county, chosen by the county, shall hold the aforesaid assizes, within the county on the day, and at the place appointed.

"19. And if the aforesaid assizes cannot be taken on the day of the county-court, let as many knights and freeholders, of those who were present at the county-court remain behind, as shall be sufficient to do justice, according to the great or less importance of the business." Reprinted in S. Doc. No. 232, 66th Cong., 2d Sess.

[14] *E. g.*, Ind. Stat., 1933, § 2–2904; Mass. Gen. Laws, 1956, c. 231, § 13A.

[15] *E. g., Farquhar & Co.* v. *Dehaven,* 70 W. Va. 738, 75 S. E. 65; see also *Hamilton* v. *Schoenberger,* 47 Iowa 385.

[16] *E. g., Nute* v. *Hamilton Mut. Ins. Co.,* 6 Gray (72 Mass.) 174; *Slocum* v. *Western Assur. Co.,* 42 F. 235 (D. C. S. D. N. Y.); see cases collected in 56 A. L. R. 2d 300, 312–316.

Court have gone to great lengths to avoid giving enforcement to such provisions. Compare *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Grover & Baker Sewing Machine Co.* v. *Radcliffe,* 137 U. S. 287.

C. Where one party, at its leisure and drawing upon expert legal advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense for this Court to formulate a federal rule designed to treat this as an agreement coolly negotiated and hammered out by equals. With respect to insurance contracts drawn this way this Court long ago said:

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow." *Aschenbrenner* v. *United States Fidelity & Guaranty Co.,* 292 U. S. 80, 84–85.[17]

It is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed. Yet holding this service effective inevitably will mean that the Szukhents must go nearly a thousand miles to a strange city, hire New York counsel, pay witnesses to travel there, pay their own and their witnesses' hotel bills, try to explain a dispute over a farm equipment lease to a New York judge or jury, and in other ways bear the burdens of litigation in a distant, and likely a strange, city. The company, of course, must have had this in mind when it put the clause in the contract. It doubtless hoped, by easing into its contract this innocent-looking provision for service of process in New York, to succeed in making it

[17] See also, *e. g., Bisso* v. *Inland Waterways Corp.,* 349 U. S. 85, 90–91; *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 379–382.

as burdensome, disadvantageous, and expensive as possible for lessees to contest actions brought against them. This Court, in applying the doctrine of *forum non conveniens,* has suggested that "a plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary." *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 507. What was there deemed to be a very unjust result is greatly aggravated, I think, by today's holding that a man can, by a cleverly drafted form, be successfully inveigled into giving up in advance of any controversy his traditional right to be served with process and sued at home. Rule 4 (d)(1), designed in part to preserve the right to have a case tried in a convenient tribunal, should not be used to formulate federal standards of agency that defeat this purpose.

It should be understood that the effect of the Court's holding is not simply to give courts sitting in New York jurisdiction over these Michigan farmers. It is also, as a practical matter, to guarantee that whenever the company wishes to sue someone who has contracted with it, it can, by force of this clause, confine all such suits to courts sitting in New York. This Court and others have frequently refused to hold valid a contract which, before any controversy has arisen, attempts to restrict jurisdiction to a single court or courts. See *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535; *Insurance Co.* v. *Morse,* 20 Wall. 445, 451; *Nute* v. *Hamilton Mut. Ins. Co.,* 6 Gray (72 Mass.) 174; 6A Corbin, Contracts § 1445. Here this contract as effectively ousts the Michigan courts of jurisdiction as if it had said so. Today's holding disregards Michigan's interest in supervising the protection of rights of its citizens who never leave the State but are sued by foreign companies with which they have done business. Cf. *Travelers Health Assn.* v. *Virginia ex rel. State Corp. Comm'n,* 339 U. S. 643; *McGee* v. *International Life Ins. Co.,* 355 U. S. 220.

D. To formulate standards of agency under Rule 4 (d)(1) which allow a plaintiff with a form contract to extend a District Court's service of process for suits on that contract anywhere in the country (or, presumably, the world) is to do something which Congress has never done. Years ago Mr. Justice Brandeis, speaking for the Court, emphasized that Congress had always been reluctant to grant power to Federal District Courts to serve process outside the territorial borders of the State in which a District Court sits, saying:

> "[N]o act has come to our attention in which such power has been conferred in a proceeding in a circuit or district court where a private citizen is the sole defendant and where the plaintiff is at liberty to commence the suit in the district of which the defendant is an inhabitant or in which he can be found." *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 624–625. (Footnotes omitted.)

This Court should reject any construction of Rule 4 (d)(1) or formulation of federal standards under it to help powerful litigants to achieve by unbargained take-it-or-leave-it contracts what Congress has consistently refused to permit by legislation.

The end result of today's holding is not difficult to foresee. Clauses like the one used against the Szukhents—clauses which companies have not inserted, I suspect, because they never dreamed a court would uphold them—will soon find their way into the "boilerplate" of everything from an equipment lease to a conditional sales contract. Today's holding gives a green light to every large company in this country to contrive contracts which declare with force of law that when such a company wants to sue someone with whom it does business, that individual must go and try to defend himself in some place, no matter how distant, where big business enterprises are

concentrated, like, for example, New York, Connecticut, or Illinois, or else suffer a default judgment. In this very case the Court holds that by this company's carefully prepared contractual clause the Szukhents must, to avoid a judgment rendered without a fair and full hearing, travel hundreds of miles across the continent, probably crippling their defense and certainly depleting what savings they may have, to try to defend themselves in a court sitting in New York City. I simply cannot believe that Congress, when by its silence it let Rule 4 (d)(1) go into effect, meant for that rule to be used as a means to achieve such a far-reaching, burdensome, and unjust result. Heretofore judicial good common sense has, on one ground or another, disregarded contractual provisions like this one, not encouraged them. It is a long trip from San Francisco—or from Honolulu or Anchorage—to New York, Boston, or Wilmington. And the trip can be very expensive, often costing more than it would simply to pay what is demanded. The very threat of such a suit can be used to force payment of alleged claims, even though they be wholly without merit. This fact will not be news to companies exerting their economic power to wangle such contracts. No statute and no rule requires this Court to place its imprimatur upon them. I would not.

III.

The Court's holding that these Michigan residents are compelled to go to New York to defend themselves in a New York court brings sharply into focus constitutional questions as to whether they will thereby be denied due process of law in violation of the Fifth and Fourteenth Amendments. While implicit in much of the oral arguments and in the briefs, these questions have not been adequately discussed. The questions are serious and involve matters of both historical and practical importance. These things lead me to believe that this case should be

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set down for reargument on these constitutional questions. Moreover, this Court might, after such arguments, conclude that these constitutional questions are so substantial and weighty that the nonconstitutional issues should be decided in favor of the Michigan defendants, thereby making a constitutional decision unnecessary. While I would prefer to await more informative constitutional discussions before deciding these due process questions, the Court rules against a reargument. In this situation I am compelled now to reach, consider, and decide the constitutional questions. My view is that the Court's holding denies the Szukhents due process of law for the following, among other, reasons.

It has been established constitutional doctrine since *Pennoyer* v. *Neff*, 95 U. S. 714, was decided in 1878, that a state court is without power to serve its process outside the State's boundaries so as to compel a resident of another State against his will to appear as a defendant in a case where a personal judgment is sought against him. This rule means that an individual has a constitutional right not to be sued on such claims in the courts of any State except his own without his consent. The prime value of this constitutional right has not diminished since *Pennoyer* v. *Neff* was decided. Our States have increased from 38 to 50. Although improved methods of travel have increased its speed and ameliorated its discomforts, it can hardly be said that these almost miraculous improvements would make more palatable or constitutional now than in 1878 a system of law that would compel a man or woman from Hawaii, Alaska, or even Michigan to travel to New York to defend against civil lawsuits claiming a few hundred or thousand dollars growing out of an ordinary commercial contract.

It can of course be argued with plausibility that the *Pennoyer* constitutional rule has no applicability here because the process served on the Szukhents ran from a

federal, not a state, court. But this case was in federal court solely because of the District Court's diversity jurisdiction. And in the absence of any overriding constitutional or congressional requirements the rights of the parties were to be preserved there as they would have been preserved in state courts.[18] Neither the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court's jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction. The constant aim of federal courts, at least since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, has been, so far as possible, to protect all the substantial rights of litigants in both courts alike. And surely the right of a person not to be dragged into the courts of a distant State to defend himself against a civil lawsuit cannot be dismissed as insubstantial. Happily, in considering this question we are not confronted with any congressional enactment designed to bring nonstate residents into a Federal District Court passed pursuant to congressional power to establish a judicial system to hear federal questions under Article III of the Constitution, or its power to regulate commerce under Art. I, § 8, or any of the other constitutionally granted congressional powers; we are dealing only with its power to let federal courts try lawsuits when the litigants reside in different States. Whatever power Congress might have in these other areas to extend a District Court's power to serve process across state lines, such power does not, I think, provide sound argument to justify reliance upon diversity jurisdiction to destroy a man's constitutional right to have his civil lawsuit tried in his own State. The protection of such a right in cases growing out of local

[18] Cf. *Guaranty Trust Co.* v. *York,* 326 U. S. 99.

state lawsuits is the reason for and the heart of the *Pennoyer* constitutional doctrine relevant here.

The Court relies on the printed provision of the contract as a consent of the Szukhents to be sued in New York, making the *Pennoyer* rule inapplicable. In effect the Court treats the provision as a waiver of the Szukhents' constitutional right not to be compelled to go to a New York court to defend themselves against the company's claims.[19] This printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home. Waivers of constitutional rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language.[20] It strains credulity to suggest that these Michigan farmers ever read this contractual provision about Mrs. Weinberg and about "accepting service of any process within the State of New York." And it exhausts credulity to think that they or any other laymen reading these legalistic words would have known

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[19] It may be that the Court intends its disclaimer of passing on venue of the New York Federal District Court to imply that the service on the Szukhents' "agent" might not after all compel them to go to New York to defend themselves against a default judgment, should they prevail on the discretion of the judge in New York to grant them a transfer of venue under 28 U. S. C. § 1404 (a). If so, apart from disregarding the trouble and expense which defendants would undergo in appearing and answering the complaint in New York and presenting evidence in hope of obtaining a discretionary change of venue, the Court's holding really would have no practical effect whatever. But the Court carefully refrains from holding that venue in New York could be successfully challenged, and consequently I must consider the statement in text to be correct.

[20] *Johnson* v. *Zerbst,* 304 U. S. 458, 464. See also, *e. g., Fay* v. *Noia,* 372 U. S. 391, 439; *Emspak* v. *United States,* 349 U. S. 190, 197–198; *Aetna Ins. Co.* v. *Kennedy ex rel. Bogash,* 301 U. S. 389, 393; *Hodges* v. *Easton,* 106 U. S. 408, 412.

or even suspected that they amounted to an agreement of the Szukhents to let the company sue them in New York should any controversy arise. This Court should not permit valuable constitutional rights to be destroyed by any such sharp contractual practices. The idea that there was a knowing consent of the Szukhents to be sued in the courts of New York is no more than a fiction—not even an amiable one at that.

I would affirm the judgment.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG join, dissenting.

I would affirm. In my view, federal standards and not state law must define who is "an agent authorized by appointment" within the meaning of Rule 4 (d)(1). See *Mississippi Pub. Corp.* v. *Murphree,* 326 U. S. 438, 445–446; *Bowles* v. *Schmitt & Co.,* 170 F. 2d 617, 620; 1 Barron and Holtzoff, Federal Practice (Wright rev. 1960), at 701. In formulating these standards I would, *first,* construe Rule 4 (d)(1) to deny validity to the appointment of a purported agent whose interests conflict with those of his supposed principal, see *Hartsock* v. *Commodity Credit Corp.,* 10 F. R. D. 181, 183. *Second,* I would require that the appointment include an explicit condition that the agent after service transmit the process forthwith to the principal. Although our decision in *Wuchter* v. *Pizzutti,* 276 U. S. 13, dealt with the constitutionality of a state statute, the reasoning of that case is persuasive that, in fashioning a federal agency rule, we should engraft the same requirement upon Rule 4 (d)(1). *Third,* since the corporate plaintiff prepared the printed form contract, I would not hold the individual purchaser bound by the appointment without proof, in addition to his mere signature on the form, that the individual understandingly consented to be sued in a State not that of his residence. We must bear in mind what was said in *United States* v.

Rumely, 345 U. S. 41, 44, that we must strive not to be "that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, . . . that does not see what '[a]ll others can see and understand.' " It offends common sense to treat a printed form which closes an installment sale as embodying terms to all of which the individual knowingly assented. The sales pitch aims solely at getting the signature on the form and wastes no time explaining or even mentioning the print. Before I would find that an individual purchaser has knowingly and intelligently consented to be sued in another State, I would require more proof of that fact than is provided by his mere signature on the form.

Since these standards were not satisfied in this case, the service of the summons and complaint was properly quashed.

HUMPHREY ET AL. *v.* MOORE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 17. Argued October 16, 1963.—Decided January 6, 1964.*

A decision of a Joint Conference Committee purported to determine the relative seniority rights of employees of two companies under a collective bargaining contract. Respondent Moore, on behalf of himself and other aggrieved employees of one of the companies, brought this class action in a Kentucky state court for an injunction against the union and the company to prevent the decision of the Committee to dovetail seniority lists from being carried out. The Kentucky Court of Appeals decreed a permanent injunction. *Held:*

1. The action is one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law, even though brought in the state court. Pp. 342–344.

(a) Moore contends that the decision of the Committee was not one which it was empowered to make; in his view the resulting award was therefore a nullity and any discharge pursuant thereto would be a breach of the collective bargaining agreement. P. 342.

(b) The complaint alleges that the Committee's decision was obtained by dishonest union conduct, and could therefore not be relied on as a basis for discharge without breaching the collective bargaining agreement. Pp. 342–343.

2. The decision of the Joint Conference Committee to dovetail seniority lists was a decision which § 5 of the contract empowered the Committee to make. Pp. 345–348.

3. There is not adequate support in the record in this case for the complaint's attack upon the integrity of the union and of the procedures which led to the Committee's decision. P. 348.

4. The evidence in this case shows no breach by the union of its duty of fair representation. P. 350.

5. The complaining employees were not inadequately represented at the hearing before the Committee and were not deprived of a fair hearing. Pp. 350–351.

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*Together with No. 18, *General Drivers, Warehousemen & Helpers, Local Union No. 89,* v. *Moore et al.,* also on certiorari to the same Court.

6. The decision of the Committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, as provided by the contract. P. 351.

356 S. W. 2d 241, reversed.

David Previant and *Mozart G. Ratner* argued the cause for petitioners. With them on the briefs were *H. Solomon Horen, William S. Zeman, Herbert S. Thatcher* and *Ralph H. Logan.*

John Y. Brown and *Newell N. Fowler* argued the cause and filed briefs for respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether the Kentucky Court of Appeals properly enjoined implementation of the decision of a joint employer-employee committee purporting to settle certain grievances in accordance with the terms of a collective bargaining contract. The decision of the committee determined the relative seniority rights of the employees of two companies, Dealers Transport Company of Memphis, Tennessee, and E & L Transport Company of Detroit, Michigan. We are of the opinion that the Kentucky court erred and we reverse its judgment.

Part of the business of each of these companies was the transportation of new automobiles from the assembly plant of the Ford Motor Company in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for some time, the two companies made these arrangements: E & L would sell to Dealers its "secondary" authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority

to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose of these arrangements was to concentrate the transportation activities of E & L in the more northerly area and those of Dealers in the southern zone. The transfers were subject to the approval of regulatory agencies.

The employees of both Dealers and E & L were represented by the same union, General Drivers, Warehousemen and Helpers, Local Union No. 89. Its president, Paul Priddy, as the result of inquiry from E & L by his assistant, understood that the transaction between the companies involved no trades, sales, or exchanges of properties but only a withdrawal by E & L at the direction of the Ford Motor Company. He consequently advised the E & L employees that their situation was precarious. When layoffs at E & L began three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be "sandwiched" and the E & L employees be taken on at Dealers with the seniority they had enjoyed at E & L. The grievances were placed before the local joint committee, Priddy or his assistant meanwhile advising Dealers employees that they had "nothing to worry about" since E & L employees had no contract right to transfer under these circumstances.

The collective bargaining contract involved covered a multi-employer, multi-local union unit negotiated on behalf of the employers by Automobile Transporters Labor Division and on behalf of the unions by National Truckaway and Driveaway Conference. Almost identical contracts were executed by each company in the unit and by the appropriate local union. According to Art. 4, § 1 of the contract "seniority rights for employees shall prevail" and "any controversy over the employees' standing

on such lists shall be submitted to the joint grievance procedure. . . ." Section 5 of the same article, of central significance here, was as follows:

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

Article 7 called for grievances to be first taken up between the employer and the local union and, if not settled, to be submitted to the local joint committee where the union and the employer were to have equal votes. Failing settlement by majority vote of the members of the local committee, the matter could be taken to the Automobile Transporters Joint Conference Committee upon which the employers and the unions in the overall bargaining unit had an equal number of representatives. Decisions of the Joint Conference Committee were to be "final and conclusive and binding upon the employer and the union, and the employees involved." However, if the Joint Conference Committee was unable to reach a decision the matter was to be submitted to arbitration as provided in the contract.

Article 7 also provided that:

> (d) "It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony on both sides, shall make a decision."

Other provisions of the contract stated that it was "the intention of the parties to resolve all questions of interpretation by mutual agreement" and that the employer agreed "to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement."

The grievances of the E & L employees were submitted directly to the local joint committee and endorsed "Deadlocked to Detroit for interpretation" over the signatures of the local union president and the Dealers representative on the committee. Later, however, the local union, having been more fully advised as to the nature of the transaction between the two companies, decided to recommend to the Joint Conference Committee that the seniority lists of the two companies be dovetailed and the E & L employees be employed at Dealers with seniority rights based upon those which they had enjoyed at E & L. The three shop stewards who represented the Dealers employees before the Joint Conference Committee meeting in Detroit were so advised by the union immediately prior to the opening of the hearing. After hearing from the company, the union and the stewards representing Dealers employees, the Joint Conference Committee thereupon determined that "in accordance with Article 4 and particularly sub-sections 4 and 5" of the agreement the employees of E & L and of Dealers should "be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein . . . ."

Since E & L was an older company and most of its employees had more seniority than the Dealers employees, the decision entailed the layoff of a large number of Dealers employees to provide openings for the E & L drivers.

Respondent Moore, on behalf of himself and other Dealers employees, then brought this class action in a Kentucky state court praying for an injunction against the union and the company to prevent the decision of the Joint Conference Committee from being carried out. Damages were asked in an alternative count and certain E & L employees were added as defendants by amendment to the complaint.[1] The complaint alleged that Dealers employees had relied upon the union to represent them, that the president of Local 89, Paul Priddy, assured Dealers employees that they had nothing to worry about and that precedent in the industry provided that when a new business is taken over, its employees do not displace the original employees of the acquiring company; it further alleged that Priddy had deliberately "deadlocked" the local joint committee and that the Dealers employees learned for the first time before the Joint Conference Committee in Detroit, that Priddy favored dovetailing the seniority lists. Priddy's actions, the complaint went on, "in deceiving these plaintiffs as to his position left them without representation before the Joint Conference Committee." The decision, according to the complaint, was "contrived, planned and brought about by Paul Priddy" who "has deceived and failed completely to represent said employees" and whose "false and deceitful action" and "connivance . . . with the employees of E & L" threatened the jobs of Dealers employees. The International union is said to have "conspired with and assisted the defendant, Local No. 89, and its president, Paul Priddy, in bringing about this result . . . ." The decision of the Joint Conference Committee was charged to be arbitrary and capricious, contrary to the existing practice in the industry and violative of the collective bargaining contract.

[1] The International union was also named as a party but service was quashed and the action dismissed as against it.

After hearing, the trial court denied a temporary and permanent injunction.[2] The Court of Appeals of the Commonwealth of Kentucky reversed and granted a permanent injunction, two judges dissenting. 356 S. W. 2d 241. In the view of that court, Art. 4, § 5 could have no application to the circumstances of this case since it came into play only if the absorbing company agreed to hire the employees of the absorbed company. The clause was said to deal with seniority, not with initial employment. Therefore, it was said, the decision of the Joint Conference Committee was not binding because the question of employing E & L drivers was not "arbitrable" at all under this section. The Court of Appeals, however, went on to hold that even if it were otherwise, the decision could not stand since the situation involved antagonistic interests of two sets of employees represented by the same union advocate. The result was inadequate representation of the Dealers employees in a context where Dealers itself was essentially neutral. Against such a backdrop, the erroneous decision of the board became "arbitrary and violative of natural justice." Kentucky cases were cited and relied upon. We granted both the petition filed by the E & L employees in No. 17 and the petition in No. 18, filed by the local union. 371 U. S. 966, 967.

I.

Since issues concerning the jurisdiction of the courts and the governing law are involved, it is well at the outset to elaborate upon the statement of the Kentucky court that this is an action to enforce a collective bargaining contract, an accurate observation as far as we are concerned.

[2] The denial of a temporary injunction by the trial court was set aside and temporary injunction ordered by the Court of Appeals. Thereafter the trial court dismissed the complaint, but the Court of Appeals reversed and made the temporary injunction permanent.

First, Moore challenges the power of the parties and of the Joint Conference Committee to dovetail seniority lists of the two companies because there was no absorption here within the meaning of § 5 of Art. 4 and because, as the court below held, that section granted no authority to deal with jobs as well as seniority. His position is that neither the parties nor the committee has any power beyond that delegated to them by the precise terms of § 5. Since in his view the Joint Committee exceeded its power in making the decision it did, the settlement is said to be a nullity and his impending discharge a breach of contract.

Second, Moore claims the decision of the Committee was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for his discharge under the contract. The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. *Syres* v. *Oil Workers Union,* 350 U. S. 892, reversing 223 F. 2d 739; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192. "By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp.* v. *Labor Board,* 323 U. S. 248, 255. The exclusive agent's obligation "to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any . . ." and its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337–338.

In the complaint which Moore filed here, the union is said to have deceived the Dealers employees concerning their job and seniority rights, deceitfully connived with the E & L drivers and with the International union to deprive Moore and others of their employment rights and prevented the latter from having a fair hearing before the Joint Committee by espousing the cause of the rival group of drivers after having indicated that the interests of the men at Dealers would be protected by the union. These allegations are sufficient to charge a breach of duty by the union in the process of settling the grievances at issue under the collective bargaining agreement.

Both the local and international unions are charged with dishonesty, and one-half of the votes on the Joint Committee were cast by representatives of unions affiliated with the international. No fraud is charged against the employer; but except for the improper action of the union, which is said to have dominated and brought about the decision, it is alleged that Dealers would have agreed to retain its own employees. The fair inference from the complaint is that the employer considered the dispute a matter for the union to decide. Moreover, the award had not been implemented at the time of the filing of the complaint, which put Dealers on notice that the union was charged with dishonesty and a breach of duty in procuring the decision of the Joint Committee. In these circumstances, the allegations of the complaint, if proved, would effectively undermine the decision of the Joint Committee as a valid basis for Moore's discharge.[3]

For these reasons this action is one arising under § 301 of the Labor Management Relations Act[4] and is

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[3] In its brief filed here Dealers does not support the decision of the Joint Committee. It suggests, rather, that the matter be finally settled by arbitration under the terms of the contract.

[4] Section 301 (a) of the L. M. R. A. is as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting com-

a case controlled by federal law, *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, even though brought in the state court. *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U. S. 95; *Smith* v. *Evening News Assn.,* 371 U. S. 195. Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act,[5] it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, *Smith* v. *Evening News Assn., supra,* subject, of course, to the applicable federal law.[6]

We now come to the merits of this case.

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merce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U. S. C. § 185 (a).

[5] Compare, for example, *Labor Board* v. *Local 294, International Bro. of Teamsters,* 317 F. 2d 746 (C. A. 2d Cir.), with *Miranda Fuel Co.,* 140 N. L. R. B. 181 (1962); enforcement denied, *Labor Board* v. *Miranda Fuel Co.,* 326 F. 2d 172 (C. A. 2d Cir.). See also Cox, The Duty of Fair Representation, 2 Villanova L. Rev. 151, 172–175.

[6] The union contended in the state courts that the jurisdiction of the state courts had been preempted by the federal statutes. The Kentucky Court of Appeals ruled otherwise and the union appears to have abandoned the view here, since it says, relying upon *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, that individual employees "may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them."

We note that in *Syres* v. *Oil Workers International Union,* 350 U. S. 892, individual employees sued the exclusive agent and the company to enjoin and declare void a collective bargaining agreement alleged to violate the duty of fair representation. Dismissal in the trial court was affirmed in the Court of Appeals. This Court reversed and ordered further proceedings in the trial court in the face

II.

If we assume with Moore and the courts below that the Joint Conference Committee's power was circumscribed by § 5 [7] and that its interpretation of the section is open to court review, Moore's cause is not measurably advanced. For in our opinion the section reasonably meant what the Joint Committee said or assumed it meant. There was an absorption here within the meaning of the section and that section did deal with jobs as well as with seniority.[8]

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of contentions made both in this Court and the lower courts that the employees should have brought their proceedings before the National Labor Relations Board. Cf. *Cosmark* v. *Struthers Wells Corp.*, 54 L. R. R. M. 2333 (Pa. Oct. 17, 1963).

The E & L employees, petitioners in No. 17, urge that even if the federal courts may entertain suits such as this, the state courts may not. Since in our view the complaint here charged a breach of contract, we find no merit in this position. It is clear that suits for violation of contracts between an employer and a labor organization may be brought in either state or federal courts. *Dowd Box Co.* v. *Courtney*, 368 U. S. 502.

[7] We need not consider the problem posed if § 5 had been omitted from the contract or if the parties had acted to amend the provision. The fact is that they purported to proceed under the section. They deadlocked at the local level and it was pursuant to § 5 that the matter was taken to the Joint Conference Committee which, under Art. 7, was to make a decision "after listening to testimony on both sides." The committee expressly recited that its decision was in accordance with § 5 of the contract. Even in the absence of § 5, however, it would be necessary to deal with the alleged breach of the union's duty of fair representation.

[8] We also put aside the union's contention that Art. 7, § (d)—providing that all matters of interpretation of the agreement be submitted to the Joint Conference Committee—makes it inescapably clear that the committee had the power to decide that the transfer of operating authority was an absorption within the scope of § 5. But it is by no means clear that this provision in Art. 7 was intended to apply to interpretations of § 5, for the latter section by its own terms appears to limit the authority of the committee to disputes over

Prior to this transaction both E & L and Dealers were transporting new cars out of Louisville for the Ford Motor Company. Afterwards, only one company enjoyed this business, and clearly this was no unilateral withdrawal by E & L. There was an agreement between the companies, preceded by long negotiation. E & L's authority to engage in the transportation of new cars out of Louisville was sold to Dealers. The business which E & L had done in that city was henceforth to be done by Dealers. While there was no sale of tangible assets at that location, the Joint Conference Committee reasonably concluded that there was an absorption by Dealers of the E & L business within the meaning of § 5 of the contract.

It was also permissible to conclude that § 5 dealt with employment as well as seniority. Mergers, sales of assets and absorptions are commonplace events. It is not unusual for collective bargaining agreements to deal with them, especially in the transportation industry where the same unions may represent the employees of both parties to the transaction.[9] Following any of such events, the business of the one company will probably include the former business of the other; and the recurring question is whether it is the employees of the absorbed company or those of the acquiring company who are to have first call upon the available work at the latter concern. Jobs, as well as seniority, are at stake; and it was to solve just such problems that § 5 was designed. Its interpretation should be commensurate with its purposes.

Seniority has become of overriding importance, and one of its major functions is to determine who gets or who

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seniority in the event of an absorption. Reconciliation of these two provisions, going to the power of the committee under the contract, itself presented an issue ultimately for the court, not the committee, to decide. Our view of the scope and applicability of § 5, *infra*, renders an accommodation of these two sections unnecessary.

[9] See cases cited in footnote 10, *infra*.

keeps an available job. Here § 5 provided for resolving the seniority of not only those employees who are "absorbed," but all who were "affected" by the absorption. Certainly the transaction "affected" the E & L employees; and the seniority of these drivers, which the parties or the Joint Conference Committee could determine, was clearly seniority at Dealers, the company which had absorbed the E & L business. The parties very probably, therefore, intended the seniority granted an E & L employee at Dealers to carry the job with it, just as seniority usually would. If it did not and if Dealers unilaterally could determine whether to hire any E & L employee, it might decide to hire none, excluding E & L employees from any of the work which they had formerly done. Or if it did hire E & L employees to fill any additional jobs resulting from the absorption of the E & L business, it might select E & L employees for jobs without regard to length of service at E & L or it might insist on an agreement from the union to grant only such seniority as might suit the company. Section 5 would be effectively emasculated.

The power of the Joint Conference Committee over seniority gave it power over jobs. It was entitled under § 5 to integrate the seniority lists upon some rational basis, and its decision to integrate lists upon the basis of length of service at either company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here.[10] The Joint Conference Committee's

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[10] See for example, *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C. A. 2d Cir. 1953); *Keller* v. *Teamsters Local 249,* 43 CCH Labor Cases ¶ 17,119 (D. C. W. D. Pa. 1961); *Pratt* v. *Wilson Trucking Co.,* 214 Ga. 385, 104 S. E. 2d 915 (1958); *Walker* v. *Pennsylvania-Reading Seashore Lines,* 142 N. J. Eq. 588, 61 A. 2d 453 (1948); *In re Western Union Telegraph Co. and American Communications*

decision to dovetail seniority lists was a decision which § 5 empowered the committee to make.

Neither do we find adequate support in this record for the complaint's attack upon the integrity of the union and of the procedures which led to the decision. Although the union at first advised the Dealers drivers that they had nothing to worry about but later supported the E & L employees before the Joint Conference Committee, there is no substantial evidence of fraud, deceitful action or dishonest conduct. Priddy's early assurances to Dealers employees were not well founded, it is true; but Priddy was acting upon information then available to him, information received from the company which led him to think there was no trade or exchange involved, no "absorption" which might bring § 5 into play. Other sections of the contract, he thought, would protect the jobs of Moore and his fellow drivers.[11] Consistent with this view, he also advised E & L employees that the situation appeared unfavorable for them. However, when he learned of the pending acquisition by Dealers of E & L operating authority in Louisville and of the involvement of other locations in the transaction, he considered the matter to be one for the Joint Committee. Ultimately

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Association (Decisions of War Labor Board 1944) 14 L. R. R. M. 1623. Cf. *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (C. A. 9th Cir. 1953); *Labor Board* v. *Wheland Co.*, 271 F. 2d 122 (C. A. 6th Cir. 1959); *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182 (C. A. 9th Cir. 1962); *Fagan* v. *Pennsylvania R. Co.*, 173 F. Supp. 465 (D. C. M. D. Pa. 1959). "Integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer . . . ." Kahn, Seniority Problems in Business Mergers, 8 Industrial and Labor Relations Review 361, 378.

[11] The Dealers employees rely upon a rider to the Dealers contract protecting the seniority of the employees at a terminal when another terminal of that company is closed down. The court below did not believe the rider dispositive, and we agree.

he took the view that an absorption was involved, that § 5 did apply and that dovetailing seniority lists was the most equitable solution for all concerned. We find in this evidence insufficient proof of dishonesty or intentional misleading on the part of the union. And we do not understand the court below to have found otherwise.

The Kentucky court, however, made much of the antagonistic interests of the E & L and Dealers drivers, both groups being represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.,* at 338. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented

by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E & L, there were fewer jobs at Dealers than there were Dealers and E & L drivers. One group or the other was going to suffer. If any E & L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation.

There is a remaining contention. Even though the union acted in good faith and was entitled to take the position it did, were the Dealers employees, if the union was going to oppose them, deprived of a fair hearing by having inadequate representation at the hearing? Dealers employees had notice of the hearing; they were obviously aware that they were locked in a struggle for jobs and seniority with the E & L drivers, and three stewards representing them went to the hearing at union expense and were given every opportunity to state their position. Thus the issue is in reality a narrow one. There was no substantial dispute about the facts concerning the nature of the transaction between the two companies. It was for the Joint Conference Committee initially to decide whether there was an "absorption" within the meaning of § 5 and, if so, whether seniority lists were to be integrated and the older employees of E & L given jobs at Dealers. The Dealers employees made no request to continue the hearing until they could secure further representation and have not yet suggested what they could

have added to the hearing by way of facts or theory if they had been differently represented. The trial court found it "idle speculation to assume that the result would have been different had the matter been differently presented." We agree.

Moore has not, therefore, proved his case. Neither the parties nor the Joint Committee exceeded their power under the contract and there was no fraud or breach of duty by the exclusive bargaining agent. The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. *Drivers Union* v. *Riss & Co.*, 372 U. S. 517.

The decision below is reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS.

I agree for the reasons stated by my Brother GOLDBERG that this litigation was properly brought in the state court but on the merits I believe that no cause of action has been made out for the reasons stated by the Court.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BRENNAN joins, concurring in the result.

I concur in the judgment and in the holding of the Court that since "Moore has not . . . proved his case . . . ," the decision below must be reversed. *Supra.* I do not, however, agree that Moore stated a cause of action arising under § 301 (a) of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185 (a). It is my view rather that Moore's claim must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141

et seq. See *Syres* v. *Oil Workers Int'l Union,* 350 U. S. 892, reversing 223 F. 2d 739; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192. Cf. *International Association of Machinists* v. *Central Airlines, Inc.,* 372 U. S. 682.

The complaint does not expressly refer either to § 301 (a) of the Labor Management Relations Act or to the National Labor Relations Act as the source of the action. Since substance and not form must govern, however, we look to the allegations of the complaint and to the federal labor statutes to determine the nature of the claim.

The opinion of the Court correctly describes Moore's complaint as alleging that the decision of the Joint Conference Committee dovetailing the seniority lists of the two companies violated Moore's rights because: (1) the Joint Committee exceeded its powers under the existing collective bargaining contract in making its decision dovetailing seniority lists, and (2) the decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation.

Neither ground, it seems to me, sustains an action under § 301 (a) of the L. M. R. A. A mutually acceptable grievance settlement between an employer and a union, which is what the decision of the Joint Committee was, cannot be challenged by an individual dissenting employee under § 301 (a) on the ground that the parties exceeded their contractual powers in making the settlement. It is true that this Court, in a series of decisions dealing with labor arbitrations, has recognized that the powers of an arbitrator arise from and are defined by the collective bargaining agreement.[1] "For arbitration," as the

[1] *E. g., United Steelworkers of America* v. *American Manufacturing Co.,* 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U. S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593.

Court said in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582, "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Thus the existing labor contract is the touchstone of an arbitrator's powers. But the power of the union and the employer jointly to settle a grievance dispute is not so limited. The parties are free by joint action to modify, amend, and supplement their original collective bargaining agreement. They are equally free, since "[t]he grievance procedure is . . . a part of the continuous collective bargaining process," to settle grievances not falling within the scope of the contract. *Id.*, at 581. In this case, for example, had the dispute gone to arbitration, the arbitrator would have been bound to apply the existing agreement and to determine whether the merger-absorption clause applied. However, even in the absence of such a clause, the contracting parties—the multiemployer unit [2] and the union—were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement. The presence of the merger-absorption clause did not restrict the right of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract.[3] There are too many unforeseeable

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[2] The Court states that "In its brief filed here Dealers does not support the decision of the Joint Committee." See *ante*, at 343, n. 3. The Court overlooks, however, that Dealers throughout the litigation has acknowledged that it is a part of the multiemployer unit, which is the employer party to the collective bargaining agreement and that the employer representatives on the Joint Conference Committee acted honestly and properly on behalf of the employer members including Dealers. See *infra*, at 357.

[3] The contract in this case specifically envisioned such a result. Section 5 of Article 4 provided that:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby

contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.

These principles were applied in *Ford Motor Co.* v. *Huffman,* 345 U. S. 330. There the union and the employer during a collective bargaining agreement entered into a "supplementary agreement" providing seniority credit for the pre-employment military service of veterans, a type of seniority credit not granted in the original agreement. *Id.,* at 334, n. 6. Huffman, on behalf of himself and other union members whose seniority was adversely affected, brought suit to have the supplementary provisions declared invalid and to obtain appropriate injunctive relief against the employer and the union. There was no doubt that Huffman and members of his class were injured as a result of the "supplementary agreement"; they were subjected to layoffs that would not have affected them if the seniority rankings had not been altered. Despite the change in rights under the prior agreement, this Court held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and

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shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure . . . ."

Section 2 of Article 7 also provided that:

"(d) It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Conference Committee, which Committee, after listening to testimony on both sides, shall make a decision."

Moreover, as the Court itself points out, other provisions stated that it was "the intention of the parties to resolve all questions of interpretation by mutual agreement" and that the employer agreed "to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement." *Ante,* at 339.

different contractual arrangements affecting seniority rights.

It necessarily follows from *Huffman* that a settlement of a seniority dispute, deemed by the parties to be an interpretation of their agreement, not requiring an amendment, is plainly within their joint authority. Just as under the *Huffman* decision an amendment is not to be tested by whether it is within the existing contract, so a grievance settlement should not be tested by whether a court could agree with the parties' interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal.

It is wholly inconsistent with this Court's recognition that "[t]he grievance procedure is . . . a part of the continuous collective bargaining process," *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S., at 581, to limit the parties' power to settle grievances to the confines of the existing labor agreement, or to assert, as the Court now does, that an individual employee can claim that the collective bargaining contract is violated because the parties have made a grievance settlement going beyond the strict terms of the existing contract.

I turn now to the second basis of the complaint, *viz.*, that the decision of the Joint Conference Committee was brought about by dishonest union conduct in breach of its duty of fair representation. In my view, such a claim of breach of the union's duty of fair representation cannot properly be treated as a claim of breach of the collective bargaining contract supporting an action under § 301 (a). This is particularly apparent where, as here, "[n]o fraud is charged against the employer . . . ." *Ante*, at 343.

This does not mean that an individual employee is without a remedy for a union's breach of its duty of fair representation. I read the decisions of this Court to hold that

an individual employee has a right to a remedy against a union breaching its duty of fair representation—a duty derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes. See *Syres* v. *Oil Workers Int'l Union, supra* (National Labor Relations Act); *Brotherhood of Railroad Trainmen* v. *Howard, supra* (Railway Labor Act); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen, supra* (Railway Labor Act); *Steele* v. *Louisville & N. R. Co., supra* (Railway Labor Act). Cf. *International Association of Machinists* v. *Central Airlines, Inc., supra* (Railway Labor Act). There is nothing to the contrary in *Smith* v. *Evening News Assn.*, 371 U. S. 195. In that case the gravamen of the individual employee's § 301 (a) action was the employer's discharge of employees in violation of the express terms of the collective bargaining agreement. No breach of the union's duty of fair representation was charged. To the contrary, the union supported the employee's suit which was brought as an individual suit out of obeisance to what the union deemed to be the requirements of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437.

The remedy in a suit based upon a breach of the union's duty of fair representation may be extended to the employer under appropriate circumstances. This was recognized in *Steele* v. *Louisville & N. R. Co., supra,* where the Court extended the remedy against the union to include injunctive relief against a contract between the employer and the union. There the employer willfully participated in the union's breach of its duty of fair representation and that breach arose from discrimination based on race, a classification that was held "irrelevant" to a union's statutory bargaining powers. The Court observed:

> "[I]t is enough for present purposes to say that the statutory power to represent a craft and to make con-

> tracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on . . . relevant differences." *Id.*, at 203.

The Court distinguished classifications and differences which are "relevant to the authorized purposes of the contract . . . such as differences in seniority, the type of work performed, [and] the competence and skill with which it is performed, . . ." *Ibid.* Where the alleged breach of a union's duty involves a differentiation based on a relevant classification—in this case seniority rankings following an amalgamation of employer units—and where the employer has not willfully participated in the alleged breach of the union's duty, the collective bargaining agreement should not be open to the collateral attack of an individual employee merely because the union alone has failed in its duty of fair representation. We should not and, indeed, we need not strain, therefore, as the Court does, to convert a breach of the union's duty to individual employees into a breach of the collective bargaining agreement between the employer and the union.

I do not agree with the Court that employer willfulness was claimed in this case by "[t]he fair inference from the complaint" that Dealers "considered the dispute a matter for the union to decide." *Ante*, at 343. Nor can I agree that willfulness could be predicated on the rationale that since "the award had not been implemented at the time of the filing of the complaint," Dealers was "put . . . on notice that the union was charged with dishonesty and a breach of duty in procuring the decision of the Joint Committee." *Ibid.* Dealers may indeed have been neutral when the case was presented to the Joint Conference Committee but the Court overlooks that the employer-party to the collective bargaining contract was the multiemployer unit whose representatives—acting on behalf of both Dealers and E & L—fully participated in the Joint Com-

mittee's decision resolving the dispute.[4] Furthermore, an employer not willfully participating in union misconduct should not be restrained from putting a grievance settlement into effect merely by being "put . . . on notice" that an individual employee has charged the union with dishonesty. Such a rule would penalize the honest employer and encourage groundless charges frustrating joint grievance settlements. Finally, it is difficult to conceive how mere notice to an employer of union dishonesty can transform the union's breach of its duty of fair representation into a contractual violation by the employer.

In summary, then, for the reasons stated, I would treat Moore's claim as a *Syres-Steele* type cause of action rather than as a § 301 (a) contract action. So considering it, I nevertheless conclude, as the Court does, that since "there was no fraud or breach of duty by the exclusive bargaining agent," *ante,* at 351, Moore is not entitled to the relief sought.

I have written at some length on what may seem a narrow point. I have done so because of my conviction that in this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process. Of course, we must protect the rights of the individual. It must not be forgotten, however, that many individual rights, such as the seniority rights involved in this case, in fact arise from the concerted exercise of the right to bargain collectively. Consequently, the understandable desire to protect the individual should not emasculate the right to bargain by placing undue restraints upon the contracting parties. Similarly, in safeguarding the individ-

[4] See note 2, *supra.*

ual against the misconduct of the bargaining agent, we must recognize that the employer's interests are inevitably involved whenever the labor contract is set aside in order to vindicate the individual's right against the union. The employer's interest should not be lightly denied where there are other remedies available to insure that a union will respect the rights of its constituents. Nor should trial-type hearing standards or conceptions of vested contractual rights be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life. I have deemed it necessary to state my views separately because I believe that the Court's analysis in part runs contrary to these principles.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I agree with the Court's opinion and judgment insofar as it relates to the claim that the Joint Conference Committee exceeded its authority under the collective bargaining agreement. Although it is undoubtedly true as a general proposition that bargaining representatives have power to alter the terms of a contract with an employer, the challenge here is not to a purported exercise of such power but to the validity of a grievance settlement reached under proceedings allegedly not authorized by the terms of the collective agreement. Moreover, a committee with authority to settle grievances whose composition is different from that in the multiunion-multiemployer bargaining unit cannot be deemed to possess power to effect changes in the bargaining agreement. When it is alleged that the union itself has engaged or acquiesced in such a departure from the collective bargaining agreement, I can see no reason why an individually affected employee may not step into the shoes of the union and maintain a § 301 suit himself.

But insofar as petitioners' claim rests upon alleged unfair union representation in the grievance proceeding, I agree with the views expressed in the concurring opinion of my Brother GOLDBERG (*ante,* 355–358) (except that I would expressly reserve the question of whether a suit of this nature would be maintainable under § 301 where it is alleged or proved that the employer was a party to the asserted unfair union representation). However, the conclusion that unilateral unfair union representation gives rise only to a cause of action for violation of a duty implicit in the National Labor Relations Act brings one face-to-face with a further question: Does such a federal cause of action come within the play of the preemption doctrine, *San Diego Trades Council* v. *Garmon,* 359 U. S. 236, contrary to what would be the case were such a suit to lie under § 301, *Smith* v. *Evening News Assn.,* 371 U. S. 195? Short of deciding that question, I do not think it would be appropriate to dispose of this case simply by saying that no unfair union representation was shown in this instance. For if there be preemption in this situation, *Garmon* would not only preclude state court jurisdiction but would also require this Court initially to defer to the primary jurisdiction of the Labor Board.

The preemption issue is a difficult and important one, carrying ramifications extending far beyond this particular case. It should not be decided without our having the benefit of the views of those charged with the administration of the labor laws. To that end I would reverse the judgment of the state court to the extent that it rests upon a holding that the Joint Conference Committee acted beyond the scope of its authority, set the case for reargument on the unfair representation issue, and invite the National Labor Relations Board to present its views by brief and oral argument on the preemption question. Cf. *Retail Clerks International Assn.* v. *Schermerhorn,* 373 U. S. 746, 757; 375 U. S. 96.

Syllabus.

POLAR ICE CREAM & CREAMERY CO. *v.* ANDREWS ET AL., CONSTITUTING THE FLORIDA MILK COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 38. Argued November 20, 1963.—Decided January 6, 1964.

Appellant (Polar), located in Pensacola, Florida, is a processor and distributor of fluid milk and milk products, which it sells to Florida consumers and dealers. It handles approximately 5,000,000 gallons of milk each year, and supplies large quantities to United States military installations. Prior to the regulations challenged here, it purchased approximately 30% of its raw milk requirements from Florida producers, the remainder from producers or brokers in other States. The Florida Milk Control Act and the orders of the Florida Milk Commission here challenged by Polar regulate dealings between milk distributors and milk producers located within the Pensacola Milk Marketing Area. *Held:*

1. Those provisions of the Florida regulations which require Polar to accept its total supply of Class I milk from designated Pensacola producers at a fixed price and oblige it to take all milk which these producers offer are invalid under the Commerce Clause of the Federal Constitution. Pp. 373–379.

(a) The controlling cases are *Baldwin* v. *Seelig,* 294 U. S. 511; *Hood & Sons* v. *Du Mond,* 336 U. S. 525; and *Dean Milk Co.* v. *Madison,* 340 U. S. 349. P. 373.

(b) Under the regulatory restraints challenged here, out-of-state milk may not participate in the milk market in Florida, including the premium Class I market, unless local production is inadequate. These barriers are precisely the kind of hindrance to the introduction of milk from other States which *Baldwin* condemned as an "unreasonable clog on the mobility of interstate commerce." Pp. 375–377.

(c) *Baldwin* and *Dean* make clear that the exclusion of out-of-state milk from a major portion of a State's market cannot be justified as an economic measure to protect the welfare of local dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. P. 377.

(d) *Nebbia* v. *New York,* 291 U. S. 502, *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, and *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, distinguished. Pp. 378–379.

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2. The question of the validity of the producer price requirement of the Florida law as applied to Polar's sales to United States military reservations is not here determined. Pp. 379–381.

3. The provision of the Milk Control Act which imposes a tax of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor—to the extent that the computation of the tax includes milk sold to federal enclaves over which the United States exercises exclusive jurisdiction—is not invalid as beyond the jurisdiction of the State. Pp. 381–383.

(a) The incidence of the tax appears to be upon the activity of processing or bottling milk in a plant located within Florida, and not upon work performed on a federal enclave or upon the sale and delivery of milk occuring within the boundaries of federal property. P. 382.

(b) The distributing of milk has its processing dimension, a substantial activity occurring within Florida, and this is enough to sustain the tax. P. 383.

(c) The provision of 4 U. S. C. §§ 105, 110, conferring upon the States jurisdiction to levy and collect a sales or use tax "in any Federal area," and defining a sales or use tax as "any tax levied on, with respect to, or measured by, sales . . . of tangible personal property," provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida. P. 383.

208 F. Supp. 899, reversed and remanded.

Joe J. Harrell argued the cause for appellant. With him on the briefs was *J. A. McClain, Jr.*

Mallory E. Horne and *Johnson S. Savary* argued the cause for appellees. With them on the brief were *Richard W. Ervin,* Attorney General of Florida, and *Joseph C. Jacobs,* Assistant Attorney General.

Mr. Justice White delivered the opinion of the Court.

We have before us the recurring question of the validity of a State's attempt to regulate the supply and distribution of milk and milk products. Challenged in this case

is Florida's system of regulation of the dealings between milk distributors and local producers.

The appellant, Polar Ice Cream & Creamery Company, located in Pensacola, Florida, 16 miles from the Florida-Alabama state line, is a processor and distributor of fluid milk and milk products. It sells fluid milk and milk products for human consumption to consumers and dealers within the State of Florida in competition with nearby Alabama distributors. Pursuant to contracts let after competitive bidding, it also supplies large quantities of milk to military installations, both within and without the State of Florida. It purchases, processes and sells as fluid milk or milk products approximately 5,000,000 gallons of milk each year.

Prior to the regulations challenged here, Polar purchased approximately 30% of its milk requirements from dairy farm producers located within the State of Florida. The remaining 70% was procured from producers, producer pools or brokers in other States, such as Alabama, Mississippi, Wisconsin, Minnesota, Missouri, Virginia, and Illinois. Its customary arrangement with Florida producers was to pay 61 cents per gallon for a specified quantity of milk from each producer and approximately 35.5 cents per gallon for all milk over that quantity. The price Polar paid its out-of-state sources varied; some milk was purchased for as low as 30–35 cents per gallon from Alabama, Virginia, and Arkansas sources. Polar's Florida producers could at no time supply all of Polar's milk requirements, but at times produced and sold to Polar amounts equal to or greater than Polar's sales of fluid milk for human consumption to consumers and dealers in Florida, excluding sales to the military, sales on reservations, and sales to local schools.

The statute and the orders of the Florida Milk Commission challenged by Polar regulate the dealings between milk distributors and milk producers located within

the Pensacola Milk Marketing Area.[1] First, they require that a Pensacola milk distributor pay a minimum price of 61 cents per gallon for all milk purchased from Pensacola producers and sold in Florida as Class I milk, defined as fluid milk or milk products sold in fluid form with exceptions, and substantially lower minimum prices for milk

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[1] Chapter 501 of the Florida Statutes establishes a comprehensive scheme for regulation of the milk industry and establishes the Florida Milk Commission. The Act empowers the Commission, *inter alia*, to supervise and regulate the entire milk industry, including the production, transportation, manufacture, storage, distribution and sale of milk, to establish milk markets within the State, to fix prices to be paid producers within a regulated marketing area by distributors, milk dealers and producer-distributors, and generally to adopt and enforce all rules, regulations, and orders necessary to carry out the purposes of the Act. Fla. Stat. § 501.04. In addition the Commission is authorized to revoke or suspend the license of a milk distributor or dealer when satisfied that the dealer or distributor has rejected or refused milk delivered by a producer in ordinary continuance of a previous course of dealings or when satisfied that the dealer or distributor has committed any act injurious to the public health or public welfare in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply. Fla. Stat. §§ 501.09 (3)(a), (c). Before the Commission may exercise its supervisory and regulatory powers in any marketing area, however, at least 10% of the producers in that area must petition the Commission for such regulation and a majority of the producers in that area must vote in favor of regulation. Fla. Stat. § 501.20 (1).

In November 1961, the dairy farmers producing milk in the four westernmost Florida counties, Escambia, Santa Rosa, Okaloosa and Walton, voted to place that area under the control of the Florida Milk Commission and thereby subject to the provisions of the Florida Milk Control Act and the orders issued pursuant thereto. Thereupon in January 1962, the Commission issued a series of orders covering the four-county area, termed the Pensacola Milk Marketing Area, and a letter to Polar Ice Cream & Creamery Co. specifying its obligations under the newly imposed regulatory structure. In August 1962, the Commission issued other orders and rules further implementing and defining the earned-base allocation plan challenged herein.

sold as Class II, III, and IV milk,[2] consisting chiefly of nonbeverage milk such as cream, sour cream and other dairy products.

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[2] The minimum price established in Official Order PEN–4, January 18, 1962, for the Pensacola area for Class II milk was 1 cent per gallon less than the minimum price established for this class milk in the Miami, Florida, Federal Milk Marketing Order, No. 118, and for Class III milk was 26 cents per gallon. There was no price set for Class IV utilization in this order. Official Order No. 20–29, covering all regulated marketing areas in Florida, effective March 4, 1962, retained the 61 cents per gallon minimum on Class I milk, and adopted the monthly prices in the Miami, Florida, Federal Milk Marketing Order, less 1 cent per gallon, for Class II, III and IV milk. All of the above prices are subject to minor adjustments for variations from the 4% average butterfat content of the milk distributed in each class.

Classes of milk are defined as follows in Official Order No. 20–28:

"It Is Hereby Ordered That:

"1. Class I Milk is hereby defined as all fluid milk or milk products sold in fluid form with the exception of buttermilk, chocolate drink and cream.

. . . . . .

"2. Class II Milk shall be all skim milk and butterfat:

"(a) Used to produce acidophilus milk, buttermilk, chocolate drink, half and half, light cream, heavy cream and sour cream, and

"(b) Contained in inventories in the form of milk products designated as Class I milk pursuant to paragraph (1) of this section on hand at the end of each month and accounting period; *provided*, that Class II classification of shrinkage prorated to skim and butterfat, respectively, in producer milk shall not exceed two per cent (2%) of skim and butterfat in producer milk.

"3. Class III Milk shall be all skim milk and butterfat:

"(a) Used to produce any product other than those specified in paragraphs (1) and (2) of this section;

"(b) That portion of fortified milk or skim milk not classified as Class I milk pursuant to subparagraph (1)(a) of this section, and

"(c) In total shrinkage of skim milk and butterfat, respectively, such shrinkage to be prorated to producer milk and other source milk received in the form of fluid milk or skim milk.

"4. Class IV Milk shall be all milk the skim portion of which is:

"(a) Disposed of for fertilizer or livestock feed, and

"(b) Dumped after such prior notification as the Commission administrator may require."

Second, the Commission has established a method by which a proportion of a distributor's monthly sales in various classes is allocated to designated Pensacola producers. Each Pensacola producer with whom Polar does business between September 1 and November 30 of each year, called the base-fixing period, is assigned an earned base, representing the ratio of milk delivered by such producer to the total milk delivered by all of Polar's Pensacola producers during the base-fixing period. The resultant percentage is then applied to the number of gallons of milk Polar sells in Class I, II, III, and IV channels monthly, in that order, to determine the number of gallons for which each earned-base producer must be paid the minimum prices assigned to each class or utilization.[3]

[3] Milk utilized by the consumer in fluid form, beverage milk, commands a substantially higher price than milk of the identical quality which is used to make manufactured milk products, such as butter, cheese, ice cream and so forth. Accordingly the processor or distributor of milk is able to pay the producer a higher price for milk which is sold in fluid form for human consumption, and most milk-pricing systems require milk to be classified according to use. See *Lehigh Valley Coop.* v. *United States,* 370 U. S. 76, 79. The milk industry generally maintains a reserve to meet the changing demands for beverage milk. Since the supply of milk is greater than the demands of the fluid milk market, the excess, referred to as surplus milk, must be channeled to the less-desirable, lower-priced outlets. This explains how Polar is able to purchase milk in Alabama and other States for as low as 30 and 35 cents per gallon and how Polar was able to pay its producers, prior to regulation, as high as 61 cents per gallon for a specified quantity of milk.

Where a distributor sells milk in both fluid and manufactured forms, problems of allocation arise. Under Federal Milk Marketing Orders establishing marketwide pools, the total proceeds received from the sale of milk by regulated handlers or distributors are pooled. A "blend" or average price is calculated by multiplying the "pool" milk disposed of in each class by the established minimum prices for each class, with some further adjustments not pertinent here. See *Lehigh Valley Coop., supra,* at 80. The "blend" price is then divided among the producers according to the amount of milk each producer sells, re-

The allocation of a producer's deliveries must first be to Class I utilization, with allocation continued thereafter in descending order through the lower classifications. Only deliveries by Pensacola producers are considered in calculating the ratio of each producer's deliveries to total deliveries to Polar during the base-fixing period and therefore the percentage assigned to these producers totals 100%. The result is that all of Polar's Class I sales must be attributed to its Pensacola earned-base producers. Only then may their milk be used for the less remunerative utilizations, and only if these producers do not fulfill Polar's need for Class I milk may other milk be used for this purpose and thus command a premium price. Moreover, the formula requires that all the milk Polar sells in Florida be first attributed to the purchases that it makes from Pensacola producers.[4] The earned-base percentages remain the same until the next base-fixing period.

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gardless of the use to which his milk is actually put. The blend price thus represents an average based upon the combined use of all regulated milk within a marketing area.

[4] Until the Florida Milk Commission's Rule 220–1.05 was promulgated on August 24, 1962, the applicability of the allocation provision to milk utilized in less than Class I channels was unclear. The Commission's letter of January 25, 1962, to Polar's earned-base producers, assigning them bases for 1962, specified that the bases entitled them to that percentage of Polar's Class I milk sales each month, without referring to Class II, III or IV utilizations. The total of the percentages assigned to these 26 producers was 100%, thus entitling them collectively to all of Polar's Class I sales for 1962.

Rule 220–1.05 (6) provides:

"Base Percentage; Computation and Application.

"(a) During the base fixing period, a base percentage shall be determined for each producer by calculating the ratio of the milk delivered by each producer to the total milk delivered by all producers for the entire base fixing period, which percentage is referred to herein as 'earned base.' This computation shall be made immediately following the close of the base fixing period, and within thirty

Third, the statute forbids termination of the business relationship between a distributor and producer with whom the distributor has had a continuous course of dealings without just cause and provides that rejection or refusal to accept any milk tendered or offered for delivery by a producer in ordinary continuance of a previous course of dealings is a ground for revocation of the distributor's license.[5] These statutory provisions have been construed

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(30) days thereafter, each producer shall be notified by mail of his base percentage and the base percentage of all other producers participating in that particular base. During this period, each plant shall supply the local Deputy Administrator with a summary of its base computations. The producer notification must illustrate how the base percentage for the producer concerned has been determined.

"1. The base percentage earned by each producer shall be applied to the total number of gallons of milk utilized in Class I channels by each distributor and producer-distributor to determine the number of gallons of milk for which the producer must be paid at the Class I price fixed by the Commission. In case a producer fails to produce the amount of milk that his 'earned base' entitles him to, in Class I channels, such deficit must be reallocated to the other 'earned base' producers in proportion to their 'earned bases,' and the Class I price paid for the milk so reallocated.

"2. The method outlined above for computing allocations to Class I utilization shall be followed in computing allocations for all other classes.

"3. First allocation of a producer's deliveries shall be to Class I utilization, with allocation continued thereafter in descending order of price through Class IV classification. The balance of any producer's production after the above allocations may then be placed in the lowest price classification.

"4. In computing Class I sales to be allocated to producers, no adjustment shall be made for milk received by distributors and/or producer-distributors from sources other than 'earned base' producers."

[5] Section 501.05 (3) provides:

"The relationship between a producer and a distributor, under which milk produced by the producer is regularly delivered to and accepted by the distributor, when once established, shall not be

to mean that a Florida distributor in a regulated marketing area must accept from his earned-base producers all the milk tendered by such producers, including milk in excess of Class I needs. A distributor is relieved of the obligation to purchase milk from earned-base producers only upon a showing of just cause, which is not met by a demonstration that the Commission's minimum prices are burdensome or that milk is available elsewhere at a lower price.[6]

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terminated either by the producer or by the distributor without just cause therefor, and the approval of the commission. Just cause will be considered by the commission as any cause deemed just by a prudent and reasonable man."

Section 501.09 (3) provides: "The commission may decline to grant any license . . . or revoke a license . . . when satisfied of the existence of any of the following . . .

"(a) That a milk dealer has rejected, without reasonable cause, any milk delivered to and accepted by the milk dealer from a producer delivered by or on behalf of the producer in ordinary continuance of a previous course of dealing, or that a milk dealer has rejected without reasonable cause, or has rejected without reasonable advance notice, any milk tendered or offered for delivery to the milk dealer by or on behalf of a producer in ordinary continuance of a previous course of dealing. It is intended hereby to provide and require that a milk dealer shall not reject or refuse to accept any milk tendered or offered for delivery by or on behalf of a producer in ordinary continuance of a previous course of dealing unless there exists reasonable cause for the rejection or refusal to accept such milk and unless the milk dealer has also given . . . advance notice . . . ."

[6] In *Borden Co.* v. *Odham,* 121 So. 2d 625, the Florida Supreme Court upheld the Commission's power to apply the percentage allocation provisions to Class II and III as well as Class I milk and to require a distributor to accept milk in excess of Class I requirements, so long as the Commission acted reasonably. However, since the statute at that time only required reasonable notice for a refusal of milk delivered in the ordinary course of dealings between a distributor and producer, the court held that the Commission's additional requirement of just cause was beyond its authority. The statute, note 5, *supra,* has subsequently been amended to require both

It is this three-pronged regulatory structure, requiring Polar to accept its total supply of Class I milk, military milk aside, from designated Pensacola producers at a fixed price, and obligating it to take all milk which these producers offer, which Polar argues imposes an undue burden on interstate commerce.[7]

The Florida Milk Commission also proposed special provisions dealing with milk that is sold to military in-

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just cause and reasonable notice before refusal or rejection of milk delivered by an earned-base producer is permissible.

In *Florida Dairy, Inc.*, v. *Florida Milk Comm'n*, 149 So. 2d 867, a milk distributor sought to terminate its relationship with producers on the ground that it could produce its own milk at a lower price than that paid to producers and that the required prices rendered the distributor unable to meet the competition from producer-distributors in its area. The Commission's finding that just cause was not met by this showing because of the injury to producers that would result from the termination and the consequent loss of business was upheld. See *Foremost Dairies* v. *Odham*, 121 So. 2d 636, upholding over Commerce Clause objections a Commission order providing for an annual base-fixing period and providing that base percentages earned by each producer are applicable to all classes of milk.

Mr. E. V. Fisher, Administrator of the Florida Milk Commission, testified below that Polar is required to accept all the milk produced and tendered by Polar's earned-base producers, and that refusal of any milk tendered without just cause is ground for a show-cause order and disciplinary proceedings. And see Rule 220–1.05 (4), (6).

Official Order PEN–2, however, provides that an earned-base producer who delivers milk in excess of Class I needs during the base-fixing period may have his subsequent earned-base reduced; this order is to discourage Pensacola producers from increasing their production to the point of supplying surplus milk, defined as milk in excess of Class I needs.

[7] In the court below and in the jurisdictional statement filed with this Court, Polar also objected that this regulatory structure violated the due process and equal protection of the laws provisions of the Fourteenth Amendment. However, Polar has not pursued these issues in its brief or argument before this Court. They appear on their face to be without merit, and, in any case, our resolution of the other claims asserted renders a decision on these issues unnecessary.

stallations of the United States—military milk. Although challenged by Polar at the outset of this litigation, this plan was not voted into effect. While the present status of military milk under Florida law is not entirely clear from the record or arguments of the parties, we read the testimony of the Commission to mean that Polar is not required to purchase military milk from its Pensacola producers, as it is Class I milk. However, if Polar does utilize milk obtained from its earned-base producers for military sales, it must pay the minimum price applicable to Class I sales. Polar challenges this producer price requirement as inconsistent with the federal procurement policy of competitive bidding, and the Federal Government's exclusive jurisdiction over the installations on which this milk is consumed.

To finance the activities of the Milk Commission, Florida imposes a tax or regulatory fee of 15/100 of 1 cent per gallon of all milk handled by Florida distributors regardless of where purchased or to whom it is sold, including milk that Polar sells to military installations. This tax abates if at any time the revenue exceeds by 25% the total amount of Commission expenditures as budgeted for that fiscal year.[8] Polar, which clearly is obliged to pay

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[8] Fla. Stat. §§ 501.09 (4)(b), 501.09 (8):

"For the privilege of continuing in or engaging in the business of distributing milk or acting as a distributor under the provisions of this chapter, there is imposed upon every distributor a tax in an amount equal to fifteen-one hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month. The amount of such tax shall be remitted by each distributor to the commission at the time that the monthly reports are required to be filed by the distributor with the commission as provided by this chapter."

"If at any time during a fiscal year the revenues received by the commission under this chapter exceed by at least twenty-five per cent the total amount of expenditures as budgeted by the commission for that fiscal year, the payment of taxes provided for in this subsection,

this fee, contends that the State is without jurisdiction to include milk sold and delivered to military reservations, exclusive jurisdiction to which has been ceded to the United States, in calculating the amount of the tax.

Since Polar's objections to the Florida Milk Control Act posed substantial federal questions, a three-judge District Court was convened, 28 U. S. C. § 2281, and testimony was taken and arguments heard in respect to the above questions. This court found that the Florida Milk Control Act was a reasonable exercise of the State's police power and accordingly rejected Polar's claims that the Act, in fixing producer prices without assuring Polar any rate of return and in compelling Polar to take all the milk of its earned-base producers, denied it due process of law and equal protection. The District Court also found that Florida's fee on milk distributed by Polar to military installations was a regulatory fee based on the privilege of doing business in Florida and not a tax and concluded that this measure therefore did not unduly burden interstate commerce or infringe upon the exclusive jurisdiction of the United States over the military installations Polar serves. The Florida producer price controls were said not to conflict with the Federal Procurement Statutes, 10 U. S. C. § 2301 *et seq.*, since they did not impose any restriction on the price paid by the Federal Government for its purchases from Polar. Although finding that the Florida regulations were intended to protect and favor Florida milk producers, the court upheld these regulations over Commerce Clause objections because there was no showing that the alleged discrimination against out-of-state

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and in § 501.09 (4), on milk distributed by distributors, will be discontinued and such taxes are not imposed for the calendar months remaining in that fiscal year commencing with the first calendar month following the time when such revenues so collected exceed by at least twenty-five per cent the total amount of expenditures so budgeted for that fiscal year."

producers burdened or restricted interstate commerce. The decision in *Baldwin* v. *Seelig,* 294 U. S. 511, invalidating a state restriction imposed on a milk distributor to shield local milk producers from the effects of out-of-state competition, was deemed inapplicable to Florida's regulations. Because of the serious questions raised under the Commerce Clause and previous decisions here dealing with milk regulations, we noted probable jurisdiction. 372 U. S. 939. We have determined that under prior cases in this Court dealing with state regulation of the milk industry the Florida law as applied in this case cannot withstand attack based upon the Commerce Clause and that the judgment below must be reversed.

I.

The controlling cases are *Baldwin* v. *Seelig,* 294 U. S. 511; *Hood & Sons* v. *Du Mond,* 336 U. S. 525; and *Dean Milk Co.* v. *Madison,* 340 U. S. 349.

In *Baldwin,* the Metropolitan Milk District in the State of New York obtained about 70% of its supplies from New York sources, the remaining 30% from other States. The New York law forbade the sale in New York of milk obtained by a distributor from other States unless the distributor had paid a price which would be lawful under the New York price regulations. This provision was attacked by a New York milk distributor, all of whose milk supply was purchased in Vermont for less than the established New York price. Remarking that the New York law aimed at keeping "the system unimpaired by competition from afar," 294 U. S., at 519, the Court struck down this provision as an impermissible burden upon interstate commerce. New York could not outlaw Vermont milk purchased at below New York prices, for to do so would "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported," 294 U. S., at 521—which is forbidden to the States by the Constitu-

tion, Art. I, § 10, cl. 2, and reserved to Congress by Art. I, § 8, cl. 3. Nice distinctions between direct and indirect burdens were said to be irrelevant

> "when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . [A] chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U. S., at 522.

To the argument that the law was in reality a health measure, since farmers must be protected from competition if they are to provide the reliable supply of healthful milk which the locality is entitled to have, the Court said,

> "Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the sev-

eral states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." 294 U. S., at 523.[9]

Baldwin was heavily relied upon in both *Du Mond* and *Dean, supra.* In *Du Mond,* New York was found to have no power under the Commerce Clause to forbid an out-of-state distributor from establishing additional processing plants and additional sources of milk within the State. In *Dean,* the City of Madison was prevented from reserving the Madison market to producers and distributors located within a specified distance of the city, although purported considerations of public health were advanced as justifying the restriction.

The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market.

II.

Under the controls challenged here, Polar must buy from its Florida producers, and pay 61 cents per gallon for it, an amount of raw milk equal to its Class I sales if it is available from these producers. If more than this

[9] In response to the argument that New York's price requirements were necessary to enhance the economic welfare of Vermont farmers and thereby ensure their observance of sanitary and health requirements, the Court stated that "the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. . . . Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." 294 U. S. at 524. See *Dean Milk Co.* v. *Madison,* 340 U. S. 349, where a purported local health measure was invalidated because reasonable nondiscriminatory alternatives, adequate to conserve and protect local interests, were available.

amount is offered, Polar must also take the surplus at the lower established prices. And these obligations continue to bind Polar even though both its Class I needs and the surplus obtainable from Florida producers may steadily increase. Polar obviously will not and cannot use outside milk for those uses for which it is required to use Florida milk. Polar may turn to out-of-state sources only after exhausting the supply offered by its Pensacola producers. Under the challenged regulations, an Alabama dairy farmer could not become one of Polar's regular producers and sell all of his milk to that company. Since he could not share in the Class I market—Pensacola producers are probably able to supply that market—his milk could command only the lower prices applicable to the less remunerative uses, prices which would not cover his cost of production.[10]

The consequences for interstate commerce are clear. In *Baldwin* New York's price control removed any economic incentive for a local distributor to purchase out-of-state milk and thereby encouraged its distributors first to consume the local supply of milk before turning to out-of-state sources. Out-of-state milk was denied an equal opportunity to compete with New York-produced milk to the extent that the out-of-state supply bore additional transportation charges. The Florida controls preempt for the Florida producers a large share of the Florida market, especially the most lucrative fluid milk market. Out-of-state milk may not participate in this part of the Florida market, unless local production is inadequate, and given the exclusive domain of the Florida producers over Class I sales, out-of-state milk may not profitably serve the re-

[10] The Florida Milk Commission has informed us that Florida producers would operate at a loss unless a proportion of their sales of milk were put to Class I use and that therein lies the purpose of the Class I purchase and allocation requirement. We do not see why the situation is different for non-Florida producers.

mainder of the Florida market, since it is relegated to the surplus market alone. These barriers are precisely the kind of hindrance to the introduction of milk from other States which *Baldwin* condemned as an "unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result." 294 U. S., at 527.

The exclusion of foreign milk from a major portion of the Florida market cannot be justified as an economic measure to protect the welfare of Florida dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. This much *Baldwin* and *Dean* made clear. Nor is it an escape from *Baldwin* to say that Polar has no interest in providing a satisfactory blend price as a basis for ongoing relationships with any out-of-state producer and that its only interest is in buying surplus milk at distress prices from out-of-state sources and selling it at Class I prices in the Florida market, all to the detriment of Florida producers and an orderly market. For this is but another assertion that a State may preempt its market for its own producers to the exclusion of production from other areas. Florida has no power "to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones," 294 U. S. 521; the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other States.

Florida, it is true, does not prevent distributors located in other States from selling wholesome fluid milk in the Florida market. But allowing competition on the distributor level is no justification for barring interstate milk from the most lucrative segment of Florida's raw milk

market. Given such distributor competition as there is,[11] there is still milk in other States which Polar can and wants to acquire and which it will not acquire in the face of the Florida regulations. The burden on commerce and the embargo on out-of-state milk remain.

The cases relied upon by the Commission do not save the regulatory scheme challenged here. *Nebbia* v. *New York,* 291 U. S. 502, established that minimum retail and wholesale prices for milk purchased and sold within the State do not offend the Due Process and Equal Protection Clauses. Nor is such price regulation an impermissible burden upon commerce, *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, even as applied to a distributor who purchases and cools milk within the State and then transports it to another State for processing and sale, since the burden on commerce is indirect and only incidental to the regulation of an essentially local activity. *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346. In

[11] A recent study of movement patterns of fluid milk and milk products in the Southeastern States indicates that the quantity of fluid milk and other products from Grade A milk moving across state lines within this area was relatively small, and that among six States in the area, North Carolina, South Carolina, Georgia, Alabama, Tennessee and Florida, Florida had by far the highest percentage of fluid milk and milk products distributed in the same areas as processed. This percentage was 95%. Carley and Purcell, Milk Movement Patterns In The Southeast, 44 (So. Coop. Series, Bull. 84, April 1962).

Another study during sample months of 1959 shows that Florida producers supplied 99.3% of the market for fluid milk in Florida; for all markets, local producer shipments were in excess of 90% of total milk supplies received and that the remainder in each area was obtained from sources located in other Florida markets. Only in northwest Florida did receipts from other States amount to 2.6% of supplies. In no other area was this amount above 1% of total receipts. R. E. L. Greene and H. W. Wurburton, An Economic Evaluation of Fluid Milk Supply, Movement and Utilization in Florida, 61 (Dept. of Agricultural Economics, Fla. Agricultural Experiment Station).

none of these cases was there any attempt to reserve a local market for local producers or to protect local producers from out-of-state competition by means of purchase and allocation requirements imposed upon milk distributors.

The power which we deny to Florida is reserved to Congress under the Commerce Clause, and we are offered nothing indicating either congressional consent to, or acquiescence in, a regulatory scheme such as Florida has employed. On the contrary, under the present Act authorizing federal marketing orders in the milk industry, such an order may not "prohibit or in any manner limit, in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States." This provision, as the Court explained in *Lehigh Valley Coop.* v. *United States,* 370 U. S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the States.

III.

We turn to the matter of Polar's sales to United States military reservations. Florida does not purport to regulate the price which Polar must charge for milk sold to the Government on or off military bases. Florida regulates only the price which Polar must pay for its milk, not what it must sell it for. Since the holding in *Paul* v. *United States,* 371 U. S. 245, dealt only with the conflict between federal procurement regulations and a State's attempt to prescribe the prices which a distributor must charge for milk sold to the United States, it is not applicable here. Likewise, because Florida regulates only producer prices applicable to sales made by producers to the distributor, none of which occur on military bases, its law is not vulnerable as an attempt to legislate with regard

to transactions occurring within federal enclaves subject to the exclusive jurisdiction of the United States. Cf. *Standard Oil* v. *California,* 291 U. S. 242, and *James* v. *Dravo Contracting Co.,* 302 U. S. 134.

However, in the *Paul* case the United States initially attacked California's producer prices, along with its distributor prices, as in conflict with federal procurement regulations, an issue which was abandoned in this Court and which was expressly saved in the Court's opinion. It is that issue which Polar now presents to us.

For good reason we again put off decision of this question to another day. At the outset of this litigation, the trial court temporarily enjoined the application to Polar of a Milk Commission order establishing prices to be paid Florida producers for milk to be sold to military installations and requiring purchases of such milk from designated producers. That order, however, was voted down by the Pensacola producers, leaving considerable confusion, amply demonstrated by the record before us, concerning the status of so-called military milk under the outstanding orders of the Commission. It would seem—although we are not sure, and there were no findings below about these matters—that military milk is Class I milk but that Polar nevertheless need not use Pensacola milk for military sales and is free to purchase out-of-state milk for this purpose, although if it does use milk purchased from its earned-base producers, it must pay 61 cents per gallon for it. It was apparent from the oral argument that Polar and the Commission were in dispute as to the impact of the existing regulations upon military sales, and we would hesitate to adjudicate the issue tendered in the absence of more helpful testimony and additional consideration of the matter in the court below, particularly since it is not at all clear that Polar has been using Pensacola milk for its military sales, or even that it wants to in the future. If it is free to utilize outside

milk, acquired at whatever price, it may not want to pursue the matter at all. Besides, Polar is obtaining a substantial percentage of its total needs from outside the State and the production of Polar's Pensacola producers may be wholly exhausted by other, nonmilitary, uses to which it may be put.

Moreover, consideration of the possible impact of producer-pricing systems upon federal procurement regulations may be premature at this time, in view of our invalidation of other provisions of the Florida law, provisions not entirely unrelated to the issue of military milk. The whole problem of military sales may take on a different aspect upon remand of this case.

IV.

Polar challenges that provision of the Florida Milk Control Act which imposes a tax in the amount of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor. To the extent the computation of the tax includes milk which it sells to Fort Benning, Tyndall Air Force Base, and the Pensacola Naval Air Station, all being federal enclaves over which the United States exercises exclusive jurisdiction, Polar argues that the taxing measure is invalid as beyond the jurisdiction of the State to impose. We do not agree.

Polar's reliance on *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Standard Oil* v. *California*, 291 U. S. 242, is misplaced. The *James* case dealt with a 2% gross receipts tax levied upon every person engaging in the business of contracting within the State, as applied to a contractor undertaking construction of locks and dams for the United States in certain navigable streams. The Court denied West Virginia's jurisdiction to assess a gross-receipts tax with respect to work done by the contractor at its plants in Pennsylvania, as well as to work done within the exterior limits of West Virginia on property over which the

United States had acquired exclusive jurisdiction. In *Standard Oil* v. *California,* California undertook to lay an excise tax upon every gasoline distributor for each gallon of motor vehicle fuel "sold and delivered by him in this State." The Court found the tax invalid where both sale and delivery occurred within the boundaries of the Presidio of San Francisco, a federal enclave over which the United States exercised exclusive jurisdiction.

In these cases the tax was deemed to fall upon the facilities of the United States or upon activities conducted within these facilities, the principle of both cases being that there was nothing occurring within the State, beyond the borders of the federal enclave, to which the tax could attach. Contrariwise, the Florida tax is on the privilege of engaging in the business of distributing milk or acting as a distributor; a distributor is defined as "any milk dealer who operates a milk gathering station or processing plant where milk is collected and bottled or otherwise processed and prepared for sale." Fla. Stat. § 501.02. The incidence of the tax appears to be upon the activity of processing or bottling milk in a plant located within Florida, and not upon work performed on a federal enclave or upon the sale and delivery of milk occurring within the boundaries of federal property. *Standard Oil* and *Dravo* do not reach this case, for the activity Florida taxes—the processing or bottling of milk—occurs at Polar's plant prior to the sale and delivery of milk to the Government.[12]

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[12] It may be that the economic burden of the tax ultimately falls upon purchasers of Polar's milk, including the United States. Decisions of this Court make clear, however, that the fact that the economic burden of a tax may fall on the Government is not determinative of the validity of the tax. As was said in respect to a sales tax applied to materials, the cost of which the Government was obliged to pay:

"The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax

It may be urged that a distributor is a dealer [13] and that a dealer is one who sells milk, including one who sells to and upon federal enclaves. But even so, distributing has, by definition, its processing dimension, a substantial activity occurring within Florida. This is enough to sustain the tax. Besides, 4 U. S. C. § 105, enacted subsequent to *James* and *Standard Oil, supra,* confers upon the States jurisdiction to levy and collect a sales or use tax "in any Federal area," and a sales or use tax is defined as "any tax levied on, with respect to, or measured by, sales . . . of tangible personal property . . . ." 4 U. S. C. § 110. We think this provision provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Alabama* v. *King & Boozer,* 314 U. S. 1, 8–9.

[13] Fla. Stat. § 501.02 provides:

" 'Milk dealer' means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state in any market as defined in this chapter. Each corporation which if a natural person would be a milk dealer within the meaning of this chapter, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer."

THOMPSON *v.* IMMIGRATION AND NATURALIZATION SERVICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 496. Decided January 6, 1964.

Twelve days after the District Court entered a final order denying his petition for naturalization, petitioner served notice that he would file motions to amend certain findings of fact and for a new trial. The Government did not object to the timeliness of the motions and the trial judge declared the motion for a new trial was made "in ample time." The motions were later denied and an appeal was filed within 60 days thereafter, but more than 60 days from the entry of judgment. The Court of Appeals dismissed the appeal since it was filed outside of the limit of 60 days after entry of judgment prescribed in Rule 73 (a) of the Federal Rules of Civil Procedure. The time was not considered tolled by the motions since they were themselves untimely having been filed more than 10 days after the final order. *Held:* In view of petitioner's reliance on the District Court's statement that his motions were timely filed, thus postponing the time to file an appeal, he should have a hearing on the merits. *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, followed.

Certiorari granted; 318 F. 2d 681, judgment vacated and case remanded.

Hal Witt for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Julia P. Cooper* for respondent.

PER CURIAM.

Petitioner, a native and national of Canada, filed a petition for naturalization under the provisions of § 310 (b) of the Nationality Act of 1940, 8 U. S. C. (1946 ed.) § 710 (b), now 8 U. S. C. § 1430. On April 18, 1962, the United States District Court for the Northern District of Illinois entered a final order denying the petition on the

ground that petitioner had failed to establish his attachment to the United States Constitution. Twelve days later, on April 30, 1962, petitioner served notice on the Immigration and Naturalization Service that he would appear before the trial judge on May 2, 1962, with post-trial motions "to amend certain findings of fact pursuant to Rule 52 F. R. C. P. and for a new trial pursuant to Rule 59 F. R. C. P." The Government raised no objection as to the timeliness of these motions, and the trial court specifically declared that the "motion for a new trial" was made "in ample time." On October 16, 1962, these motions were denied. On December 6, 1962, within 60 days of the denial of the post-trial motions but not within 60 days of the original entry of judgment by the District Court, petitioner filed a notice of appeal. The Government then moved in the Court of Appeals to dismiss the appeal on the ground that notice of appeal had not been filed within the 60-day period prescribed by Rule 73 (a) of the Federal Rules of Civil Procedure and that petitioner's post-trial motions were untimely and hence did not toll the running of the time for appeal. The Court of Appeals granted the motions. Petitioner now seeks review by certiorari of the dismissal of his appeal.

Rule 73 (a) of the Federal Rules of Civil Procedure designates "the time within which an appeal may be taken" in this type of case as "60 days" from "the entry of the judgment appealed from . . . ." The Rule also declares that:

> "the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a *timely* motion under such rules: . . . granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact . . . ; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59." (Emphasis added.)

It is clear that if petitioner's post-trial motions were "timely," then the appeal, which was filed within 60 days of the disposition of the motions, was timely. The Government alleges, however, that the post-trial motions were not timely since the applicable rules provide that they must be "served not later than 10 days after the entry of the judgment," and these motions were served 12 days after the entry of judgment. The Government concludes, therefore, that since there was no "timely motion" under the rules designated in Rule 73 (a), the appeal must be, but was not, filed within 60 days of the entry of the original judgment.

Although petitioner admits that the post-trial motions were not served until 12 days after the entry of judgment, he claims that they should be deemed timely since they were served 10 days "from receipt of notice of entry of the judgment" by his lawyers who were not in court on the day the judgment was entered. He claims, moreover, that he relied on the Government's failure to raise a claim of untimeliness when the motions were filed and on the District Court's explicit statement that the motion for a new trial was made "in ample time"; for if any question had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions.

In a recent case involving a closely related issue, we recognized "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the [applicable period for filing an appeal] and then suffers reversal of the finding . . ." after the time for filing the appeal has expired. *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, 217. In that case petitioner had, within the applicable period for filing his appeal, received from the trial

court a 30-day extension on the time for filing his appeal on the ground of "excusable neglect based on a failure of a party to learn of the entry of the judgment." Fed. Rules Civ. Proc., 73 (a). Petitioner then filed his appeal within the period of the extension but beyond the original period. The Court of Appeals, concluding that there had been no "excusable neglect" within the meaning of Rule 73 (a), held that the District Court had erred in granting the extension and dismissed the appeal. We reversed the dismissal and remanded the case to the Court of Appeals "so that petitioner's appeal may be heard on its merits." *Ibid.* See also *Lieberman* v. *Gulf Oil Corp.*, 315 F. 2d 403, cert. denied, 375 U. S. 823.

The instant cause fits squarely within the letter and spirit of *Harris.* Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline. And here, as there, the Court of Appeals concluded that the District Court had erred and dismissed the appeal. Accordingly, in view of these "unique circumstances," *Harris Truck Lines, Inc.,* v. *Cherry Meat Packers, Inc., supra,* at 217, we grant the writ of certiorari, vacate the judgment, and remand the case to the Court of Appeals so that petitioner's appeal may be heard on the merits.

It is so ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I agree with the Court of Appeals that it did not have jurisdiction to hear this appeal on the merits.

Petitioner's motions "to amend certain findings of fact pursuant to Rule 52 F. R. C. P. and for a new trial pur-

suant to Rule 59 F. R. C. P." were not timely filed, as they were not served until the 12th day after entry of judgment and not filed until the 14th day. The rules are phrased in mandatory terms:

> Rule 52 (b): "Upon motion of a party made *not later than 10 days* after entry of judgment the court may amend its findings . . . ."
>
> Rule 59 (b): "A motion for a new trial *shall be served not later than 10 days* after the entry of the judgment."
>
> Rule 59 (e): "A motion to alter or amend the judgment *shall be served not later than 10 days* after entry of the judgment." (Emphasis supplied.)

Rule 6 (b) specifically says that the court "may not extend the time for taking any action under rules . . . 52 (b), 59 (b), (d) and (e) . . . and 73 (a) . . . except to the extent and under the conditions stated in them." These requirements are mandatory and cannot be enlarged by the court or by the parties. None of these rules provides for any extension of time except 73 (a), which authorizes, "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment," an extension of the time for appeal "not exceeding 30 days from the expiration of the original time herein prescribed." Petitioner has made no claim under this provision of Rule 73 (a) in the District Court, the Court of Appeals or in the "questions presented" here. The running of the time for appeal is terminated by the filing of a *timely* motion under Rule 52 or Rule 59. But here petitioner contends that the trial court's statement that the motions were "in ample time," considered together with the Government's acquiescence, was sufficient to effect such termination. Whether the trial judge's statement was spontaneous or made by agreement is not shown by the record and is of no legal significance. The rules specifically say that motions to amend the findings

and for new trial must be made within 10 days and that this time shall not be extended.

In the light of these facts I cannot say that this case "fits squarely within the letter and spirit" of *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U. S. 215 (1962). As I read the facts in the two cases, *Harris Lines* does not touch the problem here. In that case the District Court, after denying a timely motion for a new trial, granted an application under Rule 73 (a) based on "excusable neglect" to enlarge the time for appeal. The trial court had jurisdiction and "properly entertained the motion . . . before the initial 30 days allowed for docketing the appeal had elapsed." At 216. We said that a finding of "excusable neglect" by a motions judge was entitled to "great deference by the reviewing court" in the light of the "obvious great hardship to a party who relies upon the trial judge's finding." At 217. Finally, we said that the showing of "excusable neglect" was of "unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling." *Ibid.* That is a far cry from this case where the trial court had no jurisdiction to pass upon the untimely motions to amend the findings and for a new trial. To escape this, the Court either reads into the rules, contrary to the specific prohibition of 6 (b), authorization for the District Court to enlarge the time for filing such motions, or treats the motions as being within the provisions of Rule 73 (a), despite failure to allege any "excusable neglect." By thus authorizing the trial judge to entertain the motions it thereby extends the time for appeal. And, as I have said, the error of the trial judge in entertaining the motions could not be validated by the acquiescence of the Government. It is elementary that the parties cannot confer jurisdiction on the court.

We have said that untimely motions to amend the findings and for new trial are of no legal significance whatsoever because the limiting language of Rule 6 (b) is

"mandatory and jurisdictional and [can]not be extended regardless of excuse." *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). In my view we should abide by these rules or amend them, rather than emasculate them.

Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar. Cf. *Lieberman* v. *Gulf Oil Corp.*, 315 F. 2d 403, 406, 407.

Accordingly, I would have denied certiorari in the present case, but now that it is here I would affirm the judgment of the Court of Appeals.

GRIFFIN ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 592. Decided January 6, 1964.

Certiorari granted.

Reported below: 322 F. 2d 332.

Robert L. Carter and *S. W. Tucker* for petitioners.

Robert Y. Button, Attorney General of Virginia, *R. D. McIlwaine III,* Assistant Attorney General, *Frederick T. Gray, Collins Denny, Jr., John F. Kay, Jr., C. F. Hicks* and *J. Segar Gravatt* for respondents.

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* for the United States, as *amicus curiae,* in support of the petition.

PER CURIAM.

This case is one of the school segregation cases which we dealt with nearly a decade ago in *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294. After remand, numerous opinions were written by the District Court and the Court of Appeals* but the mandate issued at the time of the *Brown* case has never been implemented. In 1956 the Board of Supervisors decided not to levy taxes or appropriate funds for integrated public schools; and white children have attended white-only schools operated by the Prince Edward School Foundation, which has received state support. The District Court enjoined allowance of such support (198 F. Supp. 497) and held that the public schools could not remain closed while public schools in other counties stayed open. 207 F. Supp. 349. Thereafter litigation was instituted in the Virginia courts which

*See 249 F. 2d 462, reversing 149 F. Supp. 431; 266 F. 2d 507, reversing 164 F. Supp. 786.

resulted in a ruling by the Virginia Supreme Court of Appeals that the Virginia Constitution compels neither the State nor the county to reopen the public schools in Prince Edward County or to furnish funds for that purpose. 204 Va. 650, 133 S. E. 2d 565. The Court of Appeals, prior to that decision, vacated the judgment of the District Court with instructions to abstain from further proceedings until the Virginia state decision became final (322 F. 2d 332)—a judgment which was stayed by MR. JUSTICE BRENNAN on September 30, 1963, "pending the timely filing and disposition of a petition for a writ of certiorari." The case is here on a petition for certiorari which raises not only the propriety of the judgment of the Court of Appeals insofar as it directed the District Court to abstain until the Virginia courts had acted, but other issues going to the merits.

In view of the long delay in the case since our decision in the *Brown* case and the importance of the questions presented, we grant certiorari and put the case down for argument March 30, 1964, on the merits, as we have done in other comparable situations without waiting for final action by the Court of Appeals. See 28 U. S. C. § 1254 (1); *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, 584; *Wilson* v. *Girard,* 354 U. S. 524, 526.

WINTNER *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 98. Decided January 6, 1964.

Certiorari granted and judgment reversed.
Reported below: 312 F. 2d 749.

Richard Katcher for petitioner.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *Joseph Kovner* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Meyer* v. *United States, ante,* p. 233.

WALKER ET AL. *v.* LOUISIANA EX REL. JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 236. Decided January 6, 1964.

Appeal dismissed and certiorari denied.

Johnnie A. Jones and *James Sharp, Jr.* for appellants.

Jack N. Rogers and *Robert H. Reiter* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

720-508 O-64-31

RATIGAN ET AL. *v.* DAVIS ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 547. Decided January 6, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 175 Neb. 416, 122 N. W. 2d 12.

Benjamin M. Wall for appellants.

William R. King and *Seymour L. Smith* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SPATT *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 562. Decided January 6, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 13 N. Y. 2d 618, 191 N. E. 2d 91.

Charles E. Bernstein for appellant.

Leo A. Larkin, Stanley Buchsbaum and *Solomon Portnow* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CONSUL GENERAL OF YUGOSLAVIA AT PITTSBURGH *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 566. Decided January 6, 1964.

Certiorari granted and judgment reversed.

Reported below: 411 Pa. 506, 192 A. 2d 740.

Lawrence S. Lesser, C. Francis Fisher and *R. Paul Lessy* for petitioner.

Walter E. Alessandroni, Attorney General of Pennsylvania, and *Vincent X. Yakowicz,* Deputy Attorney General, for respondent.

Solicitor General Cox, Assistant Attorney General Douglas and *Alan S. Rosenthal* for the United States, as *amicus curiae,* in support of the petition.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Kolovrat* v. *Oregon,* 366 U. S. 187.

SCHIRO, MAYOR OF NEW ORLEANS, ET AL. *v.* BYNUM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 580. Decided January 6, 1964.

219 F. Supp. 204, affirmed.

Alvin J. Liska for appellants.

PER CURIAM.

The judgment is affirmed. *Johnson* v. *Virginia,* 373 U. S. 61.

HANSELL ET AL. *v.* DOUGLASS ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 586. Decided January 6, 1964.

Appeal dismissed and certiorari denied.
Reported below: 234 Ore. 315, 380 P. 2d 977.

Ervin W. Potter for appellants.

Howard A. Rankin for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL UNION, PROGRESSIVE MINE WORKERS OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 597. Decided January 6, 1964.

Certiorari granted and judgment reversed.
Reported below: 319 F. 2d 428.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for petitioner.

G. William Horsley for respondents.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Labor Board* v. *Katz,* 369 U. S. 736; *Franks Bros. Co.* v. *Labor Board,* 321 U. S. 702; *Labor Board* v. *P. Lorillard Co.,* 314 U. S. 512.

FAUDEL *v.* IOWA.

APPEAL FROM THE DISTRICT COURT OF SCOTT COUNTY, IOWA.

No. 123, Misc. Decided January 6, 1964.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Evan Hultman, Attorney General of Iowa, for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

WATKINS *v.* BETO, CORRECTIONS DIRECTOR, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 417, Misc. Decided January 6, 1964.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Waggoner Carr, Attorney General of Texas, and *Howard Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals for consideration in light of *Douglas* v. *California,* 372 U. S. 353; *Draper* v. *Washington,* 372 U. S. 487.

JENNINGS *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 717, Misc. Decided January 6, 1964.

Appeal dismissed and certiorari denied.
Reported below: 367 S. W. 2d 670.

Sidney E. Dawson, Townes L. Dawson and *W. J. Durham* for appellant.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

Counsel for Parties.

ANDERSON ET AL. *v.* MARTIN.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 51. Argued November 20–21, 1963.—Decided January 13, 1964.

Appellants, residents of a Louisiana parish, are Negroes. Both sought election to the parish School Board in the 1962 Democratic Party primary election. Prior to the election they filed this suit in federal court to enjoin the enforcement of Louisiana Revised Statutes § 18:1174.1, which requires that in all primary, general or special elections, the nomination papers and ballots shall designate the race of the candidates. A three-judge District Court upheld the constitutionality of the statute. *Held:* The compulsory designation by Louisiana of the race of the candidate on the ballot operates as a discrimination against appellants and is violative of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. Pp. 402–404.

(a) The vice of the statute lies in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls. P. 402.

(b) The challenged provision of the statute cannot be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates. P. 403.

(c) The contention that the statute is nondiscriminatory because the labeling provision applies equally to Negro and white cannot be sustained. Pp. 403–404.

206 F. Supp. 700, reversed.

Jack Greenberg argued the cause for appellants. With him on the brief were *James M. Nabrit III* and *Johnnie A. Jones.*

Jack P. F. Gremillion, Attorney General of Louisiana, argued the cause for appellee. With him on the brief were *Carroll Buck,* First Asssistant Attorney General, *Harry Fuller,* Second Assistant Attorney General, and *Teddy W. Airhart, Jr.,* Assistant Attorney General.

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

Louisiana Revised Statutes § 18:1174.1 provides that in all primary, general or special elections, the nomination papers and ballots shall designate the race of candidates for elective office.[1] The question involved in this appeal is whether this requirement violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment or the Fifteenth Amendment to the Constitution of the United States. A three-judge United States District

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[1] La. Rev. Stat. (1960 Supp.) § 18:1174.1:

"Designation of race of candidates on paper and ballots

"A. Every application for or notification or declaration of candidacy, and every certificate of nomination and every nomination paper filed in any state or local primary, general or special election for any elective office in this state shall show for each candidate named therein, whether such candidate is of the Caucasian race, the Negro race or other specified race.

"B. Chairmen of party committees, party executive committees, presidents of boards of supervisors of election or any person or persons required by law to certify to the secretary of state the names of candidates to be placed on the ballots shall cause to be shown in such certification whether each candidate named therein is of the Caucasian race, Negro race or other specified race, which information shall be obtained from the applications for or notifications or declarations of candidacy or from the certificates of nomination or nomination papers, as the case may be.

"C. On the ballots to be used in any state or local primary, general or special election the secretary of state shall cause to be printed within parentheses ( ) beside the name of each candidate, the race of the candidate, whether Caucasian, Negro, or other specified race, which information shall be obtained from the documents described in Sub-section A or B of this Section. The racial designation on the ballots shall be in print of the same size as the print in the names of the candidates on the ballots."

Court, convened under 28 U. S. C. § 2284, upheld the constitutionality of the statute by a 2-to-1 vote, 206 F. Supp. 700. On direct appeal, 28 U. S. C. § 1253, we noted probable jurisdiction, 372 U. S. 904.

I.

Appellants, residents of East Baton Rouge, Louisiana, are Negroes. Each sought election to the School Board of that parish in the 1962 Democratic Party primary election. Prior to the election they filed this suit against the Secretary of State of Louisiana seeking to enjoin the enforcement of Act 538 of the 1960 Louisiana Legislature, § 1174.1 of Title 18 of the Louisiana Revised Statutes, which requires the Secretary to print, in parentheses, the race of each candidate opposite his name on all ballots. Asserting that the statute violated, *inter alia,* the Fourteenth and Fifteenth Amendments, appellants sought both preliminary and permanent injunctions and a temporary restraining order. A United States district judge denied the motion for a temporary restraining order and a three-judge court was convened. After a hearing on the merits, the preliminary injunction was denied with one judge dissenting. Thereafter the appellants sought to amend their complaint so as to show that the primary election had been held and that both appellants had been defeated [2] because of the operation and enforcement of the statute here under attack. They further alleged that they "intend to be candidates in the next duly constituted democratic primary election for nomination as members of the East Baton Rouge Parish School Board . . . ." Leave to amend was denied by the district judge and the three-judge court thereafter denied the request for a permanent injunction. We have concluded that the compulsory designation by Louisiana of the race

[2] Anderson was defeated in the primary and Belton in a subsequent run-off.

of the candidate on the ballot operates as a discrimination against appellants and is therefore violative of the Fourteenth Amendment's Equal Protection Clause.[3] In view of this we do not reach appellants' other contentions.

II.

At the outset it is well that we point out what this case does not involve. It has nothing whatever to do with the right of a citizen to cast his vote for whomever he chooses and for whatever reason he pleases or to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race. In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. Hence in a State or voting district where Negroes predominate, that race is likely to be favored by a racial designation on the ballot, while in those communities where other races are in the majority, they may be preferred. The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.

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[3] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

III.

As we said in *NAACP* v. *Alabama,* 357 U. S. 449, 463 (1958): "The crucial factor is the interplay of governmental and private action . . . ." Here the statute under attack prescribes the form and content of the official ballot used in all elections in Louisiana. The requirement that "[e]very application for or notification or declaration of candidacy, and every certificate of nomination and every nomination paper filed . . . shall show for each candidate named therein, whether such candidate is of the Caucasian race, the Negro race or other specified race" was not placed in the statute until 1960. Prior to that time the primary election ballot contained no information on the candidates other than their names; nor did the general election ballot, which only grouped the named candidates according to their respective political party. The 1960 amendment added "race" as the single item of information other than the name of the candidate. This addition to the statute in the light of "private attitudes and pressures" towards Negroes at the time of its enactment [4] could only result in that "repressive effect" which "was brought to bear only after the exercise of governmental power." *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

Nor can the attacked provision be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates. We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office. Indeed, this factor in itself "underscores the purely racial character and purpose" of the statute. *Goss* v. *Board of Education,* 373 U. S. 683, 688 (1963).

The State contends that its Act is nondiscriminatory because the labeling provision applies equally to Negro

[4] See Wollett, Race Relations, 21 La. L. Rev. 85 (1960).

and white. Obviously, Louisiana may not bar Negro citizens from offering themselves as candidates for public office, nor can it encourage its citizens to vote for a candidate solely on account of race. Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203 (1944). And that which cannot be done by express statutory prohibition cannot be done by indirection. Therefore, we view the alleged equality as superficial. Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid. *Goss* v. *Board of Education, supra,* at 688. The judgment is therefore

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* EXCHANGE PARTS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 26. Argued December 11, 1963.—Decided January 13, 1964.

It was a violation of § 8 (a)(1) of the National Labor Relations Act for an employer, shortly before a representation election, to confer economic benefits on its employees for the purpose of inducing them to vote against the union. Pp. 408–409.

(a) Section 8 (a)(1), which makes it an unfair labor practice for an employer to "interfere with" the protected right of employees to organize, prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect. P. 409.

(b) The absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and no such presumption is tenable. P. 410.

304 F. 2d 368, reversed.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Arnold Ordman* and *Norton J. Come.*

Karl H. Mueller argued the cause and filed a brief for respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents a question concerning the limitations which § 8 (a)(1) of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 158 (a)(1), places on the right of an employer to confer economic

benefits on his employees shortly before a representation election. The precise issue is whether that section prohibits the conferral of such benefits, without more, where the employer's purpose is to affect the outcome of the election. We granted the National Labor Relations Board's petition for certiorari, 373 U. S. 931, to clear up a possible conflict between the decision below and those of other Courts of Appeals [1] on an important question of national labor policy. For reasons given in this opinion, we conclude that the judgment below must be reversed.

The respondent, Exchange Parts Company, is engaged in the business of rebuilding automobile parts in Fort Worth, Texas. Prior to November 1959 its employees were not represented by a union. On November 9, 1959, the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, advised Exchange Parts that the union was conducting an organizational campaign at the plant and that a majority of the employees had designated the union as their bargaining representative. On November 16 the union petitioned the Labor Board for a representation election. The Board conducted a hearing on December 29, and on February 19, 1960, issued an order directing that an election be held. The election was held on March 18, 1960.

At two meetings on November 4 and 5, 1959, C. V. McDonald, the Vice-President and General Manager of Exchange Parts, announced to the employees that their "floating holiday" in 1959 would fall on December 26 and that there would be an additional "floating holiday" in 1960. On February 25, six days after the Board issued its election order, Exchange Parts held a dinner for employees at which Vice-President McDonald told the em-

[1] See, *e. g., Indiana Metal Products Corp.* v. *Labor Board,* 202 F. 2d 613 (C. A. 7th Cir.); *Labor Board* v. *Pyne Molding Corp.,* 226 F. 2d 818 (C. A. 2d Cir.).

ployees that they could decide whether the extra day of vacation in 1960 would be a "floating holiday" or would be taken on their birthdays. The employees voted for the latter. McDonald also referred to the forthcoming representation election as one in which, in the words of the trial examiner, the employees would "determine whether . . . [they] wished to hand over their right to speak and act for themselves." He stated that the union had distorted some of the facts and pointed out the benefits obtained by the employees without a union. He urged all the employees to vote in the election.

On March 4 Exchange Parts sent its employees a letter which spoke of "the *Empty Promises* of the Union" and "the *fact* that *it is the Company that puts things in your envelope* . . . ." After mentioning a number of benefits, the letter said: "The Union can't put any of those things in your envelope—*only the Company can do that.*" [2] Further on, the letter stated: ". . . [I]t didn't take a Union to get any of those things and . . . it won't take a Union to get additional improvements in the future." Accompanying the letter was a detailed statement of the benefits granted by the company since 1949 and an estimate of the monetary value of such benefits to the employees. Included in the statement of benefits for 1960 were the birthday holiday, a new system for computing overtime during holiday weeks which had the effect of increasing wages for those weeks, and a new vacation schedule which enabled employees to extend their vacations by sandwiching them between two weekends. Although Exchange Parts asserts that the policy behind the latter two benefits was established earlier, it is clear that the letter of March 4 was the first general announcement of the changes to the employees. In the ensuing election the union lost.

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[2] The italics appear in the original letter.

The Board, affirming the findings of the trial examiner, found that the announcement of the birthday holiday and the grant and announcement of overtime and vacation benefits were arranged by Exchange Parts with the intention of inducing the employees to vote against the union. It found that this conduct violated § 8 (a)(1) of the National Labor Relations Act and issued an appropriate order. On the Board's petition for enforcement of the order, the Court of Appeals rejected the finding that the announcement of the birthday holiday was timed to influence the outcome of the election. It accepted the Board's findings with respect to the overtime and vacation benefits, and the propriety of those findings is not in controversy here. However, noting that "the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union," 304 F. 2d 368, 375, the court denied enforcement of the Board's order. It believed that it was not an unfair labor practice under § 8 (a)(1) for an employer to grant benefits to its employees in these circumstances.

Section 8 (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 49 Stat. 452 (1935), as amended, 29 U. S. C. § 157.

We think the Court of Appeals was mistaken in concluding that the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union, does not "interfere with" the protected right to organize.

The broad purpose of § 8 (a)(1) is to establish "the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 798. We have no doubt that it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect. In *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678, 686, this Court said: "The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." Although in that case there was already a designated bargaining agent and the offer of "favors" was in response to a suggestion of the employees that they would leave the union if favors were bestowed, the principles which dictated the result there are fully applicable here. The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[3] The danger may be diminished if,

[3] The inference was made almost explicit in Exchange Parts' letter to its employees of March 4, already quoted, which said: "The Union can't put any of those . . . [benefits] in your envelope—*only the Company can do that.*" (Original italics.) We place no reliance, however, on these or other words of the respondent dissociated from its conduct. Section 8 (c) of the Act, 61 Stat. 142 (1947), 29 U. S. C. § 158 (c), provides that the expression or dissemination of "any

as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in the future; and, of course, no such presumption is tenable.

Other Courts of Appeals have found a violation of § 8 (a)(1) in the kind of conduct involved here. See, *e. g., Labor Board* v. *Pyne Molding Corp., supra; Indiana Metal Products Corp.* v. *Labor Board, supra.* It is true, as the court below pointed out, that in most cases of this kind the increase in benefits could be regarded as "one part of an overall program of interference and restraint by the employer," 304 F. 2d, at 372, and that in this case the questioned conduct stood in isolation. Other unlawful conduct may often be an indication of the motive behind a grant of benefits while an election is pending, and to that extent it is relevant to the legality of the grant; but when as here the motive is otherwise established, an employer is not free to violate § 8 (a)(1) by conferring benefits simply because it refrains from other, more obvious violations. We cannot agree with the Court of Appeals that enforcement of the Board's order will have the "ironic" result of "discouraging benefits for labor." 304 F. 2d, at 376. The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value.

Reversed.

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views, argument, or opinion" "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Syllabus.

ENGLAND ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 7. Argued October 15, 1963.—Decided January 13, 1964.

Appellants are chiropractors who seek to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act. They brought this action against appellee Board of Medical Examiners in a Federal District Court for an injunction and a declaration that, as applied to them, the Act violated the Fourteenth Amendment. A three-judge court invoked the doctrine of abstention and remitted the parties to the state courts on the ground that a decision that the Act does not apply to chiropractors might end the controversy. Appellants then brought proceedings in the state courts, unreservedly submitting for decision not only the state law question but also their Fourteenth Amendment claims, which were resolved against them. Appellants returned to the District Court, which dismissed the complaint, on the ground that the federal questions had been decided by the state courts and the proper remedy was by appeal from the state courts to the Supreme Court. *Held:* On the record in this case, the judgment is reversed and the case is remanded to the District Court for decision on the merits of appellants' Fourteenth Amendment claims. Pp. 412–423.

1. A party remitted to state courts by an abstention order of a Federal District Court has the right to return to the District Court, after obtaining the authoritative state court ruling for which the court abstained, for a determination of his federal claims. Pp. 415–417.

2. Where a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court. Pp. 417–419.

3. The case of *Government Employees* v. *Windsor,* 353 U. S. 364, is not to be read as meaning that a party must litigate his federal claims in the state courts, but only that he must inform

those courts what his federal claims are, so that the state statute may be construed "in light of" those claims. P. 420.

4. A party may readily forestall any conclusion that he has elected not to return to the District Court by making on the state record an explicit reservation to the disposition of the entire case by the state courts; that is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. P. 421.

5. However, such an explicit reservation is not indispensable, for a litigant is not to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts. P. 421.

6. On the record in this case, the Court does not apply to these appellants the rule here announced, since their primary reason for litigating their federal claims in the state courts was assertedly the view that *Windsor* required them to do so—a view which was mistaken and will not avail other litigants who rely upon it after today's decision, but which was not unreasonable at the time. P. 422.

194 F. Supp. 521, reversed and remanded.

Russell Morton Brown argued the cause for appellants. With him on the brief was *J. Minos Simon.*

Robert E. LeCorgne, Jr. argued the cause for appellees. With him on the brief were *St. Clair Adams, Jr.* and *Ashton Phelps.*

Mr. Justice Brennan delivered the opinion of the Court.

Appellants are graduates of schools of chiropractic who seek to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act, Title 37, La. Rev. Stat. §§ 1261–1290. They brought this action against respondent Louisiana State Board of Medical Examiners in the Federal District Court

for the Eastern District of Louisiana, seeking an injunction and a declaration that, as applied to them, the Act violated the Fourteenth Amendment. A statutory three-judge court [1] invoked, *sua sponte,* the doctrine of abstention, on the ground that "The state court might effectively end this controversy by a determination that chiropractors are not governed by the statute," and entered an order "staying further proceedings in this Court until the courts of the State of Louisiana shall have been afforded an opportunity to determine the issues here presented, and retaining jurisdiction to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt state court determination." 180 F. Supp. 121, 124.[2]

Appellants thereupon brought proceedings in the Louisiana courts. They did not restrict those proceedings to the question whether the Medical Practice Act applied to chiropractors. They unreservedly submitted for decision, and briefed and argued, their contention that the Act, if applicable to chiropractors, violated the Fourteenth Amendment.[3] The state proceedings terminated with a

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[1] The action was brought in 1957. The District Court initially dismissed the complaint on the authority of *Louisiana State Board of Medical Examiners* v. *Fife,* 162 La. 681, 111 So. 58, aff'd *per curiam,* 274 U. S. 720. The Court of Appeals for the Fifth Circuit reversed, 259 F. 2d 626, on petition for rehearing, 263 F. 2d 661. We denied certiorari, 359 U. S. 1012. On remand the three-judge District Court was convened.

[2] Appellants did not challenge the order of abstention by appeal here. See *Turner* v. *City of Memphis,* 369 U. S. 350; 28 U. S. C. § 1253. Nor do they now challenge it. Thus there is not before us any question as to either the proper scope of the abstention doctrine or the propriety of its application to this case.

[3] Appellants' petition in the Louisiana trial court appended a copy of the abstention order and opinion and recited that the state proceeding was brought "in pursuance of and obedience to" the abstention order. Like the complaint filed in the federal court, the petition

decision by the Louisiana Supreme Court declining to review an intermediate appellate court's holding both that the Medical Practice Act applied to chiropractors and that, as so applied, it did not violate the Fourteenth Amendment. 126 So. 2d 51.

Appellants then returned to the District Court,[4] where they were met with a motion by appellees to dismiss the federal action. This motion was granted, on the ground that "since the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution, this court, having no power to review those proceedings, must dismiss the complaint. The proper remedy was by appeal to the Supreme Court of the United States." The court saw the case as illustrating "the dilemma of a litigant who has invoked the jurisdiction of a federal court to assert a claimed constitutional right and finds himself remitted to the state tribunals." The dilemma, said the court, was that "On the one hand, in view of Government & Civic Employees Organizing Committee v. Windsor, 353 U. S. 364, . . . he dare not restrict his state court case to local law issues. On the other, if, as required by Windsor, he raises the federal questions there, well established principles will

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sought both declaratory and injunctive relief. The allegations were that the Medical Practice Act was inapplicable to chiropractors and also "In the alternative, in the event the court should hold that the Medical Practice Act does apply to your plaintiffs . . . said Act is unconstitutional" because in violation of the Fourteenth Amendment. The petition challenged the statute's validity under that Amendment in terms substantially identical to those in the federal court complaint. The trial court, on the basis of the same documentary evidence that had been submitted to the three-judge District Court, sustained appellees' defense of "no cause of action."

[4] Appellants made no attempt to obtain appellate review of the state court decision in this Court. See *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45; *NAACP* v. *Button*, 371 U. S. 415; 28 U. S. C. § 1257 (2).

bar a relitigation of those issues in the United States District Court. . . . Since, in the usual case, no question not already passed on by the state courts will remain, he is thereby effectively deprived of a federal forum for the adjudication of his federal claims." 194 F. Supp. 521, 522. Appellants appealed directly to this Court under 28 U. S. C. § 1253, and we noted probable jurisdiction. 372 U. S. 904. We reverse and remand to the District Court for decision on the merits of appellants' Fourteenth Amendment claims.

There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.[5] Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 40. Nor does anything in the abstention doctrine require or support such a result. Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." *Louisiana P. & L. Co.* v. *Thibodaux,* 360 U. S. 25, 29. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of

[5] At least this is true in a case, like the instant one, not involving the possibility of unwarranted disruption of a state administrative process. Compare *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341.

the federal judiciary in deciding questions of federal law.[6] Accordingly, we have on several occasions explicitly recognized that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison* v. *NAACP*, 360 U. S. 167, 177; *accord, Louisiana P. & L. Co.* v. *Thibodaux, supra*, 360 U. S., at 29.[7]

It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. *NAACP* v. *Button*, 371 U. S. 415; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45. But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination—often by three judges, 28 U. S. C. § 2281—to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. "It is the typical,

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[6] See Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F. R. D. 481, 487.

[7] The doctrine contemplates only "that controversies involving unsettled questions of state law [may] be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions," *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, 640; "that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest," *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134, 135–136; "that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law," *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101, 105; "that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality," *Harrison* v. *NAACP*, 360 U. S. 167, 178.

not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend* v. *Sain,* 372 U. S. 293, 312. "There is always in litigation a margin of error, representing error in factfinding . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525. Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination.[8] The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts. We made this clear only last Term in *NAACP* v. *Button, supra,* 371 U. S., at 427, when we said that "a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim."

We also made clear in *Button,* however, that a party may elect to forgo that right. Our holding in that case was that a judgment of the Virginia Supreme Court of Appeals upon federal issues submitted to the state tribunals by parties remitted there under the abstention doctrine was "final" for purposes of our review under 28 U. S. C. § 1257. In so determining, we held that the petitioner had elected "to seek a complete and final adjudication of [its] rights in the state courts" and thus not to return to the District Court, and that it had manifested this election "by seeking from the Richmond Circuit Court 'a binding adjudication' of all its claims and a per-

[8] Even where fact findings on federal constitutional contentions are for state tribunals to make in the first instance, as in state criminal prosecutions, they are not immune, when brought into question in federal habeas corpus, from District Court consideration and, in proper cases, from *de novo* consideration. *Townsend* v. *Sain,* 372 U. S. 293, 312–319.

manent injunction as well as declaratory relief, by making no reservation to the disposition of the entire case by the state courts, and by coming here directly on certiorari." 371 U. S., at 427–428. We fashioned the rule recognizing such an election because we saw no inconsistency with the abstention doctrine in allowing a litigant to decide, once the federal court has abstained and compelled him to proceed in the state courts in any event, to abandon his original choice of a federal forum and submit his entire case to the state courts, relying on the opportunity to come here directly if the state decision on his federal claims should go against him. Such a choice by a litigant serves to avoid much of the delay and expense to which application of the abstention doctrine inevitably gives rise; when the choice is voluntarily made, we see no reason why it should not be given effect.

In *Button,* we had no need to determine what steps, if any, short of those taken by the petitioner there would suffice to manifest the election. The instant case, where appellants did not attempt to come directly to this Court but sought to return to the District Court, requires such a determination. The line drawn should be bright and clear, so that litigants shunted from federal to state courts by application of the abstention doctrine will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims.[9] It might be argued that nothing short of what was done in *Button* should suffice—that a litigant should retain the right to return to the District Court unless he not only litigates his federal claims in the state tribunals but seeks review of the state decision in this Court.[10] But

[9] Cf. Wright, The Abstention Doctrine Reconsidered, 37 Tex. L. Rev. 815, 825 (1959).

[10] One case has even permitted the litigant to return to the District Court although review was sought and denied here. See *Tribune*

we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries. We implicitly rejected such a rule in *Button,* when we stated that a party elects to forgo his right to return to the District Court by a decision "to seek a complete and final adjudication of his rights in the state courts." We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court.

This rule requires clarification of our decision in *Government Employees* v. *Windsor,* 353 U. S. 364, the case referred to by the District Court. The plaintiffs in *Windsor* had submitted to the state courts only the question whether the state statute they challenged applied to them, and had not "advanced" or "presented" to those courts their contentions against the statute's constitutionality. We held that "the bare adjudication by the Alabama Supreme Court that the [appellant] union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants'

Review Publishing Co. v. *Thomas,* 153 F. Supp. 486, aff'd, 254 F. 2d 883, where the litigant's federal claims were decided by the District Court following decision upon the same claims by the Pennsylvania Supreme Court and denial by us of certiorari to that court's judgment. *Mack* v. *Pennsylvania,* 386 Pa. 251, 126 A. 2d 679, cert. denied, 352 U. S. 1002.

freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner." 353 U. S., at 366. On oral argument in the instant case, we were advised that appellants' submission of their federal claims to the state courts had been motivated primarily by a belief that *Windsor* required this. The District Court likewise thought that under *Windsor* a party is required to litigate his federal question in the state courts and "dare not restrict his state court case to local law issues." 194 F. Supp., at 522. Others have read *Windsor* the same way.[11] It should not be so read. The case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed "in light of" those claims. See Note, 73 Harv. L. Rev. 1358, 1364–1365 (1960). Thus mere compliance with *Windsor* will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court.

We recognize that in the heat of litigation a party may find it difficult to avoid doing more than is required by *Windsor*. This would be particularly true in the typical case, such as the instant one, where the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge. The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim but to argue it, for if he can persuade the state court that application of the statute to him would offend the Federal Constitution, he will ordinarily have persuaded it

[11] See Note, 59 Col. L. Rev. 749, 773 (1959); Note, 73 Harv. L. Rev. 1358, 1364 (1960), quoting brief for appellant, p. 5, in *Lassiter v. Northampton County Board of Elections*, 360 U. S. 45.

that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguably imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit.

Despite these uncertainties arising from application of *Windsor*—which decision, we repeat, does not require that federal claims be actually litigated in the state courts—a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the "reservation to the disposition of the entire case by the state courts" that we referred to in *Button*. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts.[12] When the reserva-

[12] It has been suggested that state courts may "take no more pleasure than do federal courts in deciding cases piecemeal . . ." and "probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them." *Clay* v. *Sun Ins. Office*, 363 U. S. 207, 227 (dissenting opinion). We are confident that state courts, sharing the abstention doctrine's purpose of "furthering the harmonious relation between state and federal authority," *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 501, will respect a litigant's reservation of his federal claims for decision by the federal courts. See *Spector Motor Service, Inc.*, v. *Walsh*,

tion has been made, however, his right to return will in all events be preserved.[13]

On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants. As we have noted, their primary reason for litigating their federal claims in the state courts was assertedly a view that *Windsor* required them to do so.[14] That view was mistaken, and will not avail other litigants who rely upon it after today's decision. But we cannot say, in the face of the support given the view by respectable authorities, including the court below, that appellants were unreasonable in holding it or acting upon it. We therefore hold that the District Court should not have

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135 Conn. 37, 40–41, 61 A. 2d 89, 92. However, evidence that a party has been compelled by the state courts to litigate his federal claims there will of course preclude a finding that he has voluntarily done so. And if the state court has declined to decide the state question because of the litigant's refusal to submit without reservation the federal question as well, the District Court will have no alternative but to vacate its order of abstention.

[13] The reservation may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U. S. C. § 1441 (b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question. Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court, he cannot impair the corresponding right of the defendant. The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation. It may well be, of course, that a refusal to litigate or a reservation by any party will deter the state court from deciding the federal question.

[14] The District Court's abstention order, in instructing appellants to obtain a state court determination not of the state question alone but of "the issues here presented," was also misleading.

dismissed their action. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

The judge-made rule we announce today promises to have such a serious impact on litigants who are properly in the federal courts that I think a reappraisal of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, from which today's decision stems, is necessary. Although the propriety of the *Pullman* doctrine, either as originally decided or as it has evolved, has not been raised by the parties, I think it is time for the Court, *sua sponte*, to reevaluate it.

I.

The *Pullman* case, decided a little over 20 years ago, launched an experiment in the management of federal-state relations that has inappropriately been called the "abstention doctrine." There are numerous occasions when a federal court abstains, dismissing an action or declining to entertain it because a state tribunal is a more appropriate one for resolving the controversy. A bankruptcy court commonly sends its trustee into state courts to have complex questions of local law adjudicated. *Thompson* v. *Magnolia Co.*, 309 U. S. 478. A federal court refuses to exercise its equity powers by appointing receivers to take charge of a failing business, where state procedures afford adequate protection to all private rights. *Pennsylvania* v. *Williams*, 294 U. S. 176. A federal court will normally not entertain a suit to enjoin criminal prosecutions in state tribunals, with review of such convictions by this Court being restricted to constitutional issues. *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45. A federal court declines to entertain an action for declaratory relief against state taxes because of the federal policy against

interfering with them by injunction. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293. Where state administrative action is challenged, a federal court will normally not intervene where there is an adequate state court review which is protective of any federal constitutional claim. *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Alabama Comm'n* v. *Southern R. Co.,* 341 U. S. 341. The examples could be multiplied where the federal court adopts a hands-off policy and remits the litigants to a state tribunal.

Railroad Comm'n v. *Pullman Co., supra,* is a different kind of case. There the federal court does not abstain; it does not dismiss the complaint; it retains jurisdiction while the parties go to a state tribunal to obtain a preliminary ruling—a declaratory judgment—on state law questions. The reason for requiring them to repair to the state tribunal for a preliminary ruling on a question of state law is because the state law is challenged on federal constitutional grounds; if the state law is construed one way, the constitutional issue may disappear; the federal constitutional question will survive only if one of two or more state-law constructions is adopted. The "last word" as to the meaning of local law "belongs neither to us nor to the district court but to the supreme court of Texas," we said in the *Pullman* case, 312 U. S., at 500. We concluded:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.,* 290 U. S. 177; *Lee* v. *Bickell,* 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Ibid.*

We therefore remanded the case "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion." *Id.*, at 501–502.

II.

I was a member of the Court that launched *Pullman* and sent it on its way. But if I had realized the creature it was to become, my doubts would have been far deeper than they were.

Pullman from the start seemed to have some qualities of a legal research luxury. As I said in *Clay* v. *Sun Ins. Office,* 363 U. S. 207, 228 (dissenting opinion):

> "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act."

As recently stated by the late Judge Charles E. Clark of the Second Circuit Court of Appeals, "As a result of this doctrine, individual litigants have been shuffled back and forth between state and federal courts, and cases have been dragged out over eight- and ten-year periods." Federal Procedural Reform and States' Rights, 40 Tex. L. Rev. 211, 221 (1961).

Professor Charles A. Wright described the results that occurred when this doctrine was applied to a suit to enjoin the enforcement of a state statute restricting the rights of state employees to join unions:[1] ". . . after

[1] *Government Employees* v. *Windsor,* 353 U. S. 364.

five years of litigation, including two trips to the Supreme Court of the United States and two to the highest state court, the parties still had failed to obtain a decision on the merits of the statute." The Abstention Doctrine Reconsidered, 37 Tex. L. Rev. 815, 818 (1959).

This case raises a question so simple that it at least verges on the insubstantial. The question is whether Louisiana's Medical Practice Act, La. Rev. Stat., § 37:1261 *et seq.* includes chiropractors as practitioners of medicine. The State Board of Medical Examiners, representing the State, says that they are included. The chiropractors say they are not and, if they are, that the Act is unconstitutional. The case was started in May 1957, and here we are nearly seven years later without a decision on the merits.

That seems like an unnecessary price to pay for our federalism. Referral to state courts for declaratory rulings on state law questions is said to encourage a smooth operation of our federalism, as it may avoid clashes between the two systems. But there always have been clashes and always will be; and the influence of the *Pullman* doctrine has, I think, been *de minimis*. Moreover, the complexity of local law to federal judges is inherent in the federal court system as designed by Congress. Resolution of local law questions is implicit in diversity of citizenship jurisdiction. Since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts under that head of jurisdiction daily have the task of determining what the state law is. The fact that those questions are complex and difficult is no excuse for a refusal by the District Court to entertain the suit. *Meredith* v. *Winter Haven,* 320 U. S. 228. We there said:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to

> suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts." *Id.*, at 234. And see *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 196.

The question now presented is how and when one who asserts his "option" to sue in "the federal rather than in the state courts," but who is remitted to the state court for a preliminary ruling, loses his right to return to the federal court for a final adjudication on the constitutional issues.

In *Propper* v. *Clark*, 337 U. S. 472, 491, we said that if, on referral of a discrete issue to the state courts, the latter required "complete adjudication of the controversy, the District Court would perhaps be compelled to stay proceedings in the state court to protect its own jurisdiction." We went on to say, "Otherwise, in sending a fragment of the litigation to a state court, the federal court might find itself blocked by *res judicata*, with the result that the entire federal controversy would be ousted from the federal courts, where it was placed by Congress." *Id.*, at 491–492.

Today we put federal jurisdiction in jeopardy. As the Court says there are many advantages in a federally constructed record. Moreover, federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges. Madison stated the problem when the creation of lower federal courts was being mooted:

> "What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the

seat of the court. An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would be the mere trunk of a body, without arms or legs to act or move." 5 Elliot's Debates (Lipp. ed. 1941), p. 159.

Federal judges have come in for a share of criticism in this regard, the charge at times being that on racial issues they have too often "suffered the federal law to be flouted." Lusky, Racial Discrimination and the Federal Law, 63 Col. L. Rev. 1163, 1179 (1963). That at times may be the case. But from this vantage point their devotion to the rule of law over-all seems outstanding. We stand to let federal courts lose their command over critical litigation by what we do today. The Court holds that, though the litigant goes to the state court involuntarily, he loses his right to return to the federal court if he submits the local law question and the constitutional questions to the state tribunal without reserving his right to return to the federal forum for a final adjudication. It will often be necessary to submit the local law question in light of the constitutional questions. Indeed it will be prudent to do so in light of *Government Employees* v. *Windsor, supra,* where we ruled, "The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court." 353 U. S., at 366.

Yet we now hold that if a party, who is sent by the federal court to the state courts for a preliminary ruling, submits the whole problem to those courts—that is, the constitutional as well as the bare bones of the state law question—he is presumed to have elected to try his case there rather than in the federal courts, unless he expressly reserved the right to return to the federal tribunal.

Perhaps the Court does that to avoid the consequences of *res judicata.* But *res judicata* is not a constitutional principle; it has no higher dignity than the principle we announce today. In *Propper* v. *Clark, supra,* we said that to avoid *res judicata* the District Court should stay the state proceedings. Better that we approve that judge-made procedure than to overlay the treacherous requirement of the *Pullman* case with this new judge-made requirement.

What we do today makes the *Pullman* case something of a Frankenstein. Any presumption should work the other way—that he who is *required* to go to the state courts and does what we *require* him to do when he gets there, is not there voluntarily and does not forsake his federal suit, unless he does something in the state courts that he is not required to do and that evinces an election to litigate the matter finally and not preliminarily in the state courts.

As, if, and when he exhausts the state procedure and decides to come here, as was done in *NAACP* v. *Button,* 371 U. S. 415, he has elected to abandon the federal for the state forum. *Id.,* at 428. But short of that, he seldom can be said to have made such an election. For when he pursues the matter through the hierarchy of the state courts, he is doing only what he is *required* to do. The only time when he goes beyond that requirement is when he takes the fork in the road leading here rather than the one to the District Court.

III.

If the *Pullman* doctrine is to be preserved, we should lighten rather than make more ponderous the procedures which we have been imposing. We have made *Pullman* mandatory, not discretionary, with the District Courts. As stated in *Louisiana P. & L. Co.* v. *Thibodaux,* 360 U. S. 25, 28, ". . . we have required District Courts,

and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." So, no matter the ease with which the whole controversy can be resolved, parties are sent their weary and expensive way into the state tribunals. Whether or not we agree with MR. JUSTICE BLACK that the present case involves no substantial federal question, it certainly borders on the insubstantial; and a District Court, if it has that view of a case, should be allowed in its discretion to decide the whole case at once, avoiding the state litigation completely—free of interference here or in the Court of Appeals.

We have, moreover, extended the *Pullman* doctrine, contrary to our prior decision in *Propper* v. *Clark, supra,* at 491–492, to cases that involve no shadow of a substantial constitutional issue but only local law questions in the field of eminent domain.[2] *Louisiana P. & L. Co.* v. *Thibodaux, supra.* As my Brother BRENNAN said in dissent in that case:

> ". . . the Court attempts to carve out a new area in which, even though an adjudication by the federal court would not require the decision of federal constitutional questions, nor create friction with the State, the federal courts are encouraged to abnegate their responsibilities in diversity cases." 360 U. S., at 36–37.

Thus the *Pullman* doctrine reflects an antipathy to federal courts passing on state law questions.

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[2] Some federal courts have used the doctrine to shuttle over to state courts cases properly in the federal court yet not involving constitutional issues dependent on the meaning of state law (see *Mottolese* v. *Kaufman,* 176 F. 2d 301; *Beiersdorf & Co.* v. *McGohey,* 187 F. 2d 14)—decisions which baldly deny a suitor the remedy granted by Congress because it is not convenient to the district judge to decide the case.

IV.

There have been historic clashes between the federal courts and the States, some of them needless. See Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345 (1930). The examples are numerous. Thus federal courts, free and easy with injunctions, interfered wholesale with public utility rate orders,[3] with efforts of the States to collect their revenue,[4] and with suits in state courts.[5] Prior to *Erie R. Co.* v. *Tompkins, supra,* the "mischievous results" (304 U. S., at 74) of the earlier rule of *Swift* v. *Tyson,* 16 Pet. 1, were apparent, federal courts by their formulation of "general law" often defeating legitimate state policies. 304 U. S., at 73–78. Federal courts, inflating the Due Process Clause of the Fourteenth Amendment, became a sort of super-legislature, reviewing the wisdom of a wide variety of state law. See, *e. g., Lochner* v. *New York,* 198 U. S. 45; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504.

Those chapters have ended, sometimes as a result of judicial housekeeping,[6] at other times as a consequence of federal legislation.[7] What mostly remain are clashes and conflicts between State and Nation inherent in the performance of the functions of a referee in the federal system. Such was the unavoidable consequence of the effort of the Marshall Court, beginning at least with *Gibbons*

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[3] See S. Rep. No. 701, 72d Cong., 1st Sess., pp. 2–4; H. R. Rep. No. 1194, 73d Cong., 2d Sess., pp. 2–3; S. Rep. No. 125, 73d Cong., 1st Sess., pp. 3–9 on the Johnson Act of 1934, 28 U. S. C. § 1342.

[4] See S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2, on the Tax Injunction Act of 1937. 28 U. S. C. § 1341.

[5] See *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118; 28 U. S. C. § 2283.

[6] See, *e. g., Day-Brite Lighting, Inc.,* v. *Missouri,* 342 U. S. 421; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490; *Ferguson* v. *Skrupa,* 372 U. S. 726.

[7] See notes 3, 4, and 5, *supra.*

v. *Ogden,* 9 Wheat. 1, to create a great common market within the grand design of the Commerce Clause. Such is the unavoidable consequence today when Negroes claim the full benefits of the Fourteenth (see *Brown* v. *Board of Education,* 347 U. S. 483; 349 U. S. 294), and Fifteenth Amendments. See *Alabama* v. *United States,* 304 F. 2d 583, aff'd 371 U. S. 37; *United States* v. *Raines,* 362 U. S. 17; *United States* v. *McElveen,* 180 F. Supp. 10, aff'd *sub nom. United States* v. *Thomas,* 362 U. S. 58.

If we are to retain the *Pullman* doctrine, I think with all deference, we should make it less of a mandatory and more a discretionary procedure and lighten its requirements, rather than make them stricter.

We should permit the District Court to refer the matter to the state court for a declaratory judgment only where the State offers such relief.[8] Otherwise, we should require that the litigation be conducted in the federal court where Congress decided it could be conducted. In any event we should leave it to the District Court to refuse to refer the matter to the state courts, if, as here, there is no local law question tangled in a maze of state statutes and state decisions.

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[8] Thirty-six States, plus Puerto Rico and the Virgin Islands, have adopted the Uniform Declaratory Judgments Act. See 9A Uniform L. Ann. (1962 Cum. Ann. Pt.), p. 9. Other States have special declaratory judgment statutes restricted to a litigation of a specified issue or issues. See I Anderson, Actions for Declaratory Judgments (1959 Supp.), § 6.

In *Meridian* v. *Southern Bell T. & T. Co.,* 358 U. S. 639, in which the District Court was ordered to stay its hand while the parties repaired to the state court, the State involved, Mississippi, lacked a declaratory judgment procedure. See IV Martindale-Hubbell (1963), p. 979. A state court determination was obtained only when the parties switched roles, with the city—a defendant in the federal court declaratory judgment action—suing the telephone company for noncompliance with the law originally challenged as unconstitutional. The state action was resolved in the telephone company's favor. *Southern Bell T. & T. Co.* v. *Meridian,* 241 Miss. 678, 131 So. 2d 666.

If we are to retain the *Pullman* doctrine, we should not weight it down by procedures, which, like today's decision, make it a trap for the unwary.

The *Pullman* doctrine, as it has evolved, is the least desirable alternative. It is better, I think, for the federal courts to decide local law questions, as they customarily do in the diversity cases, adding at the foot of the decree as Mr. Justice Cardozo, writing for a unanimous Court, did in *Lee* v. *Bickell,* 292 U. S. 415, 426:

> ". . . that the parties to the suit or any of them may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been then construed by the highest court of Florida as applicable to the transactions in controversy here."

Another alternative is for the District Court to follow the certificate route, when one is available. The Florida Supreme Court is authorized [9] to provide by Rule [10] for

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[9] Fla. Stat. Ann., 1955, § 25.031, provides:

"The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

See Kurland, Toward A Co-operative Judicial Federalism, 24 F. R. D. 481, 489–490 (1959); Note, 73 Harv. L. Rev. 1358, 1368 (1960).

[10] Rule 4.61 of the Florida Appellate Rules provides:

"When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there

answering certificates concerning state law questions tendered by the federal courts. We use that procedure [11] on Florida state law perplexities (*Dresner* v. *Tallahassee,* 375 U. S. 136; *Aldrich* v. *Aldrich,* 375 U. S. 75, 249). We cannot require the States to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use.

V.

After today's decision, application of the *Pullman* doctrine to the field of civil rights, particularly to controversies involving the rights of Negroes, will have, I think, serious effects. *Harrison* v. *NAACP,* 360 U. S. 167, and *NAACP* v. *Button, supra,* are harbingers of things to come. The complaint in those cases was filed November 28, 1956, and our decision on the merits was not announced until January 14, 1963. In other words, nearly seven years elapsed between the institution of the litigation and an adjudication on the merits. The end product could still be described as a sizable collision between Nation and State.

Cases where Negroes are prosecuted and convicted in state courts can find their way expeditiously to this Court, provided they present constitutional questions. Yet instances where Negroes assert their rights in judicial proceedings will continue to be numerous. Those suits will be civil ones and almost always instituted in the Federal

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are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law."

[11] As respects certificates from state courts on cases coming here, see *Herb* v. *Pitcairn,* 324 U. S. 117, 325 U. S. 77; *King* v. *Order of Travelers,* 333 U. S. 153, 160; Hart and Wechsler, The Federal Courts and the Federal System (1953), pp. 444–446.

District Courts, since those courts have a special competence in the field and a record of independence protective of the rights of unpopular minorities. That litigation more often than not entails construction of state statutes, city ordinances, state court decisions, rulings of state administrative commissions, and the like. Under the *Pullman* doctrine a Negro who starts in the federal court soon finds himself in the state court and his journey there may be not only weary and expensive but also long and drawn out. There will be no inclination to expedite his case. The whole weight of the *status quo* will be on the side of delay and procrastination. What we do today adds to the toll that the *Pullman* doctrine will take of civil rights.

The Bar is now told that if one repairs to the state courts and submits the state law question along with the federal constitutional questions, he will be presumed to have elected to pursue the state remedy, unless he makes clear a purpose to return to the federal court when the state court has made its ruling. I gather that, without that reservation, the record will be taken to mean that "he voluntarily litigated his federal claims in the state courts." Or, if he forgets or fails to make such a reservation, he can still preserve his right to return to the federal court by doing what the Court now says is required of him by *Windsor*. For he is told today that instead of submitting his federal claims to be "litigated," he may submit his state law questions only for consideration "in light of" the federal questions. Those who read this opinion may have adequate warning. But this opinion, like most, will become an obscure one—little known to the Bar. Lawyers do not keep up with all the nuances of court opinions, especially those touching on as exotic a rule of federal procedure as the one which we evolve today. I fear therefore that the rule we announce today will be a veritable trap.

The Court recognizes the value to the litigants of being in the federal court. As it says, "the benefit of a federal trial court's role in constructing a record and making fact findings" is considerable. *Ante,* at 416. A litigant trapped in state court proceedings may find himself veritably encased by findings of fact which no appellate court may disturb. The value of the independence of federal judges, and the value of an escape from local prejudices when fact findings are made are considerable ones. Yet under the rule we announce today, those values promise to be lost in important areas of civil rights.

I mention the time element as one of the evils spun by the *Pullman* doctrine. Time has a particularly noxious effect on explosive civil rights questions, where the problem only festers as grievances pile high and the law takes its slow, expensive pace to decide in years what should be decided promptly.

The late Judge Charles E. Clark made an apt and pertinent observation on the impact of the *Pullman* doctrine. At times, he said, "the upshot inevitably seems to be a negative decision or, in plain language, a defendant's judgment." [12] Delay which the *Pullman* doctrine sponsors, keeps the *status quo* entrenched and renders "a defendant's judgment" even in the face of constitutional requirements. These evils are all compounded by what we do today, making it likely that litigants seeking the protection of the federal courts for assertion of their civil rights [13] will be ground down slowly by the passage of

[12] Clark, The Limits of Judicial Objectivity, 12 Am. U. L. Rev. 1, 5 (1963).

[13] See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 L. & Cont. Problems, 216, 229–230 (1948) discussing a proposed codification of the *Pullman* doctrine whereby the federal court would retain jurisdiction only in limited situations:

"These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights

time and the expenditure of money in state proceedings, leaving the ultimate remedy here, at least in many cases, an illusory one.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I join in the judgment and in the opinion insofar as the Court holds that the District Court erred in the reasons it gave for dismissing appellants' action. I am of the opinion, however, that the dismissal should be affirmed on the grounds relied upon by Judge J. Skelly Wright sitting alone in the District Court when the action first was brought: that the complaint failed to state a substantial federal question warranting exercise of jurisdiction. See *Hitchcock* v. *Collenberg,* 140 F. Supp. 894 (D. C. D. Md.), aff'd, 353 U. S. 919; cf. *Ex parte Poresky,* 290 U. S. 30. Compare *Louisiana State Board of Medical Examiners* v. *Fife,* 162 La. 681, 111 So. 58, aff'd, 274 U. S. 720; *Dent* v. *West Virginia,* 129 U. S. 114. See also Judge Wisdom's opinions dissenting from reversal of Judge Wright's ruling, 259 F. 2d 626, 627 (C. A. 5th Cir.), and 263 F. 2d 661, 674 (C. A. 5th Cir.). Although a petition for certiorari to review the decision of the Fifth Circuit was denied, 359 U. S. 1012, issues raised at that stage of the litigation which remain dispositive of the case are properly before us. *Urie* v. *Thompson,* 337 U. S. 163.

Laws. There Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern. Needless to say, to formulate the scope of the exception is no drafting problem; its measure is the rights of action given by the Civil Rights Laws." *Id.,* at 230.

BRAZOSPORT SAVINGS & LOAN ASSOCIATION ET AL. *v.* PHILLIPS ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 565. Decided January 13, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 366 S. W. 2d 929.

John J. McKay for appellants.

Waggoner Carr, Attorney General of Texas, *Joe R. Long* and *Howard W. Mays,* Assistant Attorneys General, *Edward Clark* and *Martin Harris* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

STICKLER *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 601. Decided January 13, 1964.

Appeal dismissed and certiorari denied.
Reported below: 174 Ohio St. 382, 189 N. E. 2d 433.

Jack G. Day for appellant.

Fred Cartolano for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

BLAIKIE *v.* POWER ET AL., CONSTITUTING BOARD OF ELECTIONS, CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 617. Decided January 13, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 13 N. Y. 2d 134, 193 N. E. 2d 55.

Harry H. Lipsig for appellant.

Leo A. Larkin, Seymour B. Quel and *Joel L. Cohen* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

PENNINGTON ET AL. *v.* CITY OF CORPUS CHRISTI ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FOURTH SUPREME JUDICIAL DISTRICT.

No. 621. Decided January 13, 1964.

Appeal dismissed and certiorari denied.
Reported below: 363 S. W. 2d 502.

Sidney P. Chandler for appellants.

I. M. Singer for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

REISMAN ET AL., DOING BUSINESS AS TRAMMELL, RAND & NATHAN, *v.* CAPLIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 119. Argued December 12, 1963.—Decided January 20, 1964.

Petitioners, attorneys for taxpayers Mr. and Mrs. Bromley, seek declaratory and injunctive relief against the Commissioner of Internal Revenue and an accounting firm which at the instance of petitioners has been working on the financial records of the Bromleys. Petitioners claim as null and void summonses issued to the accounting firm by the Commissioner, under § 7602 of the Internal Revenue Code of 1954, directing the production, before a hearing officer, of "all audit reports, work papers and correspondence" in the firm's custody pertaining to Mr. Bromley and his several business interests. The contention is that the enforced production of the papers is an unlawful appropriation of petitioners' work product and trial preparation as well as an unreasonable seizure requiring the Bromleys to incriminate themselves and depriving them of the effective assistance of counsel. *Held:* Petitioners have an adequate remedy at law and the complaint is properly dismissed for want of equity. Pp. 445–450.

1. A witness or any interested party may attack before the hearing officer, on constitutional or other grounds, a summons issued under § 7602. P. 445.

2. Any action to enforce a summons issued under § 7602 must be commenced in a District Court or before a United States Commissioner; such enforcement action would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. Pp. 445–446.

3. The contention that the penalties of contempt risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judicial review cannot be sustained, since noncompliance is not subject to prosecution under § 7210 when the summons is attacked in good faith. Pp. 446–447.

4. The provision of § 7604 (b) for an "attachment . . . as for a contempt" is applicable only to persons who are summoned and

wholly make default or contumaciously refuse to comply. Pp. 447–448.

5. In the procedures before either the district judge or a United States Commissioner, the witness may challenge the summons on any appropriate ground, including the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution as well as that it is protected by the attorney-client privilege. P. 449.

6. Also in any such procedures, third parties may intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. P. 449.

7. Orders of a district judge or United States Commissioner in an attachment procedure under § 7604 (b) are appealable, and with a stay order a witness would suffer no injury while testing the summons. P. 449.

8. The remedy specified by Congress works no injustice and suffers no constitutional invalidity, wherefore the parties here are remitted to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed. P. 450.

115 U. S. App. D. C. 59, 317 F. 2d 123, affirmed on other grounds.

Warren E. Magee argued the cause for petitioners. With him on the briefs was *Hans A. Nathan.*

Assistant Attorney General Oberdorfer argued the cause for respondents. With him on the brief for respondent Caplin were *Solicitor General Cox, Stephen J. Pollak, Joseph M. Howard* and *Norman Sepenuk.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioners, attorneys for taxpayers Martin J. and Allyn Bromley, seek declaratory and injunctive relief against respondent Caplin, the Internal Revenue Commissioner, and the accounting firm of Peat, Marwick, Mitchell & Co., which at the instance of petitioners has been working on the financial records of the Bromleys. Petitioners claim as null and void summonses issued by the Commissioner,

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under § 7602 [1] of the Internal Revenue Code of 1954, to Peat, Marwick, Mitchell & Co., directing the production of "all audit reports, work papers and correspondence" in that firm's custody pertaining to Mr. Bromley and his several business interests. The contention is that the enforced production of the papers is an unlawful appropriation of petitioners' work product and trial preparation as well as an unreasonable seizure requiring the Bromleys to incriminate themselves and depriving them of the effective assistance of counsel. The District Court concluded that petitioners had no standing to sue; that the complaint failed to state a cause of action; that none of the papers were the work product of the petitioners; and, that the papers did not fall within the attorney-client privilege. The Court of Appeals affirmed, but on the entirely different theory that the suit was, in substance, one against the United States to which it had not con-

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[1] "§ 7602. Examination of books and witnesses.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

sented. 115 U. S. App. D. C. 59, 317 F. 2d 123. We granted certiorari, 374 U. S. 825, and have concluded that petitioners have an adequate remedy at law and that the complaint is therefore subject to dismissal for want of equity. This obviates our passing upon any of the other questions presented.

I.

Petitioner Reisman, an attorney of California, had for several years represented the Bromleys. In April 1960 he associated with himself the three other attorney petitioners of Washington, D. C., as counsel in connection with the Bromleys' tax matters. Petitioners employed the accounting firm of Peat, Marwick, Mitchell & Co. to assist them in connection with certain civil and criminal tax proceedings arising from the alleged tax liability of the Bromleys. Under the supervision of the petitioners, the accountants analyzed various original records of Mr. Bromley and his business interests and made periodic reports thereof. The products of the joint work of the accountants together with all of the records and papers of Bromley furnished them by the petitioners were kept separate in the accounting firm's files and labeled as the property of petitioners.

The subpoenas were served on June 13, 1961, after Bromley had refused to make his papers available upon being informed that a criminal investigation against him was pending. The subpoenas were directed to three separate branches of Peat, Marwick, Mitchell & Co., located in Los Angeles, Chicago, and New York. They required the accountants to testify before a special agent of the Commissioner on the work performed and also to produce all documents, work papers and other material in their possession with regard to the Bromley matters. At the time of service there were four civil tax cases pending in the Tax Court contesting alleged deficiencies in income tax

returns of the Bromleys.[2] In addition, a criminal investigation of Mr. Bromley on the tax matters was in progress. None of the parties involved here had prepared the tax returns under scrutiny nor advised the Bromleys with regard to the same.

On July 7, 1961, petitioners filed the complaint involved here. They alleged that Peat, Marwick, Mitchell & Co. intended to comply with the subpoenas.[3] This would result, they claimed, in an unlawful appropriation of their work product and trial preparation as well as an unconstitutional seizure of confidential and privileged documents for future use in civil and criminal litigation against petitioners' clients, the Bromleys. They moved for and obtained a temporary restraining order which was later dissolved when the complaint was dismissed. On appeal the Court of Appeals for the District of Columbia held that the complaint was properly dismissed because "it is not within the court's jurisdiction because it is in substance a suit against the United States to which it has not consented." 115 U. S. App. D. C. 59, 61, 317 F. 2d 123, 125.

The case reaches us at a stage when the only affirmative action taken by the Commissioner is the issuance of the summonses for the accountants to appear before a hearing officer, *i. e.*, a special agent of the Internal Revenue Service, to testify and produce records. The accountants have not yet refused to do so. It is therefore necessary that we first consider the statutory scheme which Congress has provided for the issuance and enforcement of the summonses.

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[2] These have been heard and are now under advisement in the Tax Court.

[3] In their answer Peat, Marwick, Mitchell & Co. admitted the essential allegations in the complaint, except the one alleging that they would voluntarily comply with the subpoenas. As to this they said compliance "could compromise trial preparations" in the Tax Court cases. They joined the prayer of petitioners for relief.

II.

Section 7602 authorizes the Secretary of the Treasury, or his delegate, for "the purpose of ascertaining the correctness of any return . . . , determining the liability of any person for any internal revenue tax . . . , or collecting any such liability . . . [t]o summon the person liable for tax . . . , or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . , or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ." The petitioners make no claim that this provision suffers any constitutional infirmity on its face. This Court has never passed upon the rights of a party summoned to appear before a hearing officer under § 7602. However, the Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122 (C. A. 2d Cir.); *Falsone* v. *United States,* 205 F. 2d 734 (C. A. 5th Cir.); and *Corbin Deposit Bank* v. *United States,* 244 F. 2d 177 (C. A. 6th Cir.). We agree with that view and see no reason why the same rule would not apply before the hearing officer. Should the challenge to the summons be rejected by the hearing examiner and the witness still refuse to testify or produce, the examiner is given no power to enforce compliance or to impose sanctions for noncompliance.

If the Secretary or his delegate wishes to enforce the summons, he must proceed under § 7402 (b), which grants the District Courts of the United States jurisdiction "by

appropriate process to compel such attendance, testimony, or production of books, papers, or other data." [4]

Any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings.

III.

It is urged that the penalties of contempt risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judicial review. The leading cases on this question are *Ex parte Young,* 209 U. S. 123 (1908), and *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331 (1920). However, we do not believe that this point is well taken here. In *Young* certain railroad rates could be tested only by a failure to comply, which occasioned a risk of both imprisonment and large fines, regardless of the willfulness of the refusal to comply. And in *Oklahoma Operating Co.* the laundry rate fixed by the Oklahoma Corporation Commission could be tested only by contempt with a penalty of $500 per day, each day being a separate violation.

On the other hand, in tax enforcement proceedings the hearing officer has no power of enforcement or right to levy any sanctions. It is true that any person summoned who "neglects to appear or to produce" may be prosecuted under § 7210 [5] and is subject to a fine not exceeding

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[4] Section 7604 (a) and (b) gives an additional remedy which is considered hereafter.

[5] Internal Revenue Code of 1954, § 7210: "Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420 (e) (2), 6421 (f) (2), 7602, 7603, and 7604 (b), neglects to appear or to produce such books, accounts, records, memoranda,

$1,000, or imprisonment for not more than a year, or both. However, this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witness "neglects" either to appear or to produce. We need not pass upon the coverage of this provision in light of the facts here. It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith.[6]

Petitioners also point to § 7604 (b) [7] as posing the risk of arrest should the Commissioner proceed under that section for an "attachment . . . as for a contempt." Argu-

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or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution."

[6] The only prosecution under § 7210 is *United States* v. *Becker*, 259 F. 2d 869. There the word "neglect" was equated with willfulness. The Government admits that the section is inapplicable to persons who appear and in good faith interpose defenses as a basis for noncompliance. Brief for the Respondent Caplin, pp. 9, 22. Cf. *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387 (1938).

[7] Internal Revenue Code of 1954, § 7604 (b): "Enforcement.—Whenever any person summoned under section 6420 (e) (2), 6421 (f) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

ably, such a sanction, even though temporary, might be a penalty severe enough to bring the section within the rationale of *Young, supra,* but we do not so read § 7604 (b). This section provides that where "any person summoned . . . neglects or refuses to obey such summons" the Commissioner may proceed before the United States Commissioner or the judge of the District Court "for an attachment against him as for a contempt." Upon a showing of "satisfactory proof," an attachment for the person so refusing is issued and he is brought before the United States Commissioner or the district judge who proceeds "to a hearing of the case." Upon the hearing the United States Commissioner or the district judge may "make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts . . . ." The predecessor of § 7604 (b) was adopted by the Congress in 1864 (13 Stat. 226) at a time when Congress was greatly concerned with tax collection delay. Cong. Globe, 38th Cong., 1st Sess. 2440–2441 (1864). The proponents of the bill emphasized that after arrest the witness could assert his objections to the summons. Cong. Globe, 38th Cong., 1st Sess. 2997 (1864). It appears to us that the provision was intended only to cover persons who were summoned and wholly made default or contumaciously refused to comply. Section 7402 (b) came into the statute in 1913 (38 Stat. 179) and has been uniformly used since that time.[8] As we read the legislative history, § 7604 (b) remains in this

[8] It is true that the attachment procedure of § 7604 (b) has been occasionally used even where the person summoned refused to testify because of a claimed privilege. *E. g., Sale* v. *United States,* 228 F. 2d 682, and *Brownson* v. *United States,* 32 F. 2d 844. We believe that the use of § 7604 (b) in that context is inappropriate. Attachment of a witness who has neither defaulted nor contumaciously refused to comply would raise constitutional considerations, which need not be considered at this time under our reading of the statute.

comprehensive procedure provided by Congress to cover only a default or contumacious refusal to honor a summons before a hearing officer. But even in such cases, just as in a criminal prosecution under § 7210, the witness may assert his objections at the hearing before the court which is authorized to make such order as it "shall deem proper." § 7604 (b).

Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F. 2d 767, 772–773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States,* 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See *In re Albert Lindley Lee Memorial Hospital, supra,* and *Corbin Deposit Bank* v. *United States, supra.* And this would be true whether the contempt be of a civil or criminal nature. Cf. *McCrone* v. *United States,* 307 U. S. 61 (1939); *Brody* v. *United States,* 243 F. 2d 378. Finally, we hold that such orders are appealable. See *O'Connor* v. *O'Connell,* 253 F. 2d 365 (C. A. 1st Cir.); *In re Albert Lindley Lee Memorial Hospital, supra; Falsone* v. *United States, supra; Bouschor* v. *United States,* 316 F. 2d 451 (C. A. 8th Cir.); *Martin* v. *Chandis Securities Co.,* 128 F. 2d 731 (C. A. 9th Cir.); *D. I. Operating Co.* v. *United States,* 321 F. 2d 586 (C. A. 9th Cir.). Contra, *Application of Davis,* 303 F. 2d 601 (C. A. 7th Cir.). It follows that with a stay order a witness would suffer no injury while testing the summons.

Nor would there be a difference should the witness indicate—as has Peat, Marwick, Mitchell & Co.—that he

would voluntarily turn the papers over to the Commissioner. If this be true, either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction. This relief was not sought here. Had it been, the Commissioner would have had to proceed for compliance, in which event the petitioners or the Bromleys might have intervened and asserted their claims.

Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity, we remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed. Cf. *United States* v. *Babcock,* 250 U. S. 328, 331 (1919).

Affirmed.

LANZA ET AL. *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 560. Decided January 20, 1964.

Appeal dismissed and certiorari denied.
Reported below: 39 N. J. 595, 190 A. 2d 374.

Jacob Green for appellants.

Arthur J. Sills, Attorney General of New Jersey, and *Bernard Hellring* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

ARONOFF ET AL. *v.* FRANCHISE TAX BOARD OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 639. Decided January 20, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 60 Cal. 2d 177, 383 P. 2d 409.

Thomas W. LeSage for appellants.

Stanley Mosk, Attorney General of California, *Dan Kaufmann,* Assistant Attorney General, and *Ernest P. Goodman,* Deputy Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ARROW CARRIER CORP. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 467. Decided January 20, 1964.

219 F. Supp. 43, affirmed.

Christian V. Graf for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission.

William A. Goichman, Joseph C. Bruno and *Edward Munce* for the Pennsylvania Public Utility Commission.

Ernest R. von Starck, Robert H. Young and *Carl Helmetag, Jr.* for the Pennsylvania Railroad Co. et al.

PER CURIAM.

The motion of Pennsylvania Public Utility Commission to be added as a party appellee is granted. The motion to correct the caption to include the Pennsylvania Railroad Company, Highway Express Lines, Inc., and Modern Transfer Co., Inc., as parties appellee is granted. The motions to affirm are granted and the judgment is affirmed.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 452 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1962, THROUGH JANUARY 21, 1964.

Cases Dismissed in Vacation.

No. 125, Misc. Harvey *v.* Supreme Court of Washington. Motion for leave to file petition for writ of mandamus. July 10, 1963. Dismissed pursuant to Rule 60 of the Rules of this Court.

No. 160. Landau *v.* Best et al. Appeal from the Supreme Court of Delaware. September 3, 1963. Dismissed pursuant to Rule 60 of the Rules of this Court. *Justin M. Golenbock* and *Leonard W. Wagman* for appellant. *Robert Roy Dann* for appellees. Reported below: 54 Del. ——, 187 A. 2d 75.

October 7, 1963.

Reappointment of Reporter of Decisions.

It is ordered that *Mr. Walter Wyatt* be, and he hereby is, appointed Reporter of Decisions of this Court, effective August 1, 1963, and continuing to and including December 31, 1963.*

Assignment Order.

An order of The Chief Justice designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning October 7, 1963, and ending June 30, 1964, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

*[Note: The Reporter of Decisions reached compulsory retirement age July 20, 1963, and retired under the Civil Service Retirement Act, effective July 31, 1963. At the request of The Chief Justice, he accepted reappointment for the period specified above.]

OCTOBER 8, 1963.

Dismissal Under Rule 60.

No. 316. IN RE GRAND JURY INVESTIGATION OF VIOLATIONS OF 18 U. S. C. § 1621 (GENERAL MOTORS CORP.); and

No. 431, Misc. GENERAL MOTORS CORP. *v.* EDELSTEIN, U. S. DISTRICT JUDGE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit in No. 316, and motion for leave to file petition for writ of certiorari and/or mandamus in No. 431, Misc., dismissed pursuant to Rule 60 of the Rules of this Court. *Bruce Bromley, Aloysius F. Power, Robert A. Nitschke* and *John W. Barnum* for General Motors Corp. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States et al. Reported below: 318 F. 2d 533, 32 F. R. D. 175.

OCTOBER 9, 1963.

Dismissal Under Rule 60.

No. 3, Misc. JAMES ET AL. *v.* TEXAS. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

OCTOBER 14, 1963.

Miscellaneous Orders.

No. 520, October Term, 1962. CHAMBERLIN ET AL. *v.* DADE COUNTY BOARD OF PUBLIC INSTRUCTION ET AL., 374 U. S. 487. The motion of the intervening appellees to dispense with printing the motion to vacate the judgment is granted. The motion of intervening appellees to vacate the judgment is denied. *E. F. P. Brigham* on the motions.

No. 14, Original. LOUISIANA *v.* MISSISSIPPI ET AL. The case is set for oral argument on the motion for leave to file the bill of complaint and answer. Two hours are allowed for oral argument. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *Edward M. Carmouche* and *John L. Madden,* Assistant Attorneys General, for plaintiff. *Joe T. Patterson,* Attorney General of Mississippi, *Martin R. McLendon* and *James Neville Patterson,* Assistant Attorneys General, and *Landman Teller,* Special Assistant to the Attorney General, for Mississippi et al., and *M. M. Roberts* for Humble Oil & Refining Co., defendants.

No. 13. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL. Certiorari, 371 U. S. 909, to the Supreme Court of Florida. Argued April 18, 1963. Decided in part June 3, 1963, and retained on the calendar for reargument on the remaining issue. 373 U. S. 746. The motion of *Claude Pepper* for leave to withdraw his appearance as counsel for petitioners is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. 16. BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL. Certiorari, 372 U. S. 905, to the United States Court of Appeals for the Second Circuit. The motion of *John A. Wilson* for leave to withdraw his appearance as counsel for Compania Azucarera Vertientes-Camaguey de Cuba is granted.

No. 39. NEW YORK TIMES CO. *v.* SULLIVAN. Certiorari, 371 U. S. 946, to the Supreme Court of Alabama. The motion of the Washington Post Co. for leave to file a brief, as *amicus curiae,* is granted. *William P. Rogers, Gerald W. Siegel* and *Stanley Godofsky* on the motion.

No. 28. Foti *v.* Immigration and Naturalization Service. Certiorari, 371 U. S. 947, to the United States Court of Appeals for the Second Circuit. The motion of the Association of Immigration and Nationality Lawyers for leave to file a brief, as *amicus curiae,* is granted. The motion for leave to participate in the oral argument is denied. *Jack Wasserman* and *David Carliner* on the motions.

No. 61. Meyer *v.* United States. Certiorari, 372 U. S. 934, to the United States Court of Appeals for the Second Circuit. The motion of Lillian Wintner for leave to file a brief, as *amicus curiae,* is granted. *Richard Katcher* on the motion.

No. 71. Federal Power Commission *v.* Southern California Edison Co. et al.; and

No. 73. City of Colton *v.* Southern California Edison Co. et al. Certiorari, 372 U. S. 958, to the United States Court of Appeals for the Ninth Circuit. The motion of American Public Power Assn. for leave to file a brief, as *amicus curiae,* is granted. *Northcutt Ely* and *C. Emerson Duncan II* on the motion. *Harry W. Sturges, Jr.* and *Boris H. Lakusta* for Southern California Edison Co., and *J. Thomason Phelps* for Public Utilities Commission of California, respondents, in opposition to the motion.

No. 75. Aro Manufacturing Co., Inc., et al. *v.* Convertible Top Replacement Co., Inc. Certiorari, 372 U. S. 958, to the United States Court of Appeals for the First Circuit. Further consideration of the motion of respondent to settle the record is postponed to the hearing of the case on the merits. *Elliott I. Pollock* on the motion. *David Wolf* and *Charles Hieken* for petitioners in opposition to the motion.

No. 72. SMITH *v.* CALIFORNIA. Certiorari, 373 U. S. 901, to the Appellate Department, Superior Court of California, County of Los Angeles. The motion of the petitioner to dispense with printing the record is granted. *Stanley Fleishman* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 81. NATIONAL EQUIPMENT RENTAL, LTD., *v.* SZUKHENT ET AL. Certiorari, 372 U. S. 974, to the United States Court of Appeals for the Second Circuit. The motion of the Bankers Trust Co. et al. for leave to file a brief, as *amici curiae,* is granted. *David Hartfield, Jr., Allen F. Maulsby, Merrell E. Clark, Jr.* and *Henry L. King* on the motion.

No. 82. ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE *v.* OREGON STEVEDORING CO., INC. Certiorari, 372 U. S. 963, to the United States Court of Appeals for the Ninth Circuit. The motion of the American Merchant Marine Institute, Inc., et al. for leave to file a brief, as *amici curiae,* is granted. *J. Ward O'Neill, Charles B. Howard, Scott H. Elder* and *J. Stewart Harrison* on the motion.

No. 107. UNITED STATES *v.* BARNETT ET AL. On certificate from the United States Court of Appeals for the Fifth Circuit. The motion of the American Civil Liberties Union for leave to file a brief, as *amicus curiae,* is granted. *Osmond K. Fraenkel, Norman Dorsen* and *Melvin L. Wulf* on the motion.

No. 209. STONER *v.* CALIFORNIA. Certiorari, 374 U. S. 826, to the District Court of Appeal of California, Second Appellate District. The motion for the appointment of counsel is granted and it is ordered that *William H. Dempsey, Jr., Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 210. FALLEN *v.* UNITED STATES. Certiorari, 374 U. S. 826, to the United States Court of Appeals for the Fifth Circuit. The motion for the appointment of counsel is granted and it is ordered that *William B. Killian, Esquire,* of Miami, Florida, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 294, Misc. BURKEY *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of certiorari denied without prejudice to an application to the appropriate United States District Court for relief in light of *Fay* v. *Noia,* 372 U. S. 391.

No. 190, Misc. STREIT *v.* BENNETT, WARDEN;
No. 210, Misc. PERRY *v.* PATE, WARDEN, ET AL.;
No. 235, Misc. EX PARTE SCHLETTE;
No. 241, Misc. HAMLIN *v.* WILSON, CORRECTIONAL SUPERINTENDENT, ET AL.;
No. 264, Misc. TURPIN *v.* MAXWELL, WARDEN;
No. 283, Misc. ELLIS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT;
No. 326, Misc. EX PARTE LEE;
No. 331, Misc. CHASE *v.* ROSELLINI, GOVERNOR OF WASHINGTON, ET AL.;
No. 340, Misc. MADDOX *v.* ALABAMA;
No. 354, Misc. ELLIS *v.* CLEMMER, CORRECTIONS DIRECTOR, ET AL.;
No. 364, Misc. CHAPMAN *v.* MAXWELL, WARDEN;
No. 444, Misc. PATTON *v.* MAXWELL, WARDEN;
No. 449, Misc. OUGHTON *v.* TAYLOR, WARDEN;
No. 457, Misc. DODGE *v.* EYMAN, WARDEN; and
No. 470, Misc. PRICE *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied.

No. 130, Misc. BIGGS *v.* WILL ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 9, Misc. MANTZOURANIS *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for respondent.

No. 28, Misc. SMITH *v.* NEBRASKA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *C. C. Sheldon*, Assistant Attorney General, for respondent.

No. 31, Misc. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for respondent.

No. 271, Misc. CHIPMAN *v.* BURKE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 228, Misc. PARKER *v.* WATERMAN, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Orrick* and *Irwin A. Seibel* for respondents.

No. 275, Misc. DRAPER ET AL. *v.* POWELL, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 268, Misc. CAUER ET AL. *v.* JUSTICES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Robert H. Rines* and *Nelson H. Shapiro* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents.

Probable Jurisdiction Noted.

No. 185. UNITED STATES ET AL. *v.* BOYD, COMMISSIONER. Appeal from the Supreme Court of Tennessee. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz, George F. Lynch* and *R. R. Kramer* for the United States et al. *George F. McCanless,* Attorney General of Tennessee, and *Milton P. Rice* and *Walker T. Tipton,* Assistant Attorneys General, for appellee. Reported below: 211 Tenn. 139, 363 S. W. 2d 193.

No. 204. UNITED STATES *v.* ALUMINUM CO. OF AMERICA ET AL. Appeal from the United States District Court for the Northern District of New York. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Donald F. Melchior* and *Charles D. Mahaffie, Jr.* for the United States. *Herbert A. Bergson, Howard Adler, Jr., Hugh Latimer* and *William K. Unverzagt* for appellees. Reported below: 214 F. Supp. 501.

No. 220. BAGGETT ET AL. *v.* BULLITT ET AL. Appeal from the United States District Court for the Western District of Washington. Probable jurisdiction noted. *Arval A. Morris* and *Kenneth A. MacDonald* for appellants. *John J. O'Connell,* Attorney General of Washington, *Herbert H. Fuller,* Deputy Attorney General, and *Dean A. Floyd,* Assistant Attorney General, for appellees. Reported below: 215 F. Supp. 439.

No. 167. UNGAR *v.* SARAFITE, JUDGE. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Emanuel Redfield* for appellant. *Frank S. Hogan* and *H. Richard Uviller* for appellee. Reported below: 12 N. Y. 2d 1013, 1104, 189 N. E. 2d 629, 190 N. E. 2d 539.

No. 116. HOSTETTER ET AL. *v.* IDLEWILD BON VOYAGE LIQUOR CORP. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. *Louis J. Lefkowitz,* Attorney General of New York, *George D. Zuckerman,* Assistant Attorney General, and *Irving Galt,* Assistant Solicitor General, for appellants. *Charles H. Tuttle* and *John F. Kelly* for appellee. Reported below: 212 F. Supp. 376.

No. 235. UNITED STATES *v.* WELDEN. Appeal from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. *Assistant Attorney General Orrick, Ralph S. Spritzer, Robert B. Hummel* and *Irwin A. Seibel* for the United States. *Edward B. Hanify* for appellee. Reported below: 215 F. Supp. 656.

Certiorari Granted. (*See also No. 97, ante, p. 6; No. 153, ante, p. 8; No. 225, ante, p. 18; No. 238, ante, p. 14; No. 6, Misc., ante, p. 13; No. 8, Misc., ante, p. 20; No. 11, Misc., ante, p. 21; Misc. Nos. 16, 36, 54, 55, 60, 62, 70, 71, 86 and 87, ante, p. 2; No. 20, Misc., ante, p. 22; No. 32, Misc., ante, p. 23; No. 50, Misc., ante, p. 16; No. 52, Misc., ante, p. 24; No. 68, Misc., ante, p. 25; No. 72, Misc., ante, p. 1; No. 82, Misc., ante, p. 26; No. 83, Misc., ante, p. 27; and No. 385, Misc., ante, p. 28.*)

No. 137. MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *J. Franklin Fort, James S. Eastham*

and *T. S. L. Perlman* for petitioners. *Solicitor General Cox* for the United States. Reported below: 312 F. 2d 214.

No. 169. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. FLOWERS, ATTORNEY GENERAL. Supreme Court of Alabama. Certiorari granted. *Robert L. Carter, Fred D. Gray* and *Arthur D. Shores* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Gordon Madison,* Assistant Attorney General, for respondent. Reported below: 274 Ala. 544, 150 So. 2d 677.

No. 253. MARKS *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Murray A. Gordon* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for respondent. Reported below: 315 F. 2d 673.

No. 273. FEDERAL POWER COMMISSION *v.* HUNT ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell* and *Josephine H. Klein* for petitioner. *Robert E. May* and *Richard F. Generelly* for respondents. Reported below: 306 F. 2d 334.

No. 157. PARDEN ET AL. *v.* TERMINAL RAILWAY OF THE ALABAMA STATE DOCKS DEPARTMENT ET AL. C. A. 5th Cir. Certiorari granted. *Al G. Rives* for petitioners. *Richmond M. Flowers,* Attorney General of Alabama, and *Willis C. Darby, Jr.* for respondents. Reported below: 311 F. 2d 727.

No. 287. RABINOWITZ ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David Rein* for petitioners. *Solicitor General Cox, Assistant Attorney General Yeagley* and *George B. Searls* for respondent. Reported below: 115 U. S. App. D. C. 210, 318 F. 2d 181.

No. 292. MISSOURI PACIFIC RAILROAD CO. *v.* ELMORE & STAHL. Supreme Court of Texas. Certiorari granted. *Thurman Arnold, Abe Fortas, Abe Krash, Dennis G. Lyons* and *T. Gilbert Sharpe* for petitioner. *John C. North, Jr.* for respondent. *John B. Prizer* for Pennsylvania Railroad Co., and *Ballinger Mills* for Atchison, Topeka & Santa Fe Railway Co. et al., as *amici curiae,* in support of the petition. Reported below: 368 S. W. 2d 99.

No. 168. SHUTTLESWORTH *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Jack Greenberg, James M. Nabrit III, Peter A. Hall* and *Orzell Billingsley, Jr.* for petitioner. *J. M. Breckenridge* for respondent. Reported below: 42 Ala. App. 1, 149 So. 2d 921.

No. 389. DEPARTMENT OF REVENUE *v.* JAMES B. BEAM DISTILLING CO. Court of Appeals of Kentucky. Certiorari granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *John B. Breckinridge,* Attorney General of Kentucky, *William S. Riley,* Assistant Attorney General, and *Hal O. Williams* for petitioner. *George R. Beneman* for respondent. Reported below: 367 S. W. 2d 267.

No. 223. RUGENDORF *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Melvin B. Lewis* and *Julius Lucius Echeles* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 316 F. 2d 589.

No. 138. MURPHY ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. Supreme Court of New Jersey. Certiorari granted. *Harold Krieger* for petitioners. *William P. Sirignano* and *Irving Malchman* for respondent. Reported below: 39 N. J. 436, 189 A. 2d 36.

No. 39, Misc. AGUILAR *v.* TEXAS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. Case transferred to the appellate docket. *Clyde W. Woody* for petitioner. *Carl E. F. Dally* for respondent. Reported below: 362 S. W. 2d 111.

Certiorari Denied. (*See also No. 47, ante, p. 5; No. 127, ante, p. 7; No. 162, ante, p. 5; No. 244, ante, p. 11; No. 311, ante, p. 10; No. 153, Misc., ante, p. 17; No. 353, Misc., ante, p. 12; No. 383, Misc., ante, p. 13; No. 403, Misc., ante, p. 17; and Misc. Nos. 28, 31 and 271, ante, p. 807.*)

No. 118. BARON *v.* VALLETON, ADMINISTRATOR. Supreme Court of Washington. Certiorari denied. *Christ D. Lillions* for petitioner. Reported below: 61 Wash. 2d 135, 377 P. 2d 262.

No. 121. MATTOX *v.* HERTWIG, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *W. M. Nicholson* and *Cubbedge Snow* for petitioner. Reported below: 315 F. 2d 221.

No. 63. Allied Paint & Color Works, Inc., *v.* United States. C. A. 2d Cir. Certiorari denied. *Robert D. Witte* and *Daniel H. Greenberg* for petitioner. *Solicitor General Cox* for the United States. Reported below: 309 F. 2d 133.

No. 103. Gulf/Mediterranean Ports Conference et al. *v.* Federal Maritime Commission et al.; and

No. 166. Far East Conference et al. *v.* United States et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph M. Rault* and *Walter Carroll* for petitioners in No. 103. *Herman Goldman, Elkan Turk* and *Elkan Turk, Jr.* for petitioners in No. 166. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel* and *Irwin A. Seibel* for the United States. *Robert E. Mitchell* for the Federal Maritime Commission, and *Shelby Fitze, Delmar W. Holloman* and *James T. Welch* for Kempner et al., respondents. Reported below: 114 U. S. App. D. C. 195, 313 F. 2d 586.

No. 124. Jakobson *v.* Levin et al. C. A. 2d Cir. Certiorari denied. *David W. Kahn* for petitioner. *George C. Levin* for respondents. Reported below: 313 F. 2d 140.

No. 125. Lamb et al. *v.* Blau et al. C. A. 2d Cir. Certiorari denied. *Jerome M. Stember* for petitioners. *Morris J. Levy* for respondents. Reported below: 314 F. 2d 618.

No. 126. Chesapeake & Ohio Railway Co. et al. *v.* Cruz. C. A. 7th Cir. Certiorari denied. *Russel J. Wildman* and *Stanley A. Tweedle* for petitioners. *Saul I. Ruman* for respondent. Reported below: 312 F. 2d 330.

No. 129. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* CARNEY. C. A. 3d Cir. Certiorari denied. *Carl E. Glock* for petitioner. Reported below: 316 F. 2d 277.

No. 130. ROSSETTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 315 F. 2d 86.

No. 131. M. J. ULINE CO. *v.* WASHINGTON SPORTSERVICE, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David G. Bress* and *Leonard Braman* for petitioner. Reported below: 114 U. S. App. D. C. 208, 313 F. 2d 889.

No. 133. CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA ET AL. *v.* GANTT. C. A. 4th Cir. Certiorari denied. *Eugene Gressman* for petitioners. Reported below: 320 F. 2d 611.

No. 135. SILVERSTEIN ET AL. *v.* PHELPS. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioners. *John H. Bishop* for respondent. Reported below: 315 F. 2d 277.

No. 139. PENNSYLVANIA RAILROAD CO. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Edward A. Kaier* and *William F. Zearfaus* for petitioner. *Solicitor General Cox, Alan S. Rosenthal* and *Kathryn H. Baldwin* for the United States et al. Reported below: 315 F. 2d 460.

No. 143. LEATHERHIDE INDUSTRIES, INC., ET AL. *v.* GUTMAN, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioners. Reported below: 315 F. 2d 151.

No. 142. General Aggregates Corp. *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari denied. *Walter Powers* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *L. W. Post* for respondent. Reported below: 313 F. 2d 25.

No. 144. Rabin *v.* United States. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 316 F. 2d 564.

No. 146. Nickerson *v.* Bearfoot Sole Co., Inc., et al. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Everett R. Hamilton* for respondents. Reported below: 311 F. 2d 858.

No. 147. Portnoy *v.* United States. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 316 F. 2d 486.

No. 148. Owens Generator Co., Inc., et al. *v.* H. J. Heinz Co. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* for petitioners. *Moses Lasky* for respondent. Reported below: 314 F. 2d 66.

No. 149. Lee et al. *v.* Louisville & Nashville Railroad Co. et al. Court of Appeals of Kentucky. Certiorari denied. *Blakey Helm* for petitioners. *Joseph E. Stopher, A. J. Deindoerfer, H. G. Breetz, W. L. Grubbs, M. D. Jones* and *Joseph L. Lenihan* for respondent Louisville & Nashville Railroad Co.; *Richard R. Lyman* and *Robert E. Hogan* for respondents other than the railroad company.

No. 150. GEMEX CORPORATION *v.* A. C. BECKEN CO.; and

No. 265. A. C. BECKEN CO. *v.* GEMEX CORPORATION. C. A. 7th Cir. Certiorari denied. *Edward A. Haight* for Gemex Corp. *Lorentz B. Knouff* for A. C. Becken Co. Reported below: 314 F. 2d 839.

No. 151. BYRD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 314 F. 2d 336.

No. 152. DIPIERRO *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Aaron H. Zychick* for petitioner. *John T. Corrigan* for respondent.

No. 154. FABRE *v.* RESERVE INSURANCE CO. Supreme Court of Louisiana. Certiorari denied. *J. Minos Simon* for petitioner. Reported below: 243 La. 982, 149 So. 2d 413.

No. 156. DELEO ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioners. Reported below: 12 N. Y. 2d 913, 188 N. E. 2d 402.

No. 158. M. W. ZACK METAL CO. *v.* THE BIRMINGHAM CITY ET AL. C. A. 2d Cir. Certiorari denied. *Anthony B. Cataldo* for petitioner. Reported below: 311 F. 2d 334.

No. 161. MCGARRH *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *James P. Coleman* for petitioner. Reported below: —— Miss. ——, 148 So. 2d 494.

No. 165. Glass *v.* Bendix Aviation Corp. C. A. 3d Cir. Certiorari denied. *Leonard L. Kalish* for petitioner. *C. Brewster Rhoads, Joseph W. Swain, Jr.* and *Dexter N. Shaw* for respondent. Reported below: 314 F. 2d 944.

No. 171. Teitelbaum *v.* Curtis Publishing Co. C. A. 7th Cir. Certiorari denied. *Abraham Teitelbaum,* petitioner, *pro se. Robert L. Stern* for respondent. Reported below: 314 F. 2d 94.

No. 172. Johnson, Administrator, *v.* Livingston. C. A. 4th Cir. Certiorari denied. *Henry H. Edens, Henry Hammer* and *Julian S. Wolfe* for petitioner. *N. Welch Morrisette, Jr.* for respondent. Reported below: 315 F. 2d 429.

No. 174. Metz *v.* United States. C. A. 6th Cir. Certiorari denied. *John Y. Brown* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 312 F. 2d 199.

No. 175. Congress Construction Corp. *v.* United States. Court of Claims. Certiorari denied. *John T. Koehler* and *John Paulding Brown* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: 161 Ct. Cl. ——, 314 F. 2d 527.

No. 176. Marydale Products Co., Inc., *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Morris Wright* and *J. V. Ferguson II* for petitioner. *Solicitor General Cox, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 311 F. 2d 890.

No. 173. DAVIS *v.* TENNESSEE VALLEY AUTHORITY. C. A. 5th Cir. Certiorari denied. *John P. Witsil* for petitioner. *Solicitor General Cox* and *Charles J. McCarthy* for respondent. Reported below: 313 F. 2d 959.

No. 179. UPTAGRAFFT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Harry E. McCoy* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States. Reported below: 315 F. 2d 200.

No. 180. WHEELER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *F. W. Baker* for petitioners. *Solicitor General Cox* for the United States. Reported below: 311 F. 2d 60.

No. 181. SLATER ET AL. *v.* STOFFEL, ADMINISTRATOR, ET AL. C. A. 7th Cir. Certiorari denied. *Winslow Van Horne* for petitioners. *Alexander M. Campbell* for respondents. Reported below: 313 F. 2d 175.

No. 182. NEWBERRY MILLS, INC., *v.* UNITED TEXTILE WORKERS OF AMERICA, AFL–CIO, LOCAL UNION No. 120. C. A. 4th Cir. Certiorari denied. *Alva M. Lumpkin, Jr.* for petitioner. *Theodore W. Law, Jr.* for respondent. Reported below: 315 F. 2d 217.

No. 183. SHEAFFER ET AL., EXECUTORS, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Karl D. Loos* and *Aaron Holman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Morton K. Rothschild* for respondent. Reported below: 313 F. 2d 738.

No. 184. GRANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 395.

No. 186. ISTHMIAN LINES, INC., *v.* STREET. C. A. 2d Cir. Certiorari denied. *Joseph M. Cunningham* and *Vernon S. Jones* for petitioner. *Israel G. Seeger* and *Albert V. Testa* for respondent. Reported below: 313 F. 2d 35.

No. 187. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. *V. C. Shuttleworth* and *H. E. Wilmarth* for petitioners. *Jordan Jay Hillman* for respondent. Reported below: 314 F. 2d 424.

No. 189. ATLANTIC MUTUAL INSURANCE CO. *v.* POSEIDON SCHIFFAHRT, G.M.B.H. C. A. 7th Cir. Certiorari denied. *Paul H. Heineke* for petitioner. Reported below: 313 F. 2d 872.

No. 190. CONNECTICUT FIRE INSURANCE CO. *v.* ALLEN N. SPOONER & SON, INC. C. A. 2d Cir. Certiorari denied. *Leonard J. Matteson* for petitioner. *Hervey C. Allen* for respondent. Reported below: 314 F. 2d 753.

No. 202. MILLS ET AL., DOING BUSINESS AS MILLS DAIRY PRODUCTS CO., ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. *George Cochran Doub* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Neil Brooks* for respondents. Reported below: 315 F. 2d 828.

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No. 191. INTERNATIONAL SHOE MACHINE CORP. *v.* UNITED SHOE MACHINERY CORP. C. A. 1st Cir. Certiorari denied. *Breck P. McAllister* for petitioner. *Ralph M. Carson* and *Robert Proctor* for respondent. Reported below: 315 F. 2d 449.

No. 192. BINION *v.* RYAN, U. S. MARSHAL. C. A. 3d Cir. Certiorari denied. *Leon H. Kline* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 314 F. 2d 389.

No. 193. RUBINGER ET AL. *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. C. A. 2d Cir. Certiorari denied. *William J. Rooney* and *Leonard F. Manning* for petitioners. *Ernest S. Meyers* for respondent. Reported below: 310 F. 2d 552.

No. 203. IMPERIAL MEAT CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Charles Rosenbaum, Stanton D. Rosenbaum* and *Nicholas J. Chase* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 316 F. 2d 435.

No. 205. PULLMAN COMPANY *v.* ORDER OF RAILWAY CONDUCTORS & BRAKEMEN ET AL. C. A. 7th Cir. Certiorari denied. *Herbert S. Anderson* for petitioner. *Burke Williamson, Jack A. Williamson* and *Harry Wilmarth* for respondents. Reported below: 316 F. 2d 556.

No. 206. DE FINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 362.

No. 207. Bridgeport Rolling Mills Co. *v.* Brown et al. C. A. 2d Cir. Certiorari denied. *Robert C. Bell, Jr.* for petitioner. Reported below: 314 F. 2d 885.

No. 208. Comptroller of the Treasury of Maryland, Retail Sales Tax Division, *v.* Pittsburgh-Des Moines Steel Co. Court of Appeals of Maryland. Certiorari denied. *Thomas B. Finan,* Attorney General of Maryland, *Robert C. Murphy,* Deputy Attorney General, and *Franklin Goldstein,* Assistant Attorney General, for petitioner. *Francis D. Murnaghan, Jr.* for respondent. Reported below: 231 Md. 132, 189 A. 2d 107.

No. 211. White *v.* United States. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 315 F. 2d 113.

No. 213. Avis, Inc., et al. *v.* Tanner Motor Livery, Ltd. C. A. 9th Cir. Certiorari denied. *Henry Duque* and *John T. Cahill* for petitioners. *Jack E. Hildreth* and *William F. Peters* for respondent. Reported below: 316 F. 2d 804.

No. 215. Cherry Meat Packers, Inc., *v.* Harris Truck Lines, Inc. C. A. 7th Cir. Certiorari denied. *John J. Kelly, Jr.* for petitioner. *Harlan L. Hackbert* for respondent. Reported below: 313 F. 2d 864.

No. 216. In re Estate of Williams. Supreme Court of Pennsylvania. Certiorari denied. *Paul Ginsburg* for petitioner. *Sanford D. Beecher* for respondent co-guardians.

No. 218. CARDILLO *v.* UNITED STATES; and

No. 221. MARGOLIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner in No. 218. *Joseph P. Altier* for petitioner in No. 221. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 316 F. 2d 606.

No. 222. EISTRAT *v.* IRVING LUMBER & MOULDING, INC., ET AL. District Court of Appeal of California, Fifth Appellate District. Certiorari denied. Reported below: 210 Cal. App. 2d 382, 26 Cal. Rptr. 520.

No. 224. TUFARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* and *Theodore Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 316 F. 2d 240.

No. 226. GABBS EXPLORATION CO. *v.* UDALL, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederick Bernays Wiener, Fred H. Evans* and *Charles F. Stewart* for petitioner. *Solicitor General Cox, S. Billingsley Hill* and *Thomas L. McKevitt* for respondent. Reported below: 114 U. S. App. D. C. 291, 315 F. 2d 37.

No. 229. WEBER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. *Jerome J. Londin* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Samuel A. Hirshowitz,* First Assistant Attorney General, for respondent. Reported below: 316 F. 2d 603.

No. 228. GULF OIL CORP. *v.* LIEBERMAN. C. A. 2d Cir. Certiorari denied. *Leo T. Kissam* for petitioner. *Bernard Tompkins* for respondent. Reported below: 315 F. 2d 403.

No. 233. CITY BANK FARMERS TRUST CO., TRUSTEE, ET AL. *v.* BERNARR MACFADDEN FOUNDATION, INC., ET AL. Court of Appeals of New York. Certiorari denied. *Maurice V. Seligson* for petitioners. *Simon H. Rifkind* for respondents.

No. 234. GINSBURG *v.* STERN ET AL. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg,* petitioner, *pro se. Elder W. Marshall* for respondents. Reported below: 314 F. 2d 500.

No. 240. AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Harold W. Kennedy* for respondent. *Sidney Machtinger* for the American Jewish Congress, as *amicus curiae,* in support of the petition. Reported below: 59 Cal. 2d 203, 379 P. 2d 4.

No. 241. ROSS *v.* GREAT NORTHERN RAILWAY CO. C. A. 9th Cir. Certiorari denied. *Leonard F. Jansen* and *Harvey Erickson* for petitioner. *Anthony Kane* for respondent. Reported below: 315 F. 2d 51.

No. 257. SPENCE *v.* BALOGH & CO., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cornelius H. Doherty* for petitioner. Reported below: 115 U. S. App. D. C. 209, 317 F. 2d 909.

No. 239. FRANKFORT OIL CO. *v.* HEYSER ET AL. C. A. 10th Cir. Certiorari denied. *Louis A. Fischl* and *Joseph M. Culp* for petitioner. Reported below: 316 F. 2d 441.

No. 242. MILLER ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James A. Greenwood* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 315 F. 2d 354.

No. 243. LETCHOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 316 F. 2d 481.

No. 247. OHIO TURNPIKE COMMISSION *v.* S. J. GROVES & SONS CO. C. A. 6th Cir. Certiorari denied. *Thomas L. Dalrymple* for petitioner. *William E. Knepper* and *Ross W. Shumaker* for respondent. Reported below: 315 F. 2d 235.

No. 248. DEFINO *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *J. F. Bishop* for the United States. Reported below: 160 Ct. Cl. —.

No. 250. BRANDENFELS *v.* DAY, POSTMASTER GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank J. Delany* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents. Reported below: 114 U. S. App. D. C. 374, 316 F. 2d 375.

No. 249. LUTKINS ET AL., EXECUTORS, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Sidney W. Davidson* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 160 Ct. Cl. —, 312 F. 2d 803.

No. 251. SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Marvin J. Sonosky, Arthur Lazarus, Jr.* and *Daniel M. Singer* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: 161 Ct. Cl. —, 315 F. 2d 378.

No. 252. TOULMIN *v.* RIKE-KUMLER CO. ET AL. C. A. 6th Cir. Certiorari denied. *H. A. Toulmin, Jr.* and *Folsom E. Drummond* for petitioner. *Lawrence B. Biebel* for respondents. Reported below: 316 F. 2d 232.

No. 254. FROLICH, DOING BUSINESS AS ENCINO CHEMICALS, *v.* MILES LABORATORIES, INC. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *William T. Woodson* for respondent. Reported below: 316 F. 2d 87.

No. 255. BROS INCORPORATED *v.* BROWNING MANUFACTURING CO. ET AL. C. A. 8th Cir. Certiorari denied. *Andrew E. Carlsen* for petitioner. *Warley L. Parrott* for respondents. Reported below: 317 F. 2d 413.

No. 262. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF MORGAN ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Cox* for petitioner. *M. R. Schlesinger* for respondents. Reported below: 316 F. 2d 238.

No. 258. Staten Island Rapid Transit Railway Co. *v.* Barney. C. A. 3d Cir. Certiorari denied. *H. Curtis Meanor* for petitioner. *Sidney Birnbaum* for respondent. Reported below: 316 F. 2d 38.

No. 261. In re Estate of Hurst. Supreme Court of Pennsylvania. Certiorari denied. *James J. Regan, Jr.* and *Robert M. Taylor* for petitioner. *Ralph S. Snyder* and *J. Pennington Straus* for residuary legatees. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 410 Pa. 104, 189 A. 2d 279.

No. 266. Hagans *v.* United States. C. A. 5th Cir. Certiorari denied. *J. Sewell Elliott* and *Joseph H. Davis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 315 F. 2d 67.

No. 268. Hildreth *v.* Union News Co. C. A. 6th Cir. Certiorari denied. *Dee Edwards* for petitioner. *Frederic S. Glover, Jr.* for respondent. Reported below: 315 F. 2d 548.

No. 270. Urow, Administratrix, *v.* District of Columbia. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Sheldon E. Bernstein* and *Milton E. Canter* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent. Reported below: 114 U. S. App. D. C. 350, 316 F. 2d 351.

No. 278. Esteva *v.* House of Seagram, Inc. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Robert L. Stern* for respondent. Reported below: 314 F. 2d 827.

No. 271. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO, et al. *v.* National Labor Relations Board et al. C. A. 3d Cir. Certiorari denied. *Lowell Goerlich* and *Ernest S. Wilson, Jr.* for petitioners. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *William J. Curtin, Robert H. Kleeb, Arthur J. Kania* and *Robert P. Garbarino* for Piasecki Aircraft Corp., respondents. Reported below: 316 F. 2d 239.

No. 272. Ripple Sole Corp. *v.* American Biltrite-Rubber Co., Inc. C. A. 1st Cir. Certiorari denied. *Edwin J. Balluff, Warren C. Horton* and *Irving U. Townsend, Jr.* for petitioner. *Melvin R. Jenney* and *Richard R. Hildreth* for respondent. Reported below: 316 F. 2d 54.

No. 279. Lee-Rowan Co. *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. *Edmonstone F. Thompson* and *Richard D. Shewmaker* for petitioner. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 316 F. 2d 209.

No. 280. Tolliver *v.* United States. C. A. 6th Cir. Certiorari denied. *Ralph A. McAllister* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 318 F. 2d 323.

No. 289. Mishkin *v.* United States. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 317 F. 2d 634.

No. 281. BASS *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *John Bolt Culbertson* for petitioner. Reported below: 242 S. C. 193, 130 S. E. 2d 481.

No. 286. MILES ET AL. *v.* TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *George W. Ericksen* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Bernard J. Schoenberg* for respondent. Reported below: 316 F. 2d 710.

No. 290. KLINE ET AL. *v.* STEWART OIL CO. ET AL. C. A. 7th Cir. Certiorari denied. *Willis P. Ryan* for petitioners. *Charles Wham* and *Ralph D. Walker* for respondents. Reported below: 315 F. 2d 759.

No. 293. CARL W. MULLIS ENGINEERING & MANUFACTURING CO., INC., *v.* NICHOLSON. C. A. 4th Cir. Certiorari denied. *Jennings Bailey, Jr.* for petitioner. *Robert W. Beach* for respondent. Reported below: 315 F. 2d 532.

No. 295. GUIDARELLI, ALIAS QUINDARELLI, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leonard J. Litz* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 318 F. 2d 523.

No. 296. RENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard R. Booth* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 317 F. 2d 499.

No. 298. MEEKER *v.* WALRAVEN. Supreme Court of New Mexico. Certiorari denied. Reported below: 72 N. M. 107, 380 P. 2d 845.

No. 299. MAISON ET AL. *v.* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION ET AL. C. A. 9th Cir. Certiorari denied. *Robert Y. Thornton,* Attorney General of Oregon, and *Arthur G. Higgs* and *Roy C. Atchison,* Assistant Attorneys General, for petitioners. *Frank E. Nash* and *Mark C. McClanahan* for respondents. Reported below: 314 F. 2d 169.

No. 301. BURT, MAYOR, ET AL. *v.* CONGRESS OF RACIAL EQUALITY. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, and *Charles Clark* for petitioners. *Carl Rachlin* and *Floyd McKissick* for respondent. Reported below: 318 F. 2d 95.

No. 302. CIA MAR ADRA, S. A., *v.* MOSLEY ET AL. C. A. 2d Cir. Certiorari denied. *Victor S. Cichanowicz* for petitioner. *Edmund F. Lamb* for respondent Lipsett Steel Products, Inc. Reported below: 314 F. 2d 223.

No. 306. CRUDUP *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *John N. Crudup,* petitioner, *pro se. Eugene Cook,* Attorney General of Georgia, *G. Hughel Harrison,* Assistant Attorney General, and *C. Ernest Smith, Jr.* for respondent. Reported below: 218 Ga. 819, 130 S. E. 2d 733.

No. 308. BROADUS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Alto V. Watson* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 317 F. 2d 212.

No. 309. ANTHONY ET AL., DOING BUSINESS AS GRAYDON ANTHONY LUMBER CO., *v.* LOUISIANA & ARKANSAS RAILWAY CO. C. A. 8th Cir. Certiorari denied. *Boyd Tackett* for petitioners. *William E. Davis* for respondent. Reported below: 316 F. 2d 858.

No. 310. DASTUGUE *v.* AMERICAN OIL CO. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Harry B. Kelleher* for respondent. Reported below: 316 F. 2d 507.

No. 312. KENNEDY, PRESIDENT OF BROTHERHOOD OF RAILROAD TRAINMEN, ET AL. *v.* LONG ISLAND RAIL ROAD CO. ET AL. C. A. 2d Cir. Certiorari denied. *Arnold B. Elkind* and *Herbert Zelenko* for petitioners. *Otto M. Buerger, James B. Donovan, Kenneth F. Burgess, Douglas F. Smith, Stuart S. Ball* and *Howard J. Trienens* for respondents. Reported below: 319 F. 2d 366.

No. 314. SCHILDHAUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arnold Schildhaus*, petitioner, *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 316 F. 2d 240.

No. 315. AUSTIN COMPANY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Leward C. Wykoff, Thomas V. Koykka* and *Edward C. Adkins* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 161 Ct. Cl. ——, 314 F. 2d 518.

No. 317. MCKEE, TRUSTEE IN BANKRUPTCY, *v.* GREAT AMERICAN INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Carl V. Wisner, Jr.* for petitioner. *John W. Fleming* for Great American Insurance Co., and *B. E. Hendricks* for American Casualty Co., respondents. Reported below: 316 F. 2d 428, 473.

No. 318. SAFWAY PRODUCTS, INC., ET AL. *v.* UP-RIGHT, INC. C. A. 5th Cir. Certiorari denied. *Paul Carrington* and *Marvin S. Sloman* for petitioners. *Oscar A. Mellin* and *Carlisle M. Moore* for respondent. Reported below: 315 F. 2d 23.

No. 319. CARIBBEAN FEDERATION LINES *v.* DAHL ET AL. C. A. 5th Cir. Certiorari denied. *C. A. L. Johnstone, Jr.* for petitioner. *Raymond H. Kierr* for respondents. Reported below: 315 F. 2d 370.

No. 320. CONAWAY ET AL. *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *Erwin Allen Goldstein* for petitioners. *Walter F. Mondale,* Attorney General of Minnesota, and *George M. Scott* for respondent.

No. 322. COLBERT ET AL. *v.* PEERLESS CHEMICALS (P. R.) INC. ET AL. C. A. 2d Cir. Certiorari denied. *George J. Engelman* and *James T. Smith* for petitioners. *Patrick E. Gibbons* for respondents. Reported below: 316 F. 2d 695.

No. 325. BACINO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Peyton Ford* for petitioner. *Solicitor General Cox* for the United States. Reported below: 316 F. 2d 11.

No. 338. GREENHILL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 391. HOLLANDER *v.* HOLLANDER. C. A. 2d Cir. Certiorari denied. *Copal Mintz* for petitioner. *Morris Pottish* for respondent. Reported below: 318 F. 2d 818.

No. 341. DANIELS ET AL. *v.* FLORIDA POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Samuel J. Powers, Jr.* for respondent. Reported below: 317 F. 2d 41.

No. 355. ADAY ET AL. *v.* U. S. DISTRICT COURT ET AL. C. A. 6th Cir. Certiorari denied. *Stanley Fleishman* and *Sam Rosenwein* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for respondents. Reported below: 318 F. 2d 588.

No. 90. CUNNINGHAM, PENITENTIARY SUPERINTENDENT, *v.* JONES. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for petitioner. Respondent *pro se.* Reported below: 313 F. 2d 347.

No. 117. ANDERSON ET AL. *v.* PANAMA CANAL CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William S. Tyson* for petitioners. *David J. Markun* for respondent. Reported below: 312 F. 2d 98.

No. 164. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* DAVIS, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harold A. Cranefield* for petitioners. *Joseph S. Radom* for respondents. Reported below: 313 F. 2d 841.

No. 128. SHEFFIELD *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abe Fortas, Hume Cofer* and *John D. Cofer* for petitioner.

No. 155. ODDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Maurice Edelbaum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 314 F. 2d 115.

No. 178. LOCAL No. 201, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES (AFL–CIO), ET AL. *v.* CITY OF MUSKEGON. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William G. Reamon* for petitioners. *Harold M. Street* for respondent. Reported below: 369 Mich. 384, 120 N. W. 2d 197.

No. 230. LEE WEI FANG ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Wasserman* and *David Carliner* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, L. Paul Winings* and *Charles Gordon* for respondent. Reported below: 115 U. S. App. D. C. 117, 317 F. 2d 180.

No. 269. R. K. LAROS CO., NOW PHARMACHEM CORPORATION, ET AL. *v.* BENGER LABORATORIES LTD. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanton T. Lawrence, Jr.* for petitioners. *Charles J. Merriam* and *Jerome B. Klose* for Benger Laboratories Ltd., respondent. Reported below: 317 F. 2d 455.

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No. 237. ILLINOIS *v.* COMMONWEALTH EDISON CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William G. Clark,* Attorney General of Illinois, *Lee A. Freeman,* Special Assistant Attorney General, and *Philip B. Kurland* for petitioner. *Charles A. Bane* and *Sharon L. King* for Commonwealth Edison Co. et al., and *Earl E. Pollock, W. Donald McSweeney, Edward R. Adams, Harold T. Halfpenny, Lloyd M. McBride, Hammond E. Chaffetz, John Paul Stevens, Edward R. Johnston, Holmes Baldridge, Sydney G. Craig, Charles M. Price, Robert C. Keck, Owen Rall, John T. Chadwell, Richard M. Keck* and *Jean Engstrom* for Allis-Chalmers Manufacturing Co. et al., respondents. Reported below: 315 F. 2d 564.

No. 136. DANIELS & KENNEDY, INC., *v.* A/S INGER. Motion of the National Association of Stevedores for leave to file a brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Joseph M. Soviero* and *Harold Klein* for petitioner. *Warner Pyne* and *William A. Wilson* for respondent. *Martin J. McHugh* and *James M. Leonard* for the National Association of Stevedores, as *amicus curiae,* in support of the petition. Reported below: 314 F. 2d 395.

No. 140. FITZGERALD MILLS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Theodore R. Iserman, Frank A. Constangy* and *Frederick T. Shea* for petitioner. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, respondent. Reported below: 313 F. 2d 260.

No. 120. CHANDLER ET AL. *v.* BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH ET AL. Motion to dispense with printing the petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Aaron Kravitch* for petitioners. Reported below: 313 F. 2d 636.

No. 170. MOSLEY *v.* CIA MAR ADRA, S. A., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Edward J. Behrens, Charles H. Lawson* and *Charles A. Ellis* for petitioner. *Victor S. Cichanowicz* for Cia Mar Adra, S. A., and *Edmund F. Lamb* for Lipsett Steel Products, Inc., respondents. Reported below: 314 F. 2d 223.

No. 214. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *Russell H. Matthias* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: 314 F. 2d 363.

No. 227. CORALLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Michael P. Direnzo* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 317 F. 2d 459.

No. 12, Misc. O'NEILL *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Arlen Specter* for respondent.

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No. 303. KEOGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *John P. McGrath, Murray I. Gurfein, Henry G. Singer* and *Orrin G. Judd* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 317 F. 2d 459.

No. 304. KAHANER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Elliott Kahaner, pro se, William W. Kleinman* and *Eugene Gold* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 317 F. 2d 459.

No. 256. BENEDEC ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Julius Lucius Echeles* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 317 F. 2d 249.

No. 10, Misc. TOLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 308 F. 2d 590.

No. 13, Misc. GREYSON *v.* KENTUCKY ET AL. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondents.

No. 332. SOUTHERN RAILWAY CO. *v.* JACKSON. C. A. 5th Cir. Certiorari denied. *Charles J. Bloch* for petitioner. *T. J. Lewis* and *T. J. Lewis, Jr.* for respondent. Reported below: 317 F. 2d 532.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting.

Respondent Jackson brought a diversity action in the United States District Court for the Northern District of Georgia claiming damages from the railroad for personal injuries. The trial judge charged the jury under the applicable Georgia comparative negligence statute * that if the plaintiff had been himself negligent, though less so than the defendant, his recovery "would be reduced in proportion to the amount of default attributable to him." The jury returned a verdict of $2,500 although there had been medical expenses of $1,300, evidence of lost earnings of $12,000, and other damage alleged up to a total of $100,000. Claiming that the instruction on comparative negligence was improper and accounted for the "grossly inadequate" award, plaintiff moved for a new trial. The District Court denied the motion but the Court of Appeals reversed, holding that under either a federal or a state standard the evidence failed to show any negligence of the plaintiff. In our judgment this reversal denied the railroad its right to a trial of the question by the jury in the United States District Court as guaranteed by the Seventh Amendment to the Constitution. See *Simler* v. *Conner,* 372 U. S. 221. Because of the importance of preserving this constitutional right we would grant certiorari and affirm the District Court's ruling on this issue.

No. 26, Misc. BELLACH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Thomas R. Sullivan* for respondent.

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*Georgia Code § 94–703.

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No. 333. BUTLER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Francis Breidenbach* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 317 F. 2d 249.

No. 17, Misc. WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 19, Misc. HUDSPETH *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *George W. Nicastro,* Special Assistant Attorney General, for respondent. Reported below: 151 Colo. 5, 375 P. 2d 518.

No. 22, Misc. MCDONALD *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se. Evan Hultman,* Attorney General of Iowa, for respondent.

No. 23, Misc. HORNE *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 24, Misc. MOODY *v.* ALABAMA ET AL. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for respondents.

No. 25, Misc. WILLIAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 27, Misc. PRESTON *v.* COLORADO ET AL. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John P. Moore*, Assistant Attorney General, for respondents.

No. 29, Misc. BOWLES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, and *Howard Fender*, *Gilbert J. Pena* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent.

No. 30, Misc. HAWRYLIAK *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 33, Misc. RASMUSSEN *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se*. *Walter F. Mondale*, Attorney General of Minnesota, and *Charles E. Houston*, Solicitor General, for respondent. Reported below: 264 Minn. 295, 118 N. W. 2d 433.

No. 34, Misc. KRUPNICK *v.* CROUSE, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se*. *William M. Ferguson*, Attorney General of Kansas, and *J. Richard Foth*, Assistant Attorney General, for respondent.

No. 35, Misc. HOOTMAN *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Petitioner *pro se*. *Edwin K. Steers*, Attorney General of Indiana, for respondent.

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No. 38, Misc. PUGH *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se.* *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

No. 40, Misc. TAYLOR *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Petitioner *pro se.* *John F. McGowan* for respondent.

No. 43, Misc. LANSING *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 44, Misc. LANGE *v.* TAHASH, WARDEN. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se.* *Walter F. Mondale,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent. Reported below: 264 Minn. 300, 119 N. W. 2d 15.

No. 48, Misc. POE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se.* *Robert Y. Thornton,* Attorney General of Oregon, and *C. L. Marsters,* Assistant Attorney General, for respondent.

No. 51, Misc. LAWERY *v.* COLORADO ET AL. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, and *Frank E. Hickey* and *John E. Bush,* Assistant Attorneys General, for respondents.

No. 53, Misc. ECKERT *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 56, Misc. KEEVER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 58, Misc. NETTINGHAM *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Robert M. Devitt* for respondent.

No. 65, Misc. BLANKENSHIP *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 73, Misc. WOLL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *A. G. Spicola, Jr.*, Assistant Attorney General, for respondent.

No. 75, Misc. BREEN *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, and *Gilbert J. Pena* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent.

No. 78, Misc. HECKE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

No. 84, Misc. DRAPER *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way*, Assistant Attorney General, for respondents.

No. 77, Misc. KRZYWOSZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Carman F. Ball* for respondent.

No. 90, Misc. MARSH *v.* KROPP, WARDEN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James R. Ramsey,* Assistant Attorney General, for respondent.

No. 91, Misc. CLARK *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 644, 187 A. 2d 699.

No. 94, Misc. TAHTINEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent.

No. 95, Misc. MCLAIN *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, for respondent.

No. 96, Misc. MATNEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 97, Misc. SWEENEY *v.* RANDOLPH, WARDEN. Circuit Court of Morgan County, Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, for respondent.

No. 98, Misc. GIACONA *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Clyde W. Woody* for petitioner. *Carl E. F. Dally* for respondent.

No. 99, Misc. WILLIAMS *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 100, Misc. CHASE *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 378 P. 2d 779.

No. 102, Misc. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 315 F. 2d 689.

No. 103, Misc. MILLS *v.* HOLMAN, WARDEN. Supreme Court of Alabama. Certiorari denied.

No. 104, Misc. PITTS *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 105, Misc. MARTIN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 106, Misc. SMITH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 107, Misc. ROMANO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

Nos. 108, Misc., and 109, Misc. INDELICATO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 110, Misc. FOUTTY *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 35, 186 N. E. 2d 623.

No. 111, Misc. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 309 F. 2d 17.

No. 114, Misc. MCNAIR *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 117, Misc. JARRELL *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 120, Misc. BRADFORD *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 121, Misc. POLK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Graydon S. Staring* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 314 F. 2d 837.

No. 122, Misc. O'CONNOR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 124, Misc. EDWARDS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 126, Misc. CRAWFORD *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. *Bernard A. Golding* for petitioner.

No. 127, Misc. WEAVER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 128, Misc. GARCIA *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 129, Misc. WELLER *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 314 F. 2d 598.

No. 131, Misc. FOWLER ET AL. *v.* BOARD OF COMMISSIONERS OF PRINCE GEORGES COUNTY ET AL. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 571, 185 A. 2d 344; 230 Md. 504, 187 A. 2d 856.

No. 132, Misc. WINTER *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 607, 188 A. 2d 145.

No. 133, Misc. GOVEIA *v.* HARITAS ET AL. Superior Court of Massachusetts, Suffolk County. Certiorari denied. *Charles W. Lavers* for petitioner.

No. 134, Misc. HARRISON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 137, Misc. ROBINSON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *James E. Kennedy* for respondent. Reported below: 61 Wash. 2d 107, 377 P. 2d 248.

No. 139, Misc. DEROSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 315 F. 2d 482.

No. 140, Misc. SNEBOLD *v.* SUPERIOR COURT OF SACRAMENTO COUNTY. Supreme Court of California. Certiorari denied.

No. 142, Misc. SEILER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 143, Misc. WADE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 40 N. J. 27, 190 A. 2d 657.

No. 144, Misc. DESIMONE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 27 Ill. 2d 406, 189 N. E. 2d 329.

No. 154, Misc. HEINECKE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *O. John Rogge* and *Josiah Lyman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 115 U. S. App. D. C. 34, 316 F. 2d 685.

No. 146, Misc. CLARK *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 147, Misc. EGITTO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 148, Misc. JONES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 150, Misc. SHAW *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 151, Misc. WINN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 152, Misc. AHLSTEDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harrison C. Thompson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 62.

No. 155, Misc. BENNETT *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 156, Misc. ROGERS ET AL. *v.* ALLIED AVIATION SERVICE CO. OF NEW JERSEY, INC. C. A. 2d Cir. Certiorari denied. *William McKelvey* for petitioners. *William W. Golub* for respondent. Reported below: 315 F. 2d 513, 518.

No. 157, Misc. BARTLETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 317 F. 2d 71.

No. 158, Misc. PETTY ET AL. *v.* CONNECTICUT. Appellate Division of the Circuit Court of Connecticut. Certiorari denied. *Catherine G. Roraback* for petitioners. *Joseph B. Clark* for respondent. Reported below: 24 Conn. Supp. 337, 190 A. 2d 502.

No. 159, Misc. MENTESANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 305 F. 2d 214.

No. 160, Misc. HERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 161, Misc. CANTIE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 164, Misc. HUDGENS *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 167, Misc. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 168, Misc. BANKS *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 170, Misc. GREEN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 637, 190 A. 2d 811.

No. 171, Misc. JONES *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 173, Misc. GRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 174, Misc. RIZZI *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 175, Misc. FRYE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 315 F. 2d 491.

No. 177, Misc. MCCARROLL *v.* MINNESOTA. District Court of Minnesota, Ninth Judicial District. Certiorari denied.

No. 178, Misc. GRAVETTE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 180, Misc. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *T. Gilbert Sharpe* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 314 F. 2d 936.

No. 181, Misc. MONTALVO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 183, Misc. CASPER *v.* MINNESOTA. District Court of Minnesota, Fourth Judicial District. Certiorari denied.

No. 184, Misc. ROBINSON *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 186, Misc. ADKINS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 187, Misc. WHITLOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *R. R. Ryder* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 316 F. 2d 188.

No. 188, Misc. COHEN *v.* TIME, INC., ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *John G. Dorsey* for respondents. Reported below: 312 F. 2d 747.

No. 189, Misc. MILLS *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 523, 190 N. E. 2d 264.

No. 193, Misc. MAHAN *v.* EYMAN ET AL. Supreme Court of Arizona. Certiorari denied.

No. 194, Misc. SHANNON *v.* TAHASH, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 265 Minn. 66, 121 N. W. 2d 59.

No. 197, Misc. GILLIAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 116 U. S. App. D. C. 313, 323 F. 2d 615.

No. 195, Misc. LINDSEY *v.* RANDOLPH, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 198, Misc. DENSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 199, Misc. ABEL ET AL. *v.* TINSLEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 314 F. 2d 342.

No. 201, Misc. WILSON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 202, Misc. ROSE *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 203, Misc. GRAY *v.* UNITED STATES; and
No. 206, Misc. SCHIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Kenneth Kaplan* for petitioner in No. 203, Misc. *A. Allen Saunders* for petitioner in No. 206, Misc. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 314 F. 2d 838.

No. 204, Misc. WILLIAMS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Leonard J. Kerpelman* for petitioner. Reported below: 231 Md. 83, 188 A. 2d 543.

No. 205, Misc. GAULT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Leonard J. Kerpelman* for petitioner. Reported below: 231 Md. 78, 188 A. 2d 539.

No. 208, Misc. CARTER *v.* ABBATE ET VIR. Civil Court of New York City, County of New York. Certiorari denied.

No. 209, Misc. MITCHELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 212, Misc. ANDERSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 213, Misc. GALVAN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 214, Misc. ROTOLO *v.* HALLIBURTON COMPANY. C. A. 5th Cir. Certiorari denied. Reported below: 317 F. 2d 9.

No. 215, Misc. SIMMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Carman F. Ball* for respondent.

No. 216, Misc. BRYANT *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 217, Misc. MITCHELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 218, Misc. BILES *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 537, 187 A. 2d 850.

No. 220, Misc. IN RE LISS. C. A. 2d Cir. Certiorari denied.

No. 221, Misc. WILLIAMS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 315 F. 2d 396.

No. 223, Misc. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 225, Misc. CASEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 229, Misc. GEMMEL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 230, Misc. MCGANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Solicitor General Cox* for the United States.

No. 231, Misc. STUMP *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *James R. McManus* for petitioner. *Evan Hultman,* Attorney General of Iowa, for respondent. Reported below: 254 Iowa 1181, 119 N. W. 2d 210.

No. 233, Misc. BERTONE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 39 N. J. 356, 188 A. 2d 599.

No. 234, Misc. NAZARIO *v.* PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Hector Lugo-Bougal* and *Carlos J. Irizarry-Yunque* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, and *Peter Ortiz,* Assistant Solicitor General, for respondent. Reported below: —— P. R. ——.

No. 236, Misc. DEININGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 313 F. 2d 221.

No. 237, Misc. PEADEN *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for respondent. Reported below: 275 Ala. 72, 152 So. 2d 136.

No. 238, Misc. MEDRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* and *Welburn Mayock* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 315 F. 2d 361.

No. 239, Misc. SULLIVAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 317 F. 2d 101.

No. 242, Misc. KING *v.* HEARD, ACTING CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 310 F. 2d 127.

No. 243, Misc. PRATHER *v.* KENTUCKY ET AL. Court of Appeals of Kentucky. Certiorari denied.

No. 244, Misc. JACKOVICK *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 245, Misc. ROSALES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 246, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Carman F. Ball* for respondent.

No. 249, Misc. ALEXANDER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 250, Misc. ROBERTS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 251, Misc. NOAH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 316 F. 2d 159.

No. 252, Misc. UMBEL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 253, Misc. PRIORE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 256, Misc. JOHNSON, ALIAS KIWANUCKA, *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. Reported below: 72 N. M. 55, 380 P. 2d 199.

No. 257, Misc. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL. Supreme Court of Wyoming. Certiorari denied. Reported below: 378 P. 2d 238.

No. 259, Misc. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph A. Calamia* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 315 F. 2d 133.

No. 258, Misc. GINGER *v.* BOWLES, JUDGE. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Aloysius J. Suchy* and *George H. Cross* for respondent. Reported below: 369 Mich. 680, 120 N. W. 2d 842.

No. 260, Misc. SORENSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 261, Misc. BILLMAN *v.* MURPHY, WARDEN. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 17 App. Div. 2d 989, 234 N. Y. S. 2d 607.

No. 262, Misc. NAVARRO *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 263, Misc. THOMAS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Joseph N. Bongiovanni, Jr.* for petitioner. Reported below: 410 Pa. 160, 189 A. 2d 255.

No. 267, Misc. ZUKOSKI *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Sydney R. Prince, Jr.* for respondent. Reported below: 315 F. 2d 622.

No. 269, Misc. TOMAIOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 317 F. 2d 324.

No. 272, Misc. COOPER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 266, Misc. GIRON *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John E. Bush*, Assistant Attorney General, for respondent. Reported below: 152 Colo. ——, 380 P. 2d 905.

No. 273, Misc. SCHUETTE *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court for Baltimore County, Maryland. Certiorari denied.

No. 274, Misc. BYRD *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 275 Ala. 285, 154 So. 2d 42.

No. 276, Misc. HUGHES ET AL. *v.* MICHIGAN. Circuit Court of Kalamazoo County, Michigan. Certiorari denied. *James B. Stanley* for petitioners.

No. 277, Misc. HAMBY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 493, 190 N. E. 2d 289.

No. 279, Misc. KNAPP *v.* UNITED STATES; and

No. 300, Misc. PISELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner in No. 279, Misc. Petitioner *pro se* in No. 300, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 316 F. 2d 606.

No. 284, Misc. WOMACK *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 234 Ore. 170, 380 P. 2d 815.

No. 281, Misc. MEIKLE *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 282, Misc. MATHEWSON *v.* MCGRATH, TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 311 F. 2d 833.

No. 285, Misc. REED *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 289, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 291, Misc. TIDMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 292, Misc. IN RE WELLMAN. Supreme Court of California. Certiorari denied.

No. 293, Misc. MOORE *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 295, Misc. SELPH *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 296, Misc. REAMS *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 297, Misc. POWERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 316 F. 2d 223.

No. 299, Misc. DeMoss *v.* Rundle, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 316 F. 2d 841.

No. 301, Misc. Irby *v.* Maryland. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 539, 188 A. 2d 283.

No. 302, Misc. Oliphant *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 814.

No. 303, Misc. Ranous *v.* New York. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 304, Misc. Taylor *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied.

No. 305, Misc. Bergen *v.* Rhay, Penitentiary Superintendent. Supreme Court of Washington. Certiorari denied.

No. 306, Misc. Gaito *v.* Rundle, Correctional Superintendent. C. A. 3d Cir. Certiorari denied.

No. 310, Misc. Seniff *v.* Seniff. Supreme Court of Florida. Certiorari denied.

No. 311, Misc. Sullivan *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied.

No. 312, Misc. Tyson *v.* Cunningham, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 309, Misc. WAYNE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 115 U. S. App. D. C. 234, 318 F. 2d 205.

No. 313, Misc. GREENE *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 314, Misc. PICCIOTTI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 315, Misc. DUNCAN *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 275 Ala. 290, 154 So. 2d 305.

No. 316, Misc. AKERS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 317, Misc. KIRK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 319, Misc. CORSO *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 322, Misc. CURRY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 321, Misc. KENNEDY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 325, Misc. PRICE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 328, Misc. PALUMBO *v.* RYAN, JUDGE. Supreme Court of Illinois. Certiorari denied. *John M. Giltinon* for petitioner.

No. 329, Misc. WYCOFF *v.* LANE, WARDEN. Supreme Court of Indiana. Certiorari denied.

No. 330, Misc. HILL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 458, 190 A. 2d 795.

No. 333, Misc. OVERBY *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 334, Misc. BIGGS ET AL. *v.* HOPE EVANGELICAL CHURCH. C. A. 7th Cir. Certiorari denied.

No. 335, Misc. CANTRELL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Dominic H. Frinzi* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 318 F. 2d 159.

No. 338, Misc. BURDETTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 343, Misc. DURHAM *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 367 S. W. 2d 619.

No. 339, Misc. STEVENS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 342, Misc. MILES *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 345, Misc. NIBBS *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 346, Misc. BIBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 314 F. 2d 106.

No. 350, Misc. STAFFORD *v.* VAUGHAN ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Sanford N. Gruskin* and *A. Wallace Tashima*, Deputy Attorneys General, for Fox et al., respondents.

No. 351, Misc. WARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 316 F. 2d 113.

No. 356, Misc. STEVENSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 359, Misc. LIPINCZYK, ALIAS WERNER, *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 360, Misc. BOOTH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 347, Misc. CASIANO *v.* PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Hector Lugo-Bougal* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, for respondent. Reported below: —— P. R. ——.

No. 349, Misc. DAGLE *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *Bernard Kaplan* for petitioner. *Edward W. Brooke,* Attorney General of Massachusetts, and *James W. Bailey,* Assistant Attorney General, for respondent. Reported below: 345 Mass. 539, 188 N. E. 2d 450.

No. 352, Misc. GANDY *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* Richmond *M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 274 Ala. 518, 150 So. 2d 397.

No. 355, Misc. QUINTANA *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: 152 Colo. ——, 380 P. 2d 667.

No. 361, Misc. TSERMENGAS *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 367, Misc. GRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 115 U. S. App. D. C. 324, 319 F. 2d 725.

No. 362, Misc. RILEY *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 363, Misc. WILSON *v.* MICHIGAN. Circuit Court for Berrien County, Michigan. Certiorari denied.

No. 365, Misc. KING *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 368, Misc. DAY *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Reported below: 152 Colo. —, 381 P. 2d 10.

No. 370, Misc. MESSER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 371, Misc. GRAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 527, 190 N. E. 2d 368.

No. 373, Misc. GAINEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 317 F. 2d 362.

No. 374, Misc. CHESTER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 376, Misc. FERMIN *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondent. Reported below: 312 F. 2d 552, 554.

No. 377, Misc. PAIGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 319 F. 2d 533.

No. 379, Misc. MITCHELL *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 380, Misc. BRIDGES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 165, 190 N. E. 2d 719.

No. 382, Misc. DRUMM *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 384, Misc. GOMINO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: See 200 Pa. Super. 160, 188 A. 2d 784.

No. 386, Misc. LARTIGUE *v.* R. J. REYNOLDS TOBACCO CO. ET AL. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* and *Melvin M. Belli* for petitioner. *Harry McCall, Harry B. Kelleher, Theodore Kiendl* and *Porter R. Chandler* for respondents. Reported below: 317 F. 2d 19.

No. 389, Misc. CUFF *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 390, Misc. HOLLINS *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 391, Misc. HARRIS *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 394, Misc. PHILLIPS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 393, Misc. MACHADO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 395, Misc. TANCHYN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: See 200 Pa. Super. 148, 188 A. 2d 824.

No. 397, Misc. WRIGHT ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 316 F. 2d 737.

No. 399, Misc. HOLT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 30, 190 N. E. 2d 797.

No. 401, Misc. ROSSANO *v.* BLUE PLATE FOODS, INC. C. A. 5th Cir. Certiorari denied. *Vincent P. McCauley* for petitioner. *Albert W. Stubbs* for respondent. Reported below: 314 F. 2d 174.

No. 402, Misc. DILLON *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 404, Misc. STOFLET *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 407, Misc. GAITHER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 409, Misc. ELLIOTT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 410, Misc. GLANCY *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 213 Cal. App. 2d 629, 28 Cal. Rptr. 903.

No. 411, Misc. FINE *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Roland D. Hartshorn* for petitioner. *Robert Y. Button,* Attorney General of Virginia, *Ralph G. Louk* and *Donald C. Crounse* for respondent.

No. 413, Misc. MIX *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 423, Misc. HARRIS *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *John S. Connolly* for petitioner. *Walter F. Mondale,* Attorney General of Minnesota, and *Linus J. Hammond,* Assistant Attorney General, for respondent. Reported below: 265 Minn. 260, 121 N. W. 2d 327.

No. 446, Misc. MILLS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 275 Ala. 217, 153 So. 2d 650.

No. 435, Misc. GOODSAID *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent.

No. 437, Misc. WEBSTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Frank D. O'Connor* and *Benj. J. Jacobson* for respondent.

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No. 415, Misc. WILHELM *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 416, Misc. SHANHOLTZ *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 425, Misc. ZIZZO *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 438, Misc. VELLUCCI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 440, Misc. YOUNG *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 467, Misc. LAWLOR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 92, Misc. DE GRANDIS ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jacques M. Schiffer* for petitioners. Reported below: 12 N. Y. 2d 812, 187 N. E. 2d 130; 12 N. Y. 2d 946, 188 N. E. 2d 794.

No. 332, Misc. ZIMPLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 318 F. 2d 676.

No. 1, Misc. YANCY *v.* CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer* and *Don G. Kircher,* Deputy Attorneys General, for respondents. Reported below: 196 Cal. App. 2d 665, 16 Cal. Rptr. 766.

No. 63, Misc. MILTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Ray Sandstrom* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent. Reported below: 147 So. 2d 137.

No. 337, Misc. REAMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *T. Eugene Thompson* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 318 F. 2d 43.

No. 101, Misc. BROWDER *v.* WASHINGTON. Motion of *Daniel J. Riviera* for leave to withdraw his appearance as counsel for petitioner granted. Petition for writ of certiorari to the Supreme Court of Washington denied. *James E. Kennedy* for respondent. Reported below: 61 Wash. 2d 300, 378 P. 2d 295.

No. 473, Misc. HILL *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Charles T. Matthews* for respondent.

No. 119, Misc. WRIGHT *v.* TEXAS. Motion for leave to supplement the petition granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *John L. Hill, Jr.* and *Walter James Kronzer, Jr.* for petitioner. Reported below: 364 S. W. 2d 384.

No. 185, Misc. LOPEZ *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

Rehearing Denied.

No. 73, October Term, 1962. CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION ET AL., 373 U. S. 294;

No. 150, October Term, 1962. SILVER, DOING BUSINESS AS MUNICIPAL SECURITIES CO., ET AL. *v.* NEW YORK STOCK EXCHANGE, 373 U. S. 341;

No. 236, October Term, 1962. LOPEZ *v.* UNITED STATES, 373 U. S. 427;

No. 463, October Term, 1962. FITZGERALD, PUBLIC ADMINISTRATOR, *v.* UNITED STATES LINES CO., 374 U. S. 16;

No. 513, October Term, 1962. NORVELL *v.* ILLINOIS, 373 U. S. 420;

No. 604, October Term, 1962. DIVISION 1287, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, ET AL. *v.* MISSOURI, 374 U. S. 74;

No. 686, October Term, 1962. BENSON *v.* CALIFORNIA, 374 U. S. 806; and

No. 1014, October Term, 1962. BURDIKOFF ET AL. *v.* RUSSIAN ORTHODOX GREEK CATHOLIC ST. PETER AND ST. PAUL'S CHURCH OF LORAIN, OHIO, ET AL., 374 U. S. 808. Petitions for rehearing denied.

No. 1016, October Term, 1962. JAMIESON *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE, 374 U. S. 487;

No. 1017, October Term, 1962. DONATO *v.* UNITED STATES, 374 U. S. 828;

No. 1044, October Term, 1962. WAPNICK *v.* UNITED STATES, 374 U. S. 829;

No. 1045, October Term, 1962. VANCE ET AL. *v.* MIDLAND ENTERPRISES, INC., ET AL., 373 U. S. 952;

No. 1058, October Term, 1962. GREENE *v.* IMMIGRATION AND NATURALIZATION SERVICE, 374 U. S. 828; and

No. 1097, October Term, 1962. JAMES *v.* UNITED STATES, 374 U. S. 832. Petitions for rehearing denied.

No. 301, October Term, 1962. WEIGEL *v.* PARTENWEEDEREI ET AL., 371 U. S. 830, 906; and

No. 467, October Term, 1962. ALVADO ET AL. *v.* GENERAL MOTORS CORP., 371 U. S. 925, 965. Motions for leave to file second petitions for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these motions.

No. 589, October Term, 1962. TEXAS & NEW ORLEANS RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL., 371 U. S. 952. Motion for leave to file petition for rehearing denied.

No. 611, October Term, 1962. PUBLIC UTILITY DISTRICT NO. 1, PEND OREILLE COUNTY, WASHINGTON, *v.* FEDERAL POWER COMMISSION ET AL., 372 U. S. 908. Motion for leave to file second petition for rehearing denied.

No. 824, October Term, 1962. WILLARD DAIRY CORP. *v.* NATIONAL DAIRY PRODUCTS CORP., 373 U. S. 934. Motion for leave to file a supplement to the petition for rehearing granted. Petition for rehearing denied.

No. 509, October Term, 1962. REED *v.* THE YAKA ET AL., 373 U. S. 410. The motion of American Marine Institute, Inc., et al. for leave to file a brief, as *amici curiae,* is granted. Petition for rehearing denied. *Vernon S. Jones, James B. Magnor, J. Ward O'Neill, Mahlon Dickerson, J. Stewart Harrison, Scott H. Elder* and *Gilbert R. Johnson* for American Marine Institute, Inc., et al.

No. 482, October Term, 1962. LOCAL NO 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL. *v.* PERKO, 373 U. S. 701; and

No. 541, October Term, 1962. LOCAL 100, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, *v.* BORDEN, 373 U. S. 690. Petitions for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these petitions.

No. 1074, October Term, 1962. LAFAZIA ET AL. *v.* UNITED STATES, 374 U. S. 829. Petitions for rehearing by petitioners Brill and Gersh denied.

No. 660, Misc., October Term, 1962. MCKEE *v.* ILLINOIS, 374 U. S. 810;

No. 788, Misc., October Term, 1962. PALMER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, 374 U. S. 507;

No. 842, Misc., October Term, 1962. POPEKO *v.* UNITED STATES, 374 U. S. 835;

No. 885, Misc., October Term, 1962. JONES *v.* UNITED STATES, 374 U. S. 835;

No. 965, Misc., October Term, 1962. PARRY-HILL *v.* MCGARRAGHY, U. S. DISTRICT JUDGE, 374 U. S. 835;

No. 996, Misc., October Term, 1962. SHIPLEY *v.* OREGON, 374 U. S. 811; and

No. 997, Misc., October Term, 1962. STEIN *v.* UNITED STATES, 373 U. S. 918. Petitions for rehearing denied.

No. 1008, Misc., October Term, 1962. SCASSERRA *v.* PENNSYLVANIA, 373 U. S. 940;

No. 1035, Misc., October Term, 1962. STEWART *v.* MICHIGAN ET AL., 373 U. S. 928;

No. 1062, Misc., October Term, 1962. BOSLER *v.* DALTON, JUDGE, ET AL., 373 U. S. 942;

No. 1070, Misc., October Term, 1962. BRIGGS *v.* LOUISIANA STATE BAR ASSOCIATION, COMMITTEE ON BAR ADMISSIONS, 374 U. S. 96;

No. 1080, Misc., October Term, 1962. SUMPTER *v.* UNITED STATES, 373 U. S. 953;

No. 1139, Misc., October Term, 1962. MAY *v.* FIDELITY & DEPOSIT CO. OF MARYLAND, 374 U. S. 812;

No. 1149, Misc., October Term, 1962. TANSIMORE *v.* UNITED STATES, 374 U. S. 839;

No. 1195, Misc., October Term, 1962. BERRY *v.* CLEMMER, CORRECTIONS DIRECTOR, 374 U. S. 840;

No. 1200, Misc., October Term, 1962. VOGELSTEIN, TRADING AS BALTIMORE POSTER CO., *v.* NATIONAL SCREEN SERVICE CORP. ET AL., 374 U. S. 840;

No. 1230, Misc., October Term, 1962. DISILVESTRO *v.* CLARK ET AL., JUDGES, 374 U. S. 822;

No. 1232, Misc., October Term, 1962. STEBBINS *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., 374 U. S. 841;

No. 1263, Misc., October Term, 1962. MONTES *v.* HERITAGE, WARDEN, 374 U. S. 816;

No. 1269, Misc., October Term, 1962. LEE *v.* PATE, WARDEN, ET AL., 374 U. S. 843;

No. 1279, Misc., October Term, 1962. HARPER *v.* CALIFORNIA, 373 U. S. 930;

No. 1288, Misc., October Term, 1962. HOLT *v.* WISCONSIN, 374 U. S. 844; and

No. 1325, Misc., October Term, 1962. CLEMONS *v.* UNITED STATES, 374 U. S. 845. Petitions for rehearing denied.

No. 1359, Misc., October Term, 1962. WHITE *v.* UNITED STATES, 374 U. S. 848;

No. 1377, Misc., October Term, 1962. WOLFE *v.* NASH, WARDEN, 374 U. S. 817;

No. 1421, Misc., October Term, 1962. WEISS *v.* HUNNA, 374 U. S. 853;

No. 1427, Misc., October Term, 1962. BLACK *v.* BETO, CORRECTIONS DIRECTOR, 374 U. S. 822;

No. 1434, Misc., October Term, 1962. LEWIS *v.* NEW YORK, 374 U. S. 854;

No. 1437, Misc., October Term, 1962. REED *v.* PATE, WARDEN, 374 U. S. 854;

No. 1448, Misc., October Term, 1962. IN RE WILSON, 374 U. S. 801;

No. 1467, Misc., October Term, 1962. MILLER *v.* GUTHRIE, 374 U. S. 855; and

No. 1474, Misc., October Term, 1962. IN RE WILSON, 374 U. S. 822. Petitions for rehearing denied.

No. 331, Misc., October Term, 1962. REICKAUER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT, 371 U. S. 866;

No. 590, Misc., October Term, 1962. MONT *v.* UNITED STATES, 371 U. S. 935;

No. 1133, Misc., October Term, 1962. GILL *v.* UNITED STATES, 373 U. S. 944; and

No. 1212, Misc., October Term, 1962. BROWNE *v.* UNITED STATES, 374 U. S. 814. Motions for leave to file petitions for rehearing denied.

No. 1256, Misc., October Term, 1962. SCARBECK *v.* UNITED STATES, 374 U. S. 856; and

No. 1322, Misc., October Term, 1962. COLLINS *v.* UNITED STATES, 374 U. S. 857. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions.

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Miscellaneous Orders.

No. 23. Reynolds, Judge, et al. *v.* Sims et al.;

No. 27. Vann et al. *v.* Baggett (formerly Frink), Secretary of State of Alabama, et al.;

No. 41. McConnell et al. *v.* Baggett (formerly Frink), Secretary of State of Alabama, et al. Appeals from the United States District Court for the Middle District of Alabama; and

No. 69. Davis, Secretary, State Board of Elections, et al. *v.* Mann et al. Appeal from the United States District Court for the Eastern District of Virginia. (Probable jurisdiction noted, 374 U. S. 802, 803.) Motion of American Jewish Congress et al. for leave to file brief, as *amici curiae,* granted. *Leo Pfeffer, Melvin L. Wulf, Jack Greenberg* and *Robert B. McKay* on the motion.

No. 72. Smith *v.* California. Certiorari, 373 U. S. 901, to the Appellate Department, Superior Court of California, County of Los Angeles. Motion of *Edward de Grazia* for leave to argue orally, as *amicus curiae,* denied.

No. 86. United States *v.* Behrens. Certiorari, 373 U. S. 902, to the United States Court of Appeals for the Seventh Circuit. Motion of respondent for leave to proceed *in forma pauperis* granted. *Aribert L. Young* on the motion.

No. 532, Misc. Burks *v.* Pate, Warden. Motion for leave to file petition for writ of certiorari denied.

No. 537, Misc. Becker *v.* Tahash, Warden. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 523, Misc. LUCKMAN *v.* CALIFORNIA ET AL.;
No. 546, Misc. STANTON *v.* RANDOLPH, WARDEN;
No. 601, Misc. HILL *v.* BETO, CORRECTIONS DIRECTOR;
No. 602, Misc. HALL *v.* BETO, CORRECTIONS DIRECTOR; and
No. 605, Misc. WALKER *v.* PATE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 598, Misc. WALTZ *v.* PETERSON ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 41, Misc. HOWARD *v.* NEBRASKA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *C. C. Sheldon,* Assistant Attorney General, for respondent.

No. 255, Misc. CARRILLO *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. Motion for leave to file petition for writ of mandamus and for other relief denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

Probable Jurisdiction Noted.

No. 201. WILLIS SHAW FROZEN EXPRESS, INC., *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Arkansas. Probable jurisdiction noted. *John H. Joyce, A. Alvis Layne* and *Lester M. Bridgeman* for appellant. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Elliott H. Moyer, Robert W. Ginnane* and *Fritz R. Kahn* for the United States and the Interstate Commerce Commission.

No. 307. ROMAN, CLERK OF THE PEACE, ET AL. *v.* SINCOCK ET AL. Appeal from the United States District Court for the District of Delaware. Probable jurisdiction noted. The motion to advance is granted and the case is set for argument on Monday, December 9, 1963. The printing of the record is dispensed with. The brief of the appellants shall be filed on or before November 9th and the brief of the appellees shall be filed on or before November 29th. *David P. Buckson,* Attorney General of Delaware, *E. Norman Veasey,* Chief Deputy Attorney General, *Frederick Bernays Wiener, Januar D. Bove, Jr., Frank O'Donnell* and *N. Maxson Terry* for appellants. *Vincent A. Theisen* for appellees. Reported below: 215 F. Supp. 169.

No. 328. UNITED STATES *v.* TATEO. Appeal from the United States District Court for the Southern District of New York. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. *O. John Rogge* for appellee. Reported below: 216 F. Supp. 850.

Certiorari Granted. (*See also No. 45, ante, p. 29; Nos. 194, 195, 196 and 197, and Misc. Nos. 79, 80, 115, 149 and 224, ante, p. 32; No. 200, ante, p. 34; No. 323, ante, p. 39; No. 335, ante, p. 44; No. 59, Misc., ante, p. 50; and No. 76, Misc., ante, p. 51.*)

No. 321. ARATANI ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Thomas H. Carolan* and *Philip W. Amram* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: 115 U. S. App. D. C. 97, 317 F. 2d 161, 323 F. 2d 427.

No. 245. BERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Irwin L. Germaise* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States.

No. 264. DONOVAN ET AL. *v.* CITY OF DALLAS ET AL. Petition for writs of certiorari to the Supreme Court of Texas and the Court of Civil Appeals of Texas, Fifth Supreme Judicial District, granted. Petition for writ of certiorari to the United States District Court for the Northern District of Texas denied. *James P. Donovan, pro se,* for petitioners. *H. P. Kucera* for respondents. Reported below: 365 S. W. 2d 919; 368 S. W. 2d 240.

No. 329. HUMBLE PIPE LINE CO. *v.* WAGGONNER, SHERIFF; and

No. 354. NATURAL GAS & OIL CORP. ET AL. *v.* WAGGONNER, SHERIFF. Court of Appeal of Louisiana, Second Circuit. Certiorari granted. *Leon O'Quin* for petitioner in No. 329. *Clyde R. Brown* and *Clarence L. Yancey* for petitioners in No. 354. *Solicitor General Cox* and *Roger P. Marquis* for the United States, as *amicus curiae,* in support of the petitions. Reported below: 151 So. 2d 575.

No. 138, Misc. ARNOLD ET AL. *v.* NORTH CAROLINA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of North Carolina granted. Case transferred to the appellate docket. *Fred W. Harrison* and *J. Harvey Turner* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 258 N. C. 563, 129 S. E. 2d 229.

Certiorari Denied. (*See also No. 288, ante, p. 42; No. 340, ante, p. 44; No. 318, Misc., ante, p. 45; No. 420, Misc., ante, p. 46; No. 426, Misc., ante, p. 45; No. 477, Misc., ante, p. 46; No. 551, Misc., ante, p. 47; and No. 41, Misc., No. 537, Misc., and No. 264, supra.*)

No. 274. Backus Plywood Corp. *v.* Commercial Decal, Inc., et al. C. A. 2d Cir. Certiorari denied. *Sydney Krause* for petitioner. *David Oppenheim* for respondents. Reported below: 317 F. 2d 339.

No. 305. Wright Contracting Co. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Scott P. Crampton, Richard S. Doyle, J. Q. Davidson* and *Tom B. Slade* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Norman H. Wolfe* for respondent. Reported below: 316 F. 2d 249.

No. 334. Wagner *v.* Fairlamb et al. Supreme Court of Colorado. Certiorari denied. *John R. Barry* for petitioner. Reported below: 151 Colo. 481, 379 P. 2d 165.

No. 339. Murdoch *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 318 F. 2d 414.

No. 343. Anthony P. Miller, Inc., *v.* United States. Court of Claims. Certiorari denied. *Paul M. Rhodes* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States. Reported below: 161 Ct. Cl. ——.

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No. 342. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL. C. A. 3d Cir. Certiorari denied. *James J. Regan, Jr.* and *Robert M. Taylor* for petitioner Alker. *W. Wilson White* for respondents. Reported below: 316 F. 2d 236.

No. 345. MANUFACTURERS HANOVER TRUST CO., TRUSTEE, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Hewitt A. Conway* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Melva M. Graney* for the United States. Reported below: 160 Ct. Cl. ——, 312 F. 2d 785.

No. 463. WEBBER ET AL. *v.* TURNER & BLANCHARD, INC., ET AL.; and

No. 499. MARITIME FOOD CORP. *v.* TURNER & BLANCHARD, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Arthur Abarbanel* for petitioners in No. 463. *David I. Gilchrist* for petitioner in No. 499. *Julius L. Goldstein* for Turner & Blanchard, Inc., *James F. Dunn* and *Morton Zuckerman* for the Government of Pakistan, and *Clement C. Rinehart* for Caltex (India) Ltd., respondents. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States et al. Reported below: 322 F. 2d 249.

No. 45, Misc. WHITE *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 186, 187 N. E. 2d 878.

No. 47, Misc. SPIVEY *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr,* Attorney General of Texas, and *Howard Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondents.

No. 219. TYRELL ET AL. *v.* BERDECIA. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Puerto Rico denied. *Carlos D. Vazquez* for petitioners. *Hector Lugo-Bougal* for respondent. Reported below: — P. R. —.

No. 277. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Harry S. Littman, Joseph J. Daniels, Dale A. Wright, Richard Littell* and *Melvin Richter* for petitioner. *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon* and *Howard E. Wahrenbrock* for respondent. *John T. Miller, Jr.* for Independent Natural Gas Assn. of America, as *amicus curiae,* in support of the petition. Reported below: 115 U. S. App. D. C. 8, 316 F. 2d 659.

No. 49, Misc. CASSIDY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Robert L. Miles* for petitioner. *Robert A. Derengoski,* Solicitor General of Michigan, for respondent.

No. 61, Misc. NEWSOM *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 64, Misc. TURNER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 67, Misc. EDWARDS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *John G. Bookout* and *Bernard F. Sykes,* Assistant Attorneys General, for respondent. Reported below: 274 Ala. 569, 150 So. 2d 710.

No. 74, Misc. SPIVAK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *John E. Thorne* for petitioner. *Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondent.

No. 85, Misc. WALKER *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. Petitioner *pro se.* *Harvey Dickerson,* Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 78 Nev. 463, 376 P. 2d 137.

No. 88, Misc. TURNER *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, *Howard Fender* and *Allo B. Crow, Jr.,* Assistant Attorneys General, and *Henry Wade* for respondent.

No. 196, Misc. HALLMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert Reed Gray* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 115 U. S. App. D. C. 350, 320 F. 2d 669.

No. 89, Misc. RIVERA *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 314 F. 2d 332.

No. 166, Misc. RAMSEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 315 F. 2d 199.

No. 232, Misc. WHITE *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Robert W. Graham* for petitioner. *James E. Kennedy* for respondent. Reported below: 60 Wash. 2d 551, 374 P. 2d 942.

No. 248, Misc. SMITH *v.* HEARD, ACTING CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *J. E. Winfree, Jr.* for petitioner. Reported below: 315 F. 2d 692.

No. 344, Misc. WILSON ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioners *pro se*. *John T. Corrigan* for respondent.

No. 348, Misc. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 319 F. 2d 527.

No. 369, Misc. GROSSMAN *v.* MURPHY, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

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No. 226, Misc. MOON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 115 U. S. App. D. C. 133, 317 F. 2d 544.

No. 392, Misc. CLEVELAND *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 116 U. S. App. D. C. 188, 322 F. 2d 401.

No. 405, Misc. MORGAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 115 U. S. App. D. C. 310, 319 F. 2d 711.

No. 414, Misc. ALCORN *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Jack M. Lowery, Jr.* for petitioner.

No. 419, Misc. WHITING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Jesse R. Fillman* and *Charles F. Choate* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 321 F. 2d 72.

No. 427, Misc. MARYANSKI *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 421, Misc. AGARD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 430, Misc. BOWIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 318 F. 2d 693.

No. 432, Misc. BENNETT *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 433, Misc. TURNER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 434, Misc. COLES *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 436, Misc. SAYLES *v.* RATCLIFF ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Roger Ratcliff, pro se,* and *David S. Scrivener* for respondents.

No. 442, Misc. OYLER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 443, Misc. HAZELWOOD *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 445, Misc. HAYNES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 319 F. 2d 620.

No. 447, Misc. STEVENS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 232 Md. 33, 192 A. 2d 73.

No. 450, Misc. ROBERTS *v.* WARDEN, MARYLAND PENITENTIARY. Criminal Court of Baltimore City, Maryland. Certiorari denied.

No. 451, Misc. SHAPIRO *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 458, Misc. FARMER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 459, Misc. O'ROURKE *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 462, Misc. PRATER *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 463, Misc. WARDEN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 476, Misc. STARKS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 479, Misc. HICKS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 480, Misc. OPPENHEIMER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 214 Cal. App. 2d 366, 29 Cal. Rptr. 474.

No. 481, Misc. SEITERLE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Earl Klein* for petitioner. Reported below: 59 Cal. 2d 703, 381 P. 2d 947.

No. 482, Misc. NEWSOME *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Francis M. Burke* for petitioner. Reported below: 366 S. W. 2d 174.

No. 483, Misc. LINDSEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 484, Misc. MOONEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 485, Misc. ALBINI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 490, Misc. HARROD ET AL. *v.* MIHOJEVICH. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Martin M. Ostrow* for petitioners. *Arch E. Ekdale* for respondent. Reported below: 214 Cal. App. 2d 360, 29 Cal. Rptr. 440.

No. 502, Misc. CARVER *v.* O'NEAL, SHERIFF, ET AL. Supreme Court of Indiana. Certiorari denied. *William C. Erbecker* for petitioner. Reported below: 244 Ind. 185, 186 N. E. 2d 422.

No. 510, Misc. O'NEILL *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 265 Minn. 407, 122 N. W. 2d 165.

No. 487, Misc. SZABO *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied.

No. 488, Misc. SANDERSON *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied.

No. 493, Misc. DAVISON *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 496, Misc. COLEMAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 503, Misc. ALLENDE *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 504, Misc. COLBERT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 508, Misc. FERMIN *v.* DEPARTMENT OF EMPLOYMENT OF CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 509, Misc. WHITNEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Reported below: 152 So. 2d 727.

No. 511, Misc. WILLIAMS *v.* TILLETT BROTHERS CONSTRUCTION CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 319 F. 2d 300.

No. 515, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 514, Misc. SIMS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 169, Misc. SNIDER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, is of the opinion that the petition should be granted for the reasons expressed in his dissenting opinion in No. 308, Misc., *Rudolph* v. *Alabama, infra,* decided this date. *Alex N. Apostolou* for petitioner.

No. 308, Misc. RUDOLPH *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *Fred Blanton, Jr.* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent. Reported below: 275 Ala. 115, 152 So. 2d 662.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I would grant certiorari in this case and in No. 169, Misc., *Snider* v. *Cunningham, supra,* to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.

The following questions, *inter alia,* seem relevant and worthy of argument and consideration:

(1) In light of the trend both in this country and throughout the world against punishing rape by death,[1]

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[1] The United Nations recently conducted a survey on the laws, regulations and practices relating to capital punishment throughout the world. In addition to the United States, 65 countries and territories responded. All but five—Nationalist China, Northern Rhodesia, Nyasaland, Republic of South Africa, and the United States—reported that their laws no longer permit the imposition of the death penalty for rape.

The following of the United States reported that their laws no longer permit the imposition of the death penalty for rape: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho,

does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of [our] maturing society," [2] or "standards of decency more or less universally accepted"? [3]

Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and Wyoming. The laws of the remaining States permit the imposition of the death penalty for rape, but some States do not, in fact, impose it. United Nations, Capital Punishment (prepared by Mr. Marc Ancel, Justice of the French Supreme Court) (N. Y. 1962) 38, 71–75. See Resolution 934 (xxxv), adopted by the United Nations Economic and Social Council (April 9, 1963).

[2] *Trop* v. *Dulles,* 356 U. S. 86, 101 (opinion of WARREN, C. J., joined by JUSTICES BLACK, DOUGLAS, and WHITTAKER).

[3] *Francis* v. *Resweber,* 329 U. S. 459, 469 (Frankfurter, J., concurring). See *Weems* v. *United States,* 217 U. S. 349, 373:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

Also see *Ex parte Wilson,* 114 U. S. 417, 427–428:

"What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former

(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged"? [4]

(3) Can the permissible aims of punishment (*e. g.*, deterrence, isolation, rehabilitation)[5] be achieved as effectively by punishing rape less severely than by death (*e. g.*, by life imprisonment); [6] if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"? [7]

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times, being put in the stocks was not considered as necessarily infamous. . . . But at the present day [it] might be thought an infamous punishment."

[4] *Weems* v. *United States*, 217 U. S. 349, 371, quoting from the dissenting opinion of Field, J., in *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340. Cf. *Lambert* v. *California*, 355 U. S. 225, 231 (dissenting opinion of Frankfurter, J.).

[5] See, *e. g.*, *Williams* v. *New York*, 337 U. S. 241; *Trop* v. *Dulles*, 356 U. S. 86, 111 (concurring opinion of BRENNAN, J.); *Blyew* v. *United States*, 13 Wall. 581, 600.

[6] The United Nations Report on Capital Punishment noted: "In Canada, rape ceased to be punishable with death in 1954: it is reported that there were 37 convictions for rape in 1950, 44 in 1953 and only 27 in 1954, the year of abolition; from 1957 to 1959 a steady decrease in convictions was noted (from 56 to 44), while in the same period the population of Canada increased by 27 per cent." United Nations, Capital Punishment, *supra*, note 1, at 54–55.

Such statistics must of course be regarded with caution. See, *e. g.*, Royal Commission Report on Capital Punishment (1953), p. 24; Hart, Murder and Its Punishment, 52 Nw. U. L. Rev. 433, 457 (1957); Allen, Review, 10 Stan. L. Rev. 595, 600 (1958). In Canada, for example, the death sentence was rarely imposed for rape even prior to its formal abolition in 1954. In 1961 there was a slight increase in the number of convictions for rape. See United Nations, Capital Punishment, *supra*, note 1, at 55.

[7] *Weems* v. *United States*, 217 U. S. 349, 370. See *Robinson* v. *California*, 370 U. S. 660, 677 (concurring opinion of DOUGLAS, J.).

No. 538, Misc. KENNEDY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 539, Misc. OOSTERWYK *v.* CORRIGAN ET AL. Supreme Court of Wisconsin. Certiorari denied. Reported below: 19 Wis. 2d 464, 120 N. W. 2d 620.

No. 547, Misc. IN RE LEMKIN. Court of Appeals of New York. Certiorari denied. *Noel W. Hauser* for petitioner. *Henry Weiner* for Co-ordinating Committee on Discipline, respondent.

No. 557, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL., 373 U. S. 546. Petitions for rehearing filed by the Metropolitan Water District of Southern California, the Imperial Irrigation District and the State of California denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions.

No. 533, October Term, 1962. DYER *v.* MURRAY, TRUSTEE, ET AL., 371 U. S. 949, 373 U. S. 905. Motion for leave to file second petition for rehearing denied.

OCTOBER 28, 1963.

Miscellaneous Orders.

No. 111. NATIONAL LABOR RELATIONS BOARD *v.* SERVETTE, INC. Certiorari, 374 U. S. 805, to the United States Court of Appeals for the Ninth Circuit. The motion of American Federation of Television & Radio Artists, San Francisco Local, et al. for leave to file a brief, as

amici curiae, is granted. *Duane B. Beeson* on the motion. *Carl M. Gould* and *Stanley E. Tobin* for respondent in opposition to the motion.

No. 66, Misc. CRAWFORD *v.* STEVENS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

No. 367. UNITED STATES *v.* CONTINENTAL CAN CO. ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Melvin Spaeth* for the United States. *Helmer R. Johnson, Mark F. Hughes* and *Milton Handler* for appellees. Reported below: 217 F. Supp. 761.

No. 368. SCHNEIDER *v.* RUSK, SECRETARY OF STATE. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. *Milton V. Freeman, Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich* for appellant. Reported below: 218 F. Supp. 302.

Certiorari Granted. (*See also No. 337, ante, p. 52.*)

No. 617, Misc. COLEMAN *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Alabama granted. Case transferred to the appellate docket. *Jack Greenberg* and *Orzell Billingsley, Jr.* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent.

No. 353. MRVICA *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari granted. *Edith Lowenstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, L. Paul Winings* and *Charles Gordon* for respondent. Reported below: 317 F. 2d 220.

No. 361. JACKSON ET AL., TRUSTEES, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Edward L. Compton, Paul Burks* and *John C. Argue* for petitioners. *Solicitor General Cox* for the United States. Reported below: 317 F. 2d 821.

Certiorari Denied.

No. 283. ORKIN EXTERMINATING CO., INC., *v.* GULF COAST RICE MILLS. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *John D. Richardson* for petitioner. *Lamar Carnes* for respondent. Reported below: 362 S. W. 2d 159.

No. 327. ROSS *v.* UNITED STATES; and

No. 431. GORDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* and *Milton S. Gould* for petitioner in No. 327. *Jacob W. Friedman* for petitioner in No. 431. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 321 F. 2d 61.

No. 348. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL. *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. *George F. Wood, Palmer Pillans* and *Joseph F. Johnston* for petitioners. Reported below: 322 F. 2d 356.

No. 349. Berguido et al. *v.* Eastern Airlines, Inc. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter, Charles A. Lord, Seymour I. Toll* and *Frank F. Truscott* for petitioners. *Bernard M. Shanley* for respondent. Reported below: 317 F. 2d 628.

No. 350. Lundy Manufacturing Corp. *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Harold Dublirer* for petitioner. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 316 F. 2d 921.

No. 351. Powers *v.* Slaton. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. William L. Wallace* and *Scott Reed* for respondent. Reported below: 314 F. 2d 413.

No. 352. Ductless Hood Co., Inc., et al. *v.* A & B Home Appliances, Inc. C. A. 2d Cir. Certiorari denied. *Irving Moldauer* for petitioners. *Alfred L. Haffner, Jr.* for respondent. Reported below: 317 F. 2d 606.

No. 357. Dick et al. *v.* McNamara, Secretary of Defense, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Donald M. Murtha* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. *E. G. Neumann* for the American Federation of Government Employees, as *amicus curiae,* in support of the petition. Reported below: 116 U. S. App. D. C. 271, 323 F. 2d 276.

No. 358. Hainline *v.* United States. C. A. 10th Cir. Certiorari denied. *Payne H. Ratner* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for the United States. Reported below: 315 F. 2d 153.

No. 360. American Dietaids Co., Inc., *v.* Celebrezze, Secretary of Health, Education and Welfare, et al. C. A. 2d Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for respondents. Reported below: 317 F. 2d 658.

No. 363. Machin *v.* Zuckert, Secretary of the Air Force. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry S. Wender* and *Jules Fink* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Kathryn H. Baldwin* for respondent. Reported below: 114 U. S. App. D. C. 335, 316 F. 2d 336.

No. 364. Milos, trading as Milos Ford Sales, *v.* Ford Motor Co. et al. C. A. 3d Cir. Certiorari denied. *Harry S. Kalson* and *Samuel M. Rosenzweig* for petitioner. *Frank L. Seamans* for respondents. Reported below: 317 F. 2d 712.

No. 366. Carleno *v.* Marine Transport Lines, Inc., et al. C. A. 4th Cir. Certiorari denied. *Israel Steingold* and *Jacob Rassner* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 317 F. 2d 662.

No. 369. Crane et al. *v.* United States; and

No. 370. Zane et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *E. Coleman Madsen* for petitioners in No. 369. *Edward S. Friedland* for petitioners in No. 370. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 316 F. 2d 907.

No. 347. WILLMARK SERVICE SYSTEM, INC., *v.* WIRTZ, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Clarence Fried* for petitioner. *Solicitor General Cox, Charles Donahue, Bessie Margolin, Sylvia S. Ellison* and *Caruthers G. Berger* for respondent. Reported below: 317 F. 2d 486.

No. 371. PANZA ET AL. *v.* ARMCO STEEL CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Samuel L. Goldstein* for petitioners. *David B. Buerger* and *John G. Buchanan, Jr.* for respondent. Reported below: 316 F. 2d 69.

No. 7, Misc. HARRIS *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge,* Attorney General of Kentucky, and *Ronald M. Sullivan,* Assistant Attorney General, for respondent.

No. 42, Misc. ROLLINS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey,* Assistant Attorneys General, for respondent.

No. 46, Misc. HAMPTON *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se*. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Teddy W. Airhart, Jr.,* Assistant Attorney General, for respondent. Reported below: 243 La. 1009, 149 So. 2d 765.

No. 499, Misc. ARROCHA *v.* SALYER. C. A. 10th Cir. Certiorari denied.

No. 179, Misc. INGLE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 247, Misc. POWELL *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se.* *Robert Y. Thornton,* Attorney General of Oregon, and *C. L. Marsters,* Assistant Attorney General, for respondent.

No. 366, Misc. LLOYD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *William I. Siegel* for respondent.

No. 506, Misc. ROSS ET AL. *v.* BANNAN, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 318 F. 2d 323.

No. 590, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States. Reported below: 115 U. S. App. D. C. 158, 317 F. 2d 569, 116 U. S. App. D. C. 131, 321 F. 2d 744.

No. 612, Misc. AARON *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *Fred D. Gray* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent. Reported below: —— Ala. ——, 155 So. 2d 334.

No. 640, Misc. POULSON *v.* UTAH. Supreme Court of Utah. Certiorari denied. Reported below: 14 Utah 2d 213, 381 P. 2d 93.

No. 656, Misc. BLACK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

NOVEMBER 12, 1963.

Miscellaneous Orders.

No. ——. ASSOCIATION FOR THE PRESERVATION OF FREEDOM OF CHOICE, INC., ET AL. *v.* NATION COMPANY. The motion of Association for the Preservation of Freedom of Choice, Inc., for leave to proceed *in forma pauperis* is denied. MR. JUSTICE BLACK, MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG are of the opinion that the motion should be granted. *Alfred Avins* on the motion.

No. 1467, Misc., October Term, 1962. MILLER *v.* GUTHRIE. (Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied, 374 U. S. 855, rehearing denied, *ante,* p. 874.) The motion to recall the order denying the petition for certiorari and for other relief is denied.

No. 30. FIELDS ET AL. *v.* CITY OF FAIRFIELD. Appeal from the Supreme Court of Alabama. (Probable jurisdiction noted, 372 U. S. 940.) The motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief, as *amicus curiae,* is granted. *Jack Greenberg, James M. Nabrit III* and *Shirley Fingerhood* on the motion.

No. 568, Misc. STINSON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States.

No. 280, Misc. HUGHES *v.* HOLMAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Richmond M. Flowers,* Attorney General of Alabama, and *Peter M. Lind,* Assistant Attorney General, for respondent.

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No. 559, Misc. KILBOURNE *v.* NORTH CAROLINA ET AL.;
No. 571, Misc. COULTON *v.* MAXWELL, WARDEN;
No. 580, Misc. TEAGUE *v.* HERITAGE, WARDEN;
No. 629, Misc. COOK *v.* MAXWELL, WARDEN;
No. 635, Misc. NICHOLS *v.* TAYLOR, WARDEN, ET AL.;
No. 654, Misc. WRIGHT *v.* MAXWELL, WARDEN, ET AL.;
No. 672, Misc. CANNON *v.* METZNER, U. S. DISTRICT JUDGE, ET AL.;
No. 673, Misc. HUNTER *v.* PRASSE ET AL.;
No. 674, Misc. WINSTON *v.* BLACKWELL, WARDEN; and
No. 688, Misc. FORD *v.* DICKSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 569, Misc. GRATTEN *v.* NASH, WARDEN; and
No. 645, Misc. PARDEE *v.* BURKE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 578, Misc. PARKER *v.* LUMBARD, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Bruce Bromley* for respondents.

No. 307, Misc. BROYDE *v.* PERRY, JUDGE. Motion for leave to file supplement to petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus denied. *Charles V. Falkenberg* for petitioner.

Probable Jurisdiction Noted.

No. 400. GARRISON *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Probable jurisdiction noted. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for appellant. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan* and *John E. Jackson, Jr.,* Assistant Attorneys General, for appellee. Reported below: 244 La. 787, 154 So. 2d 400.

No. 406. Red Ball Motor Freight, Inc., et al. *v.* Shannon et al., doing business as E. & R. Shannon; and

No. 421. United States et al. *v.* Shannon et al., doing business as E. & R. Shannon. Appeals from the United States District Court for the Western District of Texas. The motion of Transportation Association of America for leave to file a brief, as *amicus curiae,* is granted. The motion of the Common Carrier Conference—Irregular Route of the American Trucking Associations, Inc., for leave to file a brief, as *amicus curiae,* in No. 421 is granted. Probable jurisdiction noted. *Phillip Robinson, Amos M. Mathews, Roland Rice* and *John C. Bradley* for appellants in No. 406. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Elliott H. Moyer, Robert W. Ginnane* and *Fritz R. Kahn* for the United States et al. Appellees *pro se. Robert E. Redding* for Transportation Association of America, as *amicus curiae,* in support of both appeals. *James E. Wilson* for the Common Carrier Conference—Irregular Route of the American Trucking Associations, Inc., as *amicus curiae,* in support of the appeal in No. 421. Reported below: 219 F. Supp. 781.

Certiorari Granted.

No. 384. Publishers' Association of New York City *v.* New York Mailers' Union Number Six. C. A. 2d Cir. Certiorari granted. *Andrew L. Hughes* for petitioner. *Gerhard P. Van Arkel* and *George Kaufmann* for respondent. Reported below: 317 F. 2d 624.

No. 402. J. I. Case Co. et al. *v.* Borak. C. A. 7th Cir. Certiorari granted. *Clark M. Robertson, Malcolm K. Whyte* and *Robert P. Harland* for petitioners. *Alex Elson, Arnold I. Shure* and *Bruno V. Bitker* for respondent. Reported below: 317 F. 2d 838.

No. 386. Federal Power Commission *v.* Texaco Inc. et al. C. A. 10th Cir. Certiorari granted. *Solicitor General Cox, Richard A. Solomon* and *Peter H. Schiff* for petitioner. *Alfred C. DeCrane, Jr.* and *Paul F. Schlicher* for Texaco Inc., and *William J. Grove, Thomas H. Wall, Carroll L. Gilliam, W. W. Heard* and *Wm. H. Emerson* for Pan American Petroleum Corp., respondents. Reported below: 317 F. 2d 796.

No. 320, Misc. Escobedo *v.* Illinois. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Illinois granted. Case transferred to the appellate docket. *Barry L. Kroll* and *Donald M. Haskell* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 28 Ill. 2d 41, 190 N. E. 2d 825.

Certiorari Denied. (*See also Nos. 388 and 403, ante, p. 77; and Misc. Nos. 569 and 645, supra.*)

No. 324. Time, Incorporated, *v.* Pape. C. A. 7th Cir. Certiorari denied. *Howard Ellis* and *Don H. Reuben* for petitioner. *Roger Q. White* and *Leonard E. Nelson* for respondent. Reported below: 318 F. 2d 652.

No. 373. Brown et al. *v.* Rayfield, Chief of Police. C. A. 5th Cir. Certiorari denied. *Robert L. Carter, Hubert T. Delany, Jack Greenberg, Derrick A. Bell, William R. Ming, Jack H. Young, R. Jess Brown* and *Frank D. Reeves* for petitioners. Reported below: 320 F. 2d 97.

No. 374. Amerio Contact Plate Freezer, Inc., *v.* Belt-Ice Corp. et al. C. A. 9th Cir. Certiorari denied. *Arnold Bauman* for petitioner. *Alfred J. Schweppe* and *Robert W. Beach* for respondents. Reported below: 316 F. 2d 459.

No. 375. St. Paul Fire & Marine Insurance Co. *v.* Coleman et al. C. A. 8th Cir. Certiorari denied. *Alston Jennings* for petitioner. Reported below: 316 F. 2d 77.

No. 377. American Air Filter Co., Inc., *v.* Farr Company. C. A. 9th Cir. Certiorari denied. *Robert C. Watson* for petitioner. *Richard E. Lyon* for respondent. Reported below: 318 F. 2d 500.

No. 378. Blaylock et ux. *v.* State Highway Commission of Kansas. Supreme Court of Kansas. Certiorari denied. *Howard E. Payne* for petitioners. *William M. Ferguson,* Attorney General of Kansas, *Charles N. Henson, Jr.,* Assistant Attorney General, and *Jerry W. Hannah* for respondent. Reported below: 191 Kan. 187, 380 P. 2d 337.

No. 382. Connelly *v.* Central States Southeast & Southwest Areas Pension Fund. C. A. 5th Cir. Certiorari denied. *Irving M. Wolff* for petitioner. *Robert C. Ward* for respondent. Reported below: 315 F. 2d 683.

No. 383. Woodner *v.* United States. C. A. 2d Cir. Certiorari denied. *J. Lee Rankin, Samuel Gottlieb* and *Louis Bender* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 317 F. 2d 649.

No. 392. Katz et al. *v.* United States. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Burton Berkley* for the United States. Reported below: 321 F. 2d 7.

No. 393. McLouth Steel Corp. *v.* United States. Court of Claims. Certiorari denied. *Edward L. Weber* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph Kovner* and *Carolyn R. Just* for the United States. Reported below: —— Ct. Cl. ——, 319 F. 2d 167.

No. 395. Janousek *v.* Chatterton et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 115 U. S. App. D. C. 183, 317 F. 2d 594.

No. 401. Delta Air Lines, Inc., *v.* Coleman, Tax Commissioner of Clayton County, Georgia, et al. Supreme Court of Georgia. Certiorari denied. *James N. Frazer* and *B. D. Murphy* for petitioner. Reported below: 219 Ga. 12, 131 S. E. 2d 768.

No. 407. Immaculate Conception Church of Los Angeles et al. *v.* Federal Communications Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry P. Warner* and *Harold David Cohen* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum, Ruth V. Reel* and *Ernest O. Eisenberg* for respondent. Reported below: 116 U. S. App. D. C. 73, 320 F. 2d 795.

No. 409. Indemnity Insurance Co. of North America *v.* Smith. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard W. Galiher* and *William E. Stewart* for petitioner. Reported below: 115 U. S. App. D. C. 295, 318 F. 2d 266.

No. 397. Skolnick *v.* Spolar et al. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Thomas R. McMillen* for respondents. Reported below: 317 F. 2d 857.

No. 385. North Carolina National Bank *v.* United States Casualty Co. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *John H. Anderson* for respondent. Reported below: 317 F. 2d 304.

No. 390. Chenoweth et al. *v.* Pan American Petroleum Corp. et al. Supreme Court of Oklahoma. Certiorari denied. *Herbert A. Hoffman* for petitioners. Reported below: 382 P. 2d 743.

No. 394. O'Brien et al. *v.* Lang, Personnel Director, Department of Personnel of the City of New York, et al. Court of Appeals of New York. Certiorari denied. *William Goffen* for petitioners. *Leo A. Larkin, Seymour B. Quel* and *John A. Murray* for respondents. Reported below: See 18 App. Div. 2d 140, 237 N. Y. S. 2d 960.

No. 396. Ketchum *v.* United States. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* and *Jon H. Hammer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 320 F. 2d 3.

No. 398. Lakeside Truck Rental, Inc., *v.* Bowers, Tax Commissioner of Ohio. Supreme Court of Ohio. Certiorari denied. *Bernard S. Goldfarb* for petitioner. *William B. Saxbe,* Attorney General of Ohio, and *Edgar L. Lindley,* Assistant Attorney General, for respondent. Reported below: 174 Ohio St. 405, 189 N. E. 2d 723.

No. 404. Pan American Fire & Casualty Co. *v.* Pendleton. C. A. 10th Cir. Certiorari denied. *Duke Duvall* for petitioner. *James T. Paulantis* for respondent. Reported below: 317 F. 2d 96.

No. 405. PEEVYHOUSE ET UX. *v.* GARLAND COAL & MINING CO. Supreme Court of Oklahoma. Certiorari denied. *Leslie L. Conner* and *James M. Little* for petitioners. *M. A. Looney* for respondent. Reported below: 382 P. 2d 109.

No. 408. WALKER ET AL. *v.* FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Mary Shaw* for petitioners. *E. Douglas Schwantes* for respondent. Reported below: 27 Ill. 2d 538, 190 N. E. 2d 296.

No. 411. MURPHY ET AL. *v.* ST. PAUL FIRE & MARINE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Ernest A. Carrere, Jr.* for petitioners. Reported below: 314 F. 2d 30.

No. 412. FAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John M. Brant* for the United States. Reported below: 319 F. 2d 791.

No. 413. CRUZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *James J. Hanrahan* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 417. DIRECTOR OF THE DEPARTMENT OF WELFARE AND INSTITUTIONS ET AL. *v.* YAEGER. C. A. 4th Cir. Certiorari denied. *Robert Y. Button,* Attorney General of Virginia, and *Reno S. Harp III,* Assistant Attorney General, for petitioners. Reported below: 319 F. 2d 771.

No. 69, Misc. BANKER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 567. HOFFA *v.* GRAY, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Jacob Kossman* and *Z. T. Osborn, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Robert S. Erdahl* for respondent. Reported below: 323 F. 2d 178.

No. 416. HUTCHESON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Joseph P. Tumulty, Jr.* and *Charles H. Tuttle* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 115 U. S. App. D. C. 402, 320 F. 2d 721.

No. 418. THOMPSON MAHOGANY CO. *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Francis E. Marshall* for petitioner. *F. Hastings Griffin, Jr.* for respondent. Reported below: 317 F. 2d 363.

No. 410. RYAN ET AL. *v.* HIRSCH, SHERIFF. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Merritt W. Green II* and *Merritt W. Green* for petitioners. *Harry Friberg* for respondent. Reported below: 174 Ohio St. 461, 190 N. E. 2d 262.

No. 113, Misc. JAMES *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General, for respondent.

No. 427. SKOLNICK *v.* MARTIN ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Thomas R. McMillen* and *John M. O'Connor, Jr.* for respondents. Reported below: 317 F. 2d 855.

No. 414. MONTEROSSO ET AL. *v.* ST. LOUIS GLOBE-DEMOCRAT PUBLISHING CO. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Paul E. Dixon* and *Jerome J. Duff* for petitioners. *Lon Hocker* for respondent. Reported below: 368 S. W. 2d 481.

No. 415. IRWIN ET AL. *v.* GLOBE-DEMOCRAT PUBLISHING CO. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William A. Geary, Jr.* for petitioners. *Lon Hocker* for respondent. Reported below: 368 S. W. 2d 452.

No. 81, Misc. ROBINSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 409 Pa. 462, 187 A. 2d 178.

No. 135, Misc. DAVIS *v.* BETO, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, and *Sam R. Wilson*, Assistant Attorney General, for respondents.

No. 162, Misc. VAN SLYKE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Michael R. Canestrano* for respondent.

No. 165, Misc. HENIG *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Paul R. Sand* for respondent. Reported below: 200 Pa. Super. 614, 189 A. 2d 894.

No. 172, Misc. JACKSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 182, Misc. WEEKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

No. 200, Misc. PRINCE *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr,* Attorney General of Texas, and *Howard Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondents. Reported below: 367 S. W. 2d 687.

No. 327, Misc. ROBERTS *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent. Reported below: 213 Cal. App. 2d 387, 28 Cal. Rptr. 839.

No. 489, Misc. BRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 207, Misc. BINGLEY *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Petitioner *pro se*. *Bruce Bennett,* Attorney General of Arkansas, and *Jerry L. Patterson,* Assistant Attorney General, for respondent. Reported below: 235 Ark. 982, 363 S. W. 2d 530.

No. 227, Misc. HEINTZELMAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *A. G. Spicola, Jr.*, Assistant Attorney General, for respondent.

No. 265, Misc. SULLIVAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 304.

No. 288, Misc. GRUBBS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Robert Popper* for respondent.

No. 341, Misc. CLARK *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 372, Misc. BOSURGI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *John Patrick Walsh* for petitioner. *Louis F. McCabe* and *Arlen Specter* for respondent. Reported below: 411 Pa. 56, 190 A. 2d 304.

No. 381, Misc. MORRIS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *Thomas P. McMahon* and *John J. Phelan* for petitioner.

No. 388, Misc. COFFMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 398, Misc. BOWENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 318 F. 2d 828.

No. 428, Misc. PRESSLEY, ALIAS JONES, *v.* MURRAY, POLICE DEPARTMENT CHIEF, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondents.

No. 454, Misc. ROGANOVICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Bernard M. Mamet* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 318 F. 2d 167.

No. 455, Misc. MOYNAHAN *v.* PARI-MUTUEL EMPLOYEES GUILD OF CALIFORNIA, LOCAL 280, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 317 F. 2d 209.

No. 495, Misc. FRINK *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 501, Misc. WRIGHT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States.

No. 518, Misc. GONZALES *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 4th Cir. Certiorari denied. *Jeremy C. McCamic* for petitioner. *Fred L. Davis* and *John R. Morris* for respondent. Reported below: 318 F. 2d 294.

No. 531, Misc. KANE *v.* BURLINGTON SAVINGS BANK ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Joseph Kovner* for respondent District Director, Internal Revenue Service. Reported below: 320 F. 2d 545.

No. 512, Misc. POWELL *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 516, Misc. CHAPMAN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 524, Misc. DRAPER *v.* WASHINGTON ET AL. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 527, Misc. AGNEW *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 544, Misc. BUTLER *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *James R. DeGiacomo* for petitioner. *Edward W. Brooke*, Attorney General of Massachusetts, and *James W. Bailey*, Assistant Attorney General, for respondent. Reported below: 346 Mass. 147, 190 N. E. 2d 680.

No. 530, Misc. NANCE *v.* WARDEN, MARYLAND PENITENTIARY, ET AL. Baltimore City Court of Maryland. Certiorari denied.

No. 529, Misc. ANDREWS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 505, Misc. SIPES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 321 F. 2d 174.

No. 534, Misc. TAYLOR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 116 U. S. App. D. C. 278, 323 F. 2d 283.

No. 536, Misc. LOVELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Chester E. Wallace* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 319 F. 2d 673.

No. 541, Misc. BUCK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 552, Misc. WELLMAN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 550, Misc. FERGUSON *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *A. H. Leatherwood, Sr.* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *Dan Winn* for respondent. Reported below: 219 Ga. 33, 131 S. E. 2d 538.

No. 545, Misc. MCGRANE *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 554, Misc. BUYALOS *v.* COX, WARDEN. District Court of New Mexico, First Judicial District. Certiorari denied. *F. Gordon Shermack* for petitioner.

No. 555, Misc. RESOR *v.* COX, WARDEN. District Court of New Mexico, First Judicial District. Certiorari denied. *F. Gordon Shermack* for petitioner.

No. 558, Misc. CREASEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 560, Misc. ELIASON *v.* STATE ROADS COMMISSION OF MARYLAND ET AL. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 257, 189 A. 2d 649.

No. 562, Misc. HOBBS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 533, 191 A. 2d 238.

No. 565, Misc. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 319 F. 2d 133.

No. 567, Misc. BECKETT *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 607, Misc. WILLIAMS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied.

No. 588, Misc. MORTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Cox* for the United States.

No. 556, Misc. STANTON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 572, Misc. KING *v.* RHAY, PENITENTIARY SUPERINTENDENT. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 576, Misc. DIAZ *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 587, Misc. HARDEN *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 591, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 315 F. 2d 193.

No. 592, Misc. DUBOISE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 593, Misc. LAUDERDALE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 594, Misc. DICKERSON *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 411 Pa. 651, 192 A. 2d 347.

No. 615, Misc. JOHNSON ET AL. *v.* REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND ET AL. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Martin McDonough* for respondents. Reported below: 317 F. 2d 872.

No. 630, Misc. HARRIS, FORMERLY TALLEY, *v.* TALLEY. Court of Appeals of Tennessee. Certiorari denied. *John S. Wrinkle* for petitioner. *Sizer Chambliss* for respondent. Reported below: —— Tenn. App. ——, 371 S. W. 2d 152

720-508 O-64-42

No. 600, Misc. BOWERS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 611, Misc. MERRILL *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Walter H. Evans, Jr.* for petitioner.

No. 608, Misc. HAYES *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 614, Misc. SMITH *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 191, Misc. PERKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 315 F. 2d 120.

No. 387, Misc. DARNELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David I. Shapiro* and *Melvin L. Wulf* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 316 F. 2d 813.

No. 542, Misc. MIDGETT *v.* CLIFFORD ET AL. Motion to strike appendix "B" to the petition for writ of certiorari denied. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *H. Clay Espey* for petitioner. *Albert J. Ahern, Jr.* and *Charles W. Halleck* for respondents.

Rehearing Denied.

No. 1216, Misc., October Term, 1961. O'LEARY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., 370 U. S. 953. Motion for leave to file a second petition for rehearing and to continue case denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. 762, October Term, 1962. TAR ASPHALT TRUCKING CO., INC., *v.* UNITED STATES ET AL., 372 U. S. 596. Motion for leave to file petition for rehearing and for other relief denied.

No. 298. MEEKER *v.* WALRAVEN, *ante*, p. 829;

No. 25, Misc. WILLIAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 839;

No. 116, Misc. CEPERO *v.* PELOSO, *ante*, p. 16;

No. 133, Misc. GOVEIA *v.* HARITAS ET AL., *ante*, p. 845;

No. 155, Misc. BENNETT *v.* NORTH CAROLINA, *ante*, p. 847;

No. 208, Misc. CARTER *v.* ABBATE ET VIR, *ante*, p. 851;

No. 300, Misc. PISELLI *v.* UNITED STATES, *ante*, p. 857;

No. 308, Misc. RUDOLPH *v.* ALABAMA, *ante*, p. 889;

No. 338, Misc. BURDETTE *v.* UNITED STATES, *ante*, p. 861;

No. 361, Misc. TSERMENGAS *v.* MICHIGAN ET AL., *ante*, p. 863; and

No. 449, Misc. OUGHTON *v.* TAYLOR, WARDEN, *ante*, p. 806. Petitions for rehearing denied.

NOVEMBER 14, 1963.

Dismissal Under Rule 60.

No. 211, Misc. BUSH *v.* ALASKA. On petition for writ of certiorari to the Supreme Court of Alaska. Dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 18, 1963.

Miscellaneous Orders.

No. —. KAWAHARA *v.* STAHR. The motion for leave to file a petition for writ of certiorari out of time is denied.

No. 6. GRIFFIN ET AL. *v.* MARYLAND. Certiorari, 370 U. S. 935, to the Court of Appeals of Maryland. Argued November 5 and 7, 1962. Restored to calendar for reargument May 20, 1963, 373 U. S. 920. Reargued October 14 and 15, 1963;

No. 12. BELL ET AL. *v.* MARYLAND. Certiorari, 374 U. S. 805, to the Court of Appeals of Maryland. Argued October 14 and 15, 1963;

No. 9. BARR ET AL. *v.* CITY OF COLUMBIA. Certiorari, 374 U. S. 804, to the Supreme Court of South Carolina. Argued October 14 and 15, 1963;

No. 10. BOUIE ET AL. *v.* CITY OF COLUMBIA. Certiorari, 374 U. S. 805, to the Supreme Court of South Carolina. Argued October 14 and 15, 1963; and

No. 60. ROBINSON ET AL. *v.* FLORIDA. Appeal from the Supreme Court of Florida. (Probable jurisdiction noted, 374 U. S. 803.) Argued October 15, 1963. In view of the statement of the Solicitor General on oral argument signifying "his readiness to express himself further, at the suggestion of the Court, to the broader constitutional issues which have been mooted," the Solicitor General is invited to file a brief within 30 days expressing the views of the United States. Counsel for the parties may have 30 days thereafter to respond if they so desire.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that the Court should not request the Department of Justice to file a brief concerning its views upon the basic constitutional issues on which the Department chose not to take a position in its original brief and in its oral argument.

No. 71. FEDERAL POWER COMMISSION *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL.; and

No. 73. CITY OF COLTON *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL. Certiorari, 372 U. S. 958, to the United States Court of Appeals for the Ninth Circuit. The motion of the National Association of Railroad & Utilities Commissioners for leave to join in the brief of the Public Utilities Commission of California, as *amicus curiae,* is granted. *Austin L. Roberts, Jr.* on the motion.

No. 420. BANCO DO BRASIL, S. A., *v.* A. C. ISRAEL COMMODITY CO., INC. On petition for writ of certiorari to the Court of Appeals of New York. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 660, Misc. MEDLEY *v.* OREGON ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 583, Misc. BRODBENT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 586, Misc. O'NEILL *v.* TAHASH, WARDEN; and

No. 595, Misc. WOOTEN *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 498, Misc. BIGGS *v.* DECKER, JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 449. A QUANTITY OF COPIES OF BOOKS ET AL. *v.* KANSAS. Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. *Stanley Fleishman* and *Sam Rosenwein* for appellants. *William M. Ferguson,* Attorney General of Kansas, and *Robert E. Hoffman,* Assistant Attorney General, for appellee. Reported below: 191 Kan. 13, 379 P. 2d 254.

Certiorari Granted.

No. 336. MERCER *v.* THERIOT. C. A. 5th Cir. Certiorari granted. *H. Alva Brumfield* for petitioner. *Stanley E. Loeb* for respondent. Reported below: 316 F. 2d 635.

No. 423. BRUNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Ernest R. Mortenson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 317 F. 2d 229.

Certiorari Denied.

No. 419. HOWARD JOHNSON CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *John T. Noonan* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 317 F. 2d 1.

No. 422. ARONSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Burton Marks* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 319 F. 2d 48.

No. 428. CITIZENS UTILITIES CO. *v.* PROUTY ET AL. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* and *Milton S. Gould* for petitioner. *Arthur L. Graves* and *Edwin W. Lawrence* for respondents. Reported below: 321 F. 2d 34.

No. 433. COCKFIELD *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *David H. Kubert* for petitioner. *Louis F. McCabe* and *Arlen Specter* for respondent. Reported below: 411 Pa. 71, 190 A. 2d 898.

No. 426. TIGHE *v.* MOORE. Supreme Court of Mississippi. Certiorari denied. *Bowman Stirling Tighe, pro se,* and *B. L. Tighe, Jr.* for petitioner. Reported below: 246 Miss. 649, 151 So. 2d 910.

No. 436. LOCAL UNION NO. 5, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Martin F. O'Donoghue* and *Patrick C. O'Donoghue* for petitioner. *Ralph S. Spritzer, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 116 U. S. App. D. C. 100, 321 F. 2d 366.

No. 437. SAGER GLOVE CORP. *v.* AETNA INSURANCE CORP. ET AL. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Donald N. Clausen* and *John P. Gorman* for respondents. Reported below: 317 F. 2d 439.

No. 438. SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *George B. Pletsch, Stanford Clinton, Lawrence C. Mills* and *Louis L. Rochmes* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 161 Ct. Cl. ——, 315 F. 2d 896.

No. 441. ROYER ET AL. *v.* BOARD OF ELECTION SUPERVISORS FOR CECIL COUNTY, MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Fred E. Weisgal* for petitioners. Reported below: 231 Md. 561, 191 A. 2d 446.

No. 434. BLOCH ET AL. *v.* BRILL. C. A. 7th Cir. Certiorari denied. *Clarence H. Ross* for petitioners. *Charles Rivers Aiken* and *Richard F. Watt* for respondent. Reported below: 318 F. 2d 176.

No. 442. FILIPPINI, EXECUTRIX, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Henry C. Clausen* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for the United States. Reported below: 318 F. 2d 841.

No. 443. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* CITY OF ALEXANDRIA, LOUISIANA. C. A. 5th Cir. Certiorari denied. *LeDoux R. Provosty* and *Richard B. Sadler, Jr.* for petitioner. Reported below: 311 F. 2d 7; 321 F. 2d 822.

No. 446. INDEPENDENT IRON WORKS, INC., *v.* UNITED STATES STEEL CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* and *Julian Caplan* for petitioner. *Morris M. Doyle* for United States Steel Corp., *Francis R. Kirkham* and *Francis N. Marshall* for Bethlehem Pacific Coast Steel Corp. et al., and *Gordon Johnson* and *Max Thelen, Jr.* for Kaiser Steel Corp., respondents. Reported below: 322 F. 2d 656.

No. 444. ACE BEER DISTRIBUTORS, INC., *v.* KOHN, INC., ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Myron N. Krotinger* for petitioner. *C. Kenneth Clark* for Kohn, Inc., et al., and *Rockwell T. Gust, George E. Brand, Jr.* and *Sumner Canary* for Stroh Brewery Co. et al., respondents. Reported below: 318 F. 2d 283.

No. 425. Walls Manufacturing Co., Inc., *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *Charles L. Morgan* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 116 U. S. App. D. C. 140, 321 F. 2d 753.

No. 429. Seaway Beverages, Inc., *v.* Dillon, Secretary of the Treasury, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Mandel L. Anixter, Robert A. Sprecher, Joseph B. Danzansky* and *Raymond R. Dickey* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *Elliott Moyer* for respondents. Reported below: 115 U. S. App. D. C. 321, 319 F. 2d 722.

No. 472, Misc. Coppinger *v.* Colorado. Supreme Court of Colorado. Certiorari denied. Reported below: 152 Colo. —, 380 P. 2d 19.

No. 507, Misc. Blocker *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 116 U. S. App. D. C. 78, 320 F. 2d 800.

No. 461, Misc. Luke *v.* Pennsylvania Railroad Co. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Harold E. McCamey* for respondent. Reported below: 316 F. 2d 734.

Nos. 447 and 448. UNITED MINE WORKERS OF AMERICA *v.* SUNFIRE COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. *Harrison Combs* and *M. E. Boiarsky* for petitioner. *James S. Greene, Jr.* and *Logan E. Patterson* for respondents. Reported below: 313 F. 2d 108.

No. 440. IN RE A. & H. TRANSPORTATION, INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Mark R. Joelson* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Robert B. Hummel* for the United States. Reported below: 319 F. 2d 69.

No. 270, Misc. NOLAN *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent. Reported below: 316 F. 2d 776.

No. 408, Misc. KIGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 315 F. 2d 778.

No. 474, Misc. KAY *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 494, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 456, Misc. ROUZER *v.* RUSSELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 316 F. 2d 736.

No. 519, Misc. WRIGHT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 497, 190 N. E. 2d 287.

No. 522, Misc. LUCAS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 368 S. W. 2d 605.

No. 525, Misc. WRIGHT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 526, Misc. GIBBONS *v.* PRECISION INSPECTIONS, LTD., ET AL. 157th Judicial District Court of Harris County, Texas. Certiorari denied. Petitioner *pro se*. *Fannie Gray Clegg* for respondents.

No. 535, Misc. FRENCH *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 577, Misc. GOMEZ *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 581, Misc. ZANCA *v.* STICHMAN. C. A. 2d Cir. Certiorari denied. Reported below: 317 F. 2d 355.

No. 589, Misc. MILNE *v.* MARYLAND. Circuit Court of Baltimore County, Maryland. Certiorari denied.

No. 698, Misc. FERMIN *v.* MUNICIPAL COURT DEPARTMENT No. 3, OAKLAND, CALIFORNIA. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 130. ROSSETTI *v.* UNITED STATES, *ante*, p. 814;

No. 218. CARDILLO *v.* UNITED STATES, *ante*, p. 822;

No. 250. BRANDENFELS *v.* DAY, POSTMASTER GENERAL, ET AL., *ante*, p. 824; and

No. 286. MILES ET AL. *v.* TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE, *ante*, p. 828. Petitions for rehearing denied.

No. 304. KAHANER *v.* UNITED STATES, *ante*, p. 836. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 46, Misc. HAMPTON *v.* WALKER, WARDEN, *ante*, p. 897;

No. 89, Misc. RIVERA *v.* HERITAGE, WARDEN, *ante*, p. 883;

No. 226, Misc. MOON *v.* UNITED STATES, *ante*, p. 884;

No. 367, Misc. GRAY *v.* UNITED STATES, *ante*, p. 863;

No. 397, Misc. WRIGHT ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante*, p. 866; and

No. 601, Misc. HILL *v.* BETO, CORRECTIONS DIRECTOR, *ante*, p. 876. Petitions for rehearing denied.

NOVEMBER 29, 1963.

Dismissal Under Rule 60.

No. 376. EGOROV ET UX. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *William W. Kleinman* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Yeagley* for the United States. Reported below: 319 F. 2d 817.

December 2, 1963.

Miscellaneous Orders.

No. 5, Original. United States *v.* California. The motion of the United States for leave to file a supplemental complaint herein is granted. The motion of California to dismiss the case is denied and California is allowed 60 days to answer. Both parties, should they so desire, are allowed 60 days to file additional exceptions to the Special Master's Report filed on November 10, 1952, together with briefs in support of the exceptions already filed and such additional exceptions, if any. The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of these motions. *Solicitor General Cox* and *George S. Swarth* for the United States. *Stanley Mosk,* Attorney General of California, *Charles E. Corker* and *Howard S. Goldin,* Assistant Attorneys General, and *Jay L. Shavelson, Warren J. Abbott* and *N. Gregory Taylor,* Deputy Attorneys General, for defendant. [For opinion and decree in this case, see 332 U. S. 19, 804.]

No. 323. Shenandoah Valley Broadcasting, Inc., et al. *v.* American Society of Composers, Authors and Publishers, *ante,* p. 39. The petitioners are requested to file a response to the petition for rehearing in this case within 30 days.

No. 563, Misc. Pyles *v.* West Virginia et al. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. C. Donald Robertson,* Attorney General of West Virginia, and *Claude A. Joyce* and *Albert L. Sommerville, Jr.,* Assistant Attorneys General, for respondents.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. The Report of the Special Master submitted in response to the order of this Court dated February 25, 1963, 372 U. S. 926, is received and ordered filed. Exceptions, if any, with supporting briefs, to the Report of the Special Master may be filed by the parties on or before February 15, 1964. Reply briefs, if any, to such exceptions may be filed on or before March 15, 1964. [For earlier orders herein, see 369 U. S. 869; 370 U. S. 929; 371 U. S. 873; 372 U. S. 926, 973.]

No. 91. JOHN WILEY & SONS, INC., *v.* LIVINGSTON. Certiorari, 373 U. S. 908, to the United States Court of Appeals for the Second Circuit. The motion of the American Federation of Labor and Congress of Industrial Organizations for leave to file a brief, as *amicus curiae,* is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *J. Albert Woll, David E. Feller, Elliot Bredhoff* and *Jerry D. Anker* on the motion.

No. 696, Misc. PENRICE *v.* CALIFORNIA;

No. 707, Misc. DAWES ET AL. *v.* MACDOUGALL, CORRECTIONS DIRECTOR, ET AL.; and

No. 715, Misc. GULLETTE *v.* HERITAGE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 659, Misc. BOSTON *v.* STURGIS, CHIEF JUSTICE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 461. APTHEKER ET AL. *v.* SECRETARY OF STATE. Appeal from the United States District Court for the

District of Columbia. Probable jurisdiction noted. *John J. Abt* and *Joseph Forer* for appellants. *Solicitor General Cox* for appellee. Reported below: 219 F. Supp. 709.

Certiorari Granted. (*See also No. 163, Misc., ante, p. 160.*)

No. 470. Clay *v.* Sun Insurance Office, Ltd. C. A. 5th Cir. Certiorari granted. *Paschal C. Reese* for petitioner. *Bert Cotton* and *Hortense Mound* for respondent. Reported below: 319 F. 2d 505.

Certiorari Denied. (*See also Nos. 450, 451 and 465, ante, p. 161.*)

No. 14. Smith et ux. *v.* United States. C. A. 3d Cir. Certiorari denied. *Herbert L. Zuckerman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 304 F. 2d 267.

No. 70. Tobin et ux. *v.* Tomlinson, District Director of Internal Revenue. C. A. 5th Cir. Certiorari denied. *James P. Hill* and *William R. Frazier* for petitioners. *Solicitor General Cox* for respondent. Reported below: 310 F. 2d 648.

No. 439. Radiant Burners, Inc., *v.* American Gas Association et al. C. A. 7th Cir. Certiorari denied. *Lee A. Freeman, Richard F. Levy* and *Philip B. Kurland* for petitioner. *H. Templeton Brown, Horace R. Lamb, Miles G. Seeley, Robert L. Stern, Justin A. Stanley, Clarence H. Ross, Frank F. Fowle, Aloysius F. Power, Daniel Boone, Edward H. Hickey, Thomas A. Reynolds, Edward L. Foote, Robert C. Keck, Sidney Neuman* and *John L. Spalding* for respondents. Reported below: 320 F. 2d 314.

No. 445. SHELL CO. (PUERTO RICO), LTD., *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Fernando Ruiz-Suria* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, and *Americo Serra,* Assistant Solicitor General, for respondent.

No. 452. ALLIED VAN LINES, INC., *v.* ZIMMERMAN. C. A. 9th Cir. Certiorari denied. *John P. McCarthy* for petitioner. *John E. Madden* for respondent. Reported below: 317 F. 2d 72.

No. 453. TYLER *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. *Stanley E. Preiser* for petitioner.

No. 456. ETCHEVERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 320 F. 2d 873.

No. 457. WOJCIK *v.* PALMER ET AL. C. A. 7th Cir. Certiorari denied. *Harold Z. Kaplan* for petitioner. *Joseph F. Elward* for Palmer et al., and *John C. Melaniphy, pro se, Sydney R. Drebin* and *Harry H. Pollack* for Melaniphy et al., respondents. Reported below: 318 F. 2d 171.

No. 466. SURREY ET AL. *v.* LADD, COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *Margaret Laurence, Herbert I. Sherman* and *Dean Laurence* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for respondent. Reported below: 50 C. C. P. A. (Pat.) 1336, 319 F. 2d 233.

No. 458. TEXAS *v.* ASHLEY ET AL. C. A. 5th Cir. Certiorari denied. *Carl E. F. Dally* for petitioner. Reported below: 319 F. 2d 80.

No. 459. JONES OIL CO. ET AL. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Supreme Court of Oklahoma. Certiorari denied. *William J. Robinson* for petitioners. *Robert A. Hefner, Jr., Ferrill H. Rogers, Robert W. Richards, R. A. Huffman, Cecil Hamilton* and *C. B. Wallace* for respondents. Reported below: 382 P. 2d 751.

No. 460. O'BRIEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *L. W. Post* for respondent. Reported below: 319 F. 2d 532.

No. 462. HARRY ZUBIK CO., INC., *v.* RALPH. C. A. 3d Cir. Certiorari denied. *J. Vincent Burke, Jr.* for petitioner. *David Stahl* for respondent. Reported below: 319 F. 2d 531.

No. 464. IN RE MARKHAM. Supreme Court of North Carolina. Certiorari denied. *Samuel R. Pierce, Jr.* for petitioner. *Claude V. Jones* for the City of Durham, North Carolina, respondent. Reported below: 259 N. C. 566, 131 S. E. 2d 329.

No. 469. ABERNATHY *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Jay B. White* for petitioner. *John T. Corrigan* for respondent.

No. 472. VESSEL JUDITH LEE ROSE, INC., *v.* CHERMESINO, ADMINISTRATRIX. C. A. 1st Cir. Certiorari denied. *Solomon Sandler* for petitioner. *Melvin I. Bernstein* for respondent. Reported below: 317 F. 2d 927.

720-508 O-64-43

No. 435. LEVINE *v.* LACY. Supreme Court of Appeals of Virginia. Certiorari denied. *John A. Beck* and *A. Andrew Giangreco* for petitioner. *Marshall A. Martin, Jr.* and *J. Frederick Larrick* for respondent. Reported below: 204 Va. 297, 130 S. E. 2d 443.

MR. JUSTICE BLACK would grant certiorari to consider the two following questions presented by petitioner which challenge the validity under the Federal Constitution and laws of a $9,000 default judgment rendered against him by a Virginia state court in a tort case involving an automobile accident:

(1) Whether entry of the default judgment while petitioner's answer and cross-claim—which had been filed in the United States District Court as authorized by 81 (c) of the Federal Rules of Civil Procedure—were pending, amounted under the circumstances to a denial of due process of law.

(2) Whether Virginia denied petitioner the kind of notice due process requires in rendering the judgment by default against him without giving him any notice at all to enable him to contest the judgment or its amount, despite the fact that he then had pending and undisposed of an answer and cross-bill, which had been filed months before the judgment by default was entered against him.

No. 222, Misc. WHITE *v.* NEW YORK. Court of General Sessions of County of New York, N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 375, Misc. PALOMINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 318 F. 2d 613.

No. 465, Misc. STELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 316 F. 2d 801.

No. 469, Misc. BRYAN *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General, for respondent.

No. 521, Misc. FARRANT *v.* IOWA. C. A. 7th Cir. Certiorari denied.

No. 604, Misc. NICHOLAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 319 F. 2d 697.

No. 613, Misc. NORMAN *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *John M. Smith* for petitioner. Reported below: 236 Ark. 476, 366 S. W. 2d 891.

No. 632, Misc. DALTON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 637, Misc. SNOPEK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 643, Misc. HEISS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 621, Misc. STUDEMEYER *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 116 U. S. App. D. C. 75, 320 F. 2d 797; 116 U. S. App. D. C. 120, 321 F. 2d 386.

No. 633, Misc. WARE *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 243 Ind. 639, 189 N. E. 2d 704.

No. 646, Misc. PIZARRO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 647, Misc. ROBERTS *v.* NEW YORK. Supreme Court of New York, Bronx County. Certiorari denied.

No. 649, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 104, 190 N. E. 2d 805.

No. 650, Misc. CISNEROS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 655, Misc. WASHINGTON *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 658, Misc. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 320 F. 2d 472.

No. 662, Misc. THOM *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 687, Misc. GILBERT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 692, Misc. LAWLOR *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. *Frances Kahn* for petitioner.

No. 93, Misc. PETERSON *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner.

No. 324, Misc. MALORY *v.* MCGETTRICK, SHERIFF. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Walter S. Haffner* for petitioner. *John T. Corrigan* and *Harvey R. Monck* for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *Norman Leonard* for the National Lawyers Guild, and by *Melvin L. Wulf* and *Ralph Rudd* for the American and Ohio Civil Liberties Unions. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, filed a brief for the State of North Carolina, as *amicus curiae,* in opposition. Reported below: 318 F. 2d 816.

No. 406, Misc. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 316 F. 2d 81.

Rehearing Denied.

No. 132. WILLIAMS *v.* CITY OF WICHITA, *ante*, p. 7;

No. 162. AVERITT ET AL. *v.* MISSISSIPPI, *ante*, p. 5;

No. 200. TIPTON *v.* SOCONY MOBIL OIL CO., INC., *ante*, p. 34;

No. 216. IN RE ESTATE OF WILLIAMS, *ante*, p. 821;

No. 234. GINSBURG *v.* STERN ET AL., *ante*, p. 823;

No. 261. IN RE ESTATE OF HURST, *ante*, p. 826;

No. 90, Misc. MARSH *v.* KROPP, WARDEN, *ante*, p. 842;

No. 131, Misc. FOWLER ET AL. *v.* BOARD OF COMMISSIONERS OF PRINCE GEORGES COUNTY ET AL., *ante*, p. 845;

No. 188, Misc. COHEN *v.* TIME, INC., ET AL., *ante*, p. 850;

No. 236, Misc. DEININGER *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 853;

No. 257, Misc. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL., *ante*, p. 855;

No. 282, Misc. MATHEWSON *v.* MCGRATH, TRUSTEE, *ante*, p. 858;

No. 310, Misc. SENIFF *v.* SENIFF, *ante*, p. 859; and

No. 480, Misc. OPPENHEIMER *v.* CALIFORNIA, *ante*, p. 887. Petitions for rehearing denied.

DECEMBER 6, 1963.

Dismissal Under Rule 60.

No. 159. AREND ET UX. *v.* DEMASTERS, INTERNAL REVENUE AGENT, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Jay H. Topkis* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for respondents. Reported below: 313 F. 2d 79.

DECEMBER 9, 1963.

Miscellaneous Orders.

No. 34. BROTHERHOOD OF RAILROAD TRAINMEN *v.* VIRGINIA EX REL. VIRGINIA STATE BAR. Certiorari, 372 U. S. 905, to the Supreme Court of Appeals of Virginia. The motion of the American Bar Association for leave to participate in oral argument, as *amicus curiae,* is denied. *Wayland B. Cedarquist* on the motion.

No. 71. FEDERAL POWER COMMISSION *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL.; and

No. 73. CITY OF COLTON *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL. Certiorari, 372 U. S. 958, to the United States Court of Appeals for the Ninth Circuit. The motion of the American Public Power Association for leave to participate in oral argument, as *amicus curiae,* is denied. *Northcutt Ely* and *C. Emerson Duncan II* on the motion. *Harry W. Sturges, Jr.* and *Boris H. Lakusta* for Southern California Edison Co., and *J. Thomason Phelps* for the Public Utilities Commission of California, respondents, in opposition.

No. 74. SOUTHERN RAILWAY CO. *v.* NORTH CAROLINA ET AL.; and

No. 93. UNITED STATES ET AL. *v.* NORTH CAROLINA ET AL. Appeals from the United States District Court for the Middle District of North Carolina. (Probable jurisdiction noted, 373 U. S. 907.) The motion of the Railway Labor Executives' Association for leave to file a brief, as *amicus curiae,* is granted. *Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* on the motion.

No. 691, Misc. DRAPER *v.* POWELL, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 138. MURPHY ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. Certiorari, *ante,* p. 812, to the Supreme Court of New Jersey. The motion of the respondent to require certification of additional parts of the record is granted. *William P. Sirignano* on the motion. *Harold Krieger* for petitioners, in opposition.

No. 728, Misc. PADGETT *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

No. 503. UNITED STATES *v.* PENN-OLIN CHEMICAL CO. ET AL. Appeal from the United States District Court for the District of Delaware. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *Lionel Kestenbaum* for the United States. *William S. Potter, Albert R. Connelly, H. Francis DeLone* and *John W. Barnum* for appellees. Reported below: 217 F. Supp. 110.

No. 489. HUDSON DISTRIBUTORS, INC., *v.* UPJOHN COMPANY. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *Myron N. Krotinger* and *Morton L. Stone* for appellant. Reported below: 174 Ohio St. 487, 190 N. E. 2d 460.

No. 508. LUCAS ET AL. *v.* FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO ET AL. Appeal from the United States District Court for the District of Colorado. Motion of Edwin C. Johnson et al. to be added as parties appellee granted. Probable jurisdiction noted. *Charles Ginsberg* for appellants. *Duke W. Dunbar,* Attorney General of Colorado, and *Charles S. Vigil* for appellees. Reported below: 219 F. Supp. 922.

No. 490. HUDSON DISTRIBUTORS, INC., *v.* ELI LILLY & Co. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *Myron N. Krotinger* and *Morton L. Stone* for appellant. *Louis S. Peirce* for appellee. Reported below: 174 Ohio St. 487, 190 N. E. 2d 460.

Certiorari Granted.

No. 362. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* WEBB'S CITY, INC. District Court of Appeal of Florida, Second District. Certiorari granted. *Robert L. Carter* and *Richard Feder* for petitioners. *D. M. Patrick* for respondent. Reported below: 152 So. 2d 179.

No. 481. VIKING THEATRE CORP. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL. C. A. 3d Cir. Certiorari granted. *Edward Bennett Williams, Harold Ungar* and *Henry W. Sawyer III* for petitioner. *Louis Nizer, W. Bradley Ward, Louis J. Goffman, Morris Wolf, Frederick W. R. Pride, Arthur Littleton* and *Edwin P. Rome* for respondents. Reported below: 320 F. 2d 285.

No. 485. LOCAL 20, TEAMSTERS, CHAUFFEURS & HELPERS UNION *v.* MORTON, DOING BUSINESS AS LESTER MORTON TRUCKING CO. C. A. 6th Cir. Certiorari granted. *David Previant* and *David Leo Uelmen* for petitioner. *M. J. Stauffer* for respondent. Reported below: 320 F. 2d 505.

No. 294. CLINTON *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari granted. *Calvin H. Childress* for petitioner. *Robert Y. Button,* Attorney General of Virginia, and *D. Gardiner Tyler,* Assistant Attorney General, for respondent. Reported below: 204 Va. 275, 130 S. E. 2d 437.

No. 509. UNITED STATES *v.* VERMONT ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Daniel M. Friedman* and *Joseph Kovner* for the United States. *Charles E. Gibson, Jr.*, Attorney General of Vermont, for respondents. Reported below: 317 F. 2d 446.

Certiorari Denied. (*See also No. 478 and No. 497, ante, p. 214.*)

No. 276. EASTERN AIR LINES, INC., ET AL. *v.* WEINSTEIN, EXECUTRIX, ET AL. C. A. 3d Cir. Certiorari denied. *Thomas F. Mount, Owen B. Rhoads, George J. Miller* and *Sidney L. Wickenhaver* for petitioners. *Abraham E. Freedman* and *Milton M. Borowsky* for respondents. Reported below: 316 F. 2d 758.

No. 344. ORMENTO *v.* UNITED STATES;
No. 346. DI PIETRO *v.* UNITED STATES;
No. 356. FERNANDEZ *v.* UNITED STATES;
No. 359. PANICO *v.* UNITED STATES;
No. 468. GALANTE *v.* UNITED STATES;
No. 568. LOICANO *v.* UNITED STATES;
No. 441, Misc. MANCINO *v.* UNITED STATES;
No. 492, Misc. SCIREMAMMANO *v.* UNITED STATES; and
No. 705, Misc. MIRRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Kossman* for petitioner in No. 344. *Harris B. Steinberg* for petitioner in No. 346. *Nathan Kestnbaum* for petitioner in No. 356. *Jerome Lewis* for petitioner in No. 359. *Bruno Schachner* for petitioner in No. 468. *Sylvester Cosentino* for petitioner in No. 568. *Constantine N. Katsoris* for petitioner in No. 441, Misc. *Leon B. Polsky* for petitioner in No. 492, Misc. *William R. Luney* for petitioner in No. 705, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 319 F. 2d 916.

No. 263. DeGillio et al. *v.* Michigan. Supreme Court of Michigan. Certiorari denied. *Albert A. Goldfarb* for petitioners. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Donald T. Kane,* Assistant Attorney General, for respondent.

No. 475. Texaco, Inc., et al. *v.* Federal Power Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alfred C. DeCrane, Jr., Jesse H. Foster, Jr., Edwin S. Nail, Rufus S. Day, Jr.* and *Jesse P. Luton, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell* and *Israel Convisser* for respondent.

No. 473. American Federation of Musicians et al. *v.* Cutler. C. A. 2d Cir. Certiorari denied. *Henry Kaiser, Eugene Gressman, George Kaufmann* and *David I. Ashe* for petitioners. *Godfrey P. Schmidt* for respondent. Reported below: 316 F. 2d 546.

No. 482. Gerstell et ux. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Richard H. Appert* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 319 F. 2d 131.

No. 484. Manufacturers Light & Heat Co. et al. *v.* Texas Eastern Transmission Corp. C. A. 5th Cir. Certiorari denied. *John F. Sisson, Alfred A. Green* and *William C. Hart* for petitioners. *David T. Searls* for respondent. Reported below: 306 F. 2d 345.

No. 474. LAMONGE *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *John R. Spain* for petitioner. *Lynn B. Griffith, Jr.* and *David F. McLain* for respondent.

No. 477. AMERICAN EXPORT LINES, INC., *v.* CATERPILLAR OVERSEAS, S. A. C. A. 2d Cir. Certiorari denied. *Mario E. De Orchis* for petitioner. *F. Herbert Prem* for respondent. Reported below: 318 F. 2d 720.

No. 486. TIDEWATER OIL CO. *v.* JACKSON ET AL., DOING BUSINESS AS JACKSON BROTHERS. C. A. 10th Cir. Certiorari denied. *James P. Hart, Richard Jones* and *William P. Thompson* for petitioner. *Oliver H. Hughes* for respondents. Reported below: 320 F. 2d 157.

No. 488. CZAP *v.* MARSHALL ET AL. C. A. 7th Cir. Certiorari denied. *Leon Feingold* for petitioner. Reported below: 315 F. 2d 766.

No. 491. GULLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 319 F. 2d 77.

No. 492. GOMEZ-FERNANDEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. *Jack Wasserman, David Carliner* and *Chester C. Shore* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 316 F. 2d 732.

No. 494. MASTRIAN *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *Jonas G. Schwartz* and *Edward J. Drury* for petitioner. *Walter F. Mondale,* Attorney General of Minnesota, for respondent. Reported below: 266 Minn. 58, 122 N. W. 2d 621.

No. 487. National Bank of Washington et al. *v.* McGettigan et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul R. Connolly* for petitioners. *Harry W. Goldberg* and *Morris Altman* for respondents. Reported below: 115 U. S. App. D. C. 384, 320 F. 2d 703.

No. 500. R. A. Holman & Co., Inc., *v.* Securities and Exchange Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton V. Freeman, Edgar H. Brenner* and *Stuart J. Land* for petitioner. *Solicitor General Cox, Philip A. Loomis, Jr.* and *David Ferber* for respondents. Reported below: 116 U. S. App. D. C. 279, 323 F. 2d 284.

No. 502. Clark *v.* California. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 215 Cal. App. 2d 734, 30 Cal. Rptr. 487.

No. 504. Matthews *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *I. William Stempil* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 115 U. S. App. D. C. 339, 319 F. 2d 740.

No. 512. Beach *v.* District of Columbia. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ford E. Young, Jr.* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent. Reported below: 116 U. S. App. D. C. 68, 320 F. 2d 790.

No. 543, Misc. Mixon *v.* Penn Stevedores Corp. C. A. 2d Cir. Certiorari denied.

No. 493. SHAVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Eugene Gressman, William T. Kirby* and *Anna R. Lavin* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 320 F. 2d 308.

No. 495. WALTHAM WATCH CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel, James McI. Henderson* and *John Gordon Underwood* for respondent. Reported below: 318 F. 2d 28.

No. 501. DIVISION No. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *v.* M. K. & O. TRANSIT LINES, INC. C. A. 10th Cir. Certiorari denied. *I. J. Gromfine* and *Herman Sternstein* for petitioner. *Robert A. Huffman* and *Karl H. Mueller* for respondent. Reported below: 319 F. 2d 488.

No. 507. HAHN & CLAY *v.* A. O. SMITH CORP. C. A. 5th Cir. Certiorari denied. *B. R. Pravel* and *Jack W. Hayden* for petitioner. *J. Vincent Martin* for respondent. Reported below: 320 F. 2d 166.

No. 513. BROWN *v.* DREW CHEMICAL CORP. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *John J. Monigan, Jr.* for respondent. Reported below: 40 N. J. 509, 193 A. 2d 142.

No. 520, Misc. NERSESIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States.

No. 514. Most Worshipful Universal Grand Lodge, A. F. & A. M., of Washington, et al. *v.* Most Worshipful Prince Hall Grand Lodge of Washington and its Jurisdiction, F. & A. M., et al. Supreme Court of Washington. Certiorari denied. *Lary Regal* for petitioners. Reported below: 62 Wash. 2d 28, 381 P. 2d 130.

No. 497, Misc. Jones *v.* Anderson, Jail Superintendent. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 515. Union Railway Co. *v.* Cobb. C. A. 6th Cir. Certiorari denied. *Cooper Turner, Jr.* for petitioner. *Thomas R. Prewitt* and *R. G. Draper* for respondent. Reported below: 318 F. 2d 33.

No. 516. Interstate Life & Accident Insurance Co. *v.* RKO Teleradio Pictures, Inc. C. A. 6th Cir. Certiorari denied. *Cooper Turner, Jr.* for petitioner. *Walter P. Armstrong, Jr.* and *Richard H. Allen* for respondent. Reported below: 318 F. 2d 73.

No. 517. Hartley Pen Co. *v.* Mathes, U. S. District Judge, et al. C. A. 9th Cir. Certiorari denied. *Owen A. Bartlett* and *A. V. Falcone* for petitioner. *William Douglas Sellers* for Formulabs, Inc., et al., respondents. Reported below: 318 F. 2d 485.

No. 520. Cone Brothers Contracting Co. et al. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *John Bacheller, Jr.* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Gary Green* for respondent. Reported below: 317 F. 2d 3.

No. 282. CAPUTO ET AL. *v.* SALZHANDLER. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Herbert S. Thatcher* and *George Pollack* for petitioners. *Burton H. Hall* for respondent. Reported below: 316 F. 2d 445.

No. 498. SHARPE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Juanita Jackson Mitchell* for petitioner. Reported below: 231 Md. 401, 190 A. 2d 628.

No. 471, Misc. SINKS *v.* UNITED STATES. Motion to strike supplemental record and portions of memorandum of United States relating thereto denied. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Richard J. Flynn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 318 F. 2d 436.

No. 448, Misc. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: See 292 F. 2d 499.

No. 710, Misc. THOMAS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 596, Misc. ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph A. Calamia* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 318 F. 2d 530.

No. 358, Misc. CHAPMAN *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, and *Howard Fender*, *Gilbert J. Pena* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondents.

No. 597, Misc. GAGER *v.* "BOB SEIDEL" ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 116 U. S. App. D. C. 54, 320 F. 2d 776.

No. 610, Misc. HUTCHINSON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Stewart R. Jaffy* for petitioner. *Earl W. Allison* for respondent. Reported below: 175 Ohio St. 196, 191 N. E. 2d 807.

No. 628, Misc. DAYTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 115 U. S. App. D. C. 341, 319 F. 2d 742.

No. 631, Misc. WESTPHAL *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Reported below: 62 Wash. 2d 301, 382 P. 2d 269.

No. 651, Misc. BELTOWSKI *v.* TAHASH, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 266 Minn. 182, 123 N. W. 2d 207.

No. 620, Misc. PISTOR *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se*. *Eugene Cook*, Attorney General of Georgia, and *Richard Bell*, Solicitor General, for respondent. Reported below: 219 Ga. 161, 132 S. E. 2d 183.

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No. 627, Misc. WANAMAKER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 634, Misc. RYAN *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *John A. F. Hall* for respondent. Reported below: 411 Pa. 613, 192 A. 2d 362.

No. 644, Misc. ISLAND *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 667, Misc. CARMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 678, Misc. MOCABEE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 681, Misc. ROQUENI *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 683, Misc. DEXTER *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 191 Kan. 577, 382 P. 2d 462.

No. 695, Misc. COFFMAN *v.* MARONEY, PENITENTIARY SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 716, Misc. POWERS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 723, Misc. WISSENFELD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 737, Misc. EVERLY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 486, Misc. TINSLEY *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondent.

No. 518. ACKERMAN ET AL. *v.* GLOBE-DEMOCRAT PUBLISHING CO. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Bernard Dunau* for petitioners. *Lon Hocker* for respondent. Reported below: 368 S. W. 2d 469.

Rehearing Denied.

No. 146. NICKERSON *v.* BEARFOOT SOLE CO., INC., ET AL., *ante*, p. 815;

No. 149. LEE ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., *ante*, p. 815;

No. 331. DAVIS ET AL. *v.* CITY OF BOWLING GREEN, KENTUCKY, ET AL., *ante*, p. 43;

No. 339. MURDOCH *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 879;

No. 340. CADE *v.* LOUISIANA, *ante*, p. 44;

No. 342. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL., *ante*, p. 880;

No. 10, Misc. TOLES *v.* UNITED STATES, *ante*, p. 836;

No. 43, Misc. LANSING *v.* NEW YORK, *ante*, p. 840;

No. 318, Misc. HESS ET AL. *v.* KRIZ ET AL., *ante*, p. 45;

No. 436, Misc. SAYLES *v.* RATCLIFF ET AL., *ante*, p. 885;

No. 509, Misc. WHITNEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 888;

No. 511, Misc. WILLIAMS *v.* TILLETT BROTHERS CONSTRUCTION CO., INC., ET AL., *ante*, p. 888;

No. 551, Misc. THOMPSON *v.* MISSOURI, *ante*, p. 47; and

No. 614, Misc. SMITH *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante*, p. 916. Petitions for rehearing denied.

DECEMBER 16, 1963.

Miscellaneous Orders.

No. 140, October Term, 1962. WILLNER *v.* COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, 373 U. S. 96. The motion for clarification or amendment of the mandate is denied. *Henry Waldman* on the motion.

No. 14, Original. LOUISIANA *v.* MISSISSIPPI ET AL. Argued December 10, 1963. The motion for leave to file a bill of complaint is granted and the State of Mississippi is allowed 90 days to answer. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *Edward M. Carmouche* and *John L. Madden,* Assistant Attorneys General, for plaintiff. *Joe T. Patterson,* Attorney General of Mississippi, *Martin R. McLendon* and *James Neville Patterson,* Assistant Attorneys General, and *Landman Teller,* Special Assistant to the Attorney General, for Mississippi et al., and *Robert M. Bass, Jr., M. M. Roberts* and *E. L. Brunini* for Humble Oil & Refining Co., defendants. [For earlier order herein, see *ante,* p. 803.]

No. 527. UNITED FUEL GAS CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. On appeal from the Supreme Court of Appeals of West Virginia. The Solicitor General is invited to file a brief expressing the views of the United States.

Certiorari Granted. (*See No. 480, ante, p. 253, and No. 37, Misc., ante, p. 258.*)

Certiorari Denied. (*See also No. 721, Misc., ante, p. 260.*)

No. 284. Artell *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Clyde W. Woody* for petitioner. *Carl E. F. Dally* for respondent. Reported below: 372 S. W. 2d 944.

No. 300. Clark et al. *v.* Thompson, Mayor, et al. C. A. 5th Cir. Certiorari denied. *Robert L. Carter* and *Jack H. Young* for petitioners. *Thomas H. Watkins* for respondents. Reported below: 313 F. 2d 637.

No. 524. Carter Mountain Transmission Corp. *v.* Federal Communications Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *E. Stratford Smith* and *Robert E. Conn* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission, and *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for Chief Washakie TV, respondents. Reported below: 116 U. S. App. D. C. 93, 321 F. 2d 359.

No. 525. Morton Salt Co. *v.* United States. Court of Claims. Certiorari denied. *Lloyd M. McBride* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *John F. Murray* for the United States. Reported below: 161 Ct. Cl. —, 316 F. 2d 931.

No. 521. Nugey *v.* Oliver Manufacturing Supply Co. et al. C. A. 3d Cir. Certiorari denied. *Maximilian Bader* and *I. Walton Bader* for petitioner. *Louis D. Fletcher* and *Orlando H. Dey* for respondents. Reported below: 321 F. 2d 118.

No. 505. COMMITTEE APPOINTED BY THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO, *v.* BATTELLE MEMORIAL INSTITUTE. Supreme Court of Ohio. Certiorari denied. *Albert R. Teare* for petitioner. *Francis J. Wright* and *Harry Wright III* for respondent. Reported below: 175 Ohio St. 132, 191 N. E. 2d 807.

No. 522. FEDERATION CREDIT UNION, LOCAL No. 89, N. F. P. O. C., ET AL. *v.* RENDER ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Henry I. Jacobson* for petitioners. *Edward Davis* for respondents. Reported below: 411 Pa. 625, 192 A. 2d 679.

No. 526. HOLLAND-AMERICA LINE *v.* TEXPORTS STEVEDORING CO., INC. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *Carl G. Stearns* for petitioner. *E. D. Vickery* for respondent. Reported below: 365 S. W. 2d 650.

No. 528. NORFOLK DREDGING CO. *v.* LAWRENCE. C. A. 4th Cir. Certiorari denied. *Francis N. Crenshaw* and *Guilford D. Ware* for petitioner. *Abraham E. Freedman, Wilfred R. Lorry* and *Sidney H. Kelsey* for respondent. Reported below: 319 F. 2d 805.

No. 529. STARR *v.* UNITED STATES. Court of Claims. Certiorari denied. *Fred W. Shields* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 532. O'NEAL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert L. Kilgo* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 322 F. 2d 443.

No. 533. IVEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Eugene H. Phillips* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 322 F. 2d 523.

No. 535. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Francis X. Ward* and *Bernard Dunau* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 321 F. 2d 126.

No. 536. SCHERE, DOING BUSINESS AS JENASOL COMPANY, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 320 F. 2d 564.

No. 537. NORDEN-KETAY CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Don V. Harris, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for respondent. Reported below: 319 F. 2d 902.

No. 540. GARDINER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert R. Slaughter* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 321 F. 2d 159.

No. 600. LANE, WARDEN, *v.* WHITE. C. A. 7th Cir. Certiorari denied. *Edwin K. Steers,* Attorney General of Indiana, for petitioner. *Porter R. Draper* for respondent. Reported below: 321 F. 2d 298.

No. 538. G. L. CHRISTIAN & ASSOCIATES *v.* UNITED STATES. Court of Claims. Certiorari denied. *Gilbert A. Cuneo, Norman R. Crozier, Jr., Chester H. Johnson, William L. Hillyer, Wilson Johnston, Eldon H. Crowell* and *Ashley Sellers* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. *Travis Brown* for Associated General Contractors of America, and *John B. Olverson* and *Mark E. Richardson* for Electronic Industries Association, as *amici curiae,* in support of the petition. Reported below: 160 Ct. Cl. —, 312 F. 2d 418; — Ct. Cl. —, 320 F. 2d 345.

No. 543. UNITED STATES *v.* MARYLAND FOR THE USE OF MEYER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. *Richard W. Galiher, William E. Stewart, Jr., Louis G. Davidson* and *Peter J. McBreen* for respondents. Reported below: 116 U. S. App. D. C. 259, 322 F. 2d 1009.

No. 471. JUDY BOND, INC., *v.* KREINDLER. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Edward C. Wallace* and *Marshall C. Berger* for petitioner. *Isadore Katz* for respondent. Reported below: 18 App. Div. 2d 1138, 239 N. Y. S. 2d 532.

No. 136, Misc. AIAS ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *George H. Fust* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General, for respondent. Reported below: 243 La. 945, 149 So. 2d 400.

No. 483. Ng Kam Fook et al. *v.* Esperdy, District Director, Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioners. *Solicitor General Cox* for respondent. Reported below: 320 F. 2d 86.

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

Section 243 (a) of the Immigration and Nationality Act (66 Stat. 163, 212, 8 U. S. C. § 1253 (a)) provides in pertinent part:

> ". . . deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory."

Respondent and both lower federal courts have determined that petitioners, who were both born on the mainland of China, who came to the United States as crewmen in 1953 and 1955, and who have never resided in Formosa, are "subject national[s] or citizen[s]" of the Republic of China, located on Formosa. Accordingly, when the Republic of China refused to accept petitioners, they were ordered deported, under other provisions of the Act, to Hong Kong and the Netherlands—regimes to which they have never been subject—either as citizens or as nationals, petitioners having been born on the mainland of China, as I have said.

The decision below is predicated in part upon nonrecognition of the Peking regime by the United States, and the fear that a contrary holding would require a preliminary inquiry concerning its willingness to accept petitioners which "might impliedly suggest recognition and thus might embarrass the decisions of the Executive Department as to foreign policies." [1] 320 F. 2d 86, 89. Since

[1] This overlooks the fact that since 1955 we have been in regular contact with the Peking regime, first by Alexis Johnson, our former

the question touches a basic human right and since the proper construction of the statute poses a substantial question,[2] which should be considered by this Court, I would grant certiorari.

No. 542. Roy *v.* Minnesota. Motion to dispense with printing the petition granted. Petition for writ of certiorari to the Supreme Court of Minnesota denied. Reported below: 266 Minn. 6, 122 N. W. 2d 615.

No. 278, Misc. Jackson *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Charles Alan Wright* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 365 S. W. 2d 935.

No. 429, Misc. Ashton *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

Ambassador to Czechoslovakia and now by John M. Cabot, our Ambassador to Poland. See Department of State, Release Aug. 14, 1963, interview of Alexis Johnson by Irving Chapman.

[2] Chief Judge Lumbard stated in dissent, 320 F. 2d 86, 90:

"For the reasons stated in my concurring opinion in Leong Leun Do v. Esperdy, 309 F. 2d 467, 475, 477–479 (2 Cir. 1962), I would hold that for purposes of the present proceeding, 'the Chinese mainland is a country of which an alien may be a subject national or citizen.' Id. 309 F. 2d at 478. It seems to me that some agencies of the United States government could, directly or through intermediaries, contact agents of the Communist government without implying recognition. If such a procedure is rejected by the executive branch, then, under the present statute, the alien should not be deported. This area of the law seems to be one which particularly requires legislative attention."

No. 584. ARNEBERGH *v.* ZEITLIN ET AL. Motion of Citizens for Decent Literature, Inc., et al., for leave to file a brief, as *amici curiae,* in support of the petition, granted. Petition for writ of certiorari to the Supreme Court of California denied. *Roger Arnebergh, pro se, Philip E. Grey* and *Wm. E. Doran* for petitioner. *Charles H. Keating, Jr.* for Citizens for Decent Literature, Inc., et al. Reported below: 59 Cal. 2d 901, 383 P. 2d 152.

No. 192, Misc. THOMPSON *v.* UNITED STATES BOARD OF PAROLE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondents. Reported below: 115 U. S. App. D. C. 254, 318 F. 2d 225.

No. 286, Misc. HAGANS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 372 S. W. 2d 946.

No. 418, Misc. JAMISON ET AL. *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence Speiser* and *David B. Isbell* for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondents. Reported below: 115 U. S. App. D. C. 254, 318 F. 2d 225.

No. 685, Misc. JENKINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 466, Misc. MAHI *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws*, Deputy Attorney General, for respondent.

No. 548, Misc. FREEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States.

No. 564, Misc. REVAZQUEZ *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent. Reported below: 319 F. 2d 818.

No. 606, Misc. IRBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 616, Misc. LINGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 320 F. 2d 260.

No. 626, Misc. PALMA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 318 F. 2d 645.

No. 666, Misc. LATHAM ET AL. *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. *Lawrence Speiser* and *Bernard Roazen* for petitioners. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Park McGee,* Assistant Attorneys General, for respondent. Reported below: 320 F. 2d 120.

No. 636, Misc. GOINS *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, ET AL. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 411 Pa. 590, 192 A. 2d 720.

No. 642, Misc. BURNS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 321 F. 2d 893.

No. 684, Misc. SCHEXNAYDER *v.* HUNTER, U. S. DISTRICT JUDGE. C. A. 5th Cir. and Supreme Court of Louisiana. Certiorari denied. *J. Minos Simon* for petitioner. *Nolan J. Edwards* and *Samuel W. Plauche, Jr.* for respondent.

No. 693, Misc. PEPPENTENZZA *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 702, Misc. LYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 708, Misc. PEALO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 677, Misc. BOGAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 733, Misc. ODDO *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 4, Misc. WHIPPLER *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Joseph H. Davis* for petitioner. *Eugene Cook*, Attorney General of Georgia, and *G. Hughel Harrison* and *John S. Harrison*, Assistant Attorneys General, for respondent. Reported below: 218 Ga. 198, 126 S. E. 2d 744.

No. 5, Misc. TERRY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Arthur Warner* for petitioner. Reported below: 57 Cal. 2d 538, 370 P. 2d 985.

Rehearing Denied.

No. 1321, Misc., October Term, 1962. GREGORY *v.* UNITED STATES, 374 U. S. 822. Motion for leave to file a petition for rehearing denied.

No. 397. SKOLNICK *v.* SPOLAR ET AL., *ante*, p. 904;

No. 399. COURTESY SANDWICH SHOP, INC., ET AL. *v.* PORT OF NEW YORK AUTHORITY ET AL., *ante*, p. 78;

No. 427. SKOLNICK *v.* MARTIN ET AL., *ante*, p. 908; and

No. 527, Misc. AGNEW *v.* CALIFORNIA, *ante*, p. 912. Petitions for rehearing denied.

JANUARY 6, 1964.

Miscellaneous Orders.

No. 11. JACOBELLIS *v.* OHIO. Appeal from the Supreme Court of Ohio. The motion of the Citizens for Decent Literature, Inc., for leave to file a brief, as *amicus curiae,* is granted. *Charles H. Keating, Jr.* on the motion.

No. 508. LUCAS ET AL. *v.* FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO ET AL. Appeal from the United States District Court for the District of Colorado. (Probable jurisdiction noted, *ante,* p. 938.) This case is set for argument on Tuesday, March 31, 1964, and the printing of the record is dispensed with. The brief for the appellants shall be filed on or before February 11, 1964, and the brief for the appellees shall be filed on or before March 17, 1964.

No. 752, Misc. TERRY *v.* DICKSON, WARDEN;
No. 759, Misc. RHODES *v.* SOUTH CAROLINA ET AL.;
No. 769, Misc. HURLEY *v.* ANDERSON, JAIL SUPERINTENDENT;
No. 825, Misc. HEMMIS *v.* BURKE, WARDEN;
No. 833, Misc. UNGER *v.* NEW JERSEY; and
No. 842, Misc. WILLIAMS *v.* NORTH CAROLINA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 789, Misc. CHANCE *v.* ARIZONA ET AL.;
No. 810, Misc. SMITH *v.* NORTH CAROLINA; and
No. 814, Misc. WARREN *v.* FLORIDA. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 198. FERGUSON ET AL. *v.* UNITED STATES. Certiorari, 374 U. S. 805, to the United States Court of Appeals for the Tenth Circuit. The motion of the United States to remand is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that Court with directions to determine whether, in the light of the relevant circumstances, the trial court's ruling that only one of the two defense counsel would be allowed to question each prosecution witness on cross-examination constitutes error of such magnitude as to require a reversal under the plain error rule. *A. Kenneth Pye,* by appointment of the Court (374 U. S. 821), for petitioners. *Solicitor General Cox* for the United States.

Certiorari Granted. (See also No. 98, ante, p. 393; No. 496, ante, p. 384; No. 566, ante, p. 395; No. 592, ante, p. 391; No. 597, ante, p. 396; and No. 417, Misc., ante, p. 397.)

No. 558. NATIONAL LABOR RELATIONS BOARD *v.* BROWN ET AL., DOING BUSINESS AS BROWN FOOD STORE, ET AL. C. A. 10th Cir. Certiorari granted. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Gary Green* for petitioner. *William L. Keller* for respondents. Reported below: 319 F. 2d 7.

No. 582. GILLESPIE, ADMINISTRATRIX, *v.* UNITED STATES STEEL CORP. C. A. 6th Cir. Certiorari granted. *Jack G. Day* and *Bernard A. Berkman* for petitioner. *Thomas V. Koykka* for respondent. Reported below: 321 F. 2d 518.

No. 606. UNITED STATES *v.* BARRETT ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Jerome M. Feit* for the United States. Reported below: 322 F. 2d 292.

No. 575. ABERNATHY ET AL. *v.* ALABAMA. Court of Appeals of Alabama. Certiorari granted. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Fred D. Gray, Louis H. Pollak* and *Charles S. Conley* for petitioners. *Richmond M. Flowers,* Attorney General of Alabama, and *Leslie Hall,* Assistant Attorney General, for respondent. Reported below: 42 Ala. App. 149, 155 So. 2d 586.

No. 610. FIBREBOARD PAPER PRODUCTS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to Questions 1 and 3 presented by the petition which read as follows:

"1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

"3. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?"

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Marion B. Plant* and *Gerard D. Reilly* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 116 U. S. App. D. C. 198, 322 F. 2d 411.

No. 15, Misc. GIOVA *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to the appellate docket. *Fred Okrand* for petitioner. *Solicitor General Cox* for respondent. Reported below: 308 F. 2d 347.

Certiorari Denied. (*See also No. 236, ante, p. 393; No. 586, ante, p. 396; No. 123, Misc., ante, p. 397; No. 717, Misc., ante, p. 398; and Misc. Nos. 789, 810 and 814, supra.*)

No. 519. SHERWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Richard H. Foster, John V. Lewis* and *Clifton Hildebrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Lawrence K. Bailey* for the United States. Reported below: 320 F. 2d 137.

No. 523. LEWIS ET AL. *v.* KOSTY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward L. Carey, John J. Wilson, Val J. Mitch, Harold H. Bacon* and *Charles L. Widman* for petitioners. *Joseph M. Stone* and *Louis Rabil* for respondent. Reported below: 115 U. S. App. D. C. 343, 319 F. 2d 744.

No. 531. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Marion E. Sibley, Vincent C. Giblin* and *Sam Daniels* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 321 F. 2d 274.

No. 530. SIGLER ET AL. *v.* ALLSTATE INSURANCE CO. C. A. 7th Cir. Certiorari denied. *Sydney M. Eisenberg* for petitioners. *Suel O. Arnold* for respondent. Reported below: 319 F. 2d 418.

No. 544. BOWLING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 321 F. 2d 698.

No. 545. PACIFIC SUPPLY COOPERATIVE *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL. C. A. 9th Cir. Certiorari denied. *William F. White* for petitioner. *Jack R. Cluck, Eugene M. Warlich* and *Richard H. Magnuson* for Farmers Union Central Exchange, Inc., and *Orville H. Mills* and *Irving M. Tullar* for National Cooperatives, Inc., respondents. Reported below: 318 F. 2d 894.

No. 549. COZINACIS *v.* COZINACIS. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Edward P. Good* and *Thomas A. Lazaroff* for petitioner. *Stephen E. Nash* for respondent. Reported below: 411 Pa. 419, 192 A. 2d 737.

No. 550. CHEMICAL BANK NEW YORK TRUST CO. ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Orison S. Marden, Brackley Shaw* and *Asbury H. deYampert* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *John C. Eldridge* for respondent. Reported below: 115 U. S. App. D. C. 319, 319 F. 2d 720.

No. 551. HUGHES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Samuel H. Crossland* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 320 F. 2d 459.

No. 552. GRIGSBY ET AL. *v.* MITCHUM, MAYOR, ET AL. Supreme Court of Kansas. Certiorari denied. *Peyton Ford* for petitioners. *William M. Ferguson,* Attorney General of Kansas, and *James B. Flack* for respondents. Reported below: 191 Kan. 293, 380 P. 2d 363.

No. 555. GENERAL INSTRUMENT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Murray Gartner, Jesse Freidin* and *Herbert Prashker* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 319 F. 2d 420.

No. 556. UNITED MINE WORKERS OF AMERICA *v.* WHITE OAK COAL CO., INC. C. A. 6th Cir. Certiorari denied. *E. H. Rayson, R. R. Kramer* and *Willard P. Owens* for petitioner. *Robert S. Young, Jr.* and *Howard H. Baker, Jr.* for respondent. Reported below: 318 F. 2d 591.

No. 557. BERKERY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Louis F. McCabe* and *Arlen Specter* for respondent.

No. 563. UNITED STATES *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Douglas, Stephen J. Pollak* and *Alan S. Rosenthal* for the United States. *M. Bayard Crutcher* for respondents. Reported below: 319 F. 2d 512.

No. 564. NICHOLS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Melvin B. Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 322 F. 2d 681.

No. 573. SIGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Paul M. Stocker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 320 F. 2d 176.

No. 574. WILLIAMSON ET AL., EXECUTORS, *v.* PEURIFOY, JUDGE. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *William D. Neary* for respondent. Reported below: 316 F. 2d 774.

No. 577. HASSAN, ADMINISTRATRIX, *v.* A. M. LANDRY & SON, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioner. *Ernest A. Carrere, Jr.* for respondents. Reported below: 321 F. 2d 570.

No. 578. D'ERCOLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Thomas J. Todarelli* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 321 F. 2d 509.

No. 579. IN RE GRUSCHWITZ ET AL. Court of Customs and Patent Appeals. Certiorari denied. *Michael S. Striker* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for the Commissioner of Patents in opposition. Reported below: 50 C. C. P. A. (Pat.) 1498, 320 F. 2d 401.

No. 576. Lynd, Circuit Clerk and Registrar of Voters of Forrest County, Mississippi, et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, *Peter M. Stockett, Jr.,* Special Assistant Attorney General, *Dugas Shands* and *Will S. Wells,* Assistant Attorneys General, and *M. M. Roberts* for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for the United States. Reported below: 321 F. 2d 26.

No. 581. Gajewski et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Francis Breidenbach* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 321 F. 2d 261.

No. 587. American Compress Warehouse, Division of Frost-Whited Co., Inc., *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Thomas E. Shroyer* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 321 F. 2d 547.

No. 596. Public Utility District No. 2 of Grant County, Washington, *v.* Merritt-Chapman & Scott Corp. C. A. 2d Cir. Certiorari denied. *Whitman Knapp* and *Martin F. Richman* for petitioner. *William L. Lynch* and *James W. Lamberton* for respondent. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Sheldon Raab,* Assistant Attorney General, for the Attorney General of the State of New York, as *amicus curiae,* in support of the petition. Reported below: 319 F. 2d 94.

No. 589. DANFELSER ET AL. *v.* STATE HIGHWAY COMMISSION OF NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. *Dudley Cornell* for petitioners. *Joseph L. Droege, Hadley Kelsey, John C. Worden* and *Richard T. Whitley,* Special Assistant Attorneys General of New Mexico, for respondent. Reported below: 72 N. M. 361, 384 P. 2d 241.

No. 591. MCDONALD *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Seymour Margulies* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Pauline B. Heller* for the United States, and *Peter L. Hughes III* for Bethlehem Steel Co., respondents. Reported below: 321 F. 2d 437.

No. 598. PEORIA & PEKIN UNION RAILWAY CO. ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Donald G. Beste, Robert S. Kirby, John M. Elliott* and *W. S. Bodman* for petitioners. *Jordan Jay Hillman* and *John C. Danielson* for respondent. Reported below: 319 F. 2d 117.

No. 599. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *John M. Elliott* for petitioner. *Jordan Jay Hillman* and *John C. Danielson* for respondent. Reported below: 319 F. 2d 117.

No. 602. MINNESOTA MINING & MANUFACTURING CO. *v.* PLYMOUTH RUBBER CO., INC. C. A. 1st Cir. Certiorari denied. *Edward A. Haight* and *Harold J. Kinney* for petitioner. *William W. Rymer* for respondent. Reported below: 321 F. 2d 151.

No. 593. St. Clair *v.* Yonkers Raceway, Inc., et al. Court of Appeals of New York. Certiorari denied. *J. Clement Johnston* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for State Harness Racing Commission et al.; *Louis Haimoff* for Yonkers Raceway, Inc.; and *Samuel I. Rosenman, George Morton Levy, Sr.,* and *Max Freund* for Roosevelt Raceway, Inc., respondents. Reported below: 13 N. Y. 2d 72, 192 N. E. 2d 15.

No. 594. Browder *v.* Vance, Secretary of the Army, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William G. Downey, Jr.* and *Charles D. T. Lennhoff* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondents.

No. 611. Nichol *v.* United States. C. A. 7th Cir. Certiorari denied. *Bernard J. Mellman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 323 F. 2d 633.

No. 613. Ross *v.* United States. C. A. 4th Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 322 F. 2d 306.

No. 616. Chicago Metallic Manufacturing Co. *v.* Ekco Products Co., Inc. C. A. 7th Cir. Certiorari denied. *Dugald S. McDougall* for petitioner. *Will Freeman* for respondent. Reported below: 321 F. 2d 550.

No. 605. PETERSON *v.* ZUCKERT, SECRETARY OF THE AIR FORCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Samuel C. Klein* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondent. Reported below: 116 U. S. App. D. C. 135, 321 F. 2d 748.

No. 618. GENERAL MOTORS CORP. ET AL. *v.* DEVEX CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. *George N. Hibben, Arthur W. Dickey, Jerome F. Fallon, Carlton Hill* and *Benjamin H. Sherman* for petitioners. *Walter J. Blenko* and *William C. McCoy, Jr.* for respondents. Reported below: 321 F. 2d 234.

No. 619. COTA *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 622. SHREVEPORT MACARONI MANUFACTURING CO., INC., *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *Robert G. Pugh* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *James McI. Henderson* for respondent. Reported below: 321 F. 2d 404.

No. 123. UNITED STATES *v.* JOHNSON. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. *Leon B. Polsky* for respondent. Reported below: 315 F. 2d 714.

No. 479. BECK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 317 F. 2d 865.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Like *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 234, "This case presents an unusual question involving the integrity of a criminal trial in the federal courts."

Petitioner was convicted by a jury of violating 21 U. S. C. § 176a—smuggling marihuana into the United States. The Court of Appeals affirmed. 317 F. 2d 865. A principal witness for the Government was a woman, Janet Watkins, arrested with petitioner, the marihuana having been discovered in her hair. Before petitioner's trial, she pleaded guilty to transporting marihuana without having paid a transfer tax, and the smuggling charge against her was then dismissed. At the trial, she testified on cross-examination that her guilty plea was still in effect, that no action, personally or through an attorney, had been taken to withdraw it, and that she did not then intend to withdraw it. The judge instructed the jury that he had accepted the plea only after she admitted knowing that the marihuana was in her hair.

Following affirmance in the Court of Appeals, petitioner filed two petitions for rehearing and a motion to supplement the record, pointing out that the judge who presided at his trial had subsequently granted the woman's unopposed motion to withdraw the guilty plea and that, on the Government's motion, the indictment against her was dismissed. In support of his request that the case be remanded to the Federal District Court for an inquiry into the propriety of what had transpired, petitioner pre-

sented this newly discovered letter from one of the woman's attorneys to the other:

> "Since Janet pled guilty she has had a conference with Hugh Johnson, Probation Officer, who believes that she was a victim of circumstances the same as you and I believe. After conferring with the Probation Officer he was able to have a conference with Judge Connally* concerning the matter, who, in turn, had a conference with Janet personally. It is my understanding, although not confirmed, that Judge Connally is of the same opinion as we are. After conferring with Judge Connally we were able to talk to Bill Jackson of the Federal District Attorney's office, who is also convinced that Janet is a victim of circumstances and not guilty.
>
> "The present course of action is as follows: Janet will be a witness for the Government against Mr. Beck. After she testifies against him, Janet will withdraw her plea of guilty to not guilty, and the cases will be tried before the court if tried at all. Although the Government has not promised anything, they have as much as indicated her cases will be dismissed. . . ."

Had all these facts been known and disclosed at the time of the trial they might have had an effect on the outcome. For the case was submitted to the jury on two separate theories—that petitioner alone smuggled the marihuana into the United States and that he aided and abetted Janet Watkins in doing so. The jury returned a general verdict; and on appeal the Court of Appeals rejected the argument that the case had been improperly submitted on the aider and abetter theory. 317 F. 2d, at 870–871.

*Judge Connally presided at petitioner Beck's trial in this case.

The Government argues that petitioner should have proceeded by filing a motion for a new trial. See Rule 33, Fed. Rules Crim. Proc. "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone* v. *United States,* 375 U. S. 52, 54.

I would grant certiorari, reverse the judgment below, and remand the case for a new trial. Cf. *Brady* v. *Maryland,* 373 U. S. 83.

No. 641. CIMINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* and *Theodore Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 321 F. 2d 509.

No. 541. NATIONAL SURETY CORP. *v.* MUSGROVE ET AL., DOING BUSINESS AS MUSGROVE INSURANCE AGENCY, ET AL. Motion of respondent, Gladys Holmes Southwick, for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *James E. Clark* for petitioner. *Charles A. Poellnitz* for Musgrove et al., and *Francis H. Hare* for Southwick, respondents. Reported below: 310 F. 2d 256.

No. 628. EAST BAY UNION OF MACHINISTS, LOCAL 1304, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Jay Darwin* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 116 U. S. App. D. C. 198, 322 F. 2d 411.

No. 570. ANDERSON *v.* GLADDEN, WARDEN. The motion to dispense with printing the petition for certiorari is granted. Petition for writ of certiorari to the Supreme Court of Oregon denied. Reported below: 234 Ore. 614, 383 P. 2d 986.

No. 603. SULLIVAN ET AL. *v.* NESMITH ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this petition. *John P. Kohn* and *Calvin M. Whitesell* for petitioners. Reported below: 318 F. 2d 110; 319 F. 2d 859.

No. 176, Misc. SYDNOR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 254, Misc. SPENCER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 27 Ill. 2d 320, 189 N. E. 2d 270.

No. 287, Misc. HARRIS *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 528, Misc. OPPENHEIMER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William B. McKesson* for respondent. Reported below: 209 Cal. App. 2d 413, 26 Cal. Rptr. 18.

No. 439, Misc. HARRIS *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge*, Attorney General of Kentucky, and *Martin Glazer*, Assistant Attorney General, for respondent.

No. 475, Misc. WALKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 116 U. S. App. D. C. 221, 322 F. 2d 434.

No. 638, Misc. GARDINER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard Schmude* for the United States. Reported below: 116 U. S. App. D. C. 270, 323 F. 2d 275.

No. 648, Misc. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 657, Misc. AGNEW *v.* CONTRACTORS SAFETY ASSOCIATION ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Frank De Marco, Jr.* for respondents. Reported below: 216 Cal. App. 2d 154, 30 Cal. Rptr. 690.

No. 661, Misc. RINDGO *v.* TOBRINER ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondents.

No. 663, Misc. TUCKER *v.* KROSS, CORRECTION COMMISSIONER. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. Reported below: 321 F. 2d 114.

No. 664, Misc. MORTON *v.* MCDONALD, SHERIFF. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Robert P. Lewis* for respondent. Reported below: 321 F. 2d 540.

No. 680, Misc. BANTON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 232 Md. 328, 193 A. 2d 46.

No. 694, Misc. JOSEPH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *K. Bruce Friedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 321 F. 2d 710.

No. 704, Misc. MAHURIN *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 321 F. 2d 662.

No. 706, Misc. FOX *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 712, Misc. MARONEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 713, Misc. COPEMAN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 718, Misc. FARRANT *v.* BENNETT, WARDEN, ET AL. Supreme Court of Iowa. Certiorari denied. Reported below: 255 Iowa 704, 123 N. W. 2d 888.

No. 724, Misc. WRIGHT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 720, Misc. SQUIRES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 518, 190 N. E. 2d 361.

No. 725, Misc. SCHOENEICH *v.* ILLINOIS. Court of Claims of Illinois. Certiorari denied. *John R. Snively* for petitioner.

No. 726, Misc. THOMAS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 727, Misc. MEADOWS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 730, Misc. HORNBECK *v.* NEW YORK STATE PAROLE BOARD. C. A. 2d Cir. Certiorari denied.

No. 732, Misc. HALL *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 266 Minn. 74, 123 N. W. 2d 116.

No. 734, Misc. REAM *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 735, Misc. COLLINS *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 739, Misc. CONTALDO *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 740, Misc. AUFLICK *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 742, Misc. WEAVER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 741, Misc. CHASE *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 382 P. 2d 457.

No. 743, Misc. BARNES *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 744, Misc. HAMMOND *v.* NORTH CAROLINA ET AL. Supreme Court of North Carolina. Certiorari denied.

No. 746, Misc. BOGAN *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 748, Misc. CLEMENTS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 534, 192 N. E. 2d 923.

No. 749, Misc. GREULICH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 753, Misc. DANIELS ET AL. *v.* ALASKA. Supreme Court of Alaska. Certiorari denied. Reported below: —— Alaska ——, 383 P. 2d 323.

No. 754, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 757, Misc. FEBUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 758, Misc. BABB ET AL. *v.* SOUTH CAROLINA ET AL. Supreme Court of South Carolina. Certiorari denied.

No. 762, Misc. CARPENTER *v.* MURPHY, ACTING HOSPITAL DIRECTOR. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 766, Misc. BATES *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 772, Misc. BATES *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 773, Misc. COLE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 232 Md. 111, 194 A. 2d 278.

No. 774, Misc. PIERCE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 775, Misc. BRASFIELD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 518, 192 N. E. 2d 914.

No. 778, Misc. HALL *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 785, Misc. HOLLINS *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 797, Misc. PEGUESE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 566, Misc. HETENYI *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 240, Misc. COCHRAN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morris A. Shenker* for petitioner. *Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent. Reported below: 366 S. W. 2d 360.

No. 619, Misc. RAGAN *v.* COX, COMMANDANT, U. S. DISCIPLINARY BARRACKS. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Frederick Bernays Wiener* and *Robert E. Hannon* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 320 F. 2d 815.

No. 540, Misc. PAROUTIAN *v.* UNITED STATES. Motion to remand and petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Irving Younger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 319 F. 2d 661.

Rehearing Denied.

No. 54. UNITED STATES *v.* STAPF ET AL., EXECUTORS AND TRUSTEES, *ante,* p. 118;

No. 305. WRIGHT CONTRACTING CO. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 879;

No. 403. MISSISSIPPI POWER & LIGHT CO. ET AL. *v.* CAPITAL ELECTRIC POWER ASSOCIATION ET AL., *ante,* p. 77; and

No. 408. WALKER ET AL. *v.* FOREST PRESERVE DISTRICT OF COOK COUNTY, ILLINOIS, *ante,* p. 906. Petitions for rehearing denied.

No. 422. ARONSON *v.* UNITED STATES, *ante*, p. 920;

No. 429. SEAWAY BEVERAGES, INC., *v.* DILLON, SECRETARY OF THE TREASURY, ET AL., *ante*, p. 923;

No. 435. LEVINE *v.* LACY, *ante*, p. 932; and

No. 444. ACE BEER DISTRIBUTORS, INC., *v.* KOHN, INC., ET AL., *ante*, p. 922. Petitions for rehearing denied.

No. 171. TEITELBAUM *v.* CURTIS PUBLISHING CO., *ante*, p. 817. Motion for leave to file a petition for rehearing denied.

No. 227. CORALLO *v.* UNITED STATES, *ante*, p. 835. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 258, Misc. GINGER *v.* BOWLES, JUDGE, *ante*, p. 856;

No. 297, Misc. POWERS *v.* UNITED STATES, *ante*, p. 858;

No. 307, Misc. BROYDE *v.* PERRY, JUDGE, *ante*, p. 900;

No. 324, Misc. MALORY *v.* MCGETTRICK, SHERIFF, *ante*, p. 935;

No. 387, Misc. DARNELL *v.* UNITED STATES, *ante*, p. 916;

No. 465, Misc. STELLO *v.* UNITED STATES, *ante*, p. 933;

No. 565, Misc. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL., *ante*, p. 914;

No. 581, Misc. ZANCA *v.* STICHMAN, *ante*, p. 925; and

No. 591, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante*, p. 915. Petitions for rehearing denied.

JANUARY 13, 1964.

Miscellaneous Orders.

No. 53. BROOKS *v.* MISSOURI PACIFIC RAILROAD CO. The motion of *Pat Mehaffy* for leave to withdraw his appearance as counsel for the respondent is granted.

No. 549, Misc. MALONE *v.* WALKER, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Teddy W. Airhart, Jr.,* Assistant Attorney General, for respondent.

No. 883, Misc. TAUB *v.* WARDEN, MANHATTAN FEDERAL HOUSE OF DETENTION. Motion to dispense with printing granted. Motion for leave to file petition for writ of habeas corpus denied. *Jacob Rassner* for petitioner.

Certiorari Granted.

No. 569. SCHLAGENHAUF *v.* HOLDER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari granted. *Richard W. Yarling, Wilbert McInerney* and *Robert S. Smith* for petitioner. *Erle A. Kightlinger, Aribert L. Young* and *Keith C. Reese* for respondent. Reported below: 321 F. 2d 43.

No. 637. NATIONAL LABOR RELATIONS BOARD *v.* BURNUP & SIMS, INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *John Bacheller, Jr.* for respondent. Reported below: 322 F. 2d 57.

No. 654. KING, EXECUTRIX, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *David S. Bate* and *Paul T. Murphy* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 322 F. 2d 317.

No. 623. CALHOUN ET AL. *v.* LATIMER ET AL. C. A. 5th Cir. Certiorari granted. *Constance Baker Motley, Jack Greenberg, E. E. Moore, Donald L. Hollowell* and *A. T. Walden* for petitioners. *Henry Bowden* for respondents. Reported below

Certiorari Denied. (*See also No. 601, ante, p. 438, and No. 621, ante, p. 439.*)

No. 595. Bethlehem Steel Co. *v.* National Labor Relations Board et al. C. A. 3d Cir. Certiorari denied. *John H. Morse* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for the National Labor Relations Board, and *M. H. Goldstein* for the Industrial Union of Marine & Shipbuilding Workers of America, respondents. Reported below: 320 F. 2d 615.

No. 620. Boeing Airplane Co. *v.* Perry, Administrator, et al. C. A. 10th Cir. Certiorari denied. *Malcolm Miller* for petitioner. *Solicitor General Cox* for the United States, as *amicus curiae,* in opposition. Reported below: 322 F. 2d 589.

No. 625. Braswell Motor Freight Lines, Inc., et al. *v.* Pensick & Gordon, Inc.; and

No. 645. Pensick & Gordon, Inc., *v.* California Motor Express et al. C. A. 9th Cir. Certiorari denied. *George L. Catlin* and *Theodore W. Russell* for petitioners in No. 625 and for California Motor Express et al., respondents in No. 645. *Carl M. Gould* for Pensick & Gordon, Inc. *Harry J. Keaton* for Pacific Intermountain Express et al., respondents in No. 645. Reported below: 323 F. 2d 769.

No. 643. Willmut Gas & Oil Co. *v.* Fly, Administrator. C. A. 5th Cir. Certiorari denied. *Reynolds S. Cheney* and *Garner W. Green* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Marselli* and *Benjamin M. Parker* for respondent. Reported below: 322 F. 2d 301.

No. 627. AGOBIAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Peter J. Hughes* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 323 F. 2d 693.

No. 629. FRANCIS *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied. Petitioner *pro se. Arlen Specter* for respondent. Reported below: 201 Pa. Super. 313, 191 A. 2d 884.

No. 632. HARRIS *v.* NORFOLK SOUTHERN RAILWAY. C. A. 4th Cir. Certiorari denied. *Louis B. Fine* and *Howard I. Legum* for petitioner. *William C. Worthington* for respondent. Reported below: 319 F. 2d 493.

No. 640. COHEN *v.* NEW YORK. Supreme Court of New York, Kings County. Certiorari denied. *William W. Kleinman* and *Eugene Gold* for petitioner. *Edward S. Silver* and *William I. Siegel* for respondent.

No. 644. SOUTHERN RAILWAY CO. *v.* GUILFORD NATIONAL BANK OF GREENSBORO, ADMINISTRATOR. C. A. 4th Cir. Certiorari denied. *W. T. Joyner* and *C. T. Leonard, Jr.* for petitioner. Reported below: 319 F. 2d 825.

No. 646. SARELAS *v.* PORIKOS ET AL. C. A. 7th Cir. Certiorari denied. *Peter S. Sarelas,* petitioner, *pro se.* Reported below: 320 F. 2d 827.

No. 650. BOREN *v.* MCLEAN, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Richard H. Wels* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard Schmude* for respondent.

No. 647. CLARK *v.* WASHINGTON STATE BAR ASSOCIATION. Supreme Court of Washington. Certiorari denied. *Henry Waldman* for petitioner. *T. M. Royce* for respondent. Reported below: 61 Wash. 2d 547, 379 P. 2d 354.

No. 651. RUSHING, DOING BUSINESS AS MARCEL COMPANY, *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *John E. Jackson* and *John E. Jackson, Jr.* for petitioner. *Solicitor General Cox* for respondent. Reported below: 320 F. 2d 280.

No. 633. MILLER & LUX INCORPORATED *v.* ANDERSON ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Dean Acheson* and *C. Ray Robinson* for petitioner. *Clayton L. Orn, James D. Adams, Arthur R. Albrecht, Martin J. Weil, Adolph H. Levy, Lloyd M. Tweedt, Marcus Mattson, Harold C. Morton, Marion B. Plant, Herbert W. Clark, Girvan Peck, Edward G. Chandler, Edwin S. Pillsbury, Richard H. Peterson, Paul F. Schlicher, Walter M. Gleason, Joseph M. McLaughlin* and *Patrick James Kirby* for Marathon Oil Co. et al.; *Stanley F. Davie* for Trico Oil & Gas Co. et al.; and *Rodney K. Potter* for Lloyd Corporation, Ltd., et al., respondents. Reported below: 318 F. 2d 831.

No. 662. UNITED STATES *v.* MANN. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. *John J. Pichinson* and *Luther E. Jones, Jr.* for respondent. Reported below: 319 F. 2d 404.

No. 460, Misc. McINTOSH *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *Abraham Ziegler* for petitioner. *Joseph A. Ryan* and *Michael R. Canestrano* for respondent.

No. 478, Misc. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 313 F. 2d 953.

No. 491, Misc. KINCAID *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Andrew J. Goodwin,* Assistant Attorneys General, for respondent.

No. 517, Misc. AMIOTTE *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gilbert F. Nelson,* Deputy Attorney General, for respondent. Reported below: 215 Cal. App. 2d 176, 30 Cal. Rptr. 102.

No. 582, Misc. ALVARADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 321 F. 2d 336.

No. 584, Misc. MURDAUGH *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 575, Misc. WATKINS *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se*. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Teddy W. Airhart, Jr.*, Assistant Attorney General, for respondent. Reported below: 244 La. 699, 154 So. 2d 368.

No. 599, Misc. MIERS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Bernard A. Golding* for petitioner. *Waggoner Carr*, Attorney General of Texas, and *James E. Barlow* for respondent.

No. 609, Misc. NASH *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for respondent. Reported below: 216 Cal. App. 2d 491, 31 Cal. Rptr. 195.

No. 622, Misc. BOOKER *v.* OVERNITE TRANSPORTATION CO., INC. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Samuel A. Miller* for respondent. Reported below: 314 F. 2d 342.

No. 623, Misc. BYRD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 653, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 321 F. 2d 731.

No. 665, Misc. HAIDER *v.* MINNESOTA. District Court of Minnesota, Fourth Judicial District. Certiorari denied.

No. 670, Misc. KOCH *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Leonard B. Boudin* and *Norman Dorsen* for petitioner. *James J. Costello* and *Albert E. Jenner, Jr.* for respondent. Reported below: See 39 Ill. App. 2d 51, 187 N. E. 2d 340.

No. 703, Misc. ROGERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 319 F. 2d 5.

Rehearing Denied.

No. 46. MEEKER ET UX. *v.* AMBASSADOR OIL CORP., *ante*, p. 160;

No. 356. FERNANDEZ *v.* UNITED STATES, *ante*, p. 940;

No. 453. TYLER *v.* WEST VIRGINIA, *ante*, p. 930;

No. 456. ETCHEVERRY *v.* UNITED STATES, *ante*, p. 930;

No. 460. O'BRIEN *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 931;

No. 286, Misc. HAGANS *v.* TEXAS, *ante*, p. 957;

No. 375, Misc. PALOMINO *v.* UNITED STATES, *ante*, p. 932;

No. 406, Misc. MILLER *v.* UNITED STATES, *ante*, p. 935;

No. 651, Misc. BELTOWSKI *v.* TAHASH, WARDEN, *ante*, p. 947; and

No. 710, Misc. THOMAS *v.* HOLMAN, WARDEN, *ante*, p. 946. Petitions for rehearing denied.

JANUARY 15, 1964.

Dismissal Under Rule 60.

No. 756, Misc. IN RE EASTERN AIR LINES, INC. Motion for leave to file petition for writ of certiorari to the United States Court of Appeals for the First Circuit dismissed pursuant to Rule 60 of the Rules of this Court. *E. Smythe Gambrell, Harold L. Russell, Robert Proctor* and *Richard Wait* for movant. *Henry E. Foley* and *John H. Pickering* for Northeast Airlines, Inc., and *Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for Master Executive Council of Northeast Pilots & International Association of Machinists, in opposition. *Acting Solicitor General Spritzer* for the Civil Aeronautics Board.

JANUARY 20, 1964.

Miscellaneous Orders.

No. 5, Original. UNITED STATES *v.* CALIFORNIA. The joint motion of counsel for extensions of time to file pleadings and briefs is granted and the order of this Court of December 2, 1963, *ante,* p. 927, is amended to provide that the answer to the supplemental complaint shall be filed on or before March 2, 1964; additional exceptions to the Report of the Special Master and briefs in support thereof shall be filed on or before April 1, 1964, and answering briefs shall be filed on or before May 15, 1964. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Solicitor General Cox* for the United States. *Stanley Mosk,* Attorney General of California, for defendant.

No. 862, Misc. BIZUP *v.* TINSLEY, WARDEN. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 94. UNITED STATES *v.* EL PASO NATURAL GAS CO. ET AL. Appeal from the United States District Court for the District of Utah. (Probable jurisdiction noted, 373 U. S. 930.) The motion of the State of California for leave to participate in oral argument, as *amicus curiae*, is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *William M. Bennett* on the motion. *Gregory A. Harrison, Arthur H. Dean, Charles V. Shannon, Atherton Phleger, Roy H. Steyer, Stephen Rackow Kaye, Leon M. Payne* and *Dennis McCarthy* for El Paso Natural Gas Co., in opposition.

No. 636. GERMANO ET AL. *v.* KERNER ET AL. Appeal from the United States District Court for the Northern District of Illinois. The appellants' motion to advance is denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Bernard Kleiman, Lester Asher, John C. Melaniphy* and *Charles S. Rhyne* on the motion.

Certiorari Granted.

No. 688. CALHOON, PRESIDENT, OR PETERS, SECRETARY-TREASURER OF DISTRICT NO. 1 NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL–CIO, *v.* HARVEY ET AL. C. A. 2d Cir. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *David Scribner* for petitioner. *Burton H. Hall* for respondents. Reported below: 324 F. 2d 486.

Certiorari Denied. (*See also No. 560, ante, p. 451.*)

No. 588. MONROE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Benjamin E. Smith* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 320 F. 2d 277.

No. 607. MERIDIAN, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *James E. Mitchell* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 322 F. 2d 198.

No. 626. BARKMAN *v.* CITY OF AKRON ET AL. Supreme Court of Ohio. Certiorari denied. *Rufus L. Thompson* for petitioner. *James V. Barbuto* and *Sal Germano* for respondents. Reported below: 175 Ohio St. 71, 191 N. E. 2d 540.

No. 635. CARPENTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Gordon W. Gerber, Kenneth W. Gemmill* and *P. J. Di Quinzio* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones, Gilbert E. Andrews* and *Carolyn R. Just* for respondent. Reported below: 322 F. 2d 733.

No. 638. FARRELL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James A. Poore* and *Burton Marks* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 321 F. 2d 409.

No. 648. CLEMMONS ET AL. *v.* CONGRESS OF RACIAL EQUALITY ET AL. C. A. 5th Cir. Certiorari denied. *John V. Parker* and *John F. Ward, Jr.* for petitioners. *Carl Rachlin, Robert Collins, Nils Douglas* and *Floyd McKissick* for respondents. Reported below: 323 F. 2d 54.

No. 667. MYERS *v.* MOORE, JUDGE. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 204 Va. 409, 131 S. E. 2d 414.

No. 652. Trosch et al., doing business as Maryland News Co., *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. *James J. Doherty* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 321 F. 2d 692.

No. 656. American Can Co. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Charles C. MacLean, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 317 F. 2d 604.

No. 658. Rayor *v.* United States. C. A. 9th Cir. Certiorari denied. *Ernest R. Mortenson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 323 F. 2d 519.

No. 661. Parrott et al. *v.* Securities and Exchange Commission. C. A. 10th Cir. Certiorari denied. *Robert E. Shelton* for petitioners. *Solicitor General Cox, Philip A. Loomis, Jr., David Ferber* and *David B. Bliss* for respondent.

No. 666. Nooksack Tribe of Indians *v.* United States. The motion to dispense with printing the petition for a writ of certiorari is granted. Petition for a writ of certiorari to the United States Court of Claims denied. *Frederick W. Post* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: —— Ct. Cl. ——.

No. 767, Misc. Odom *v.* Missouri. Supreme Court of Missouri. Certiorari denied. Reported below: 369 S. W. 2d 173.

No. 668. Bross et al. *v.* Board of County Supervisors of Fairfax County, Virginia, et al. Supreme Court of Appeals of Virginia. Certiorari denied. Mr. Justice Douglas and Mr. Justice White took no part in the consideration or decision of this petition. *J. Sloan Kuykendall* and *E. A. Prichard* for petitioners. *Frederick T. Gray* and *Ralph G. Louk* for respondents.

No. 686, Misc. Butler *v.* New Jersey. C. A. 3d Cir. Certiorari denied.

No. 697, Misc. Lee *v.* Holman, Warden. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *Peter M. Lind*, Assistant Attorney General, for respondent.

No. 794, Misc. Hall *v.* California. Supreme Court of California. Certiorari denied.

No. 804, Misc. Lopez *v.* California; and

No. 817, Misc. Winhoven *v.* California. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner in No. 804, Misc. Reported below: 60 Cal. 2d 223, 384 P. 2d 16.

No. 823, Misc. Timmons *v.* Cunningham, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied.

Rehearing Granted.

No. 323. Shenandoah Valley Broadcasting, Inc., et al. *v.* American Society of Composers, Authors and Publishers. The petition for rehearing is granted and the last sentence of the *per curiam* opinion announced on October 21, 1963, 375 U. S. 39, 41, is amended to read: "The petition is therefore granted and the judgment is re-

versed and the cause remanded to the Court of Appeals for further proceedings in conformity with this opinion."

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BLACK joins, dissenting from the order granting rehearing and from the modification of the original opinion.

In my view, the cause was properly remanded "to the Court of Appeals for consideration on its merits," 375 U. S. 39, 41, and there is no reason to modify the original opinion.

Respondent requests the change in order to be free upon remand to argue to the Court of Appeals that petitioners originally failed to perfect their appeal to that court because they did not comply with the 30-day requirement of Rule 73 (a) of the Federal Rules of Civil Procedure. The Rule provides that:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, *except* that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, . . ." (Emphasis added.)

Petitioners, having filed their notice of appeal with the Court of Appeals more than 30 days but less than 60 days after the entry of the District Court order dismissing their petition, contend that the 60-day limitation applies, that their appeal to the Court of Appeals was timely, and, therefore, that this Court properly remanded the case for consideration on the merits. Petitioners argue that the proceedings they had instituted in the District Court must be regarded as a continuation of the original suit brought by the United States, that the United States is a "party" to the action within the meaning of 28 U. S. C. § 2107 and Rule 73 (a), and, therefore, all the parties

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have 60 days from the entry of judgment to file a notice of appeal.

The Court in granting rehearing does not pass on the merits of these contentions, leaving them for consideration by the Court of Appeals. I do not believe that the Court of Appeals need consider this procedural question and wish to point out why our original opinion properly directed that court to consider the case on its merits.

We are here confronted with a situation in which, at the time when review of a District Court decision was sought, two questions concerning appellate jurisdiction had not definitely been settled. First, it was not altogether clear whether review in this type of action should be sought in the Court of Appeals or directly in this Court under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. To avoid being impaled upon the horns of this procedural dilemma, petitioners attempted to pursue both routes. We have now clarified the law and held that the Expediting Act was inapplicable and that review should proceed through the Court of Appeals. 375 U. S. 39. Second, even if the first question had not been beset by uncertainties, it was not clearly settled whether, in proceeding to the Court of Appeals, petitioners' case would come within the 60-day, as opposed to the 30-day, appeal limitation. Under these circumstances, given the prior complexities and our decision that the case is one to be reviewed by the Court of Appeals, we should now issue an order which will insure that petitioners' right to appellate review is properly safeguarded. We have the power to do precisely that.

The Court has frequently held, in cases involving attempted direct appeals from three-judge District Courts to this Court, that "where the question of jurisdiction was not obviously settled by prior decisions," the Court will enter "an order framed to save appellants their proper remedies." *Phillips* v. *United States,* 312 U. S. 246, 254.

See also *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 676–678; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19. To accomplish this the Court has remanded "the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals." *Phillips* v. *United States, supra,* at 254. Here, as in the cited decisions, we have a case in which, as a result of uncertainties in federal appellate procedures and without unreasonable action by petitioners, it is conceivable under the Court's modified opinion that an appellate review of the merits of the case may not only be unnecessarily delayed but even ultimately thwarted. What we have accomplished indirectly in the cited cases—to the end of safeguarding the statutory right to appellate review—we should be able to do directly in the exercise of our powers of appellate supervision. Compare *Bartone* v. *United States,* 375 U. S. 52.

A remand to the Court of Appeals for consideration on the merits is expressly authorized by 28 U. S. C. § 2106 which provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The decisions in the above-cited cases establish that this Court has on numerous occasions made "such disposition of the case as justice requires" as is authorized by the statute. *Walling* v. *James V. Reuter, Inc., supra,* at 676. In the present case there can be no doubt that a hearing on

the merits would "be just under the circumstances." The fact that this case has proven to involve two procedural difficulties, instead of simply one as in other instances, should not so confuse the matter as conceivably to defeat the realization of appellate review on the merits. This case, which has been in this Court twice and which will now be in the Court of Appeals for a second time, should be decided in that court on the merits. The right to appellate review should no longer be delayed or denied as a result of uncertainties in federal procedures.

Rehearing Denied.

No. 491. GULLEY *v.* UNITED STATES, *ante*, p. 942; and No. 495. WALTHAM WATCH CO. ET AL. *v.* FEDERAL TRADE COMMISSION, *ante*, p. 944. Petitions for rehearing denied.

No. 478. KAYE *v.* SPENCE CHAPIN ADOPTION HOME, *ante*, p. 214. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 502. CLARK *v.* CALIFORNIA, *ante*, p. 943. The motion to dispense with printing the petition for rehearing is granted. Petition for rehearing denied.

JANUARY 21, 1964.

Dismissal Under Rule 60.

No. 690. P. A. C. REALTY CO. ET AL. *v.* FELDMAN, TRUSTEE IN BANKRUPTCY. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Samuel Kaufman, John M. Kaufman* and *Andrew L. Kaufman* for petitioners. Reported below: 323 F. 2d 134.

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